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By email: asbestosreview@dpc.nsw.gov.au

Mr Anthony Lean
Policy Manager
Legal Branch
Department of Premier and Cabinet
Review of the Dust Diseases Claims Resolution Process
G P O Box 5341
SYDNEY NSW 2001

Dear Mr Lean

Review of Dust Diseases Claims Resolution Process

Please find enclosed a submission prepared by the Law Society's Dust Diseases Tribunal Working Group about the operation of the Claims Resolution Process.

The Society greatly appreciates the opportunity to contribute to the Review.

Yours sincerely

Joe Catanzariti
President

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SUBMISSION

DUST DISEASES TRIBUNAL WORKING GROUP

REVIEW OF THE DUST DISEASES CLAIMS RESOLUTION PROCESS

ISSUES PAPER DECEMBER 2008

23 FEBRUARY 2009

About the Law Society and the Dust Diseases Tribunal Working Group

The Law Society of New South Wales is the professional association representing the solicitors of New South Wales. The Law Society has two primary responsibilities: it acts as the profession's licensing and regulatory authority and also represents the interests of its members. The role of the Society is summarised by the objectives set out in the Memorandum and Articles of Association, which include:

- To consider, originate and promote reform and improvements in the law;
- To remedy defects in the administration of justice;
- To effect improvements in administration or practice;
- To represent generally the views of the profession;
- To preserve its integrity and status;
- To suppress dishonourable conduct or practices;
- To consider and deal with all matters affecting professional interests of members of the Society.

The role of the committees of the Law Society is to review new legislation, both State and Federal; monitor law reform proposals and other developments in law and practice; and provide a practice support function by responding to practitioners' enquiries on matters of law and practice.

Members of the **Dust Diseases Working Group** are legal practitioners with wide experience in the Dust Diseases Tribunal jurisdiction. Their expertise has been developed in representing the interests of both plaintiff and defendant clients.

This submission contains the considered views of the Dust Diseases Tribunal Working Group.

LAW SOCIETY OF NSW
DUST DISEASES TRIBUNAL WORKING GROUP

REVIEW OF DUST DISEASES CLAIMS RESOLUTION PROCESS

INTRODUCTION

The legal practitioners comprising the Dust Diseases Tribunal Working Group are pleased to be able to participate in the Current Review.

As a matter of general comment, the practitioners agree that the Claims Resolution Process works well. They believe that CRP and the Tribunal are best supported where parties are represented by experienced practitioners.

In this submission, the Working Group responds to a number of the issues raised by the Review in its Issues Paper. The Working Group has also taken the opportunity to present the Review with a number of its own proposals for consideration.

Flexibility of CRP – Tribunal discretion

For a small but significant proportion of cases – perhaps 10% to 15% - the Working Group suggests that the interests of the administration of justice would benefit from providing greater discretion in the Tribunal in a number of areas:

- Removal of urgent claims – for example, the Tribunal should take into account the need to consider the fragility and mental capacity of the plaintiff in relation to being able to give evidence;
- Transitional cases where no action has been taken on a matter within a reasonable period of time;
- Contributions apportionment disputes;
- Opportunity to apply to Tribunal for directions (see comments below in relation to Issue 35).

CHAPTER 3 COMMENCEMENT OF PROCEEDINGS AND THE CRP

3.1 Serving the Statement of Claim and Statement of Particulars – Issue 2

Defendant practitioners within the Working Group expressed a strong preference for receiving Statements of Claim as soon as practicable, and if necessary, prior to Statements of Particulars being completed and available. This would aid the early investigation of matters and relieve some of the pressure they feel meeting timetable obligations under the CRP. Plaintiff practitioners within the Working Group, while appreciating the desire for defendants to commence investigations as early as possible, were concerned about the potential unfairness that ordering the early service of

Statements of Claim could create, including that defendants could begin to incur costs in prematurely investigating claims.

The Working Group discussed the issue at some length but was unable to reach a final view to resolve this tension. However, the Working Group agreed that if the review was minded to consider time limits within which a Statement of Claim is required to be served, the following matters should be taken into account:

- It is common practice for plaintiff solicitors to file Statements of Claim to protect the plaintiff's damages, soon after taking instructions, even though further investigations may be necessary to verify those instructions. The Working Group believes that having regard for the nature of the claims brought in the Tribunal this practice should not be criticised. The Working Group also noted, in this connection, that plaintiffs have up to 28 days in which they can amend a Statement of Claim as of right, without the need for either leave of the Tribunal or consent from the other side.
- If any limit is imposed, it would be appropriate to provide some mechanism whereby a plaintiff could make an application to the Tribunal to seek an extension of that limit in an appropriate case (such as when further information is being sought to verify instructions or confirm a diagnosis, such information being unable to be obtained within the time permitted by the time limit).

CHAPTER 3 COMMENCEMENT OF PROCEEDINGS AND THE CRP

3.4 Removal of claims from the CRP - Urgent Claims- Issue 5

On the application of a plaintiff, the Tribunal is empowered to order the removal of a claim from the CRP, if the Tribunal is satisfied that the claim is urgent.

However, Clause 22(2) of the *Dust Diseases Tribunal Regulation* 2007 (the Regulation) sharply limits the matters the Tribunal can consider in deciding whether a claim is urgent. Essentially, a claim is only urgent if there is medical evidence that the plaintiff would likely pass away before the claim could be determined by the Tribunal, if it were to remain in the CRP. The Tribunal has taken the view that this test can only be met by medical evidence demonstrating that the Plaintiff is likely to pass away within 3 months.

Accordingly, to have a claim removed from the CRP, it is necessary to obtain medical evidence as to the plaintiff's prognosis. This can be difficult to do at short notice. It has been our experience that treating doctors can be reluctant to give an opinion about a plaintiff's prognosis, at the level of specificity that is required by the Regulation. Furthermore, in the necessarily hasty circumstances in which these opinions are sought, it is most unlikely that a doctor would adopt the Expert Witness Code of Conduct.

Working Group proposal:

> In our view, Clause 22 should be amended to provide the Tribunal with a greater discretion in the matters it can consider in determining whether a claim is urgent. It would be possible to deal with these issues by way of a modest amendment to Clause 22(1) as follows.

Removal of certain claims from Claims Resolution Process

(1) A claim is removed from (and is therefore not subject to) the claims resolution process if:-

a) The Tribunal determines, on application by the claimant and on the basis of:-

i) Medical evidence presented for the claimant (such evidence not required to comply with Part 31 of the Uniform Civil Procedure Rules); or

ii) The Tribunal being satisfied that an oral medical opinion has been expressed but despite reasonable effort the claimant has been unable to obtain that medical opinion in writing

that the claim is urgent.

CHAPTER 5 INFORMATION EXCHANGE

5.1 Adequacy of the Statement of Particulars and Reply - Issue 15

Practitioners are of the view that the Statement of Particulars (SOP) is adequate in the information that is to be provided. All parties should attempt to provide full particulars at an early stage.

If parties are required to serve SOP only when fully complete this will delay the service of the Statement of Claim and cause further delays to defendants in completing investigations on liability.

Practitioners are concerned that, if parties are required to prepare, file and serve updated SOP, this will cause legal costs to increase.

Practitioners suggest that parties should continue to update particulars by correspondence as they come to hand.

CHAPTER 7 CONTRIBUTIONS ASSESSMENT

7.2 Overall operation of the contributions assessment process – Challenging contributions assessments – Issue 23

The Working Group proposes that Clause 52(1) of the Regulation requires clarification. Practitioners respectfully suggest that its meaning remains unclear. The provisions for challenging the Determination of a Contributions Assessor are also confusing and there remains uncertainty as to how they operate. The Working Group is aware of a number of discussions in open Court as to exactly how a Contributions Assessment is challenged by a defendant not satisfied with the liability apportioned to his/her client.

As the Working Group understands it, there are a number of current theories as to how it is that a challenge to the determination of a Contributions Assessor might operate:

1. A Cross Claim is issued in the matter proceeding in the Tribunal as a Section 5 contributions claim – this is the approach that makes sense to the Working Group

as being the appropriate approach although this is by no means clear given the wording of Regulation 52.

2. Justice Handley makes a comment in the matter of *QBE Australia v Wallaby Grip & Ors (2007)* NSWCA 43 that a cause of action arises in the nature of a claim for restitution.

3. The Tribunal is required to conduct an administrative review such that a Judge of the Tribunal redoes the assessment applying the standard presumptions – this would seem to not make much sense but is a possible interpretation.

In light of the competing theories, clarification as to the meaning of Clause 52 is sought.

7.3.1 Impecunious defendants and indivisible injuries - Contributions Assessment and Joint and Several Liability – Issue 24

In some cases, the Contributions Assessment (CA) process can create problems in the plaintiff's claim.

It has been suggested by some defendant practitioners that a CA is binding not just among defendants and cross defendants, but also on the plaintiff. This is said to be a result of Clause 49(8) of the Regulation, which reads:

> *"(2) A determination of a Contributions Assessor under this Division cannot be challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings. This subclause does not prevent the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment."*

Problems can arise in cases where one of the defendants is an insurer, standing in the shoes of an entity with only limited cover. This can be seen in the following example:

In a claim, there are two defendants, which are concurrent tortfeasors. The CA has determined the defendants are equally liable. Damages in the claim assess at $300,000, however defendant A is an insurer, acting for a deregistered company which had a common law policy of only $50,000. If the CA is binding on the plaintiff, it could be said that the Plaintiff would only be entitled to $200,000 in damages, comprised of $50,000 from defendant A (being the limit of the policy) and $150,000 from defendant B (being their 50% contribution). If the CA is not binding on the plaintiff, he would be entitled to his verdict of $300,000.

Working Group proposal:

In our view, a modest amendment should be made to Part 4, Division 5 of the Regulation, to clarify that the CA process is not binding on the plaintiff. A possible approach would be to amend Clause 49(8) as follows:

> *"(2) A determination of a Contributions Assessor under this Division cannot be challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings. This subclause:*
> *(a) is not binding on a plaintiff;*

(b) does not change the law of causation as between a plaintiff and defendants;
(c) does not dispel the laws of joint and several liability; and
(d) does not prevent the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment."

This amendment would bring Clause 49(8) into line with Clause 52(1), and would remove from the Regulation a problem which may otherwise require appellate consideration at a later date.

CONTRIBUTIONS ASSESSMENT - APPOINTMENT OF ASSESSORS

Practitioners have given consideration to the current process of appointing assessors.

Working Group proposal:

Practitioners suggest that:

- the process of appointment should be reviewed;
- only practitioners with a number of years experience should be appointed;
- only a small panel is necessary;
- the process of objecting to appointment of an assessor should be more rigorous, with account taken of the following matters:
  - Clause 51 of the Regulation should be repealed having regard to the panel selection being an appropriate and discerning process;
  - It is not an appropriate ground having regard to the integrity of the panel that objection may be made on the basis that the CA has acted for a party to the claim in other proceedings;
  - prima facie anyone on the panel may be appointed, subject to legitimate objection guided by the principles of recusal;
  - issues of legitimate objection ought to be raised by application to the Tribunal for directions (see comment on Issue 35 below) with appropriate cost penalties.

CHAPTER 9 OPPORTUNITY TO APPLY TO THE TRIBUNAL FOR DIRECTIONS – Issue 35

Practitioners agree that it would be beneficial to enlist the aid of the Tribunal in enforcing provisions of CRP or resolving prolonged disputes. Examples of situations where CRP would benefit from the Tribunal interceding to make directions include a failure to provide proper particulars on request, delays in complying with a requirement of CRP or its timetable, for example a delay in serving documents or information, a delay in organising a mediation or there is an inability to agree on a mediator.