

NSW GOVERNMENT

# REVIEW OF THE DUST DISEASES CLAIMS RESOLUTION PROCESS

ISSUES PAPER DECEMBER 2008

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ATTORNEY GENERAL'S  
DEPARTMENT OF NSW  
& THE DEPARTMENT OF  
PREMIER AND CABINET

**Issues Paper: Review of the Dust Diseases Claims Resolution Process**

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## GLOSSARY

2004 Review	The Review of Legal and Administrative Costs in Dust Diseases Compensation Claims carried out in 2004 (and which reported in March 2005)
2006 Review	The Review of the Dust Diseases Claims Resolution Process carried out in 2006 (and which reported in January 2007)
ARPD	Asbestos-related pleural disease
CRP	Claims resolution process established by the <i>Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005</i>
Current Review	The review currently being undertaken
Data Paper for 2006-07	Data in relation to the second full 12 months during which the CRP operated, released in December 2007
Final Report of the 2004 Review	Final Report of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims – March 2005
Final Report of the 2006 Review	Review of the Dust Diseases Claims Resolution Process: Report and Proposed Regulation 2007 – January 2007
Form 3 Return	Return lodged by all legal practitioners representing parties to proceedings and self-represented litigants which provide details of costs incurred in progressing or defending a claim
Regulation	The <i>Dust Diseases Tribunal Regulation 2007</i>
Reply (Form 2)	The Reply prepared by each defendant to the plaintiff's Statement of Particulars
SCM	Single Claims Manager which may be appointed under the Regulation in multiple defendant claims to act for all defendants
Transitional claims	Claims which were commenced before 1 July 2005 and which are subject to the CRP through the operation of transitional provisions
Tribunal	Dust Diseases Tribunal

## **Chapter 1 Introduction**

### **1.1 Background**

In November 2004, the NSW Government established the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims to consider the issue of improving the efficiency with which dust diseases compensation claims are resolved.

The Review was conducted by Mr Laurie Glanfield AM, Director-General of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General of The Cabinet Office (as it then was).

The Terms of Reference for the Review required it to consider the processes for handling and resolving dust diseases compensation claims and identify ways in which legal, administrative and other costs can be reduced within the existing common law system in New South Wales.

The Review was not to consider any proposal to introduce a statutory scheme to resolve dust diseases compensation claims or which would adversely affect plaintiffs' compensation rights.

The Review released an Issues Paper in December 2004 for public comment. The Final Report of the Review was released in March 2005.

### **1.2 Final Report of the 2004 Review**

The 2004 Review concluded that reforms to the dust diseases system should be guided by the following principles.

1. Early exchange of information is the key to promoting early settlement and reducing legal costs and a claims resolution process should be designed to ensure that this happens.
2. Disputes as to contribution between defendants contribute significantly to legal costs. The claims resolution process must be designed to encourage defendants to resolve these disputes quickly and commercially, without delaying resolution of the plaintiff's claim.
3. The reforms should give defendants the tools to be commercial and to pursue early settlement so as to avoid unnecessary costs, but defendants would need to ensure that they and their lawyers use these tools.
4. The reforms should encourage early settlement so that fewer cases need to be determined by litigation before the Tribunal. For those fewer cases, the Tribunal's procedures should be streamlined and improved.

5. The new system should recognise the importance of the Tribunal. Plaintiffs must retain access to the Tribunal, especially when their claim is urgent or becomes urgent.

The Government accepted all of the recommendations of the Review.

### 1.3 The CRP

The main recommendation of the Final Report of the 2004 Review proposed the establishment of the Claims Resolution Process (CRP) to provide a mechanism to require the parties to exchange information and participate in settlement discussions. The *Dust Diseases Tribunal Act 1989* was amended to include new regulation making powers to facilitate establishment of the CRP, and the CRP was established by the *Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005* (the Regulation).

The main features of the CRP are as follows:

- (i) Plaintiffs continue to commence their claim by filing a Statement of Claim with the Tribunal. This ensures that entitlements to general damages for the plaintiff and the plaintiff's estate are preserved.
- (ii) Urgent cases (or cases which become urgent) proceed through the existing Tribunal litigation process. The Tribunal determines which claims are urgent.
- (iii) All other claims proceed through the CRP. A claim is not subject to case management by the Tribunal while the claim is proceeding through the CRP.

The key steps in the CRP are as follows.

- a. After filing (but not serving) the Statement of Claim, plaintiffs complete a standard form "Statement of Particulars", verified by statutory declaration, which includes expert reports and certain other documentary evidence. This is served with the Statement of Claim.
- b. Defendants prepare a standard form "Reply" admitting, disputing or requiring further information on each point, with documents to support the defendant's position on any point it is disputing.
- c. Defendants are required to join any other defendants as soon as practicable.
- d. Defendants seek to agree on apportionment of liability. If they cannot agree, an independent third party will apportion liability among the defendants using standard presumptions. The determination can be challenged, but only after the plaintiff's claim is settled or determined.
- e. If the claim does not resolve informally, compulsory mediation occurs between the plaintiff and defendants, conducted by a mediator.

- f. The plaintiff attends the mediation personally unless he or she is too ill. Defendant claims managers must attend if requested by the mediator.
- g. If defendants want to dispute contribution at a later date, the plaintiff can be required to give sworn evidence at the end of the mediation but only if the plaintiff's claim already has been settled with the defendants.
- h. Parties will be able to encourage settlement by using "offers of compromise". New provisions were introduced to make these more effective.

#### **1.4 2006 Review and data for 2006-07**

The Final Report of the 2004 Review recommended that the CRP be reviewed after data in relation to its first 12 months of operation are available. Accordingly, a review was initiated in August 2006 (2006 Review) and an Issues Paper was released for public comment in October 2006 (2006 Issues Paper).

The 2006 Issues Paper contained an overview of the first full 12 months of operation of the CRP in respect of claims which were commenced between 1 July 2005 and 30 June 2006. Data was also provided in respect of transitional claims which commenced before 1 July 2005.

The Final Report of the 2006 Review was released in January 2007 and made a number of recommendations for minor amendments to the CRP. These were implemented in the *Dust Diseases Tribunal Regulation 2007* which was made on 28 February 2007.

The Final Report of the 2006 Review also recommended that data in relation to the operation of the CRP be published every 12 months and consideration be given to whether a further review is required at that time, with a preference for a further review to be conducted only where there has been sufficient experience using the CRP (perhaps in July 2008).

Accordingly, data in relation to the second full 12 months during which the CRP operated (that is, between 1 July 2006 and 30 June 2007) was released in December 2007 (Data Paper for 2006-07).

At that time, a further review of the CRP was not proposed given there was only data in relation to the operation of the CRP for two years and as minor changes to the system were made only seven months before that time.

#### **1.5 The Current Review**

As the CRP has been in operation for three years, the Current Review was initiated in July 2008 to conduct a further review of the CRP, as foreshadowed in the Final Report of the 2006 Review.

The Current Review is again being conducted by Mr Laurie Glanfield AM, Director-General of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director General (General Counsel) of the Department of Premier and Cabinet.

The Current Review is to consider the overall operation of the CRP, and in particular:

- the impact of the CRP on legal, administrative and other costs; and
- whether further reforms should be implemented to reduce legal, administrative and other costs.

This Issues Paper has been prepared to facilitate discussion for the purpose of the Current Review.

This paper deals with issues in the order of the steps involved in resolving a claim under the CRP.

In July 2008, stakeholders were invited by the Current Review to raise issues for consideration in the Issues Paper. In addition, the Registrar of the Tribunal held a Practitioners' Forum in August 2008 where practitioners raised a number of issues. A transcript of the forum was made available to the Current Review by the Registrar.

In this Issues Paper, comments from plaintiff solicitors are identified as comments from "plaintiff representatives." Likewise, comments from defendants (including insurers), or lawyers representing defendants are generally identified as being from "defendant representatives." In some instances, this Issues Paper has separately identified where comments are made by lawyers representing defendants rather than from the defendants themselves. In many instances, comments from defendant lawyers will not necessarily represent the views or commercial interests of their defendant clients. This should be borne in mind where views are attributed to "defendant representatives" as this may include the views of both defendants and their legal representatives.

## **1.6 Data review**

This paper provides the same categories of information regarding the operation of the CRP as were provided in the 2006 Issues Paper and the Data Paper for 2006-07. Given this, the same data sources that were used to provide the information in the two previous documents have been used for the purpose of this paper. These data sources are all held by the Registry of the Tribunal.

The data sources which were used include the Tribunal Registry Database and consolidated material concerning the Form 3 Returns. The Registry of the Tribunal also provided further assistance by enabling information to be obtained from various data sources it holds which record various actions taken by plaintiffs and defendants as part of the CRP.



The Current Review extends its gratitude to the Registrar and the staff of the Tribunal for their considerable assistance in relation to the data sources.

As was the case with the information which was provided in the 2006 Issues Paper and the Data Paper for 2006-07, a number of points should be noted about information which is provided in this paper.

First, some of the information provided in the Issues Paper is based on small sample sizes. The Issues Paper has sought to identify where this is the case.

Second, the information held by the Tribunal which records various actions taken by plaintiffs and defendants as part of the CRP includes all post 1 July 2005 claims once a Statement of Claim is filed. This information provides an indication of how claims have been dealt with as part of the CRP. It should be noted, however, that the data source from which this information was extracted was created as a case management tool for the Tribunal, rather than as a source of statistics. As such, the data has some limitations and some inconsistencies arise.

Third, the CRP only applies to asbestos-related claims, in particular asbestosis, asbestos-related pleural disease (ARPD), carcinoma and mesothelioma. It does not, for example, apply to silicosis claims. The information provided in this Issues Paper relates to these four conditions. It should be noted that the data includes carcinoma. It is not possible to determine from the data whether the particular condition is asbestos-related because of the way in which the data is recorded. It is likely, however, that the overwhelming majority of cases recorded in the data as carcinoma are asbestos-related. It is also noted that while the CRP applies to claims under the *Compensation to Relatives Act 1897*, this information is not included in the data.

## 1.7 Submissions

Comments are sought, not only on the issues raised, but also on any other issues concerning the operation of the CRP.

Submissions from all stakeholders are welcome. Submissions should be addressed to:

Review of the Dust Diseases Claims Resolution Process

By email: [asbestosreview@dpc.nsw.gov.au](mailto:asbestosreview@dpc.nsw.gov.au)

By mail: GPO Box 5341  
Sydney NSW 2001

For further enquiries, please contact the Department of Premier and Cabinet (Legal Branch) on (02) 9228 5599 or the Attorney General's Department (Legislation, Policy and Criminal Law Review Division) on 8061 9238.

**The closing date for submissions is Friday 20 February 2009.**

## **Chapter 2            Overview of the operation of the CRP and the Tribunal**

### **2.1    Introduction**

The CRP commenced operation on 1 July 2005. As at that date, the following claims were to be subject to the CRP:

- Claims commenced by a Statement of Claim filed on or after 1 July 2005;
- Claims commenced by Statement of Claim filed before 1 July 2005 where:
  - A hearing date for the claim had not been set before 1 July 2005 (provided the parties have not notified the Registrar in writing that the parties have agreed the CRP should not apply); or
  - All the parties have agreed that the CRP is to apply.

### **2.2    Data for 2007-08 and observations regarding data from the CRP's three years of operation**

As recommended by the Final Report of the 2006 Review, this Issues Paper provides data in relation to the third full 12 months operation of the CRP. The data for 2007-08 is provided in Appendix A.

In this chapter, the Current Review has also sought to consolidate data from the CRP's three years of operation (using data provided in the 2006 Issues Paper, the Data Paper for 2006-07 and Appendix A of this Issues Paper). It has only been possible to do this in respect of data which can be compared directly.

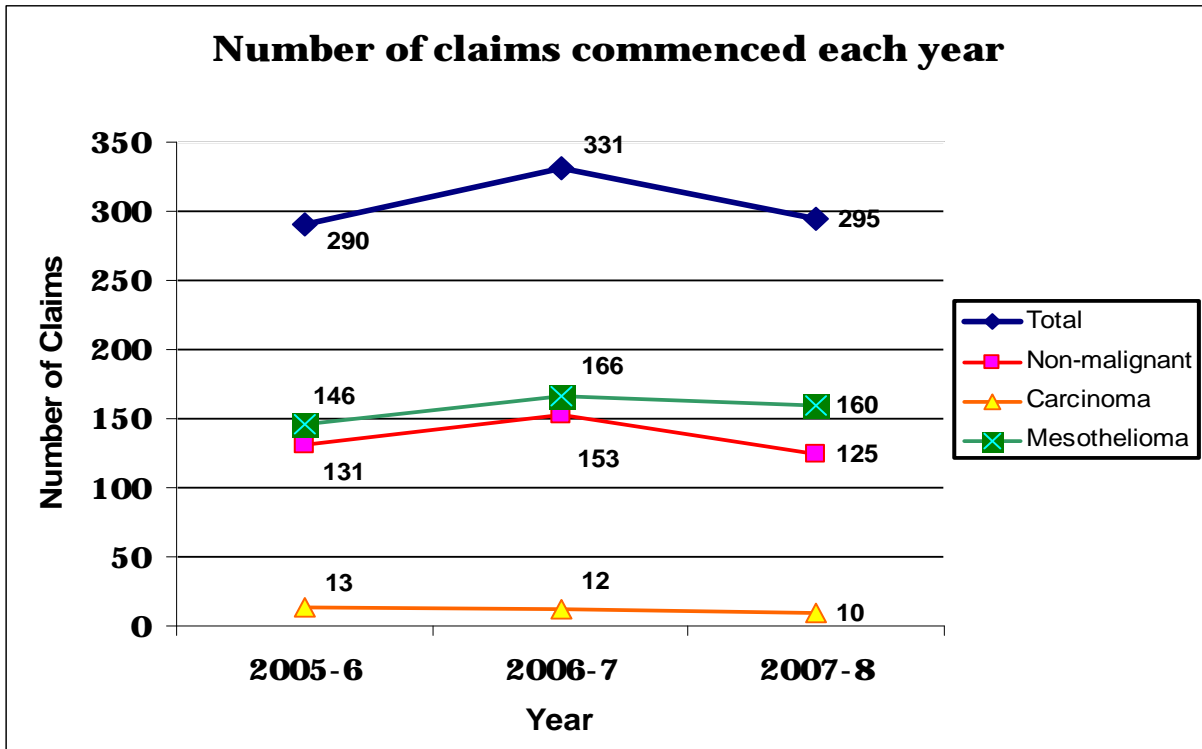
A number of observations may be made regarding this information.

#### **2.2.1    *Number of claims commenced***

The number of asbestos-related claims which have been commenced throughout the three years of operation of the CRP has remained steady. While there was an increase in the number of claims which were commenced during the second 12 months in which the CRP operated when compared with the first 12 months (that is, 331 during 2006-07 financial year compared to 290 during the 2005-06 financial year), the number of claims commenced in the third 12 months is similar to that commenced in the first 12 months of the operation of the CRP (295 during 2007-08 financial year).

The following graph shows the number of claims commenced in the three 12-month periods during which the CRP has operated. The number of claims commenced has also been broken down according to disease type.

**Graph 1** Claims commenced during each 12 month period of the CRP's operation



Source: Tribunal Claims Database

**Note 1:** There were also a number of *Compensation to Relatives Act* claims during this period, and although it is likely that these are asbestos-related, this is not separately identified by the Tribunal Claims Database. There were also a number of claims for other conditions. Although these claims may be asbestos-related, this is not separately identified by the Tribunal Claims Database and so have not been included.

### 2.2.2 Finalisation of claims

The finalisation rate for claims which were commenced and resolved (whether by settlement or judgment) in the same financial year has increased. The finalisation rate has increased from about 23% for both the 2005-6 and 2006-07 financial years to about 31% of claims which were commenced during the 2007-08 financial year.

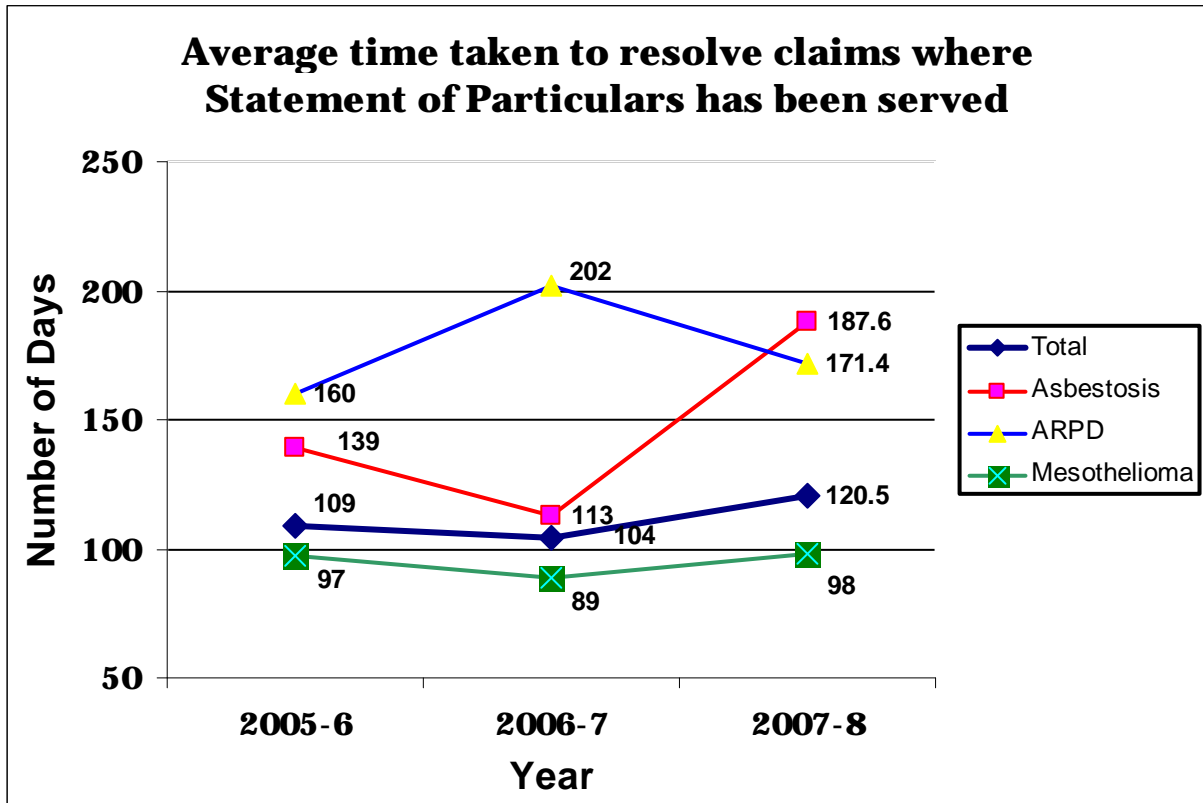
The number of claims which were settled while subject to the CRP has increased. This result is obtained by comparing the number of claims which were settled while subject to the CRP during the same financial year in which the claim commenced, over the three years of operation of the CRP. While the number decreased in the second 12 months of the CRP when compared to the first 12 months (down from 18.8% to 16.3%), during the third 12 months of the CRP the number of claims which were settled while subject to the CRP increased to 20.7%.

The average time taken to resolve claims where a Statement of Particulars has been served appears to have increased slightly. This is the case when comparing claims which were commenced during the 2005-06 financial year and resolved up to

31 August 2006, claims which were commenced during the 2006-07 financial year and resolved during that period and claims which were commenced during the 2007-08 financial year and resolved during that period.

This information is shown in the following graph which includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Graph 2** Calendar days taken to finalise a claim from service of the Statement of Particulars for claims commenced in the 2005-06 financial year which resolved up to 31 August 2006, claims which were commenced and resolved in the 2006-07 financial year and claims which were commenced and resolved in the 2007-08 financial year



Source: Tribunal Registry

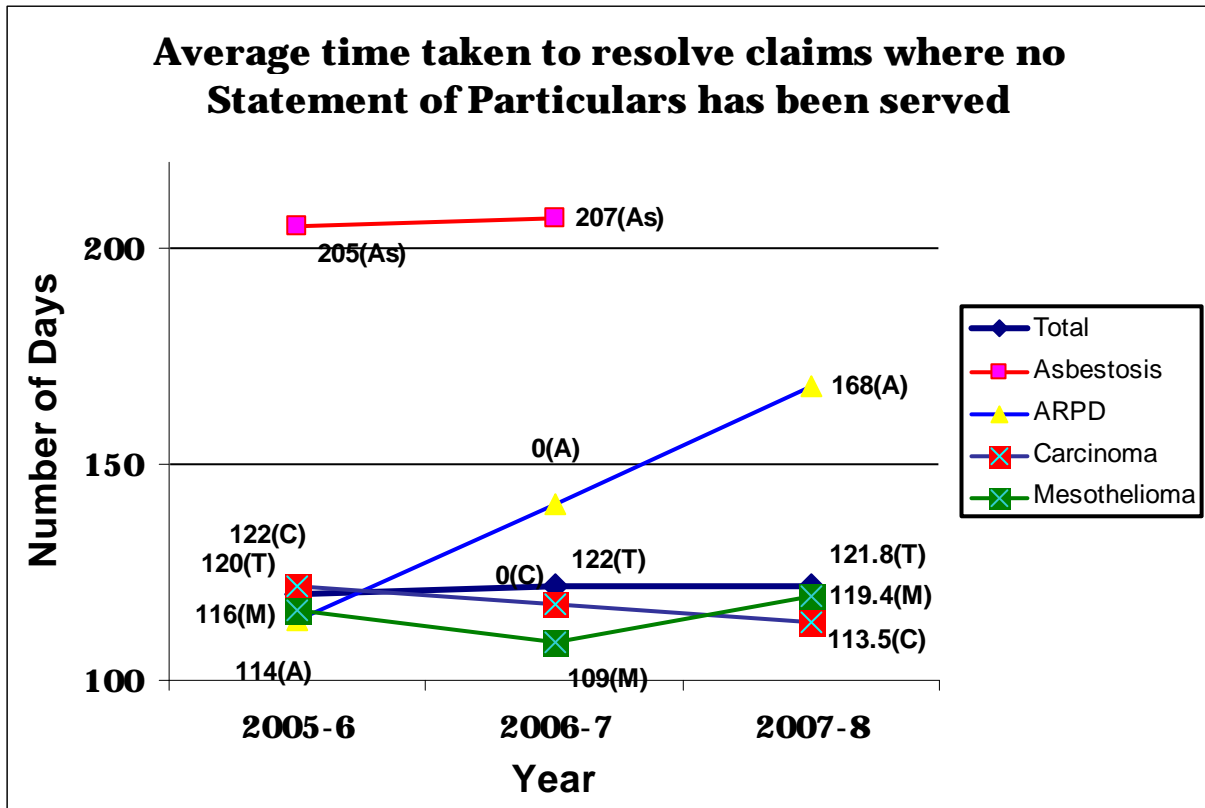
**Note 1** There were no carcinoma claims which were commenced and resolved during the relevant periods where a Statement of Particulars had been served.

**Note 2** The information for ARPD claims is based on very small sample sizes (2 claims for 2005-06, 4 claims for 2006-07 and 5 claims for 2007-08).

The average time taken to resolve claims without serving a Statement of Particulars, however, appears to be about the same overall. This is the case when comparing claims which were commenced during the 2005-06 financial year and resolved up to 31 August 2006, claims which were commenced during the 2006-07 financial year and resolved during that period and claims which were commenced during the 2007-08 financial year and resolved during that period.

This information is shown in the following graph which includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Graph 3** Calendar days taken to finalise a claim from filing of the Statement of Claim in claims where a Statement of Particulars has not been served - claims commenced in the 2005-06 financial year which resolved up to 31 August 2006, claims which were commenced and resolved in the 2006-07 financial year, and claims which were commenced and resolved in the 2007-08 financial year



Source: Tribunal Registry

**Note 1** There were no ARPD or carcinoma claims which were commenced and resolved in the 2006-07 financial year without serving a Statement of Particulars. There were also no asbestosis claims which were commenced and resolved in the 2007-08 financial year without serving a Statement of Particulars.

**Note 2** Except for mesothelioma, the information for all disease types is based on very small sample sizes.

### 2.2.3 Service of Statement of Particulars

The proportion of claims in which a Statement of Particulars was served in the same financial year in which the Statement of Claim was filed has increased. It has increased from 28% (for claims which were commenced and served in the 2005-06 financial year) to 35% (for claims which were commenced and served in the 2006-07 financial year) to 39% (for claims which were commenced and served in the 2007-08 financial year).

#### 2.2.4 *Plaintiff costs*

It should be noted that in this section, costs for the 2005-06 and 2006-07 financial years have been adjusted for inflation to show the costs in terms of 2007-08 financial year dollars using the Australian Bureau of Statistics' Producer Price Indexes, Australia, June 2008 using the legal services index.

It should also be noted that although costs in this section are described as being "incurred by plaintiffs", costs are usually ultimately borne by defendants in the settlement or determination of a claim.

Legal and other costs incurred by plaintiffs in single defendant claims for claims which were resolved in the 2005-06 financial year compared with claims which were resolved in the 2006-07 and 2007-08 financial years (that is, during the CRP's three years of operation) have remained fairly stable. This includes claims finalised by settlement and by judgment, however, the costs exclude transitional claims which were commenced prior to 1 July 2005.

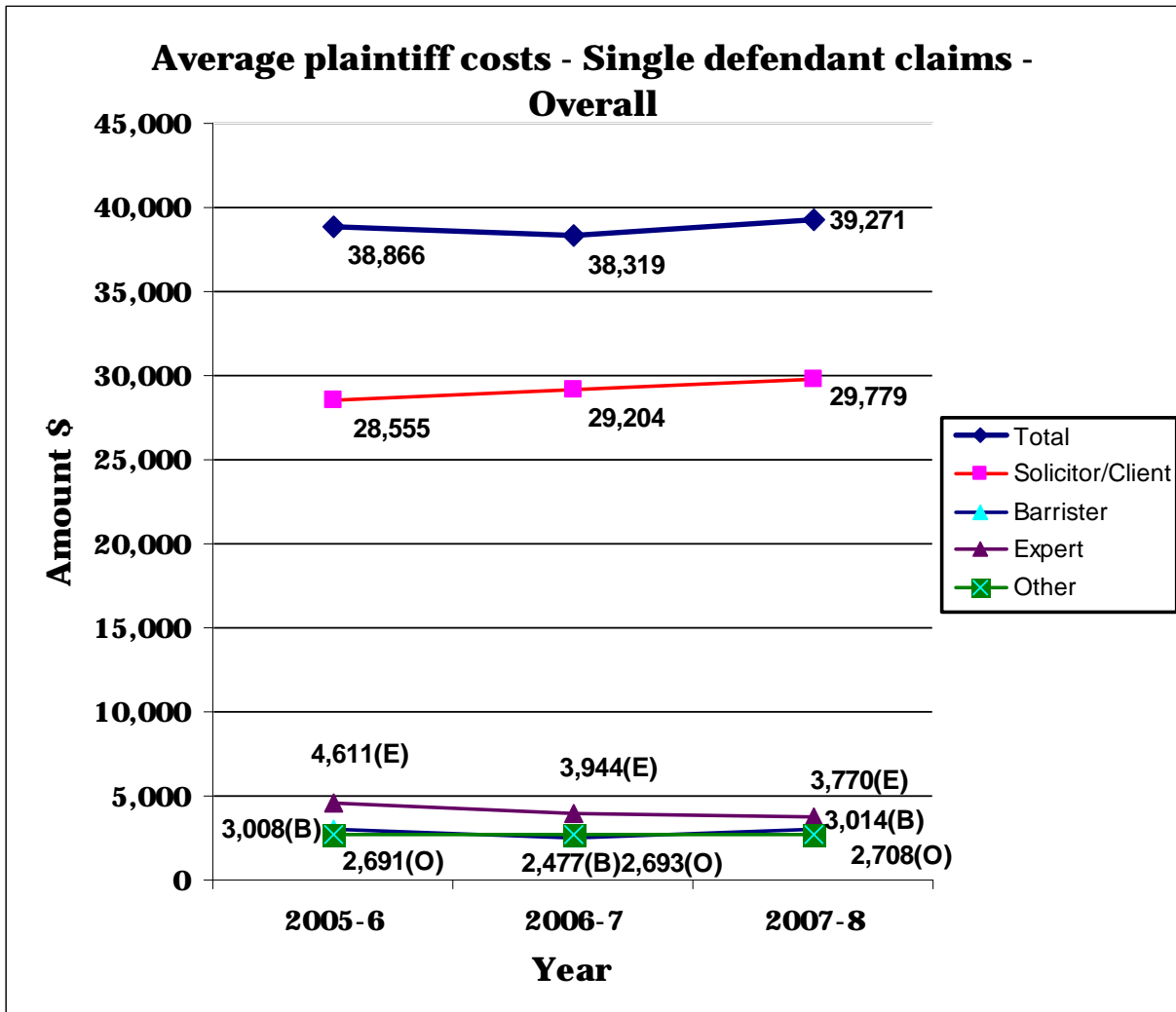
When the costs are broken down into categories, there appears to be negligible increases in barristers' fees and other disbursements which include the costs of photocopying, facsimiles, filing fees, stationery, couriers and travel between 2005-06 and 2007-08. There has been an increase in solicitor-client costs over the same period, while the costs of expert reports has decreased.

There appears, however, to be an increase in legal and other costs incurred by plaintiffs in multiple defendant claims when claims which were resolved in the 2005-06 financial year are compared to the 2007-08 financial year. Again transitional claims were excluded from these costs. There appear to be increases in all of the categories of costs, except for other disbursements.

In calculating the average amount for each category of cost, claims were included only where an amount has been identified in the Form 3 Return for solicitor-client costs. This was because some returns had indicated that this amount still was to be advised or confirmed (for example, where the costs are still to be agreed or assessed).

The following graph shows the average costs incurred by plaintiffs in single defendant claims which were resolved in each financial year of the CRP's operation.

**Graph 4** Average plaintiff legal and other costs for claims finalised during the 2005-06 financial year, claims finalised during the 2006-07 financial year and claims finalised during the 2007-08 financial year – Single defendant claims



Source: Form 3 Returns

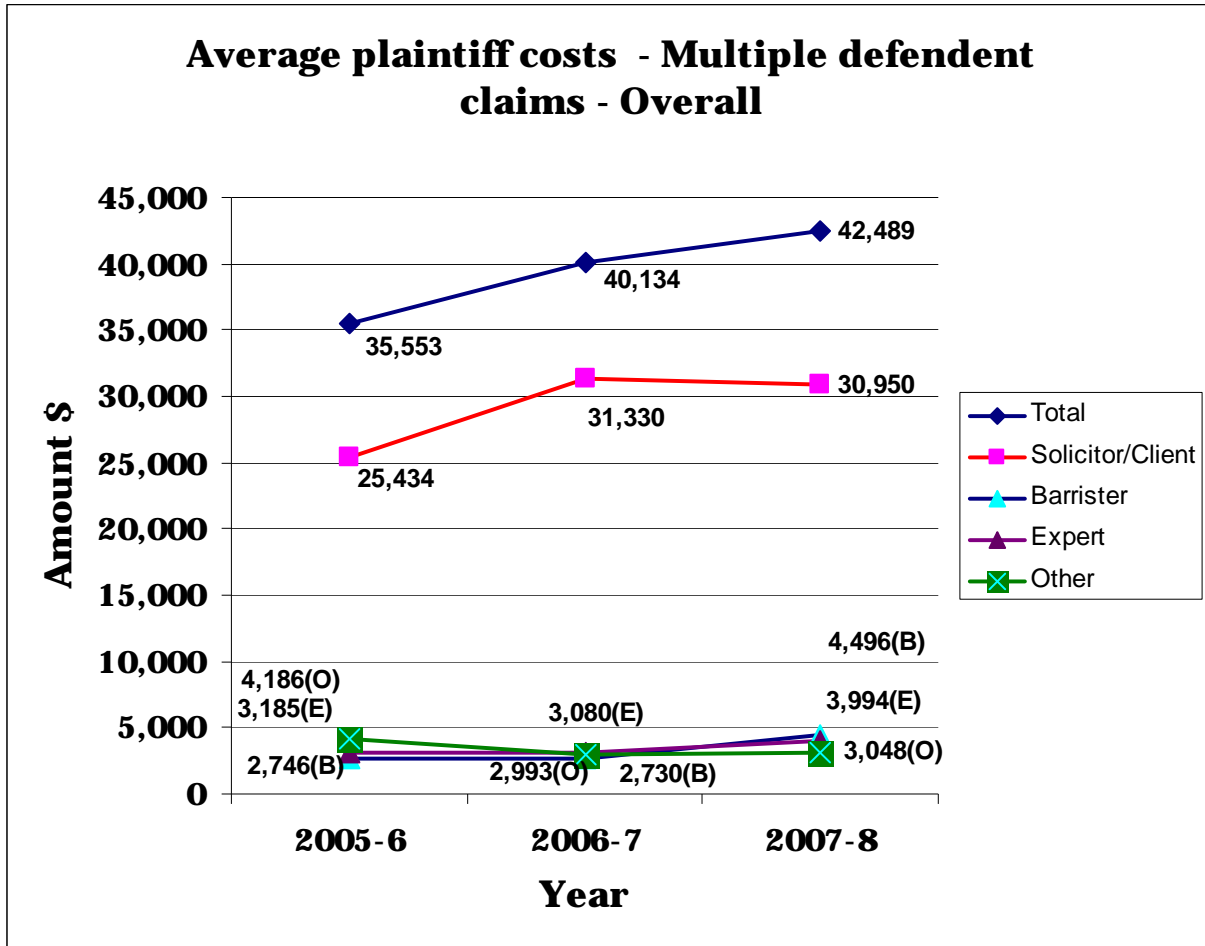
**Note 1** Claims which were commenced prior to 1 July 2005 have been excluded from these costs.

**Note 2** Costs for 2005-06 are based on 52 claims, for 2006-07 are based on 125 claims and for 2007-08 are based on 110 claims.

**Note 3** Costs for 2005-06 and 2006-07 have been adjusted for inflation to show the costs in terms of 2007-08 figures using the Australian Bureau of Statistics' Producer Price Indexes, Australia, June 2008. In particular, the costs were adjusted using the price index for legal services given the majority of costs are legal costs. The price index for legal services for June 2006 was 135.1, for June 2007 was 141.2 and for June 2008 was 148.6. These were converted to the following percentages; 4.5% for 2006-07 and 5.2% for 2007-08.

The following graph shows the average costs incurred by plaintiffs in multiple defendant claims which were resolved in each financial year of the CRP’s operation.

**Graph 5** Average plaintiff legal and other costs for claims finalised during the 2005-06 financial year, claims finalised during the 2006-07 financial year and claims finalised during the 2007-08 financial year – Multiple defendant claims



Source: Form 3 Returns

**Note 1** Claims which were commenced prior to 1 July 2005 have been excluded from these costs.

**Note 2** Costs for 2005-06 are based on 11 claims, for 2006-07 are based on 54 claims and for 2007-08 are based on 105 claims.

**Note 3** Costs for 2005-06 and 2006-07 have been adjusted for inflation to show the costs in terms of 2007-08 figures using the Australian Bureau of Statistics’ Producer Price Indexes, Australia, June 2008. In particular, the costs were adjusted using the price index for legal services given the majority of costs are legal costs. The price index for legal services for June 2006 was 135.1, for June 2007 was 141.2 and for June 2008 was 148.6. These were converted to the following percentages; 4.5% for 2006-07 and 5.2% for 2007-08.

The Current Review notes that graphs 4 and 5 show the legal and other costs incurred by plaintiffs to resolve claims after the establishment of the CRP. While there is no comprehensive data set available regarding the costs of resolving claims prior to the establishment of the CRP, the Final Report of the 2004 Review contains information regarding the costs in claims involving the former James Hardie subsidiaries.

Chapter 2 of that Report shows the average plaintiff legal cost between 1995 - 2003 for claims against the former James Hardie subsidiaries, on a party/ party basis, was \$44,000. This amounts to \$55,410 when adjusted to 2007-08 financial year figures



using the following price index for legal services from the Australian Bureau of Statistics' Producer Price Indexes, Australia, June 2008.

There are some limitations with using this data for comparative purposes. This is because the James Hardie Industries -NV data records legal costs on a party/party basis and not solicitor-client costs (as is the case with the tables in this Chapter). Obviously, the solicitor-client costs are likely to be higher than the party/party costs. Also, the information was provided by James Hardie Industries NV in respect of the former James Hardie subsidiaries and therefore does not represent comprehensive data in respect of all claims. Finally, the information provided by James Hardie Industries -NV is derived from those claims where a separate amount was identified for costs. As many claims are settled on a "costs inclusive" basis, this may not be representative.

Despite these limitations, the data provided by James Hardie Industries NV still appears to indicate that there has been a significant reduction in legal costs incurred by plaintiffs in resolving their claims after the CRP's establishment when compared to the legal costs of resolving claims prior to the establishment of the CRP.

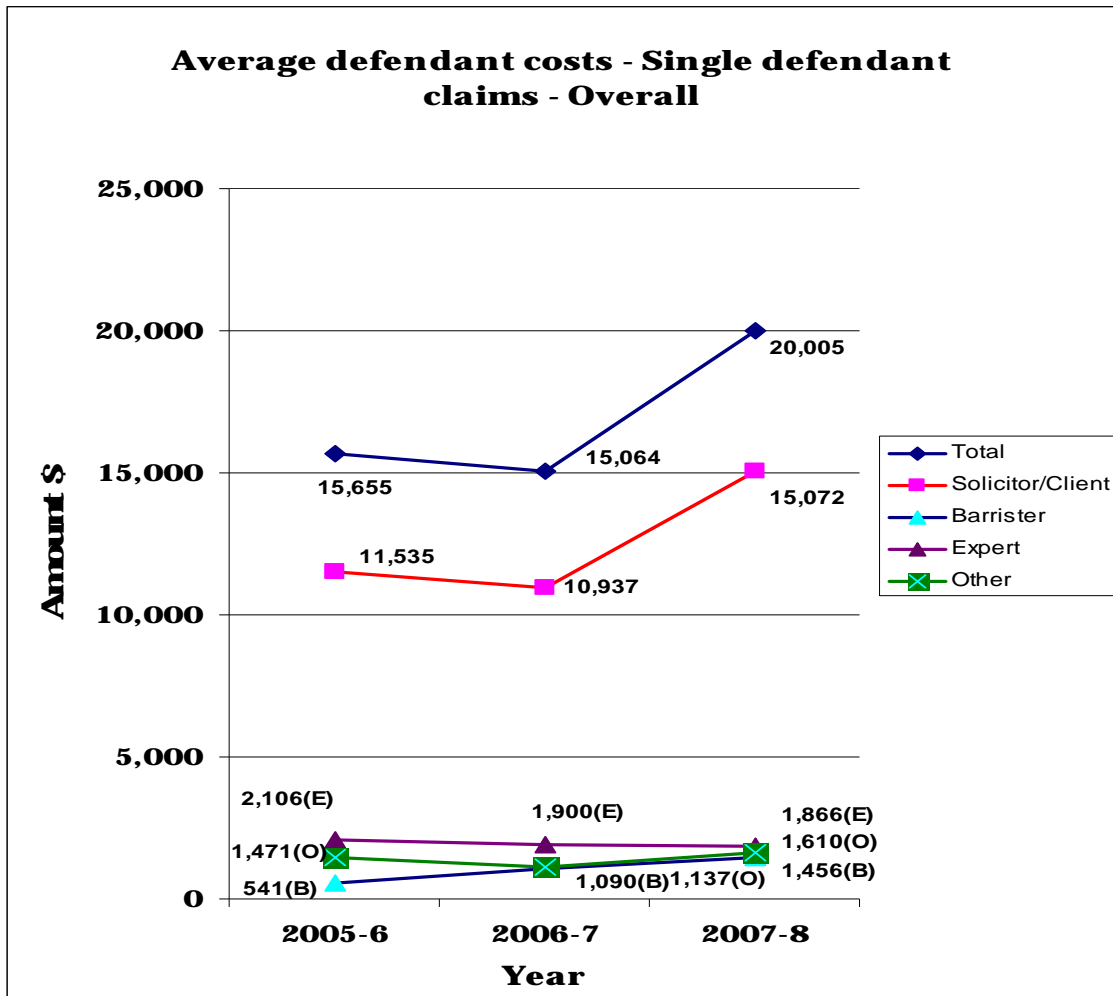
### **2.2.5 Defendant costs**

Again, costs for the 2005-06 and 2006-07 financial years shown in this section have been adjusted for inflation to show the costs in terms of 2007-08 financial year figures using the Australian Bureau of Statistics' Producer Price Indexes, Australia, June 2008, for legal services.

Although fairly stable between 2005-06 and 2006-07, defendant legal and other costs appear to have increased for single defendant claims in the 2007-08 financial year. This includes claims finalised by settlement and by judgment, however, the costs exclude transitional claims. There appear to be increases in all of the categories of costs, except for expert reports.

The following graph shows the average defendant costs for single defendant claims which were resolved in each financial year of the CRP's operation.

**Graph 6** Average defendant legal and other costs for claims finalised during the 2005-06 financial year, claims finalised during the 2006-07 financial year and claims finalised during the 2007-08 financial year – Single defendant claims



Source: Form 3 Returns

**Note 1** Claims which were commenced prior to 1 July 2005 have been excluded from these costs.

**Note 2** Costs for 2005-06 are based on 40 claims, for 2006-07 are based on 114 claims and for 2007-08 are based on 84 claims.

**Note 3** Costs for 2005-06 and 2006-07 have been adjusted for inflation to show the costs in terms of 2007-08 figures using the Australian Bureau of Statistics' Producer Price Indexes, Australia, June 2008. In particular, the costs were adjusted using the price index for legal services given the majority of costs are legal costs. The price index for legal services for June 2006 was 135.1, for June 2007 was 141.2 and for June 2008 was 148.6. These were converted to the following percentages; 4.5% for 2006-07 and 5.2% for 2007-08.

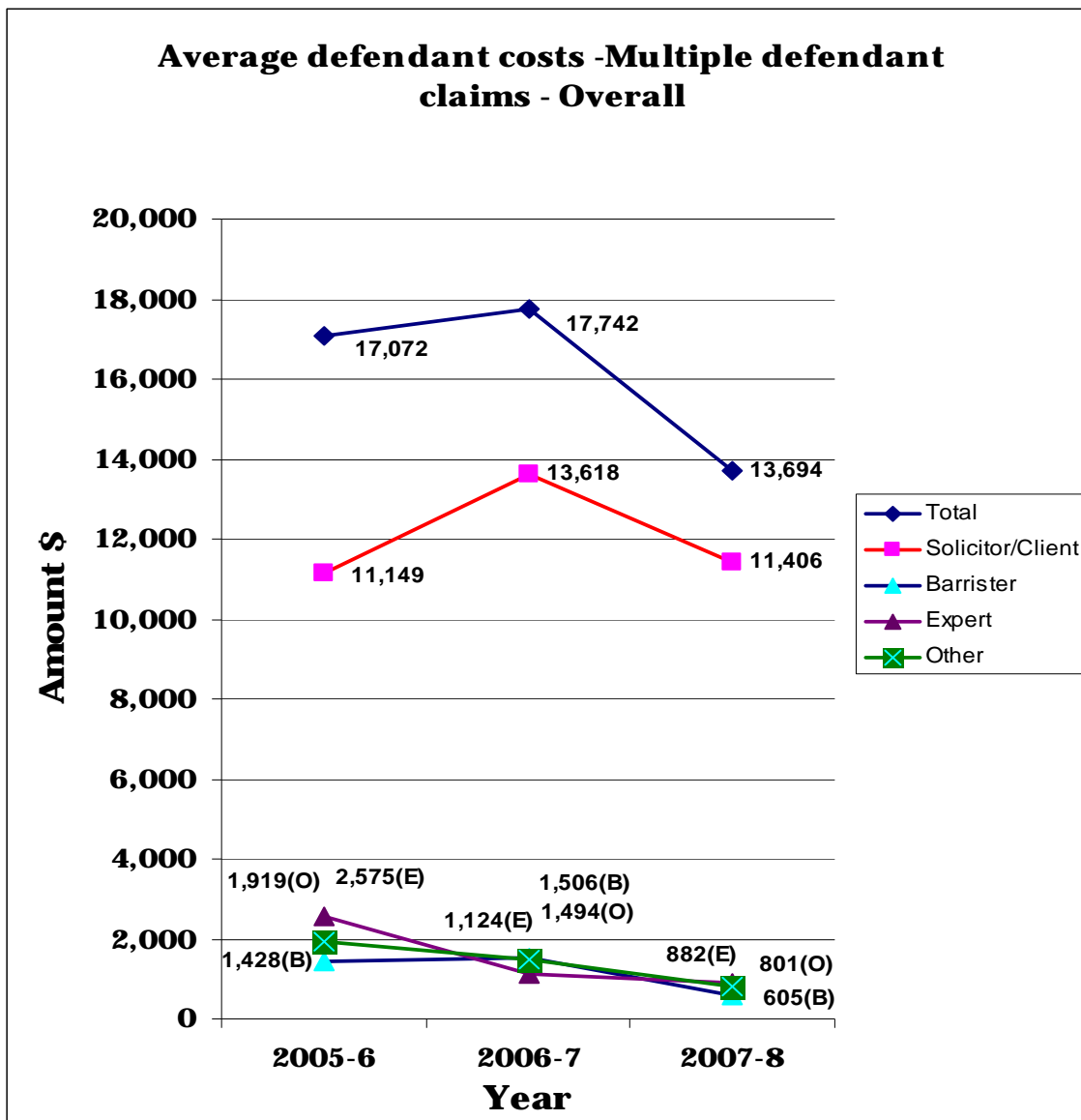
The reasons for this sharp increase in the most recent year are not clear, although it is noted that given the low number of claims involved, a small number of high cost claims (for example, test cases) could distort the overall average figures.

It appears, however, that there is an overall decrease in defendant costs of resolving multiple defendant claims when claims which were resolved in the 2005-06 financial year are compared with claims which were resolved in the 2007-08 financial year. Again transitional claims have been excluded from these costs. There appear to be decreases in all of the categories of costs, except for a modest increase in solicitor-client costs, between 2005-06 and 2007-08.

The average amounts specified are the average costs for each defendant to a multiple defendant claim. This includes claims where more than one defendant has been named in the Statement of Claim by the plaintiff, as well as defendants who were joined (either as a party to the plaintiff’s claim or by a defendant commencing a cross-claim against one or more other defendants). Claims were not included unless there had been full reporting by all defendants that were a party to the claim.

The following graph shows the average defendant costs for multiple defendant claims which were resolved in each financial year of the CRP’s operation.

**Graph 7** Average defendant legal and other costs for claims finalised during the 2005-06 financial year, claims finalised during the 2006-07 financial year and claims finalised during the 2007-08 financial year – Multiple defendant claims



Source: Form 3 Returns

**Note 1** Claims which were commenced prior to 1 July 2005 have been excluded from these costs.

**Note 2** Costs for 2005-06 are based on a small sample size of 6 claims, while the costs for 2006-07 are based on 28 claims and for 2007-08 are based on 47 claims.

**Note 3** Costs for 2005-06 and 2006-07 have been adjusted for inflation to show the costs in terms of 2007-08 figures using the Australian Bureau of Statistics’ Producer Price Indexes, Australia, June 2008. In particular, the costs were adjusted using the price index for legal services given the majority of costs are legal costs. The price index for legal services for

June 2006 was 135.1, for June 2007 was 141.2 and for June 2008 was 148.6. These were converted to the following percentages; 4.5% for 2006-07 and 5.2% for 2007-08.

Graphs 6 and 7 show defendants' legal and other costs for resolving claims after the establishment of the CRP. While data to assess defendant costs for all defendants prior to the establishment of the CRP is not available, there is comprehensive data available in relation to the former James Hardie subsidiaries.

The Final Report of the 2004 Review shows the average defendant legal cost between 1995 - 2003 for claims against the former James Hardie subsidiaries, on a solicitor-client basis, was \$43,000. This amounts to \$54,151 dollars when adjusted to 2007-08 financial year figures using the price index for legal services from the Australian Bureau of Statistics' Producer Price Indexes, Australia, June 2008; 118 for June 2003 and 148.6 for June 2008.

It needs to be emphasised that this represents the expenditure of one particular defendant (albeit one of the largest defendants) which is a manufacturer (and in many cases, an employer). Nevertheless, the data provided by James Hardie Industries NV still appears to indicate that there has been a significant reduction in legal costs for defendants to resolve claims after the CRP's establishment when compared to the legal costs of resolving claims prior to the establishment of the CRP.

### **2.2.6 Compensation received by plaintiffs**

There appears to be an increase in the net amount of compensation recovered by plaintiffs (that is, after deducting legal and other costs). This is the case when the net amount of compensation recovered by plaintiffs is compared for claims which were commenced and resolved during the 2005-06 financial year and claims which were commenced and resolved during the 2007-08 financial year.

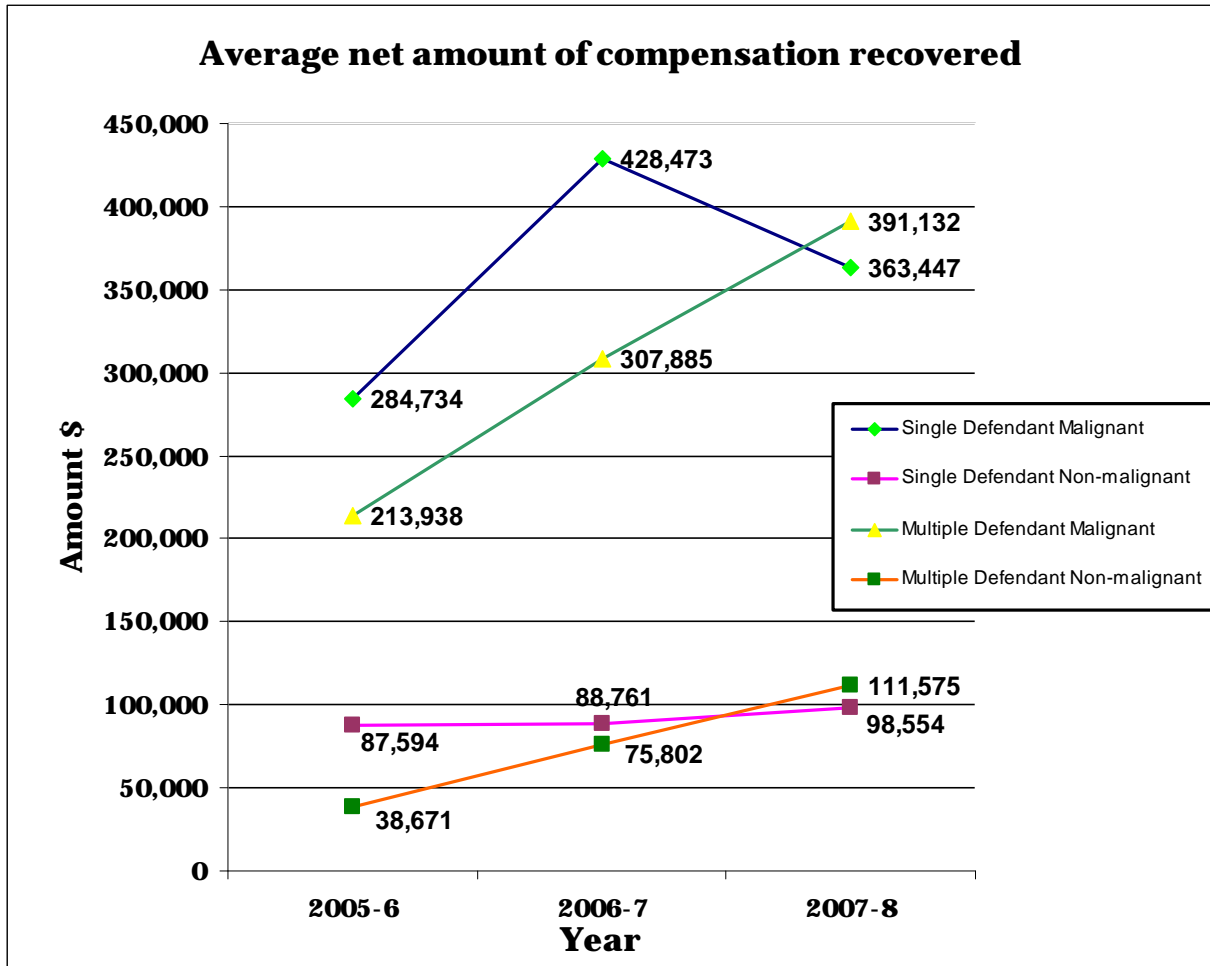
It should be noted, however, for single defendant malignant claims, there was a decrease in the net amount of compensation recovered by plaintiffs in claims which were commenced and resolved during the last financial year (2007-08) when compared to the amount recovered in claims which were commenced and resolved in the preceding financial year (2006-07). This is because there were a couple of mesothelioma claims which were commenced and resolved during the 2006-07 financial year where more than one million dollars was recovered in compensation (before costs were deducted). This was not the case for claims commenced and resolved during the 2007-08 financial year.

Nevertheless, there has been an increase in the net amount of compensation recovered by plaintiffs in single defendant malignant claims when the amount recovered in claims which were commenced and resolved during the last financial year is compared to the amount recovered in the first year of the CRP (2005-06).

The Current Review notes that the net average amounts of compensation awarded for the 2005-06 and 2006-07 financial years have been adjusted for inflation to show the amount in terms of 2007-08 figures using the Australian Bureau of Statistics' Consumer Price Index, Australia, June 2008.

The following graph shows the net amount of compensation recovered by plaintiffs for claims which were commenced and resolved during the 2005-06 financial year, claims which were commenced and resolved during the 2006-07 financial year and claims which were commenced and resolved during the 2007-08 financial year.

**Graph 8** Average amount of compensation recovered after deducting legal and other costs incurred by plaintiffs – Claims commenced and finalised during the 2005-06 financial year, claims commenced and finalised during the 2006-07 financial year and claims commenced and finalised during the 2007-08 financial year



Source: Form 3 Returns

**Note 1** The compensation amounts for 2005-06 and 2006-07 have been adjusted for inflation to show the amounts in terms of 2007-08 figures using the Australian Bureau of Statistics' Consumer Price Index, Australia, June 2008. The weighted average of the capital cities was used as follows: 154.3 for June 2006, 157.5 for June 2007 and 164.6 for June 2008.

In light of the data presented above, the Current Review welcomes submissions in relation to the overall operation of the CRP.

**Issue 1 Overall operation of the CRP**

Is the CRP operating effectively? Do stakeholders have any comments in relation to the overall operation of the CRP?

## Chapter 3 Commencement of proceedings and the CRP

### 3.1 Serving the Statement of Claim and Statement of Particulars

#### 3.1.1 Introduction

Under the Regulation, a Statement of Claim may be filed with the Tribunal, but it is not validly served on the defendant unless it is served with the Statement of Particulars. Currently under the Uniform Civil Procedure Rules, a Statement of Claim is valid for service for six months from the time it is filed with the Tribunal. Prior to 15 August 2005, this period was 12 months.

The Final Report of the 2004 Review noted that filing the Statement of Claim is critical for the plaintiff because it preserves the entitlement of the plaintiff's estate to damages for pain and suffering. If the plaintiff does not commence proceedings by lodging a Statement of Claim before he or she dies, the value of his or her claim will be significantly reduced.

The Final Report of the 2004 Review also recognised that defendants may incur unnecessary legal costs investigating claims before receiving adequate information from the plaintiff to inform their investigations.

Given these issues, the Final Report of the 2004 Review recommended the Statement of Claim should be able to be filed with the Tribunal in order to preserve the plaintiff's position in terms of damages, but that service of the Statement of Claim be deferred until the plaintiff's form containing information on the claim (the Statement of Particulars) is ready. This approach was designed to give solicitors acting on behalf of plaintiffs enough time to collate the information needed so that the defendant could properly assess the claim, even if the Statement of Claim must be filed urgently to protect the plaintiff's position and before any detailed instructions can be taken.

Concerns regarding delays in serving the Statement of Claim with the Statement of Particulars have been raised by defendant lawyers and a defendant. It is argued that there is often considerable delay between a plaintiff's solicitor filing a Statement of Claim and serving a Statement of Claim with a Statement of Particulars. This, it is argued, disadvantages defendants in the investigation and preparation of their case and this is particularly because in malignant claims a delay in service can lead to an urgent hearing before the Tribunal being sought. Further, it has been suggested that plaintiffs should be able to serve a Statement of Claim separately from a Statement of Particulars. Some defendant lawyers at the Practitioners' Forum expressed the view that plaintiffs should be encouraged or required to serve the Statement of Claim within a reasonable period of filing (even if the Statement of Particulars is not yet available) to give the defendant(s) notice of the claim and an opportunity to undertake some preliminary investigations.

Concerns regarding the delays in serving the Statement of Claim with the Statement of Particulars were previously raised and considered in the 2006 Review. Based on data in relation to the operation of the CRP during the 2005-06 financial year, the Final

Report of the 2006 Review considered that it was not necessary to make any changes at that stage as it did not appear that plaintiff solicitors were delaying service of the Statement of Claim with the Statement of Particulars.

The Final Report of the 2006 Review considered that there really is no advantage to plaintiffs in delaying service and that it is critical that plaintiffs are able to commence proceedings in order to preserve their entitlements to general damages.

The Report referred to the fact that one of the main criticisms from defendants in relation to the system in place prior to the CRP was that Statements of Claim lacked adequate information to properly assess the claim. Hence, the Final Report of the 2004 Review recommended that the Statement of Claim be served together with a Statement of Particulars. The Statement of Particulars should provide defendants with adequate information to assess the claim in a short timeframe, and some period of time must be allowed for the necessary information to be collected. The Final Report of the 2006 Review further noted that plaintiffs should be given the time they require (within reason) to build the best possible case against defendants, particularly given that this is the one and only opportunity plaintiffs have to get compensation for serious, and often fatal, injuries suffered as a result of the defendants' negligence.

### 3.1.2 Data concerning delays in service of the Statement of Claim and the Statement of Particulars

The following table was provided in the 2006 Issues Paper in relation to claims which commenced between 1 July 2005 and 30 June 2006. In relation to these claims, it shows the average time taken between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars.

**Table 1** Calendar days between lodgement of a Statement of Claim and service of the Statement of Particulars on the last original defendant for claims commenced between 1 July 2005 and 30 June 2006 – Statement of Particulars served before 31 August 2006

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	<b>104</b> <sup>1</sup>	38	16	4	46
<b>Range</b>	<b>0 - 243</b>	5 - 227	2 - 216	56 - 179	0 - 243
<b>Median</b>	<b>121</b>	160	128	57	76
<b>Average</b>	<b>111</b>	137	115	114	92

Source: Tribunal Registry

**Note 1** In order to increase the sample size, the data set used in this table includes all claims in respect of which a Statement of Particulars was served before 31 August 2006. All claims where a Statement of Particulars has been served are included in the total, regardless of the outcome of the claim (that is, settled, outstanding, removed for urgency etc).

The following table was provided last year in the Data Paper for 2006-07 in relation to claims commenced between 1 July 2006 and 30 June 2007. It shows the average time

taken between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars.

**Table 2** Calendar days between lodgement of a Statement of Claim and service of the Statement of Particulars on the last original defendant for claims commenced between 1 July 2006 and 30 June 2007 – Statement of Particulars served after 1 July 2006

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	117 <sup>1</sup>	40	19	4	54
<b>Range</b>	0 - 269	0 - 184	2 - 269	3 - 152	9 - 179
<b>Median</b>	67	137	91	52.5	50.5
<b>Average</b>	85	119	102	65	56

Source: Tribunal Registry

**Note 1** The data set used in this table includes all claims in respect of which a Statement of Particulars was served between 1 July 2006 and 30 June 2007. All claims where a Statement of Particulars has been served are included in the total, regardless of the outcome of the claim (that is, settled, outstanding, removed for urgency etc).

The following table is in relation to claims commenced between 1 July 2007 and 30 June 2008 and shows the average time taken between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars.

**Table 3** Calendar days between lodgement of a Statement of Claim and service of the Statement of Particulars on the last original defendant for claims commenced between 1 July 2007 and 30 June 2008 – Statement of Particulars served from 1 July 2007

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	114 <sup>1</sup>	36	15	2	61
<b>Range</b>	0 - 237	0 - 203	2 - 237	9 - 204	0 - 182
<b>Median</b>	61.5	76.5	121	106.5	53
<b>Average</b>	76.7	93.4	104	106.5	59.2

Source: Tribunal Registry

**Note 1** The data set used in this table includes all claims in respect of which a Statement of Particulars was served between 1 July 2007 and 30 June 2008. All claims where a Statement of Particulars has been served are included in the total, regardless of the outcome of the claim (that is, settled, outstanding, removed for urgency etc).

From the above data, there appears to have been some improvement in the time within which plaintiffs are serving their Statement of Claim with their Statement of Particulars. The average number of days taken to serve a Statement of Particulars on the last original defendant from filing a Statement of Claim has decreased from 111 days to about 77 days. In the case of mesothelioma claims, where issues of urgency are most likely to arise, the average number of days taken has decreased from 92 days to about 59 days.



It remains somewhat surprising, however, that the longest time taken to serve a Statement of Particulars in mesothelioma claims over the past three financial years ranges from 179 to 243 days.

There are also a number of claims which were pending at the end of each financial year where no Statement of Particulars had been served. Of the claims which were commenced during the 2005-06 financial year, there were 145 outstanding as at 1 July 2006 where no Statement of Particulars had been served. Of the claims which were commenced during the 2006-07 financial year, there were 167 outstanding as at 1 July 2007 where no Statement of Particulars had been served. Of the claims which were commenced during the 2007-08 financial year, there were 138 outstanding as at 1 July 2008 where no Statement of Particulars had been served.

It should also be noted, however, that claims appear to have been resolved during each financial year without a Statement of Particulars being served. There were 51 claims (of which 41 were for mesothelioma) which were commenced during the 2005-06 financial year which were resolved up to 31 August 2006 without a Statement of Particulars being filed. Likewise, there were 32 claims (of which 28 were for mesothelioma) which were commenced and resolved during the 2006-07 financial year without a Statement of Particulars being filed. Finally, there were 35 claims (of which 31 were for mesothelioma) which were commenced and resolved during the 2007-08 financial year without a Statement of Particulars being filed.

While the data provides a quantitative picture of the time which it takes to serve the Statement of Particulars, it does not address the qualitative issues around the time taken to serve the document. For example, the question arises as to whether claims are being better prepared so that they are able to be investigated and resolved more quickly? Was it necessary in particular cases for the Statement of Claim to be filed as soon as possible to minimise the risk of the plaintiff's claim being compromised?

Of the 290 claims commenced between 1 July 2005 and 30 June 2006, 15 claims were removed by the Tribunal by 30 June 2006 on the grounds of urgency.

Of the 331 claims commenced between 1 July 2006 and 30 June 2007, 24 claims were removed by the Tribunal by 30 June 2007 on the grounds of urgency.

Of the 295 claims commenced between 1 July 2007 and 30 June 2008, 23 claims were removed by the Tribunal by 30 June 2008 on the grounds of urgency.

The files for these 62 cases have been reviewed and provide a clear indication of the number of weeks between the filing of the Statement of Claim and the date when the claim was removed for urgency.

**Table 4** Number of months between filing of the Statement of Claim and removal of the claim on the grounds of urgency

	Months from filing the Statement of Claim to removal for urgency					
	Less than 1 month	After 1 month, but before 2 months	After 2 months but before 3 months	After 3 months, but before 4 months	After 4 months, but before 5 months	More than 5 months
No of claims removed for urgency	36	13	6	3	1	3

**Source:** *Tribunal Registry*

**Note** The position in relation to one claim was unclear.

It does not appear from this data that plaintiffs' solicitors are 'gaming' the system and not serving the Statement of Claim with their Statement of Particulars until months later when the plaintiff's condition has deteriorated. In the majority of cases, applications to remove a claim for urgency are being made and claims removed from the CRP, shortly after filing a Statement of Claim. There are a small number of cases, however, where the time taken between filing the Statement of Claim and removal of the claim on the basis of urgency seems rather long. It is not clear from the data above, however, whether the application to remove a claim for urgency was being made in these cases where a long period of time has elapsed from filing the Statement of Claim because of a sudden change in the plaintiff's health.

### 3.1.3 *Is there a need for amendments?*

As noted above, the Uniform Civil Procedure Rules provide that Statements of Claim are valid for service for six months after being filed. As noted in the 2006 Review, while it is possible that this period could be shortened, this may detract from the quality of the Statement of Particulars. This might result in increased costs for defendants as they would not have sufficient information to properly investigate the claim.

As noted in the 2006 Review, the Current Review reiterates that if a case could be made out, options which could be considered include the following:

- An express obligation could be introduced to require the Statement of Particulars to be completed and served as soon as practicable with the Statement of Claim.
- Cost sanctions could be applied in respect of cases which are removed on the grounds of urgency where more than a specified period has elapsed since the Statement of Claim was filed. Any cost sanction would need to be imposed by the Tribunal, and the issue would arise as to whether it should be discretionary so that the individual circumstances of the case can be considered.
- Early notification of the claim could be required, for example, at or around the time that the Statement of Claim is filed or plaintiffs could be required to serve

the Statement of Claim within a reasonable period of filing (even if the Statement of Particulars is not yet available).

The options in the last dot point might allow a defendant to carry out investigations to enable it to respond more quickly to the claim when the Statement of Particulars is served, and notify potential cross defendants. One of the key reasons, however, that the Final Report of the 2004 Review recommended the introduction of the Statement of Particulars was that defendant representatives (including both defendants and defendant lawyers) had argued that Statements of Claim lacked sufficient information to enable proper investigations to be undertaken. Accordingly, the Final Report of the 2004 Review recommended that a Statement of Claim be served with a Statement of Particulars. If, as suggested by some defendant lawyers, early notification of a claim were to be given by plaintiffs or a Statement of Claim served without a Statement of Particulars, it could result in unnecessary costs for defendants if the solicitors commence investigations before the relevant information is provided by the plaintiff in the Statement of Particulars. It appears, however, that a number of claims are being settled by parties without the defendants insisting on the requirement for a Statement of Particulars.

## **Issue 2      Delays in serving the Statement of Claim and Statement of Particulars**

Does the period between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars cause any difficulties for defendants? What are they?

Could the period be reduced or made subject to specified limits, without creating unfairness to plaintiffs? How?

Should plaintiffs be encouraged or required to serve the Statement of Claim within a certain period of filing, even if the Statement of Particulars is not yet available?

Do parties, in some circumstances, not follow the requirements of the CRP as to Statements of Particulars? If so, in what circumstances? Does this help or hinder resolution of claims?

### **3.2 Operation of the CRP in relation to malignant claims**

As is the case with non-malignant claims, malignant claims are subject to the CRP until they either settle or are removed from the CRP on one of the prescribed grounds set out in the Regulation. Accordingly, the Tribunal, generally, does not have jurisdiction over malignant claims unless a claim is returned to the Tribunal after completing the CRP without being settled or is removed from the CRP, for example, on the grounds of urgency.

Concerns have been raised, including by the Tribunal, in relation to the operation of the CRP in relation to malignant claims.

In particular, one stakeholder contends that as the Tribunal cannot deal with a malignant claim until the CRP is exhausted or a claim is removed from the CRP this can lead to two main problems. The first is that plaintiffs die before their cases are finalised. The Tribunal has also raised this concern.

The second concern is that when the Tribunal does deal with a malignant claim, the plaintiff's health is especially parlous at that stage and this can prevent proper evidence being given and cross-examination taking place.

The stakeholder further submits that the prognosis for the probable course of an asbestos-related malignant disease is variable and impossible to predict with any degree of certainty and sudden deterioration in a plaintiff's health commonly occurs. It is contended that by the time life expectancy is capable of assessment medically, as required by the provisions for removal of a claim for urgency, the plaintiff is terminally ill and required to give evidence in these circumstances.

The stakeholder suggests that all Statements of Claim in respect of malignant diseases be referred to the Tribunal for directions as to the taking of the plaintiff's evidence and whether or not the claim should proceed through the CRP. The Tribunal has suggested that management of all malignant claims should be returned to the Tribunal.

From information received by the Current Review from the Tribunal and Tribunal Registry's records, at least 73 plaintiffs have died before their cases were finalised between 1 July 2005 and 30 June 2008 (that is, during the three years of the CRP's operation). Of these 73 cases, 64 were malignant claims. Accordingly, of the 916 claims which have commenced during the CRP's three year's of operation, there have been at least 73 deaths before claims were resolved. Of the 507 malignant claims, there have been 64 deaths before the claims were resolved.

Some plaintiffs, however, died before their claims were resolved prior to the establishment of the CRP when cases were managed by the Tribunal. Information available to the Current Review from the Tribunal Registry's records indicates that of the 462 claims (188 of which were malignant claims) which were commenced in the 2004-05 financial year, which is the twelve month period before the CRP was established, 36 plaintiffs died in that financial year before their claims were resolved. Of these claims, 28 involved a malignant disease. It is likely that the total number of plaintiffs who died in that financial year, before their claims were resolved, regardless of which year their claims were commenced, is higher than the 36 cases which are known to the Current Review. Specifically, the information in respect of the CRP involves deaths which occurred over the full three year period, regardless of which financial year during the three year period the claim commenced (for example, a death may have occurred in the 2006-07 financial year when the claim commenced in the previous financial year). In contrast, the information in relation to the pre-CRP year only includes claims which commenced in the 2004-05 financial year where the plaintiff died during that twelve month period. Accordingly, the deaths attributed to the three year period are likely to be higher than if a direct comparison was made using a single financial year.

Comparing the known 36 cases from the one year before the Tribunal with the 73 cases from the three years under the CRP, against overall claim numbers (462 and 916 respectively), the percentage of claims where the plaintiff died before their claim was resolved is slightly higher for the CRP (7.97 percent) when compared to the pre-CRP period (7.79 percent). When malignant claims are compared for the same period, of the 188 claims involving malignant cases there were 28 deaths during the period 2004-05 prior to the establishment of the CRP (or 14.89 percent), whereas for the three years of the CRP there were 507 cases involving malignant diseases and 64 deaths (or 12.62 percent of such claims)., This suggests that the rate of malignant claims in which the plaintiff has died before settlement or judgment is in fact lower under the CRP than it was before the Tribunal.

In light of this information, it is clear that the problem of plaintiff deaths is not related to the CRP. Rather the information indicates that the problem of plaintiffs dying before their claims are resolved is related, unfortunately, to the nature of asbestos-related diseases.

One stakeholder suggested during preliminary consultation that there should be an initial directions hearing for all malignant claims. It is argued that this may facilitate the resolution of claims during a plaintiff's lifetime and the taking of evidence from a plaintiff before his or her illness reaches its final stages. Under this model, a determination can be made at the beginning of a claim as to whether or not the claim should proceed through the CRP or be dealt with by the Tribunal on an expedited basis.

Requiring an initial directions hearing for malignant claims, however, would result in additional legal costs in respect of all malignant claims. In light of the information referred to above concerning the number of plaintiffs who died without having their claim resolved before the CRP was established, it is not clear that this would make the situation better and in fact the limited data above suggests the situation might be worse. In these circumstances, there would not seem to be any justification for imposing additional costs on malignant claims.

Arguably, an initial directions hearing would allow issues concerning prognosis to be considered when a claim is commenced. The Current Review notes, however, that a mechanism already exists for making a determination that a claim should be removed on the basis of urgency at the same time that a Statement of Claim is filed. This approach provides a more targeted approach than the proposal for an initial directions hearing in all cases, thus minimising unnecessary costs.

Given the nature of asbestos-related diseases dealt with in the jurisdiction, no system could ensure that all claims are resolved within the relevant plaintiff's lifetime. It is important, however, that claims are resolved as quickly and as expeditiously as possible. The Current Review is of the view that consideration should be given to whether or not there may be barriers in the operation of the CRP which hinder a claim being resolved before a plaintiff's death. The CRP was designed to encourage the early settlement of claims, with claims returning to the Tribunal if they are not settled

while subject to the CRP. A claim, however, may be removed from the CRP and dealt with by the Tribunal if the claim is urgent on the basis of the plaintiff's health.

Of the 73 deaths identified before resolution of the claim under the CRP, further information has been located in relation to 71 of them. Of these, 45 deaths occurred after the claim was returned to the Tribunal (only two of these involved claims which had completed the CRP but returned to the Tribunal after unsuccessful mediation, one had been removed on the basis of failure to comply with the CRP and 42 had been removed on the basis of urgency).

The remaining 26 plaintiffs died while their claims were still subject to the CRP (one plaintiff died on the same day the Statement of Claim was filed and another four days after filing). It is not clear to the Current Review whether or not an application to remove the claim on the basis of urgency had been made in any of these cases, although the Current Review notes that such an application would not have made any difference in the case where the plaintiff died on the same day as the Statement of Claim was filed. If an application had not been made, it would be useful for stakeholder feedback on why this was the case.

### **Issue 3      Operation of the CRP in relation to malignant claims**

Are changes required to the operation of the CRP in relation to malignant claims? If so, why and what changes should be made?

### **3.3            Conduct of urgent claims after a plaintiff's death**

Once a claim is removed from the CRP on the basis of urgency, it is dealt with by the Tribunal. This remains the case if the plaintiff dies before resolution of his or her claim.

A defendant representative has suggested that after a plaintiff's death, an urgent claim should be returned to the CRP on either a timetable for non-malignant claims or a different timetable.

It appears to the Current Review that there may be a case for returning urgent claims to the CRP after a plaintiff's death as the need to progress a claim on an expedited basis no longer exists. It is recognised, however, that the plaintiff's estate may not favour this approach, as it may prefer to have the claim dealt with on an expedited basis in an attempt to resolve the claim as soon as possible.

### **Issue 4            Conduct of urgent claims after a plaintiff's death**

Should urgent claims be returned to the CRP after a plaintiff's death? If so, what timetable should apply to these claims once they are returned to the CRP?

Are any other changes required to the Regulation, if an urgent claim is returned to the CRP after a plaintiff's death? If so, what changes should be made?

Could returning an urgent claim to the CRP after a plaintiff's death cause any unfairness to a plaintiff's estate? If so, please provide specific examples.

### 3.4 Removal of claims from the CRP

In general, a claim remains subject to the CRP until it either settles or, if a claim does not settle following mediation, returns to the Tribunal. Proceedings in the Tribunal are deferred and the claim is not subject to case management by the Tribunal while the claim is subject to the CRP. The Tribunal may, however, exercise certain limited functions in relation to claims as set out in clause 19(2).<sup>1</sup>

Claims can be removed from the CRP in the following circumstances:

- The Tribunal determines, on application by the plaintiff and on the basis of medical evidence presented for the plaintiff, that the claim is urgent; or
- All parties agree following the information exchange process that the claim should not be subject to the CRP; or
- The Tribunal determines that the claim should be removed because another party to the claim has failed to comply with the requirements of the Regulation and this has resulted in substantial prejudice or substantial delay.

#### 3.4.1 Removal on the grounds of urgency

Clause 22(2) provides that a claim may be removed for urgency if the Tribunal is satisfied that, as a result of the seriousness of the plaintiff's condition, the plaintiff's life expectancy is so short as to leave insufficient time for the requirements of the CRP to be completed and the claim finally determined by the Tribunal, if required, on an expedited basis. The maximum time period, not allowing for any extension, for which a malignant claim will be subject to the CRP is 45 working days or nine weeks for a single defendant claim and 60 working days or 12 weeks for a multiple defendant claim.

A plaintiff representative has raised a concern that the matters which the Tribunal can consider when determining whether or not a claim is urgent are too limited. In particular, the plaintiff representative argues that the Tribunal has taken the view that

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<sup>1</sup> These include: (i) amendment of a Statement of Claim to join a party before the Statement of Particulars is served, (ii) amendment of a Statement of Claim to join a party at the request of the plaintiff where it is necessary to do so to preserve the plaintiff's cause of action, (iii) amendment of the Statement of Claim to add a claim under the *Compensation to Relatives Act* after the death of the plaintiff, (iv) the making of orders to give effect to any agreement or arrangement between the parties, (v) the issue and return of subpoenas, (vi) granting of leave to commence proceedings under section 6 of the *Law Reform (Miscellaneous Provisions) Act*, and (vii) amendment of the Statement of Claim to discontinue proceedings against any party.

the test for urgency in clause 22 can only be met by medical evidence demonstrating that the plaintiff is likely to pass away within three months.

While this is the case, the plaintiff representative contends that it can be difficult to obtain medical evidence as to the plaintiff's prognosis at short notice and that treating doctors can be reluctant to give an opinion at the level of specificity required by the Regulation. The plaintiff representative submits that 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 as required by the Uniform Civil Procedure Rules.

The plaintiff representative suggests that clause 22 be amended to provide the Tribunal with greater discretion in relation to matters it can consider when determining whether or not a claim should be removed for urgency, such as the age of the plaintiff, whether or not the plaintiff suffers from co-morbidities, and whether or not the plaintiff's medical treatment is primarily palliative. It has also been suggested that clause 22 be amended to provide that medical evidence relied upon for urgency applications need not comply with Part 31 of the Uniform Civil Procedure Rules (regarding evidence).

Concerns over the threshold for removing claims from the CRP on the basis of urgency were also raised by defendant lawyers who suggested that plaintiff solicitors must wait until the plaintiff's health has deteriorated to a significant degree before a claim may be removed. This is said to lead to defendants being suddenly presented with an urgent case with little time to respond.

The Current Review has no information available to it regarding the difficulties of obtaining medical evidence to satisfy the test in clause 22 of the Regulation. Such information would be useful in assessing whether further reform in relation to this issue is necessary.

The following information was provided in the 2006 Issues Paper regarding the 15 cases removed for urgency during the first year of operation of the CRP.

The medical evidence relied upon by the Tribunal to remove a claim for urgency generally suggested a prognosis of weeks or 1-2 months to live. Removal on the grounds of urgency was agreed to in one case, however, where the prognosis was up to 6 months.

The Current Review is making enquiries regarding the medical evidence and prognosis relied upon by the Tribunal to remove claims for urgency since the 2005-06 financial year. The Tribunal has advised the Current Review that it recalls perhaps two or three instances where an application to remove a claim for urgency was refused. The Current Review would welcome information on the medical evidence and prognosis relied upon by the Tribunal to remove claims for urgency and on what basis the Tribunal has rejected any applications from stakeholders.



## **Issue 5      Removal of urgent claims**

Are the provisions of the Regulation relating to the removal of urgent claims sufficient? If not, how have those provisions caused difficulty or prejudiced parties? Please provide specific examples.

Is there a need for any changes to the provisions which stipulate when a claim is urgent? If so, what changes should be made?

### **3.4.2    *Other grounds for removal of claims***

It has been suggested that there should be more grounds on which a claim can be removed from the CRP as those currently prescribed by the Regulation are too restrictive and do not address unique situations. It has been suggested that another ground for removing claims from the CRP should be introduced to address situations such as where an insurer has limited liability.

The Current Review notes, however, that parties may already agree to remove a claim from the CRP following the information exchange process. This provision can already be used by parties if they consider that the claim raises novel issues (for example, in the nature of a “test case”) that are unlikely to be resolved under the CRP.

As noted in the 2006 Review, it is also not clear what basis there would be for allowing parties to agree to withdraw a claim from the CRP prior to the information exchange process. Until information exchange occurs, there is a strong argument that the parties cannot really be said to be in a position to properly assess their positions and decide whether the claim is more likely to be resolved outside the CRP. Accordingly, the 2006 Review did not consider that there are circumstances other than those prescribed in the Regulation where a claim should be removed from the CRP prior to information exchange.

It is not clear to the Current Review, whether there have been any changes in circumstances, or difficulties faced by parties to warrant further grounds for removing a claim from the CRP.

## **Issue 6      Further grounds for removal of claims**

Are there circumstances other than those currently prescribed by the Regulation where claims should be removed from the CRP? If so, for what reason? How have such cases caused difficulty in claims under the Regulation to date?

### 3.5 Jurisdiction of the Tribunal in relation to dormant claims

While pre 1 July 2005 claims are subject to the CRP, clause 16(2) of the Regulation has the effect that no action needs to be taken on the claim until a “current claim proposal” has been served on all of the defendants by the plaintiff. The intention of the current claim proposal is to have the parties negotiate how the CRP should apply to the claim. This was designed to avoid the parties unnecessarily duplicating actions which had already been taken prior to the introduction of the CRP.

The Regulation leaves it to the plaintiff to commence the current claim proposal process. This approach was adopted because it was not considered feasible to require current claims proposals to be served for all claims within a specified period because of the workload pressures this might cause. Further, some claims have remained ‘dormant’ in the list because the plaintiff is not ready to proceed. There is an issue of fairness to the plaintiff if they are forced to proceed with their claim before they are ready.

The issue of fairness to defendants, however, has also been raised. If there is no mechanism for dealing with or progressing dormant claims, one defendant contends that defendants will be unable to make accurate assessments of reserves which need to be set aside for these claims. It is also argued that defendants will be required to set aside reserves for dormant claims indefinitely.

Prior to the introduction of the CRP, the Tribunal would list ‘dormant’ claims annually for a status hearing. The Tribunal no longer has jurisdiction to strike out claims (except with consent) or to case manage these claims while they remain subject to the CRP. Theoretically, dormant claims can remain in the list indefinitely.

The same issue of unfairness to defendants was raised in the 2006 Review. At that time, defendant representatives suggested that the Tribunal should be able to case manage dormant claims, and if appropriate, strike them out. Alternatively, it was suggested that defendants should be entitled to call on the plaintiff to serve a current claims proposal and if the plaintiff does not then take action, the claim should be listed before the Tribunal for consideration as to whether it should be struck out for want of prosecution.

The Final Report of the 2006 Review, however, did not support any changes at that stage as it appeared that transitional claims were being finalised at an acceptable rate. According to the Tribunal claims database, 272 pre 1 July 2005 claims were finalised between 1 July 2005 and 30 June 2006. It appeared that most of these resolved without steps formally being taken as part of the CRP, while 35 proceeded through the CRP. Only three current claim proposals were provided to the Registrar by 30 June 2006, although there is no requirement in the Regulation for such proposals to be provided. As at 30 June 2006, there were 234 pre 1 July 2005 claims pending.

The Final Report of the 2006 Review also noted the potentially prejudicial effects highlighted in submissions by plaintiff representatives. In particular, plaintiff representatives noted in late 2006, that there will be a small portion of claims that will

not be resolved in the next 12 to 24 months for legitimate reasons. These are claims which were commenced prior to the introduction of provisional damages in 1996 when limitation periods still applied to dust disease claims. The Current Review understands that these are claims which were filed to protect the plaintiff's position in circumstances where the plaintiff alleges some evidence of damage, but may wish to allege greater damage from asbestos if their health deteriorates.

The Final Report of the 2006 Review noted that plaintiff lawyers should, however, progress transitional claims unless there are good reasons not to. Further, it noted that this issue will be carefully reviewed in future reviews if it appears that the rate of disposal of these claims is unacceptable.

Accordingly, given the issue has been raised again during preliminary consultation, it is important to consider the rate of disposal of transitional claims since the 2005-06 financial year.

According to the Tribunal claims database, between 1 July 2006 and 30 June 2008, 149 pre 1 July 2005 claims were resolved. A further claim was transferred to another jurisdiction (South Australia). As at 1 July 2008, 84 pre 1 July 2005 claims remain pending.

Having regard to the rate of disposal of pre 1 July 2005 claims, it may be that no action is necessary. Equally, however, defendants may consider that matters are not being disposed of quickly enough and consider that some further action might be necessary.

#### **Issue 7      Dormant claims**

Do dormant claims create any difficulties or unfairness for any parties? If so, what difficulty or unfairness is experienced?

Is there a need to amend the Regulation to require that steps be taken in relation to transitional claims where no action is taken by the plaintiff within a reasonable period of time? If so, how?

### **3.6      Operation of the CRP in relation to late cross-claims**

The Regulation provides that a cross-claim must be commenced within a prescribed period to be joined to a plaintiff's claim (clause 25(2)). An original defendant, however, can seek an extension of time to commence a cross-claim and a plaintiff cannot refuse unless he or she can demonstrate that it would result in substantial prejudice to the plaintiff (clause 25(3)). The Regulation stipulates the maximum period for which an extension may be given (clause 25(4)).

If a cross-claim is not filed and served within the prescribed timeframes, the Regulation provides that it cannot be made in the proceedings (with the plaintiff's

claim) (clause 25(9)). This, however, does not affect any right of a defendant to initiate a claim in separate proceedings to the plaintiff's claim. Accordingly, a defendant can commence a separate claim seeking contribution from other defendants which may be dealt with by the Tribunal. This was done to ensure that a late cross-claim, which is filed outside of the prescribed timeframes, does not delay a plaintiff's claim.

The Registrar has noted, however, that some cross-claimants and cross-defendants have (incorrectly) assumed that a cross-claim which has been filed late can still be joined to a plaintiff's claim, and therefore, is subject to the CRP. These cross-claimants and cross-defendants have asked the Registrar for particular actions to be undertaken in accordance with the CRP.

The Current Review notes that the Regulation already provides that a cross-claim which is commenced after the finalisation of a plaintiff's claim is subject to the CRP (Division 6). The Regulation, however, is silent as to whether or not a cross claim which is commenced after the permitted timeframes in clause 25 but before the plaintiff's claim is finalised, should proceed through the modified apportionment process in Division 6. Accordingly, one option would be to defer proceedings until after the plaintiff's claim is finalised and then proceed through the modified apportionment process.

#### **Issue 8      Operation of the CRP in relation to late cross-claims**

Should an opportunity be given for late cross-claims, which are commenced outside of the prescribed timeframes, to be subject to the CRP in a way which would not delay a plaintiff's claim? If so, how?

## Chapter 4 Timetable for the CRP

Claims in the CRP must progress according to a strict timetable set out in the Regulation. The timeframe within which each step of the CRP must occur varies depending on the type of claim (malignant or non-malignant) and on the number of defendants (one or more). The CRP timetable is set out in **Appendix B**.

### 4.1 Flexibility of the timetable

The Current Review understands that there is some concern about the lack of flexibility in the CRP timetable. At the Practitioners' Forum, for instance, some practitioners expressed the view that the timetable provisions are too constrained and impossible to comply with in some circumstances. They suggested that there is a need for greater flexibility in the timetable.

When this issue was raised in the 2006 Review, defendant representatives' submissions all expressed difficulty in complying with the timetable, particularly for malignant claims. The 2006 Review, however, did not support any extensions to the timetable. It noted that there are provisions in the Regulation that allow for the following aspects of the timetable to be varied:

- the time for the filing and service of cross-claims;
- the period within which medical examinations must occur;
- referral of a claim for mediation by the Registrar; and
- deferral of mediation by the mediator.

The 2006 Review also observed that difficulties in compliance with the timetable might have been attributable to practitioners becoming accustomed to the new system. It did not support the suggestion that parties should be able to vary the timetable if all of them consent, or that the Registrar should be able to vary the timetable generally on a needs basis. Such provisions, it noted, would be likely to result in delay and additional costs.

The Current Review would be interested to know whether concerns around the lack of flexibility in the timetable have decreased as practitioners become more familiar with the CRP. If there continue to be concerns, however, the Review would be open to submissions on the issue, but maintains the view that a strict timetable is integral to the efficient and cost-effective resolution of claims.

#### Issue 9 Flexibility of the timetable

Have concerns around the lack of flexibility in the CRP timetable diminished as practitioners have become more accustomed to the Regulation?

Are there specific parts of the CRP timetable that are posing particular difficulties for parties?

Are there other steps in the CRP timetable that should be capable of variation and if so by what means (bearing in mind the need to ensure the prompt and cost effective resolution of claims)?

## 4.2 Notification of service of the Statement of Particulars

The CRP timetable commences on the date that the plaintiff's Statement of Particulars is served on the last original defendant(s). The plaintiff must notify the Registrar and the original defendant(s) of this date within five business days of service (clause 24(5)).

A defendant representative suggested that plaintiffs should be required to file and serve a timetable (clearly stating the date of service on the last defendant), rather than just notifying the date of service, to ensure that all parties operate off the same timetable. The Current Review understands that this is the practice of some plaintiff solicitors at present, and would welcome feedback on the proposal to formalise this practice. At the same time, it is mindful of any proposal which has the potential to result in additional costs being incurred by plaintiffs, which would in nearly all cases be borne by defendants as part of any settlement or judgment..

### Issue 10 Notification of service of the Statement of Particulars

Should plaintiffs be required to file and serve a timetable based on the date of service of the Statement of Particulars on the last original defendant, rather than just notifying the date of service? Would this result in plaintiffs incurring unnecessary extra costs which would ultimately be borne by defendants?

## 4.3 Timetable for filing and service of the Defendant's Reply

Some practitioners have raised concerns regarding the timeframe for the filing and service of the defendant's Reply. The Regulation requires a Reply to be served within 20 business days (of service of the Statement of Particulars on the last defendant) for malignant claims, and within 30 business days for non-malignant claims (clause 26). At the Practitioners' Forum, some defendant representatives indicated that these timeframes constrain the ability of defendants to provide a meaningful response. In preliminary consultation, one written submission from a defendant representative also raised as an issue 'the differentiation between single defendant and multi-defendant matters and the timing of replies generally to allow an appropriate period of investigation'.

The timeframe for serving the defendant's Reply was also raised and addressed in the 2006 Review. While most defendant representatives' submissions stated that the timeframe to file the Reply was too short, the 2006 Review did not support any changes at that time. Given practitioners were still becoming familiar with the CRP, it thought any change to this aspect of the timetable would be premature. It also noted that the Regulation allows defendants to update the Reply when information which was not available at the time of service becomes available.

In light of this provision, and the need to encourage the prompt resolution of claims, it is not clear to the Current Review that any change to the timetable for filing a Reply is warranted. However, the Current Review would be interested in stakeholder feedback on this issue in light of their further experience with the CRP.

#### **Issue 11 Timetable for filing and service of the Defendant's Reply**

Is the timeframe for the filing and service of the Defendant's Reply appropriate?

### **4.4 Timetable for commencement of cross-claims**

One defendant representative suggested that consultation is required regarding what would constitute a reasonable period of time to issue cross-claims to enable all issues to be dealt with in the one set of proceedings.

This issue was also considered in the 2006 Review. The 2006 Review did not support any changes in the timetable, given the Regulation already allows original defendants to request an extension of time for serving cross-claims. The plaintiff can only refuse a request where he or she can establish that the extension would result in substantial prejudice. Although this issue was extensively considered in the 2006 Review and the Current Review is not aware of any changes since that review which suggest amendments are necessary, the Current Review welcomes submissions from stakeholders on the issue.

In the alternative, the defendant representative suggested that an appropriate definition of 'substantial prejudice' is required, to facilitate the granting of extensions to file cross-claims in appropriate circumstances.

The Current Review is concerned that attempting to define 'substantial prejudice' may not be helpful or appropriate, given that the meaning of the term is likely to differ depending on the facts of each case. The Current Review also notes that any definition given to the term will also have implications for other provisions in the Regulation which use the term, such as clause 22 (removal for failure to comply with the CRP where non-compliance has caused substantial prejudice or substantial delay) and clause 33 (a mediator cannot defer mediation if it would result in substantial prejudice to a party or substantial delay).

However, the Current Review welcomes stakeholder feedback on whether difficulties have been encountered in this area, and whether further guidance on the meaning of ‘substantial prejudice’ is required in this context.

Another defendant representative contends that a newly joined cross-defendant cannot issue a cross-claim under the CRP. This is not the case. The Regulation does not prohibit cross-defendants from issuing a cross-claim and provides that cross-claims by all defendants must be filed and served within the same time period.

The Regulation, however, only permits an original defendant (that is, a defendant on the claim before the joinder of any other person as a defendant and therefore, not a defendant to a cross-claim on the plaintiff’s claim) to seek an extension of time to make cross-claims. As noted earlier, a plaintiff cannot refuse unless he or she can demonstrate that it would result in substantial prejudice.

During the 2006 Review, a defendant representative contended that, consequentially, there is effectively no opportunity for non-original defendants to lodge further cross-claims.

The Final Report of the 2006 Review did not consider that any changes were required. It noted that the extension provision was deliberately limited to original defendants, because to enable non-original defendants to seek an extension of the timetable to issue cross-claims could be potentially open-ended and result in unacceptable delay. The Report noted that joining other defendants helps other defendants, not the plaintiff, and the plaintiff’s claim should not be delayed further to assist the defendants. Further the Report noted that in any event, a non-original defendant can initiate a cross claim in separate proceedings to the plaintiff’s claim.

The Current Review welcomes further submissions as to whether there have been any changes in circumstances since the 2006 Review which warrant reconsideration of this issue.

## **Issue 12      Timetable for commencement of cross-claims**

Is there a need for any changes to the timetable for commencing cross-claims? If so, what changes are necessary?

Are plaintiffs regularly declining to extend the time for the filing and service of cross-claims?

Have there been difficulties or disputes between parties over the meaning of “substantial prejudice” in this context? Is it necessary or desirable to define this term or provide guidance about its meaning? If so, how should the term be defined?



Has anything changed since the 2005-06 financial year to such an extent that it would be appropriate to reconsider the issue of allowing non-original defendants to request an extension of the timetable to file and serve a cross-claim?

If so, what changes could be made to the Regulation without creating any unfairness to plaintiffs?

#### **4.5 Application of timetable where additional defendants are joined by the plaintiff**

During preliminary consultation, a defendant representative raised as an issue the application of the CRP timetable when additional defendants are joined by the plaintiff. At the Practitioners' Forum, the Registrar also noted that complications arise when a timetable is revised to take into account other defendants. Some practitioners contend that in some cases, the joining of additional defendants by the plaintiff can cause undue delay.

While it is unclear to the Current Review how often this issue would arise (as it seems more likely that a defendant would commence a cross-claim rather than a plaintiff join additional original defendants) it would welcome submissions on any concerns in this area.

#### **Issue 13 Application of timetable where additional defendants are joined by the plaintiff**

Should the Regulation be amended to provide for circumstances where further defendants are joined by the plaintiff?

Is this a common scenario and does it cause particular difficulties?

If so, what changes are required to the Regulation?

#### **4.6 Timeframe for medical examinations**

It also appears that there are concerns about the timeframe for arranging medical examinations. The Regulation requires defendants and cross-defendants to notify the plaintiff if they require the plaintiff to attend for a clinical medical examination within set timeframes (these vary according to whether the claim is malignant or non-malignant and whether the claim is a single defendant or multiple defendant matter – see clause 28(1)). Any medical examination of the plaintiff that an original defendant requires must also take place within stipulated time periods (clause 28(2)). These periods, however, may be varied by agreement between all of the parties to the claim.

Any such variation has no effect on the running of any other time period for the purposes of the CRP.

A defendant representative suggested that consultation be carried out on whether or not the period of time for defendants and cross-defendants to arrange a medical examination of the plaintiff is reasonable. At the Practitioners' Forum, another defendant representative expressed the view that the timetable for medical examinations is virtually impossible to comply with, largely because of the difficulties experienced securing medical appointments in these periods.

While the Current Review appreciates that it may not always be possible to arrange medical examinations within the timeframes set, it notes that these timeframes can be varied by agreement. The Current Review also notes that a plaintiff is required to provide with his or her Statement of Particulars certain medical evidence relating to his or her diagnosis, in particular, a short report from the medical practitioner who diagnosed the plaintiff's condition and associated X-rays, pathology reports, ultrasounds etc. This process was designed to reduce the number of medical reports obtained unnecessarily by defendants by ensuring they have basic information about the plaintiff's condition when the Statement of Particulars is served.

The Current Review seeks further feedback on this issue, and, specifically, seeks clarification on whether or not any problems have arisen because parties are not consenting to extend the period for arranging medical examinations. Alternatively, it may be that concerns have arisen because varying the timeframe for medical examinations has no effect on the other timetable provisions in the CRP. The Current Review would be grateful for comments on these issues.

#### **Issue 14      Timeframe for medical examinations**

Have stakeholders encountered difficulties securing medical examinations of the plaintiff within the prescribed period? If so, what are these difficulties and how might they be addressed, while still providing for the efficient progression of the plaintiff's claim?

Do stakeholders consider that unnecessary medical examinations are being arranged by defendants?

Has it been difficult to obtain other parties' consent to extend the timeframe for conducting medical examinations?

Have difficulties arisen because any extension to the timeframe for arranging medical examinations does not affect the rest of the CRP timetable?

## **Chapter 5 Information exchange**

### **5.1 Adequacy of the Statement of Particulars and Reply**

Concerns have also been raised regarding the adequacy of the information provided in plaintiffs' Statements of Particulars (Form 1s) and responses in defendants' Replies (Form 2s). At the Practitioners' Forum, it was suggested that Form 1s are being prepared in a formulaic and meaningless way. One submission during preliminary consultation also stated that Form 1s are not being completed properly. Similarly, some practitioners in the jurisdiction have commented that defendant Replies often contain multiple 'Do not know' responses.

One preliminary submission from a defendant representative suggested that quantification of damages being claimed by the plaintiff should be compulsory in all matters, and that if a particular head of damage has not been included, then the plaintiff should be required to submit an Amended Form 1. Additional time would be added to the timetable to allow the defendant to investigate the new head of damage.

Issues around the adequacy of information provided in the Statement of Particulars and the responses provided in the Reply were considered in the 2006 Review. While, at that time, most of the submissions suggested that insufficient information was being provided on the forms, no changes were supported by the 2006 Review. It was not clear, at that time, whether the forms were lacking all relevant and necessary information because the information was not available at the time of completion, or because it was never going to become available. The 2006 Review also considered that the CRP needed a further period of time in which to operate in order to determine whether the problem was widespread and if there was a better solution before changes were made.

In response to the specific issues identified in the defendant representative's submission referred to above, the Current Review notes that Part 6 of Form 1 specifically requires particulars of damages claimed by the plaintiff, including heads of damage and amounts.

The Regulation also acknowledges that not all documents or information required to accompany the Particulars and Reply may be available at the time of completion. In these instances, it requires parties to indicate this and provide an indication of when the information will be available (see clauses 24(3) and 26(3)).

Further, clause 23 of the Regulation imposes on parties a general obligation to update or notify any necessary changes to the documents and information provided as and when any relevant new or changed documents or information becomes available.

The Current Review would welcome further feedback on compliance with these provisions. Feedback would also be useful on whether or not adequate information is being provided in the Statement of Particulars and in the Reply in light of the further experience with the CRP. Any ongoing difficulties in this area should be identified with as much specificity as possible.

## **Issue 15      Adequacy of the Statement of Particulars and Reply**

Do Forms 1 and 2 identify all relevant and necessary information that should be provided in the Statement of Particulars and the Reply?

Is all information required in the Statement of Particulars and Reply being provided?

Are parties clearly identifying information and documents that are not available and indicating when they will become available?

Are parties updating their information and documents when new or updated information and documents become available?

What improvements to the system could be made to ensure better compliance in this area?

## **5.2      Medical authority**

One defendant representative submission during preliminary consultation suggested that the medical authority allowed for in Form 1 should be compulsory. It stated that plaintiff firms have not been providing the medical authority, citing a potential waiver of privilege over medical information. The defendant representative contends that this has forced defendants to subpoena medical records in order to gain a full understanding of the plaintiff's medical situation, resulting in additional time delay and expense.

The Current Review notes that both the Final Report of the 2004 Review and the Final Report of the 2006 Review did not support making medical authorities mandatory. In many cases, the plaintiff's treating practitioner may have provided an expert report and real issues of privilege may arise. Also, the streamlined subpoena process in the Regulation provides a preferable way for defendants to gain access to plaintiff medical records if the authority is not provided. Accordingly, it is not clear to the Current Review whether this issue needs to be revisited.

## **Issue 16      Medical authorities**

Has anything changed since the 2006 Review to such an extent that it would be appropriate to reconsider the issue of mandatory medical authorities?

## Chapter 6      **Mediation**

### 6.1      **Objections to mediators**

A mediator can be appointed by the parties by agreement, or failing agreement, by the Registrar from a list of practitioners approved by the President of the Tribunal (clause 34). Mediators appointed by the Registrar are appointed from a list of mediators compiled by the President. As far as practicable, these mediators should have experience in dust diseases claims.

During preliminary consultation, a defendant representative suggested that parties should have the opportunity to object to a mediator who is appointed by the Registrar (if, for example, the mediator is a solicitor or counsel who has acted against a party, or has charged excessive fees).

The 2006 Review examined this suggestion and concluded that no objections process was necessary. Most submissions to that review did not support the proposal. The 2006 Review also pointed to the non-binding nature of mediation (where the mediator's role is to assist parties achieve their own resolution of the dispute), and the professional obligations of mediators who can decide whether or not it is appropriate for them to act.

It appears to the Current Review that the benefits of a process for objecting to mediators are unclear, for the same reasons given in the 2006 Review. It is also noted that parties have the option of agreeing on a mediator between themselves. This provides an opportunity to select a mediator whose experience and fees are acceptable to all parties. Nevertheless, the Current Review would be interested to receive submissions on whether anything has changed since the 2006 Review to warrant reconsideration of the issue.

#### **Issue 17      Objections to mediators**

Are there any new or compelling reasons why parties should be able to object to a mediator appointed by the Registrar, given the role of the mediator and the non-binding nature of mediation?

### 6.2      **Costs of mediations**

The Regulation (clause 46) provides that the costs of mediation are to be borne by:

- (a) the parties in such proportions as they may agree among themselves if mediation results in settlement or the claim is otherwise settled; or
- (b) the defendant (or all the defendants in equal shares) if mediation does not result in settlement of the claim and the claim is not otherwise settled.

During preliminary consultation, a defendant representative suggested that matters that settle within a week or so of a mediation should not be classified as a failed mediation, with the defendants to bear the costs.

On the basis of the wording in the Regulation, the Current Review does not consider that defendants would need to bear the costs of mediation if the matter settled within a week of a failed mediation (that is, if the matter was settled before the Tribunal determined the matter). Even though the mediation did not result in settlement, the matter still qualifies as a claim that has 'otherwise settled' within the meaning of clause 46(1)(a) of the Regulation. Accordingly, the parties can agree the proportion each party is to pay in relation to the costs of the mediation.

The Current Review, however, would welcome feedback on the operation of these provisions in practice, and any concerns that may exist.

#### **Issue 18      Costs of mediation**

How have the provisions in the Regulation dealing with the costs of mediation been operating in practice?

Do the provisions promote early settlement in an appropriate manner?

### **6.3      Mediator fees**

Mediator fees are currently unregulated. The Current Review understands that mediators' fees vary depending on whether the mediator is a solicitor or senior counsel, and the manner in which they are charged (for instance per hour, per mediation or a daily rate). A defendant representative has suggested that mediators' fees should be subject to regulation, similar to the fees of Contributions Assessors.

This issue was also addressed in the 2006 Review, which concluded that fee regulation for mediators is undesirable. It noted that fee regulation could discourage certain practitioners, particularly those with substantial experience or Senior Counsel, from acting as mediators. For this and other reasons, a number of submissions to the 2006 Review did not support the proposal. One commented that mediators' fees are the subject of negotiation and market forces determine if a mediator is too expensive.

While these reasons remain valid, the Current Review would welcome submissions on the issue.

#### **Issue 19      Mediator fees**

Should the fees of mediators be regulated? If so, how?

## 6.4 Preparation for mediations

During preliminary consultation, a defendant representative suggested that plaintiffs should submit a schedule of damages and an offer of settlement in sufficient time prior to mediation for recommendations to be made and instructions received.

It is noted that plaintiffs are already required to provide information regarding compensation (including heads of damage and amounts) in the Statement of Particulars. If there are concerns in relation to the provision of this information, these could be raised in relation to Issue 15, 'Adequacy of the Statement of Particulars and Reply'. The Review also considers it inappropriate to require plaintiffs to make an offer of settlement prior to mediation. It is unaware of any jurisdiction which imposes a mandatory obligation on plaintiffs to make an offer of settlement. The Current Review notes that the defendant, on the basis of the plaintiff's Statement of Particulars, should be in a position to make an Offer of Compromise.

### Issue 20 Preparation for mediations

Are further measures needed to encourage or require parties to better prepare for mediation? If so, what are they?

## 6.5 Opportunity to vacate

All claims which are not removed from the CRP must complete mediation. During preliminary consultation, a defendant representative suggested that mediation is not useful in some cases (for instance, where liability is disputed). It submitted that parties should be able to approach the Tribunal to have a mediation vacated should the reason for vacation be reasonable.

It is not clear to the Current Review that such a provision is warranted. If parties do not consider that mediation would be useful, following information exchange, they can agree that the claim be removed from the CRP (clause 22(1)(b)). The Current Review also notes that the proposal to allow mediation to be vacated for any reasonable reason is very broad, and could increase disputes between parties as to whether or not they should proceed with mediation.

### Issue 21 Opportunity to have a mediation vacated

Should parties have any further opportunities to approach the Tribunal to have a mediation vacated? If so, in what circumstances?

## 6.6 Unsuccessful mediations

From data recorded by the Tribunal's Registry, it appears that the number of unsuccessful mediations has increased during the CRP's three years of operation (up from two in 2005-06 to four in 2006-07 and 75 in 2007-08). At this stage, it appears to the Current Review that this apparent increase is likely to be a result of under-reporting or anomalies in the data sources from which this information was extracted in previous years. Accordingly, the Current Review is considering whether or not there are alternative data sources from which the number of unsuccessful mediations may be obtained in the future, without having to review each file. It could be a very time consuming exercise if each file needed to be reviewed.

The number of unsuccessful mediations should be considered in the context of the number of claims which, nevertheless, settled when the claim was returned to the Tribunal. Of the two claims which were unsuccessfully mediated in the 2005-06 financial year, both of these claims appear to have settled after returning to the Tribunal and of the four claims which were unsuccessfully mediated in the 2006-07 financial year, two claims subsequently settled. Of the 75 claims which were unsuccessfully mediated in the 2007-08 financial year, 67 claims subsequently settled after returning to the Tribunal and before a determination by the Tribunal was required.

### Issue 22 Unsuccessful mediations

Do stakeholders consider that the number of unsuccessful mediations has increased? If so, why, and is there a need for any changes to the CRP as a result?



## Chapter 7 Contributions assessment

### 7.1 Introduction

The Final Report of the 2004 Review confirmed that apportionment disputes contributed significantly to legal costs within this jurisdiction. It also questioned why there was such a high level of disputation, particularly as court and Tribunal decisions in the years immediately before the Final Report had provided a greater degree of clarity as to the liability share of each defendant for particular claims than had been the case when the Tribunal was first established.

The contributions assessment provisions, and the standard presumptions which underpin them, were introduced to provide greater incentives to defendants to adopt a commercial approach to settlement. The standard presumptions were based on existing case law on the apportionment of liability. Once the standard presumptions are applied by the independent Contributions Assessor, cost penalties apply to any defendant who subsequently seeks to challenge the contributions assessment before the Tribunal.

The contributions assessment provisions also were intended to provide a division of financial responsibility among the defendants to prevent the final determination of the plaintiff's claim being delayed by contribution disputes. They establish 'a procedure for the summary but provisional determination of contribution claims in order to facilitate settlement of the plaintiff's claims and the satisfaction of any judgment he may obtain by judicial decision or settlement.'<sup>2</sup>

The Final Report of the 2006 Review concluded that there was general support for retaining contributions assessments as part of the CRP.

### 7.2 Overall operation of the contributions assessment system

During the CRP's three years of operation, there were 77 contributions assessments undertaken. During this time, the Registry has advised that it is aware of only one challenge to a contributions assessment that has been filed with the Tribunal. That challenge was filed during the last financial year and the matter is still pending.

Despite the apparent low rate of challenges to contributions assessments to date, one stakeholder has suggested that there is an increasing tendency for defendants to challenge contribution assessments by way of cross-claims. The stakeholder suggests that although there are adequate cost penalties to discourage frivolous claims, the costs of this process remain high. Hence the stakeholder queries whether an alternative system, such as arbitration, should be considered. The Current Review has no information available to it to compare the costs of challenging a contributions assessment before the Tribunal with the costs of using arbitration.

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<sup>2</sup> *QBE Insurance (Australia) Limited v Wallaby Grip Limited & Ors* [2007] NSWCA 43 (re *Linguist*)

## **Issue 23      Operation of the contributions assessment provisions**

Are defendants behaving more commercially in relation to contributions disputes? If not, why not?

Are challenges to contributions assessments increasing? Should alternative dispute mechanisms, such as arbitration, be considered?

Is there a need to change specific aspects of the apportionment process?

### **7.3      Effect of a contributions assessment**

A number of stakeholders have suggested that there may still be some uncertainties about the effect of a contributions assessment.

Clause 52 of the Regulation provides:

- (1) An agreement or determination as to apportionment among defendants for the purposes of this Division is conclusively binding on the defendants for the purposes of settlement, or the determination by the Tribunal, of the plaintiff's claim and the payment of the plaintiff's damages.
- (2) The agreement or determination is not binding for the purposes of the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment.

Clause 49(8) of the Regulation also provides that a determination of a Contributions Assessor cannot be challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, however, the subclause does not prevent the subsequent taking, or determination by the Tribunal of a dispute between defendants as to apportionment.

#### **7.3.1      *Impecunious defendants and indivisible injuries***

Some stakeholders have referred to issues that can arise when there is an indivisible injury (and so concurrent liability) and one of the defendants does not have the means to pay their assessed proportion (for example, one of the defendants is a deregistered company, with a limited insurance policy).

A plaintiff representative gave, as an example, the situation of two defendants who are concurrent tortfeasors.

'The Contributions assessor 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 Contributions assessment 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 Contributions assessment is not binding on the Plaintiff, he would be entitled to his verdict of \$300,000.'

The intention behind the contributions assessment provisions was to:

- provide greater incentives to defendants to adopt a commercial approach to settlement; and
- prevent the final determination of the plaintiff's claim being delayed by contribution disputes.

There was no intention to replace joint and several liability for indivisible injuries. The Current Review considers that in the circumstances described:

- A judgment in favour of the plaintiff would be entered against the defendants for the full amount of the plaintiff's damages with the defendants being jointly and severally liable for this amount; and
- The plaintiff would be able to enforce the entire judgment against any of the jointly and severally liable defendants, who may then seek to recover the relevant contributions from the other defendants or cross-defendants.

Comments from stakeholders, however, suggest that this view may not be shared by all defendants.

#### **Issue 24      Impecunious defendants and indivisible injuries**

Are defendants refusing to accept joint and several liability for indivisible injuries because of clause 52 or clause 49? Is this causing a problem when there are impecunious defendants or in any other circumstances?

Does the Regulation need to be amended to clarify that it does not affect joint and several liability?

#### **7.3.2    *Whether contributions assessment imposes an obligation to pay on a cross defendant***

Some cross-defendants have argued that they are not liable to pay the apportionment as determined by a Contributions Assessor either directly to the plaintiff or to the cross-claimant. This occurred in *Eraring Energy & Anor v Power Technologies* [2007] NSWDDT 24 (*Re Millard*) where the Tribunal ordered the cross-defendant to pay the cross-claimants, who had already paid the full settlement amount to the plaintiff.

In *Eraring Energy v The English Electric Company Limited* [2008] NSW DDT 19 (*Re Osborne*) a cross defendant argued that to the extent the Regulation seeks to impose a liability upon a cross-defendant to make a payment to a plaintiff or a defendant, it is

invalid. The Tribunal found the Regulation was valid and ordered the cross-defendant to pay the defendant.

The Court of Appeal considered the obligation on a cross-defendant following a contributions assessment and resolution of the plaintiff's claim in *QBE Insurance (Australia) Limited v Wallaby Grip Limited & Ors* [2007] NSWCA 43 (re Linquist).

AJA Handley stated:

'Division 5 establishes a procedure for the summary but provisional determination of contribution claims in order to facilitate settlement of the plaintiff's claim and the satisfaction of any judgment he may obtain by judicial decision or settlement. A defendant or cross-defendant who is dissatisfied with the summary determination can pursue its strict rights and seek a more favourable determination at a trial but will be subject to significant costs sanctions if a substantially better result is not achieved. Meanwhile the summary determination is immediately enforceable. A clear purpose of the scheme is to prevent the final determination of the plaintiff's claim being delayed by contribution disputes.'

The Court held that a determination of the liability of cross-defendants for contribution did not entitle the plaintiff to judgment against the cross-defendants or to enforce the cross-defendants' liability for the purposes of satisfying the plaintiff's judgment against the defendants. However, as the defendants had satisfied the consent judgment in favour of the plaintiff they would be entitled to judgments against each other and the cross-defendants for the contributions determined by the assessor.

It has been suggested, nonetheless, that there may still be some uncertainty in relation to these issues, leading to additional costs. One stakeholder commented that the Tribunal, in some matters, has indicated the appropriate course is for verdicts and judgments to be entered in both the plaintiff's claim and the cross-claims following resolution of the plaintiff's matter, but has in other matters refrained from entering verdicts and judgments on the cross-claims.

#### **Issue 25      Obligation of cross-defendant to pay**

Is there uncertainty about the obligations on cross-defendants to pay following a contributions assessment and resolution of the plaintiff's claim that requires clarification?

Is there uncertainty about the verdicts and judgments that should be entered that requires clarification?

### 7.3.3 Disputes between defendants as to apportionment

Some stakeholders have indicated that while clause 52(2) provides that the agreement or determination is not binding for the purposes of the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment, it does not address the nature of such a challenge. Stakeholders are concerned that the refusal of some cross-defendants to pay the plaintiff or the cross-claimant without a hearing of the full cross-claim leads to various scenarios that are not adequately covered by the Regulation. It has been suggested that parties are disputing whether any subsequent cause of action between the cross-claimant and any cross-defendants is a hearing de novo of the cross-claim, or a claim for restitution, and further, which party has the onus of proof. It has also been suggested that this uncertainty may require further litigation and involve additional costs.

The Court of Appeal dealt with the issue of the nature of a challenge to a contributions assessment by a cross-defendant in *QBE Insurance (Australia) Limited v Wallaby Grip Limited & Ors* [2007] NSWCA 43 (*re Linqvist*). The Court noted that if the defendants were satisfied with the determination by the Contributions Assessor but the cross-defendants were not, the cross-defendants would be in an unusual position and would ‘in reality be plaintiffs seeking a refund of a contribution they had overpaid.’ The Court said they would not be able to seek a judicial determination of their liability under s5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946*, but

‘Their remedy may be a claim or cross-claim in the Tribunal for restitution for having discharged, by compulsion of law, an obligation for which the defendants on the record were liable. They would have the onus of proving that the defendants should bear a greater share of responsibility than that determined by the Assessor. If they succeeded the defendants would be ordered to refund the difference between the amounts paid by the opponents and their contributions as judicially determined. These views are tentative because the matter was not fully argued.’

#### Issue 26 Disputes between defendants as to apportionment

Is there uncertainty about the nature of challenges to contributions assessments that requires clarification in the Regulation? If so, should the Regulation be amended to clarify the position? If so, how?

### 7.4 Material considered by a Contributions Assessor

In addition to the standard presumptions on apportionment, a Contributions Assessor can only consider a Statement of Particulars and Reply in making a determination (clause 49(4)).

## **Statement of Claim and Cross-Claims**

A defendant representative has suggested that a Contributions Assessor should also be provided with and consider the Statement of Claim and any Cross-Claim. The defendant representative contends that if a plaintiff provides evidence of exposure in his or her Statement of Particulars which is not pleaded in the Statement of Claim, determining contributions on the basis of the Statement of Particulars alone can distort the apportionment.

It appears that the defendant representative is suggesting that where evidence is provided in a Statement of Particulars which is not pleaded in a Statement of Claim, a Contributions Assessor should not be able to take this evidence into account when making a determination. It is not clear to the Current Review that such a change is warranted.

While technically in these circumstances, a Statement of Claim should be amended to plead the further matter, there would appear to be minimal, if any, disadvantage to the defendants as they would have the opportunity to respond to the additional evidence in their Replies. Further, it seems that requiring a Statement of Claim to be provided to Contributions Assessors only to have them ignore any evidence not pleaded in the Statement of Claim may, in fact, delay settlement. Nonetheless, the Current Review would welcome comments on this suggestion.

## **Late or amended documents**

A defendant representative has noted that there are no penalties for failing to comply with the CRP timetable for the filing and service of Form 2 Replies and accompanying evidence by defendants and cross-defendants. It is suggested that some parties have not complied with the relevant timetable but their Form 2 Replies have nonetheless been considered by Contributions Assessors, while further submissions and or Amended Form 2 Replies are not always considered by Contributions Assessors. It is claimed this disadvantages those parties who do comply with the requisite timeframes and provides a forensic advantage to those parties who do not. It has also been suggested that Contributions Assessors should have no discretion to admit late Replies of defendants and cross-defendants except with the leave of all of the parties involved.

The Current Review notes that this suggestion could provide an incentive for defendants and cross-defendants to comply with the timetable for filing Replies. There is a risk, however, that such an amendment could increase disputes between defendants and cross-defendants. Further, it appears that if a Contributions Assessor does not have the benefit of all Replies, including amended Replies, when making a determination, this could either delay settlement of a plaintiff's claim or result in a claim not being settled at all.

**Issue 27      Material to be considered by a Contributions Assessor**

Should Contributions Assessors be required to also consider the Statement of Claim and any Cross-Claims?

Are Replies being filed late and considered by Contributions Assessors? Does this disadvantage parties who comply with the timeframes? Should the Regulation be amended, and if so, how?

Should Contributions Assessors consider late and/or amended documents (e.g. Replies)?

## **7.5      Contributions assessments and assumption of liability**

A Contributions Assessor must assume that all parties are liable.

As a result of the 2006 Review, however, the Regulation was amended to allow all defendants to agree that a particular defendant should not be presumed liable for the purpose of a contributions assessment. The Regulation was also amended to impose costs sanctions on each defendant that refuses to agree a defendant is not liable for the purpose of a contributions assessment if that defendant is later found not to be liable on the basis of evidence provided in its Reply or the issue is admitted in proceedings by the disputing defendant (clause 53).

Further, the Regulation was amended to ensure that defendants assessed to be liable for a small percentage of the plaintiff's damages, who dispute this, and are found not liable at all, are not disadvantaged by the costs penalties. The amendments provide a defendant is not liable to a costs penalty for failing to materially improve its position, if it establishes that it was not liable for the reasons given in its Reply (clause 52).

Some stakeholders, however, have suggested that there should not be an assumption that all defendants are liable at all as this places hardship on defendants while not assisting in the Plaintiff's recovery of damages. If this were to be the case, however, the Current Review notes that a Contributions Assessor would be placed in a position where he or she would need to determine liability before a determination can be made in relation to apportionment. This is likely to contribute to delay and cost.

**Issue 28      Contributions assessments and assumption of liability**

Are the 'innocent defendant' provisions working to assist defendants with no liability or do they need improvement?

Should the assumption that all defendants are liable for the purpose of a contributions assessment be retained?

## 7.6 Quality and consistency of contributions assessments

Some defendant representatives have suggested that there is a lack of consistency between findings made in contributions assessments. For example, some Contributions Assessors determine that an employer also can be an installer, while others believe the same employer is not an installer. Also some Contributions Assessors view some entities as two separate defendants while others view the entity as one defendant.

A number of suggestions have been made to address the quality and consistency of contributions assessments:

- A contributions assessment should be binding on all future decisions;
- A general review of Contributions Assessors should be undertaken to improve the quality, consistency and efficacy of the assessments undertaken. Issues such as selection criteria, training and feedback mechanisms could be reviewed;
- Consideration should be given to allowing an appeal from a contributions assessment.

In relation to the last suggestion by a defendant representative, the Current Review notes that the Regulation already allows defendants to challenge a contributions assessment in the Tribunal. Accordingly, it is assumed this last suggestion is referring to allowing an appeal without going to the Tribunal, however, there are concerns that this might unfairly delay resolution of the plaintiff's claim. Further, defendants in this jurisdiction are sophisticated and should already have a detailed understanding of their likely shares of liability as well as the respective shares of other defendants. It is therefore not clear why some defendants are unable to resolve these issues among themselves on a commercial basis or through including appropriate information in their Replies.

### Issue 29 Quality of contributions assessments & lack of consistency

Are there any issues with the quality and consistency of contributions assessments?

If so, what measures should be taken to address this?



## 7.7 Standard presumptions on apportionment – definition of installer

The contributions assessment provisions, and the standard presumptions which underpin them, were introduced to provide greater incentives to defendants to adopt a commercial approach to settlement. If defendants do not agree on how liability is to be apportioned among them, then the Contributions Assessor is to apportion liability using the standard presumptions which are contained in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (attached as **Appendix C**).

The standard presumptions were based on existing case law on the apportionment of liability. Under the standard presumptions, liability is apportioned to each class of defendant according to fixed percentages which vary depending upon the date of exposure. The Contributions Assessor can vary the fixed percentage assigned to each class of defendant within a permissible range. Some of the factors which may be considered are:

- (a) the state of actual knowledge of a defendant (other than those in category 1, that is manufacturers, suppliers and installers);
- (b) the identity, capacity, size and state of sophistication of a particular defendant, including the industry, and nature of the industry, in which the defendant was engaged;
- (c) the number of defendants identified within each category as being at fault in connection with the plaintiff's claim; and
- (d) the steps which the particular defendant took, ought to have taken and/or was capable of taking, to minimise the risks of harm from the manufacture, supply, installation, exposure to and use of asbestos.

Liability is then divided equally among the defendants in each class, unless the Contributions Assessor is satisfied a different share should apply.

A defendant representative has expressed dissatisfaction with Contributions Assessors' interpretation of the term 'installer of asbestos products' for the purpose of the *Dust Diseases Tribunal (Standard Presumptions-Apportionment) Order 2007*. It appears that the defendant representative believes that because it is an occupier or an employer whose primary business does not involve installing asbestos for fee or reward to third parties, it should be classified as a Category 2 defendant (that is, as a user of asbestos products). The defendant representative contends, however, that it has been classified as a Category 1 defendant (that is, as an installer) by some Contributions Assessors because it installed asbestos in its own plant and equipment. In contrast, the defendant representative contends that another company has been classified as a Category 2 defendant even though that company has similar characteristics to it.

## **Issue 30      Standard presumptions relating to apportionment**

Do the standard presumptions set out in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* require amendment?

In particular, do any of the terms in the Order (including the term ‘installer of asbestos products’ require clarification?

## **7.8      Single claims manager**

### **7.8.1      Effectiveness of the SCM**

If there is more than one defendant to a claim, the defendants must use a single claims manager to manage and negotiate the resolution of the plaintiff’s claim on their behalf (the Single Claims Manager or ‘SCM’). However, defendants can elect not to use an SCM if they all agree (clause 60). The defendants can select one of the defendants or some other person (such as a claims management company) to act as the SCM. Failing agreement, the Registrar or the Contributions Assessor will appoint one of the defendants to act as the SCM.<sup>3</sup>

Some of the submissions during preliminary consultation raised issues around the SCM. One defendant representative claimed that this aspect of the CRP is ineffective. It observed that defendants do not wish to relinquish control to another defendant as SCM, as they are concerned the SCM will not have their interests at heart. It commented that it had not experienced any reduction in disputes or even in the number of parties attending the mediation. The submission, therefore, suggested the SCM provisions be removed and that each defendant bear its own costs in relation to resolving the plaintiff's claim.

Another defendant representative submission stated that SCMs are not commonly used but are useful in certain circumstances. It suggested that the presumption in favour of appointing an SCM should be reversed, so that SCMs would be appointed by choice and not mandatory. The Current Review would be interested to receive stakeholder views on this issue.

## **Issue 31      Effectiveness of the SCM**

Have parties found SCMs useful in managing multiple defendant claims and reducing costs?

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<sup>3</sup> If apportionment has been agreed by the defendants within the required period, the Registrar will appoint the SCM. If it has not, the Contributions Assessor will appoint the SCM.

Have there been any advantages or disadvantages for plaintiffs or defendants arising from the use of SCMs?

Should SCMs only be appointed with the agreement of all defendants?

### 7.8.2 *Role, functions and authority of the SCM*

The SCM has, and may exercise, on behalf of each defendant, all of the functions of a defendant for the purposes of negotiating, managing and seeking to resolve the plaintiff's claim (clause 62). In dealing with the role and functions of the SCM, clause 62 of the Regulation provides, amongst other things, that:

- (4) Each defendant is taken to authorise the SCM to settle the matter with the plaintiff, both informally and at any formal mediation.
- (5) A defendant may impose a monetary limit on the authority of the SCM to settle a claim on behalf of the defendant but must act reasonably in imposing that limit.
- (6) The imposition of a monetary limit on the authority of the SCM to settle a claim on behalf of a defendant is, for the purposes of the mediation of the claim, an aspect of participation in mediation, and the power of a mediator to issue a certificate to the effect that in the mediator's opinion a defendant did not participate in good faith in the mediation extends to this aspect of the defendant's participation in mediation.

One defendant representative submitted that the SCM should only be able to negotiate settlement once it has received instructions from the original and non-original defendants. Arguably, it said, on the basis of the provisions of the Regulation set out above, the "SCM can settle a claim without instructions from other defendants – all that is required is that defendants *can* place a limit on the SCM."

### **Issue 32      The role, functions and authority of the SCM**

Have defendants using SCMs experienced difficulties or disagreement over the scope of the SCMs' role, functions and authority?

Is it desirable to amend the Regulation to expressly provide that the SCM is only able to negotiate settlement once it has received instructions from the original and non-original defendants?

### 7.8.3 *Fees of the SCM*

If the SCM is not one of the defendants, the costs of the SCM are payable as agreed between the defendants and the SCM. If the SCM is one of the defendants, each of the

other defendants is liable to reimburse the SCM, with half of the SCM's costs being divided according to the number of defendants (including the SCM) and the other half divided according to the apportionment of liability between the defendants (clause 64(2)).

The external legal costs of an SCM are subject to assessment under the *Legal Profession Act 2004* (on application by a defendant liable for reimbursement).

The Regulation also allows the Minister, by order published in the Gazette, to establish a scale of costs for use in determining the operational costs of an SCM. However, no scale of costs has been gazetted to date.

One submission in preliminary consultation proposed that SCM fees should be regulated. The Current Review would be interested in stakeholder feedback on this issue.

### **Issue 33      Fees of the SCM**

Have parties encountered difficulties over the issue of costs in the SCM scheme?

Would it be desirable for the Minister to establish a scale of costs for use in determining the operational costs of an SCM?

## Chapter 8 Compensation to Relatives Claims when plaintiff dies

The Regulation (clause 20(1)) currently provides that if a plaintiff dies, the CRP is suspended until:

- (a) the Tribunal amends the Statement of Claim to add a Compensation to Relatives claim, or
- (b) the claimant notifies the parties to the claim that the matter is ready to proceed.

Where a plaintiff dies, the plaintiff's action may be continued by the plaintiff's Legal Personal Representative. It has been observed by practitioners and the Tribunal that the interests of the Legal Personal Representative (representing the estate) and the plaintiff(s) in a Compensation to Relatives claim may not be identical and conflicts can arise. This issue has been discussed in *May v CSR Limited an Anor* DDT5103/05 (transcript of proceedings 10 December 2007) and *Wearne v Allied Mills* DDT7238/07 (transcript of proceedings 18 December 2007). For instance, the original plaintiff could leave his or her estate to a person who is not a relative. In such a case, the beneficiaries of the two claims (the plaintiff's claim and the Compensation to Relatives claim) are different. Further, the Legal Personal Representative/executor and the plaintiff(s) in the Compensation to Relatives claim may be different people, with different interests, and may wish to progress their claims in different ways (for instance, they may have different views on settlement).

The Current Review notes, however, that it is unclear which provision of the Regulation requires a Compensation to Relatives claim to be dealt with together with the plaintiff's claim after a plaintiff's death. It is noted that clause 20 of the Regulation only deals with the suspension of the CRP timetable after a plaintiff's death. Accordingly, where the beneficiaries of the plaintiff's claim and the Compensation to Relatives claim are different, a separate Compensation to Relatives claim could be commenced. If this occurs, the plaintiff's Legal Personal Representative could notify that the plaintiff's claim is ready to proceed under clause 20(1)(b) without adding a separate Compensation to Relatives claim.

Concerns have also been raised that practical difficulties have arisen after a Compensation to Relatives claim has been made. In *Cornelius v Amaca Seltsam Pty Limited* DDT6116/06 (transcript of proceedings 8 October 2007) and *Goostrey v Amaca Pty Limited* DDT 7048/07 (transcript of proceedings 22 October 2007), for instance, there was some confusion over where the matter sat on the CRP timetable following amendment of the Statement of Claim. There were also references in *Cornelius* to serving new Statements of Particulars and Replies in light of the amended Statement of Claim. In *May v CSR Limited and Anor* DDT5103/05 (transcript of proceedings 10 December 2007) the plaintiff's claim had been removed from the CRP, the plaintiff died and the plaintiff's widow commenced separate proceedings under the Compensation to Relatives Act. The Compensation to Relatives claim had to proceed under the CRP (there were no relevant grounds for removal) and the plaintiff's claim could not be returned to the CRP.

In light of these issues, the Current Review is of the view that consideration should be given to amending the provisions dealing with the treatment of a plaintiff's claim and any Compensation to Relatives claim after the plaintiff dies. The Current Review welcomes suggestions for appropriate reform in this area.

**Issue 34      Treatment of plaintiff's claim and Compensation to Relative Claims when the plaintiff dies**

Is there a need to clarify that after a plaintiff's death, a Compensation to Relatives claim may be dealt with separately from the plaintiff's claim? If so, how?

What changes should be made to clarify how the CRP timetable applies to a Compensation to Relatives claim?

Are there any other amendments that could be made to improve the application of the CRP when a Compensation to Relatives claim is made?

## **Chapter 9            Opportunity to apply to the Tribunal for directions**

A number of practitioners at the DDT Practitioners' Forum expressed the view that there should be further opportunity to apply to the Tribunal, not necessarily to remove the matter from the CRP, but for the resolution of a dispute between parties or to seek directions. For instance, one defendant lawyer raised this issue in the context of plaintiffs failing to provide proper particulars. A practitioner who acts as a mediator and Contributions Assessor in the jurisdiction raised this in the context of mediation where parties are failing to attend, or where there is a 'glitch' in the contributions assessment system.

One practitioner suggested to the Current Review that an equivalent provision to that in clause 16(5) of the Regulation (which applies to transitional claims) should be available in all claims. In essence, where there has been a failure to agree on a matter after 10 days, the parties would be permitted to forward the matter to the Registrar for determination and directions (without removing the claim from the CRP).

The Current Review would be open to submissions on this issue to review whether or not such an amendment is warranted. If such an amendment were to be made, it appears to the Current Review that an opportunity to apply to the Tribunal should not be available for technical breaches of the CRP or minor disputes. Instead, there would need to be a suitable threshold, such as significant non-compliance or a disagreement between the parties that cannot be resolved within 10 days. The Current Review notes, however, that there is a risk that providing an opportunity to apply to the Tribunal for directions could become another area for dispute, delay and increased costs.

### **Issue 35            Opportunity to apply to the Tribunal for directions**

Are parties encountering difficulties with other parties not complying with the provisions of the CRP or with prolonged disputes?

If so, should there be an opportunity to apply to the Registrar of the Tribunal to seek enforcement of the provisions of the CRP or resolution of a prolonged dispute?

If stakeholders do support introducing such a provision, what would be an appropriate threshold to limit this opportunity, so as not to delay the progression of the plaintiff's claim and increase costs?

## Chapter 10 Costs

### 10.1 Form 3s

Once a claim is finalised, legal practitioners must provide the Registrar of the Tribunal with certain information about the claim, as required by Form 3.

At the Practitioners' Forum, comments were made that the Form 3 is poorly drafted. It was suggested that costs assessors in the jurisdiction could assist in redrafting the Form to make it more practical and relevant for practitioners. The Current Review is open to submissions and suggestions on this issue.

#### Issue 36 Form 3s

Is the information required on the Form 3 sufficient and appropriate?

In what way could the layout and drafting of Form 3 be improved?

### 10.2 Plaintiff and defendant costs

#### 10.2.1 Plaintiff and defendant costs

It has been suggested by two defendant representatives that the CRP has reduced defendant costs (one suggests there has been a significant reduction). In contrast, however, defendant representatives suggest that there does not appear to have been a corresponding reduction in costs incurred by plaintiffs, despite the more efficient procedures now in place with the CRP. If this is the case, they suggest that a review is required of costs incurred by plaintiffs or consideration given to a mechanism for regulating those costs.

Chapter 2 includes detailed information in relation to the changes in costs under the CRP during its three years of operation.

As noted in Chapter 2, it is difficult to conclusively benchmark the CRP against the dust diseases compensation system prior to the introduction of the CRP as there is no comprehensive data set available in respect of the earlier scheme. While this is the case, costs data provided by James Hardie Industries NV regarding the costs in claims involving the former James Hardie subsidiaries, contained in the Final Report of the 2004 Review, can be used as an indication of the costs involved in resolving claims prior to the establishment of the CRP.

The limitations in using that data are discussed in Chapter 2 of this Issues Paper. Despite this, the data from the Final Report of the 2004 Review still appears to indicate that there has been a significant reduction in both plaintiff and defendant legal costs



in resolving claims after the establishment of the CRP when compared to the legal costs of resolving claims prior to the establishment of the CRP.

### *10.2.2 Presentation of defendant's costs*

The defendant costs provided in Chapter 2 and the data paper in Appendix A for multiple defendant claims show the average costs per defendant in a multiple defendant claim. This includes claims where more than one defendant has been named in the Statement of Claim by the plaintiff, as well as defendants who were joined (either as a party to the plaintiff's claim or by a defendant commencing a cross-claim against one or more other defendants). Claims were not included unless there had been full reporting by all defendants that were a party to the claim.

In relation to multiple defendant claims which were resolved during the first year of the CRP's operation, the 2006 Issues Paper showed the average costs for **all** defendants to a claim, rather than the average costs **per** defendant. In subsequent years, the average costs per defendant are provided. The Current Review would be interested in feedback on which type of costs stakeholders would prefer to be provided in future data papers.

### *10.2.3 Limitations in relation to costs data*

A number of limitations should be noted when considering the information provided in Chapter 2 and Appendix A regarding plaintiff and defendant costs. Firstly, the information regarding costs following the establishment of the CRP has been obtained from Form 3 returns completed by legal practitioners following the finalisation of claims. In many cases, the costs data has been collated from small sample sizes, in particular, when costs are broken down into whether a claim is a single or multiple defendant claim or broken down into disease type.

This is because the Tribunal is still waiting for Form 3 returns to be lodged in relation to a number of claims. For example, while 91 claims which were commenced during the 2007-08 financial year were also resolved during that period, the Tribunal has only received Form 3 Returns from all parties in respect of 78 claims.

Secondly, the sample size used to calculate average costs is usually less than the number of claims for which Form 3 returns have been lodged as claims were included only where an amount has been identified in the return for solicitor-client costs. This was because some returns had indicated that this amount still was to be advised or confirmed (for example, where the costs are still to be agreed or assessed). For example, while Form 3 Returns from all parties were lodged in respect of 78 claims which were commenced and resolved during the 2007-08 financial year, only 56 claims were used to calculate plaintiff's average costs (34 of these were for single defendant claims and 22 for multiple defendant claims).

Thirdly, it should also be noted that, given the small number of claims, average costs could be distorted by costs in a few particular claims. For example, this could occur if

a claim was dealt with by the Tribunal to resolve novel issues and significant costs arose from that claim.

**Issue 37      Plaintiff and defendant costs**

Could further changes be made to the operation of the CRP or the Regulation to reduce plaintiff and defendant costs in connection with resolving claims? If so, how?

In relation to multiple defendant claims, would stakeholders prefer to be provided with the average costs for **all** defendants to a claim or the average costs for **each** defendant to a claim?

### 10.3 Further Review

The CRP has now been in operation for three years. During this time, a review of the CRP was conducted after the first year of operation of the CRP. That review recommended that data in relation to the operation of the CRP be published every 12 months and consideration be given to whether a further review is required at that time, with a preference for a further review to be conducted only where there has been sufficient experience using the CRP (perhaps in July 2008).

Accordingly, a review is currently being conducted in relation to the CRP and data in relation to the third 12 months of operation of the CRP has been provided in Appendix A.

The Regulation was remade in February 2007 in accordance with the *Subordinate Legislation Act 1989* which requires a regulation to be repealed after 5 years. Accordingly, the Regulation will next be due for statutory repeal and need to be remade by 1 September 2012.

**Issue 38      Further review and publication of data**

When should a further review of the CRP's operation be conducted?

For how long should data in relation to the operation of the CRP be provided?

Should any additional data be provided in future years?

Do stakeholders consider it no longer necessary to provide any of the data published in Appendix A?

## APPENDIX A

## Dust Diseases Claims Resolution Process: Data for 2007-08

## 1 Introduction

The Final Report of the 2006 Review recommended that data in relation to the operation of the CRP be published every 12 months. Accordingly, this paper provides data in relation to the third full 12 months during which the CRP operated (that is, between 1 July 2007 and 30 June 2008).

## 2 Number of claims and claim outcomes

## 2.1 Claims commenced

Claims commenced by a Statement of Claim after 1 July 2005 proceed through the CRP (unless they are or become urgent).

The following table shows the number of claims commenced in the third 12 months of the CRP (that is, between 1 July 2007 and 30 June 2008).

**Table 1** Claims commenced between 1 July 2007 and 30 June 2008 by month

	Total Number <sup>1</sup>	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
July <sup>2</sup>	24	11	1	12
August	26	13	0	13
September	25	10	1	14
October	22	10	0	12
November	22	8	0	14
December	24	8	2	14
January	22	9	3	10
February	25	14	1	10
March	15	5	0	10
April	25	13	0	12
May	31	11	1	19
June	34	13	1	20
<b>Total claims commenced between 1 July 2006 and 30 June 2007</b>	<b>295</b>	<b>125</b>	<b>10</b>	<b>160</b>

**Source:** *Tribunal Claims Database*

**Note 1:** There were also nine *Compensation to Relatives Act* claims during this period, and although it is likely that these are asbestos-related, this is not separately identified by the Tribunal Claims Database. There were also a number of claims for bronchitis and other respiratory problems in this period. Although these claims may be asbestos-related, this is not separately identified by the Tribunal Claims Database and so have not been included.

**Note 2** The month is the month in which the Statement of Claim was filed with the Tribunal.

## 2.2 Outcome of claims - General

In relation to the period between 1 July 2007 and 30 June 2008, the following table shows the outcome of claims which commenced between 1 July 2005 and 30 June 2006 or between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007, and claims commenced between 1 July 2007 and 30 June 2008. Outcomes include the number of claims which were resolved (by settlement or judgment) or remained pending.

**Table 2 Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced between 1 July 2005 and 30 June 2008**

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims commenced between 1 July 2005 and 30 June 2006 pending at 1 July 2007	<b>68</b>	42	4	22
Claims commenced between 1 July 2006 and 30 June 2007 pending at 1 July 2007	<b>253</b>	138	12	103
Claims commenced between 1 July 2007 and 30 June 2008	<b>295</b>	125	10	160
<b>Total</b>	<b>616</b>	<b>305</b>	<b>26</b>	<b>285</b>
Claims finalised <sup>1</sup> between 1 July 2007 and 30 June 2008	<b>291</b>	136	7	148
Claims discontinued <sup>2</sup> between 1 July 2007 and 30 June 2008	<b>6</b>	3	0	3
Claims pending at 1 July 2008	<b>319</b>	166	19	134
<b>Total</b>	<b>616</b>	<b>305</b>	<b>26</b>	<b>285</b>

**Source:** *Tribunal Claims Database*

**Note 1** This includes claims which are settled by way of judgment and those which are finalised by way of settlement.

**Note 2** This includes claims which are discontinued, struck out or transferred to another jurisdiction.

The outcome of claims during the period between 1 July 2007 and 30 June 2008 has also been broken down by the year in which claims were commenced. In relation to the period between 1 July 2007 and 30 June 2008, the following table shows the outcome of claims which commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007.

**Table 3** Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced between 1 July 2005 and 30 June 2006 which were pending at 1 July 2007

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims finalised <sup>1</sup> – commenced between 1 July 2005 and 30 June 2006	32	26	0	6
Claims discontinued <sup>2</sup> – commenced between 1 July 2005 and 30 June 2006	1	1	0	0
Claims pending at 1 July 2008 – commenced between 1 July 2005 and 30 June 2006	35	15	4	16
<b>Total</b>	<b>68</b>	<b>42</b>	<b>4</b>	<b>22</b>

Source: *Tribunal Claims Database*

**Note 1** This includes claims which are settled by way of judgment and those which are finalised by way of settlement.

**Note 2** This includes claims which are discontinued, struck out or transferred to another jurisdiction.

In relation to the period between 1 July 2007 and 30 June 2008, the following table shows the outcome of claims which commenced between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007.

**Table 4 Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced between 1 July 2006 and 30 June 2007 which were pending at 1 July 2007**

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims finalised <sup>1</sup> – commenced between 1 July 2006 and 30 June 2007	<b>168</b>	93	5	70
Claims discontinued <sup>2</sup> – commenced between 1 July 2006 and 30 June 2007	<b>2</b>	2	0	0
Claims pending at 1 July 2008 – commenced between 1 July 2006 and 30 June 2007	<b>83</b>	43	7	33
<b>Total</b>	<b>253</b>	<b>138</b>	<b>12</b>	<b>103</b>

**Source:** *Tribunal Claims Database*

**Note 1** This includes claims which are settled by way of judgment and those which are finalised by way of settlement.

**Note 2** This includes claims which are discontinued, struck out or transferred to another jurisdiction.

The following table shows the outcome during the period 1 July 2007 to 30 June 2008 of claims commenced during that period.

**Table 5** Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced during that period

	Total Number <sup>1</sup>	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims finalised <sup>2</sup> – commenced between 1 July 2007 and 30 June 2008	<b>91</b>	17	2	72
Claims discontinued <sup>3</sup> – commenced between 1 July 2007 and 30 June 2008	<b>3</b>	0	0	3
Claims pending at 1 July 2008 – commenced between 1 July 2007 and 30 June 2008	<b>201</b>	108	8	85
<b>Total</b>	<b>295</b>	<b>125</b>	<b>10</b>	<b>160</b>

**Source:** *Tribunal Claims Database*

**Note 1** See note 1 for Table 1.

**Note 2** This includes claims which are settled by way of judgment and those which are finalised by way of settlement.

**Note 3** This includes claims which are discontinued, struck out or transferred to another jurisdiction.

### 2.3 Outcome of claims – Settlement or judgment

The Form 3 Returns lodged by practitioners distinguish between the number of claims which are resolved by judgment and those which are resolved by settlement.

The following table shows the number of Form 3 Returns that were filed in respect of claims that were commenced between 1 July 2005 and 30 June 2008 which were resolved between 1 July 2007 and 30 June 2008.

**Table 6 Outcome during the period 1 July 2007 to 30 June 2008 (finalised by settlement or judgment) of claims commenced between 1 July 2005 and 30 June 2008 where a Form 3 Return has been filed**

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
Claims commenced between 1 July 2005 and 30 June 2006 where Form 3 filed	31 <sup>1</sup>	17	9	0	5
Claims commenced between 1 July 2006 and 30 June 2007 where Form 3 filed	159 <sup>1</sup>	57	34	3	65
Claims commenced between 1 July 2007 and 30 June 2008 where Form 3 filed	78 <sup>1</sup>	8	6	1	63
<b>Total</b>	<b>268</b>	<b>82</b>	<b>49</b>	<b>4</b>	<b>133</b>
Claims resolved by judgment	5	1	0	0	4
Claims resolved by settlement	263	81	49	4	129
<b>Total</b>	<b>268</b>	<b>82</b>	<b>49</b>	<b>4</b>	<b>133</b>

**Source:** *Form 3 Returns*

**Note 1** Only claims which resolved between 1 July 2007 and 30 June 2008 are included. This number is lower than the total number of claims which have been finalised as set out in Tables 3, 4 or 5 because the Tribunal is still waiting for returns to be lodged in relation to a small number of claims.

#### **2.4 *Serving the Statement of Claim and Statement of Particulars***

The CRP timetable does not commence until the Statement of Claim is served with a Statement of Particulars.

The following table shows whether a Statement of Particulars has been served for those claims which were pending at 1 July 2008 but were still subject to the CRP and had commenced between 1 July 2005 and 30 June 2006.



**Table 7** Claims commenced between 1 July 2005 and 30 June 2006 which were pending at 1 July 2008 according to whether a Statement of Particulars has been served

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims pending at 1 July 2008 where the Statement of Claim and Statement of Particulars have been served	10	4	0	6
Claims where Statement of Claim has been filed, but has not been served with the Statement of Particulars	17	8	3	6
<b>Total claims pending</b>	<b>27<sup>1</sup></b>	<b>12</b>	<b>3</b>	<b>12</b>

Source: *Tribunal Registry*

**Note 1** The total of claims filed between 1 July 2005 and 30 June 2006 recorded as outstanding is different from that recorded in the Tribunal Claims Database because the numbers included in this Table do not include those matters which remained outstanding as at 1 July 2008 which had been removed from the CRP and had returned to the Tribunal either on the grounds of urgency or due to the failure of a party to comply with the CRP or had returned to the Tribunal as mediation was unsuccessful.

The following table shows whether a Statement of Particulars has been served for those claims which were pending at 1 July 2008 but were still subject to the CRP and had commenced between 1 July 2006 and 30 June 2007.

**Table 8** Claims commenced between 1 July 2006 and 30 June 2007 which were pending at 1 July 2008 according to whether a Statement of Particulars has been served

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims pending at 1 July 2008 where the Statement of Claim and Statement of Particulars have been served	14	8	1	5
Claims where Statement of Claim has been filed, but has not been served with the Statement of Particulars	61	28	5	28
<b>Total claims pending</b>	<b>75<sup>1</sup></b>	<b>36</b>	<b>6</b>	<b>33</b>

Source: *Tribunal Registry*

**Note 1** The total of claims filed between 1 July 2006 and 30 June 2007 recorded as outstanding is different from that recorded in the Tribunal Claims Database because the numbers included in this Table do not include

those matters which remained outstanding as at 1 July 2008 which had been removed from the CRP and had returned to the Tribunal on the grounds of urgency or had returned to the Tribunal as mediation was unsuccessful.

The following table shows whether a Statement of Particulars has been served for those claims which were pending at 1 July 2008 but were still subject to the CRP and had commenced between 1 July 2007 and 30 June 2008.

**Table 9** Claims commenced between 1 July 2007 and 30 June 2008 which were pending at 1 July 2008 according to whether a Statement of Particulars has been served

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims pending at 1 July 2008 where the Statement of Claim and Statement of Particulars have been served	51	35	1	15
Claims where Statement of Claim has been filed, but has not been served with the Statement of Particulars	138	69	6	63
<b>Total claims pending</b>	<b>189<sup>1</sup></b>	<b>104</b>	<b>7</b>	<b>78</b>

Source: *Tribunal Registry*

**Note 1** The total of claims filed between 1 July 2007 and 30 June 2008 recorded as outstanding is different from that recorded in the Tribunal Claims Database because the numbers included in this Table do not include those matters which remained outstanding as at 1 July 2008 which had been removed from the CRP and had returned to the Tribunal on the grounds of urgency or had returned to the Tribunal as mediation was unsuccessful.

### 3 Handling of claims within the CRP

#### 3.1. *Serving the Statement of Claim and Statement of Particulars*

A strict timetable applies to claims subject to the CRP once the plaintiff serves the Statement of Claim and Statement of Particulars on the defendant(s).

The following table shows the number of claims where the timetable of the CRP has been commenced through service of a Statement of Particulars between 1 July 2007 and 30 June 2008. It includes claims commenced between 1 July 2005 and 30 June 2008.

It is noted that this information was originally reported during the first year of the CRP's operation to show that although there was relatively little activity in the CRP during that first year, activity had increased significantly in the second six months. Given this and the increase in activity in the CRP during the last two financial years, the Current Review is considering whether or not it is now necessary to continue providing this information.

**Table 10** Month in respect of which the CRP timetable has been commenced by service of the Statement of Particulars between 1 July 2007 and 30 June 2008 for claims commenced between 1 July 2005 and 30 June 2008

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Statement of Particulars served for claims commenced between 1 July 2005 and 30 June 2006	0	0	0	0
Statement of Particulars served for claims commenced between 1 July 2006 and 30 June 2007	49	31	1	17
Statement of Particulars served for claims commenced between 1 July 2007 and 30 June 2008	114	51	2	61
<b>Total Statement of Particulars served</b>	<b>163</b>	<b>82</b>	<b>3</b>	<b>78</b>
July	21	12	0	9
August	18	7	0	11
September	5	3	0	2

October	14	10	0	4
November	21	10	1	10
December	8	3	0	5
January	14	7	1	6
February	14	9	1	4
March	12	4	0	8
April	16	7	0	9
May	12	6	0	6
June	8	4	0	4
<b>Total Statement of Particulars served</b>	<b>163</b>	<b>82</b>	<b>3</b>	<b>78</b>

Source: *Tribunal Registry*

The number of claims where the timetable of the CRP has been commenced through service of the Statement of Particulars between 1 July 2007 and 30 June 2008 has also been broken down by the year in which claims commenced. None of these involved claims which were commenced between 1 July 2005 and 30 June 2006.

The following table shows the number of claims commenced between 1 July 2006 and 30 June 2007 where the timetable of the CRP has been commenced through service of a Statement of Particulars between 1 July 2007 and 30 June 2008.

**Table 11**      **Month in respect of which the CRP timetable has been commenced by service of the Statement of Particulars between 1 July 2007 and 30 June 2008 for claims commenced between 1 July 2006 and 30 June 2007**

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
July	21	12	0	9
August	11	6	0	5
September	1	1	0	0
October	6	5	0	1
November	8	5	1	2
December	0	0	0	0
January	1	1	0	0
February	1	1	0	0
March	0	0	0	0
April	0	0	0	0
May	0	0	0	0
June	0	0	0	0
<b>Total Statement of Particulars served</b>	<b>49</b>	<b>31</b>	<b>1</b>	<b>17</b>

Source: *Tribunal Registry*

The following table shows the number of claims commenced between 1 July 2007 and 30 June 2008 where the timetable of the CRP has been commenced through service of a Statement of Particulars during that period.

**Table 12** Month in respect of which the CRP timetable has been commenced by service of the Statement of Particulars between 1 July 2007 and 30 June 2008 for claims commenced during that period

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
July	0	0	0	0
August	7	1	0	6
September	4	2	0	2
October	8	5	0	3
November	13	5	0	8
December	8	3	0	5
January	13	6	1	6
February	13	8	1	4
March	12	4	0	8
April	16	7	0	9
May	12	6	0	6
June	8	4	0	4
<b>Total Statement of Particulars served</b>	<b>114</b>	<b>51</b>	<b>2</b>	<b>61</b>

Source: Tribunal Registry

### 3.2 Outcome of claims where active steps are taken as part of the CRP

The following table shows the outcome of claims during the period between 1 July 2007 and 30 June 2008 where action has been taken as part of the CRP. The following data includes claims commenced between 1 July 2005 and 30 June 2007 which were outstanding as at 1 July 2007 and claims commenced between 1 July 2007 and 30 June 2008.

**Table 13** Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced between 1 July 2005 and 30 June 2008 while subject to the CRP

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims reported as settled while the claim is subject to the CRP	181	93	2	86
Claims discontinued	6	3	0	3
Claims removed for urgency	27	0	3	24
Claims removed by agreement after information exchange	0	0	0	0
Claims removed for failure to comply with the CRP	3	1	0	2
Claims returned to Tribunal as mediation was unsuccessful	75 <sup>1</sup>	39	2	34
Claims outstanding on 30 June 2008 which remain subject to the CRP	291 <sup>2</sup>	152	16	123
<b>Total</b>	<b>583<sup>3</sup></b>	<b>288</b>	<b>23</b>	<b>272</b>

**Source:** Tribunal Registry

**Note 1** In relation to the number of unsuccessful mediations, please see section 6.6 Unsuccessful mediations in the 2008 Issues Paper

**Note 2** Of the outstanding claims, the Statement of Particulars has been served in 75 claims (and as such the claims are active as part of the CRP). As at 1 July 2008 the Statement of Claim and the Statement of Particulars have not been served in 216 claims. This is set out in Tables 7, 8 and 9.

**Note 3** The total number of claims is lower than that reported as the total in Table 2 because whereas Table 2 shows the outcome at 1 July 2008 of all claims which were pending at 1 July 2007 regardless of whether the claim was subject to the CRP or had returned to the Tribunal and claims commenced between 1 July 2007 and 30 June 2008, this table only shows the outcome of claims which were still subject to the CRP at 1 July 2007 as well as the outcome of claims which were commenced between 1 July 2007 and 30 June 2008.

The outcome of claims during the period between 1 July 2007 and 30 June 2008 where action has been taken as part of the CRP has also been broken

down by the year in which claims were commenced. The following table shows this information for claims that were commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007.

**Table 14 Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced between 1 July 2005 to 30 June 2006 which remained subject to the CRP**

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims reported as settled while the claim is subject to the CRP	23	19	0	4
Claims discontinued	1	1	0	0
Claims removed for urgency	0	0	0	0
Claims removed by agreement after information exchange	0	0	0	0
Claims removed for failure to comply with the CRP	0	0	0	0
Claims returned to Tribunal as mediation was unsuccessful	5 <sup>1</sup>	5	0	0
Claims outstanding on 30 June 2008 which remain subject to the CRP	27 <sup>2</sup>	12	3	12
<b>Total</b>	<b>56<sup>23</sup></b>	<b>37</b>	<b>3</b>	<b>16</b>

Source: *Tribunal Registry*

**Note 1** In relation to the number of unsuccessful mediations, please see section 6.6 Unsuccessful mediations in the 2008 Issues Paper

**Note 2** Of the outstanding claims, the Statement of Particulars has been served in 10 claims (and as such the claims are active as part of the CRP). As at 1 July 2008 the Statement of Claim and the Statement of Particulars have not been served in 17 claims. This is set out in Table 7.

**Note 3** The total number of claims is lower by 12 than that reported as the total in Table 3 because whereas Table 3 shows the outcome at 1 July 2008 of all claims which were pending at 1 July 2007 regardless of whether the claim was subject to the CRP or had returned to the Tribunal, this table only shows the outcome of claims which were still subject to the CRP at 1 July 2007.



The following table shows the outcome of claims during the period between 1 July 2007 and 30 June 2008 where action has been taken as part of the CRP for claims commenced between 1 July 2006 and 30 June 2007.

**Table 15 Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced between 1 July 2006 and 30 June 2007 while subject to the CRP**

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims reported as settled while the claim is subject to the CRP	97	58	1	38
Claims discontinued	2	2 <sup>1</sup>	0	0
Claims removed for urgency	4	0	1	3
Claims removed by agreement after information exchange	0	0	0	0
Claims removed for failure to comply with the CRP	2	0	0	2
Claims returned to Tribunal as mediation was unsuccessful	52 <sup>2</sup>	30	2	20
Claims outstanding on 30 June 2008 which remain subject to the CRP	75 <sup>3</sup>	36	6	33
<b>Total</b>	<b>232<sup>4</sup></b>	<b>126</b>	<b>10</b>	<b>96</b>

Source: *Tribunal Registry*

**Note 1** This includes a claim which was transferred to another jurisdiction.

**Note 2** In relation to the number of unsuccessful mediations, please see section 6.6 Unsuccessful mediations in the 2008 Issues Paper

**Note 3** Of the outstanding claims, the Statement of Particulars has been served in 14 claims (and as such the claims are active as part of the CRP). As at 1 July 2008, the Statement of Claim and the Statement of Particulars have not been served in 61 claims. This is set out in Table 8.

**Note 4** The total number of claims is lower by 21 than that reported as the total in Table 4 because whereas Table 4 shows the outcome at 1 July 2008 of all claims which were pending at 1 July 2007 regardless of whether the claim was subject to the CRP or had returned to the Tribunal, this table only shows the outcome of claims which were still subject to the CRP at 1 July 2007.

The following table shows the outcome of claims during the period between 1 July 2007 and 30 June 2008 where action has been taken as part of the CRP for claims commenced during that period.

**Table 16 Outcome during the period 1 July 2007 to 30 June 2008 of claims commenced during that period while subject to the CRP**

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims reported as settled while the claim is subject to the CRP	61	16	1	44
Claims discontinued	3	0	0	3 <sup>1</sup>
Claims removed for urgency	23	0	2	21
Claims removed by agreement after information exchange	0	0	0	0
Claims removed for failure to comply with the CRP	1	1	0	0
Claims returned to Tribunal as mediation was unsuccessful	18 <sup>2</sup>	4	0	14
Claims outstanding on 30 June 2008 which remain subject to the CRP	189 <sup>3</sup>	104	7	78
<b>Total</b>	<b>295</b>	<b>125</b>	<b>10</b>	<b>160</b>

Source: *Tribunal Registry*

**Note 1** This includes a claim which was struck out.

**Note 2** In relation to the number of unsuccessful mediations, please see section 6.6 Unsuccessful mediations in the 2008 Issues Paper

**Note 3** Of the outstanding claims, the Statement of Particulars has been served in 51 claims (and as such the claims are active as part of the CRP). As at 1 July 2008, the Statement of Claim and the Statement of Particulars have not been served in 138 claims. This is set out in Table 9.

## 4 Time frames as part of the CRP

The following information is based on data recorded by the Tribunal in respect of those claims where action is taken as part of the CRP.

### 4.1 Service of the Statement of Particulars

The following table is in relation to claims commenced between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007. For claims where the Statement of Particulars was served between 1 July 2007 and 30 June 2008, it shows the average time taken between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars. The shortest period taken to serve the Statement of Particulars after the Statement of Claim is filed was 28 days, while the longest time taken was 425 calendar days.

**Table 17** Calendar days between lodgement of a Statement of Claim and service of the Statement of Particulars on the last original defendant for claims commenced between 1 July 2006 and 30 June 2007 – Statement of Particulars served from 1 July 2007

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	49 <sup>1</sup>	21	10	1	17
<b>Range</b>	28 - 425	29 - 425	36 - 255	192	28 - 177
<b>Median</b>	124	157	161.5	192	85
<b>Average</b>	126.4	142.6	143	192	92.6

Source: Tribunal Registry

**Note 1** The data set used in this table includes all claims in respect of which a Statement of Particulars was served between 1 July 2007 and 30 June 2008. All claims where a Statement of Particulars has been served are included in the total, regardless of the outcome of the claim (that is, settled, outstanding etc).

The following table is in relation to claims commenced between 1 July 2007 and 30 June 2008. For claims where the Statement of Particulars was served between 1 July 2007 and 30 June 2008, it shows the average time taken between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars. The shortest period taken to serve the Statement of Particulars after the Statement of Claim is filed was the same day, while the longest time taken was 237 calendar days.

**Table 18** Calendar days between lodgement of a Statement of Claim and service of the Statement of Particulars on the last original defendant for claims commenced between 1 July 2007 and 30 June 2008 – Statement of Particulars served from 1 July 2007

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	<b>114<sup>1</sup></b>	36	15	2	61
<b>Range</b>	<b>0 – 237</b>	0 - 203	2 - 237	9 - 204	0 - 182
<b>Median</b>	<b>61.5</b>	76.5	121	106.5	53
<b>Average</b>	<b>76.7</b>	93.4	104	106.5	59.2

Source: Tribunal Registry

**Note 1** The data set used in this table includes all claims in respect of which a Statement of Particulars was served between 1 July 2007 and 30 June 2008. All claims where a Statement of Particulars has been served are included in the total, regardless of the outcome of the claim (that is, settled, outstanding, removed for urgency etc).

As there were no Statement of Particulars served between 1 July 2007 and 30 June 2008 for claims commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007, no table is provided regarding these claims.

#### 4.2 Time taken to resolve claims

The following table shows the average time taken to resolve a claim from the time that the Statement of Particulars is served. The table is in relation to claims commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007 but resolved by 30 June 2008. This includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Table 19** Calendar days taken to finalise a claim from service of the Statement of Particulars for claims commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007 but resolved by 30 June 2008

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	<b>24<sup>1</sup></b>	16	6	0	2
<b>Range</b>	<b>166 - 606</b>	227 - 568	299 - 606	0	166 - 287
<b>Median</b>	<b>354</b>	377	380	0	226.5
<b>Average</b>	<b>389.7</b>	393.4	434	0	226.5

Source: Tribunal Registry

**Note 1** The total number includes claims filed between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007 and resolved by 30 June 2008. Claims have been included only where a Statement of Particulars has been filed and served.

In relation to claims commenced between 1 July 2006 and 30 June 2007, which were outstanding at 1 July 2007 but resolved by 30 June 2008, the table shows the average time taken to resolve a claim from the time that the Statement of Particulars is served. This includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Table 20** Calendar days taken to finalise a claim as part of the CRP from service of the Statement of Particulars for claims commenced between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007 but resolved by 30 June 2008

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	<b>117<sup>1</sup></b>	52	22	4	39
<b>Range</b>	<b>10 – 565</b>	83 - 565	87 - 460	101 - 392	10 - 439
<b>Median</b>	<b>192</b>	226	193.5	188.5	125
<b>Average</b>	<b>207.3</b>	241.6	207.6	217.5	160.4

Source: *Tribunal Registry*

**Note 1** The total number includes claims filed between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007 and resolved by 30 June 2008. Claims have been included only where a Statement of Particulars has been filed and served.

In relation to claims commenced between 1 July 2007 and 30 June 2008 which were resolved during that period, the table shows the average time taken to resolve a claim from the time that the Statement of Particulars is served. This includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Table 21** Calendar days taken to finalise a claim as part of the CRP from service of the Statement of Particulars for claims commenced between 1 July 2007 and 30 June 2008 which resolved during that period

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	<b>56<sup>1</sup></b>	10	5	0	41
<b>Range</b>	<b>28 - 235</b>	129 - 235	102 - 215	0	28 - 211
<b>Median</b>	<b>109.5</b>	181.5	192	0	88
<b>Average</b>	<b>120.5</b>	187.6	171.4	0	98

Source: *Tribunal Registry*

**Note 1** The total number includes claims filed between 1 July 2007 and 30 June 2008 which were resolved during that period. Claims have been included only where a Statement of Particulars has been filed and served.

### 4.3 Resolution of claims where there is no Statement of Particulars

The following table is in relation to claims commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007 but resolved by 30 June 2008. It shows the time taken to resolve matters without a Statement of Particulars having been filed and served. This table includes claims which were resolved as part of the CRP.

**Table 22** Calendar days taken to finalise a claim from filing of the Statement of Claim in claims where a Statement of Particulars has not been served – Claims commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007 but resolved by 30 June 2008

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
Number	6 <sup>1</sup>	2	2	0	2
Range	404 - 843	668 - 843	404 - 782	0	587 - 675
Median	671.5	755.5	593	0	631
Average	659.8	755.5	593	0	631

Source: Tribunal Registry

**Note 1** The table includes claims commenced between 1 July 2005 and 30 June 2006 which were outstanding at 1 July 2007 and resolved by 30 June 2008.

In relation to claims commenced between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007 but resolved by 30 June 2008, the following table shows the time taken to resolve matters without a Statement of Particulars having been filed and served. This includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Table 23** Calendar days taken to finalise a claim from filing of the Statement of Claim in claims where a Statement of Particulars has not been served – Claims commenced between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007 but resolved by 30 June 2008

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
Number	45 <sup>1</sup>	7	10	0	28
Range	48 - 664	154 - 397	263 - 664	0	48 - 615
Median	305	319	322.5	0	252
Average	291.3	284	376.6	0	262.6

Source: Tribunal Registry

**Note 1** The table includes claims commenced between 1 July 2006 and 30 June 2007 which were outstanding at 1 July 2007 and resolved by 30 June 2008.

In relation to claims commenced between 1 July 2007 and 30 June 2008 which were resolved during that period, the following table shows the time taken to resolve matters without a Statement of Particulars having been filed and served. This includes claims which were resolved as part of the CRP and claims which were otherwise resolved.

**Table 24** Calendar days taken to finalise a claim from filing of the Statement of Claim in claims where a Statement of Particulars has not been served – Claims commenced between 1 July 2007 and 30 June 2008 which resolved during that period

	By Disease Type				
	Total	Asbestosis	ARPD	Carcinoma	Mesothelioma
<b>Number</b>	35 <sup>1</sup>	0	2	2	31
<b>Range</b>	10 - 251	0	85 - 251	69 - 158	10 - 314
<b>Median</b>	98	0	168	113.5	98
<b>Average</b>	121.8	0	168	113.5	119.4

Source: Tribunal Registry

**Note 1** The table includes claims commenced between 1 July 2007 and 30 June 2008 which were resolved during that period.

## 5 Contributions assessment

Between 1 July 2007 and 30 June 2008, there were 23 contributions assessments undertaken. Three of these were conducted in relation to transitional claims, one was undertaken in respect of a claim lodged between 1 July 2005 and 30 June 2006, 16 were undertaken in respect of claims lodged between 1 July 2006 and 30 June 2007 and the remaining three were undertaken in respect of claims lodged between 1 July 2007 and 30 June 2008. The Registry has advised that it is aware of only one challenge to a contributions assessment that has been filed with the Tribunal during the last financial year. The matter is still pending.

## 6 Mediation

Of the 23 claims commenced between 1 July 2005 and 30 June 2006 which resolved by way of settlement while subject to the CRP between 1 July 2007 and 30 June 2008, mediators were appointed in 17 claims. It appears that nine of these claims were actually mediated.

Of the 97 claims commenced between 1 July 2006 and 30 June 2007 which resolved by way of settlement while subject to the CRP between 1 July 2007 and 30 June 2008, the data show that mediators were appointed in 79 claims. It appears that 41 of these claims were actually mediated.

Of the 61 claims commenced between 1 July 2007 and 30 June 2008 which resolved by way of settlement while subject to the CRP during that period, the data show that mediators were appointed in 47 claims. It appears that 18 of these claims were actually mediated.

In relation to claims which resolved between 1 July 2007 and 30 June 2008, 67 claims which were not successfully mediated while subject to the CRP were subsequently settled when the claim returned to the Tribunal.



## 7 Transitional claims commenced before 1 July 2005

### 7.1 Outcome of transitional claims

The following table shows details of the number of transitional claims “on hand” in the Tribunal as at 1 July 2007 and the outcome of those claims during the period between 1 July 2007 and 30 June 2008. As was the case with Table 1, cross-claims are not included.

**Table 25** Outcome during the period 1 July 2007 to 30 June 2008 of pre 1 July 2005 claims

	Total Number	By Disease Type		
		Non-malignant	Carcinoma	Mesothelioma
Claims on hand at 1 July 2007	131	104	15	12
Claims finalised <sup>1</sup> – commenced pre 1 July 2005	46	38	4	4
Claims discontinued <sup>2</sup> – commenced pre 1 July 2005	1	1	0	0
Claims pending as at 1 July 2008 – commenced pre 1 July 2005	84	65	11	8

**Source:** *Tribunal Claims Database*

**Note 1** These include claims which are settled by way of judgment and those which are finalised by way of settlement.

**Note 2** This category includes claims which are discontinued, struck out or transferred to another jurisdiction. In this instance, the claim was transferred to another jurisdiction (South Australia).

### 7.2 Steps taken as part of the CRP on pre 1 July 2005 claims

Between 1 July 2007 and 30 June 2008, 40 pre 1 July 2005 claims were recorded in the Registry’s database which tracks progress through the CRP. From Table 25 above, there were 131 claims as at 1 July 2007 which potentially could have been subject to the CRP. Of the 40 claims recorded by the Registry, current claims proposals were notified to the Registrar of the Tribunal in only nine claims. Three of these were notified between 1 July 2006 and 30 June 2007 and the remaining six were notified between 1 July 2007 and 30 June 2008.

The Form 3 Returns lodged by practitioners distinguish between the number of claims which are resolved by judgment and those which are resolved by settlement.

In relation to pre 1 July 2005 claims that resolved between 1 July 2007 and 30 June 2008, the following table shows the number of claims which were resolved by judgment and those which were resolved by settlement.

**Table 26** Claims resolved by settlement or judgment where a Form 3 Return has been filed – Pre 1 July 2005 claims which resolved between 1 July 2007 and 30 June 2008

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
Claims resolved by settlement – commenced pre 1 July 2005	41	19	13	4	5
Claims resolved by judgment – commenced pre 1 July 2005	1	1	0	0	0
<b>Total</b>	<b>42<sup>1</sup></b>	<b>20</b>	<b>13</b>	<b>4</b>	<b>5</b>

Source: *Form 3 Returns*

**Note 1** This number is lower than the total number of claims which have been finalised as set out in Table 25 because the Tribunal is still waiting for returns to be lodged in relation to four claims.

## 8 Legal and other claim costs

### 8.1 Plaintiff legal and other claim costs - General

In calculating the average amount for each category of cost, claims were included only where an amount has been identified in the Form 3 Return for solicitor-client costs. This was because some returns had indicated that this amount still was to be advised or confirmed (for example, where the costs are still to be agreed or assessed).

The following tables show average plaintiff costs for all claims which were finalised between 1 July 2007 and 30 June 2008, whether the claims were commenced between 1 July 2005 and 30 June 2006, or between 1 July 2006 and 30 June 2007 or between 1 July 2007 and 30 June 2008.

**Table 27** Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2008 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	110	51	59
Solicitor-Client Costs	29,779	23,999	34,775
Barristers' Fees	3,014	1,703	4,147
Expert Reports	3,770	3,706	3,826
Other Disbursements	2,708	2,117	3,219
<b>Total</b>	<b>39,271</b>	<b>31,525</b>	<b>45,967</b>

Source: Form 3 Returns

**Table 28** Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2008 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	105	55	50
Solicitor-Client Costs	30,950	28,425	33,728
Barristers' Fees	4,496	3,140	6,804
Expert Reports	3,994	3,741	4,272
Other Disbursements	3,048	2,487	3,666
<b>Total</b>	<b>42,489<sup>1</sup></b>	<b>37,792<sup>1</sup></b>	<b>48,471<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

Plaintiff costs for claims which were finalised between 1 July 2007 and 30 June 2008 were also broken down by the year in which claims were commenced. The following tables show the average plaintiff costs for claims which commenced between 1 July 2005 and 30 June 2006 which were finalised between 1 July 2007 and 30 June 2008.

**Table 29** Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	8	7	1
Solicitor-Client Costs	26,507	21,336	62,700
Barristers' Fees	2,310	1,426	8,498
Expert Reports	4,576	4,285	6,609
Other Disbursements	2,885	2,071	8,583
<b>Total</b>	<b>36,277<sup>1</sup></b>	<b>29,119<sup>1</sup></b>	<b>86,390</b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

**Table 30** Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	17	13	4
Solicitor-Client Costs	30,008	28,862	33,731
Barristers' Fees	5,618	4,677	8,677
Expert Reports	5,839	6,701	3,038
Other Disbursements	3,969	3,893	4,213
<b>Total</b>	<b>45,433<sup>1</sup></b>	<b>44,133</b>	<b>49,659</b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

The following tables show the average plaintiff costs for claims which commenced between 1 July 2006 and 30 June 2007 which were finalised between 1 July 2007 and 30 June 2008.

**Table 31** Average plaintiff legal and other costs for claims commenced between 1 July 2006 and 30 June 2007 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	68	41	27
Solicitor-Client Costs	27,994	24,347	33,532
Barristers' Fees	2,498	1,710	3,694
Expert Reports	4019	3,656	4,572
Other Disbursements	2,388	2,107	2,816
<b>Total</b>	<b>36,899</b>	<b>31,820</b>	<b>44,612 <sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

**Table 32** Average plaintiff legal and other costs for claims commenced between 1 July 2006 and 30 June 2007 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	66	37	29
Solicitor-Client Costs	30,227	28,095	32,947
Barristers' Fees	2,982	1,519	4,848
Expert Reports	3,363	2,981	3,851
Other Disbursements	2,684	2,119	3,405
<b>Total</b>	<b>39,256</b>	<b>34,714</b>	<b>45,051</b>

Source: Form 3 Returns

The following tables show the average plaintiff costs for claims which commenced between 1 July 2007 and 30 June 2008 which were finalised during that period.

**Table 33** Average plaintiff legal and other costs for claims commenced between 1 July 2007 and 30 June 2008 which finalised during that period – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	34	3	31
Solicitor-Client Costs	34,119	25,457	34,958
Barristers' Fees	4,213	2,255	4,402
Expert Reports	3,082	3,041	3,086
Other Disbursements	3,305	2,360	3,397
<b>Total</b>	<b>44,719</b>	<b>33,113</b>	<b>45,843</b>

Source: Form 3 Returns

**Table 34** Average plaintiff legal and other costs for claims commenced between 1 July 2007 and 30 June 2008 which finalised during that period – Multiple defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	22	5	17
Solicitor-Client Costs	33,848	29,730	35,060
Barristers' Fees	8,171	2,976	9,699
Expert Reports	4,462	1,672	5,282
Other Disbursements	3,429	1,547	3,983
<b>Total</b>	<b>49,911<sup>1</sup></b>	<b>35,925</b>	<b>54,024</b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

## 8.2 Plaintiff legal and other claim costs – Transitional claims

The following tables show the average plaintiff costs for pre 1 July 2005 claims which were finalised between 1 July 2007 and 30 June 2008.

**Table 35** Average plaintiff legal and other costs for claims commenced prior to 1 July 2005 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type			
	Overall	Asbestosis	ARPD	Malignant
Number	8	4	3	1
Solicitor-Client Costs	33,286	27,078	36,157	49,500
Barristers' Fees	6,231	701	15,680	0
Expert Reports	8,477	7,463	8,644	12,032
Other Disbursements	5,586	3,132	9,635	3,255
<b>Total</b>	<b>53,579<sup>1</sup></b>	<b>38,375<sup>1</sup></b>	<b>70,116</b>	<b>64,787</b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

**Table 36** Average plaintiff legal and other costs for claims commenced prior to 1 July 2005 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type			
	Overall	Asbestosis	ARPD	Malignant
Number	26	14	8	4
Solicitor-Client Costs	28,646	26,605	30,664	31,755
Barristers' Fees	2,240	2,111	3,121	930
Expert Reports	7,584	8,697	6,981	4,895
Other Disbursements	2,600	2,196	3,028	3,155
<b>Total</b>	<b>41,070</b>	<b>39,609</b>	<b>43,794</b>	<b>40,737<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

### 8.3 Plaintiff legal and other claim costs – Mesothelioma claims

The following table consolidates information concerning mesothelioma claims which were finalised between 1 July 2007 and 30 June 2008. It is not possible to present the information regarding plaintiff costs in single defendant claims for those claims which were commenced between 1 July 2005 and 30 June 2006 and claims commenced pre 1 July 2005 as the very small sample size in respect of these claims would raise privacy concerns.

**Table 37** Average plaintiff legal and other costs - Mesothelioma claims which finalised between 1 July 2007 and 30 June 2008

	By Disease Type					
	Claims commenced between 1 July 2007 and 30 June 2008		Claims commenced between 1 July 2006 and 30 June 2007		Claims commenced between 1 July 2005 and 30 June 2006	Claims commenced pre 1 July 2005
	Meso (Single Def)	Meso (Multi Def)	Meso (Single Def)	Meso (Multi Def)	Meso (Multi Def)	Meso (Multi Def)
Solicitor-Client Costs	34,958	35,060	33,088	32,716	33,731	35,552
Barristers' Fees	4,402	9,699	3,391	4,927	8,677	0
Expert Reports	3,086	5,282	4,163	3,653	3,038	2,909
Other Disbursements	3,397	3,983	2,609	3,400	4,213	2,521
<b>Total</b>	<b>45,843</b>	<b>54,024</b>	<b>43,251</b>	<b>44,696</b>	<b>49,659</b>	<b>40,982</b>

Source: Form 3 Returns

### 8.4 Defendant legal and other claim costs - General

The following tables show average defendant's costs for all claims which were finalised between 1 July 2007 and 30 June 2008, whether the claims were commenced between 1 July 2005 and 30 June 2006, or 1 July 2006 and 30 June 2007 or 1 July 2007 and 30 June 2008.

They include information concerning the average solicitor-client costs, barristers' fees, cost of expert reports and cost of disbursements for defendants on a per claim basis. The average amounts specified in Table 39 (multiple defendant claims) are the average costs for each defendant to a claim. This includes claims where more than one defendant has been named in the Statement of Claim by the plaintiff, as well as defendants who were joined (either as a party to the plaintiff's claim or by a defendant commencing



a cross-claim against one or more other defendants). Claims were not included unless there had been full reporting by all defendants that were a party to the claim.

**Table 38** Average defendant legal and other costs for claims commenced between 1 July 2005 and 30 June 2008 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	84	41	43
Solicitor-Client Costs	15,072	16,105	14,087
Barristers' Fees	1,456	783	2,098
Expert Reports	1,866	2,102	1,640
Other Disbursements	1,610	1,763	1,465
<b>Total</b>	<b>20,005<sup>1</sup></b>	<b>20,754<sup>1</sup></b>	<b>19,291<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

**Table 39** Average defendant legal and other costs for claims commenced between 1 July 2005 and 30 June 2008 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type				
	Overall	Asbestosis	ARPD	Carcinoma	Mesothelioma
Number	47	24	4	0	19
Solicitor-Client Costs	11,406	9,866	13,363	0	13,582
Barristers' Fees	605	278	0	0	1,312
Expert Reports	882	975	1,186	0	650
Other Disbursements	801	577	1,224	0	1,083
<b>Total</b>	<b>13,694</b>	<b>11,696</b>	<b>15,773</b>	<b>0</b>	<b>16,628<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

Defendant's costs for claims which were finalised between 1 July 2007 and 30 June 2008 have also been broken down by the year in which claims were commenced. The following tables show the average defendant's costs for

claims which commenced between 1 July 2005 and 30 June 2006 which were finalised between 1 July 2007 and 30 June 2008.

**Table 40** Average defendant legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	7	6	1
Solicitor-Client Costs	22,272	18,319	45,989
Barristers' Fees	2,762	1,128	12,568
Expert Reports	3,313	3,590	1,650
Other Disbursements	2,382	2,155	3,743
<b>Total</b>	<b>30,728<sup>1</sup></b>	<b>25,191<sup>1</sup></b>	<b>63,950</b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

**Table 41** Average defendant legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type				
	Overall	Asbestosis	ARPD	Carcinoma	Mesothelioma
Number	10	7	1	0	2
Solicitor-Client Costs	8,047	7,468	12,013	0	7,437
Barristers' Fees	244	207	0	0	704
Expert Reports	871	1,038	733	0	44
Other Disbursements	620	546	781	0	886
<b>Total</b>	<b>9,782</b>	<b>9,259</b>	<b>13,527</b>	<b>0</b>	<b>9,071</b>

Source: Form 3 Returns

The following tables show the average defendant's costs for claims which commenced between 1 July 2006 and 30 June 2007 and were finalised between 1 July 2007 and 30 June 2008.

**Table 42** Average defendant legal and other costs for claims commenced between 1 July 2006 and 30 June 2007 which finalised between 1 July 2007 and 30 June 2008 – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	54	32	22
Solicitor-Client Costs	15,600	16,128	14,832
Barristers' Fees	1,167	749	1,775
Expert Reports	1,803	1,842	1,746
Other Disbursements	1,646	1,738	1,513
<b>Total</b>	<b>20,216</b>	<b>20,457</b>	<b>19,866</b>

Source: Form 3 Returns

**Table 43** Average defendant legal and other costs for claims commenced between 1 July 2006 and 30 June 2007 which finalised between 1 July 2007 and 30 June 2008 – Multiple defendant claims

	By Disease Type				
	Overall	Asbestosis	ARPD	Carcinoma	Mesothelioma
Number	32	16	3	0	13
Solicitor-Client Costs	11,724	11,404	14,488	0	11,688
Barristers' Fees	587	332	0	0	1,064
Expert Reports	906	935	1,563	0	744
Other Disbursements	855	620	1,594	0	1,063
<b>Total</b>	<b>14,073<sup>1</sup></b>	<b>13,292<sup>1</sup></b>	<b>17,645</b>	<b>0</b>	<b>14,560<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

The following tables show the average defendant's costs for claims which commenced between 1 July 2007 and 30 June 2008 and were finalised during that period.

**Table 44** Average defendant legal and other costs for claims commenced between 1 July 2007 and 30 June 2008 which finalised during that period – Single defendant claims

	By Disease Type		
	Overall	Non-malignant	Malignant
Number	23	3	20
Solicitor-Client Costs	11,642	11,433	11,673
Barristers' Fees	1,738	458	1,930
Expert Reports	1,574	1,905	1,524
Other Disbursements	1,292	1,249	1,298
<b>Total</b>	<b>16,245<sup>1</sup></b>	<b>15,044<sup>1</sup></b>	<b>16,426<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

**Table 45** Average defendant legal and other costs for claims commenced between 1 July 2007 and 30 June 2008 which finalised during that period – Multiple defendant claims

	By Disease Type				
	Overall	Asbestosis	ARPD	Carcinoma	Mesothelioma
Number	5	1	0	0	4
Solicitor-Client Costs	21,733	7,728	0	0	25,235
Barristers' Fees	2,173	0	0	0	2,716
Expert Reports	714	1,000	0	0	643
Other Disbursements	1,031	0	0	0	1,288
<b>Total</b>	<b>25,650<sup>1</sup></b>	<b>8,728</b>	<b>0</b>	<b>0</b>	<b>29,881<sup>1</sup></b>

Source: Form 3 Returns

**Note 1** The total is different from the sum of the separate costs outlined above as the separate costs have been rounded to the nearest dollar. The total was calculated by adding the separate costs before they were rounded up or down.

## 9 Compensation recovered

### 9.1 Compensation recovered - General

The Form 3 Returns include information concerning the amount of compensation either awarded by the Tribunal or agreed between the parties.

The average amount of compensation which was recovered in claims was also broken down by whether or not costs were included in the amount of compensation which was awarded by the Tribunal or agreed between the parties.

The following table shows the average amount of compensation which was recovered in claims which were resolved between 1 July 2007 and 30 June 2008. It includes claims which were commenced between 1 July 2005 and 30 June 2008.

**Table 46** Average amount of compensation recovered for claims which resolved between 1 July 2007 and 30 June 2008 – Claims commenced between 1 July 2005 and 30 June 2008

	By Disease Type	
	Non-malignant	Malignant
Average compensation recovered by settlement (including costs) – commenced between 1 July 2005 and 30 June 2008	142,602	402,950
Average compensation recovered by settlement (not including costs) – claims commenced between 1 July 2005 and 30 June 2008	227,000	313,750

**Source:** *Form 3 Returns*

The average amount of compensation which was recovered in claims which were resolved between 1 July 2007 and 30 June 2008 has also been broken down by the year in which claims were commenced. The following table shows this information for claims which were commenced between 1 July 2005 and 30 June 2006.

**Table 47** Average amount of compensation recovered for claims which resolved between 1 July 2007 and 30 June 2008 – Claims commenced between 1 July 2005 and 30 June 2006

	By Disease Type			
	Asbestosis	ARPD	Carcinoma	Mesothelioma
Average compensation recovered by settlement (including costs) – commenced between 1 July 2005 and 30 June 2006	166,524	188,333	-	322,000
Average compensation recovered by settlement (not including costs) – claims commenced between 1 July 2005 and 30 June 2006	-	-	-	-

**Source:** *Form 3 Returns*

The following table shows the average amount of compensation recovered in claims which were commenced between 1 July 2006 and 30 June 2007 which were resolved between 1 July 2007 and 30 June 2008.

**Table 48** Average amount of compensation recovered for claims which resolved between 1 July 2007 and 30 June 2008 – Claims commenced between 1 July 2006 and 30 June 2007

	By Disease Type	
	Non-malignant	Malignant
Average compensation recovered by settlement (including costs) – commenced between 1 July 2006 and 30 June 2007	142,797	394,300
Average compensation recovered by settlement (not including costs) – claims commenced between 1 July 2006 and 30 June 2007	113,500	313,750

**Source:** *Form 3 Returns*

The following table shows the average amount of compensation recovered in claims which were commenced between 1 July 2007 and 30 June 2008 which were resolved during that period.

**Table 49** Average amount of compensation recovered for claims which resolved between 1 July 2007 and 30 June 2008 – Claims commenced during that period

	By Disease Type		
	Asbestosis	ARPD	Malignant
Average compensation recovered by settlement (including costs) – commenced between 1 July 2007 and 30 June 2008	144,375	138,750	421,500
Average compensation recovered by settlement (not including costs) – claims commenced between 1 July 2007 and 30 June 2008	-	-	525,000

Source: *Form 3 Returns*

The average amount of compensation recovered has also been calculated for claims which were commenced before 1 July 2005. The following table shows this information for those claims which were resolved between 1 July 2007 and 30 June 2008.

**Table 50** Average amount of compensation recovered for claims which resolved between 1 July 2007 and 30 June 2008 – Claims commenced before 1 July 2005

	By Disease Type		
	Asbestosis	ARPD	Malignant
Average compensation recovered by settlement (including costs) – commenced before 1 July 2005	160,108	142,091	300,000
Average compensation recovered by settlement (not including costs) – claims commenced before 1 July 2005	-	-	-

Source: *Form 3 Returns*

## 9.2 Compensation recovered – After deducting legal and other costs

Tables 27 to 37 show average plaintiff legal and other costs. The information in those tables was calculated using those claims where information was provided as part of the Form 3 Returns concerning costs. Claims were necessarily excluded from the samples used to make those calculations (even

though the settlement amount was known) where there was no information as to legal costs, either because it was not reported or it still was to be agreed or assessed.

The following table shows the average amount of compensation recovered by plaintiffs, after deducting legal and other costs, for claims which were resolved between 1 July 2007 and 30 June 2008. It includes claims which were commenced between 1 July 2005 and 30 June 2008. To enable the average amounts being received by plaintiffs, after legal and other costs are deducted, to be calculated, the "Average amount of compensation recovered" in the following table was calculated using the same data sets which were used for Tables 27 and 28. It includes amounts recovered by settlement or judgment.

**Table 51** Average amount of compensation recovered after deducting legal and other costs incurred by plaintiffs – Claims commenced between 1 July 2005 and 30 June 2008 which resolved between 1 July 2007 and 30 June 2008

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Malignant	383,311	45,967	337,344
Single Defendant – Non-malignant	147,917	31,525	116,392
Multiple Defendant - Malignant	434,772	48,471	386,301
Multiple Defendant – Non - malignant	134,994	37,792	97,202

**Source:** *Form 3 Returns*

The average amount of compensation recovered by plaintiffs, after deducting legal and other costs, for claims which were resolved between 1 July 2007 and 30 June 2008 has also been broken down by the year in which claims were commenced.



The following table shows this information for claims which were commenced between 1 July 2005 and 30 June 2006. The amount of compensation recovered by plaintiffs, after deducting legal and other costs, has been calculated on the same basis as above.

**Table 52** Average amount of compensation recovered after deducting legal and other costs incurred by plaintiffs – Claims commenced between 1 July 2005 and 30 June 2006 which resolved between 1 July 2007 and 30 June 2008

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Malignant	300,000	86,390	213,610
Single Defendant – Non-malignant	131,071	29,119	101,952
Multiple Defendant - Malignant	327,500	49,659	277,841
Multiple Defendant – Non - malignant	148,330	44,133	104,197

Source: Form 3 Returns

The following table shows the average amount of compensation recovered by plaintiffs, after deducting legal and other costs, for claims which were resolved between 1 July 2007 and 30 June 2008 which were commenced between 1 July 2006 and 30 June 2008.

**Table 53** Average amount of compensation recovered after deducting legal and other costs incurred by plaintiffs – Claims commenced between 1 July 2006 and 30 June 2007 which resolved between 1 July 2007 and 30 June 2008

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Malignant	356,567	44,612	311,955
Single Defendant – Non-malignant	151,982	31,820	120,162
Multiple Defendant - Malignant	444,885	45,051	399,834
Multiple Defendant – Non - malignant	128,441	34,714	93,727

Source: Form 3 Returns

The following table shows the average amount of compensation recovered by plaintiffs, after deducting legal and other costs, for claims which were

resolved between 1 July 2007 and 30 June 2008 which were commenced during that period.

**Table 54** Average amount of compensation recovered after deducting legal and other costs incurred by plaintiffs – Claims commenced between 1 July 2007 and 30 June 2008 which resolved during that period

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Malignant	409,290	45,843	363,447
Single Defendant – Non-malignant	131,667	33,113	98,554
Multiple Defendant - Malignant	445,156	54,024	391,132
Multiple Defendant – Non - malignant	147,500	35,925	111,575

**Source:** *Form 3 Returns*

The average amount of compensation recovered by plaintiffs, after deducting legal and other costs, for claims which were resolved between 1 July 2007 and 30 June 2008 has also been calculated for claims which were commenced before 1 July 2005.

**Table 55** Average amount of compensation recovered after deducting legal and other costs incurred by plaintiffs – Claims commenced before 1 July 2005 which resolved between 1 July 2007 and 30 June 2008

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Asbestosis	147,611	38,375	109,236
Single Defendant – ARPD	197,667	70,116	127,551
Single Defendant – Malignant	470,000	64,787	405,213
Multiple Defendant – Asbestosis	163,679	39,609	124,070
Multiple Defendant – ARPD	121,250	43,794	77,456
Multiple Defendant – Malignant	257,500	40,737	216,763

**Source:** *Form 3 Returns*

**APPENDIX B**

**TIMETABLE FOR CLAIMS RESOLUTION PROCESS**

STEP IN CLAIMS RESOLUTION PROCESS	LAST BUSINESS DAY FOR STEP TO OCCUR (WEEKS IN WHICH STEP SHOULD BE OCCURRING)			
	MALIGNANT CLAIMS		NON-MALIGNANT CLAIMS	
	SINGLE DEFENDANT	MULTIPLE DEFENDANTS	SINGLE DEFENDANT	MULTIPLE DEFENDANTS
Plaintiff serves statement of claim and statement of particulars on original defendant(s)	0	0	0	0
Original defendant(s) cross-claim against any additional defendants	N/A	10 (Weeks 1-2)	N/A	30 (Weeks 1-6)
Defendants and cross-defendant(s) notify plaintiff if clinical examination required	10 (Weeks 1-2)	20 (Weeks 1-4)	30 (Weeks 1-6)	50 (Weeks 1-10)
Original defendant(s) file and serve reply	20 (Weeks 1-4)	20 (Weeks 1-4)	30 (Weeks 1-6)	30 (Weeks 1-6)
Clinical examination(s) of plaintiff, if required	20 (Weeks 3-4)	30 (Weeks 5-6)	40 (Weeks 7-8)	60 (Weeks 11-12)
Cross-defendant(s) file and serve reply	N/A	30 (Weeks 3-6)	N/A	60 (Weeks 7-12)
Defendant(s) and cross-defendant(s) agree on contribution and Single Claims Manager	N/A	35 (Week 7)	N/A	70 (Weeks 13-14)
Registrar refers contribution to Contributions Assessor or determines Single Claims Manager, if required	N/A	35/36 (End Week 7, start Week 8)	N/A	70/71 (End Week 14, start Week 15)
Assessor determines contribution and Single Claims Manager, if required	N/A	40 (Week 8)	N/A	80 (Weeks 15-16)
Preparation for mediation/possibility of early settlement	30 (Weeks 5-6)	50 (Weeks 9-10)	60 (Weeks 9-12)	100 (Weeks 17-20)
Parties or Registrar refer claim to mediation, if not settled	30/31 (End Week 6, start Week 7)	50/51 (End Week 10, start Week 11)	60/61 (End Week 12, start Week 13)	100/101 (End Week 20, start Week 21)
Mediation must be completed	45 (Weeks 7-9)	60 (Weeks 11-12)	90 (Weeks 13-18)	120 (Weeks 21-24)



New South Wales

# Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2007

under the

Dust Diseases Tribunal Regulation 2007

I, Robert John Debus MP, the Attorney General, in pursuance of clause 49 of the *Dust Diseases Tribunal Regulation 2007*, make the following Order.

Dated, this nineteenth day of March 2007.

BOB DEBUS, M.P.,  
Attorney General

## Explanatory note

The object of this Order is to determine the standard presumptions as to apportionment that are referred to in clause 49 of the *Dust Diseases Tribunal Regulation 2007*. Those presumptions are the presumptions on the basis of which a Contributions Assessor is to make a determination of apportionment of liability between defendants for the purposes of the claims resolution process for asbestos-related claims under Part 4 of that Regulation.

This Order is made under clause 49 of the *Dust Diseases Tribunal Regulation 2007*.

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**Dust Diseases Tribunal (Standard Presumptions—  
Apportionment) Order 2007**

under the

Dust Diseases Tribunal Regulation 2007

**1 Name of Order**

This Order is the *Dust Diseases Tribunal (Standard Presumptions—  
Apportionment) Order 2007*.

**2 Commencement**

This Order commences on the date it is published in the Gazette.

**3 Adoption of standard presumptions on apportionment**

The presumptions set out in Schedule 1 are the standard presumptions  
as to apportionment for the purposes of clause 49 of the *Dust Diseases  
Tribunal Regulation 2007*.

**4 Repeal of Dust Diseases Tribunal (Standard Presumptions—  
Apportionment) Order 2005**

The *Dust Diseases Tribunal (Standard Presumptions—Apportionment)  
Order 2005* is repealed.

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## Schedule 1      Standard apportionment—process and presumptions

(Clause 3)

### 1 Introduction

- (1) On Tuesday 8 March 2005, the NSW Government Report of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims (*the Review*) was released.
- (2) The Review found that early settlement of claims ought be encouraged with the result that fewer cases would need to be determined before the Dust Diseases Tribunal (*DDT*).
- (3) It also found upon a review of the files of the DDT that in nearly half of those cases (48 percent) there were two or more defendants. It found, unsurprisingly, that disputes as to contribution between defendants contributed significantly to legal costs. It found that a new claims resolution process was necessary to encourage defendants to resolve their disputes quickly and commercially without delaying the resolution of a claimant's claim.
- (4) The Review identified a reform process which had as one of its key steps the following:

*Defendants will seek to agree on apportionment of liability. If they cannot agree, an independent third party will determine the apportionment using standard presumptions. The determination can be challenged, but only after the claimant's case is settled or determined.*

### 2 Legal basis for and approach to apportionment

- (1) Apportionment between joint tortfeasors is governed by the provisions of section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*. That section is in the following terms:

#### 5 Proceedings against and contribution between joint and several tortfeasors

- (1) Where damage is suffered by any person as a result of a tort (whether a crime or not):
  - ...
  - (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be

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entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.

- (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
- (2) The phrase “responsibility for the damage” in section 5 (2) requires a comparison of the relative culpability of each tortfeasor in causing the damage<sup>1</sup>. Alternatively put, the Court in making an apportionment is engaged in a consideration of the relative blameworthiness and causal potency of the negligence of each party. These contribution provisions have become notorious for the conceptual and practical difficulties they engender<sup>2</sup>. In practical terms, in most cases a broad-brush approach is undertaken<sup>3</sup>. The aim is to arrive at an apportionment which is “... just and equitable ...”.

**Note.**

- 1 See Clarke JA in *Macquarie Pathology Service Pty Ltd v Sullivan* (Court of Appeal, Nos 40313/94 and 40289/94, 28 March 1995, unreported).
- 2 See McHugh J in *Amaca Pty Ltd v State of New South Wales* [2003] HCA 44 (7 August 2003) para 17.
- 3 See Curtis J in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd (In Liquidation) & Anor* [1996] NSWDDT 7 (1 November 1996); (1996) 13 NSWCCR 634.

### 3 Factual considerations

- (1) There are a multitude of factual matters which will impact upon apportionment in each case. They will vary from case to case and they will vary over time. These factors may include, but are not limited to the following:
- (a) the type of disease suffered by the claimant: whether it is a divisible or an indivisible disease,
  - (b) the length and/or intensity of the exposure of the claimant to asbestos,
  - (c) the type of asbestos to which the claimant was exposed,
  - (d) the lag time between exposure and diagnosis of the disease,
  - (e) the year and decade in which the exposure occurred,

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- (f) the relationship between the particular defendant and the claimant eg employer/employee, occupier/entrant, and supplier/user,
  - (g) the identity, capacity, size and state of sophistication of a particular defendant, including the industry, and nature of the industry, in which the defendant was engaged,
  - (h) the number of defendants identified as being at fault in connection with the claimant's claim,
  - (i) the state of the knowledge of the particular defendant about the risks associated with the manufacture, supply, installation and use of asbestos,
  - (j) the state of the knowledge about the risks associated with the manufacture, supply, installation and use of asbestos of which the particular defendant ought to have been aware,
  - (k) the steps which the particular defendant took, ought to have taken and/or was capable of taking, to minimise the risks of harm from the manufacture, supply, installation and use of asbestos.
- (2) Notwithstanding this multitude of factors, an analysis of cases decided by the DDT demonstrates a broad consistency of apportionment which can be identified substantially with these factors:
- (a) the knowledge of the defendant, actual or constructive, derived from the nature of the business in which the particular defendant was engaged and the role it was engaged in, in the particular case, and
  - (b) the general state of knowledge, and the knowledge of the defendant, actual or constructive, available throughout the year or years, decade or decades during which the exposure took place.

#### 4 Methodology

- (1) The following is a brief summary of the procedures which generally apply in relation to apportionment. It should also be noted that modified procedures apply in relation to apportionment where an original defendant commences cross-claims against other defendants that were not part of the original proceedings with the claimant after the claimant's proceedings have been settled by the parties or determined by the DDT (see Division 6 of Part 4 of the *Dust Diseases Tribunal Regulation 2007*).
- (2) Defendants against whom proceedings have been commenced by a claimant, or against whom cross-claims have been filed by original defendants, are required to identify in their reply filed in the proceedings, any matters, including those matters which have either



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been found in other proceedings or to which the provisions of sections 25 (3), 25A and 25B of the *Dust Diseases Tribunal Act 1989* would apply, which relate to other defendants<sup>4</sup> (see Part 8 of the prescribed form set out in Form 2 of Schedule 2 to the *Dust Diseases Tribunal Regulation 2007*). They are also required to identify the reasons for and the extent to which they contend that the standard presumptions ought be varied in the particular claim.

**Note.**

4 The term is used here to refer to all responsible identified parties other than the claimant whether they be the original defendants identified by the claimant or else cross defendants identified by original defendants. Where cross-claims are commenced while the claimant's proceedings are pending, these responsible identified parties are only those joined to the claimant's proceedings. Where cross-claims are commenced after the claimant's proceedings have been settled or determined, in addition to those responsible identified parties that were joined to the claimant's proceedings while they were still pending, responsible identified parties also include the cross defendants against whom proceedings are commenced in separate proceedings by an original defendant after the claimant's proceedings have been settled or determined.

- (3) During the period limited by the claims resolution process<sup>5</sup> following the filing of replies, it is open to the defendants, and they are encouraged to, meet together for the purpose of agreeing between themselves what apportionment is appropriate to the particular claim.

**Note.**

5 The period will vary according to the state of health of the claimant.

- (4) Failing agreement by the requisite time, the papers which include the material filed by the claimant and the replies filed by the defendants will be referred to an independent Contributions Assessor (see clause 49 (1) of the *Dust Diseases Tribunal Regulation 2007*). The task of the independent Contributions Assessor will be, upon the basis of the papers, to apply the standard presumptions with such variations as are appropriate to the particular case but within the permitted range (see clause 49 (4) of the *Dust Diseases Tribunal Regulation 2007*). When determining the apportionment for the claim, the Contributions Assessor is to assume that each defendant is liable, unless the defendants agree that a particular defendant should not be assumed to be liable, in which case that particular defendant is to be excluded from the apportionment (including the standard presumptions) by the Contributions Assessor (see clause 49 (5) of the *Dust Diseases Tribunal Regulation 2007*).
- (5) The apportionment is thereby determined for the claimant's case by the Contributions Assessor. Where the apportionment is determined by the Contributions Assessor while the claimant's proceedings are still pending, judgments as to apportionment are to automatically follow the final determination by entry of judgment (either by consent or after a

hearing) in favour of the claimant (see clause 52 (1) of the *Dust Diseases Tribunal Regulation 2007*). Where the apportionment is determined by the Contributions Assessor after the claimant's proceedings have been settled or determined, judgments as to apportionment automatically follow the apportionment by the Contributions Assessor. Any defendant has a right to seek a review of the Contributions Assessor's apportionment by a formal hearing and determination by the DDT of the question of apportionment, but any such hearing will not proceed until after the conclusion of the claimant's claim (either by settlement or entry of judgment after hearing) (see clause 52 (2) of the *Dust Diseases Tribunal Regulation 2007*).

## 5 Standard presumptions

- (1) Where defendants, by the requisite time, cannot agree upon an appropriate apportionment between themselves in any one claim, then the apportionment set out in the following Table will apply:

Index	Date of exposure	Standard presumption for each category of defendants <sup>6</sup>	Extent of variation for each category of defendant
Period A	Before 1 January 1961 <sup>7</sup>	Category 1: 75 percent Category 2: 25 percent	An increase or decrease by an amount up to 20 percentage points
Period B	Between 1 January 1961 and 31 December 1978 <sup>8</sup>	Category 1: 65 percent Category 2: 35 percent	An increase or decrease by an amount up to 20 percentage points
Period C	Between 1 January 1979 and 31 December 1989 <sup>9</sup>	Category 1: 60 percent Category 2: 40 percent	An increase or decrease by an amount up to 20 percentage points
Period D	After 1 January 1990	Category 1: 40 percent Category 2: 60 percent	An increase or decrease by an amount up to 30 percentage points

### Note.

- <sup>6</sup> The standard presumptions are designed, principally, to take account of the relative state of knowledge that can be attributed to the broad categories of defendants in each period. In Period A, for example, the standard presumption is designed to reflect actual knowledge of the dangers of asbestos for Category 1 defendants and an absence of actual

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or constructive knowledge for Category 2 defendants. In moving from Period A through to Period D, the standard presumptions are designed to reflect the increasing level of knowledge of Category 2 defendants, to the point that, in Period D, it can be assumed that all defendants (and the community generally) have actual knowledge of the dangers of asbestos.

- 7 This date reflects the established link between asbestos exposure and mesothelioma set out in the article by Wagner & ors in the *British Journal of Industrial Medicine*: see *Bendix Mintex P/L v Barnes* (1997) 42 NSWLR 307 at 329G.
  - 8 This date reflects the fact that in 1978, James Hardie & Co Pty Ltd first displayed warnings on their products containing asbestos, and the advice of the Australian National Health & Medical Research Council about reduction of exposure to asbestos to a minimum: see *Bendix* at 331 B–C.
  - 9 This date reflects the conclusion of the first calendar year of operation of the DDT, by which time it can be confidently asserted that there was not, or ought not to have been, any knowledge differential within the community.
- (2) For the purposes of determining the apportionment, the Contributions Assessor is to determine into which of the two categories each defendant falls (except for any defendant that is to be excluded from the apportionment, as agreed by the defendants). The two categories are:
- (a) Category 1 which includes all those corporations, authorities, and legal entities who engage in a business which relates to the period of exposure and which can be described as Miners, Manufacturers, Suppliers and/or Installers<sup>10</sup> of asbestos or of products, plant and equipment which contained asbestos<sup>11</sup>, and
  - (b) Category 2 which includes all other defendants. These would ordinarily be all corporations, authorities, and legal entities who engage in a business which relates to the period of exposure and which can be described as Users of asbestos or products, plant and equipment which contained asbestos, Occupiers of Premises which contained asbestos or where asbestos or products, plant and equipment which contained asbestos were situated or Employers of staff who in the course of, or as an incident to, their employment were exposed to asbestos.

**Note.**

- 10 It is not intended to include retail shops or outlets within the meaning of the term Supplier in Category 1. Retail shops or outlets are included in Category 2. Similarly, it is not intended to include a user of asbestos products, such as a small building company, which uses bonded asbestos sheeting in building works.
- 11 For example, the category of installer would include the designer and manufacturer of particular plant or equipment which included asbestos as part of its design, as well as a company which is engaged to install the plant in accordance with the manufacturer's instructions.

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- (3) If a defendant, in any particular case, falls within both categories (ie as an installer and employer of the claimant) then a separate share is to be calculated by the Contributions Assessor for the role of that defendant which falls within each category.
  - (4) If there is more than one defendant in either of Category 1 and Category 2, then the Contributions Assessor is to treat each defendant as equal in contribution to the percent share of that Category unless satisfied that a variable contribution ought apply.
  - (5) The standard presumptions are intended to take account of, and strike an appropriate balance between the two broad categories of defendants having regard to all of those matters set out in clause 3 (Factual considerations). There will be cases where it is appropriate for the Contributions Assessor to vary the standard presumptions within the variation band specified in Column 4 (Extent of variation for each category of defendant) of the Table to subclause (1). However, a different percentage figure from the standard presumption within the variation band is not to be applied by the Contributions Assessor unless the Contributions Assessor is satisfied that it is appropriate to vary the standard presumptions in the particular circumstances of the individual case. A number may not be determined which falls outside the variation band specified in Column 4 of that Table<sup>12</sup>.

**Note.**

12 For example, a case might arise where the Contributions Assessor considers that the apportionment between an employer and supplier should be adjusted because the employer is considered particularly culpable in this particular instance. The Contributions Assessor could adjust the apportionment in the first index period by up to 20 percentage points, that is from 25 percent to 45 percent, but no higher.

- (6) In calculating the appropriate variation, the Contributions Assessor is to have regard to the facts, matters and circumstances which make the case unusual, which may include, but are not limited to, the following facts, matters and circumstances:
  - (a) the state of actual knowledge of a Category 2 defendant (but not a Category 1 defendant, which is taken to have had actual knowledge at all times),
  - (b) the identity, capacity, size and state of sophistication of a particular defendant, including the industry, and nature of the industry, in which the defendant was engaged,
  - (c) the number of defendants identified within each category as being at fault in connection with the claimant's claim<sup>13</sup>,
  - (d) the steps which the particular defendant took, ought to have taken and/or was capable of taking, to minimise the risks of harm from

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the manufacture, supply, installation, exposure to and use of asbestos.

**Note.**

13 For example, if there is more than one Category 1 defendant in periods B or C, and only one Category 2 defendant, the Contributions Assessor might wish to increase the collective share of the Category 1 defendants so that their individual shares are larger than the share of the one Category 2 defendant to reflect their greater culpability, if appropriate.

- (7) Where the disease the subject of the claim is an indivisible disease (ie mesothelioma or lung cancer), the apportionment above will apply to the whole of the claim unless the Contributions Assessor is satisfied that by reference to the existence of separate periods of exposure, a differential determination of the contribution of each such exposure period ought be made. If so, a determination will then be made of what proportion to the whole each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period<sup>14</sup>. The standard presumptions will then be applied to each separate period. Where periods of exposure span the index periods specified in the Table to subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial<sup>15</sup>.

**Note.**

14 An example of one method of such an apportionment is to be found in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd (In Liquidation) & Anor* [1996] NSWDDT 7 (1 November 1996); (1996) 13 NSWCCR 634.

15 The Contributions Assessor could decide that an index period is so immaterial that it does not warrant any adjustment. For example, where an exposure occurred for equal periods in index period A and index period B, then the Contributions Assessor ordinarily would adjust the standard presumption accordingly. Where, however, only a small part of the exposure occurred in Period B, the Contributions Assessor might decide to make no adjustment.

- (8) Where the disease is a divisible disease (ie asbestosis or pleural disease), the independent Contributions Assessor will first determine (on the basis of the papers) the existence of any separate periods of exposure. A determination will then be made of what proportion to the whole, each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period<sup>16</sup>. The Contributions Assessor is to treat each separate period as equal in contribution to the disease unless satisfied that a variable weighting ought apply. The Contributions Assessor will then apply to each separate period the proportions set out in the table above. Where periods of exposure span the index periods specified in the Table to

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subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial<sup>17</sup>.

**Note.**

16 An example of one method of such an apportionment is to be found in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd (In Liquidation) & Anor* [1996] NSWDDT 7 (1 November 1996); (1996) 13 NSWCCR 634.

17 See note 15.