THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:PWml1293322

5 May 2017

Committee Director
Standing Committee on Law & Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Director,

First review of the Dust Diseases scheme

The Law Society of NSW welcomes the opportunity to provide a submission to the Legislative Council Standing Committee on Law and Justice's First review of the Dust Diseases scheme. The Law Society's Injury Compensation Committee has approved this submission.

1. Malignant claims

The Law Society notes that the *Dust Diseases Tribunal Regulation 2013* ("Regulation") applies the asbestos claims resolution process to all asbestos-related claims for damage. If a plaintiff is said to be suffering from mesothelioma or carcinoma, the claim is categorised as "malignant" and will follow a shortened timetable under the claims resolution process. For all other asbestos-related diseases, the claim is categorised as "non-malignant" and will follow a separate timetable under the claims resolution process.

The Law Society is concerned that a judge of the Dust Diseases Tribunal ("Tribunal") is unable to hear or deal with an asbestos case unless and until the claims resolution process is exhausted or certain other conditions are satisfied. Clause 21(1)(a) of the Regulation provides that the claim is removed from (and therefore not subject to) the claims resolution process if the Tribunal determines, on application by the claimant and on the basis of medical evidence presented for the claimant, that the claim is "urgent". The claim is "urgent" only if the Tribunal is satisfied that, as a result of the seriousness of the claimant's condition:

(a) the claimant's life expectancy is so short as to leave insufficient time for the requirements of the claims resolution process to be completed and the claim finally determined by the Tribunal, if required, on an expedited basis, or

(b) the claimant is not likely to be able to give oral evidence or participate in Tribunal processes once the claims resolution process is completed.[1]

[1] Clause 21(2) of the Regulation.

The Law Society submits that a distinction should be drawn between malignant and non-malignant claims with respect to access to the Tribunal, given the urgency of malignant claims to be listed and heard by the Tribunal.

Judge Kearns identified the case for law reform in his Tribunal decision in *re Dawson*.[2] This case concerned a plaintiff who contracted mesothelioma as a result of exposure to asbestos, and subsequently died before the case could be completed. Judge Kearns expressed his concerns, as follows:

> 145. This means, as happened in this case, and happens in many cases, that a judge is unable to hear or otherwise deal with [an asbestos] case until the plaintiff's state of health is especially parlous and the hold on life quite tenuous. It also means that when plaintiffs give their evidence, they are often weak and enfeebled and not always lucid. It also means that defendants are often denied the opportunity to cross-examine plaintiffs fully...
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> 146. ... If, on the filing of the statement of claim, this case was soon thereafter listed before the President, as used to be the case, the issues in this case would have been properly isolated and the parties ready for hearing soon thereafter...
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> ...
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> 148. The result has been that this has been another case where the plaintiff died before it could be completed... If, without prejudice to the defendant in the proper preparation and conduct of its case, a case can be completed in a plaintiff's lifetime, it should be...
>
> 149. I urge the regulators to consider making appropriate amendments to the Regulation with some urgency.

We agree with the case for law reform identified by Judge Kearns in this case.

We note the following further practical issues which are relevant in this context:

(a) The timetable for the claims resolution process only begins to run from the date of service of the statement of particulars on the last of the original defendants. We are concerned that, in practice, a statement of claim in such matters is filed but often not served on the defendant until much later in the process. The statement of particulars is a detailed document, requiring plaintiffs' solicitors to take extensive instructions and obtain evidence such as medical reports. It is served on defendants at the same time as the statement of claim. This often results in defendants not being aware of a claim until it has become very urgent due to the declining health of a plaintiff. This delay in notification of a claim having been filed creates difficulties for the defendant in that there is little to no opportunity to investigate claims. It also places strain on the limited resources of the Tribunal.

(b) Mesothelioma is notorious for its capacity to aggressively deteriorate without warning.

We recommend that the procedure be modified for malignant claims, which would compel such claims to be listed for directions by the Tribunal within seven days of the statement of claim being filed. The Tribunal should then exercise its discretion in the making of orders for the usual steps to be taken in the claims resolution process, with appropriate modifications. For example, a date by which the plaintiff completes the statement of particulars so far as exposure allegations are concerned, with particulars of quantum to be supplied at a later date. Orders can also be made for other steps, such as the filing of Replies, cross claims,

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[2] *(re Dawson) Novek v Amaca Pty Limited* [2008] NSWDDT 12.

referral to a Contributions Assessor and mediation. In this way, all of the advantages of the claims resolution can be retained.

2. Designated insurer

Section 151AB of the *Workers Compensation Act 1987* (NSW) ("Act") provides, with respect to dust diseases and other specified conditions, that for the purpose of any policy of insurance obtained by an employer, the employer's liability is taken to have arisen "when the worker was last employed by the employer in employment to the nature of which the disease was due".[3] Section 151AC of the Act provides that, if there is a dispute as to which of two or more insurers is liable to indemnify the employer under s 151AB, then, pending resolution of the dispute, the insurer designated either in accordance with s 151AC(3) or by the Tribunal is to be treated as the insurer liable to indemnify the employer for the purposes of s 151AB. Part 7 of the Act provides for an Insurers' Guarantee Fund, created by s 227, under the control of the State Insurance Regulatory Authority ("SIRA"), whose purpose is to provide a safety net in circumstances where the insurer is unable to meet its liability under its policies.[4] However, following a decision of the NSW Court of Appeal,[5] SIRA is not capable of being designated an insurer for the purposes of ss 151AB and 151AC. In effect, this leaves an employer without insurance coverage.

We recommend an amendment to the Act and/or Regulation deeming SIRA to be an "insurer" for the purposes of ss 151AB and 151AC of the Act. Furthermore, we recommend that clause 18 of the Regulation be amended to insert a new subclause 2(k) providing that the Tribunal may hear and determine an application seeking an order that an insurer (which would include SIRA) be a designated insurer for the purposes of s 151AC of the Act.

3. Dubious cross claims

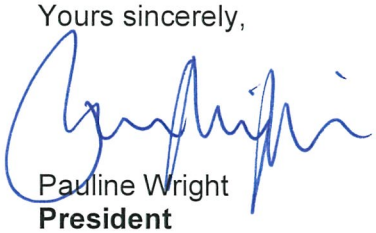
We note that, in a number of instances, defendants file contribution claims where it is obvious that a cross defendant will have an insignificant share of liability. Clause 56 of the Regulation provides a strong cost disincentive to a cross defendant challenging its apportioned share under a Contributions Assessment Determination.

There are instances where a cross defendant has been apportioned as little as less than 1%.

We recommend that the Regulation provide that, in cases where a cross defendant is apportioned less than 5% in a Contributions Assessment Determination, the cross claimant should pay the costs of the cross defendant, unless the Tribunal orders otherwise.

Thank you for considering this submission. Should you have any questions, please contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or liza.booth@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

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[3] Section 151AB(1)(a) of the Act.
[4] *University of New South Wales v AAI Limited* [2014] NSWCA 153, para 20.
[5] Ibid.