



THE LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

# FINAL REPORT PROJECT 109

CLAIMS FOR NON-ECONOMIC LOSS  
FOR WRONGFUL DEATH UNDER THE  
*FATAL ACCIDENTS ACT 1959 (WA)*

September 2020

**LAW REFORM COMMISSION OF WESTERN AUSTRALIA**  
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## Foreword

### Summary of the reference

On 26 February 2018, the Attorney General for Western Australia, the Hon John Quigley MLA (the Attorney General) requested that the Law Reform Commission of Western Australia (the Commission) provide advice and make recommendations for consideration by the Government of Western Australia as to whether there should be any reform and, if so, the extent of any reform, to allow for claims for non-economic loss for wrongful death under the *Fatal Accidents Act 1959* (WA) (the Act) and any consequential amendments.

In particular, in carrying out its review, the Terms of Reference require that the Commission undertake a review of the following:

1. the scope of the class of persons who may claim for non-economic loss;
2. the types of non-economic loss that ought to qualify;
3. the appropriate quantum of damages for non-economic loss, including how damages are to be calculated and whether damages should be:
  - a. fixed or variable; or
  - b. capped or uncapped;
4. whether other types of damages awarded for non-economic loss for wrongful death should be deducted from any damages awarded for non-economic loss for wrongful death under the Act;
5. the measurable financial impact of any recommended changes on plaintiffs, insurers and the Government; and
6. any other related matter.

Given the requirement in paragraph 5 above, on 4 June 2019 Taylor Fry, consulting actuaries, were appointed to undertake the economic analysis involved in measuring the financial impact of a number of scenarios under consideration by the Commission.

In December 2019, the Commission released a Discussion Paper which posed a series of questions about possible courses of action open to the Government. Submissions were invited on these questions and any other matters. The closing date for submissions was 31 March 2020.

Taylor Fry's report on the costing of proposals for claims for non-economic loss for wrongful death (the Economic Costs Report) was received by the Commission on 30 July 2020. When Taylor Fry completed the Economic Costs Report it had the benefit of the Discussion Paper and various scenarios discussed in it.

At the time the Discussion Paper was released the Commission had not reached a preliminary view about whether there should be reform of this area of the law.

The Commission received nine written submissions after the release of the Discussion Paper. As is always the case, the submissions were of great assistance in completing the project. Submissions are a cornerstone of the Commission's work. The Commission appreciates the time and effort that went into their preparation.

It is a matter of regret that due to delays in the procurement processes for the writers and actuaries, the writers' unforeseen workloads and the impact of the COVID-19 pandemic,

the Commission had to seek and obtain extensions to the timeframe for the provision of this Report. Given the delays which had occurred prior to the receipt of the Economic Costs Report, it was not possible to conduct a further consultation period after receipt of that report.

### Should claims for non-economic loss for wrongful death under the Act be allowed?

Following an analysis of the submissions received, the Economic Costs Report and its own research, the Commission recommends there should not be any reform to allow for claims for non-economic loss for wrongful death under the Act.

The Commission considers that the introduction of a legislative scheme allowing for claims for non-economic loss under the Act is supportable as a matter of principle. If there were no countervailing considerations, it would provide further compensation for losses arising from a wrongful death.

However after considering the numerous competing considerations it has determined that it would not be of sufficient utility to attempt to do so. Those competing considerations are discussed fully in this Report.

### Related issues

The Commission acknowledges that it is the Government's role ultimately to determine where the balance should be struck in this matter. Economic and other circumstances unknown to

the Commission may mean that the Government considers that the reform is attainable.

For this reason and because the Attorney General asked the Commission to determine the reference after taking into account related issues, the Commission makes the following recommendations in respect of the related issues referred to it. These recommendations will be relevant only if the Government decides to amend the Act to allow for claims for non-economic loss for wrongful death.

### Recommendations

1. The Commission recommends there should not be any reform to allow for claims for non-economic loss for wrongful death under the Act.
2. The Commission recommends that if, contrary to Recommendation 1, the Act is to be amended to allow for compensation for non-economic loss that:
  - (a) the class of claimants be limited to spouses, partners,<sup>1</sup> children,<sup>2</sup> siblings<sup>3</sup> and parents<sup>4</sup> of deceased persons;
  - (b) the types of compensable non-economic loss be the grief and suffering of a relative of the deceased, the loss to an adult relative of the deceased's companionship and the loss to a dependant child of the deceased's assistance and guidance;<sup>5</sup>

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1 Spouse and partner to be broadly defined.

2 Child includes step child or grandchild who was dependent on the deceased.

3 Includes half siblings and step siblings.

4 Parents includes persons in loco parentis.

5 There may be other close relatives who relied on a deceased for assistance and guidance, for example, adults with a disability. If the Act was to be amended, there would need to be consideration given to these relatives being able to claim under this head of damages.

- (c) the preferred method of assessment of damages is a cap of \$150,000 to be divided amongst eligible claimants, with awards to be fixed at \$25,000 per claimant;
- (d) any damages for non-economic loss awarded under the *Criminal Injuries Compensation Act 2003* (WA) (the Criminal Injuries Act) should be deducted from any damages awarded for non-economic loss for wrongful death under the Act; and
- (e) before any amendment to the Act is undertaken, further consultation and discussion be undertaken with the Government of New South Wales and parties to the funding agreement for the Asbestos Injuries Compensation Fund to determine any impact on the ability of family members of those who suffer fatal asbestos related diseases from recovering compensation due to them under the funding agreement.

### Acknowledgements

The Commission thanks the authors of the submissions. This Report, as in the case of all Commission reports, would not be complete without the useful and well considered submissions received from stakeholders and the public.

The Commission is grateful to its project writers, Thomas Offer and

Adam Nolan, both barristers of Francis Burt Chambers, for researching and writing the initial draft of the Discussion Paper and the initial draft of this Report. The Commission also thanks Taylor Fry for the comprehensive analysis in the Economic Costs Report.

This reference was commenced by a Commission comprising Dr David Cox (Chair), Dr Eileen Webb and Fiona Seaward. Each of those members retired during the course of the reference. The Commission comprising myself, Dr Sarah Murray and Kirsten Chivers completed the reference.

Over the course of the reference the administrative support to the Commission was provided by the Western Australian Department of Justice (the Department of Justice), particularly Dominic Fernandes and Cassandra Pollock. The Commission is extremely grateful for their efforts and those of other staff of the Department of Justice who assisted earlier and from time to time. The Commission also thanks the Director General of the Department of Justice, Dr Adam Tomison, for his support of the Commission. Finally, the Commission thanks the Attorney General for providing this reference and for his continued support of the Commission's work.

**The Hon Lindy Jenkins  
Chair**

## 1. Introduction

On 26 February 2018 the Commission received a reference from the Attorney General as set out in 1.1 below.

### 1.1 Terms of Reference

The Attorney General requested that the Commission provide advice and make recommendations for consideration by the Government as to whether there should be any reform, and if so, the extent of any reform, to allow for claims for non-economic loss for wrongful death under the Act and any consequential amendments. In particular, in carrying out its review, the Terms of Reference required that the Commission undertake a review of the following:

1. the scope of the class of persons who may claim for non-economic loss;
2. the types of non-economic loss that ought to qualify;
3. the appropriate quantum of damages for non-economic loss, including how damages are to be calculated and whether damages should be:
  - (a) fixed or variable; or
  - (b) capped or uncapped;
4. whether other types of damages awarded for non-economic loss for wrongful death should be deducted from any damages awarded for non-economic loss for wrongful death under the Act;
5. the measurable financial impact of any recommended changes on

6. plaintiffs, insurers and the Government; and
- any other related matter.

### 1.2 Background to this Reference

Historically, if a person was killed as a result of the wrongful act or negligence of another (a 'wrongful death'), the law did not recognise that death as an injury and did not permit damages to be recovered by either the estate of the deceased, or the dependants of the deceased.

This changed in 1846, when in response to increasing and widespread criticism of the plight of a deceased's dependents, the English Parliament enacted the *Fatal Accidents Act 1846* (UK), commonly referred to as Lord Campbell's Act, granting close relatives of a deceased the right to recover financial compensation from those who caused or contributed to the deceased's death.

While the impetus for the implementation of Lord Campbell's Act arose primarily in the context of a period of increasingly frequent deaths on railways in England, the mainstay of Lord Campbell's Act remains relevant and enshrined in one form or another in all Australian jurisdictions today.

In Western Australia, Lord Campbell's Act was adopted by Ordinance in 1849,<sup>6</sup> which was subsequently repealed and replaced by the Act.

While the Act provides protection to those who were dependent on a deceased for financial support, the

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<sup>6</sup> *Imperial Acts Adopting Ordinance 1849* (WA) (12 Vict No 21).

legislation does not permit the recovery of compensation for any form of non-economic (that is, non-financial) loss, including grief or suffering as a result of the deceased's death.

The ability to recover damages for non-economic losses, sometimes referred to as bereavement damages or solatium, is not entirely foreign to the common law. England, Scotland and Ireland all permit recovery of damages for non-economic losses in wrongful death claims. In Australia, the ability to recover damages for non-economic loss in wrongful death claims is permitted only in the Northern Territory and South Australia.

In 1978, this issue was considered by the Commission at the request of the then Attorney General.<sup>7</sup> At that time, the Commission recommended in its report entitled *Fatal Accidents - Project 66* (Project 66) that the Act be amended to permit the award of damages to compensate certain close relatives of the deceased for the loss of such non-economic benefit as they might have expected to derive from the deceased's assistance and guidance if he or she had not died. It said that this ought to be known as a 'loss of assistance and guidance award'. This terminology distinguished the proposed award from an award of damages in the nature of solatium, that is damages for grief and suffering, which the Commission did not favour permitting.<sup>8</sup> Both are forms of non-economic loss. The recommendation to permit damages for the loss of assistance and guidance was not taken up by Parliament.

As with any legislative reform there are undoubtedly arguments for and against the implementation of provisions permitting the recovery of non-economic losses. It remains that the inability of surviving relatives to obtain compensation that recognises and acknowledges their grief and suffering as well as other forms of non-economic loss, may be a source of considerable confusion and anger to those affected.

Since the publication of Project 66 in 1978 and Parliament's decision in 1984 not to introduce damages for loss of assistance and guidance, legislation has been implemented that recognises an injured person's right to recover damages for psychiatric or psychological injuries. The *Civil Liability Act 2002* (WA) (the Civil Liability Act) recognises those injuries suffered as a result of the commission of an offence and for wrongful acts more generally.

The Attorney General has sought the assistance of the Commission to re-visit this issue and has sought advice and recommendations from the Commission as to whether the Act should be reformed, and if so, the extent of such reform, to allow claims for non-economic loss for wrongful death under the Act.

### 1.3 Methodology

In undertaking its consideration of the Terms of Reference, the Commission published its Discussion Paper in

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<sup>7</sup> Law Reform Commission of Western Australia, *Fatal Accidents* (Report, Project 66, December 1978) ('Project 66').

<sup>8</sup> *Ibid* 26. For consistency this report will make the same distinction and use the same terminology.

December 2019.<sup>9</sup> The Discussion Paper invited responses from stakeholders and the public in relation to the reform options that were identified by the Commission. In order to assist in focusing submissions, the Commission posed a number of questions for consideration by stakeholders and interested members of the public. Those questions were as follows:

**Question 1:** Should the Act be amended to allow claims for non-economic loss for wrongful death?

**Question 2(a):** If the Act is to be amended to allow damages for non-economic loss, what type of non-economic loss ought to be compensable under the Act?

**Question 2(b):** If the Act is to be amended to allow damages for non-economic loss, should it be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of the companionship, guidance and/or counsel provided by the deceased?

**Question 3:** If the Act is to be amended to allow damages for non-economic loss, what is the appropriate class of persons who may be awarded such damages?

**Question 4(a):** If the Act is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and without any limitation or statutory cap?

**Question 4(b):** If the Act is to be amended to allow damages for non-economic loss, should those damages

be determined according to common law principles and be subject to a limitation or statutory cap?

**Question 4(c):** If the Act is to be amended to allow damages for non-economic loss, and such damages are to be determined according to common law principles subject to a limitation or statutory cap, should that statutory cap be:

- (a) determined according to a formula similar in effect to that set out in section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA) (the Motor Vehicle TPI Act) with appropriate adjustments to ‘Amount A’, ‘Amount B’ and ‘Amount C’ to take into account the reality that non-economic loss for relatives in the fatal accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm; or
- (b) a lump sum payment to each relative entitled by reference to the definition of ‘relative’ in Schedule 2 of the Act, or alternatively a more limited class of ‘close relatives’:
  - (i) in a set amount without differentiation between the relationship with the deceased; or
  - (ii) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased; or

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<sup>9</sup> Law Reform Commission of Western Australia, *Claims for Non-Economic Loss for Wrongful Death Under the Fatal Accidents Act 1959* (WA) (Discussion Paper, Project 109, December 2019) (‘Discussion Paper’).

- (c) a lump sum payment to be divided between all relatives entitled by reference to the definition of ‘relative’ in Schedule 2 of the Act, or alternatively a more limited class of ‘close relatives’:
  - (i) in equal shares; or
  - (ii) according to a table of percentages based on their relationship with the deceased; or
- (d) some other form of statutory limitation or cap?

The Commission received nine submissions from stakeholders and members of the public, the contents of which have informed the preparation of this Report. The full list of submissions received are set out in **Annexure A**.

The submissions received by the Commission expressed a range of views on the issues raised in the Discussion Paper. Some of the submissions which did not support the amendment of the Act to allow claims for non-economic loss for wrongful death, understandably, did not go on to answer the remaining questions raised in the Discussion Paper.

Paragraph 5 of the Terms of Reference was not addressed in detail in the Discussion Paper. The Commission did, however, set out the options it proposed to submit for economic modelling and assessment by expert advisers. In considering Paragraph 5 of the Terms of Reference and determining its position for the purposes of this Report, the Commission engaged the services of expert actuaries to undertake economic modelling and assessment, and provide advice on the measurable financial impact of

any recommended changes on plaintiffs, insurers and the Government. The Commission notes that it received submissions from some stakeholders which addressed the potential financial impact if the Act was to be amended to enable claims for non-economic loss for wrongful death, and those submissions have also informed this Report.

#### 1.4 Definitions

As noted in the Discussion Paper, the terms non-pecuniary loss, solatium, non-patrimonial loss, happiness damages and bereavement damages are used by the various legislatures and courts to describe non-economic losses suffered by surviving relatives in wrongful death claims. In Project 66, the Commission also used the term, loss of assistance and guidance damages.

The Commission continues to acknowledge that there are subtle differences in the meaning and application of each of these terms depending on the context and usage of each. The Report maintains the consistency of terms within the context of each discussion. This is particularly so regarding the types of non-economic loss that should be compensable under the Act.

Generally, the Report refers to solatium as being compensation for grief and suffering consequent upon a wrongful death. When it is relevant to do so, the Report refers separately to compensation for loss of the deceased’s companionship and loss of the deceased’s assistance and guidance. For consistency and ease of reference for readers, the Commission has continued in this Report where possible, to use the

broad descriptor 'non-economic loss' to collectively describe the losses the subject of the Attorney General's reference.

## 1.5 About this Report

The Chapters of this Report closely follow those in the Discussion Paper.

The Discussion Paper sets out in detail the historical context of the availability of compensation for non-economic losses in connection with wrongful deaths, and outlines the approaches adopted in various comparable jurisdictions. Where it provides useful context to the contents of this Report, some of that detail has been included in this Report. The Report seeks to build on the issues in the Discussion Paper with regard to the submissions received from stakeholders and the public, and the Commission's consideration of those submissions.

In addition, this Report outlines the financial implications of reform, as identified in the Economic Costs Report.

The final chapter of the Report sets out the Commission's recommendations in response to the Terms of Reference.

## 2. Historical context

The Discussion Paper sets out in detail the historical context of the legal approach to recovery in tort or otherwise for the death of a human being.<sup>10</sup>

In 1976 the Commission received a reference from the then Attorney General asking it to consider whether the Act should be amended to:

- (a) widen the class of persons entitled to claim under the Act; and
- (b) provide for an amount to be awarded in the nature of solatium.

Project 66 was published in 1978. Project 66 provides important and useful background for this Report and is available for public download on the Commission's website.<sup>11</sup>

Project 66 recommended that the Act be amended to provide for an award of damages, known as a loss of assistance and guidance award, to compensate certain close relatives of the deceased for the loss of non-economic benefit they might have expected to derive from the deceased's assistance and guidance if he or she had not died. It did not recommend that the Act be amended to permit an award of damages for grief and suffering, or in other words, solatium.<sup>12</sup>

The Commission recommended that damages for loss of assistance and guidance be available to the following individuals:<sup>13</sup>

- (a) the deceased's husband or wife;
- (b) the deceased's de facto spouse;
- (c) a parent of the deceased;
- (d) an unmarried child of the deceased; and

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<sup>10</sup> Readers who are interested in the history prior to the Project 66 should refer to the Discussion Paper available at <<https://www.lrc.justice.wa.gov.au/P/project-109.aspx>>.

<sup>11</sup> <[https://www.lrc.justice.wa.gov.au/P/project\\_66.aspx](https://www.lrc.justice.wa.gov.au/P/project_66.aspx)>.

<sup>12</sup> Project 66 (n 7) recommendation 5.1(g); 26-27 [4.13].

<sup>13</sup> Ibid [4.14].

- (e) an unmarried person to whom the deceased stood *in loco parentis*.

The Commission also recommended that such an award:

- (a) not survive for the benefit of the estate of the claimants;<sup>14</sup>
- (b) be in addition to any award for pecuniary loss allowable under the Act;<sup>15</sup>
- (c) not be a fixed sum, but rather that the maximum amount able to be awarded be subject to a statutory cap (indexed to inflation) as follows:
  - i. an award to a lawful spouse - \$5,000;
  - ii. an award to a de facto spouse - \$5,000;
  - iii. an award to a parent of the deceased - \$2,500;
  - iv. an award to an unmarried child of the deceased - \$2,500; and
  - v. an award to an unmarried person to whom the deceased stood *in loco parentis* - \$2,500.<sup>16</sup>

The relevant paragraphs of Project 66 provide:

*4.11 The Commission agrees that an award for solatium for grief and suffering could lead to unsatisfactory consequences. If the award was too small, it could be regarded with contempt by those whose grief was greatest. If the award was too large it could amount to a gratuity to those who felt no grief at all. Some persons could be affronted by any award of this nature at all. The Commission does not favour*

*recovery of damages in the nature of solatium.*

*4.12 However, the Commission sees merit in the loss of society award which is now provided for in the Damages (Scotland) Act 1976. This award represents compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased's society and guidance if he had not died. The Commission considers that there should be an award of damages by way of compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased's assistance and guidance if he had not died. Assistance which can theoretically be replaced in return for money, or can at least be valued in terms of money, should be included in the pecuniary damages already recoverable under the Fatal Accidents Act. Assistance which would defy attempts at valuation would be compensated under the proposed new head of damages by way of a lump sum in the same way as pain and suffering or loss of enjoyment of life, in personal injury claims. The damages should be known as a "loss of assistance and guidance award" which the Commission considers is a more accurate description of the losses which are compensable under the Scottish provision. The Commission's intention is that its proposed award for loss of assistance and guidance should comprise the same losses as*

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<sup>14</sup> Ibid [4.15].

<sup>15</sup> Ibid [4.19].

<sup>16</sup> Ibid [4.16]-[4.20].

*those comprised by the Scottish loss of society award.*

4.13 *The Commission accordingly recommends that the Fatal Accidents Act should be amended to provide for the award of damages to compensate certain close relatives of the deceased for the loss of such non-pecuniary benefit as they might have expected to derive from the deceased's assistance and guidance if he had not died. The damages should be known as a "loss of assistance and guidance award" and should be recoverable under the Fatal Accidents Act.*

The Commission notes that Project 66 was published well before the statutory tort law reforms which have limited a plaintiff's right to obtain awards of damages under the common law.

The *Fatal Accidents Amendment Act 1985* (WA) implemented the Commission's recommendations to expand the class of claimants under the Act. However, the Commission's recommendation for the establishment of an award of damages for loss of assistance and guidance was not taken up by Parliament, with the then Attorney General, the Hon JM Berinson, setting out the following reasoning:

*The Government has decided not to proceed with these recommendations. It would require the courts to undertake a time-consuming and difficult task in assessing the appropriate award and in any event, the amount awarded*

*under such an arbitrary limit would be very likely to affront claimants as often as it might solace them. There are very few jurisdictions where such provision exists.<sup>17</sup>*

### 3. Current Western Australian statutory regime

As set out in the Discussion Paper, the Act creates a right for a limited class of relatives to recover damages following a wrongful death.

A relevant provision is section 4(1) of the Act, which provides as follows:

*Where the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a crime.*

To bring a cause of action, it is necessary for a plaintiff to establish the following elements:

- (a) if the deceased had not died, they could have brought an action in relation to their injury, and they would have recovered damages;
- (b) there is a causal link between the defendant's wrongful conduct and the death; and

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<sup>17</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 1984, p 6464.

(c) the claimants are relatives as defined in the Act.

The proper plaintiff for an action under the Act is the executor or administrator of the deceased,<sup>18</sup> and the action shall be for the benefit of the relatives of the deceased.<sup>19</sup>

In the event that there is no executor or administrator of the deceased, or where the executor or administrator does not commence an action under the Act within six months after the death, any one or more of the persons for whose benefit the action might be brought by the executor or administrator may bring the action.<sup>20</sup> No more than one action lies under the Act for and in respect of the same subject matter of complaint.<sup>21</sup>

### 3.1 Key provisions of the Act

The Act defines 'relative' in clause 1 of Schedule 2 as follows:

*relative, in relation to a deceased person, means –*

- (a) *a person who immediately before the deceased's death was –*
  - (i) *the spouse of the deceased; or*
  - (ii) *a de facto partner of the deceased who was living in a de facto relationship with the deceased and had been living on that basis with the deceased for at least 2 years immediately before the deceased died;*
- (b) *any person who was the parent, grandparent or step parent of the deceased;*
- (c) *any person who was a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased;*

- (d) *any person to whom the deceased person stood in loco parentis immediately before the death of the deceased;*
- (e) *any person who stood in loco parentis to the deceased person immediately before his death;*
- (f) *any person who was a brother, sister, half-brother or half-sister of the deceased person; and*
- (g) *any person who was a former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, immediately before his or her death, to make provision for with respect to financial matters.*

The Act contains very few provisions regarding the damages that are payable under the Act. Section 5(1) of the Act specifically provides for the payment of medical and funeral expenses incurred by the parties for whose benefit the action is brought. Section 5(2) of the Act specifies certain matters that shall not be taken into account in assessing damages.

The key operative provision is section 6(2) of the Act, which provides as follows:

*In every action the court may give such damages as it thinks proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought.*

Section 6(4) of the Act further provides that the amount of damages recovered, 'shall be divided amongst the persons for whose benefit the action was brought in such shares as the court finds and directs.'

18 The Act s 6(1B).

19 Ibid s 6(1A).

20 Ibid s 9(1).

21 Ibid s 7.

On their face, such provisions might be thought to allow (or at least not prohibit) the recovery of damages for non-economic loss suffered by the beneficiaries under the legislation.

However this is not how these provisions (or other similar provisions in other jurisdictions) have been interpreted by the courts. Rather, it has been held that damages under the Act are recoverable for the loss of economic benefits caused by the death only.

### 3.2 What is recoverable under the Act?

In *De Sales v Ingrilli* the High Court considered a claim for damages under the Act.<sup>22</sup> The claim was brought by Mrs De Sales on behalf of herself and the deceased's two children following her husband's wrongful death. At first instance, Jackson DCJ awarded sums of \$10,000 to each of the deceased's children for 'loss of parental support, guidance and training'.

The defendant appealed and argued that there was no entitlement at law to damages of that kind. The appeal was allowed on the basis that it was 'not usual' or 'appropriate' to award such damages.<sup>23</sup>

While these conclusions were not challenged in the subsequent appeal, the High Court's reasons for the decision are instructive as to the type of damages that are and are not recoverable under the Act.

In *De Sales v Ingrilli*, Gleeson CJ explained that the Act is directed to compensation for 'injury'. Whilst that

term is not defined, it has been interpreted to mean:

*... the loss of a benefit the claimant would otherwise have reasonably expected to receive from the deceased, had the accident not occurred.*<sup>24</sup>

Gleeson CJ went on to note that two points result from this interpretation:

*First, damages are calculated by reference to the pecuniary benefit that could reasonably have been expected from the continuance of the life had death not occurred. Damages do not compensate for non-pecuniary injuries such as grief... Secondly, damages for injury are calculated on a balance of pecuniary gains and losses consequent upon the death (emphasis added).*<sup>25</sup>

However, Gleeson CJ noted that pecuniary losses also extend to a claim for loss of services the deceased would have provided around the home.<sup>26</sup>

This approach to the assessment of damages under the Act was accepted by the other members of the High Court in *De Sales v Ingrilli*. For example, Gaudron, Gummow and Hayne JJ in a joint judgment noted without criticism, that under Lord Campbell's Act, compensation was limited to pecuniary loss as a result of death, and a jury could not award compensation for mental suffering or loss of society.<sup>27</sup> McHugh J noted that the term 'injury' has always been confined to pecuniary loss and did not

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<sup>22</sup> (2002) 212 CLR 338.

<sup>23</sup> *De Sales v Ingrilli* (2000) 23 WAR 417, 9 [30] (Wallwork J), 32 [99] (Miller J, Parker J agreeing).

<sup>24</sup> (2002) 212 CLR 338, 346 [11].

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* 347 [13].

<sup>27</sup> *Ibid* 359 [55].

extend to compensation for 'grief, sorrow or bereavement'.<sup>28</sup>

Subsequently in *Dinnison v Mindarie Regional Council*, the plaintiff made a claim for solatium under the Act on the basis that there were no binding authorities which prevented an award of solatium being made.<sup>29</sup>

Commissioner Archer (as Her Honour then was) rejected the claim relying on the judgments in *De Sales v Ingrilli* and also the decision of *Public Trustee v Zoanetti* where Dixon J stated:

*In estimating the damages to be recovered under legislation taken from Lord Campbell's Act ... 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.*<sup>30</sup>

#### 4. Damages for mental harm

As noted in the Discussion Paper there is a distinction between the proposed claim for damages for non-economic loss related to a wrongful death and damages that might be recoverable in a negligence action for mental harm (or nervous shock as it was previously known).

The basis of the award of damages in the latter circumstance is that the defendant owes a plaintiff a separate duty of care not to cause a reasonably

foreseeable psychiatric injury to the plaintiff, by causing injury or death to another.<sup>31</sup> The damages are therefore not awarded for grief or suffering or similar loss.

It may be that in some cases where damages are sought under the Act, a separate negligence action is also commenced to which the Civil Liability Act applies, by one (or more) persons for whose benefit an action may be commenced under the Act, seeking damages for mental harm. Awards of damages for non-economic losses in mental harm claims under the Civil Liability Act are restricted by section 9 which implements a 'threshold' or minimum level of damages at which damages must be assessed before a court may award damages for non-economic loss. The Civil Liability Act prescribes a formulaic approach to this restriction on damages, correspondingly reducing the effect of the 'threshold' as the quantum of damages assessed by the Court increases. The current amount of that threshold is \$22,500 and is reviewed annually.

The restrictions on the award of damages implemented by section 9 of the Civil Liability Act do not apply to damages for pecuniary or financial losses.

##### 4.1 Claims for non-economic loss to which the Civil Liability Act does not apply

Section 3A of the Civil Liability Act excludes (in part) a number of classes

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28 Ibid 371-372 [90]-[93]. See also Ibid 401-402 [183] (Callinan J) and 382-383 [126] (Kirby J). Kirby J accepted it as settled law that the Act did not include damages for non-economic loss but said that as a matter of construction it did not have to be so.

29 *Dinnison v Mindarie Regional Council* [2005] WADC 252, [65].

30 *Public Trustee v Zoanetti* (1945) 70 CLR 266, 276. This was in the context of considering the then South Australian equivalent provision of Lord Campbell's Act.

31 Civil Liability Act ss 5Q-5T; *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales* (2002) 211 CLR 317.

of damages for non-economic loss from the restrictions imposed by section 9. These include non-economic losses suffered as a result of an intentional act carried out with the intention to cause personal injury to a person, sexual offences and claims for non-economic loss arising from a motor vehicle accident or damages.

Notwithstanding the exclusion of these classes of damages from the threshold restrictions on the awarding of damages for non-economic losses, the Western Australian legislature has seen fit to implement similar restrictions in some of those classes of damages.

In the case of damages for non-economic losses suffered as a result of a motor vehicle accident, for example: the Motor Vehicle TPI Act implements similar and comparative restrictions on the recovery of damages for non-economic loss.

The Civil Liability Act arguably does not apply to claims for solatium and definitely does not apply to claims for loss of companionship and loss of assistance and guidance as those losses would not fall within the definition of harm in the Civil Liability Act.<sup>32</sup>

#### 4.2 Claims for non-economic loss under the Motor Vehicle TPI Act

Damages for non-economic losses under the Motor Vehicle TPI Act are currently capped at \$432,000 with such an amount reserved for a 'most

extreme case'. In cases other than a 'most extreme case', awards of damages for non-economic loss are determined according to the severity of the non-economic loss suffered, proportionate to that 'most extreme case' and the maximum allowable damages award. In addition, at the lower end of the damages spectrum, section 3C of the Motor Vehicle TPI Act imposes a threshold of \$22,500 that currently results in claimants suffering non-economic losses assessed at or less than 5% of a most extreme case being unable to recover any damages for non-economic loss.<sup>33</sup>

These restrictions on recovery apply equally to physical and psychological or psychiatric injuries and are adjusted on an annual basis. However, the Motor Vehicle TPI Act limitations on the recovery of damages only apply to damages in respect of bodily injury to a person caused directly or indirectly by, or by the driving of, a motor vehicle.<sup>34</sup>

It should be noted that while section 3A of the Civil Liability Act excludes damages for non-economic losses suffered as a result of a motor vehicle accident from the 'threshold' regime, provisions such as sections 5Q-5T of the Civil Liability Act requiring a recognised psychiatric illness consequent upon a personal injury still apply.

#### 4.3 Compensation for mental harm under the Criminal Injuries Compensation legislation

Section 35 of the Criminal Injuries Act provides that:

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<sup>32</sup> *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, 15-20 [47]-[58].

<sup>33</sup> This threshold reduces in accordance with a formula provided in section 3C of the Motor Vehicle TPI Act for damages assessed at greater than 15% of a most extreme case but equal to or less than 20% of a most extreme case. For any damages for non-pecuniary loss assessed in excess of 20% of a most extreme case, the threshold does not apply.

<sup>34</sup> *Ibid* s 3A.

(2) *An assessor must not make a compensation award for mental and nervous shock suffered by a victim as a consequence of the commission of an offence, or for any loss in respect of such shock, unless the assessor is satisfied-...*

(d) *that immediately before the offence was committed the victim was the parent or step parent of a person who died as a consequence of the commission of the offence; or*

(e) *that immediately before the offence was committed the victim -*

(i) *was a close relative of a person who suffered injury or died as a consequence of the commission of the offence; and*

(ii) *was living with that person.*

A 'close relative' is defined in section 4 of the Criminal Injuries Act as:

(1) *For the purposes of this Act, a close relative of a victim who dies or is injured as a consequence of the commission of an offence, is a person who, immediately before the offence was committed, was -*

(a) *a parent, grandparent or step-parent of the victim; or*

(b) *the spouse or a de facto partner of the victim; or*

(c) *a child, grandchild or stepchild of the victim.'*

In the context of claims for criminal injuries compensation, mental and nervous shock has been held to mean:

*a malfunction of the person which can be said to be a consequence of the impact of the events constituting or associated with the commission of the offence upon the mind or nervous system. It is bodily harm of one sort or another and it must be suffered in consequence of the commission of the offence.*<sup>35</sup>

Humiliation or anguish suffered as a result of a reaction of the victim's family or friends or of the litigation process itself is not considered to be a compensable 'injury'.<sup>36</sup>

It is important to note the difference between the pre-requisite 'injury' that must exist before criminal injuries compensation or damages for mental and nervous shock is able to be awarded, and the question posed by the Attorney General's reference, that is, the potential amendment of the Act to allow recovery of non-economic losses. While the common law, the Civil Liability Act and the Criminal Injuries Act require something more than grief or suffering before damages become payable, the very nature of awards of damages for solatium do not.

Another matter of note in regard to the Criminal Injuries Act is that the Act provides that relatives of a victim of a crime who dies may only obtain compensation for their loss, not any injury. The Criminal Injuries Act contains definitions of the two important terms, being injury and

35 *Hatfield v Under Secretary for Law* (Unreported, WASC, Library No 4012, 15 December 1980) 5 (Burt CJ). See also *M v J; J v J* (Unreported, WASC, Library No 920598, 19 November 1992) and *S v Neumann* (1995) 14 WAR 452, 461 (Murray J).

36 See, eg, *RJE v Bandy* (Unreported, WASC, Library No 5489, 31 May 1974); *Garton v McCormack* [2002] WADC 111; *McDavitt v McDavitt* [No 2] [2013] WADC 198; *Re Dunne* [2014] WADC 131.

loss. Injury is defined to include mental and nervous shock.<sup>37</sup> Loss, in the case of a victim of crime who dies, is defined as:

*any loss suffered by a close relative of the victim for which damages could be awarded to the relative under the Fatal Accidents Act 1959 if the death of the victim were caused by the wrongful act, neglect or default of another.*<sup>38</sup>

The Criminal Injuries Act provides that in the case of a compensation application made by the personal representative of a victim who dies as a consequence of the commission of an offence (that is, as opposed to an application made by a victim of an offence), an assessor may award such compensation as the assessor is satisfied is just for the loss suffered by one or more of the close relatives of the deceased.<sup>39</sup> There is no capacity for an assessor to make an award to close relatives for any injury or death. A close relative of a deceased who died as a result of being a victim of crime may not obtain compensation for non-economic loss under the Criminal Injuries Act. This situation would change if the Act was amended to make non-economic loss recoverable.

## 5. Nature of compensation

In the Discussion Paper, the Commission recognised the need to identify the basis for any recognition in the Act of non-economic loss.

### 5.1 Bases for an award of damages for non-economic loss

The Commission accepts the long held view that an award of damages for non-economic loss should not attempt to compensate for the loss of a human life. The Commission remains of the view expressed in the Discussion Paper that even if the Act was amended to permit an award of damages for non-economic loss, the award would not, and could not, be compensation as substitute for the loss of a human life.<sup>40</sup>

Quite apart from the moral and ethical considerations inherent in the very notion of ascribing value to a life, the practical challenges in assessing such damages would be, in the Commission's respectful view, almost insurmountable.

Whilst many economists have theorised about the notion of valuing a human life, the reality is that there is no convincing argument to suggest that a practical methodology has been, or will ever be, devised. The common law has unsurprisingly, largely and very sensibly avoided such an exercise in judicial accountancy.<sup>41</sup>

If non-economic damages are not to be regarded as compensation for the loss of a life then what detriment or loss are they directed to?

Most debate in respect to this question settles on the notion of 'bereavement damages' but again there is little consistency or agreement as to what such a term

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<sup>37</sup> Criminal Injuries Act s 3.

<sup>38</sup> Ibid s 6(3).

<sup>39</sup> Ibid ss 12(2), 30(3).

<sup>40</sup> Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 8th ed, 2013) 89.

<sup>41</sup> Whilst Heydon J was in the minority in the ultimate outcome in *Cattanach v Melchior*, his views about the valuation of human life very much represent the mainstream of legal thought: *Cattanach v Melchior* (2003) 215 CLR 1, 127-128 [353].

means or what detriment or loss such damages might be directed to.

After noting that *'the very availability of bereavement damages is a controversial issue'* the Law Commission of England and Wales in its 1997 Discussion Paper on this topic noted:

*'There are at least five distinct purposes which an award of bereavement damages might be seen to serve. These are:*

- (a) Compensating relatives for their mental suffering (that is, their grief and sorrow, both immediate upon the deceased's death and continuing).*
- (b) Compensating relatives for the non-pecuniary benefits which they would have enjoyed (that is, the loss of the care and guidance of the deceased, and/or the loss of society with the deceased).*
- (c) Providing practical help for the relatives.*
- (d) Symbolising public recognition that the deceased's death was wrongful.*
- (e) Punishing the tortfeasor who caused the wrongful death.'*<sup>42</sup>

In relation to (c) above, the Commission regards providing practical help for the relatives as being an indirect result of an award of compensation rather than a basis for making an award.

Allied to (d) above and a more punitive view of damages, one submission received by the Commission opined that one of the

'significant benefits' of a change in the law would be to 'publicly recognise that the deceased's death was wrongful'. In the Commission's view the Act by its nature is a public recognition that harm caused to close relatives of a person who dies by a wrongful death should be compensated to some extent. Extending the type of damages available for a wrongful death will not recognise what is already acknowledged by the existence of, and the existing provisions in, the Act.

A similar comment may also be made in relation to the justification which the Hon JM Berinson, the then Attorney General, expressed when stating that the Government of the day would not implement the Commission's recommendation in Project 66, that the Act be amended to permit a loss of assistance and guidance award, stating; *'the amount awarded under such an arbitrary limit would be likely to affront claimants as often as it might solace them'*.

An award of damages under the Act as it is presently formulated, is a public recognition that that harm caused to close relatives of a person who dies by a wrongful death should be compensated, but only to a certain extent. Such an award is unlikely to compensate a plaintiff for all his or her economic losses caused by the wrongful death. Yet the Act is considered to be an improvement on the situation which existed prior to its enactment which was that no compensation was recoverable for such losses; rather than an affront.

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42 Law Commission of England and Wales, *Claims for Wrongful Death* (Consultation Paper, No 148, 1997) [3.127].

It is notable that the only submissions which relied on the ‘affront’ argument articulated by the Hon JM Berinson, were against the extension of the Act to non-economic loss. The Commission’s view is that most people would prefer to get something rather than nothing for their loss, and most people would prefer to have some acknowledgement of their non-economic loss than none; just as they would prefer to be able to recover some of their economic losses under the Act as it is presently drafted, rather than none.

In relation to (e) above, it is clear from the provisions of the Act and the case law considering claims brought pursuant to that Act, that the Act is compensatory rather than punitive.

It is the Commission’s view that if the circumstances of a deceased’s death warrant criminal sanction then such sanction or punishment can be adequately dealt with under the existing criminal statutory regime.

The Commission concludes that the bases for an award of damages for

non-economic loss under the Act would be to compensate for the claimant’s:

1. grief and suffering which was consequence on a wrongful death;
2. loss of the deceased’s companionship;<sup>43</sup> and
3. loss of the deceased’s assistance and guidance.<sup>44</sup>

## **6. Australian statutory provisions permitting recovery of damages for non-economic loss consequent upon death**

### **6.1 Northern Territory and South Australia**

In Australia only two jurisdictions, the Northern Territory and South Australia, have enacted legislation permitting the recovery of damages for non-economic loss consequent upon a wrongful death.<sup>45</sup>

The provisions of these Acts, and cases which have considered them, are referred to in detail in the Discussion Paper. A broad summary of their provisions are contained in the table below.

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43 This basis is broader than the Northern Territory’s provision for loss of consortium which only applies to spouses.

44 The Law Commission of England and Wales describes 2 and 3 together as loss of society.

45 *Compensation (Fatal Injuries) Act 1974* (NT); *Civil Liability Act 1936* (SA).

Jurisdiction	Who may claim?	What is claimed?	How are damages calculated?	Are there any preconditions to an award?
South Australia	A spouse or domestic partner of a deceased or a parent of a deceased child.	Solatium	An award is in the discretion of the court. There is a statutory limit of \$10,000. Where both parents claim solatium the statutory limit is payable as an aggregate sum which may be divided between them. The same rule applies if a spouse and domestic partner apply.	The death of a person must be caused by a wrongful act, neglect or default and the act, neglect or default must be such as would, if death had not ensued, have entitled that person to maintain an action to recover damages from the defendant.
Northern Territory	A spouse or de facto partner of a deceased, a child of the deceased, a deceased's parents, siblings and former spouse or de facto partner.	Loss of consortium (deceased's spouse or de facto partner), loss of care and guidance (deceased's child) and solatium (all potential claimants).	An award and the amount of it is in the discretion of the court.	Similar to South Australia.

Table - Summary of South Australia and Northern Territory provisions

## 6.2 New South Wales

As noted above, New South Wales does not permit awards of damages for non-economic loss in claims of wrongful death.

In its report on *Compensation to Relatives* the New South Wales Law Reform Commission (the NSW Commission) considered whether amendments should be introduced to

institute bereavement damages in dust diseases cases, or fatal accident cases more generally.<sup>46</sup>

The NSW Commission noted the various methods of awarding bereavement damages in South Australia, the Northern Territory and the United Kingdom and emphasised the difference between damages for bereavement and damages for nervous shock. The report did not

<sup>46</sup> New South Wales Law Reform Commission, *Compensation to Relatives* (Report No 131, October 2011) ('Compensation to Relatives Report').

however propose any particular model for the award of bereavement damages in New South Wales.

In response to its discussion paper seeking comment as to whether bereavement damages should be introduced, the NSW Commission received submissions confirming the views long held in those jurisdictions that do permit recovery of such damages; that bereavement damages '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.'<sup>47</sup>

Arguments against the introduction of bereavement damages included the absence of any pressing public policy need for the extension of damages in New South Wales, to the increased cost and prejudice to insurers. A further argument was the difficulty in establishing proof of entitlement, particularly if it were necessary to assess the extent of a claimant's grief. The difficulty in defining a class of claimants who might be entitled to recover bereavement damages was also acknowledged.

Ultimately the NSW Commission did not recommend the introduction of

bereavement damages in dust disease cases or more generally, stating: *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.*

## **7. Comparable international statutory regimes**

In the Discussion Paper the Commission considered in detail three international jurisdictions, being England, Scotland and Ireland, which permit limited recovery of non-economic loss in fatal accidents. A broad summary of their provisions is contained in the table below.

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<sup>47</sup> Ibid, Appendix B, Australian Lawyers Alliance, *Submission CR14* <<https://www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Compensation-to-relatives/Submissions/CR14.pdf>>.

Jurisdiction	Who may claim?	What is claimed?	How are damages calculated?	Are there any preconditions to an award?
England	A spouse or civil partner of a deceased and where the deceased was an unmarried minor, to one or both parents contingent on whether the child was legitimate or illegitimate.	Bereavement damages.	£15,120 is the fixed amount but in the event of a claim being brought by both parents of a deceased minor, divisible equally between those parents.	The death must be caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof.
Scotland	A spouse or civil partner of a deceased person, a parent or child of the deceased, a sibling of the deceased and a grandparent or grandchild of the deceased.  Any relative who is an immediate member of the deceased's family may claim damages for patrimonial (economic) or non-patrimonial (non-economic) loss suffered consequent upon the deceased's death.	Distress and anxiety endured in contemplation of the deceased's suffering before the deceased's death, grief and sorrow caused by the deceased's death and loss of such non-economic benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died.	An award and the amount of it is in the discretion of the court.	The death of a person must be a consequence of suffering personal injuries as a result of the act or omission of another person and that act or omission must give rise to a liability to pay damages to the deceased, or would have given rise to such liability but for the deceased's death.
Ireland	A spouse or civil partner of a deceased and the parents, grandparents, step-parents, children, grandchildren, siblings and half-brother and half-sister of a deceased person.	Happiness damages for mental distress which it has been said is 'some real intense feeling of being grievously affected by the death'.	An award and the amount of it is in the discretion of the court but there is a cap of £35,000.	Similar to Scotland.

*Table - Summary of England, Scotland and Ireland provisions*

## 8. Should damages for non-economic loss be available under the Act - consideration of the Discussion Paper questions and stakeholder submissions

The Commission will draw its conclusions after addressing in turn each of the questions which were posed for consideration in the Discussion Paper. There is one issue in the Terms of Reference which was not the subject of a question in the Discussion Paper. It is whether any other types of damages awarded for non-economic loss should be deducted from the damages for non-economic loss under the Act. The Commission is of the view that damages under the Criminal Injuries Act is the obvious type of damages which ought to be deducted. Beyond this, the Commission makes no recommendation.

Before addressing each question, the Commission notes that the question of whether the Act should be amended to provide for the provision of damages for non-economic loss for wrongful death may ultimately be a question of policy for the Government and one that will need to be informed by balancing the financial and other impacts of the reform with the legal and policy justifications for it.

However, from a legal policy perspective, the Commission notes that there were a number of factors both in favour and against the introduction of such damages.

**Question 1:** Should the *Fatal Accidents Act 1959* (WA) be amended to allow claims for non-economic loss for wrongful death?

## 8.1 Arguments in favour of Reform

### 8.1.1 Recognition of loss

The principal argument for legislating recovery of non-economic loss in cases of wrongful death is that such damages recognise and compensate the relatives of the deceased for their grief and suffering consequent upon the deceased's death.

The Law Commission of England and Wales recognised that an award of damages for non-economic loss for bereavement is:

*...widely perceived as performing a further symbolic function of providing some 'sympathetic recognition' by the state of the fact of bereavement and an expression on the part of society of the gravity with which it regards the loss of a human life.<sup>48</sup>*

In other words, it is compensation for the emotional impact of the deceased's death; a natural and accepted consequence of that death, in circumstances where that death is attributable to the wrongful act or omission of another. While such emotional impact may not rise to the severity or duration required to be diagnosed as an actual psychiatric injury, it is a trauma suffered nonetheless.

An award of solatium, however small, as opposed to an award of damages for loss of life, would serve as recognition and compensation to relatives of the deceased for the grief and suffering experienced following the death of their loved one. An award of damages for non-economic loss would also be compensation for the loss of companionship, assistance and guidance of the deceased. This may particularly be the case where a relative does not suffer any pecuniary

<sup>48</sup> Law Commission of England and Wales, *Claims for Wrongful Death* (Report No 263, November 1999) [2.67].

losses. For example, the Act currently offers little to compensate a surviving spouse who was the sole income earner of the relationship. A surviving spouse (and child) in that circumstance may recover for loss of domestic services, but otherwise receive no recognition of their grief, suffering and loss. A spouse currently has no right to recover for the loss of companionship provided by the deceased, nor the grief and suffering at their loss. In the case of a deceased child who had not established some financial contribution to the household, the parents of that child currently have no remedy for their losses.

### 8.1.2 Damages for non-economic losses are not unprecedented

The Commission also notes that, in general terms, the concept of awarding damages for non-economic losses for mental harm is not foreign to the courts. For example, courts are presently required to, and do, award damages for mental harm (or nervous shock) in negligence cases and in the some claims under the Criminal Injuries Act. Therefore, the Commission considers that if the Act were to be amended to make provision for damages for non-economic loss for wrongful death, the courts are already equipped to consider and make such awards in appropriate circumstances.

Further, as outlined above, damages for non-economic loss for wrongful death are presently available in the jurisdictions of the Northern Territory, South Australia, England, Scotland and Ireland. The concept is therefore not unknown in other jurisdictions.

The introduction of damages for non-economic loss under the Act is also consistent with the Commission's recommendations in Project 66,<sup>49</sup> where the Commission recommended damages be made available for loss of

assistance and guidance to spouses, parents, unmarried children and unmarried persons to whom the deceased stood *in loco parentis*.<sup>50</sup>

### 8.1.3 Stakeholder submissions in support of reform

Stakeholder submissions received in support of amending the Act to allow claims for non-economic loss generally focused on the following benefits;

- (a) compensating relatives for their mental suffering, grief and the emotional impact of a deceased's death; particularly where such impact may not rise to the severity or duration required to be recognised as a psychological or psychiatric injury;
- (b) compensating relatives for loss of non-economic benefits that they would otherwise have enjoyed had the deceased's death not have occurred (for example, loss of care and guidance);
- (c) publicly recognising the wrongful nature of the deceased's death;
- (d) providing public recognition to relatives for the loss of a loved one; and
- (e) reflecting current community and societal standards and the importance of recognising mental suffering and grief.

The general tenor of the submissions in favour of reform was that the Act fails to reflect that emotional harm arising out of the death is likely to be more significant than the purely financial considerations.

In respect of items (a) and (e) above, while it is understandable that at the time Lord Campbell's Act was enacted non-economic loss was not included as a head of damage, the same cannot be

<sup>49</sup> Project 66 (n 7) [4.11]-[4.20].

<sup>50</sup> This recommendation was not implemented.

said today. It was understandable because of the then embryonic state of knowledge of psychiatric, psychological and emotional disorders, including grief and mental suffering. This lack of knowledge and understanding led to the view that such injuries were not foreseeable and consequently, damages for them were not recoverable under the English common law. Stakeholder feedback noted that since that time the situation has changed vastly.

In the 170 years since Lord Campbell's Act was enacted there has been great increase in knowledge and understanding of how the human brain functions and how trauma can affect a person's emotional, psychiatric and physical health. Correspondingly there has been a clear movement towards greater legal recognition of the mental and psychological impacts of negligence and wrongful death, including through the recognition of liability for nervous shock and psychiatric illness in negligence and the recognition of a tort of intentionally causing nervous shock, even though that recognition may stop short of awarding damages for harm which does not amount to a recognised psychiatric illness.

It was noted by one stakeholder that awarding damages for mental harm falling short of a recognised mental illness was perhaps the next logical step, and indeed that it would be inconceivable that if, in 2020, the legislature were enacting a statute providing compensation for wrongful death for the first time that it would be limited to economic losses only. This is particularly so given the broad community acceptance that grief and mental suffering of relatives are inevitable and usually highly significant consequences of a wrongful death. The Commission agrees with that submission to the extent that recovery for non-economic loss would not be excluded as a result of ignorance of the nature and degree of non-economic loss. However,

the Commission concludes that there are other considerations which would result in non-economic loss being excluded.

#### *Capacity of courts to make awards*

A number of the submissions in favour of extending the Act noted that Courts are well versed in making awards of damages for non-economic losses for mental harm in negligence claims and criminal injuries claims and were, accordingly, adequately equipped to meet any conceptual challenges arising. To the extent that any assistance was required, there was some support for the prescription of statutory caps to assist with judicial decision-making. It is worth noting at this juncture that a number of submissions against extending the Act expressed the contrary view, instead considering the Courts to be poorly equipped for fixing awards of damages, and this point is discussed below.

There was widespread acknowledgement of the potential for further harm arising out of judicial inquiry into the degree and extent of the grief suffered by surviving relatives. For this reason, submissions were generally more supportive of fixed awards in the manner preferred in the English reforms, which did not necessitate the same degree of judicial inquiry into the relationship and the impacts of the death on the claimant.

#### *Consistency of compensation laws*

The vast majority of stakeholders made comment on the issue of the consistency of laws. However, there was a significant divergence of views on the issues (as will be seen below). In favour of reform, stakeholder submissions argued that the unique nature of the Act meant that reform to permit recovery of non-economic losses in wrongful death cases could occur without creating inconsistency with parts of tort law.

The Commission notes that the unique nature of the Act might militate against the argument that the reform itself would create inconsistencies with the existing law of torts and undermine the significant reforms in that area which were implemented for very cogent policy reasons. However, this does not provide a justification for reform.

The stronger justification for reform is the submission that extending the Act to include compensation for non-economic loss would bring the law into alignment with contemporary and community standards. They submitted that the law and society had moved on since the enactment of Lord Campbell's Act.

### *Uniformity with other jurisdictions*

Stakeholders also submitted that reforming the Act to allow recovery of damages for non-pecuniary loss would ensure consistency with other common law jurisdictions including those identified by the Commission in the Discussion Paper.

The Commission rejects this argument. Uniformity of law with some international common law jurisdictions is not on the face of it desirable. International jurisdictions are bound to have quite different compensation laws and quite different insurance and economic circumstances. They do not share a judicial appellate structure with Australia. Whilst other international statutory regimes (particularly those which share a common law heritage) and the stated justifications for them are worthy of consideration, their mere existence is of little weight in deciding what the law should be in Western Australia.

The Commission accepts that uniformity of statute law with other Australian jurisdictions is desirable.

Currently only one Australian State and one Australian Territory permit claims for non-economic losses in wrongful death claims. Thus the overwhelming number of Australian jurisdictions do not allow such claims. This number also includes the most populous States.

Further, the two jurisdictions which allow such claims have such different regimes that it is not possible to describe them as being uniform with each other.<sup>51</sup> If the Western Australian Parliament was to amend the Act to permit such claims, it is likely that its regime would be different again. This would not advance uniformity in this area of the law.

## 8.2 Arguments against reform

### 8.2.1 Adding insult to injury

An argument against reform, is that it is impossible to ascribe a precise monetary value for a person's grief or the loss of companionship, assistance or guidance that results from the death of a loved one. These emotions and losses are simply a part of the human experience and neither the law nor the community requires compensation for them.

As Gummow and Kirby JJ said, albeit in the context of the law of negligence:

*Grief and sorrow are among the 'ordinary and inevitable incidents of life'; the very universality of those emotions denies to them the character of compensable loss under the tort of negligence.*<sup>52</sup>

Awards of solatium, by their very nature, are unlikely and unable to accurately assess or measure the loss suffered. This was recognised by

<sup>51</sup> As illustrated in the table on page 19.

<sup>52</sup> *Tame v New South Wales* (2002) 211 CLR 317, 381-382 [193].

Muirhead J in *Cook v Cavenagh* when His Honour stated:<sup>53</sup>

*In assessing solatium therefore I approach the matter objectively and separately in the case of each relative and I can only attempt to measure the intensity of sorrow and its duration. I must take into account aggravating and mitigating factors. There is no question of pecuniary loss or compensation for such loss. The assessment of general damages for pain and suffering including transitory suffering is an exercise frequently required by the law and of that there can be no measure save perhaps knowledge of earlier assessments. Compensating grief in terms of money is perhaps a more difficult exercise as in reality money can be little compensation in a society such as ours and one must in the long run endeavour to do justice between the plaintiff and the defendant.*

Leaving the assessment of non-economic losses to the exercise of judicial discretion necessitates inquiry into and a weighing up of the degree and extent of grief suffered by surviving dependants. While such a process might permit (to the extent that it can) awards that more accurately reflect losses suffered, the inquiry itself may increase a surviving dependant's suffering, delay the grieving process and potentially be viewed as distasteful and insulting to both claimants and the deceased.

The current South Australian provisions permit awards of solatium in fixed, arbitrary and nominal amounts. A similar position exists in England. The Commission is conscious of the risk that, in fixing nominal or arbitrary awards for solatium, such awards might

be considered insulting to those who have suffered the loss of a close relative. However, the Commission also notes that the absence of any award of solatium may also cause insult to those surviving the deceased. Earlier in this Report the Commission has determined that the 'affront' argument is not on its own a reason not to extend the Act to include non-economic damages.

The Commission also recognises that there is a risk that the imposition of a fixed award for non-economic loss (aside from the arbitrary and/or nominal nature of that award) may give the impression of creating an entitlement rather than being compensatory in nature.

### 8.2.2 Insurance against non-economic losses?

The Commission is also conscious that in many cases it is the insurer of the wrongdoer, rather than the wrongdoer themselves, who fund any award of non-economic loss, just as they often fund existing claims. In the case of death occasioned by motor vehicle accident, for example, the Insurance Commission of Western Australia as the statutory third party insurer will (save in limited circumstances) stand in place of the wrongdoer. Similarly, an insurer may stand in place of an at fault employer. Arguably, if an insurer does not stand in place of the wrongdoer, the ability of a claimant to recover such damages (as distinct from being awarded damages) may be significantly diminished. Conversely, if legislative amendment permits an award of non-economic loss, insurance premiums will likely increase to allow for an insurer's additional exposure. The financial impact of any proposed amendments to the award of damages under the Act is discussed further below.

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<sup>53</sup> *Cook v Cavenagh* (1981) 10 NTR 35, 37-38.

### 8.2.3 Should an award of non-economic loss fill 'gaps' in recoverable damages?

The Commission notes that it is arguable that if the current provisions in the Act do not compensate, or inadequately compensate a deceased's surviving dependants for all economic losses suffered following wrongful death, then consideration ought to be given to amending those provisions to correct such inadequacies, rather than attempting to correct them by way of an award for non-economic loss.

### 8.2.4 Stakeholder submissions against reform

Stakeholder submissions arguing for the status quo tended to focus on the following propositions:

- (a) compensation without injury is rare in tort law;
- (b) the law already recognises the possibility of alternative redress in circumstances where psychiatric injury is sustained;
- (c) assessing and quantifying damages for solatium and loss of care, guidance and companionship is fraught with difficulty;
- (d) there is no real way to avoid the significant risk of insult to survivors or the potential for inadequate damages awards to cause further distress and harm;
- (e) an unfettered ability to recover damages for non-economic loss would require courts, insurers and defendants to inquire into the private lives of claimants and interrogate the nature of relationships between relatives. This is a considerably greater intrusion into the private lives of claimants by the courts than that

which is currently undertaken when assessing damages in connection with a physical injury or recognised psychiatric illness, where assessments are informed by expert opinions from doctors and other health professionals and informed by contemporaneous records. In addition, the ultimate award might be dictated by how stoic the claimant is in their presentation; that is, the risk arises that the award of damages will be determined by how a claimant expresses their loss, rather than by the loss itself;

- (f) reforming the Act to allow claims for non-economic loss for wrongful death would increase the cost of liability risk for defendants and insurers, reduce claims cost predictability and generally impact on economic activity;
- (g) no novel or pressing public policy issue has been identified justifying reform and the absence of such compelling policy reasons was confirmed by the NSW Commission in 2011 in its report on *Compensation to Relatives*;<sup>54</sup> and
- (h) reform of the nature proposed would be novel and create inconsistencies between the position in Western Australia and the position in other States and Territories when the justification or otherwise for awarding damages should bear no link to the location of the accident.

A number of submissions drew attention to recent legislative developments restricting awards or common law access in a number of respects, for example:

- (a) section 3C of the Motor Vehicle TPI Act - limiting recovery for non-pecuniary loss;

<sup>54</sup> Compensation to Relatives Report (n 46) [4.15].

- (b) section 9 of the Civil Liability Act - limiting recovery for non-pecuniary loss; and
- (c) section 146C(6) of the *Workers' Compensation and Injury Management Act 1981* (WA) (the Workers' Compensation Act) - precluding (inter alia) secondary psychological and psychiatric conditions from the assessment of 'Whole Person Impairment' for the purposes of establishing an entitlement to bring common law proceedings.

A number of stakeholders noted that the *Review of the Law of Negligence* (Ipp Report)<sup>55</sup> and consequent tort reforms across Australian jurisdictions were directed to reigning in claim costs and consequential insurance costs. It was argued that adding a new head of damages in wrongful death claims would be inconsistent with such developments and would undermine the benefits flowing from those reforms.

In addition, it would wrongly convey the message that grief and suffering incurred in connection with a wrongful death should be compensable in a way that grief and suffering of an individual who themselves suffered harm as a result of negligence was not.

Further, it was submitted that to symbolise public recognition that a deceased's death was wrongful would be comparable to an award of aggravated damages; a rarity in personal injury cases. Stakeholders noted that the two jurisdictions in Australia where claims of this nature were permitted were in the minority, and that this was an area in which uniformity between

jurisdictions is beneficial for multiple reasons.

First, it is said there is no principled reason why a person should be compensated in one jurisdiction for the precise loss that they cannot be compensated for in another. Second, to the extent that they can be compensated, the value of that compensation should be the same regardless of the jurisdiction in which the accident occurred. Finally, a lack of consistency between jurisdictions makes it difficult to predict liability of an insured in a reliable way, which will inevitably result in increased premiums.

Stakeholders opposing the amendment of the Act to allow claims for non-economic loss also noted the potential for significant increases in the costs of claims arising out of a wrongful death, and the potential impact that recovery of damages for non-economic loss might have on the Commonwealth government's 'High Cost Claims Scheme' in relation to medical indemnity claims.<sup>56</sup>

The Commission notes the submission that the flow-on effect of increased claim costs will inevitably be an increase in insurance premiums payable by the broader community. This is said to be the case even if the quantum of damages is quite limited, as the vast majority of smaller claims will be settled in order to avoid the expense of a trial. A number of the issues relating to the costs implications of the proposed reform are discussed below. In relation to item (h) above, the Commission acknowledges the desirability of uniformity in approach between Australian jurisdictions.

<sup>55</sup> Commonwealth of Australia, *Review of the Law of Negligence* (Final Report, September 2002) ('Ipp Report').

<sup>56</sup> The High Cost Claims Scheme is a scheme established to enable medical indemnity insurers to increase assets available to pay future claims without needing to significantly increase premiums paid by medical practitioners. Under the scheme the Commonwealth contributes 50% of the cost of eligible claims over a threshold of \$300,000 (currently).

Unfortunately there is no such uniformity and reform of this Act to include claims for damages for non-economic loss will not achieve uniformity. Rather it is likely to add to the number of diverse legislative regimes.

### 8.3 Conclusion as to whether there should be reform of the Act

The Commission concludes that the current state of knowledge about the existence of and seriousness of non-economic loss and detriment caused by a wrongful death is such that there is some justification for amending the Act to allow for claims for non-economic loss for wrongful death. However the Commission recognises that such a change to the law would result in inconsistency between various Western Australian compensation laws which, for example, require living injured persons to reach certain thresholds before being entitled to non-economic loss. Also, there is no universally accepted way of sensitively and fairly assessing non-economic loss in wrongful death cases. Reform would also add to the lack of uniformity in this area of law between Australian States and negatively impact the cost of claims on insurers and increase the cost of insurance premiums. Therefore it has reached the conclusion that there should not be reform of the Act to allow for claims for non-economic loss.

## 9. Nature and Scope of damages - consideration of the Discussion Paper questions and stakeholder submissions

### 9.1.1 What type of non-economic loss ought to be compensable under the Act?

**Question 2(a):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss,

what type of non-economic loss ought to be compensable under the Act?

**Question 2(b):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should it be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of the companionship, guidance and/or counsel provided by the deceased?

In the Discussion Paper the Commission formed a preliminary view that in the event that the Act is to be amended to provide damages for non-economic loss, such damages should be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of the companionship, guidance and/or counsel provided by the deceased.

The Commission suggested that such an approach would be broadly consistent with other jurisdictions which have made provision for the award of such damages. It would be consistent with the object and purpose of providing damages under the Act (being to compensate the claimant for losses the claimant has suffered as a result of the death of their relative). This approach was also suggested to address the justifiable concern about placing a value on the life of a deceased person.

Amongst those stakeholders supporting amendment there was general support for a form of damages recognising bereavement, grief and sorrow caused by a deceased's death (that is, solatium), loss of companionship and loss of care and guidance. In particular it was argued that restricting recovery solely to bereavement damages would result in classes of relatives, such as infant children, falling outside the ambit of the mooted compensation.

The majority of stakeholders in support of reform indicated that if the Act was amended to allow recovery of damages

for non-economic loss for wrongful death they would support an approach in line with the approach taken by the Law Commission of England and Wales and the 1982 amendments to the *Fatal Accidents Act 1976* (England).

Those stakeholders who opposed amendment to the Act to allow recovery of damages for non-economic loss tended not to address Question 2 in any great detail. Of the responses that did address Question 2, there was some limited support for recovery limited to solatium only.

None of the submissions received in opposition to amendment were supportive of recovery for loss of companionship, assistance and guidance.

### 9.2 Conclusion as to the type of non-economic loss which ought to be compensable under the Act

The Commission concludes that if the Act is to be amended to allow for claims for non-economic loss, for reasons of principle and pragmatism, there needs to be a limit on the type of non-economic loss recoverable under the Act. In relation to principle, it is of the opinion that there should not be any attempt to compensate a relative of a deceased for the value of the deceased's life. An award, however, could be some compensation for the grief and suffering of a relative of the deceased. The Commission also favours the inclusion of an award for loss of the deceased's companionship. If the Act was amended, dependant children ought to be able to claim for the loss of the assistance and guidance of the deceased; rather than for loss of the deceased's companionship, which is a loss suffered by adults.<sup>57</sup> Contrary to

the recommendation of the Commission in Project 66, the Commission does not recommend that a broader class of claimant ought to be able to claim loss of assistance and guidance damages. This change is consistent with contemporary understandings of the basis for this head of damages.

### 9.3 What is the appropriate class of claimants?

**Question 3:** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, what is the appropriate class of persons who may be awarded such damages?

In the Discussion Paper the Commission considered the class of persons who ought to qualify for damages for compensation for non-economic loss in the event that the Act was amended.

The Commission considered that there were two broad options in this respect:

- (a) the class of persons to be same as the class of persons for whose benefit an action can currently be brought under the Act; or
- (b) a more limited class of persons.

The first broader category would include all those persons currently falling within the definition of 'relative' of the deceased contained in clause 1 of Schedule 2 to the Act as follows:

- (a) *a person who immediately before the deceased's death was –*
  - (i) *the spouse of the deceased; or*
  - (ii) *a de facto partner of the deceased who was living in a de facto relationship with the deceased and had been living on that basis with the deceased for at least 2 years*

<sup>57</sup> There may be other close relatives who relied on a deceased for assistance and guidance, for example, adults with a disability. If the Act was to be amended, there would need to be consideration given to these relatives being able to claim under this head of damages.

- immediately before the deceased died;*
- (b) *any person who was the parent, grandparent or step parent of the deceased;*
  - (c) *any person who was a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased;*
  - (d) *any person to whom the deceased person stood in loco parentis immediately before the death of the deceased;*
  - (e) *any person who stood in loco parentis to the deceased person immediately before his death;*
  - (f) *any person who was a brother, sister, half-brother or half-sister of the deceased person; and*
  - (g) *any person who was a former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, immediately before his or her death, to make provision for with respect to financial matters.*

This approach is broadly consistent with provisions in Scotland and Ireland which, whilst excluding some classes of relative (notably the former spouse or civil partner), make provision for an award of damages to a broad class of persons.

The second approach is to adopt a more restrictive class of persons who may claim damages for non-economic loss. Both England and South Australia adopt a restrictive category of claimants, being limited to the spouse or de facto partner and the parents of an infant child, but do not include a child of the deceased.

The Commission notes that the first approach has the benefit of ensuring that the relatives of the deceased are treated equally under the Act. From a legal policy perspective, the Act currently identifies those relatives for whom a claim under the Act might be brought. If it is appropriate for those

relatives to be awarded damages for economic loss, then if damages for non-economic loss are to be made available, the issue is whether there is a good reason why they should not be made available to the same category of relatives.

The Commission acknowledges that the list of persons falling within the definition of 'relative' is extensive (although it may not be in any one case). There is an argument that damages for non-economic loss have historically been treated differently under the law to damages for economic loss, and therefore it is appropriate to restrict the class of persons to whom they are applicable. Based on the approaches adopted in South Australia, England and parts of the Northern Territory legislation, that class of persons is generally limited to what might be described as 'close relatives'.

#### 9.4 Stakeholder submissions

Of those submissions in support of amendments to allow damages for non-economic loss, opinions diverged as to the appropriate class of persons who ought to be awarded damages flowing from the loss.

There was some support amongst stakeholders to limit the class of relatives who may be awarded damages more narrowly than the general class of relatives listed in Schedule 2 of the Act, such as was adopted in England and South Australia.

Other stakeholders were supportive of the view that to adopt a less restrictive approach would have the benefit of ensuring that all relatives of the deceased are treated equally under the Act. It was submitted that there was no prevailing policy reason to restrict the class of claimants to 'close relatives'.

Stakeholders who opposed reform to allow damages for non-economic loss

noted that the larger the class of potential claimants, the greater the potential for increased insurance premiums, legal costs (both to insurers and claimants), the value of damages paid per wrongful death claim more generally, and far-reaching financial consequences for insurers and the community.

It was submitted that if the Act were to be amended, recovery of damages for non-economic loss should be limited to 'close relatives' or 'close immediate relatives'. Proponents against reform suggested that doing so would likely see damages being awarded to those who suffered a genuine loss and those who would be most likely to benefit from an award.

#### 9.5 Conclusion as to class of claimants

Given the Commission's recommendations as to the nature of the claim for non-economic loss, it recommends that the class of claimants be limited to spouses, partners,<sup>58</sup> siblings,<sup>59</sup> children and parents<sup>60</sup> of deceased persons,<sup>61</sup> broadly defined. This class of claimants comprises those close relatives who are most likely to be affected by the wrongful death. Only adult claimants ought to be able to claim for loss of the deceased's companionship. Only dependant children ought to be able to claim for loss of the deceased's assistance and guidance.

#### 9.6 Quantum of damages and how damages should be calculated - consideration of the Discussion Paper questions and stakeholder submissions

**Question 4(a):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and without any limitation or statutory cap?

**Question 4(b):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and be subject a limitation or statutory cap?

**Question 4(c):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, and such damages be determined according to common law principles and be subject to a limitation or statutory cap, should that statutory cap take the form of:

- (a) a formula similar in effect to that set out in section 3C of the Motor Vehicle TPI Act, with appropriate adjustments to 'Amount A', 'Amount B' and 'Amount C' to take into account the reality that non-economic loss for relatives in the fatal accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm;
- (b) a lump sum payment to each relative entitled by reference to Schedule 2 of the Act:
  - (i) in a set amount without differentiation between relationship with the deceased;
  - (ii) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased;
- (c) a lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the Act:
  - (i) in equal shares; or

<sup>58</sup> Spouse and partner to be broadly defined.

<sup>59</sup> Siblings includes half siblings and step siblings.

<sup>60</sup> A parent includes a person standing in *loco parentis*.

<sup>61</sup> Child includes step child or grandchild who was dependent on the deceased and where the deceased stood in *loco parentis*.

(ii) according to a table of percentages based up their relationship with the deceased; or  
(d) some other form of statutory limitation or cap?

If the Act is to be amended to allow for compensation for non-economic loss, the Commission has considered what the quantum of damages should be, and how such damages should be calculated. In its Discussion Paper, the Commission identified the following different options in this respect:

1. Determined according to common law principles without statutory limitation or capping (**Option 1**).
2. Determined according to common law principles but subject to a statutory limit on the award of damages (**Option 2**).
3. Determined according to a formula similar in effect to that set out in section 3C of the Motor Vehicle TPI Act, with appropriate adjustments to 'Amount A', 'Amount B' and 'Amount C' to take into account the reality that non-economic loss for relatives of a person who suffered a wrongful death is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm (**Option 3**).
4. By lump sum payment of non-economic loss to:
  - (a) each relative entitled by reference to Schedule 2 of the Act in a set amount without differentiation between relationship with the deceased (**Option 4(a)**);
  - (b) close relatives in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased (**Option 4(b)**).
5. By lump sum payment of non-economic loss to be divided between all relatives entitled by reference to Schedule 2 of the Act:

- (a) in equal shares (**Option 5(a)**);  
or
- (b) according to a table of percentages based upon their relationship with the deceased (**Option 5(b)**).

The Commission outlined the various advantages and drawbacks of the differing approaches in the Discussion Paper. In order to assist in formulating its recommendations the Commission sought stakeholder feedback and obtained detailed actuarial modelling on the financial implications of the assessment methodologies outlined above.

#### 9.6.1 Option 1 - Determined according to common law principles without limitation or capping

Permitting the Courts to make an unlimited discretionary award of damages according to common law principles would essentially follow the Northern Territory model. The principal advantage of the Northern Territory model is that it allows for judicial discretion and flexibility in examining the extent to which various claimants have been impacted by the loss of a family member. The Commission envisages this would include the ability for the Court to exercise its discretion so as not to make an award of damages if it thinks that it is not just to do so.

Of course the principal disadvantage flows from those same considerations. There is clearly a risk that enquiries as to the relationship between various claimants and the deceased and the impact of the death on such individuals might lead to distress or unnecessary conflict. Further, enquiring as to the very personal and emotional impact of the death of a loved one might serve to reinforce or aggravate a family's suffering and highlight the limited ability of the legal system to adequately evaluate and compensate such loss.

Considerations such as these led the Law Commission of England and Wales to declare that:

*we are anxious that there should be no judicial enquiry at all into the consequences of bereavement.*<sup>62</sup>

On a functional level, the Commission accepts that the assessment of such damage involves new lines of enquiry and reasoning which have not previously been the subject of consideration. Accordingly, the introduction of such compensation is likely to involve some passing degree of challenge or uncertainty on the part of the courts and of legal practitioners providing advice and representation.

However, the Commission anticipates that the process of adaption would be relatively unproblematic given the:

1. limited number of claims under the legislation; and
2. availability of Northern Territory judgments which are likely to provide assistance until a body of local experience can be accumulated.

There is also a risk of significant cost increases due to large discretionary awards. However, the Commission anticipates that non-economic damages awards in the fatal accidents context are likely to be significantly lower than awards for non-economic loss claims for personal injuries. Such expectation flows from the absence of direct pain and physical suffering, curtailment of expectation of life or the existence of bodily harm on the part of potential claimants.

This is consistent with the awards flowing from the Northern Territory Courts, which appear to have been relatively modest, with awards typically in the region of \$20,000 to \$25,000 per claimant. However, the Commission does note a trend towards significantly increasing awards under section 4(3)(b) of the *Damages (Scotland) Act 2011* (Scotland), initially driven by jury awards but more recently taken up by judges in non-jury cases.<sup>63</sup>

#### 9.6.2 Option 2 - Determined according to common law principles but subject to a statutory limit on the award of damages

The second alternative is for any damages to be determined according to common law principles, but subject to a statutory limit. Again, the Commission envisages this would include the ability for the Court to exercise its discretion so as not to make an award of damages if it thinks just.

Whilst the Northern Territory experience leads the Commission to the view that awards for non-economic loss would be relatively modest, the recent trends in Scotland raise the prospect of unanticipated consequence in the form of more substantial compensation.

In those circumstances the question arises as to whether a more managed introduction of awards of damages might be necessary to avoid issues in respect to insurance and the costing of risk. In this context, concerns as to large damages awards resulting from an unfettered common law approach might be addressed by way of a statutory cap.

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<sup>62</sup> England and Wales Law Commission Report LC056: *Personal Injury Litigation: Assessment of Administration of Damages report* (24 July 1973) [175].

<sup>63</sup> For example, in *Anderson & others v Brig Brae Garage Ltd* [H.S. at W 2015] the surviving partner of deceased person was awarded £140,000. In contrast, in *Martha Young v. Arthur MacVean* [2015] CSIH 70 the Scottish Appeal Court noted that Judges must have regard to the 'upward pull of Jury awards' when making awards of damages for non-pecuniary losses in fatal accidents cases (and in general).

In order to address the prospective economic impact associated with reform, the Commission sought costings assuming a cap of \$20,000 to \$25,000. Such a range would accord generally with lump sum payments available under the English model and with the range of awards made in the Northern Territory.

### 9.6.3 Option 3 - Determined according to a formula similar in effect to that set out in section 3C of the Motor Vehicle TPI Act and section 9 the Civil Liability Act

In Western Australia many claims in tort are subject to statutory restrictions on the recovery of non-economic loss; notably those claims impacted by the Civil Liability Act and the Motor Vehicle TPI Act. Under both these Acts the legislature has sought to limit the recovery of low value or modest claims for non-economic loss.

In the case of the Motor Vehicle TPI Act the legislature has gone further, imposing a statutory maximum to be awarded '*only in a most extreme case*' (see section 3C(3)) with all other awards made in proportion '*according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded*' (section 3C(2)).

The Commission recognises the advantages that flow from a consistent approach to the assessment of non-economic loss across various legislative instruments. To this end the Commission examined whether a formula, similar to that which applies to such damages under the Motor Vehicle TPI Act, ought to apply in the event that reform is undertaken in respect to the Act.

Consistent with the motor vehicle legislation:

1. smaller claims would not attract an award for non-economic loss; and

2. non-economic loss would otherwise be calculated as a proportion of a most extreme case.

Given that pain and physical suffering, curtailment of expectation of life or the existence of bodily harm are unlikely to be present (save insofar as the claimant might be injured in the same event resulting in a direct cause of action), the various caps and thresholds would need to be adjusted.

Whilst the methodologies considered above work around figures of \$20,000 to \$30,000, the introduction of the concept of '*a worst case*' against which claims are benchmarked might justify a higher cap.

With this in mind, the Commission sought costings in relation to a modified version of the motor vehicle injury formula. The costings were based on the following:

- Amount A - \$50,000;
- Amount B - \$5,000; and
- Amount C - \$10,000.

The approach outlined allowed for the award of a more substantial award than Option 2 in the case of particularly traumatic loss.

However, such a methodology would require the Courts to directly compare loss against '*a worst case*' benchmark. The Commission recognises that such analysis may cause considerable distress to and conflict between family members. Such benchmarking may also have the effect of suggesting a lack of understanding or empathy on the part of judicial officers called upon to carry out such enquiry.

### 9.6.4 Options 4(a) and 4(b) - Lump sum payment for non-economic loss to each relative entitled by reference to Schedule 2 of the Act

Whilst Options 1 - 3 all call for judicial examination of the 'quality' or extent of grief or loss of companionship or guidance/counsel, lump sum models avoid such potentially fraught analysis.

Under Option 4(a), there would be fixed payments of compensation to each relative entitled by reference to Schedule 2 of the Act, those relatives being:

- (a) a person who immediately before the deceased's death was:
  - (i) the spouse of the deceased; or
  - (ii) a de facto partner of the deceased who was living in a de facto relationship with the deceased and had been living on that basis with the deceased for at least 2 years immediately before the deceased died;
- (b) any person who was the parent, grandparent or step parent of the deceased;
- (c) any person who was a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased;
- (d) any person to whom the deceased person stood *in loco parentis* immediately before the death of the deceased;
- (e) any person who stood *in loco parentis* to the deceased person immediately before his death;
- (f) any person who was a brother, sister, half-brother or half-sister of the deceased person; and
- (g) any person who was a former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, immediately before his or her death, to make provision for with respect to financial matters.

The Commission notes that Parliament frequently adjusts entitlements depending on the nature of the relationship between family members.

An obvious example of such differentiation can be found in the *Administration Act 1903* (WA).

The Commission sought guidance in the form of economic modelling on two distinct approaches:

- (a) in a set amount without differentiation between relationships with the deceased (Option 4(a)); and
- (b) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased (Option 4(b)).

Option 4(a) allows for a set award to all claimants in equal amounts. For the purposes of discussion, the Commission requested modelling on a figure of \$25,000, again reflecting the quantum of awards flowing out of the Northern Territory.

Under Option 4(b), lump sum payments would be limited to close relatives with the amount depending on the nature of the relationship to the deceased. For the purposes of discussion, the Commission sought advice as to the economic impact of the following:

- (a) surviving spouse or de facto partner: \$25,000;
- (b) each surviving parent or step parent of a deceased child under the age of 18 years as at the date of death: \$15,000;
- (c) each surviving parent or step parent of a deceased child over the age of 18 years as at the date of death: \$10,000;
- (d) each surviving child of the Deceased under the age of 18 years as at the date of death (including persons to whom the Deceased stood *in loco parentis*): \$10,000;
- (e) each surviving child over the age of 18 years as at the date of death (including persons to whom the

- deceased stood *in loco parentis*): \$5,000; and
- (f) each surviving sibling (including half siblings) of the deceased: \$5,000.

#### 9.6.5 Options 5(a) and 5(b) - Lump sum payment for non-economic loss to be divided between all relatives entitled by reference to Schedule 2 of the Act

If compensation for non-economic loss was to be awarded there would obviously be a degree of variation in exposure on the part of the tortfeasor depending on the number of relatives and their relationships to the deceased.

Such variability inevitably causes difficulty with respect to issues such as insurance and the pricing of risk. Such challenges are not unprecedented; the tortfeasor has always taken injured persons as they find them, with all of their vulnerabilities and individual circumstances. Common law jurisdictions have proved adept at recognising and adapting to the variability in this respect. However, the larger the class of claimant, the greater the potential costs arising out of any changes to the law in this area. However, a degree of certainty might be achieved by allowing for a lump sum or pool from which all claimants would be compensated. For the purposes of costing the Commission adopted a figure of \$150,000, with the reservation that no claimant would be entitled to an award greater than \$25,000.

#### 9.6.6 Stakeholder submissions in respect to assessment of non-economic loss

Most stakeholder submissions favoured some form of statutory limitation or cap on awards of damages, irrespective of whether the stakeholder supported or opposed the notion of reform.

All stakeholders recognised the inherent difficulties in quantifying claims for non-economic loss. Losses of this nature were identified as being subjective to individuals who suffered them with the potential for insult significant. Consistent with the Commission's analysis in the Discussion Paper, stakeholders were concerned that too small an award might be seen as inadequate recognition of loss; too great an award would result in detriment to the availability of insurance, the cost of claims and to the community.

Of proponents for reform, the English model which nominated an amount to be awarded to relatives in various classes of claimant found greatest favour.

In this respect, it was noted that an award in a fixed amount determined by reference to the relationship of the claimant to the deceased would not only eliminate judicial inquiry into degrees of grief, to the benefit of surviving family members, but would also provide the wider community with certainty as to the extent of potential liability and the attendant flow-on economic cost.

Only one stakeholder advocated that a 'substantial' statutory cap or fixed award of damages be reviewed regularly and increased over time.

The submissions received from stakeholders opposed to the amendment of the Act to allow recovery of damages for non-economic loss were also supportive of statutory limitations and a statutory cap being introduced if the Act was to be amended.

It was submitted that if reform was undertaken, legislation should clearly outline who qualified for an award of damages for non-economic loss in wrongful death cases to avoid the need for defendants and insurers to be drawn

into family disputes and to avoid the need for a deceased's survivors to be interrogated as to the nature of their personal relationships.

There was some divergence between stakeholders (both for and against reform) as to whether the preferable methodology should incorporate a set lump sum payment to each relative entitled (Options 4(a) and 4(b)) or a lump sum payment to be divided between all relatives entitled (Options 5(a) and 5(b)) above.

Some stakeholders considered that Options 4(a) or 4(b) would be the least problematic, as long as the class of relatives entitled was limited in scope. It was submitted that adopting a set tariff of damages referable to the objective relationship, rather than the subjective 'quality' of the relationship, would be simpler and less traumatic. It was also submitted that this approach would lessen the need for additional Court time and minimise legal expenses and delays associated with finalising claims.

Other stakeholders considered that the desirability of adopting Options 4(a) or 4(b) would depend on the quantum of the fixed amount and the size of eligible class. It was submitted that a relatively high quantum for a wide class might result in greater disparity between the value of awards in individual cases depending on the number of claimants. Stakeholders observed that such an approach might increase difficulties in assessing risk and calculating premiums.

Insofar as Options 5(a) and 5(b) are concerned, stakeholders acknowledged that there was a degree of undesirability in dividing a lump sum between all qualifying relatives but also in leaving relatives dissatisfied if an amount paid to one relative would reduce the amount of the 'cap' left available to another. It was suggested

by one stakeholder that it may be more desirable to implement an 'overall cap' with 'sub-caps' awarded for each class of relationship that attracted compensation.

## 9.7 Conclusion as to quantum and calculation of damages

After considering all of the above matters and the Economic Costs Report (discussed below), if the Act was amended to permit the recovery of non-economic loss the Commission's preferred method of assessment of damages is a cap of \$150,000 to be divided amongst all eligible claimants, with awards to be fixed at \$25,000 per claimant. If individual awards would result in the \$150,000 cap being exceeded, each award would be reduced by the same amount so that the sum of all awards did not exceed \$150,000. The class of eligible claimants should be limited to spouses, partners, dependant children, siblings and parents of deceased persons.

As discussed, the advantages of assessing compensation in this manner include:

- (a) no judicial enquiry into the quality of the relationship and resultant loss;
- (b) no conflict between family members as to the comparative value of their loss or emotional distress;
- (c) a greater degree of certainty with respect to legal exposure on the part of defendants and insurers; and
- (d) reduced legal and administrative costs associated with claims management.

Whilst the relatively moderate economic impact from this model is an advantage in one respect, the modest level of compensation does feed into what is perhaps the most sensitive and concerning consideration in play. The

Commission remains acutely concerned that a more limited level of compensation may be viewed as so tokenistic as to not be capable of meeting its purpose of compensating the close relatives for their loss. Even though the increased cap proposed is a more generous allowance, the Commission believes it will result in a lesser economic impact than Options 4(a) and 5 because it will apply to a more limited class of claimant.

## 10. Financial impact - consideration of the Economic Costs Report and stakeholder submissions

### 10.1 General observations

The Discussion Paper did not address Paragraph 5 of the Terms of Reference, being the measurable financial impact of any recommended changes on plaintiffs, insurers and the Government. Instead, the Commission undertook a separate review of Paragraph 5 of the Terms of Reference and engaged expert actuaries to provide economic modelling of the financial impact of reforms based on assessment of non-economic loss using the methodologies described in 9.6 above.

On 30 July 2020, the Commission received and subsequently considered the Economic Costs Report. A complete copy of the Economic Costs Report can be found at **Annexure B** of this Report.

The Commission notes that there are limitations to the accuracy of the estimates provided in the Economic Costs Report arising from inherent uncertainties in the nature of reforms, the number and types of claims that might be affected by reforms and the

impact of the reforms on those claims. The costings provided are dependent upon assumptions founded in limited data and experience.

Costings of proposals for claims for non-economic loss for wrongful death were modelled on two scenarios:

#### Approach 1:

reform applying only to deaths which occurred after the date any proposed legislation takes effect; and

#### Approach 2:

reform applying to all claims with settlements or resolution occurring after the date any proposed legislation takes effect.

The Commission makes the following general observations in respect to the financial impact of the proposed reform. As was identified by Taylor Fry:

*Generally, the delay between the event which causes the fatality and when the death occurs is short. However, in some instances such as exposure to asbestos, it can take decades. It can then take several more years after death until the damages are paid. Reforms that apply only to deaths occurring after the date of the legislation will plainly capture a smaller range of deaths and consequently will likely have a less significant financial impact.<sup>64</sup>*

The modelling indicates that no matter which Option might be utilised or whether Approach 1 or Approach 2 was adopted, substantial additional claim exposure would result. Inevitably, this would result in an increase in insurance premiums and/or the cost of self-insurance, although the precise gravity of that increase would vary with the Option and approach utilised.

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<sup>64</sup> Taylor Fry, *Costing of proposals for claims for non-economic loss for wrongful death* (Report, 30 July 2020) 2 ('Economic Costs Report').

It is noted that adopting Approach 2 would involve an increase in outstanding claims liabilities across all insurance classes, including asbestos related claims. Asbestos claims are subject to some specific policy considerations which are discussed in greater depth below. The Commission considers that such considerations favour the adoption of Approach 1.

As can be seen from Annexure A of the Economic Costs Report, the estimated total number of fatality claims arising each year is 386. Of those fatalities the majority of deaths arise in the context of asbestos related diseases (136) and fatal motor vehicle accidents.

As has been recognised in other parts of this Report, a single fatality is capable of generating multiple claims depending on the number of affected relatives and the class of claimants that any potential amendment to the Act might permit. Assuming that claims for non-economic loss arising from wrongful death were limited to 'close relatives', Taylor Fry estimated an average of 5.03 relatives (potential claimants) might claim for each wrongful death. If the class of claimants were expanded to include a broader definition of eligible relatives, this estimate increased to 7.51 eligible relatives (potential claimants) per wrongful death.<sup>65</sup>

Depending on the age of the deceased, the number of eligible claimants and the methodology applied in awarding damages for non-economic loss in wrongful death cases, the average cost per fatality was estimated to range between under \$50,000<sup>66</sup> up to \$263,000.<sup>67</sup>

The significant financial impact of any of the proposed Options was identified

in the modelling undertaken by Taylor Fry and reflected in the following extract from the Economic Costs Report:

Annual cost impact:

*The estimated annual damages and legal costs of the reforms varies from \$14m up to \$75m. Option 4 (Schedule B) differs significantly from the other options because it has both fewer relatives who are eligible to make a claim and the prescribed level of damages are much lower than the other options.*

*For Asbestos claims only, they are mainly due to past exposure and so the main effect is expected to be on outstanding liabilities with little or no effect on premiums. As asbestos claims mostly relate to non-insurance entities including self-insurers and the AICF, they would need to fund the increase from other sources. Excluding these claims means that the premium impact is less than the total estimated annual amount of damages and legal costs paid.*

*For other claim types, the annual cost represents the ongoing additional cost of claims arising from wrongful deaths during each future year. The impact on premiums is estimated to be 1% to 2% however ... this is higher for CTP and medical indemnity policies.*

Liability impact:

*The liability impact depends on which claims will be entitled to non-economic loss damages. If only claims where death occurs after the commencement date are eligible (Approach 1) then the*

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65 Ibid 21.

66 Ibid 3. Adopting an approach where a lump sum payment would be limited to 'close relative' with the amount of each award depending on the relationship of a claimant to the deceased.

67 Ibid. Assuming an approach consistent with the formula adopted by s 3C of the *Motor Vehicle TPI Act*.

*liability impact will be largely restricted to asbestos claims. The liability impact is estimated at \$120m to \$712m as almost every mesothelioma or asbestos related lung cancer diagnosis could lead to a wrongful death claim. If all wrongful death settlements occurring after the commencement date are eligible (Approach 2), then the estimated liability increase for non-asbestos claims would be \$27m to \$127m (1% to 3%), which is also the liability impact if asbestos claims were precluded from the reforms. Including asbestos claims, Approach 2 would result in a liability increase of \$147m to \$839m... for non-asbestos claims the liability increase will have a similar relative impact to premiums, with larger increases for CTP and medical indemnity than for public liability and workers' compensation.*<sup>68</sup>

Projected premium increases were highest in the medical indemnity insurance sphere due to a proportionately higher number of fatality claims; followed by compulsory third party motor vehicle accident claims due to the high number of road fatalities. The Commission notes that projected premium increases diminished as the number of restrictions on classes of claimants was increased and quantum of potential claims decreased.

Of all the options considered by the Commission and costed by Taylor Fry, Option 4(b) (lump sum payments limited to 'close relatives' with an amount of damages corresponding to the relationship between the 'close relative' and the deceased) resulted in the lowest premium increase and an

overall liability impact of \$103m.<sup>69</sup> The Commission notes that this Option most closely aligns with submissions received by proponents for and against amending the Act to allow damages for non-economic loss in wrongful death cases.

The Commission recognises the risks identified in the Economic Costs Report that amending the Act to permit recovery of damages for non-economic loss may result in a further short term increase in cost and delay claims being finalised until the reforms are better understood. In the longer term, it is noted that there is a risk of cost escalation in the absence of statutorily prescribed damages awards.

The Commission is cognisant that, while not explicitly stated in the Economic Costs Report, any reform which permits periodic review and increases in a statutory cap would have the effect of increasing, potentially significantly, claim costs and premiums over time. This was a risk that was specifically identified in a number of stakeholder submissions, particularly from those in the insurance industry, as a factor weighing against reforms allowing claims for non-economic loss in the context of the Act. The Commission notes, however, that the absence of a mechanism for periodic review and increases in the statutory cap also raises risks. Any reform that does not permit periodic review and an increase in a statutory cap on the amount of damages that might be awarded for non-economic loss, has the ability as time goes on, to increase the perceived inadequacy of an award in real terms, as well as failing to meet its perceived purpose and cause insult to surviving relatives.

<sup>68</sup> *ibid* 4-5.

<sup>69</sup> *ibid* 4. It should be noted that the lower premium increase and overall liability impact is also affected by the reduced quantum of proposed awards in Option 4, Schedule B.

## 10.2 Asbestos related diseases

As noted above the Commission recognises that any amendment of the Act may have an impact on the ability of survivors of a deceased who died from an asbestos related disease, to recover damages from the Asbestos Injury Compensation Fund.

The issue, albeit in relation to a different head of damages, was described in the Commission's Final Report in Project 106 as follows:

*The Asbestos Injury Compensation Fund is a special purpose company that was formed to pay the compensation liabilities of the James Hardie group of companies. In previous court cases, James Hardie had been found liable for some asbestos-related diseases where plaintiffs were found likely to have been exposed to products containing asbestos (such as cement sheeting) which James Hardie companies had manufactured or distributed. In 2001, Australian-based companies Amaca (formerly James Hardie & Coy Pty Ltd) and Amaba (formerly Jsekarb Pty Ltd) were separated from the James Hardie group. This resulted in concerns that the liabilities for personal injury claims arising from James Hardie's asbestos products would not be appropriately funded. In 2005, the Government of New South Wales sought to resolve the funding for personal injury claims. Accordingly, the Funding Agreement for the Asbestos Injury Compensation Fund was established through a contract between James Hardie Industries, the Asbestos Injury Compensation Fund and the Government of New South Wales. Clause 13(4) of the Funding Agreement makes provision for the situation where any State*

*government (not just New South Wales) enacts legislation that has the effect of increasing the amounts payable under the Funding Agreement.*

*In such a situation, James Hardie and the NSW Government are required to negotiate in good faith to modify the terms of the Funding Agreement (and the Trust Deed), to ensure that the liabilities of the Asbestos Injuries Compensation Fund (and the various James Hardie entities providing funding under the Funding Agreement) are not increased as a result of the introduction of the legislation in question.*

*In its submission to the Commission, James Hardie considers that the introduction of provisional damages and damages for gratuitous services by the Western Australian government would enliven clause 13(4) of the Funding Agreement. The submission goes on to note that this may negatively impact on the funds available to the Asbestos Injuries Compensation Fund and payments to claimants resident in Western Australia.*

*Further consultation is required with the Government of New South Wales and other parties to the Funding Agreement to determine whether the proposed reform would trigger clause 13 of the Funding Agreement, and if so, the financial implications for claimants relying on the Asbestos Injuries Compensation Fund, and the State of Western Australia.*

*The Commission note that the proposed reform to the 'once and for all' rule (with respect to asbestos disease sufferers) aligns well to the current provisions for asbestos disease sufferers that apply in New South Wales. The Commission see no reasons why the citizens of Western Australia should be treated differently*

*from residents of New South Wales, but are aware that the financial implications for Western Australia are unknown.<sup>70</sup>*

Unlike the proposed reforms to the 'once and for all' rule, the Commission considers that amendment to the Act to allow recovery of damages for non-economic loss in wrongful death cases may have a direct effect on the quantum of compensation paid in relation to asbestos related claims.

This is highlighted in the Economic Costs Report in the following terms:

*If asbestos claims are eligible for non-economic loss damages, then it is important to note that approximately 60% of WA asbestos liabilities are held by the Asbestos Injuries Compensation Fund ('AICF'). The estimates of asbestos liability increases above do not make any allowance for the funding arrangement between the NSW Government and James Hardie Industries ('JHI') under which the company is required to provide continued funding to the AICF. The agreement provides that when a government other than NSW introduces a scheme or legislative change that increases payments to asbestos victims, an adjustment is required to JHI's payment obligations so that its present and future liabilities are not increased as a result of that scheme or legislative change. A possible result of introducing the LRC reforms, subject to the outcome of negotiations between JHI and the NSW Government, may be to enliven the 'adverse action' provisions in the Amended and Restated Final Funding Agreement ('AFFA') between JHI*

*and the NSW Government which may negate for claimants against the AICF the intended benefits of introducing the LRC reforms... Given the magnitude of the potential increase in asbestos liabilities arising from the proposed reforms and its potential consequential impact on NSW as a result of their arrangement with JHI, this issue needs to be raised for discussion before the Council of Australian Governments before any scheme can be implemented.*

The Commission adopts the concerns outlined in the Project 106 final report and the Economic Costs Report and recommends that before any amendment to the Act is undertaken, further consultation and discussion be undertaken with the Government of New South Wales and parties to the funding agreement for the Asbestos Injuries Compensation Fund to determine any impact on the ability of family members of those who suffer fatal asbestos related diseases from recovering compensation due to them under the funding agreement.

### 10.3 Option 1 - damages for non-economic loss determined according to common law principles without limitation or capping

The financial modelling calculates that the impact of reform, incorporating this method of assessment, would result in an increase in 'liability impact' of some \$610m (if limited to deaths occurring after commencement) or \$719m (if all extant claims were included).

'Liability impact' is essentially the Insurer's provision for outstanding claims, including outstanding

<sup>70</sup> Law Reform Commission of Western Australia, *Provisional Damages and Damages for Gratuitous Services* (Final Report, Project 106, October 2016) 19.

settlement costs, costs of claims administration and a risk margin.

In addition to the liability impact, there would be ongoing annual costs amounting to \$104m.

The modelling suggests an increase in insurance premiums of approximately 2% but this increased cost would not fall uniformly, with Medical Indemnity (10%) and Compulsory Third Party (4%) disproportionately affected.

#### 10.4 Option 2 - determined according to common law principles but subject to a statutory limit on the award of damages

The financial modelling calculates the impact of reform, incorporating this method of assessment, would result in an increase in 'liability impact' of some \$488m (if limited to deaths occurring after commencement) or \$575m (if all extant claims were included). Ongoing annual costs would amount to \$84m.

The modelling suggests an increase in insurance premiums of approximately 1% but again, this increased cost would not fall uniformly, with Medical Indemnity (8%) and Compulsory Third Party (3%) disproportionately affected.

#### 10.5 Option 3 - determined according to a formula similar in effect to that set out in section 3C of the Motor Vehicle TPI Act and section 9 the Civil Liability Act

The financial modelling calculates the impact of reform, incorporating this method of assessment, would result in an increase in 'liability impact' of some \$712m (if limited to deaths occurring after commencement) or \$839m (if all extant claims were included). Ongoing annual costs would amount to \$122m.

The modelling suggests an increase in insurance premiums of approximately 2% but again, this increased cost would not fall uniformly, with Medical Indemnity (12%) and Compulsory Third Party (4%) disproportionately affected.

#### 10.6 Options 4(a) and 4(b) - lump sum payment for non-economic loss to each relative entitled by reference to Schedule 2 of the Act

Adopting a fixed amount of compensation (\$25,000) for each entitled claimant would result in an increase in 'liability impact' of some \$521m (if limited to deaths occurring after commencement) or \$614m (if all extant claims were included). Ongoing annual costs would amount to \$90m.

The financial modelling option 4(a) suggests an increase in insurance premiums of approximately 2%, with Medical Indemnity (8%) and Compulsory Third Party (3%) disproportionately affected.

Alternatively, Option 4(b) which is fixing compensation using a tariff dependant on the nature of the relationship (ranging from \$5,000 to \$25,000 as previously identified), would result in a 'liability impact' of some \$120m (if limited to deaths occurring after commencement) or \$147m (if all extant claims were included). Ongoing annual costs would amount to \$24m.

The modelling based on such methodology suggests an increase in insurance premiums of less than 1%, with Medical Indemnity (2%) and Compulsory Third Party (1%) sustaining marginally greater than average impact.

### 10.7 Option 5(a) and 5(b) - lump sum payment for non-economic loss to be divided between all relatives entitled by reference to Schedule 2 of the Act

Adopting either Option 5(a) or (b) was found in the Economic Costs Report to not affect the cost of the reforms. With the proposed cap of \$150,000 to be divided amongst all eligible claimants, with no individual award to exceed \$25,000, the financial modelling calculates the economic cost of reform under Option 5, to be an increase in 'liability impact' of some \$378m (if limited to deaths occurring after commencement) or \$452m (if all extant claims were included). Ongoing annual costs would amount to \$69m.

The financial modelling suggests an increase in insurance premiums of approximately 1% but again this increased cost would not fall uniformly, with Medical Indemnity (7%) and Compulsory Third Party (2%) disproportionately affected.

## 11. Recommendations

The enactment of a cause of action under the Act in the mid-nineteenth century was an impressive, arguably revolutionary, development in the law, recognising, as it did, a right to compensation beyond the immediate accident victim.

Emeritus Professor Handford in his submission to the Commission, noted the comments of Lord Blackburn in *The Vera Cruz*,<sup>71</sup> that the then new cause of action under Lord Campbell's Act was '*new in its species, new in its quality, new in its principle, in every way new.*'

In the Commission's view, the recognition in the Act of a legal right to

compensation for economic loss beyond the immediate accident victim remains a remarkable and valuable exception to the general common law principle that compensation is only available to the immediate accident victim.

Proponents of reform to allow the recovery of non-economic damages in fatal accident claims characterise such a step as a logical and timely extension, consistent with modern understanding of mental harm and the development of the law in respect to such loss.

It is certainly true that the development of the law relating to 'nervous shock' and the recognition of claims founded on recognised psychiatric illness are reflective of a greater understanding and appreciation of both the nature of mental harm and the true cost of avoidable loss of life. To this extent, there is some intellectual, and perhaps even moral, weight in favour of an extension of the legal recognition of loss falling short of psychiatric illness.

However, with the exception of statutory reform in the jurisdictions identified above, the law is yet to recognise such loss as the basis for recovery, and the appropriateness of doing so must be considered, having regard not only to the moral or intellectual justifications for reform, but the practical and financial impacts of reform as well.

As outlined above, England, Scotland, Ireland, South Australia and the Northern Territory have undertaken such statutory reform. As impressive as this list is, the existence of these statutory regimes does not amount to an overwhelming convergence, requiring or suggestive of a need for reform out of a need for uniformity.

71 *Seward v The Vera Cruz* (1884) 10 App Cas 59, 70 -

Indeed other jurisdictions, in particular New South Wales, have examined and rejected proposed reform of the type under consideration.

The Commission also notes recent developments in the legal landscape that might be said to militate against reform of the type presently contemplated.

The last two decades have been marked by inquiry and analysis in Australia of the cost to the wider community of unrestricted recovery of loss and damage. The Ipp Report and the resultant legislative restrictions imposed by (inter alia) the Civil Liability Act (together with earlier restrictions imposed by amendments to the Motor Vehicle TPI Act and the Workers' Compensation Act) are a reflection of the concerns as to the cost to the community of full legal redress and associated insurance issues.

Many of these legislative changes have been directed to restricting smaller claims, particularly with respect to non-economic loss, with the intention of limiting recovery where legal costs and administrative costs might have a disproportionate impact.

The Commission is concerned that reform of the type under consideration would run counter to, and be inconsistent with, these recent legislative interventions.

In addition, the cost of the proposed reforms to the wider community must bear significantly upon the Commission's recommendation.

Given that:

- (a) there is no compelling need to amend the Act to include claims for non-economic loss in order to achieve consistency with Australian or other common law jurisdictions;
- (b) the law generally maintains a distinction between compensable nervous shock and psychiatric illness on the one hand, and non-compensable emotional harms such as grief and suffering, on the other;
- (c) damages for non-economic loss in wrongful death claims are difficult to assess fairly and if the amount of the award is at the discretion of a court, it involves a judicial enquiry into very personal matters, which may cause further distress to a claimant but if the amount of the award is fixed, then it may give the appearance of being arbitrary or tokenistic;
- (d) allowing recovery of even modest damages for non-economic loss under the Act could be seen to be inconsistent with recent legislative interventions restricting small claims for non-economic loss;
- (e) there are substantial costs associated with claims for non-economic loss; and
- (f) reform in this area would exacerbate the lack of uniformity between Australian State and Territory laws,

the Commission does not recommend amendment to the Act at this time.

In conclusion:

1. The Commission recommends there should not be any reform to allow for claims for non-economic loss for wrongful death under the Act.
2. The Commission recommends that if, contrary to Recommendation 1, the Act is to be amended to allow for compensation for non-economic loss, that:
  - (a) the class of claimants be limited to spouses, partners,<sup>72</sup> children,<sup>73</sup> siblings<sup>74</sup> and parents<sup>75</sup> of deceased persons;
  - (b) the types of compensable non-economic loss be the grief and suffering of a relative of the deceased, the loss to an adult relative of the deceased's companionship, and the loss to a dependant child of the deceased's assistance and guidance;<sup>76</sup>
  - (c) the preferred method of assessment of damages is a cap of \$150,000 to be divided amongst eligible complainants, with awards to be fixed at \$25,000 per claimant;
  - (d) any damages for non-economic loss awarded under the Criminal Injuries Act should be deducted from any damages awarded for non-economic loss for wrongful death under the Act; and

- (e) before any amendment to the Act is undertaken, further consultation and discussion be undertaken with the Government of New South Wales and parties to the funding agreement for the Asbestos Injuries Compensation Fund to determine any impact on the ability of family members of those who suffer fatal asbestos related diseases from recovering compensation due to them under the funding agreement.

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72 Spouse and partner to be broadly defined.

73 Child includes step child or grandchild who was dependent on the deceased.

74 Includes half siblings and step siblings.

75 Parents includes persons in *loco parentis*.

76 As noted above, there may be other close relatives who relied on a deceased for assistance and guidance, for example, adults with a disability. If the Act was to be amended, there would need to be consideration given to these relatives being able to claim under this head of damages.

The Commission would like to acknowledge and thank the following stakeholders for their contribution and submissions in the preparation of this Report:

Avant Mutual  
Dr Iain Field  
E/Prof Peter Handford  
Insurance Commission of Western  
Australia  
Law Society of Western Australia  
MDA National  
MIGA  
Professor Mark Lunney  
Slater and Gordon Lawyers

## Annexure A - Submissions Received

1. Avant Mutual
2. Dr Iain Field
3. E/Prof Peter Handford
4. Insurance Commission of  
Western Australia
5. Law Society of Western  
Australia
6. MDA National
7. MIGA
8. Professor Mark Lunney
9. Slater and Gordon Lawyers

**Annexure B - Costing of proposals  
for claims for non-economic loss  
for wrongful death (Economic  
Costs Report)**



# Law Reform Commission of Western Australia

Costing of proposals for claims for  
non-economic loss for wrongful death

30 July 2020



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Dear Dr Cox

## Costing of Law Reform Commission proposals for claims for non-economic loss for wrongful death

I am pleased to enclose Taylor Fry's costing of the proposed options for non-economic loss damages related to wrongful death claims in Western Australia.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Darryl Frank', written in a cursive style.

**Darryl Frank**  
Fellow of the Institute of Actuaries of Australia

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Part A - Introduction

# 1 Executive Summary

## 1.1 Purpose and Scope

The Law Reform Commission of Western Australia (“LRC”) issued a discussion paper “Discussion Paper Project 109: claims for non-economic loss for wrongful death under the *Fatal Accidents Act 1959* (WA)” in December 2019 (“the LRC Discussion Paper”). The LRC Discussion Paper outlines possible courses of action open to the Western Australian Government in relation to introducing damages for non-economic loss for wrongful death.

Taylor Fry has been engaged to estimate the financial impact of different reform options, as required under Section 10 of the LRC Discussion Paper. These options are:

1. Determined according to common law principles without limitation or capping.
2. Determined according to common law principles but with a statutory limit on the award of damages.
3. Determined according to a formula similar in effect to that set out in Section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA).
4. By lump sum payment to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of ‘close relatives’:
  - a. in a set amount without differentiation between relationship with the deceased; or
  - b. in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased.
5. By lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of ‘close relatives’:
  - a. in equal shares; or
  - b. according to a table of percentages based on their relationship with the deceased.

## 1.2 Distribution and Use

This report is addressed to the Chair of the LRC of Western Australia and the whole report can be included, as part of the LRC’s final report. This report is provided solely for the purpose stated under the Purpose and Scope; being to estimate the financial impact of the proposed reform options described in the LRC Discussion Paper. As such no reliance should be placed on the information or findings from this report except in relation to the specific items listed in the Purpose and Scope. Notwithstanding that this report may be made publicly available, Taylor Fry does not owe any duty or obligation to any third-parties.

## 1.3 Reliances and Limitations

There are limitations upon the accuracy of the estimates in this report as there are many inherent uncertainties in relation to:

- The precise form and operation of any legislation that might be enacted to implement the reforms, including how legislation might be interpreted by the courts;
- The number and types of claims that might be affected by the proposed reforms; and
- The impact of the reforms on those claims and the resulting financial effects.

In our opinion, we have employed techniques and made assumptions that are appropriate, with conclusions presented that are reasonable given the limited information which is currently available. However, it should be recognised that the ultimate financial effects are likely to deviate, perhaps materially, from our estimates.

Judgements about the methodology, analyses, assumptions and estimates of the financial effects described in this report should be made only after considering this report and appendices in their entirety. Parts of the report and appendices could be misinterpreted and/or misleading if considered in isolation.

## 1.4 Assumptions and methodology

The Commission has requested costings for two potential approaches:

- **Approach 1:** Reforms apply only to deaths which occur after the date the legislation takes effect.
- **Approach 2:** Reforms apply to all claims with settlements occurring after the date the legislation takes effect.

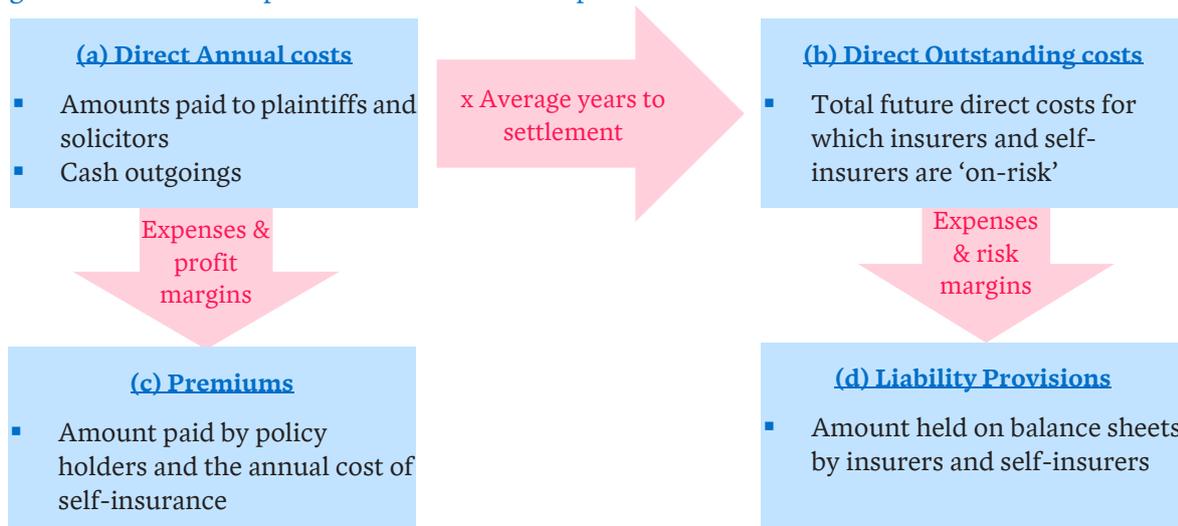
To understand the difference between these approaches one needs to consider the time it takes between the event which causes the death and when the settlement is paid. This is summarised below:



Generally, the delay between the event which causes the fatality and when death occurs is short. However, in some instances such as exposure to asbestos, it can take decades. It can then take several more years after death until the damages are paid. Reforms that apply only to deaths occurring after the date of the legislation will plainly capture a smaller range of deaths and consequently will likely have a less significant financial impact.

The financial impact of the reforms can be measured in different ways depending on whose perspective one considers. In our assessment we have considered four measures which are summarised in Figure 1.1

Figure 1.1 – Relationship between the financial impact measures



Therefore, when assessing the financial effect of the reforms the impact will be:

- **Approach 1:** Annual premiums charged by insurers and the annual costs of self-insurance will increase. Outstanding claims liabilities will be unchanged aside from those held in relation to asbestos claims.
- **Approach 2:** Annual premiums charged by insurers and the annual costs of self-insurance will increase. Outstanding claims liabilities will also increase for all insurance classes as there will be claims which are yet to settle for wrongful deaths which occurred prior to the commencement date.

In assessing the financial impact claims were segmented into the following groups:

- Asbestos
- CTP (motor vehicle accidents)
- Medical indemnity
- Public liability (including products liability and cover provided by householders' policies)
- Workers' compensation
- Uninsured fatalities

We have not made any adjustments to allow for the deceased's contribution in causing their death. Where fault can be apportioned between the defendant and the deceased, we have assumed that the full amount of the damages will be paid (i.e. we have assumed that any damages paid will not be apportioned).

Table 1.1 summarises the estimated annual number of fatality claims. Where the deceased was at-fault, or where claims are withdrawn, these have been excluded from the results.

Table 1.1 – Estimated number of not at fault deaths per year

Age band	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Uninsured fatalities
0 to 18	0	18	4	1	1	
19 to 29	1	23	8	1	4	
30 to 59	29	29	7	2	16	
60 and over	106	22	8	1	5	
<b>Total</b>	<b>136</b>	<b>92</b>	<b>27</b>	<b>5</b>	<b>26</b>	<b>100</b>

For uninsured fatalities, it is likely that only a small proportion of defendants will have the capacity to pay damages from their personal finances. Therefore, we have excluded these deaths from the financial impact.

A single fatality can lead to multiple claims depending on the number of affected relatives. Most of the proposed options adopt a broad definition for eligible relatives, but some utilise a more restrictive definition that only includes ‘close relatives’ being partners, parents, children and siblings of the deceased. The average number of relatives has been assessed by the age of the deceased, and then given the age profile from Table 1.1, this has been converted to estimate average number of relatives by type of insurance in Table 1.2.

Table 1.2 – Estimated average number of relatives by type of insurance

	Asbestos	CTP	Medical indemnity	Public liability	Workers’ comp.	Overall
Broad relative eligibility	7.85	7.19	7.24	7.17	7.22	7.51
‘Close relatives’	5.06	4.88	4.88	5.01	5.56	5.03

Asbestos claims have the highest estimated number of relatives on average because most deceased are over sixty and hence are likely to have children and grandchildren. In contrast, fatalities for other insurance types involve more young people and have similar estimated average numbers of relatives.

Narrowing which relatives could make a claim changes the picture significantly with CTP and medical indemnity deceased having the fewest estimated number of relatives and workers’ compensation the most.

Based on the damages available for each option, the age distribution of the deceased and the assumed number of eligible relatives we have estimated the average cost per fatality. This ranges from under \$50,000 on average under Option 4 (Schedule B) to \$263,000 under Option 3. Within each option there is some variation due to differences in the age profile of the deceased.

Table 1.3 – Average cost of non-economic loss damages and legal costs per death by claim type (\$’000)

	Asbestos	CTP	Medical indemnity	Public liability	Workers’ comp.	Overall
Option 1	236	216	217	215	217	<b>225</b>
Option 2	188	173	174	172	173	<b>180</b>
Option 3	275	252	253	251	253	<b>263</b>
Option 4 (Schedule A)	201	185	186	184	186	<b>193</b>
Option 4 (Schedule B)	46	51	50	53	57	<b>49</b>
Option 5	146	147	146	147	145	<b>146</b>

## 1.5 Summary of results

### 1.5.1 Impact of the different options

Direct costs incurred by insurers allow for the estimated damages and legal costs that they will incur as a result of the reforms. The premium and balance sheet provisions include additional amounts such as claims management and administration costs as well as other margins that are required or likely to be applied.

Following discussions with the LRC it remains unclear whether asbestos claims will be covered by the proposed reforms. For the purposes of this report **asbestos claims have been included in** the assessment of the financial impact of the reforms. The liability impact excluding asbestos claims is the difference between Approach 1 and Approach 2.

Table 1.4 – Comparison of the overall estimated impact of the reform options

	<b>Annual cost impact</b>			<b>Liability impact: Approach 1 Asbestos claims only</b>			<b>Liability impact: Approach 2 All claim types</b>		
	<b>Damages &amp; legal</b>	<b>Premiums</b>		<b>Damages &amp; legal</b>	<b>Balance Sheet Provision</b>		<b>Damages &amp; legal</b>	<b>Balance Sheet Provision</b>	
Option 1	\$64m	\$40m	2%	\$402m	\$610m	92%	\$499m	\$719m	14%
Option 2	\$52m	\$32m	1%	\$322m	\$488m	73%	\$399m	\$575m	11%
Option 3	\$75m	\$47m	2%	\$469m	\$712m	107%	\$582m	\$839m	16%
Option 4 (Schedule A)	\$55m	\$35m	2%	\$343m	\$521m	78%	\$427m	\$614m	12%
Option 4 (Schedule B)	\$14m	\$10m	<1%	\$79m	\$120m	18%	\$103m	\$147m	3%
Option 5*	\$42m	\$27m	1%	\$249m	\$378m	57%	\$315m	\$452m	9%

\*For Option 5, the LRC Discussion Paper considers two ways that damages may be divided between relatives. This choice does not affect the cost of the reforms and hence we have not shown separate results for these two approaches.

#### Annual cost impact

The estimated annual damages and legal costs of the reforms varies from \$14m up to \$75m. Option 4 (Schedule B) differs significantly from the other options because it has both fewer relatives who are eligible to make a claim and the prescribed level of damages are much lower than the other options.

For asbestos claims only, they are mainly due to past exposure and so the main effect is expected to be on outstanding liabilities with little or no effect on premiums. As asbestos claims mostly relate to non-insurance entities including self-insurers and the AICF, they would need to fund the increase from other sources. Excluding these claims means that the premium impact is less than the total estimated annual amount of damages and legal costs paid.

For the other claim types, the annual cost represents the ongoing additional cost of claims arising from wrongful deaths during each future year. The impact on premiums is estimated to be 1% to 2% however, as shown in Table 1.5 this is higher for CTP and medical indemnity policies.

#### Liability impact

The liability impact depends on which claims will be entitled to non-economic loss damages.

If only claims where death occurs after the commencement date are eligible (Approach 1) then the liability impact will be largely restricted to asbestos claims. The liability impact is estimated at \$120m to \$712m as almost every mesothelioma or asbestos related lung cancer diagnosis could lead to a wrongful death claim.

If all wrongful death settlements occurring after the commencement date are eligible (Approach 2), then the estimated liability increase for non-asbestos claims would be \$27m to \$127m (1% to 3%), which is also the liability impact if asbestos claims were precluded from the reforms. Including asbestos claims, Approach 2 would result in a liability increase of \$147m to \$839m. Table 1.6 shows that for non-asbestos claims the liability increase will have a similar relative impact to premiums, with larger increases for CTP and medical indemnity than for public liability and workers' compensation.

### 1.5.2 Annual costs and Premiums: Impact by type of insurance

Table 1.5 – Estimated increase in premiums and contributions by class of insurance (\$m)

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total
<b>Pre-reform premiums</b>	<b>N/A</b>	<b>635</b>	<b>82</b>	<b>214</b>	<b>1,361</b>	<b>2,292</b>
Option 1		23	8	2	8	<b>40</b>
Option 2		18	6	1	6	<b>32</b>
Option 3		27	9	2	9	<b>47</b>
Option 4 (Schedule A)		19	7	1	7	<b>35</b>
Option 4 (Schedule B)		5	2	0	2	<b>10</b>
Option 5		15	5	1	5	<b>27</b>
Option 1		4%	10%	1%	1%	<b>2%</b>
Option 2		3%	8%	1%	<1%	<b>1%</b>
Option 3		4%	12%	1%	1%	<b>2%</b>
Option 4 (Schedule A)		3%	8%	1%	<1%	<b>2%</b>
Option 4 (Schedule B)		1%	2%	<1%	<1%	<b>&lt;1%</b>
Option 5		2%	7%	1%	<1%	<b>1%</b>

\*Adding numbers across the different types of insurance may not sum to the total amount due to rounding

Premium increases are greatest for medical indemnity insurance due to its relatively high proportion of fatality claims. The next highest increase is for CTP due to the high number of road fatalities. The increases are smallest for workers' compensation and public liability as they have the lowest proportion of fatality claims.

Most if not all asbestos claims relate to exposure or initial use that occurred many years ago. Therefore, it is unlikely that there will be many deaths that are deemed as future insured events and thus any impact on future premiums will likely be insignificant.

Premium increases are lowest for Option 4 (Schedule B) as this option is the most restrictive as to which relatives can make a claim and the payments are lower for some relatives.

### 1.5.3 Liability and Balance Sheet: Impact by type of insurance

Table 1.6 – Estimated increase in liabilities by class of insurance (\$m)

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total (Approach 2)
<b>Pre-reform liabilities</b>	<b>664</b>	<b>2,231</b>	<b>336</b>	<b>489</b>	<b>1,585</b>	<b>5,305</b>
Option 1	610	65	20	4	19	<b>719</b>
Option 2	488	52	16	3	16	<b>575</b>
Option 3	712	76	24	4	23	<b>839</b>
Option 4 (Schedule A)	521	56	17	3	17	<b>614</b>
Option 4 (Schedule B)	120	16	5	1	5	<b>147</b>
Option 5	378	44	14	3	13	<b>452</b>
Option 1	92%	3%	6%	1%	1%	<b>14%</b>
Option 2	73%	2%	5%	1%	1%	<b>11%</b>
Option 3	107%	3%	7%	1%	1%	<b>16%</b>
Option 4 (Schedule A)	78%	3%	5%	1%	1%	<b>12%</b>
Option 4 (Schedule B)	18%	1%	1%	<1%	<1%	<b>3%</b>
Option 5	57%	2%	4%	1%	1%	<b>9%</b>

\*Adding numbers across the different types of insurance may not sum to the total amount due to rounding

Liability increases for asbestos claims are large because of the high number of expected future deaths caused by past exposure. As shown in Table 1.1, there are expected to be 136 asbestos related deaths in the first year after the reforms but this grows to a total of 1,707 future settlements after the reforms commence for deaths caused by historical exposure.

If asbestos claims are eligible for non-economic loss damages, then it is important to note that approximately 60% of WA asbestos liabilities are held by the Asbestos Injuries Compensation Fund ('AICF'). The estimates of asbestos liability increases above do not make any allowance for the funding arrangement between the NSW Government and James Hardie Industries ('JHI') under which the company is required to provide continued funding to the AICF. The agreement provides that when a government other than NSW introduces a scheme or legislative change that increases payments to asbestos victims, an adjustment is required to JHI's payment obligations so that its present and future liabilities are not increased as a result of that scheme or legislative change. A possible result of introducing the LRC reforms, subject to the outcome of negotiations between JHI and the NSW Government, may be to enliven the 'adverse action' provisions in the Amended and Restated Final Funding Agreement ('AFFA') between JHI and the NSW Government which may negate for claimants against the AICF the intended benefits of introducing the LRC reforms.

Similar issues arose in the Commission's recent report on provisional damages reforms. Further consideration will be a matter for discussion between the WA and NSW Governments and JHI and is beyond the scope of our report. Given the magnitude of the potential increase in asbestos liabilities arising from the proposed reforms and its potential consequential impact on NSW as a result of their arrangement with JHI, this issue needs to be raised for discussion before the Council of Australian Governments before any scheme can be implemented.

As was the case for premium increases, CTP and medical indemnity increases are higher than for public liability and workers' compensation due to having a higher proportion of death claims. Again, liability increases are lowest for Option 4 (Schedule B) because this option is the most restrictive on relative eligibility and the payments are lower for some relatives.

#### 1.5.4 Further considerations

Even though the estimated impact of the reforms assumes no change to claimant or lawyer behaviour. There are however risks that could emerge as either temporary short-term effects or as longer-term risks.

- Short-term effects include plaintiffs delaying or taking longer to settle claims following the reforms until they and their legal advisers better understand the system. This is mostly likely to result in short-term timing impacts with only a small likelihood of cost increases. Although a more costly impact could occur if entitlement was based on the settlement date rather than the date of death. This would likely result in many settlements being postponed until after the commencement date so that plaintiffs could receive the non-economic loss damages.
- Long-term the key risks revolve around cost escalation over time, noting that these are more controllable under options where damages are statutorily prescribed. The cost of the reforms could be less than is estimated if some allowances for non-economic loss damages are already being implicitly included in settlements, or if some eligible relatives do not make a claim.

The estimates that have been calculated contain a high degree of uncertainty as there is limited data and experience upon which some key assumptions have been based.

Therefore, we have calculated the impact of varying certain key assumptions and parameters. Some of these changes, such as restricting entitlement to 'close relatives' could result in significant cost reductions, while others would put further upward pressure on premiums and liabilities.

## 2 Introduction

### 2.1 Purpose

The Law Reform Commission of Western Australia (“LRC”) issued a discussion paper “Discussion Paper Project 109: claims for non-economic loss for wrongful death under the *Fatal Accidents Act 1959* (WA)” in December 2019 (“the LRC Discussion Paper”). The LRC Discussion Paper outlines possible courses of action open to the Western Australian Government in relation to introducing damages for non-economic loss for wrongful death.

Taylor Fry has been engaged to estimate the financial impact of different reform options, as required under Section 10 of the LRC Discussion Paper.

### 2.2 Background

#### 2.2.1 Wrongful death

The Attorney General has sought advice and recommendations from the LRC as to whether the *Fatal Accidents Act 1959* (WA) should be reformed, and if so, the extent of such reform, to allow claims for non-economic loss for wrongful death and any other consequential amendments. The LRC Discussion Paper details the Commission’s preliminary research and views in relation to this reform and seeks community and stakeholder feedback and comments.

#### 2.2.2 The LRC Discussion Paper and this report

The LRC Discussion Paper did not include any estimate of the financial impact of introducing damages for non-economic loss. This report is intended to provide those estimates for inclusion in the LRC’s final report.

## 2.3 Scope

### 2.3.1 Options

This paper provides estimates for the following options for the assessment of damages for non-economic loss for wrongful death:

1. Determined according to common law principles without limitation or capping.
2. Determined according to common law principles but with a statutory limit on the award of damages.
3. Determined according to a formula similar in effect to that set out in Section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA), with appropriate adjustments to 'Amount A', 'Amount B' and 'Amount C' to take into account that non-economic loss for relatives in the fatal accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm.
4. By lump sum payment to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - a. in a set amount without differentiation between relationship with the deceased; or
  - b. in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased.
5. By lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - a. in equal shares; or
  - b. according to a table of percentages based on their relationship with the deceased.

#### Coverage

The *Fatal Accidents Act 1959* (WA) creates rights to damages following the death of a person, where that death has been caused by a wrongful act, neglect or default. This report assesses the impact on deaths where the amount recovered will ultimately be paid by an insurer under various types of insurance policies or paid by a self-insurer. The report also provides brief analysis and commentary for situations where an individual would be personally liable following an uninsurable event, such as death following an assault.

### 2.3.2 Quantifying of the financial impact

The estimated financial impacts of the reform options have been estimated for:

1. The additional premiums required to fund the costs for future underwriting periods.
2. The increase to the outstanding claims liability provisions of insurers and self-insurers, in order to fund the additional damages arising out of matters on policies issued prior to the commencement date.

## 3 Approach

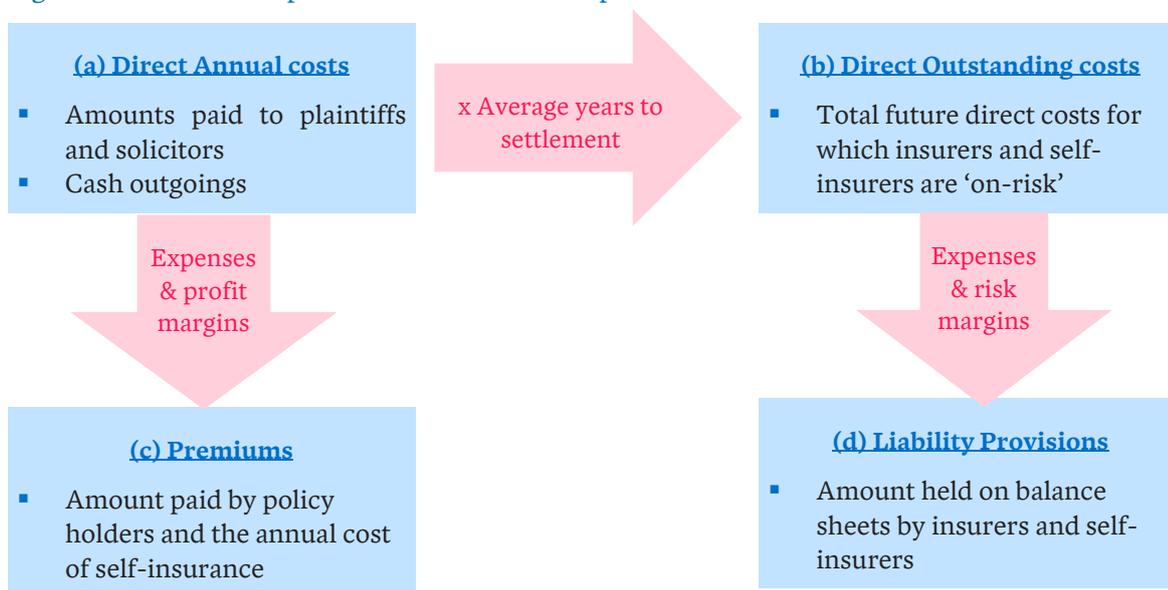
### 3.1 Measuring the financial impact

The financial impact of the reforms can be measured in different ways depending on whose perspective one considers. In our assessment we have considered four measures:

- a. **Direct annual costs:** This represents the amount that is paid by defendants to plaintiffs and lawyers for claims arising during a year.
- b. **Direct outstanding settlement costs:** This is the same as (a) but recognises that it can take several years between exposure to the event which caused the death and damages being paid, as discussed under Approach 2 in Section 5. Therefore, if the reforms are implemented under this approach, the costs paid by insurers will be larger than just the direct annual costs and this measure represents the insurers direct claims liability.
- c. **Premium impact:** This estimates the additional amount insurance policy holders will pay for their cover. It is the direct annual costs in (a) plus administration costs incurred by insurers plus any margins they require to cover the additional risk they face and the cost of capital.
- d. **Insurer liability impact:** Insurer’s provisions for outstanding claims comprise the direct outstanding settlement costs plus an allowance for internal administration expenses plus a risk margin. The risk margin provides insurers a buffer on the balance sheet in the event the claim costs are higher than projected and is a mandatory requirement for APRA regulated insurers but is commonly also adopted by non-APRA regulated insurers. If experience emerges as expected, this margin is released over time in accordance with the run-off pattern of the claims liability.

The relationship between these measures are summarised in Figure 3.1

Figure 3.1 – Relationship between the financial impact measures



### 3.2 Contributory Negligence

We have not made any adjustments to allow for the deceased’s contribution in causing their death. Where fault can be apportioned between the defendant and the deceased, we have assumed that the full amount of the damages will be paid (i.e. we have assumed that any damages paid will not be apportioned).

### 3.3 Methodology

The steps taken to estimate the financial impacts of the reforms are:

1. Separate claims into different classes of insurance being:
  - Asbestos
  - CTP (motor accidents)
  - Medical indemnity
  - Public liability (including products liability and liability cover provided under householders' policies)
  - Workers' compensation
  - Uninsured fatalities

Asbestos related claims are usually made under workers' compensation or public and products liability policies. For the purposes of this analysis we have combined all asbestos related claims into the asbestos group and removed these amounts from the workers' compensation or public and products liability groups. More than 60% of the liability, and hence cost of the reforms, relates to the AICF and self-insurers who do not have premium income. The remainder mostly relates to government held workers' compensation funds which could, if necessary, increase future premiums. Following discussions with the LRC it remains unclear whether asbestos claims will be covered by the proposed reforms. For the purposes of this report, asbestos claims **have been included** in the assessment of the financial impact of the reforms.

Uninsured fatalities relate to deaths caused by events where no insurance is in place. This covers events which are not insurable such as homicides, and deaths caused where insurance was available but not taken by the defendant such as public liability cover on one's property. In these instances, it is likely that only a small proportion of defendants will have the capacity to pay damages from their personal finances. Therefore, we have excluded these deaths from the estimated financial impact. However, if a defendant could pay damages, we would expect that the average cost would be similar to public liability insurance claims.

Claims were further segmented into government and private sector. Generally, this split is consistent between premium payers and holders of the liability. One exception to this is CTP where the liability is held by a public sector entity (ICWA) whereas the majority of premiums are paid by the private sector.

2. Describe how different rules relating to which claims will be eligible can affect the cost of the reform – discussed in Section 5.
3. Estimate the number of fatality claims for each insurance class – discussed in Section 6.
4. Estimate the number of relatives for each insurance class which will be eligible to make a claim for non-economic loss – discussed in Section 7.
5. Estimate the direct financial impact of each of the five reform options considered in the LRC Discussion Paper as per (a) and (b) above. This includes the estimated direct impact on both the outstanding liabilities and annual costs of claims in Western Australia for each class of insurance business. These estimates will only allow for the additional direct cost of claims excluding any potential effects of changes in claimants' or insurers' behaviour – discussed in Sections 8 to 13.
6. Estimate the overall financial impact on premiums and insurers' liability provisions as per (c) and (d) above, by applying loadings by class of insurance to the increase in costs summarised in Section 14.
7. Consider potential short and long-term impacts resulting from changes in claimants' and insurers' behaviour – discussed in Section 15.

# B

Part B – Data and Analysis

## 4 Information and data

### 4.1 Fatalities in WA that could be affected by the reforms

Each fatality could give rise to several claims for non-economic loss, depending on the number of eligible relatives a deceased person has, if it can be established that another person or persons was at least partly at fault in causing the death. The data and assumptions used to estimate the number of fatalities from different causes, and which are likely to give rise to a claim for non-economic loss, are as follows:

#### Asbestos

- Australian Institute of Health and Welfare report ‘Mesothelioma in Australia 2018’, dated August 2019.
- Department of Health (Western Australia) report ‘Cancer incidence, mortality and survival in Western Australia, 2017’ from 2020.
- ICWA provided the expected number of asbestos claims reported in 2019/20, split by type of disease for their workers’ compensation policies and the Insurance Commission General Fund.

#### CTP

- Road Safety Commission (WA) report dated 1 May 2019 and titled ‘2018 Preliminary summary of fatalities of Western Australian roads’. This report was used to assess the age distribution for fatalities, and the recent 2019 report shows a similar age distribution.
- Road Safety Commission (WA) website (<https://www.rsc.wa.gov.au/Statistics/Latest-Statistics>) provides annual road fatality statistics.
- Australian Road Deaths Database published by the Bureau of Infrastructure, Transport and Regional Economics ([https://www.bitre.gov.au/statistics/safety/fatal\\_road\\_crash\\_database](https://www.bitre.gov.au/statistics/safety/fatal_road_crash_database)).

#### Medical Indemnity

- Australian Institute of Health and Welfare report titled ‘Australia’s medical indemnity claims 2012-13’.
- Australian Bureau of Statistics ‘3303.0 Causes of Death, Western Australia, 2018’, September 2019.

#### Public liability

- APRA provided claim reported numbers for WA fatality claims.

#### Workers’ Compensation

- WorkCover WA report titled ‘Workers’ Compensation Scheme Trends’, dated November 2019.
- WorkCover WA report titled ‘Workers’ Compensation in Western Australia 2014/15 to 2017/18 Annual Statistical Report’, dated August 2019.
- Department of Mines, Industry Regulation and Safety (WA) report titled ‘Work-related traumatic injury fatalities in Western Australia 2006-2007 to 2017-2018’.
- SafeWork Australia report titled ‘Work-related Traumatic Injury Fatalities, Australia 2018’ provided information on the age distribution of worker fatalities for Australia as a whole.
- WorkCover WA provided data on fatality claims for accidents occurring after 30 June 2010.

#### Uninsured fatalities

- Western Australia Police Force website ([https://www.police.wa.gov.au/Crime/CrimeStatistics#/#/](https://www.police.wa.gov.au/Crime/CrimeStatistics#/)) provides annual homicide statistics.

## 4.2 Family Composition Data

For most of the options considered in the LRC Discussion Paper the potential cost of non-economic loss damages will depend on the number of eligible relatives of the deceased person. The following data was used to estimate the number of possible claimants per fatality:

- Australian Bureau of Statistics report titled '2016 Census of Population and Housing: General Community Profile Western Australia'.
- Australian Bureau of Statistics report titled '2016 Census of Population and Housing: Time Series Profile Western Australia'.
- Australian Bureau of Statistics Life Tables, Western Australia, 2016-2018.

## 4.3 Submissions to the LRC

The LRC's process for developing its reform proposals included issuing a Discussion Paper in December 2019, inviting and considering submissions, and then preparing a final report which is expected to be published later in 2020.

- The Department also provided us with copies of all submissions made to the LRC by the following organisations.

## 4.4 Insurers' Premiums and Outstanding Claims Liabilities

### 4.4.1 Data description

We obtained or were supplied with the following data:

#### Asbestos

- The Asbestos Injuries Compensation Fund (AICF) financial report for the year ended 31 March 2019.
- The KPMG report dated 21 May 2019 titled 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust' which contained estimates of liabilities as at 31 March 2019.
- The CSR Limited financial report for the year ended 31 March 2019 contained (at Note 15) estimates of outstanding asbestos public and products liabilities claims for Australia and the US.
- The PwC report dated 23 August 2019 titled 'WorkCover WA 30 June 2019 actuarial valuation of Supplementation Fund's asbestos liabilities' contained estimates of asbestos liabilities that have arisen under the Supplementation Fund.
- ICWA provided estimates of their asbestos liabilities that had arisen under workers' compensation policies and under the Insurance Commission General Fund.
- The estimate of liabilities of other insured and self-insured entities which had incurred asbestos liabilities under workers' compensation policies was derived by assuming that the proportion of total WA asbestos liabilities held by these entities was the same as that for non-asbestos workers' compensation liabilities. This information was obtained from a combination of:
  - The PwC report dated 23 August 2019 referred to above,
  - The ICWA asbestos liabilities, and
  - A PwC report dated 2 April 2019 titled 'WorkCover WA 2019/20 recommended premium rates'.

#### CTP

- The ICWA Annual Report 2019 contained estimates of the outstanding claims liabilities as at 30 June 2019 and premium income for 2018/19 for the Third Party Insurance Fund.
- ICWA provided the expected premium income for 2019/20 for the Third-Party Insurance Fund.

#### Medical Indemnity

- ICWA provided the estimated outstanding claims liability as at 30 June 2019, total premiums for 2018/19 and expected premiums for 2019/20.
- The National Claims and Policies Database (NCPD) for public and products liability and professional indemnity insurance is maintained and published by the Australian Prudential Regulation Authority (APRA). It contains details on medical indemnity claim numbers and costs for authorised insurers which includes the major private sector medical indemnity providers.
- Private sector medical indemnity insurance which is not placed with APRA authorised insurers is most likely to be for private hospitals and (to a lesser extent) corporate medical practices whose insurance is placed overseas - typically with Lloyds and/or other London Market insurers. We have assumed that this would equal 10% of ICWA public sector and APRA regulated private sector insurers' exposure. This 10% loading is a high-level approximation based on previous analysis we have performed.

## Public liability

This category of insurance includes coverage under both public and products liability policies.

- APRA collects data on combined homeowners' property and liability policies as if they were two separate policies. The liability portion is grouped with public liability data. Thus, the APRA public liability data includes claims made under homeowners' policies.
- The NCPD data for public and products liability and professional indemnity insurance contains details on public and products liability claim numbers and costs for authorised insurers which includes the major private sector public liability insurers.
- ICWA provided the estimated outstanding claims liability as at 30 June 2019, total premiums for 2018/19 and expected premiums for 2019/20 for ICWA's public liability portfolios, including those covered by RiskCover and the General Insurance Fund (GIF).
- It is unlikely that there will be any material public and products liability insurance not covered by either of these two sources. It is also worth noting that all the premium and outstanding claims liability amounts shown in this report combine both personal injury and property damages cover. We have not tried to separate out these two types of risk as generally they are covered by a single policy.

## Workers' Compensation

- The PwC report dated 4 April 2019 titled 'WorkCover WA 2019/20 recommended premium rates' contained estimates of workers' compensation claims liabilities and annual costs for premium rates returning entities (PRRE) which includes private sector insurers (except possibly for some insolvent insurers whose remaining liabilities are managed in the Supplementation Fund), ICWA RiskCover, ICWA GIF and ICWA Insurance Commission General Fund (ICGF), but excludes all WA workers' compensation self-insurers except ICWA RiskCover and ICWA GIF. Therefore, there was a need to gross-up the estimates in PwC's April 2019 report to include an allowance for the self-insurers excluded from PRRE. The WorkCover WA report dated September 2019 titled 'WorkCover WA Claims Experience Status Report 30 June 2019' contained data for all insurers and self-insurers as well as data for PRRE only. The allowance for self-insurers was estimated using ratios between aggregate data shown in the experience status report.
- ICWA provided the estimated outstanding claims liability (excluding asbestos related claims) as at 30 June 2019, total premiums for 2018/19 and expected premiums for 2019/20 for ICWA's workers' compensation portfolios, including those covered by RiskCover and the General Insurance Fund (GIF).
- The PwC report dated 23 August 2019 titled 'WorkCover WA 30 June 2019 actuarial valuation of Supplementation Fund's claims' contained estimates of workers' compensation liabilities that had arisen under the Supplementation Fund, excluding asbestos liabilities.

### 4.4.2 Reasonableness checks

We have undertaken various reasonableness checks of the data. We have not audited the data and it would not be possible for us to do so, but we have no reason to believe that it is unsuitable for estimating the exposure of claims to the effects of the LRC reforms.

## 5 Commencement and eligible claims

The Commission has requested costings for two potential approaches:

- **Approach 1:** Reforms apply only to deaths which occur after the date the legislation takes effect.
- **Approach 2:** Reforms apply to all claims with settlements occurring after the date the legislation takes effect.

To understand the difference between these approaches one needs to consider the time it takes between the event which causes the death and when the settlement is paid. This is summarised below:



Generally, the delay between the event which causes the fatality and when death occurs is short. However, in some instances such as exposure to asbestos, it can take decades. It can then take several more years after death until the damages are paid. Reforms that apply only to deaths occurring after the date of the legislation will plainly capture a smaller range of deaths and consequently will likely have a less significant financial impact.

Under the first approach, the ability to receive damages for non-economic loss will only apply where the person dies after the commencement of the reform. In this case, for non-asbestos claims there will be minimal impact on insurers' outstanding claims liabilities (i.e. amounts insurers expect to pay in the future for injuries/deaths that have already occurred). The impact of the reforms will mostly, but not completely, relate to coverage under policies issued or renewed after the reforms commence and for which insurers can make the necessary future premium adjustments to meet the cost of the reforms.

For asbestos diseases, claims for economic loss (which are rare given the age profile of sufferers) will usually be made prior to death and hence relatives bringing a claim for non-economic loss would need to wait until after the person dies and bring their claim as a separate action. Therefore, there will not be many (if any) cases where a person has died and the relative has lodged a claim but is awaiting settlement at the reform commencement date. Therefore, the costs under both approaches will be similar for asbestos claims.

Under the second approach, the impact of the reforms will be the amount under Approach 1 plus the costs for deaths which occurred prior to the reform commencement date, but for which claims are not settled. This will increase insurers' outstanding claims liabilities. Insurers would not have priced their policies to allow for non-economic loss damages for relatives and it could lead to some insurers having to further increase premiums, beyond the adjustment made under Approach 1, to fund the liability increase.

Furthermore, under Approach 2 we have assumed that non-economic loss damages would be available even if a claim had commenced prior to the effective date of the reforms. Since the timing of when claims are lodged and settlements agreed is within the control of the plaintiffs, this approach could lead to changes and delays in the process. These are discussed in Section 15.

Therefore, when assessing the financial effect of the reforms the impact will be:

- **Approach 1:** Annual premiums charged by insurers and the annual costs of self-insurance will increase. Outstanding claims liabilities will be unchanged aside from those held in relation to asbestos claims.
- **Approach 2:** Annual premiums charged by insurers and the annual costs of self-insurance will increase. Outstanding claims liabilities will also increase for all insurance classes as there will be claims which are yet to settle for wrongful deaths which occurred prior to the commencement date.

Most of the increases relate to insurance entities. However, for some self-insurers there is generally limited data available. We have adjusted the outstanding claim liabilities and annual premiums to estimate amounts to cover the exposure for these organisations. We have also noted where our estimates may be under-stated due to missing data but consider the overall effect of missing data is unlikely to be material relative to the other uncertainties inherent in our estimates of the financial impact of the reforms.

## 6 Fatality claims

### 6.1 Number of deaths each year

The data used to estimate the annual number of fatality claims for each class of insurance is described in Section 4. The approach to estimating the number of deaths per year for each insurance class is as follows:

- **Asbestos:** People with mesothelioma generally die within two to three years of diagnosis. Therefore, number of new claims reported during 2018 will be a reasonable guide as to the number of eligible deaths in the first year of the reforms. There is typically a latency period of decades between exposure to asbestos and death from an asbestos related disease, and it can then take several more years after death until the damages are paid. The projected number of mesothelioma and lung cancer cases for the first year of the reforms is based on WA's share of the number of reported mesothelioma diagnoses in Australia in 2018, which is then adjusted for lung cancer diagnoses and takes into account when people were exposed to asbestos and the latency period for the diseases to manifest. The number of projected settlements is based on the run-off pattern of asbestos claim lodgement which is then adjusted for the additional time it takes until claims are settled.
- **Compulsory third party (CTP):** The average number of WA road fatalities during the four years to 2019, reduced by the estimated proportion of wholly at-fault drivers.
- **Medical indemnity:** The average number of medical malpractice death claims lodged from 2008/09 to 2011/12. The data collected by the Australian Institute of Health and Welfare (AIHW) includes private and public sectors and all states, except for the WA public sector. We have therefore estimated the number of WA claims based on the share of population. Further, experience from 2009/10 to 2012/13 indicates that only about half of lodged death claims will result in a damages settlement, as many claims are withdrawn. More recent data from the Australian Bureau of Statistics indicates that the number of deaths from surgery and medicines has been decreasing over the last ten years and we have adjusted the older AIHW data for this trend.
- **Public liability:** The average number of public liability fatality claims notified to APRA authorised insurers from 2014 to 2018. This data does not include public sector fatality claims insured by RiskCover. We have assumed that the adjustment required to allow for public sector fatality claims is small and is offset by the adjustment required for private sector claims which are lodged but do not receive a settlement.
- **Workers' compensation:** The average number of compensated work fatalities in WA from 2015/16 to 2018/19. In WA, there have only been two silicosis claims reported over the last ten years, one of which was withdrawn<sup>1</sup>. However, there is an increasing number of such diseases occurring in other states' workplaces. We have therefore allowed for an additional three deaths per year on top of recent historical experience. There is a risk that silicosis related deaths could increase beyond this allowance.
- **Uninsured:** The average number of homicides in WA from 2015/16 to 2018/19. There is also likely to be a few non-criminal negligent acts which are not insured and where the tortfeasor would be personally liable, for example household accidents for which the householder does not have insurance. We have shown the number of fatalities that could receive damages but, given that most of these deaths will not have a defendant with the personal financial capacity to pay damages, we have excluded these deaths from the estimated financial impact for most of the result tables shown in sections 8 to 12.

Relatives of the deceased may be able to obtain compensation under the *Criminal Injuries Compensation Act 2003* (WA). Any allowance for non-economic loss damages under that act may require amendments separate to those for the *Fatal Accidents Act* and are therefore beyond the scope of this report.

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<sup>1</sup> Section 7.3.1 of PwC Report "WorkCover WA 2019/20 recommended premium rates"

Table 6.1 summarises the estimated number of annual fatality claims by age band. Where the deceased was at-fault, or where claims are withdrawn, these have been excluded from the results.

Table 6.1 – Estimated number of not at fault deaths per year

Age band	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Uninsured fatalities
0 to 18	0	18	4	1	1	
19 to 29	1	23	8	1	4	
30 to 59	29	29	7	2	16	
60 and over	106	22	8	1	5	
<b>Total</b>	<b>136</b>	<b>92</b>	<b>27</b>	<b>5</b>	<b>26</b>	<b>100</b>

More information regarding the trends in claim numbers and the basis for the assumed number of deaths each year are provided in Appendix A.

## 6.2 Number of deaths in the liabilities

To calculate the impact of the reforms on outstanding claims liabilities we need to adjust the annual number of fatalities in Table 6.1 to estimate the number of future settlements of fatality claims which come from historical exposure and accidents. By definition, uninsured events will not have associated outstanding claims liability provisions.

Table 6.2 shows the liability factors that are applied to the annual figures and the estimated number of future claim settlements to arise from past events. Most if not all asbestos claims relate to exposure or initial use that occurred many years ago with the number of diagnoses and deaths being spread across several decades. It is projected that there may be asbestos related deaths for another thirty years or so, with more deaths occurring during the next few years, gradually reducing over time with only a small number after 2040. There are expected to be 136 asbestos related deaths in the first year after the reforms commence, and after adding up all the projected future deaths we have estimated that in total there will be 1,707 future deaths. This is 12.5 times the number of deaths expected in the first year.

The liability multipliers for other types of claims are lower than that for asbestos claims as there is generally a much shorter delay between the time of death and the exposure or accident which caused it. While some claims may be resolved quickly, others will take several years, and on average it is estimated to take three years from the time the fatality occurs until the claim is settled. This means that at any point in time, insurers have about three years' worth of open claims which are held as liabilities on their balance sheets.

Table 6.2 – Number of future fatality claims from historical exposure and accidents

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total
Annual number	136	92	27	5	26	286
Liability multiplier	12.5	3.0	3.0	3.0	3.0	7.5
<b>Number outstanding</b>	<b>1,707</b>	<b>276</b>	<b>81</b>	<b>15</b>	<b>78</b>	<b>2,157</b>

### 6.3 Share of deaths between Government and Private Sector Insurers

In order to quantify the impact separately for government and private sector insurers we have had to estimate the proportion for each insurance class. This is shown in Table 6.3.

Table 6.3 – Estimated share of deaths between Government and Private Sector Insurers

Insurance class	Government Sector	Private Sector
Asbestos	14%	86%
CTP	100%	0%
Medical indemnity	47%	53%
Public liability	10%	90%
Workers' compensation	10%	90%

More information regarding how the number and cost of fatalities is apportioned by sector is shown in Appendix C. The main sources of this split are:

- **Asbestos:** Based on the share of the outstanding claims liability.
- **CTP:** All claims liabilities are managed by ICWA, although we note the majority of premiums are paid by the private sector. Therefore, in this report we treat increases to liabilities as belonging wholly to the government sector and increases in premiums as belonging to the private sector.
- **Medical Indemnity:** Based on the share of annual claim costs and the share of fatality claim numbers.
- **Public Liability:** Based on the share of annual claim costs.
- **Workers' Compensation:** Based on the share of fatality claim numbers.

## 7 Family information

For all options considered in the LRC Discussion Paper, the cost of non-economic loss damages depends on the number of eligible relatives. The data used to estimate the number of relatives for each fatality is described in Section 4.2. Table 7.1 summarises the estimated average number of each type of relative that could be eligible to claim non-economic loss damages, split by age. This has been performed using both a broad definition for eligible relatives, and a restrictive definition which only includes ‘close relatives’ being partners, parents, children and siblings of the deceased (indicated with a ‘\*’). Further details are provided in Appendix B.

Table 7.1 – Average number of relatives per fatality

Relative	Age of the deceased			
	Under 18	19 to 30	31 to 60	Over 60
Spouse or de facto partner*	0.02	0.50	0.74	0.63
Parents/step-parents*	2.16	2.09	1.76	0.07
Child – minor*	0.02	0.40	0.83	-
Child – adult*	-	-	1.02	2.55
Siblings and half-siblings*	1.15	1.51	1.87	1.50
Grandparent	3.49	2.19	0.13	-
Grandchild	-	-	0.50	3.00
Stepchild	-	0.04	0.19	0.25
Guardians	0.01	-	-	-
Dependant former spouse	-	0.01	0.05	0.07
<b>Total: Broad relative eligibility</b>	<b>6.85</b>	<b>6.74</b>	<b>7.09</b>	<b>8.07</b>
<b>Total: ‘Close relatives’</b>	<b>3.35</b>	<b>4.50</b>	<b>6.22</b>	<b>4.75</b>

Aside from Option 4, damages have been assumed to have minimal variation based on the age of each relative. So, the different age profiles of the deceased for each type of insurance means that the average number of relatives will also vary. By combining the age profile in Table 6.1 with the number of relatives from Table 7.1 we can show the estimated number of relatives by insurance class. This is summarised in Table 7.2.

Table 7.2 – Average number of relatives by type of insurance

	Asbestos	CTP	Medical indemnity	Public liability	Workers’ comp.	Overall
Broad relative eligibility	7.85	7.19	7.24	7.17	7.22	7.51
‘Close relatives’	5.06	4.88	4.85	5.01	5.56	5.03

Asbestos claims have the highest estimated number of relatives on average because most deceased are over sixty and hence are likely to have children and grandchildren. In contrast, fatalities for other insurance types involve more young people and have similar estimated average numbers of relatives.

Narrowing which relatives would be able to make a claim changes the picture significantly with CTP and medical indemnity deceased having the fewest estimated average number of relatives and workers’ compensation having the most.

## 8 Option 1: Determined according to common law principles without limitation or capping

### 8.1 Description

Under this option damages will be determined according to common law principles, without any statutory limitations. This approach follows that adopted by the Northern Territory. The LRC Discussion Paper notes that awards for non-economic loss in the Northern Territory have been in the region of \$20,000 to \$25,000 per relative.

### 8.2 Calculation of the Estimated Cost

The average cost of common law settlements is assumed to be \$25,000. This represents the average amount, meaning that in some cases damages will be below this amount, while other cases will be above. There is a risk that a small number of claims could have very large damages which might skew the results so that the eventual average cost is higher than this estimate.

We have assumed that damages (for non-economic loss of relatives) will not vary by the age of the deceased, although it is conceivable that relatives of older people might get lower damages, although equally some younger people could have higher average costs. This difference would not change the overall average but would reduce the costs for asbestos claims and increase the costs for CTP claims.

It is difficult to obtain data to estimate the component of legal costs that relates to non-economic loss claims. In the absence of relevant data, we have allowed for a further \$5,000 per relative to cover additional legal fees incurred by insurers as a result of the reforms. This an average amount across all claims and allows for:

- a small proportion of cases to go to trial; and
- standalone claims for non-economic loss damages where other heads of damage are not available.

In practice, the legal costs related to individual fatalities will vary widely due to the circumstances of each claim and the parties involved in the settlement. We have assumed that average legal costs per relative will not vary by the number of relatives making claims. However, it is possible that costs per relative will be higher for fatalities with fewer relatives and lower for fatalities with more relatives. This does not change the overall average cost per relative. Also, asbestos claims are more likely to be standalone and not part of a claim for economic loss because most asbestos deaths are after retirement age or will have been settled prior to death, so legal costs may be higher for these cases.

Adding the average legal cost to the average cost of common law settlements gives an assumed **overall average cost per relative of \$30,000**. The average award per fatality is calculated by multiplying the average cost per relative by the average number of relatives from Table 7.2.

Table 8.1 – Average cost per fatality

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average number of relatives	7.85	7.19	7.24	7.17	7.22	7.51
x Average per relative	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
<b>= Average cost per fatality</b>	<b>\$235,500</b>	<b>\$215,700</b>	<b>\$217,200</b>	<b>\$215,100</b>	<b>\$216,600</b>	<b>\$225,300</b>

The estimated average cost per fatality is \$225,300 with asbestos having the highest cost of \$235,500 and the averages for the other insurance types being between \$215,000 and \$217,000. This is a fairly narrow range, partly due to the average damages being assumed not to vary by either the age of the deceased or the age of their relatives. It is worth noting that the range of costs for individual cases will be much wider due to

variations in the number of relatives making a claim and in the basis on which the courts assess damages as well as any associated legal costs.

The estimated annual cost of non-economic loss claims is calculated by multiplying the costs per death in Table 8.1 with the numbers of fatalities in Table 6.1. The resulting costs by insurance type are shown in Table 8.2.

Table 8.2 – Estimated cost of Option 1

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average cost per fatality	\$235,500	\$215,700	\$217,200	\$215,100	\$216,600	\$225,300
x Number of fatalities p.a.	136	92	27	5	26	286
<b>= New Year cost</b>	<b>\$32.0m</b>	<b>\$19.8m</b>	<b>\$5.9m</b>	<b>\$1.1m</b>	<b>\$5.6m</b>	<b>\$64.4m</b>
x Liability multiplier	12.5	3.0	3.0	3.0	3.0	
<b>= Liability impact</b>	<b>\$402m</b>	<b>\$60m</b>	<b>\$18m</b>	<b>\$3m</b>	<b>\$17m</b>	<b>\$499m</b>

The estimated impact of this option would be to **increase damages and legal costs annually by \$64.4m with a \$499m liability increase.**

### 8.3 Scenario Testing

The actual average cost of damages and legal costs that will eventuate under the reform are likely to be different to our adopted assumptions of \$25,000 and \$5,000, respectively. To show how costs vary with these assumptions we have estimated annual costs under three alternative scenarios. The alternative scenarios tested are:

1. Average common law settlement per relative of \$40,000 and average legal cost per relative of \$5,000.
2. Average common law settlement per relative of \$15,000 and average legal cost per relative of \$5,000.
3. In this scenario the assumed average settlement cost per relative varies depending on the age of the deceased person. We assume average damages of \$40,000 for relatives of people who were 30 or younger when they died, \$30,000 for relatives of people aged 31 to 60 and \$15,000 for people aged over 60. Our legal cost assumption of \$5,000 per relative is unchanged.

The costs for each scenario are shown in Table 8.3.

Table 8.3 – Estimated cost of annual fatalities for alternative scenarios (\$m)

Scenario	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Scenario 1	48.0	29.8	8.8	1.6	8.4	<b>96.7</b>
Scenario 2	21.4	13.2	3.9	0.7	3.8	<b>43.0</b>
Scenario 3	25.0	23.7	6.8	1.3	6.4	<b>63.2</b>

For Scenarios 1 and 2, annual costs scale up and down in line with the assumed average cost per relative. For Scenario 3, the overall average settlement cost per relative across the different age groups is similar to the adopted assumptions being nearly \$30,000. However, because most people who die from asbestos related diseases are more than 60 years old, their relatives would receive lower settlements under this scenario. Asbestos claims (which have the largest liability multiplier) are reduced by on average 20%, whereas other insurance types have average damages increase by 10% to 20%.

## 9 Option 2: Determined according to common law principles but subject to a statutory limit on the award of damages

### 9.1 Description

This option is similar to Option 1, with the only difference being that the awards will be capped. We have been requested to provide costings for a cap of \$25,000 per relative.

### 9.2 Calculation of the Estimated Cost

As discussed for Option 1 there will be a range of damages amounts paid for non-economic loss. We were unable to obtain relevant data that could be used to estimate the distribution of damages and thereby calculate the effect of the introduction of a limit on the average size of damages. We have assumed that a cap of \$25,000 would reduce the average common law settlement from \$25,000 under Option 1 to \$20,000 for this option. The inclusion of a cap removes the possibility to have very large settlements that exist under Option 1.

We have allowed for a further \$4,000 per claim to cover additional legal fees incurred by insurers as a result of the reforms. This is less than under Option 1 as the capped level of damages will reduce the incentive to prolong negotiations or going to trial in order to seek larger damages, resulting in lower average legal costs. This means that the **overall average cost per relative is expected to be \$24,000**.

The average award per fatality is calculated by multiplying the average cost per relative by the average number of relatives from Table 7.2.

Table 9.1 – Average cost per fatality

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average number of relatives	7.85	7.19	7.24	7.17	7.22	7.51
x Average per relative	\$24,000	\$24,000	\$24,000	\$24,000	\$24,000	\$24,000
<b>= Average cost per fatality</b>	<b>\$188,400</b>	<b>\$172,560</b>	<b>\$173,760</b>	<b>\$172,080</b>	<b>\$173,280</b>	<b>\$180,240</b>

As per Option 1, the variation in estimated average costs is based on the expected number of relatives. The overall average of \$180,240 is approximately \$45,000 less than Option 1 as a result of the capped damages and lower legal costs. The estimated annual cost of non-economic loss claims is calculated by multiplying the costs per death in Table 9.1 with the numbers of fatalities in Table 6.1. The resulting costs by insurance type are shown in Table 9.2.

Table 9.2 – Estimated cost of Option 2

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average cost per fatality	\$188,400	\$172,560	\$173,760	\$172,080	\$173,280	\$180,240
x Number of fatalities p.a.	136	92	27	5	26	286
<b>= New Year cost</b>	<b>\$25.6m</b>	<b>\$15.9m</b>	<b>\$4.7m</b>	<b>\$0.9m</b>	<b>\$4.5m</b>	<b>\$51.5m</b>
x Liability multiplier	12.5	3.0	3.0	3.0	3.0	
<b>= Liability impact</b>	<b>\$322m</b>	<b>\$48m</b>	<b>\$14m</b>	<b>\$3m</b>	<b>\$14m</b>	<b>\$399m</b>

The estimated impact of this option would be to **increase damages and legal costs annually by \$51.5m with a \$399m liability increase**.

### 9.3 Scenario Testing

The sensitivity of the cost of Option 2 to assumption changes is similar to that for Option 1 and, therefore, we have not included separate scenarios for this option.

## 10 Option 3: Determined according to a formula similar to that in Section 3C of the Motor Vehicle Third Party Insurance Act 1943

### 10.1 Description

This option is derived from section 3C of the *Motor Vehicle (Third Party Insurance) Act 1943*. A statutory maximum is assessed and awarded ‘only in a most extreme case’ and all other **cases are assessed as a proportion of the extreme**. The assessed proportion of the most extreme case is used to determine an Assessed Amount, which is the proportion multiplied by the statutory maximum.

**The calculated award varies from the Assessed Amount** based on the formula shown in Table 10.1. We have assumed that this formula is applied to each relative who lodges a claim for wrongful death and not to all relatives in aggregate.

Table 10.1 – Non-economic loss award depending on range of Assessed Amount

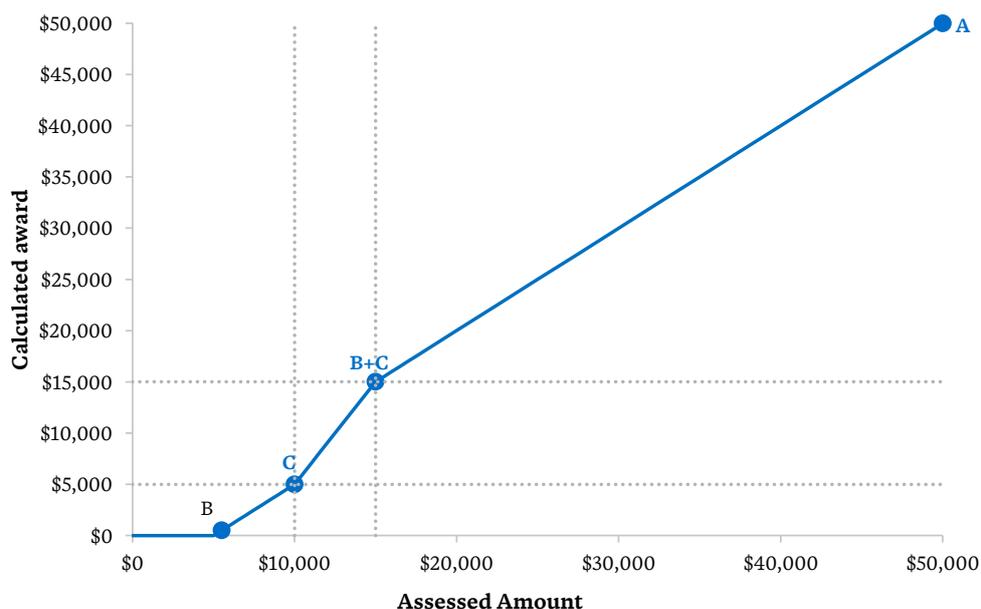
Range		Award calculation
0	to Amount B	0
Amount B	to Amount C	Assessed Amount – Amount B
Amount C	to Amount B + Amount C	2 x Assessed Amount – Amount B – Amount C
Amount B + Amount C	to Amount A	Assessed Amount

The LRC has requested costings based on:

- Amount A \$50,000 (statutory maximum award)
- Amount B \$5,000
- Amount C \$10,000.

Figure 10.1 shows the calculated award for the amounts above. No damages are awarded when the Assessed Amount is less than \$5,000 (Amount B). The calculated award is capped at \$50,000 (Amount A).

Figure 10.1 – Calculated non-economic loss award



## 10.2 Calculation of the Estimated Cost

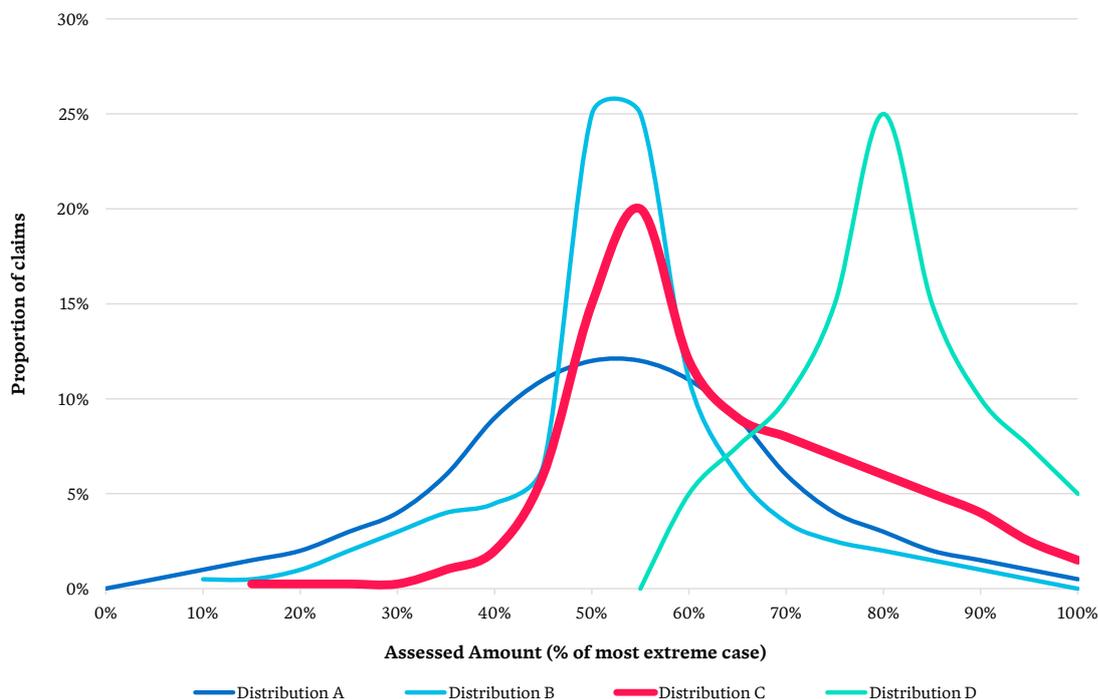
Damages under section 3C of the Motor Vehicle Act are based on long established assessments of injury severity for the injured person, whereas under the proposed reforms there are not yet any guidelines as to how levels of non-economic loss to relatives will be measured. From a costing point of view this approach is particularly challenging and therefore we have considered a range of potential distributions of loss. If this option were adopted, it would likely require some further guidance as to what different levels of assessment meant.

### 10.2.1 Distribution of Assessed Loss

The average cost per fatality depends on the distribution of the proportion of a most extreme case as determined by courts. Given the significant uncertainty regarding how non-economic loss to relatives would be assessed, we have considered four different distributions of assessed loss shown in Figure 10.2:

- Distribution A: Symmetrical distribution with a wide spread of assessed loss.
- Distribution B: High concentration of claims with a 50% assessed loss. It also assumes a higher proportion of cases will have above 50% assessments compared to below 50%.
- Distribution C: A highly skewed distribution with 75% of participants having an assessed loss of 50% or more.
- Distribution D: A high loss distribution with everyone having at least 50% assessed loss and most people being close to 80% of the maximum.

Figure 10.2 – Assumed distributions of the proportion of a most extreme case



As noted in the discussion paper, Option 1 and Option 2 considered possible damages amounts of \$20,000 to \$30,000, and the introduction of the concept of ‘a worst case’ against which claims are benchmarked might justify a higher cap than under Option 2. Therefore, it has been assumed that a majority of cases will have assessed losses close to 50%, except under Distribution D.

The proposed values for amounts A and B mean that an assessed loss of 20% (equivalent to Amount C) results in damages of \$5,000. Due to the different amounts for A, B and C, an equivalent 20% assessment under the Motor Vehicles Act equates to \$83,500 in damages.

### 10.2.2 Average cost per relative

From each of the assumed distributions shown in Figure 10.2, we have calculated the average damages (rounded to the nearest \$500) that would result, shown in Table 10.2.

Table 10.2 – Average non-economic loss damages for each assessed loss distribution

Assessed Loss Distribution	Average Damages
A	\$24,500
B	\$25,000
C	\$30,000
D	\$39,000

Both distributions A and B result in average damages which are close to \$25,000. This is because most claims have an assessed loss above \$15,000 (Amounts B+C) where the damages and assessed loss are equivalent. This level of damages is broadly consistent with the common law-based estimates under Options 1 and 2.

Distribution C has a higher average cost, and we think that there is more likely to be a higher proportion of people assessed as being well above 50% compared to the number with low assessments. Further, in many cases it could be difficult to award damages to relatives saying that their level of loss is less than half of the maximum. Therefore, without any guidelines regarding the assessment of loss, **of the four distributions we think that Distribution C is the most realistic**, and it is the basis for our estimated cost of this option.

Distribution D provides a high cost scenario that could occur if most relatives' loss is assumed to be high. Under the current proposal, B is 10% of the maximum (A), compared to 5% under the Motor Vehicle Act.

It has been assumed that each fatality will have the same loss distribution. However, it is possible that insurance classes where there are more likely to be a larger proportion of 'close relatives' could have a higher average cost per claim compared to classes where there are fewer 'close relatives'.

### 10.2.3 Legal Costs

We have assumed legal costs of \$5,000 per relative making a claim for non-economic loss damages. This is the same amount we have used for Option 1. Under this option there is the potential for dispute over the assessed proportion but, as noted for Option 2, the capped level of damages may preclude more prolonged cases where there is more scope for disputes over potentially large sums.

We understand that for successful claims under the *Motor Vehicle Act* average legal costs can be quite large and that there is a high level of disputation regarding assessed loss. Until norms are established around how assessed loss is measured, particularly during the first few years post implementation, it is quite possible that legal costs may be higher than has been assumed for non-economic loss damages.

### 10.2.4 Estimated Financial Impact

Based on the average damages of \$30,000 from Distribution C and average legal costs of \$5,000, the total assumed average cost per relative is \$35,000. We have assumed that the damages will not vary by the age of the deceased although it is conceivable that relatives of older people might get lower damages which could have a material impact on asbestos costs where the age profile is weighted towards people over 60.

The average award per fatality is computed by multiplying the award per relative by the average number of relatives from Table 7.2.

Table 10.3 – Average cost per fatality

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average number of relatives	7.85	7.19	7.24	7.17	7.22	7.51
x Average per relative	\$35,000	\$35,000	\$35,000	\$35,000	\$35,000	\$35,000
<b>= Average cost per fatality</b>	<b>\$274,750</b>	<b>\$251,650</b>	<b>\$253,400</b>	<b>\$250,950</b>	<b>\$252,700</b>	<b>\$262,850</b>

The estimated annual cost of non-economic loss claims is calculated by multiplying the costs per death in Table 10.3 with the number of fatalities in Table 6.1. The resulting costs by insurance type are shown in Table 10.4. The different age profiles of those who die by class of insurance mean that the expected number of relatives and hence cost per fatality also varies by insurance class.

Table 10.4 – Estimated cost of Option 3

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average cost per fatality	\$274,750	\$251,650	\$253,400	\$250,950	\$252,700	\$262,850
x Number of fatalities p.a.	136	92	27	5	26	286
<b>= New Year cost</b>	<b>\$37.4m</b>	<b>\$23.2m</b>	<b>\$6.8m</b>	<b>\$1.3m</b>	<b>\$6.6m</b>	<b>\$75.2m</b>
x Liability multiplier	12.5	3.0	3.0	3.0	3.0	
<b>= Liability impact</b>	<b>\$469m</b>	<b>\$69m</b>	<b>\$21m</b>	<b>\$4m</b>	<b>\$20m</b>	<b>\$582m</b>

The estimated average cost per fatality is within a fairly narrow range, partly due to the assumed average damages not varying by either the age of the deceased or the age of their relatives. The estimated impact of this option would be to **increase damages and legal costs annually by \$75.2m with a \$582m liability increase.**

### 10.3 Scenario Testing

The distribution of assessed loss is a significant source of uncertainty for this option. The cost implications for the different illustrative assessed loss distributions described in 10.2.1 relative to the selected distribution are shown in Table 10.5. As it has been assumed that distribution of awards will be the same for each fatality, the percentage impact of each distribution on estimated costs is the same. To demonstrate the impact of changing Amounts B and C in the formula an additional scenario has been shown with higher values for these amounts.

Table 10.5 – Estimated impact of alternate scenarios (\$m)

	Average Damages	Legal costs	Total cost per relative	% Change from selected
<b>Selected Assumption</b>	<b>\$30,000</b>	<b>5,000</b>	<b>\$35,000</b>	
Distribution A	\$24,500	5,000	\$29,500	-16%
Distribution B	\$25,000	5,000	\$30,000	-14%
Distribution D	\$39,000	5,000	\$44,000	26%
Distribution C but B = \$10,000 & C = \$25,000	\$21,563	5,000	\$26,563	-24%

## 11 Option 4: Lump sum payment to each relative

### 11.1 Description

Under this proposed model, there would be fixed payments of compensation to each relative. The two payment schedules being considered are:

- **Schedule A:** fixed lump sum payments of compensation to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA)
- **Schedule B:** lump sum payments would be limited to ‘close relatives’ with the amount depending on the relationship.

The LRC has requested costings based on the amounts in Table 11.1.

Table 11.1 – Lump sum payment made to each relative

Relative	Schedule A	Schedule B
Spouse	\$25,000	\$25,000
Parents/step parents (deceased child)	\$25,000	\$15,000
Parents/step-parents (deceased adult)	\$25,000	\$10,000
Child – minor	\$25,000	\$10,000
Child – adult	\$25,000	\$5,000
Siblings	\$25,000	\$5,000
Grandparent	\$25,000	
Grandchild	\$25,000	
Stepchild	\$25,000	
Guardians	\$25,000	
Dependant former spouse	\$25,000	

### 11.2 Calculation of the estimated cost

For Schedules A and B, the estimated cost per death for each age bracket is calculated by multiplying the amounts per relative in Table 11.1 by the corresponding average number of relatives in Table 7.1. Under the proposed options Schedule A costs would be applied to a broader definition of eligible relatives while Schedule B would only apply to those defined as ‘close relatives’.

We have also allowed for \$5,000 per fatality (rather than per relative as was used for the previous options) in legal costs incurred by insurers. The codified nature of the awards means that there is less scope for protracted disputes compared to Options 1 to 3 and hence separate legal costs are less likely to be required for each relative.

The calculated costs per death for each payment schedule are given in Table 11.2. The results shown in the ‘All Ages’ columns are based on the age mix of the deceased across all insurance types.

Table 11.2 – Cost per fatality for Schedule A and Schedule B by age

	Age range				
	Under 18	19 to 30	31 to 60	Over 60	All Ages
<b>Schedule A</b>					
Number of relatives	6.85	6.74	7.09	8.07	7.51
x Average per relative	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000
= Cost of awards	<b>\$171,250</b>	<b>\$168,500</b>	<b>\$177,250</b>	<b>\$201,750</b>	<b>\$187,750</b>
+ Legal costs	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000
= <b>Average cost per fatality</b>	<b>\$176,250</b>	<b>\$173,500</b>	<b>\$182,250</b>	<b>\$206,750</b>	<b>\$192,750</b>
<b>Schedule B</b>					
Number of 'close relatives'	3.35	4.50	6.22	4.75	5.03
x Average per relative	\$11,597	\$9,989	\$9,461	\$7,726	\$8,822
= Cost of awards	<b>\$38,850</b>	<b>\$44,950</b>	<b>\$58,850</b>	<b>\$36,700</b>	<b>\$44,376</b>
+ Legal costs	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000
= <b>Average cost per fatality</b>	<b>\$43,850</b>	<b>\$49,950</b>	<b>\$63,850</b>	<b>\$41,700</b>	<b>\$49,376</b>

The estimated annual cost of non-economic loss claims is calculated by multiplying the costs per fatality in Table 11.2 with the numbers of fatalities for each age bracket in Table 6.1. The resulting costs by insurance type are shown in Table 11.3. The different age profiles of those who die by class of insurance mean that the expected average number of relatives and hence cost per fatality also varies by insurance class.

Table 11.3 – Estimated cost of Option 4

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
<b>Schedule A</b>						
Number of fatalities p.a.	136	92	27	5	26	286
x Average cost	\$201,250	\$184,750	\$186,000	\$184,250	\$185,500	\$192,750
= <b>New Year Cost</b>	<b>\$27.4m</b>	<b>\$17.0m</b>	<b>\$5.0m</b>	<b>\$0.9m</b>	<b>\$4.8m</b>	<b>\$55.1m</b>
x Liability multiplier	12.5	3.0	3.0	3.0	3.0	
= <b>Liability impact</b>	<b>\$343m</b>	<b>\$51m</b>	<b>\$15m</b>	<b>\$3m</b>	<b>\$14m</b>	<b>\$427m</b>
<b>Schedule B</b>						
Number of fatalities p.a.	136	92	27	5	26	286
x Average cost	\$46,484	\$51,165	\$50,206	\$52,640	\$56,683	\$49,376
= <b>New Year Cost</b>	<b>\$6.3m</b>	<b>\$4.7m</b>	<b>\$1.4m</b>	<b>\$0.3m</b>	<b>\$1.5m</b>	<b>\$14.1m</b>
x Liability multiplier	12.5	3.0	3.0	3.0	3.0	
= <b>Liability impact</b>	<b>\$79m</b>	<b>\$14m</b>	<b>\$4m</b>	<b>\$1m</b>	<b>\$4m</b>	<b>\$103m</b>

The estimated average cost per fatality under Schedule A is approximately four times higher than under Schedule B. This results in an estimated impact under **Schedule A of an annual increase of \$55.1m with a \$427m liability increase, compared to \$14.1m annually with an \$103m liability increase under Schedule B.**

### 11.3 Scenario Testing

In addition to the cost estimates calculated above for Schedule A and Schedule B we have tested other payment schedules to show how costs vary as the number of eligible relatives and size of payments change. The alternative scenarios tested are:

1. The LRC requested costings for Schedule A with payments of \$20,000 to \$25,000 per relative. We have computed the cost for \$25,000 payments above and this scenario is for payments of \$20,000 per relative.
2. Payments of \$25,000 are made to all the 'close relatives' in Schedule B.
3. This scenario is the same as Scenario 2 except that siblings are not eligible to receive the payment of \$25,000.
4. This scenario is the same as Schedule B except that that siblings are not eligible to receive the payment of \$5,000.

The costs for each scenario are shown in Table 11.4.

Table 11.4 – Estimated cost of annual fatalities for alternative scenarios (\$m)

<b>Scenario</b>	<b>Asbestos</b>	<b>CTP</b>	<b>Medical indemnity</b>	<b>Public liability</b>	<b>Workers' comp.</b>	<b>Overall</b>
Scenario 1	22.0	13.7	4.0	0.7	3.9	44.4
Scenario 2	17.9	11.7	3.4	0.7	3.7	37.4
Scenario 3	12.5	8.1	3.2	0.5	2.6	26.1
Scenario 4	5.3	4.0	1.1	0.2	1.3	11.9

## 12 Option 5: Lump sum payment to be divided between relatives

### 12.1 Description

This option is similar to Schedule A under Option 4 in that relatives listed in Schedule 2 of the *Fatal Accidents Act 1959* (WA) are eligible for a payment of \$25,000 but with the addition of a cap of \$150,000 on the total of lump sum payments amongst all claimants. If the deceased has six or fewer eligible relatives then each would receive \$25,000. If the deceased has more than six relatives then the total lump sum payment of \$150,000 is split equally amongst the eligible relatives.

The LRC Discussion Paper considers two ways that damages may be divided between relatives. This choice does not affect the cost of the reforms and hence we have not shown separate results for these two approaches.

### 12.2 Calculation of the Estimated Cost

#### 12.2.1 Number of relatives

While the cost of damages will depend on the number of each type of relative for Options 1 to 4, the cost of damages for Option 5 depends only on the total number of relatives. The estimated distribution of the number of relatives for each age bracket is shown in Table 12.1.

Table 12.1 – Distribution of the total number of relatives by age range

Number of relatives	Age of the deceased			
	Under 18	19 to 30	31 to 60	Over 60
0	0%	0%	0%	0%
1	0%	0%	0%	0%
2	0%	0%	1%	1%
3	0%	2%	3%	3%
4	2%	7%	8%	5%
5	11%	16%	13%	8%
6 or more	87%	74%	76%	82%
<b>Average number of relatives (capped at 6)</b>	<b>5.84</b>	<b>5.62</b>	<b>5.59</b>	<b>5.66</b>

### 12.2.2 Average cost per fatality

By combining the number of relatives (capped at 6) from Table 12.1 with the age distribution of fatalities from Table 6.1 we have calculated the average number of \$25,000 awards paid.

We have allowed for \$5,000 per fatality in legal costs incurred by insurers. The fixed nature of the award means that there is limited scope for significant legal disputes. The estimated average cost per fatality is shown in Table 12.2.

Table 12.2 – Average cost per fatality

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average number of relatives	5.64	5.66	5.66	5.66	5.62	5.65
x Average per relative	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000
= Cost of awards	<b>\$141,119</b>	<b>\$141,579</b>	<b>\$141,417</b>	<b>\$141,500</b>	<b>\$140,442</b>	<b>\$141,240</b>
+ Legal costs	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000
= <b>Average cost per fatality</b>	<b>\$146,119</b>	<b>\$146,579</b>	<b>\$146,417</b>	<b>\$146,500</b>	<b>\$145,442</b>	<b>\$146,240</b>

The estimated cost of non-economic loss claims is calculated by multiplying the costs per fatality in Table 12.2 with the numbers of fatalities in Table 6.1. The resulting costs by insurance type are shown in Table 12.3.

Table 12.3 – Estimated cost of Option 5

	Asbestos	CTP	Medical indemnity	Public liability	Workers' comp.	Overall
Average cost per fatality	\$146,119	\$146,579	\$146,417	\$146,500	\$145,442	\$146,240
x Number of fatalities p.a.	136	92	27	5	26	286
= <b>New Year cost</b>	<b>\$19.9m</b>	<b>\$13.5m</b>	<b>\$4.0m</b>	<b>\$0.7m</b>	<b>\$3.8m</b>	<b>\$41.8m</b>
x Liability multiplier	12.5	3.0	3.0	3.0	3.0	
= <b>Liability impact</b>	<b>\$249m</b>	<b>\$40m</b>	<b>\$12m</b>	<b>\$2m</b>	<b>\$11m</b>	<b>\$315m</b>

## 12.3 Scenario Testing

In addition to the cost estimates calculated above we have tested other payment schedules to show how cost varies as the number of eligible relatives and size of payments change. The alternative scenarios tested are:

1. Removal of the limit of a maximum of six relatives. This is the same as Schedule A for Option 4.
2. Payments of \$10,000 to each relative with total lump sum to all relatives capped at \$60,000.
3. Total lump sum halved to \$75,000.
4. Only 'close relatives' as per Schedule B of Option 4 are eligible.

The costs for each scenario are shown in Table 12.4.

Table 12.4 – Estimated cost of annual fatalities for alternative scenarios (\$m)

<b>Schedule</b>	<b>Asbestos</b>	<b>CTP</b>	<b>Medical indemnity</b>	<b>Public liability</b>	<b>Workers' comp.</b>	<b>Overall</b>
Scenario 1	27.4	17.0	5.0	0.9	4.8	<b>55.1</b>
Scenario 2	8.4	5.7	1.7	0.3	1.6	<b>17.6</b>
Scenario 3	10.8	7.3	2.2	0.4	2.1	<b>22.8</b>
Scenario 4	16.4	10.8	3.2	0.6	s3.3	<b>34.2</b>

## 13 Summary cost of damages and legal costs

### 13.1 Average cost per fatality

The tables in this section summarise the estimated impact of damages and legal costs under each of the options discussed in Sections 8 to 12.

Table 13.1 – Average cost of non-economic loss damages and legal costs per death by claim type (\$'000)

	<b>Asbestos</b>	<b>CTP</b>	<b>Medical indemnity</b>	<b>Public liability</b>	<b>Workers' comp.</b>	<b>Overall</b>
Option 1	236	216	217	215	217	<b>225</b>
Option 2	188	173	174	172	173	<b>180</b>
Option 3	275	252	253	251	253	<b>263</b>
Option 4 (Schedule A)	201	185	186	184	186	<b>193</b>
Option 4 (Schedule B)	46	51	50	53	57	<b>49</b>
Option 5	146	147	146	147	145	<b>146</b>

Based on the damages available for each option, the age distribution of the deceased and the assumed number of eligible relatives we have estimated the average cost per fatality. This ranges from under \$50,000 on average under Option 4 (Schedule B) to \$263,000 under Option 3. Within each option there is some variation due to differences in the age profile of the deceased.

Table 13.2 – Average cost of non-economic loss damages and legal costs per death by age (\$'000)

	<b>Age range of the deceased</b>				<b>All Ages</b>
	<b>Under 18</b>	<b>19 to 30</b>	<b>31 to 60</b>	<b>Over 60</b>	
Option 1	206	202	213	242	<b>225</b>
Option 2	164	162	170	194	<b>180</b>
Option 3	240	236	248	282	<b>263</b>
Option 4 (Schedule A)	176	174	182	207	<b>193</b>
Option 4 (Schedule B)	44	50	64	42	<b>49</b>
Option 5	151	146	145	147	<b>146</b>

## 13.2 Total cost

The following tables summarise the total annual and liability amount for non-economic loss damages under each of the proposed options. In some instances, adding numbers across the different types of insurance may not sum to the total amount due to rounding.

Table 13.3 – Annual cost of damages and legal costs by insurance class (\$m)

	<b>Asbestos</b>	<b>CTP</b>	<b>Medical indemnity</b>	<b>Public liability</b>	<b>Workers comp.</b>	<b>Total</b>
Option 1	32.0	19.8	5.9	1.1	5.6	<b>64.4</b>
Option 2	25.6	15.9	4.7	0.9	4.5	<b>51.5</b>
Option 3	37.4	23.2	6.8	1.3	6.6	<b>75.2</b>
Option 4 (Schedule A)	27.4	17.0	5.0	0.9	4.8	<b>55.1</b>
Option 4 (Schedule B)	6.3	4.7	1.4	0.3	1.5	<b>14.1</b>
Option 5	19.9	13.5	4.0	0.7	3.8	<b>41.8</b>

Table 13.4 – Liability cost of damages and legal costs by insurance class (\$m)

	<b>Asbestos</b>	<b>CTP</b>	<b>Medical indemnity</b>	<b>Public liability</b>	<b>Workers comp.</b>	<b>Total</b>
Option 1	402	60	18	3	17	<b>499</b>
Option 2	322	48	14	3	14	<b>399</b>
Option 3	469	69	21	4	20	<b>582</b>
Option 4 (Schedule A)	343	51	15	3	14	<b>427</b>
Option 4 (Schedule B)	79	14	4	1	4	<b>103</b>
Option 5	249	40	12	2	11	<b>315</b>



Part C – Results

## 14 Estimated financial impacts

### 14.1 Impact on annual costs and premiums

#### 14.1.1 Converting annual costs into premium increases

The premium impact of the reforms is the annual cost of damages and legal costs shown in Table 13.3, adjusted to allow for:

- Administration or claims management costs incurred by insurers to process the damages awards.
- Profit or other margin to cover the additional risk insurers face from the reforms and the cost of capital.

No adjustment has been made for the time value of money as most claims will be settled within a few years of the policy being issued, and given current forecasts for inflation and interest rates there is unlikely to be a material impact from inflation and discounting for non-asbestos claims.

We have not included recoveries from third parties and reinsurers. Recoveries will tend to be paid by other insurers operating within the same market and hence there is minimal impact on a consolidated basis.

Table 14.1 summarises the estimated loadings that would be applied to the cost of the reforms. For this analysis we have not allowed any asbestos premium impact as these claims relate to past exposure but it is likely that self-insurers will 'charge' internal business units a breakeven cost.

Table 14.1 – Estimated loadings in premiums and contributions split by class of insurance

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.
Government share of total	N/A	0%	47%	10%	10%
Government Sector	N/A	N/A	11.4%	11.4%	11.4%
Private Sector	N/A	14.5%	61.7%	53.8%	43.1%
<b>Overall</b>	<b>N/A</b>	<b>14.5%</b>	<b>38.0%</b>	<b>49.6%</b>	<b>39.9%</b>

The private sector loading for medical indemnity is large due to high administration and claims management costs. Private sector loadings tend to be high due to a combination of claims management costs and profit margins. The public sector loadings are lower because they tend not to include margins in their premiums and there are economies of scale in managing the claims of their combined portfolios. Further information on loadings and the government and private sector shares is provided in Appendix C.

To put the proposed increases into context, Table 14.2 summarises the estimate of annual premiums by class of business and sector (further information is provided in Appendix C).

Table 14.2 – Estimated annual premium income for WA policies (\$m)

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total
Government Sector	N/A	0	31	14	191	236
Private Sector	N/A	635	51	200	1,170	2,056
<b>Total premium</b>	<b>N/A</b>	<b>635</b>	<b>82</b>	<b>214</b>	<b>1,361</b>	<b>2,292</b>

Asbestos claims relate to past exposure and hence there are no premiums collected.

### 14.1.2 Estimated premium increases

Table 14.3 – Estimated increase in premiums and contributions by class of insurance (\$m)

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total
<b>Pre-reform premiums</b>	<b>N/A</b>	<b>635</b>	<b>82</b>	<b>214</b>	<b>1,361</b>	<b>2,292</b>
Option 1		23	8	2	8	<b>40</b>
Option 2		18	6	1	6	<b>32</b>
Option 3		27	9	2	9	<b>47</b>
Option 4 (Schedule A)		19	7	1	7	<b>35</b>
Option 4 (Schedule B)		5	2	0	2	<b>10</b>
Option 5		15	5	1	5	<b>27</b>
Option 1		4%	10%	1%	1%	<b>2%</b>
Option 2		3%	8%	1%	<1%	<b>1%</b>
Option 3		4%	12%	1%	1%	<b>2%</b>
Option 4 (Schedule A)		3%	8%	1%	<1%	<b>2%</b>
Option 4 (Schedule B)		1%	2%	<1%	<1%	<b>&lt;1%</b>
Option 5		2%	7%	1%	<1%	<b>1%</b>

\*Adding numbers across the different types of insurance may not sum to the total amount due to rounding

Premium increases are greatest for medical indemnity insurance due to its relatively high proportion of fatality claims. The next highest increase is for CTP due to the high number of road fatalities. The increases are smallest for workers' compensation and public liability as they have the lowest proportion of fatality claims.

Most if not all asbestos claims relate to exposure or initial use that occurred many years ago. Therefore, it is unlikely that there will be many deaths that are deemed as future insured events and thus any impact on future premiums will likely be insignificant.

Premium increases are lowest for Option 4 (Schedule B) as this option is the most restrictive as to which relatives can make a claim and the payments are lower for some relatives.

The government and private sector shares of the increase are shown in Table 14.4 and have been calculated using the shares in Table 14.1.

Table 14.4 – Estimated increase in premiums and contributions in WA by sector (\$m)

	<b>Government sector</b>	<b>Private sector</b>	<b>Total</b>
<b>Pre-reform premiums</b>	<b>236</b>	<b>2,056</b>	<b>2,292</b>
Option 1	4	36	<b>40</b>
Option 2	3	29	<b>32</b>
Option 3	4	43	<b>47</b>
Option 4 (Schedule A)	3	31	<b>35</b>
Option 4 (Schedule B)	1	9	<b>10</b>
Option 5	3	25	<b>27</b>
Option 1	2%	2%	2%
Option 2	1%	1%	1%
Option 3	2%	2%	2%
Option 4 (Schedule A)	1%	2%	2%
Option 4 (Schedule B)	<1%	<1%	<1%
Option 5	1%	1%	1%

\*Adding numbers across the different sectors may not sum to the total amount due to rounding

As noted in section 3, although CTP claims are managed by the public sector, the effects of any premium increases will be largely paid by the private sector. Therefore, the private sector category includes \$635m of CTP premiums with potential increases of \$5m to \$27m.

## 14.2 Estimated financial impact on liabilities

### 14.2.1 Converting liability costs into liability increases

As per premiums, to assess the impact on the liability we need to make additional allowances to the amounts shown in Table 13.4. These include:

- The time-value of money for asbestos claims. We have not included an allowance for non-asbestos claims because the relatively short average time to settlement combined with current forecasts for inflation and interest rates are unlikely to have a material impact for these claims.
- Administration or claims management costs incurred by insurers to process the damages awards.
- Risk margin impact which means that insurers' statutory liabilities are held above the central estimate. We note that not all entities or funds, such as self-insurers and RiskCover, hold a risk margin.

We have not included recoveries from third parties and reinsurers. Recoveries will tend to be paid by other insurers operating within the same market and hence there is minimal impact on a consolidated basis. We have not allowed for ITC/DAMs which, if applicable, could reduce costs by about 6%.

Table 14.5 – Estimated loadings in outstanding claims liabilities split by class of insurance

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.
Government share of total	14%	100%	47%	10%	10%
Government	53.0%	9.9%	9.0%	6.1%	11.2%
Private Sector	51.6%	N/A	20.6%	18.7%	15.2%
<b>Overall</b>	<b>51.8%</b>	<b>9.9%</b>	<b>15.1%</b>	<b>17.4%</b>	<b>14.8%</b>

The high loadings for asbestos claims are primarily due to the high-risk margins that insurers hold for asbestos claims to allow for the uncertainty around the number and cost of future claims. There is also the effect of inflation and discounting which is substantial because of the long delays between the initial asbestos exposure and the diagnosis of asbestos related diseases.

Loadings for private sector medical indemnity, public liability and workers' compensation are higher than for the public sector because private insurers are required to include a risk margin while RiskCover does not.

To put the proposed increases into context, Table 14.6 summarises the estimate of outstanding claims liabilities by class of business and sector (further information is provided in Appendix C). Most of the liabilities are based on information available as at 30 June 2019 and therefore could change by the time the reforms are implemented. Nonetheless, they provide an appropriate measure against which one can compare the estimated impact of the proposed reform options.

Table 14.6 – Estimated outstanding claim liabilities for WA (\$m)

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total
Government Sector	96	2,231	172	58	316	2,873
Private Sector	568	0	164	431	1,269	2,432
<b>Total liabilities</b>	<b>664</b>	<b>2,231</b>	<b>336</b>	<b>489</b>	<b>1,585</b>	<b>5,305</b>

CTP liabilities are managed by ICWA and they are a majority of the government sector liabilities. Workers' compensation liabilities are approximately half of the private sector liabilities.

## 14.2.2 Estimated liability increases

Table 14.7 – Estimated increase in liabilities by class of insurance (\$m)

	Asbestos	CTP	Medical indemnity	Public liability	Workers comp.	Total
<b>Pre-reform liabilities</b>	<b>664</b>	<b>2,231</b>	<b>336</b>	<b>489</b>	<b>1,585</b>	<b>5,305</b>
Option 1	610	65	20	4	19	<b>719</b>
Option 2	488	52	16	3	16	<b>575</b>
Option 3	712	76	24	4	23	<b>839</b>
Option 4 (Schedule A)	521	56	17	3	17	<b>614</b>
Option 4 (Schedule B)	120	16	5	1	5	<b>147</b>
Option 5	378	44	14	3	13	<b>452</b>
Option 1	92%	3%	6%	1%	1%	<b>14%</b>
Option 2	73%	2%	5%	1%	1%	<b>11%</b>
Option 3	107%	3%	7%	1%	1%	<b>16%</b>
Option 4 (Schedule A)	78%	3%	5%	1%	1%	<b>12%</b>
Option 4 (Schedule B)	18%	1%	1%	<1%	<1%	<b>3%</b>
Option 5	57%	2%	4%	1%	1%	<b>9%</b>

\*Adding numbers across the different types of insurance may not sum to the total amount due to rounding

Liability increases for asbestos are large because of the high number of expected future deaths caused by past exposure. As shown in Table 6.2, there are expected to be about 1,700 asbestos related deaths after the reforms commence.

If asbestos claims are eligible for non-economic loss damages, then it is important to note that approximately 60% of WA asbestos liabilities are held by the Asbestos Injuries Compensation Fund ('AICF'). The estimates of asbestos liability increases above do not make any allowance for the funding arrangement between the NSW Government and James Hardie Industries ('JHI') under which the company is required to provide continued funding to the AICF. The agreement provides that when a government other than NSW introduces a scheme or legislative change that increases payments to asbestos victims, an adjustment is required to JHI's payment obligations so that its present and future liabilities are not increased as a result of that scheme or legislative change. A possible result of introducing the LRC reforms, subject to the outcome of negotiations between JHI and the NSW Government, may be to enliven the 'adverse action' provisions in the Amended and Restated Final Funding Agreement ('AFFA') between JHI and the NSW Government which may negate for claimants against the AICF the intended benefits of introducing the LRC reforms.

Similar issues arose in the Commission's recent report on provisional damages reforms. Further consideration will be a matter for discussion between the WA and NSW Governments and JHI and is beyond the scope of our report. Given the magnitude of the potential increase in asbestos liabilities arising from the proposed reforms and its potential consequential impact on NSW as a result of their arrangement with JHI, this issue needs to be raised for discussion before the Council of Australian Governments before any scheme can be implemented.

As was the case for premium increases, CTP and medical indemnity increases are higher than for public liability and workers' compensation due to having a higher proportion of death claims.

Table 14.8 – Estimated increase in liabilities by sector (\$m)

	<b>Government sector</b>	<b>Private sector</b>	<b>Total</b>
<b>Pre-reform liabilities</b>	<b>2,873</b>	<b>2,432</b>	<b>5,305</b>
Option 1	165	554	<b>719</b>
Option 2	132	443	<b>575</b>
Option 3	192	646	<b>839</b>
Option 4 (Schedule A)	141	473	<b>614</b>
Option 4 (Schedule B)	36	111	<b>147</b>
Option 5	107	345	<b>452</b>
Option 1	6%	23%	14%
Option 2	5%	18%	11%
Option 3	7%	27%	16%
Option 4 (Schedule A)	5%	19%	12%
Option 4 (Schedule B)	1%	5%	3%
Option 5	4%	14%	9%

\*Adding numbers across the different sectors may not sum to the total amount due to rounding

Government sector increases are smaller than private sector ones as only 14% of asbestos liabilities lie with the government sector and increases for asbestos liabilities are much larger than for other types of insurance.

## 14.3 Summary

Direct costs incurred by insurers allow for the estimated damages and legal costs that they will incur as a result of the reforms. The premium and balance sheet provisions include additional amounts such as claims management and administration costs as well as other margins that are required or likely to be applied.

Table 14.9 – Comparison of the overall estimated impact of the reform options

	<b>Annual cost impact</b>			<b>Liability impact: Approach 1 Asbestos claims only</b>			<b>Liability impact: Approach 2 All claim types</b>		
	<b>Damage &amp; legal</b>	<b>Premiums</b>		<b>Damages &amp; legal</b>	<b>Balance Sheet Provision</b>		<b>Damages &amp; legal</b>	<b>Balance Sheet Provision</b>	
Option 1	\$64m	\$40m	2%	\$402m	\$610m	92%	\$499m	\$719m	14%
Option 2	\$52m	\$32m	1%	\$322m	\$488m	73%	\$399m	\$575m	11%
Option 3	\$75m	\$47m	2%	\$469m	\$712m	107%	\$582m	\$839m	16%
Option 4 (Schedule A)	\$55m	\$35m	2%	\$343m	\$521m	78%	\$427m	\$614m	12%
Option 4 (Schedule B)	\$14m	\$10m	<1%	\$79m	\$120m	18%	\$103m	\$147m	3%
Option 5	\$42m	\$27m	1%	\$249m	\$378m	57%	\$315m	\$452m	9%

Options 1 to 3 and Option 4 (Schedule A) are the highest cost options having an average cost per relative of between \$25,000 and \$35,000 each, and with the same number of eligible relatives. Option 4 (Schedule B) is the lowest cost option while Option 5 lies in between.

### Annual cost impact

The estimated annual damages and legal costs of the reforms varies from \$14m up to \$75m. Option 4 (Schedule B) differs significantly from the other options because it has both fewer relatives who are eligible to make a claim and the prescribed level of damages are much lower than the other options.

For asbestos claims only, they are mainly due to past exposure and so the main effect is expected to be on outstanding liabilities with little or no effect on premiums. As asbestos claims mostly relate to non-insurance entities including self-insurers and the AICF, they would need to fund the increase from other sources. Excluding these claims means that the premium impact is less than the total estimated annual amount of damages and legal cost paid.

For the other claim types, the annual cost represents the ongoing additional cost of claims arising from wrongful deaths during each future year. The impact on premiums is estimated to be 1% to 2% however, as shown in Table 14.3 this is higher for CTP and medical indemnity policies.

### Liability impact

The liability impact depends on which claims will be entitled to non-economic loss damages.

If only claims where death occurs after the commencement date are eligible (Approach 1) then the liability impact will be largely restricted to asbestos claims. The liability impact is estimated at \$120m to \$712m as almost every mesothelioma or asbestos related lung cancer diagnosis could lead to a wrongful death claim.

If all wrongful death settlements occurring after the commencement date are eligible (Approach 2), then the estimated liability increase for non-asbestos claims would be \$27m to \$127m (1% to 3%), which is also the liability impact if asbestos claims were precluded from the reforms. Including asbestos claims, Approach 2 would result in a liability increase of \$147m to \$839m. Table 14.7 shows that for non-asbestos claims the liability increase will have a similar relative impact to premiums, with larger increases for CTP and medical indemnity than for public liability and workers' compensation.

## 15 Potential risks and changes to behaviour

### 15.1 Short term effects

- **Delays:** Under Approach 2, where a death has occurred, there will be an incentive to delay making or settling a claim until after the commencement date of the reform. This would mean a likely spike in settlements after the commencement date, which would increase the liability impact.
- **Slowdowns:** Under both Approach 1 and Approach 2 there could be a slowdown in claim settlement rates for Options 1 to 3 as plaintiffs and their legal advisers wait for precedents to be made and to try to understand the rules governing the system.
- **COVID-19:** At the time of publication, there have been 9 COVID-19 related deaths in WA. We have assumed that none of these will become claims, eligible under the reforms. Further, we have not made an allowance for any future COVID-related deaths to be eligible as a result of the reforms.

### 15.2 Long term effects

- **Substitution:** If some allowance for damages for non-economic loss had to date been implicitly included as part of economic loss damages, then this is likely to lead to some mitigation of the financial impact of the reforms.
- **Common law increases:** Under the common law options (Options 1 and 2) there is a risk of creep over time in the amount of damages awarded. This can be difficult to control as most matters are settled by negotiation. Increases can also occur via legal precedent. Option 2 partially mitigates this risk by having a statutory cap.
- **Cap increases:** Similarly, statutory caps can increase over time above the rate of inflation. This has been evident in other jurisdictions such as Ireland, but these increases are deliberate and can be costed before implementation.
- **Mental harm claims:** There will be situations where relatives of the deceased will be able to seek damages for mental harm as well as non-economic loss for wrongful death. Entitlement to claim for mental harm is constrained by section 3A of the *Civil Liability Act* which excludes work and asbestos claims. To avoid some damages being paid twice for the same death plaintiffs may have to elect the order in which claims are settled:
  - If a non-economic loss claim is finalised first, any damages awarded to a relative would be deducted in determining subsequent, and typically greater, general damages for mental harm to the same relative, and
  - If a mental harm claim is finalised first, it would preclude any subsequent award of damages for non-economic loss to the same relative.

The net impact of any election should be cost neutral, but to the extent that more people elect to settle the mental harm claim first this could decrease the gross cost of the non-economic loss damages reforms. If plaintiffs find it easier to claim non-economic loss damages, then this could potentially reduce the number of mental harm claims.

- **Claim propensity:** The reform costings assume that all eligible relatives will make a non-economic loss claim. In practice some relatives will not be aware of the eligibility for non-economic loss damages and others will not be willing to lodge a claim. Awareness of eligibility will be low at the time of the reform and will increase over time. Willingness to lodge a claim will depend on the reform option selected and the size of damages available.

### 15.3 Potential size of the risks and changes to behaviour

The size of risks and effects of behavioural changes are difficult to quantify. We have not included these effects in our costings but have classified their potential size as Low, Medium or High in Table 15.1. If these consequences were to eventuate after the reforms are implemented, some of them will increase the cost of the reforms and some will decrease them.

Table 15.1 – Behavioural consequences

	<b>Effect</b>	<b>Potential cost impact</b>	<b>Risk to costs</b>
<b>Short term</b>	Delays	Low	Increase
	Slowdowns	Neutral to Low	Increase
	COVID-19	Low to Medium	Increase
<b>Long term</b>	Substitution	Low	Decrease
	Common law increases	Medium for Option 1, Low for other options	Increase
	Cap increases	Medium for Options 2, 4 & 5, Low for other options	Increase
	Mental harm claims	Neutral	-
	Claim propensity	Low to Medium	Decrease

## 16 Sensitivity analysis

In each of the sections describing the five options we have tested a range of scenarios specific to that option. In this section we have tested assumptions which could affect a number of the options.

The estimates have been calculated using methods that rely on certain assumptions about the future experience of claims. To understand the impact of variations in these assumptions, changes were made to key assumptions and the effects on projected outstanding claims liabilities and future premiums or contributions were quantified. This is referred to as a sensitivity analysis and results are shown below.

### 16.1 Asbestos claims

The estimated liability impacts of the reforms are largely driven by asbestos claims. These claims also differ from the other claims as the event causing the fatality (i.e. exposure to asbestos dust) has already occurred. We considered the following sensitivities:

- **Higher legal costs:** The estimated average legal costs assume that most claims for non-economic loss will be attached to an existing claim for economic loss. As discussed in section 8, asbestos claims are more likely to be standalone and not part of a claim for economic loss as most asbestos deaths are after retirement age or will have been settled prior to death, so legal costs may be higher for these cases. In this sensitivity we assume that legal costs will be three times higher for asbestos claims.
- **Delayed implementation:** Asbestos claims generally arise from past exposure to asbestos and the number of deaths is expected to decrease each year. Therefore, the later the reforms take effect, fewer people will be able to access these damages. For this sensitivity we assume that the introduction of the reforms will be delayed for ten years.

Table 16.1 – Sensitivity of asbestos liabilities (\$m)

	Base	Higher legal costs	Delayed implementation
Option 1	610	744	195
Option 2	488	595	156
Option 3	712	846	227
Option 4 (Schedule A)	521	538	167
Option 4 (Schedule B)	120	137	38
Option 5	378	396	121

The effect of higher legal costs is greater for Options 1 to 3 which have higher legal cost assumptions per fatality than Options 4 and 5.

We estimate that about 70% of the asbestos settlements will occur over the next ten years, so a delay of this duration would lead to a corresponding decrease in the cost of the reforms for asbestos claims.

## 16.2 Number of medical indemnity claims

In the analysis we have assumed that non-economic loss damages will be awarded to 27 medical indemnity fatality claims per year. In section 6 we discussed that this number was estimated from data for medical indemnity claims from 2009/10 to 2012/13 which was then adjusted for recent decreases in medical treatment deaths. If we do not make this adjustment for recent experience, then the estimated number of medical indemnity fatality claims is 37 per year.

In this sensitivity, we quantify the cost increases if we increase our assumed fatality claim numbers from 27 to 37 per year. This would increase the estimated the medical indemnity premiums and liability impacts for all options by 37%.

Table 16.2 – Sensitivity of medical indemnity premiums and liabilities (\$m)

	Premiums		Liabilities (Approach 2)	
	Base	Sensitivity	Base	Sensitivity
Option 1	8	11	20	28
Option 2	6	9	16	22
Option 3	9	13	24	32
Option 4 (Schedule A)	7	9	17	24
Option 4 (Schedule B)	2	3	5	6
Option 5	5	7	14	19

## 16.3 Entitlement to ‘close relatives’ only

Apart from Option 4 (Schedule B), the reform options permit non-economic loss claims from a broad range of relatives. In this sensitivity eligible claimants are restricted only to ‘close relatives’ for all options.

Table 16.3 – Sensitivity of premiums and liabilities for all types of insurance (\$m)

	Premiums		Liabilities (Approach 2)	
	Base	Sensitivity	Base	Sensitivity
Option 1	40	28	719	469
Option 2	32	22	575	375
Option 3	47	33	839	547
Option 4 (Schedule A)	35	24	614	406
Option 4 (Schedule B)	10	10	147	147
Option 5	27	22	452	372

Restricting the eligible relatives to a list of ‘close relatives’ reduces the cost of the reforms by about 30% for Options 1, 2, 3 and 4 (Schedule A). The reduction for Option 5 is smaller as this option already has a cap on the number of relatives. There is no impact for Option 4 (Schedule B) as under this option awards are already restricted to ‘close relatives’.

## 16.4 Uncapped common law damages increase faster than inflation

Under Option 1 common law damages are uncapped and there is a risk of awards increasing over time. This has been Scotland’s experience, as noted in the LRC Discussion Paper. In this sensitivity we assume damages increase by 2% p.a. above inflation. Although there is a risk of awards increasing over time for other options, this risk is much smaller and has not been quantified.

Table 16.4 – Sensitivity of liabilities for all types of insurance (\$m)

	<b>Asbestos</b>	<b>CTP</b>	<b>Medical indemnity</b>	<b>Public liability</b>	<b>Workers’ comp.</b>	<b>Overall</b>
Base	610	65	20	4	19	719
Sensitivity	717	69	21	4	21	832
<b>Increase</b>	<b>18%</b>	<b>6%</b>	<b>6%</b>	<b>6%</b>	<b>6%</b>	<b>16%</b>

If common law damages increase by 2% p.a. above inflation under Option 1 then the asbestos liability would increase by 18% over the \$610m reform impact estimated in section 14 to \$717m.

For the non-asbestos classes, the additional liability increases are smaller being only 6% as the average time to settlement is shorter. However, this would likely mean that over time non-asbestos premiums would increase faster than inflation.

## 17 Reliances and limitations

### 17.1 Limitations and uncertainty

For this investigation we have relied upon, but not limited to, the information described in Section 4 of this report. We have not undertaken an independent audit of the data and it would not be possible for us to do so, although it has been reviewed where possible for reasonableness and consistency.

There is a limitation upon the accuracy of the estimates in this report in that there are substantial inherent uncertainties in relation to:

- The precise form and operation of any legislation that might be enacted to implement the reforms, including how legislation might be interpreted by the courts;
- The number of eligible relatives and their likelihood of making claims for non-economic loss; and
- The impact of the reforms on those claims and the resulting financial effects.

In our opinion, we have employed techniques and made assumptions that are appropriate, and the conclusions presented herein are reasonable, given the limited information which is currently available. However, it should be recognised that the ultimate financial effects are likely to deviate, perhaps materially, from our estimates.

Judgements about the methodology, analyses, assumptions and estimates of financial effects described in this report should be made only after considering this report and appendices in their entirety. Parts of the report and appendices could be misinterpreted and/or misleading if considered in isolation.

Taylor Fry has been engaged by the Department of Justice (“DoJ” or “the Department”) to provide estimates of the financial impact of different reform options, as required under Section 10 of the LRC Discussion Paper. This report is being provided solely for the purpose stated under section 1.1 Purpose and Scope. It is not intended, and is not necessarily suitable, for any other purpose. As such, no reliance should be placed on this report for any purpose other than that which is stated under Purpose and Scope. Discussions should be held with the authors before the results are used for other purposes.

Further limitations on the conclusions reached are expressed in various sections of the report. These should be noted in any interpretation of this report.

The results in this report are subject to a series of uncertainties. These arise from:

#### General sources of uncertainty

- Data error – the base data can contain material errors or may not be representative of the claims that might be affected by the reforms.
- Model error – incorrect or inappropriate models may be used to project the financial effects.
- Parameter error – the selected values for various assumptions within the estimates are in some cases based on judgement and may not accurately represent the future values for the parameters.
- Random error – claims costs are, by their nature, subject to random variation.
- Unforeseen developments due to events including future legislative implementation of the reforms, court interpretations of the legislation, development of future types of claims that have not been identified to date, public attitudes, and future social/economic conditions such as inflation.

### Specific sources of uncertainty

- There is limited data about the size of non-economic loss damages for wrongful deaths and the associated legal costs. Actual damages and legal costs may deviate from our assumptions.
- The information on the average number of relatives of deceased persons has been derived from 2016 WA census data and where there have been gaps, we have been required to make reasonable approximations.
- The interaction of the reforms with the current COVID-19 pandemic is unclear at the time of writing this report and we have made no allowances for the pandemic.

Although we have prepared estimates in conformity with what we believe to be the likely future experience, the experience could differ considerably from the estimates. Material deviations from our estimates are normal and are to be expected.

# D

Part D – Appendices

# Appendix A Estimated number of fatalities

## Appendix A1: Number of fatalities - Asbestos related diseases

### A1.1 Mesothelioma diagnoses and deaths in Australia

Year diagnosed	Reported diagnoses	Reporting delay adjustment	Ultimate diagnoses
2015	745	103%	767
2016	773	107%	827
2017	759	112%	850
2018	662	120%	794
<b>Total</b>	<b>2,939</b>		<b>3,239</b>
WA: 2015 to 2018	480		
<b>WA Proportion</b>	<b>16.3%</b>		

Source: Australian Institute of Health and Welfare report titled 'Mesothelioma in Australia 2018', August 2019

Reporting delay adjustments are based on reporting delays in AIHW report

Australia Mesothelioma	WA Proportion	WA Mesothelioma	Lung cancer loading	WA NEL eligible
794	16.3%	130	5%	136

Assuming that the number of mesothelioma diagnoses for 2018/19 is the same as for the 2018 calendar year

Lung cancer loading based on the ratio of lung cancer to mesothelioma claims in KPMG report 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust'

### A1.2 WA age distribution

Age range	WA mesothelioma diagnoses	Distribution	WA assumed number NEL claims
0 to 14 years	0	0%	0
15 to 39 years	1	1%	1
40 to 64 years	28	21%	29
65 years and over	106	78%	106
<b>Total</b>	<b>135</b>	<b>100%</b>	<b>136</b>

Source: Department of Health (Western Australia) report from 2020 titled 'Cancer incidence, mortality and survival in Western Australia, 2017'.

### A1.3 AICF mesothelioma claims

<b>Year ending 31 March</b>	<b>Claims reported</b>	<b>Proportion outstanding March 2019</b>	<b>Outstanding settlements March 2019</b>
2012	259	0.2%	1
2013	309	0.5%	2
2014	369	1.0%	4
2015	413	2.0%	8
2016	397	5.0%	20
2017	374	40.0%	150
2018	393	100.0%	393
2019	374	100.0%	374
<b>Total</b>			<b>950</b>

Source: KPMG report dated 21 May 2019 titled 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust'

Using settlement delay pattern from KPMG report with an additional two year delay to allow for the average time between mesothelioma diagnosis and death

<b>Future settlements at March 2019</b>	
Claims reported before March 2019	950
Claims reported after March 2019	3,743
<b>Total</b>	<b>4,693</b>
divide by: Claims reported in 2019	374
<b>Future settlements ratio</b>	<b>12.5</b>

Claims reported after March 2019 from published AICF financial statements for the year ending 31 March 2019

	<b>Liability as at March 2019 (\$m)</b>
Uninflated & undiscounted	1,256
Inflated & discounted	1,427
<b>Inflation &amp; discount factor</b>	<b>1.14</b>

Uninflated & undiscounted liability is derived from the inflated & undiscounted projections in the KPMG report using inflation assumption of 3.75% (excluding superimposed inflation)

## Appendix A2: Number of fatalities - CTP claims

### A2.1 WA Road fatalities

Calendar year	Number
2014	182
2015	161
2016	195
2017	160
2018	159
2019	164
Average 2016-2019	169.5
Adopted annual assumption	170.0

Source: Road Safety Commission (WA) website (<https://www.rsc.wa.gov.au/Statistics/Latest-Statistics>)

### A2.2 Age distribution and NEL eligibility

Age range	5 year average	Age distribution	Rescaled	Not at fault	NEL eligible
0 to 16	12	7%	12	95%	11
17 to 19	12	7%	12	60%	7
20 to 29	42	24%	41	55%	23
30 to 39	26	15%	26	45%	11
40 to 49	28	16%	28	40%	11
50 to 59	14	8%	14	45%	6
60 to 69	16	9%	16	50%	8
70 to 79	11	6%	11	55%	6
80 to 109	12	7%	12	70%	8
<b>Total</b>	<b>173</b>	<b>100%</b>	<b>170</b>	<b>54%</b>	<b>92</b>

Source: Road Safety Commission (WA) report dated 1 May 2019 and titled '2018 Preliminary summary of fatalities of Western Australian roads'

Not at-fault percentages are estimated from WA road fatalities from 2014 to 2018 contained in the Australian Road Deaths Database.

We have assumed that all passengers, cyclists and pedestrians are not at fault and 75% of motorcyclists and 50% of drivers in accidents involving multiple participants are not at fault.

All drivers and motorcyclists involved in single vehicle accidents are assumed to be at-fault.

## Appendix A3: Number of fatalities - Medical Indemnity claims

### A3.1 Australian medical indemnity fatality claims reported

Year ending 30 June	National			Western Australia			
	Aust Excl WA Public Hospitals <sup>1</sup>	Aust Incl WA Private Hospitals <sup>2</sup>	Total	Public Hospitals (x12%)	Private Hospitals APRA Insured (x10%)	Private Hospitals non-APRA Insured <sup>3</sup>	Total
2009	216	327	543	26	33	6	64
2010	294	320	614	35	32	7	74
2011	313	255	568	38	26	6	69
2012	332	346	678	40	35	7	82
2013	152	152	304	18	15	3	37
<b>Average p.a. excl 2013</b>				<b>34.7</b>	<b>31.2</b>	<b>6.6</b>	<b>72.4</b>

Claim numbers for 2013 are low due to delays in indentifying claims as fatality claims at the time of publication

#### Population

WA	2,591,887	WA Share	11.6%	10.4%
Australia	24,899,077	Adopted	12.0%	10.0%

Source: Australian Institute of Health and Welfare report titled 'Australia's medical indemnity claims 2012-13'.

Notes:

1. Excludes WA public hospitals
2. Private cover placed with APRA authorised insurers
3. Assumed to be 10% of RiskCover and APRA authorised insurers' fatality claims

### A3.2 Western Australian medical indemnity fatality claims reported in first year after reform

Average annual WA claims lodged in data period	72.4
Years from data period to reform	10
Annual decrease in medical related deaths	2.9%
<b>Estimated number of claims lodged in first year after reform</b>	<b>54.0</b>

The estimate of 72.4 claims in Appendix B3.1 is based on data from the 2008/09 to 2011/12 financial years.

The first year after the reform is about 10 years after the mid-point of the period covered by the data.

We analysed the number of deaths in the Australian Bureau of Statistics publication '3303.0 Causes of Death, Western Australia, 2018'. We used ICD-10 codes YA, Y8A and Y88 as these deaths appeared to be the ones most likely to lead to a medical indemnity claim.

Over the period from 2011 to 2016, the number of deaths in these categories decreased by approximately 2.9% p.a. on average. Data from later years is incomplete.

number of fatality claims lodged in the first year after the reform.

### A3.3 Proportion of fatality claims reaching settlement

	All claims Aust (Excl WA) Public Hospitals 2008/09 to 2012/13			Fatality claims Aust Public (Excl WA) & Private Hospitals (Incl WA) 2009/10 to 2012/13		
Claim size	Finalised claims	Discontinued	% Discont.	Finalised claims	% Discont.	Discont.
less than \$10,000	2694	2116	79%	1388	79%	1090
\$10,000 to \$100,000	1916	746	39%	775	39%	302
\$100,000 or more	2103	75	4%	421	4%	15
<b>Total</b>	<b>6713</b>	<b>2937</b>	<b>44%</b>	<b>2584</b>	<b>54%</b>	<b>1407</b>
Proportion of fatality claims discontinued					<b>54%</b>	
Proportion of fatality claims reaching settlement					<b>46%</b>	
<b>Assumed proportion of fatality claims reaching settlement</b>					<b>50%</b>	

Source: Australian Institute of Health and Welfare report titled 'Australia's medical indemnity claims 2012-13'.

Discontinued claim statistics only available for public hospital (excl WA) claims, with fatality and non-fatality claims combined.

Discontinued proportions by claim size for all claims have been applied to fatality claims according to their size.

### A3.4 Age distribution

Age range	Aus claims reported	Age Distribution		WA claims NEL eligible	WA claims
Under 18	33	13%	7.1	50%	3.5
18 to 39	74	29%	15.9	50%	8.0
40 to 59	67	27%	14.4	50%	7.2
60 to 79	60	24%	12.9	50%	6.5
80 or more	17	7%	3.7	50%	1.8
Not known	53				
<b>Total</b>	<b>304</b>	<b>100%</b>	<b>54.0</b>		<b>27.0</b>

Source: Australian Institute of Health and Welfare report titled 'Australia's medical indemnity claims 2012-13'. Death claims from 2012/13 from public sector (excluding WA) and private sector.

## Appendix A4: Number of fatalities - Public and Products Liability

### A4.1 Number of public and products fatalities in WA

Age range	WA fatality claims
Under 18	1
18 to 30	1
31 to 60	2
Over 60	1
<b>Total</b>	<b>5</b>

Source: NCPD data on reported fatality claims supplied by APRA

Total number of fatalities based average annual number of death claims from 2014 to 2018

Age distribution is assumed to approximately follow that of CTP fatalities

Includes an allowance for public sector claims not included in APRA data

## Appendix A5: Number of fatalities - Workers' compensation claims

### A5.1 Number of compensated workplace fatalities in WA

Lodgement year ending 30 June	Number
2016	25
2017	18
2018	24
2019	24
Average 2016-2019	22.8
Silicosis Allowance	3
<b>Adopted assumption</b>	<b>26.0</b>

Source: WorkCover WA report titled 'Workers' Compensation Scheme Trends', November 2019

### A5.2 Workplace fatalities in WA by age

Age range	<u>Traumatic injury fatalities<sup>1</sup></u> 2006/07 to 2017/18		<u>Compensated fatalities<sup>2</sup></u> 2010/11 to 2018/19		<u>Assumed</u>	
	Number	Distribution	Number	Distribution	Number	Distribution
15-19 years	9	4%	8	4%	1.0	4%
20-24 years	19	9%	13	6%	1.8	7%
25-34 years	43	20%	42	19%	5.2	20%
35-44 years	42	20%	37	17%	4.7	18%
45-54 years	39	18%	51	24%	5.5	21%
55-59 years	19	9%	31	14%	3.1	12%
60-64 years	17	8%	20	9%	2.3	9%
65-69 years	15	7%	11	5%	1.6	6%
70 years and over	9	4%	4	2%	0.8	3%
Unknown	5					
Bystanders	9					
<b>Total</b>	<b>226</b>					
<b>Total excl. Unknown &amp; Bystanders</b>	<b>212</b>	<b>100%</b>	<b>217</b>	<b>100%</b>	<b>26.0</b>	<b>100%</b>

Notes:

- Workers' related traumatic injury fatalities for 2006/07 to 2017/18 from Department of Mines, Industry Regulation and Safety (WA) report titled 'Work-related traumatic injury fatalities in Western Australia 2006-2007 to 2017-2018'.
- Claim data from WorkCover WA for fatality claims lodged from 2010/11 to 2018/19 (excludes disallowed and withdrawn claims)

## Appendix A6: Number of homicides

### A6.1 Number of homicides in WA

<b>Year ending 30 June</b>	<b>Number</b>
2011	110
2012	104
2013	103
2014	98
2015	91
2016	94
2017	107
2018	94
2019	102
Average 2016-2019	99.3
<b>Adopted assumption</b>	<b>100.0</b>

Source: Western Australia Police Force (<https://www.police.wa.gov.au/Crime/CrimeStatistics#/>)

Appendix B Estimated number of relatives per fatality

## Appendix B: Average Number of relatives

Relative	Age range			
	Under 18	19 to 30	31 to 60	Over 60
Spouse	0.02	0.50	0.74	0.63
Parent/step parent	2.16	2.09	1.76	0.07
Child - minor	0.02	0.40	0.83	0.00
Child - adult	0.00	0.00	1.02	2.55
Sibling	1.15	1.51	1.87	1.50
Grandparent	3.49	2.19	0.13	0.00
Grandchild	0.00	0.00	0.50	3.00
Stepchild	0.00	0.04	0.19	0.25
Guardian	0.01	0.00	0.00	0.00
Dependant former	0.00	0.01	0.05	0.07
<b>Total</b>	<b>6.85</b>	<b>6.74</b>	<b>7.09</b>	<b>8.07</b>

Source: Australian Bureau of Statistics report titled '2016 Census of Population and Housing: General Community Profile Western Australia'.

Mortality adjustments derived from Australian Bureau of Statistics Life Tables, Western Australia, 2016-2018.

Relative	Estimation approach
Spouse	From Social Marital Status data in ABS report
Parent	Two parents, adjusted for parent mortality, assuming parents are about 30 years older than child
Step parent	Assuming that, on average, for each parent alive there are 0.1 step parents, based on analysis of Family Composition and Family Blending data in ABS report
Children	From Number of Children Ever Born data in ABS report split between minor and adult children is based on likely age of children
Sibling	Based on Number of Children Ever Born data in ABS report, assuming that children are about 30 years younger than parents, with a mortality adjustment applied to the over 60 age group
Grandparent	Four parents, adjusted for grandparent mortality, assuming grandparents are about 60 years older than grandchild
Grandchild	Based on Number of Children Ever Born data in ABS report and likely age of children of deceased grandparent
Stepchild	Assuming 0.1 stepchildren for each child, similar to step parents
Guardian	Based on number of children in out-of-home care in WA from Australian Institute of Family Studies website ( <a href="https://aifs.gov.au/cfca/publications/children-care">https://aifs.gov.au/cfca/publications/children-care</a> )
Dependant former spouse	Assumed to be 50% of divorced people from Registered Marital Status data in ABS report

# Appendix C Outstanding claims liabilities and premiums

## Appendix C1: Industry annual claim costs and liabilities - Asbestos related claims

### Liability by Insurer

<b>Insurer</b>	<b>Government sector \$m</b>	<b>Private sector \$m</b>
AICF		403.8
CSR		38.3
ICWA Funds	96.2	
Private insurers and self-insurers		126.3
<b>Total Asbestos</b>	<b>96.2</b>	<b>568.4</b>

### Liability components

	<b>Government sector \$m</b>	<b>Private sector \$m</b>
Net claims liability	69	411.7
Expenses	7.0	11.6
Risk Margin	20.2	145.1
<b>Liability</b>	<b>96.2</b>	<b>568.4</b>

## C1.1 Estimated WA provisions - AICF

### Liability as at 31 March 2019

Disease type	AICF Liabilities	Assumed WA	AICF WA liabilities
	\$m	%	\$m
Mesothelioma	1653.9	16%	264.6
Asbestosis	105.1	6%	6.3
Lung cancer	23.1	6%	1.4
ARPD and other	33.4	6%	2.0
Legal and other costs (9.4%)	170.9	15%	25.8
Workers comp including legal costs	1.6	-	-
Wharf including legal costs	13.8	-	-
Baryulgil mine	2.3	-	-
<b>Total claims cost</b>	<b>2004.1</b>	<b>15%</b>	<b>300.1</b>
Cross claim and reinsurance recoveries	-135.7		-20.3
<b>Net claims liability</b>	<b>1868.4</b>		<b>279.8</b>
Expenses (1.8%)	33.7		5.0
Risk margin (41.7%)	794.1		118.9
<b>Liability</b>	<b>2696.2</b>		<b>403.8</b>

Source: KPMG report dated 21 May 2019 titled 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust'

Assumed WA proportions based on proportions of claim notifications

Expense and risk margin amounts are not included in KPMG's report, but are provided in AICF's financial statements

## C1.2 Estimated WA provisions - CSR

### Liabilities as at 31 March 2019

	Global	Australia	WA
Net claims liability	221.2	158.1	31.6
Expenses (5.0%)	11.1	7.9	1.6
Risk margin (15.4%)	35.7	25.5	5.1
<b>Total liability</b>	<b>268.0</b>	<b>191.5</b>	<b>38.3</b>

Source: CSR Limited Annual Reports 2018 and 2019

Assumed expenses of 5% based on industry knowledge

CSR's 2019 annual report does not split the asbestos provision between US and Australian claims.

Aust share of Global liabilities from 2018 Annual report **71.5%**

WA's share of Aust liabilities is based on previous analysis performed by **20.0%**

Taylor Fry which assessed that WA's share of liability related to Wittenoom and a share of downstream products. The adopted share is slightly higher than the AICF share shown in C1.1

## Appendix C1: Industry annual claim costs and liabilities - Asbestos related claims

### C1.3 ICWA Funds

#### Outstanding claims liability as at June 2019 including risk margin

	GIF	ICGF	Supplementation Fund	All Funds
Net claims liability	30.6	28.4	10.0	69.0
Expenses	3.1	3.7	0.2	7.0
Risk Margin	9.3	8.8	2.1	20.2
<b>Liability</b>	<b>43.0</b>	<b>40.9</b>	<b>12.3</b>	<b>96.2</b>

#### Share by Disease

GIF: Provided by ICWA and the 2019 ICWA Annual Report

ICGF: Provided by ICWA and the 2019 ICWA Annual Report

Supplementation Fund: PwC report "WorkCover WA 30 June 2019 actuarial valuation of Supplementation Fund's asbestos liabilities".

PwC's published estimates of outstanding claims liabilities for Premium Rates Returning Entities (PRRE) appears to **largely exclude liabilities for asbestos claims** - refer sections 1.4.2 and 3.1.2 in PwC's March 2019 report for WorkCover WA. PRRE includes private sector insurers and ICWA, but excludes self-insurers other than RiskCover - refer Appendix B1 in PwC's report.

The estimate of insured and self-insured workers compensation asbestos liabilities excluding those managed by ICWA has been calculated as follows, assuming all relate to exposure before 1 July 1997 when RiskCover was established:

\$30.6m GIF asbestos net claims liabilities

x 4.57 Scales public sector to PRRE. Assumes the ratio of liabilities for PRRE to RiskCover (from Appendix C5.4) is the same for both asbestos and non-asbestos claims

x 1.08 Gross-up from PRRE only to all WA insurers including self-insurers from Appendix C5.3

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**\$151.0m** estimated total asbestos net claim liabilities for all WA insurers and self-insurers

-\$30.6m deduct GIF asbestos liabilities

-\$14.6m deduct ICGF estimated non-CSR workers comp "lung" claim liabilities, which would have been private sector liabilities insured by SGIO WA before its privatisation. They were then transferred to the ICGF.

-\$10.0m deduct Supplementation Fund asbestos liabilities, which would have been private sector insurers' liabilities which became liabilities of the Supplementation Fund when those insurers became insolvent

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**\$100.3m** million, compared with outstanding liabilities for all PRRE of approx \$1.5 billion.

x 1.05 allow for 5% expense rate

x 1.20 Risk margin, based on average CSR risk margin over the 2017/18 and 2018/19 years.

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**\$126.3m** Estimated liability

## Appendix C: Industry annual claim costs and liabilities - CTP claims

### C2.1 ICWA - TPIF

#### Outstanding claim liabilities as at 30 June 2019

	<b>\$m</b>
Gross claims liability	2,195.1
Recoveries	- 181.2
Net Claims liability	2,013.9
Claims handling expense	76.8
Risk margin	140.1
<b>Liability</b>	<b>2,230.8</b>

Source: 2019 ICWA Annual Report

#### Premium Revenue

	<b>\$m</b>
Claims cost	554.6
Expenses	33.3
Margin	47.0
Estimated premium 2019/20	<b>634.9</b>

Source: ICWA

Assumed expenses of 6% and margin  
of 8% based on industry experience

## Appendix C3: Industry annual claim costs and liabilities - Medical Indemnity claims

Outstanding claims liabilities (\$m)			Annual costs (\$m)		
Insurer	Government sector	Private sector	Insurer	Government sector	Private sector
RiskCover	171.7		RiskCover	31.1	
APRA Insurers		133.8	APRA Insurers		43.2
Other medical indemnity insurers		30.5	Other medical indemnity insurers		7.4
<b>Total</b>	<b>171.7</b>	<b>164.3</b>	<b>Total</b>	<b>31.1</b>	<b>50.6</b>

Assumes private hospitals and corporate medical practices whose insurance is placed overseas with Lloyds and/or other London Market insurers are 10% of ICWA and APRA authorised MI insurers.

Liability components			Premium Revenue		
	Government sector \$m	Private sector \$m		Government sector \$m	Private sector \$m
Net claims liability	157.5	136.3	Claims cost	27.9	31.3
Expenses	14.2	12.3	Expenses & margin	3.2	19.3
Risk Margin	0.0	15.8			
<b>Liability</b>	<b>171.7</b>	<b>164.3</b>	<b>Estimated premium 2019/20</b>	<b>31.1</b>	<b>50.6</b>

### C3.1 RiskCover

Liability at 30 June 2019	
	\$m
Net claims liability	157.5
Expenses	14.2
Risk Margin	0.0
<b>Liability</b>	<b>171.7</b>

Premium Revenue	
	\$m
Claims cost	27.9
Expenses & margin	3.2
<b>Estimated premium 2019</b>	<b>31.1</b>

Source: ICWA

Estimated Claims cost based on net loss ratio of 89.8% in RiskCover budget from 2019 ICWA Annual Report

### C3.2 APRA Authorised Insurers

#### Liabilities at 30 June 2019

	<b>\$m</b>
Net claims liability	109.6
Expenses	9.9
Risk Margin	14.3
<b>Liability</b>	<b>133.8</b>

Central estimate based on Taylor Fry analysis of APRA NCPD data

Assumed claims handling expense of 9%

Assumed average risk margin of 12%

#### Estimated 2019/20 premium

	<b>\$m</b>
Claims cost	25.9
Expenses	15.1
Profit margin	2.2
<b>Premium</b>	<b>43.2</b>

Claims cost based on analysis of APRA NCPD data

Assumed expenses are 35% of premiums

based on MDAN and Avant 2019 annual reports

Allowed for a 5% profit margin based on industry experience

### C3.3 Other Medical Indemnity Insurers liabilities and annual premiums

Assumed to be 10% of RiskCover and APRA authorised insurers' liabilities and annual premiums

#### Appendix C4: Industry annual claim costs and liabilities - Public and Product Liability claims

Insurer	Outstanding claims liabilities (\$m)		Insurer	Annual costs (\$m)	
	Government sector	Private sector		Government sector	Private sector
ICWA	58.0		ICWA	13.9	
APRA insurers		430.9	APRA insurers		200.0
<b>Total</b>	<b>58.0</b>	<b>430.9</b>	<b>Total</b>	<b>13.9</b>	<b>200.0</b>

#### Liability components

	Government sector \$m	Private sector \$m		Government sector \$m	Private sector \$m
Net claims liability	54.6	363.0	Claims cost	12.5	130.0
Expenses	3.3	21.8	Expenses & margin	1.4	70.0
Risk Margin	0.1	46.2			
<b>Liability</b>	<b>58.0</b>	<b>430.9</b>	<b>Estimated premium 2019/20</b>	<b>13.9</b>	<b>200.0</b>

## C4.1 ICWA

### Liability at 30 June 2019

<b>RiskCover &amp; GIF</b>	<b>\$m</b>
Net claims liability	54.6
Expenses	3.3
Risk Margin (GIF only, RiskCover has no margin)	0.1
<b>Liability</b>	<b>58.0</b>

Source: ICWA. Mostly relates to RiskCover with less than \$0.5m from GIF

### Premium Revenue (RiskCover)

	<b>\$m</b>
Claims cost	12.5
Expenses & margin	1.4
<b>Estimated premium income 2019/20</b>	<b>13.9</b>

Source: ICWA

Estimated Claims cost based on net loss ratio of 89.8% in RiskCover budget from 2019 ICWA Annual Report

## C4.2 APRA Authorised Insurers

### Liabilities at 30 June 2019

	<b>\$m</b>
Net claims liability	363.0
Expenses	21.8
Risk Margin	46.2
<b>Liability</b>	<b>430.9</b>

Central estimate based on analysis of APRA NCPD data

Includes property damage, financial loss and bodily injury claims

Assumed expenses of 6% based on ICWA allowance

Assumed average risk margin of 12% based on APRA industry statistics

### Estimated 2019/20 premium

	<b>\$m</b>
Claims cost	130.0
Expenses & margin	70.0
<b>Premium</b>	<b>200.0</b>

Total premium based on NCPD data

Claims cost and expenses calculated using loss ratio of 65% based on previous analysis of APRA data.

## Appendix C5: Industry annual claim costs and liabilities - Workers Compensation claims

Insurer	Outstanding claims liabilities (\$m)		Insurer	Annual costs (\$m)	
	Government sector	Private sector		Government sector	Private sector
ICWA Funds	315.7		ICWA Funds	190.8	
Private insurers		1158.3	Private insurers		1072.1
Self-insurers		110.3	Self-insurers		97.5
<b>Total</b>	<b>315.7</b>	<b>1268.6</b>	<b>Total</b>	<b>190.8</b>	<b>1169.6</b>

### Liability components

	Government sector	Private sector		Government sector	Private sector
	\$m	\$m		\$m	\$m
Net claims liability	284.4	1,100.9	Claims cost	171.3	817.3
Expenses	31.1	57.6	Expenses & margin	19.5	352.4
Risk Margin	0.9	110.1		0.0	
<b>Liability</b>	<b>315.7</b>	<b>1268.6</b>	<b>Estimated premium 2019/20</b>	<b>190.8</b>	<b>1169.6</b>

## C5.1 ICWA - Public sector workers' compensation

### Liability at 30 June 2019

RiskCover, GIF & Supplementation Fund	\$m
Net claims liability	284.4
Expenses	31.1
Risk Margin (GIF and Supp. Fund only)	0.9
<b>Liability</b>	<b>315.7</b>

Sources: ICWA for RiskCover and GIF, PwC report titled "WorkCover WA 30 June 2019 actuarial valuation of Supplementation Fund's claims".

The liabilities for GIF and the Supplementation Fund are \$4m of the total

### Premium Revenue (RiskCover)

	\$m
Claims cost	171.3
Expenses & margin	19.5
<b>Estimated premium income 2019/20</b>	<b>190.8</b>

Source: ICWA

Estimated Claims cost based on net loss ratio of 89.8% in RiskCover budget from 2019 ICWA Annual Report

## C5.2 Private sector insurers' workers compensation liabilities

### Liability at 30 June 2019

	\$m
Net claims liability for PRREs	1,282.7
less ICWA net claims liabilities	- 284.4
Central estimate of private sector liabilities	998.3
Expenses (5.0%)	49.9
Risk margin (10.5%)	110.1
<b>Liability for private sector insurers</b>	<b>1,158.3</b>

Source: PwC report titled "WorkCover WA 2019/20 recommended premium rates"

Premium Rate Returning Entities (PRREs) include RiskCover, GIF, ICGF and private sector insurers, except insolvent insurers whose remaining liabilities are managed in the Supplementation Fund. Other self-insurers are excluded.

Risk margin and expense assumptions from PwC report

### Premium

	\$m
PRRE risk premium	915.4
less RiskCover claims cost	-171.3
Non-govt insurers' risk premium	744.1
Expenses	210.1
Profit margin	117.9
<b>Gross premium</b>	<b>1072.1</b>

From the PwC Report

Expenses assumed to be 19.6% of premium

Profit assumed to be 11.0% of premium

### C5.3 Self-insurer workers' compensation claims

Payments	Payment financial year			Total
	2016/17	2017/18	2018/19	
Insurers and self-insurers	945.7	917.3	899.8	2,762.8
Insurers, excluding self-insurers	876.2	848.1	834.0	2,558.3
Gross-up for self-insurers	107.9%	108.2%	107.9%	108.0%
<b>Adopted gross-up for self-insurers</b>				<b>108.0%</b>

Source: WorkCover WA report titled "Claims Experience Status Report June 2019"

Payments including self-insurers are from section 1.3 and payments excluding self-insurers are from section 2.2.2

Liability at 30 June 2019		Annual cost of claims	
	\$m		\$m
Net claims liability for PPREs	1,282.7 from above	Total PPREs	915.4
Self insurers as a % of PPREs	8% from table above	Self insurers proportion	8%
Net claims liability for self insurers	102.6	Net cost of claims	73.2
Expenses (7.5%)	7.7	Expenses	24.3
Risk margin (0.0%)	-	Profit margin	0.0
<b>Liability for self-insurers</b>	<b>110.3</b>	<b>Total cost</b>	<b>97.5</b>

Source: PwC report titled "WorkCover WA 2019/20 recommended premium rates"

Self-insurers are assumed to have twice the expense rate as private sector insurers, because they are smaller.

Self-insurers are not APRA regulated and typically do not hold a risk margin

Source: PwC report titled "WorkCover WA 2019/20 recommended premium rates"

### C5.4 Ratio of PRRE liabilities to RiskCover liabilities

PPRE liabilities	1282.7 from Appendix C5.2 (excluding expenses)
RiskCover workers comp liabilities	280.7 from Appendix C5.1 reduced by assumed expenses of 12%
<b>Ratio</b>	<b>4.57</b>

This ratio is used to estimate outstanding asbestos liabilities for private insurers and self-insurers in Appendix D1.8

## Appendix C6: Loadings required to calculate NEL damages impact on premiums and liabilities

### C6.1: Liability loadings

		<b>Loadings in outstanding claims liabilities</b>				
		<b>Asbestos</b>	<b>CTP</b>	<b>Medical indem.</b>	<b>Public liability</b>	<b>Workers comp.</b>
<b>Government</b>	Future inflation & the time value of money	13.6%				
	Expenses	10.1%	3.5%	9.0%	6.0%	10.9%
	Risk Margin	29.3%	6.4%	0.0%	0.1%	0.3%
	<b>Total</b>	<b>53.0%</b>	<b>9.9%</b>	<b>9.0%</b>	<b>6.1%</b>	<b>11.2%</b>
<b>Private sector</b>	Future inflation & the time value of money	13.6%		0.0%	0.0%	0.0%
	Expenses	2.8%		9.0%	6.0%	5.2%
	Risk Margin	35.2%		11.6%	12.7%	10.0%
	<b>Total</b>	<b>51.6%</b>	<b>N/A</b>	<b>20.6%</b>	<b>18.7%</b>	<b>15.2%</b>

#### **Future inflation & the time value of money**

Future inflation & the time value of money for asbestos liabilities is calculated from the KPMG report 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust'

Given the current forecasts for inflation and interest rates there is unlikely to be a material impact from inflation and discounting of costs for non-asbestos claims

## C6.2: Premium loadings

		Loadings in premiums and contributions				
		Asbestos	CTP	Medical indem.	Public liability	Workers comp.
<b>Government</b>	Future inflation & the time value of money					
	Expenses			11.4%	11.4%	11.4%
	Profit/Other Margins			0.0%	0.0%	0.0%
<b>Total</b>		<b>N/A</b>	<b>N/A</b>	<b>11.4%</b>	<b>11.4%</b>	<b>11.4%</b>
<b>Private sector</b>	Future inflation & the time value of money					
	Expenses & Profit/Other Margins		14.48%	61.7%	53.8%	43.1%
	<b>Total</b>	<b>N/A</b>	<b>14.5%</b>	<b>61.7%</b>	<b>53.8%</b>	<b>43.1%</b>

### **Future inflation & the time value of money**

Given the current forecasts for inflation and interest rates there is unlikely to be a material impact from inflation and discounting of costs for non-asbestos claims

## C6.3: Share of additional cost between sectors

	Asbestos	CTP	Medical indem.	Public liability	Workers comp.
Government	14.4%	100%	47.1%	10.0%	10.0%
Private sector	85.6%	0.0%	52.9%	90.0%	90.0%

**Asbestos:** share based on the share of the outstanding claims liability

**CTP:** Government share is different for premiums and liability. All claims liabilities are managed by ICWA but we assume that the government share of premiums is zero as the majority of premiums are paid the private sector

**Medical indemnity:** share based on share of annual claim costs and share of fatality claim numbers

**Public liability:** share based on share of annual claim costs

**Workers compensation:** share based on share of fatality claim numbers



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THE LAW REFORM COMMISSION  
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WESTERN AUSTRALIA

# **FINAL REPORT PROJECT 109**

CLAIMS FOR NON-ECONOMIC LOSS  
FOR WRONGFUL DEATH UNDER THE  
*FATAL ACCIDENTS ACT 1959 (WA)*