THE LAW SOCIETY
OF NEW SOUTH WALES

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

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160 Marsden Street
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Dear Ms Chen-Hatton,

Review of the Dust Diseases Tribunal Regulation 2013 – staged repeal process

Thank you for the opportunity to comment on proposals relating to the review of the Dust Diseases Tribunal Regulation 2013 ("the Regulation"). This is a joint submission on behalf of the Law Society of New South Wales and the Australian Lawyers Alliance ("ALA").

1. Proposal to introduce election by plaintiff to use CRP or case management by the Dust Diseases Tribunal

The current experience with the CRP

The Law Society and ALA are of the view that overall the Claims Resolution Process ("CRP") system as it currently stands operates relatively well, and largely achieves the objects set out in clause 13 of the Regulation. However, the Law Society and ALA note that there have been numerous cases where plaintiffs have died before the finalisation of their claims, which we consider to be attributable in large part to the current manner in which clause 21 of the Regulation is drafted.

The new timeframes proposed

The Law Society and ALA consider that there is no need to alter timeframes and the existing CRP model in relation to non-malignant claims, with the exception that service of a statement of claim should be required within five business days of filing.

For the purposes of this review, we assume that "Table 1 – Difference between current CRP model and case management by the Tribunal" ("Table 1") is intended only to provide options in relation to malignant claims. The Law Society and ALA agree with and adopt Table 1, with the following exceptions.

We disagree with the proposal that a service of a statement of particulars is not required. Statements of claim are often put in general terms and contain no particulars of the actual circumstances in which the plaintiff was exposed to asbestos. It is noted that this is

appropriately often done to preserve a plaintiff's entitlement to general damages pursuant to section 12B of the *Dust Diseases Tribunal Act 1989*. However, the non-provision of a detailed exposure history makes it impossible for a defendant to determine whether any cross claims should be filed. We consider that it is unrealistic for cross claims to be filed within 10 days of the service of the statement of claim.

The Law Society and ALA are of the view that a better proposal would be for the service of the statement of particulars be "as directed by the Dust Diseases Tribunal ("Tribunal") at the first directions hearing". We further consider that a plaintiff should also have completed the requirements of Part 3 (Summary of work and exposure history) and Part 4 (Detailed exposure history) of the Form 1 statement of particulars ("Form 1") by the first directions hearing. This is particularly the case as these parts of Form 1 require no more than the plaintiff's best recollections to their knowledge, information and belief. We consider that the remaining parts of Form 1, particularly those that relate to quantum, can be completed at a later date in accordance with any timetable set by the Tribunal.

We consider that this proposal conforms to the first objective of the CRP as set out in clause 13(a) of the Regulation, being "to foster the early provision of information and particulars concerning claims in respect of asbestos-related conditions".

Further, we consider that the proposed case management model should provide for filing and service of cross claims within 20 business days of service of both the statement of claim and Parts 3 and 4 of Form 1, and that any shorter timeframe would be unduly restrictive. It is submitted that this will not inappropriately increase the length of matters as the timetabling of matters will be significantly brought forward by the proposal to hold a first directions hearing within 10-14 days of the filing of a statement of claim which contrasts with the current period of approximately of 2-3 months between the filing of a statement of claim and service of the statement of claim and completed Form 1 upon defendants.

The election mechanism (i.e. plaintiff elects)

The Law Society and ALA consider that in relation to malignant claims, there should be no election mechanism, and that all claims should be promptly brought before the Tribunal and dealt with in accordance with Table 1, subject to the concerns raised above.

We submit that allowing malignant claims to progress within the current CRP model creates significant logistical issues in monitoring the health of a plaintiff. We are aware of difficulties in maintaining effective communication between solicitors and treating practitioners that allow for the plaintiff's condition to be appropriately monitored. Noting the comments by O'Meally P in the matter of Smart v State of NSW: "Accepting, as one does, the unpredictable course of mesothelioma which can lead to a sudden deterioration in the health of a sufferer with little to no warning…"[1] we submit that it is necessary for all malignant claims to proceed before the Tribunal.

Noting the above, we consider that compulsory case management is the best way to ensure that any unnecessary delay is avoided, and that the proposal to hold a directions hearing within 10-14 days from the date of filing of a statement of claim will ensure that matters will be dealt with more swiftly. We consider that this is vitally important, noting the comments made in the joint judgment of the Court in the matter of QBE Insurance v Noel Bull: "this type of litigation is complex, costly, contentious and above all crushing as it bears upon a plaintiff who may be in the final days or weeks of life".[2]

[1] [2008] NSWDDT 20
[2] [1999] NSWCA 185

The proposal to lower the threshold for removal of a claim from the CRP and what types of evidence would be required to satisfy any lowered new threshold at 1.7-1.8.

Given the above submission in relation to malignant claims and non-election, we have no submission to make in relation to this proposal, however we consider that the time and cost of potential arguments relating to whether a new threshold for removal from the CRP has been met should be avoided.

2. Alternative proposal to amend Clause 21 of the Regulation

The current experience with Clause 21

The Law Society and ALA are aware of the extreme difficulties in obtaining even a short written report from a treating doctor in circumstances where a report is urgently required to substantiate the deterioration of a plaintiff's situation. We consider that in the current circumstances, this leads to an unnecessary delay in the plaintiff's access to case management by the Tribunal.

3. Other proposals raised by stakeholders

Proposals 3.1, 3.2 and 3.4

The Law Society and ALA submit that given the position that all malignant claims should be case managed, it is unnecessary to consider the proposal. For non-malignant claims, we submit that the current clause 21(1)(c) and 21(6) are adequate. Further, we submit that in both malignant and non-malignant matters, if the plaintiff dies at any point after filing the statement of claim, the matter should be listed no later than 16 weeks after this date for the substitution of a fresh plaintiff and the entry of a resumption proposal (non-malignant claim) or directions (malignant claim).

Proposal 3.3

The Law Society and ALA submit that the proposal is reasonable and strikes a balance between the need to have claims finalised without excessive delay and enabling defendant solicitors time to investigate whether a Contributions Assessment Determination should be challenged, which may require extensive factual investigation.

Proposals 3.5 and 3.6

The Law Society and ALA have no submission to make in relation to these proposals.

Proposal 3.7

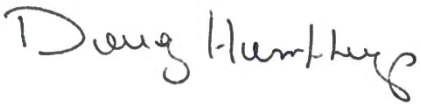
The Law Society and ALA submit that this proposal will be unlikely to facilitate any change, as there is currently a difference of opinion between contributions assessors as to the proper application of the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007*, and as such it is unlikely that agreements on a contribution assessor will be reached between parties.

Proposal 3.8

The Law Society and ALA submit that if an additional defendant is joined by the plaintiff, the Regulation should provide for a further Contributions Assessment Determination under Division 5 of the Regulation. Further, we submit that in relation to cross-claims, the new regulation should make it clear that further cross-defendants cannot be joined in the Plaintiff's proceeding. It is proposed that as an alternative, a fresh statement of claim should be filed by the defendant(s) wishing to do so, after finalisation of the plaintiff's claim, with the contributions assessment determination then being able to take place under clause 62 of the Regulation.

Should you have any questions or require further information, please contact Jonas Lipsius, Principal Policy Lawyer, on (02) 9926 0218 or email jonas.lipsius@lawsociety.com.au.

Yours sincerely,



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