



**Attorney General
& Justice**

REGULATORY

IMPACT

STATEMENT

PROPOSED DUST DISEASES TRIBUNAL REGULATION 2013

July 2013

Regulatory Impact Statement

Title of Regulatory Proposal: Dust Diseases Tribunal Regulation 2013

Proponent: Attorney General & Justice

Responsible Minister: Hon Greg Smith SC MP
Attorney General

Relevant Act: *Dust Diseases Tribunal Act 1989*

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How to make a submission

Interested parties are invited to comment on the proposed regulation and this Regulatory Impact Statement (RIS).

Submissions can be made to:

Director
Justice Policy
Department of Attorney General & Justice
GPO Box 6
Sydney NSW 2001

Submissions can also be made via email to lpclrd_inquiries@agd.nsw.gov.au. If you would like to provide comments in an alternative format please contact us on (02) 8061 9222.

The closing date for submissions is **Wednesday 31 July 2013**.

Copies of the proposed regulation and the RIS are available:

- on the Department of Attorney General and Justice website at www.lawlink.nsw.gov.au/lpd
- by emailing lpclrd@agd.nsw.gov.au
- by telephoning (02) 8061 9222

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- TTY users phone 133 677 then ask for (02) 8061 9222
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Copies of the *Dust Diseases Tribunal Act 1989* and the *Dust Diseases Tribunal Regulation 2007* are available online at www.legislation.nsw.gov.au.

Please note that submissions may be made public, subject to the provisions of the *Government Information (Public Access) Act 2009*. The Department of Attorney General and Justice will consider any requests for submissions to be treated on a confidential basis, subject to the provisions of the Act.

Summary of abbreviations

2005 amending Regulation	<i>Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005</i>
current Regulation	<i>Dust Diseases Tribunal Regulation 2007</i>
CRP	Claims resolution process
DDT Act	<i>Dust Diseases Tribunal Act 1989</i>
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
Issues paper	<i>Review of the Dusts Diseases Claims Resolution Process Issues Paper December 2008</i>
proposed Regulation	<i>Proposed Dust Diseases Tribunal Regulation 2013</i>
RIS	Regulatory Impact Statement
SCM	Single Claims Manager, who may be appointed under the Regulation in multiple defendant claims to act for all defendants
Tribunal	Dust Diseases Tribunal

Executive summary

The *Dust Diseases Tribunal Regulation 2007* (current Regulation) establishes the Claims Resolution Process (CRP). The purpose of the CRP is to encourage timely and cost effective resolution of asbestos-related claims through early exchange of information between the parties and other arrangements to facilitate settlement. The current Regulation also prescribes certain court fees and establishes rules for the payment of fees, as well as providing a streamlined process for subpoenas, arrangements for making offers of compromise and reporting requirements for legal practitioners.

The *Subordinate Legislation Act 1989* provides for regulations to have a limited life and in most cases, regulations are automatically repealed after five years. The automatic repeal of the current Regulation was postponed in 2012 and the current Regulation is instead due for repeal on 1 September 2013.

When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the need for the regulation. The agency must then make a decision about whether the regulation should be remade. The findings of that review are published in this regulatory impact statement (RIS).

The RIS examines the costs and benefits of the following options against the objectives of the regulatory proposal:

- (1) Ending the arrangements provided under the current Regulation
- (2) Continuing arrangements provided under the current Regulation without change
- (3) Continuing current arrangements with some refinements to the CRP (the proposed Regulation)

In doing so, the RIS considers issues raised in the submissions to a review of the CRP commenced in 2008. Fourteen submissions were received in response to the *Review of the Dust Diseases Claims Resolution Process Issues Paper December 2008*.¹ A number of amendments to further improve the operation of the CRP were identified as part of that review.

This RIS proposes that the arrangements under the current Regulation continue with some modifications to the CRP to enhance its operation. The proposed *Dust Diseases Tribunal Regulation 2013* (proposed Regulation) would implement the preferred option.

¹ Available on the Department of Attorney General and Justice website at <http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/issues_paper_review_of_the_dust_diseases_claims_resolution_process_1.pdf>

Background

Compensation claims for dust related diseases in NSW are resolved by the Dust Diseases Tribunal (the Tribunal). The Tribunal was established by the *Dust Diseases Tribunal Act 1989* (DDT Act) and has exclusive jurisdiction to hear and determine damages claims for those who have been affected by dust diseases including diseases related to asbestos exposure and claims made by the dependants of those who have died from dust diseases.

The DDT Act includes various powers to make regulations in relation to the practice and procedure of the Tribunal. The *Dust Diseases Tribunal Regulation 2001* as originally enacted prescribed fees, established rules for their payment and the percentage that must be deducted from amounts paid into the Tribunal and invested. These provisions have been amended each year, except 2006, to increase fee amounts in line with the Consumer Price Index.

In late 2004 and early 2005 a review was conducted of the legal and administrative costs in dust diseases compensation claims. 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 could be reduced within the existing common law system in New South Wales.

The review's main recommendation was to establish the CRP, providing a mechanism to require the parties to exchange information and participate in settlement discussions.² Further to the review's recommendation, the DDT Act was amended in 2005 to include new regulation making powers to enable the CRP to be established. The CRP was established by the *Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005* (2005 amending Regulation).

The 2005 amending Regulation also established a number of other measures to facilitate the resolution of claims both before the Tribunal and as part of the CRP, including:

- A streamlined process for issuing subpoenas based on the procedures used in the District Court
- Stronger incentives to consider settlement offers made, and
- Reporting requirements for legal practitioners on damages paid and legal and other costs incurred in progressing or defending claims.

The *Dust Diseases Tribunal Regulation 2001* was remade in 2007 and is the current Regulation. The current Regulation contains a number of minor changes that were identified as an outcome of the 2006-07 review of the CRP, mainly to further encourage defendants to resolve disputes regarding liability quickly and commercially.

² NSW Government, Report of Legal and Administrative Costs in Dust Diseases Compensation Claims

The key elements of the CRP provided for in the current Regulation are:

- (1) After filing the statement of claim (but before service), plaintiffs complete a standard statement of particulars form, verified by statutory declaration, which includes expert reports and certain other documentary evidence. This is served with the statement of claim.
- (2) Defendants prepare a standard reply form admitting, disputing or requiring further information on each point, with documents to support the defendant's position on any point disputed.
- (3) Defendants are required to join any other defendants as soon as practicable.
- (4) 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.
- (5) If the claim is not resolved informally, compulsory mediation occurs between the plaintiff and defendants.
- (6) The plaintiff attends the mediation personally unless he or she is too ill. Defendant claims managers must attend if requested by the mediator.
- (7) If defendants want to dispute their 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 has been settled with the defendants.
- (8) Parties are able to encourage settlement by using 'offers of compromise'.

A further review of the CRP was commenced in 2008. The review considered 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.

As part of the review, the Issues Paper was released in January 2009 for public comment.³ Fourteen submissions were received in response to the Issues Paper. Thirteen of the fourteen submissions regarded the overall operation of the CRP positively. A number of potential improvements to the operation of the current Regulation were identified. These improvements are considered in this RIS.

³ The Issues Paper is available on the Department of Attorney General and Justice website at: <http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/issues_paper_review_of_the_dust_diseases_claims_resolution_process_1.pdf>

The need for a process to resolve asbestos-related claims

In a recent report, WorkCover NSW identified New South Wales as having the highest number of new mesothelioma cases compared to other Australian jurisdictions and noted that the incidence of asbestos-related disease in New South Wales nearly doubled between 1987 and 2006.⁴ The number of claims for asbestos-related conditions has also been increasing over time.⁵

Many people who lodge a dust diseases claim are dying from their illnesses at the time of making their application. In many asbestos-related cases there can be swift progression towards death after initial diagnosis. While no amount of financial compensation will make up for the harm caused by asbestos-related illnesses, ensuring asbestos victims and their families receive appropriate compensation can help give victims and their families a sense of justice and closure.

While the Tribunal's fundamental role in resolving asbestos-related claims is key in stating the law for the benefit of the community as a whole and determining the rights of litigants, many claims can be resolved through early information exchange and settlement discussions.

The CRP was established to create an alternative process for efficient and effective resolution of asbestos related claims.

Objectives of the regulatory proposal

The objectives of the regulatory proposal are:

- The effective and efficient resolution of asbestos-related claims without incurring unnecessary legal, administrative and other costs, and
- Users of the Tribunal system contribute equitably to the costs of operating the Tribunal.

Options

The options evaluated to provide effective and efficient resolution of asbestos-related claims and arrangements for the Tribunal's operating costs were:

- (1) Ending the arrangements provided under the current Regulation for resolution of claims and fees
- (2) Continuing arrangements provided under the current Regulation for resolution of claims and fees without change, and

⁴ WorkCover NSW (2013), *NSW state-wide asbestos plan: A plan to secure the safe management of asbestos in NSW (consultation draft)*,

<<http://www.workcover.nsw.gov.au/formspublications/publications/Documents/nsw-state-wide-asbestos-plan-WC03760.pdf>>

⁵

- (3) Continuing current arrangements with some refinements to the CRP (the proposed Regulation).

Evaluation of options

Option 1 – Ending current arrangements

If the current Regulation were to lapse, the CRP would no longer apply to asbestos-related claims, including the requirement for early exchange of information and mandatory mediation. All asbestos-related claims would be case managed by the Tribunal and, if not settled through the Tribunal system, would proceed to a hearing.

Parties to asbestos-related claims will incur costs in progressing or defending a claim regardless of whether the claim is resolved through the Tribunal's case management system or through the CRP. The level of costs, however, will differ depending on which process is used. While data is not available to quantify the costs of resolving a claim through the Tribunal system, it is likely that these costs would be higher than the costs of progressing a claim through the CRP (with or without the modifications considered under Option 3). The CRP results in lower costs because parties are required to exchange information early, reducing costs, as parties do not have to conduct their own investigations. The apportionment process also creates an incentive for defendants to resolve contribution disputes quickly and commercially.

Allowing the current Regulation to lapse may also result in claims being resolved over a longer period of time than if they were subject to the CRP. A number of submissions to the review stated that their experience is that claims subject to the CRP are resolved earlier than claims that were managed by the Tribunal under the previous system, and that the streamlined process under the CRP facilitates the early resolution of claims. Early resolution of claims reduces the costs to the parties and benefits plaintiffs and their families by providing resolution and closure.

Allowing Option 1 would result in less regulation of the parties' resolution of disputes and this might be seen as a benefit of this option. On the other hand, appropriate cases can be removed from the CRP and dealt with Tribunal under the current Regulation. Urgent claims can be resolved by the Tribunal (without having to complete steps in the CRP), as can test cases after the exchange of information required by the CRP. In addition, if a claim is not resolved under the CRP, it will be returned to the Tribunal system for resolution.

One benefit of returning all claims to the Tribunal may be the legal precedents established by Tribunal judgments. This benefit may be marginal, as even without the CRP, the overwhelming majority of claims do not require determination by the Tribunal. Also, the Tribunal can still resolve test cases under the current Regulation.

As noted earlier in this RIS, thirteen of the fourteen submissions received in response to the Issues Paper evaluated the overall operation of the CRP positively. These submissions either suggested minor amendments or raised specific areas for improvement. Only one stakeholder expressed concerns about the overall operation of the CRP and suggested that it should be replaced entirely with another system.

This suggests that overall stakeholders view the benefits of the CRP as outweighing the costs.

The current Regulation prescribes fees and sets out rules for their collection. If the current Regulation is allowed to lapse, the power of the Tribunal to collect court fees would be doubtful and the Government would not be able to recover a proportion of the costs of the Tribunal's business from users of the Tribunal. If these costs are not recovered from users of the Tribunal, inevitably, they would need to be subsidised by other sectors of the community, either through a larger budget allocation to the Tribunal by the Government (thus impacting on taxpayers generally) or through increased funding from the Dust Diseases Board (which is primarily funded through insurance premiums paid by employers). If the decrease in the Tribunal's revenue is not supplemented by other means, it would adversely affect the level of service provided by the Tribunal and this in turn could lead to delays in progressing claims that could prejudice the parties involved (particularly the plaintiff). There would also be no capacity to fund further improvements to the administration of the Tribunal.

A lack of court fees could also encourage frivolous and vexatious claims. This would impair the Tribunal's ability to deal with bona fide claims expeditiously. While the Tribunal could potentially save some administrative costs by not having to collect court fees, this benefit is outweighed by the loss of revenue that would result from not collecting court fees.

Costs would also be likely to increase with the removal of incentives to consider offers of compromise seriously and reinstatement of the old process for issuing subpoenas, which is less streamlined and more costly than the process under the current Regulation.

Ceasing the data reporting requirements that apply to legal practitioners under the current Regulation would reduce the costs to practitioners, which are ultimately passed on to plaintiffs and defendants. At the same time, removal of the reporting requirement would reduce the evidence base available to support future reviews of the CRP.

Option 1 is therefore not recommended on the basis that the costs outweigh the benefits of this option.

Option 2 – Continuing current arrangements

If the current Regulation is remade in its current form claims would continue to be subject to the current CRP.

The main benefit of this option, which would retain the CRP, would be the reduced costs of resolving asbestos-related claims when compared to the costs of resolving claims through case management by the Tribunal and, failing settlement, through a hearing. Stakeholders have suggested that the CRP has facilitated the earlier resolution of claims, as compared to case management by the Tribunal. If the CRP continues to operate, the early resolution of claims could be expected to improve over time as parties become increasingly accustomed to the system. This is supported by the information provided by practitioners in 'Form 3 - Claims

Information' returns, which shows that claims are increasingly being finalised during the mediation stage.⁶

Under this option, the Government would continue to recover some of the costs of the Tribunal's business from users through fees. The fees collected by the Tribunal would assist the Tribunal to meet some of its operational costs. Safeguards would continue to apply for people who might otherwise find the fees a barrier to having their claim resolved. As per the arrangements under the current Regulation, payment of the fee by people who are pensioners, legally assisted or a pro bono party would be postponed until judgement has been given in the proceedings. While there are administrative costs involved in collecting fees payable to the Tribunal, these are negligible relative to the funding received.

A further benefit relative to Option 1 would be continuation of current arrangements that provide incentives for considering offers of compromise and streamline the process for issuing subpoenas.

The review of the CRP identified a number of possible refinements to improve the operation of the CRP. If these changes are implemented, the CRP is likely to operate more efficiently and effectively and at a lower cost than is currently the case. While submissions to the review found that the current CRP is operating effectively, one of the costs of this option is that users of the CRP would forego the potential benefits of improvements to the CRP under Option 3.

Option 2 is therefore not the preferred option, as its benefits are less relative to option 3.

Option 3 – Continuing current arrangements with some refinements to the CRP (the proposed Regulation)

Option 3 (the proposed Regulation) would continue the Regulation in its current form with some changes to the CRP. The proposed changes aim to address issues identified through the review of the CRP and through the CRP's practical operation. The proposed changes are:

- Use of a common CRP timetable by the parties that is prepared by the Registrar
- Expanded notification requirements
- Clarifying that the Registrar can revoke a referral to a mediator or contributions assessor and providing that the parties must pay any related costs if the appointment occurred in error as a result of a failure by the relevant parties or party to notify the Registrar
- Providing a clearer process for the CRP's application to claims following the death of a plaintiff, including Compensation to Relatives claims

⁶ See Attachment B to this RIS, *Dust Diseases Claims Resolution Process: Data for 2008-09 to 2011-12*

- Providing for the reinstatement of urgent claims in the CRP following a plaintiff's death
- Improving the flexibility of arrangements for giving medical evidence about the urgency of a plaintiff's claim
- Providing for the joinder of additional defendants in proceedings for divisible claims after the statement of particulars has been filed and served on the last original defendant
- Increased ability for mediators to request information
- Changes to the matters a Contributions Assessor can consider and the effect of an Assessor's determination, and
- Making the use of a Single Claims Manager voluntary rather than mandatory.

By addressing issues identified in the review and clarifying the operation of some procedures under the CRP, it is envisaged that the CRP would operate more efficiently and effectively. Users of the CRP would be able to proceed with more certainty in resolving claims under the CRP. Therefore, from the options considered, option 3 is most likely to ensure the effective and efficient resolution of asbestos related claims without incurring unnecessary legal, administrative and other costs.

There may be once-off implementation costs for legal practitioners in modifying practices and procedures. These are considered to be outweighed by the overall benefits as the changes will simplify the CRP and clarify some aspects of the CRP that were previously unclear.

Option 3 is therefore the preferred option as it is likely to impose the least costs on parties to resolve asbestos-related claims and may improve the speed with which claims are resolved.

Recommended option

Based on the cost benefit analysis of each option outlined above, this RIS recommends Option 3, the proposed Regulation. The proposed Regulation aligns with the objectives of the regulatory proposal and will improve the operation of the CRP through changes identified as an outcome of consultation with users of the process.

The proposed Regulation

The changes proposed to the current Regulation that are reflected in the proposed Regulation are considered below. The changes were developed based on the submissions to the Issues Paper within the context of the CRP's overall objectives:

- (1) To foster the early provision of information and particulars concerning claims in respect of asbestos-related conditions
- (2) To encourage early settlement of those claims, and
- (3) To reduce legal and administrative costs in connection with those claims.⁷

All references to clauses below are references to the proposed Regulation unless otherwise stated. A comparison between the proposed Regulation and the current Regulation is at **Attachment A**.

Practical operation of the CRP timetable

Submissions received in 2009 suggested that it would be useful and beneficial for all parties to operate from a single timetable.

The proposed Regulation therefore provides that the Registrar will provide all parties with a timetable based on the date of service of the statement of particulars on the last original defendant (clause 25). This timetable will set out how the various stages of the process apply to the claim, based on the Regulation's requirements.

The proposed Regulation also includes additional notification requirements to ensure that the Registrar and/or the parties are notified of events that occur that impact on the CRP timetable. The proposed additional notification requirements are:

- If the parties agree to extend the period for which the claim is subject to the CRP or to suspend the CRP they are to notify the Registrar within five days of reaching agreement (clause 17(5))
- If the plaintiff dies, the authorised representative of the deceased plaintiff must notify the mediator of the plaintiff's death (clause 19(2)(c))
- If the time for filing and serving a cross-claim is extended, the original defendant is to notify the Registrar of the number of days of the extension (clause 26(6))
- An original defendant who is the sole defendant in proceedings is to notify the plaintiff if a cross-claim is filed (clause 26(12))
- The parties must notify the Registrar within one business day of the claim being settled or being referred for mediation (clause 35(2)). Currently the

⁷ Clause 13 of the current Regulation

requirement is to notify the Registrar 'as soon as' one of these events occurs, and

- The initiating defendant is to advise the Registrar within five working days of the service of the cross-claim statement of claim on the last of the original defendants (clause 61(8)).

Suspension of the CRP if the plaintiff dies and application of the CRP to compensation to relatives claims

While there is no actual requirement in the current Regulation for a Compensation to Relatives claim to be dealt with in conjunction with an estate claim by amending the plaintiff's statement of claim, most submissions received indicated that there is a need to clarify that a Compensation to Relatives claim may be dealt with separately from the plaintiff's claim. Only one submission considered that such clarification is unnecessary.

Clause 12(1) of both the current and the proposed Regulation defines 'claim' to include a Compensation to Relatives claim. This means that if a Compensation to Relatives claim is commenced separately from the estate claim, the CRP applies to the claim just as it would to any other claim. In this way, the deceased plaintiff's relatives and/or estate can decide whether to deal with the Compensation to Relatives claim together with the estate claim or separately. This recognises that the beneficiaries of the plaintiff's estate and the Compensation to Relatives claim may not be the same and that their interests may differ. Accordingly, if the deceased plaintiff's relatives and the estate wish to deal with the Compensation to Relatives claim together with the estate claim, the statement of claim can be amended to add the Compensation to Relatives claim. Otherwise, a separate statement of claim can be filed.

Given the uncertainty expressed in submissions about this issue, the proposed Regulation includes a provision clarifying that a Compensation to Relatives claim need not be an amendment to the original statement of claim (clause 19(6)).

A number of submissions suggested that Form 1 (Plaintiff's statement of particulars) and Form 2 (Defendant's reply) are inadequate for Compensation to Relatives claims. The forms in Schedule 3 of the proposed Regulation include changes to properly provide for Compensation to Relatives claims.⁸

The submissions to the review also highlighted that the application of the CRP timetable becomes more complicated where a Compensation to Relatives claim is added to an estate claim, so that both matters are dealt with by the same proceedings. Three stakeholders (a defendant and two plaintiff representatives) submitted to the review that a directions hearing should be held before the Tribunal to clarify how the CRP timetable applies after a plaintiff dies.

To address this issue it is proposed that the plaintiff's authorised representative prepare a proposal for how the claim will proceed in the CRP (a resumption proposal)

⁸ See Part 8 of Form 1 and Part 10 of Form 2.

and provide it to each of the parties and to the Registrar with the notice of motion to add an estate and/or Compensation to Relatives claim (clauses 22(2)-(3)). The parties would then be required to try to reach agreement about the resumption proposal (clause 22(5)).

The proposed Regulation also gives the Tribunal the ability to determine any matters in dispute about the resumption proposal. This would occur when it is considering the notice of motion to amend the statement of claim to substitute an estate claim or to add a Compensation to Relatives claim. As the Tribunal must consider the notice of motion in any event, using this step to resolve any issues about the continuation of the claim should not result in increased costs for the parties or cause additional delay. The same process is proposed where a claim has been removed from the CRP due to its urgency and is to be returned to the CRP. This is discussed further below.

Clause 19(1) of the proposed Regulation has also been amended to remove the requirement for the claimant to notify the parties to enable a claim to resume in the CRP. Instead it provides that the claim would resume following the hearing of the notice of motion to substitute or add a plaintiff. This change is intended to remove duplication between the Tribunal proceeding and the CRP, saving time and costs by utilising the Tribunal proceeding to ensure that the parties have clear information about the future application of the CRP to the claim.

Medical evidence to support removal of urgent claims from the CRP

All of the submissions received from plaintiff representatives, and one submission from another stakeholder, suggested that changes are required to the arrangements for removal of claims from the CRP on the basis of urgency.

Currently the Tribunal may remove a claim from the CRP if the Tribunal determines, based on medical evidence, that the claim is urgent. A claim is urgent only 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 that there is not enough time for the requirements of the CRP to be completed. In these circumstances the claim can be determined by the Tribunal on an expedited basis if required.

Most of the submissions contended that the Tribunal has taken the view that the test for urgency can only be met by medical evidence demonstrating that the plaintiff is likely to die within three months. The submissions indicated that it can be difficult to obtain medical evidence about the plaintiff's prognosis at short notice. In addition, the submissions suggest that treating doctors can be reluctant to give an opinion at the level of specificity required by the current Regulation and 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. Accordingly, these submissions suggested that the medical evidence required to support an application for removal should not need to comply

with the Expert Witness Code of Conduct.⁹ They also suggested that the medical evidence required should include a medical report or evidence provided by affidavit regarding an oral medical opinion.

A number of submissions also suggested that the Tribunal should be given greater discretion about the matters it can consider when determining whether or not a claim is urgent. Suggested changes ranged from allowing the Tribunal to consider a broader range of factors in making its determination to giving the Tribunal absolute discretion.

To address these issues, changes are proposed to reduce the practical difficulties involved in filing an application for the removal of a claim. It is proposed that the medical evidence presented to the Tribunal can be provided by an affidavit setting out a medical opinion that has been given orally (clause 21(9)(a)) and that such reports not be required to comply with the Expert Witness Code of Conduct (clause 21(9)(b)).

Resumption of claims after the death of a plaintiff

If a claim is removed from the CRP on the basis of urgency, it is then dealt with by the Tribunal. Currently, this remains the case if the plaintiff dies before his or her claim is resolved.

Many submissions suggested that urgent claims should be returned to the CRP if a plaintiff dies before the resolution of his or her claim. This is based on a view that in such cases the need to expedite a claim no longer exists.

Some submissions suggested that the timetable for malignant claims should apply to claims when they are returned to the CRP. Others suggested that such claims should be returned to a timetable for non-malignant claims, some that the Tribunal should have the power to exempt the return of some claims, and some that there should be a directions hearing to consider what specific parts of the CRP should be complied with in each case. One submission opposed the return of urgent claims to the CRP on the basis that the plaintiff's family will want closure through resolution of the plaintiff's claim.

There may also be cases where it may not be appropriate to return an urgent claim to the CRP. This is clearly the case where the Tribunal has already held a hearing in respect of a claim and parties are awaiting judgment or where the parties have already completed compulsory mediation ordered by the Tribunal. Also, it may not be appropriate where a hearing date has already been set for a claim, for example, if parties have already expended considerable effort in preparing for trial. Parties may

⁹ Among other requirements on experts, the Expert Witness Code of Conduct requires an expert's report to include the expert's qualifications as an expert on the issue the subject of the report, the facts and assumptions of fact on which the report's opinions are based, the expert's reasons for each opinion expressed, if any particular issues falls outside the expert's field of expertise, any literature or other materials utilised in support of the opinions, any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and in the case of a lengthy or complex report, a brief summary of the report (clause 5, Schedule 7 of the Uniform Civil Procedure Rules 2005).

also have expended considerable effort in preparing for trial even if a hearing date has not been set.

In light of the submissions received it is proposed that claims would remain in the Tribunal if a hearing date has been set, unless all of the parties agree that the claim should return to the CRP. If no hearing date has been set, the claim would remain in the Tribunal until such time as the statement of claim is amended to add an estate or Compensation to Relatives claim (clause 21(8)(a)). After that time the claim would return to the CRP unless all of the parties agree that it should remain in the Tribunal (clause 21(8)(b)).

To facilitate the claim's return to the CRP, the proposed Regulation provides that if a notice of motion is given to add an estate or Compensation to Relatives claim, the plaintiff's authorised representative must provide each party and the Registrar with a 'resumption proposal' setting out how the claim should be returned to the CRP, including necessary modifications (clause 22(2)). If the parties do not agree to the resumption proposal before the claim is listed before the Tribunal to substitute the deceased plaintiff, the Tribunal will determine the matters in dispute (clause 22(6)). The claim would then return to the CRP following the hearing of the notice of motion (clause 19(8)(a)).

Most of the claims that are removed from the CRP on the basis of urgency are malignant claims, and would have been subject to the timetable for malignant claims had the claims remained subject to the CRP. Given this and the benefit for the deceased plaintiff's family of resolving the claim as soon as possible, the proposed Regulation provides that the timetable to apply would be the timetable for malignant claims (clause 22(4)).

Joinder of additional defendants

While it is not common for a plaintiff to join additional defendants in the proceedings, some submissions indicated concern that the current Regulation provides no guidance about how the CRP timetable should apply if a plaintiff does join additional defendants.

Suggestions about how to address this included:

- Extend the relevant timetable where further defendants are joined by a plaintiff
- Allow the original claim to be 'stayed temporarily' in the CRP until such time as the new claim (with the additional defendants) reaches the same stage as the original claim in the CRP, allowing all issues to be dealt with at the same time, and
- Enabling a party to apply to the Tribunal for directions as to the future conduct of the claim in these circumstances.

It is clearly in the plaintiff's interest to be able to join a defendant where the claim concerns a divisible disease in order to avoid an 'empty chair' in the apportionment process. It is also in the defendants' interests generally to have all potentially liable

parties joined to the plaintiff's proceedings, so that attempts can be made to resolve apportionment as part of those proceedings. Any defendants joined later in the proceedings by a plaintiff should not be precluded from filing replies or participating in the apportionment process.

It is therefore proposed that where a plaintiff joins a further defendant in a claim concerning a divisible disease after the statement of particulars has been filed and served on the last original defendant, the existing CRP (including its application to any cross-claims) is suspended temporarily until the new claim (in respect of the newly joined defendant) reaches the same point in the CRP timetable as the existing claim (clause 28(2)). After this point the plaintiff's claim against both existing and additional defendants would proceed together. The plaintiff would submit a proposed timetable with the notice of motion to join the new defendant that sets out the timetable for completion of the CRP (clause 28(4)). The Tribunal would then be able to make orders or directions relating to, or consequent on the joinder of the new defendant (clause 28(5)).

Interlocutory disputes

The 2008 Issues Paper sought submissions on whether there should be further opportunity to apply to the Tribunal to resolve a prolonged dispute between parties or otherwise to seek directions. While the Issues Paper acknowledged stakeholder concerns in this area, it noted the risk that expanded access to the Tribunal for these reasons could result in further disputes, delays and increased costs in the resolution of claims.

A number of submissions to the review suggested that some parties were encountering difficulties with other parties not complying with the provisions of the CRP and with prolonged disputes. The majority of submissions supported an amendment to provide an opportunity to apply to the Tribunal for directions. One submission noted that while applications to remove claims from the CRP are available, this mechanism can be blunt and sometimes inappropriate. Most submissions generally endorsed parties being given an opportunity to apply to the Registrar or the Tribunal for enforcement of the provisions of the CRP or resolution of a prolonged dispute.

It is not proposed to introduce a provision that would enable parties to apply to the Tribunal for directions in the event of a breach of the CRP or a prolonged dispute. There is a risk that a provision enabling parties to apply to the Tribunal for directions in the event of a breach of the CRP or a prolonged dispute would be overused, particularly for trivial matters, and may unnecessarily increase costs.

Most problems appear to be arising before mediation, and centre on the adequacy of information provided in the statement of particulars and the reply. It is therefore proposed to increase the power of the mediator to deal with this issue.

Specifically, it is proposed that mediators be empowered to direct parties to provide additional information within no more than five business days for a malignant claim and 10 business days for a non-malignant claim (clause 39(1)). The information must be information that is required to be provided in or with a statement of particulars or a

reply to the claim. A failure to provide this information within the time specified without reasonable grounds would be grounds for the mediator to issue a certificate to the effect that, in the mediator's opinion, the party did not participate in good faith in the mediation (clause 39(2)). This could in turn be grounds for an order for costs.

The proposed Regulation also permits the Tribunal to resolve matters about the continuation of a claim in the CRP in some circumstances where the Tribunal would be hearing an application in respect of the claim in any event. This is considered further below.

Mediation

In a submission to the review, a defendant representative raised an issue about the definition of the term 'defendant' for the purpose of mediation. The stakeholder noted that while the current Regulation extends the definition of defendants to include cross-defendants in respect of apportionment, there is no similar provision for mediation. To put the matter beyond doubt, the proposed Regulation makes it clear that the requirements for mediation apply to cross-defendants (clause 33).

The proposed Regulation also clarifies that the Registrar is able to revoke the appointment of a mediator (clause 37(6)). This is intended to address issues that have arisen in practice where a mediator is no longer able to mediate, for example due to illness, or where an appointment has been made in error as a result of a failure by parties to notify the Registrar that they reached agreement or appointed their own mediator. The proposed Regulation also provides that any costs incurred when an appointment is made in error as a result of a failure by the parties to notify the Registrar are to be shared between the parties as mediation costs (clause 50(4)).

Contributions assessment

The aim of the contributions assessment process is to encourage an efficient and commercial approach to resolving contributions disputes. Overall the submissions to the review of the current Regulation supported the view that most defendants are acting more commercially in relation to contributions disputes.

One of the issues canvassed in the review of the current Regulation was the material a Contributions Assessor should consider in carrying out an assessment. In addition to the standard presumptions on apportionment, currently a Contributions Assessor can only consider a statement of particulars and reply in making a determination.¹⁰ Views expressed in the submissions to the review varied and included:

- There should be no change that would delay the contributions assessment process
- Contributions Assessors should consider the statement of claim and/or cross-claims

¹⁰ Clause 49(4) of current Regulation

- Contributions Assessors should be required to consider all relevant information
- Late replies should not be considered by Contributions Assessors as this will reduce the cost to all defendants of having to file amended replies and decrease delay
- Contributions Assessors should be required to consider late replies, and
- Contributions Assessors should have a discretion to consider late replies as the contributions assessment process is enhanced when the Contributions Assessor has access to all relevant information.

Views varied about whether the late filing of replies and their consideration by a Contributions Assessor causes prejudice to parties.

The plaintiff's statement of particulars and defendant replies should contain sufficient information for the Contributions Assessor to determine the contribution that each defendant is liable to make. In addition, requiring a Contributions Assessor to also consider a statement of claim or other materials and submissions could increase costs. It is therefore not proposed to require a Contributions Assessor to consider this information. It is however proposed to clarify that a Contributions Assessor may consider, but is not required to consider, amendments to the statement of particulars and late and amended replies (clause 53(5)). This aims to achieve an appropriate balance between the need to encourage compliance with the timeframes of the CRP, while still allowing Contributions Assessors to consider amendments to the statement of particulars and late and amended replies when relevant and necessary.

Under the current Regulation, a Contributions Assessor must notify the Registrar and each defendant of a conflict of interest by the end of the next business day after the matter was referred. A defendant can object to the referral by notice in writing to the Registrar by the end of the next business day following the day on which the Contributions Assessor notified the objector of the conflict.

A defendant could identify a conflict of interest and want to object in the absence of any notification from the Contributions Assessor. The proposed Regulation therefore makes it clear that a defendant can object to the referral of a matter to a particular Contributions Assessor on conflict of interest grounds regardless of whether or not they have received notification of a conflict from the Contributions Assessor (clause 55(2)). This should provide an additional safeguard against conflicts of interest, increasing the rigor of the contributions assessment process. To mitigate against the risk of delay, the defendant must notify the Registrar within one business day of when they would otherwise have been notified of the conflict by the Contributions Assessor (clause 55(2)(b)). A notification to the Registrar by a Contributions Assessor or defendant must also include relevant details about the nature of the conflict of interest (clauses 55(1) and (2) respectively).

The proposed Regulation also makes it clear that the Registrar may revoke the referral of a matter to a Contributions Assessor otherwise than in the circumstances set out in clause 55 (clause 55(7)). This can occur when the defendant fails to file an

apportionment statement and the Registrar refers the matter to a Contributions Assessor on the basis that no agreement has been reached. If this occurs, clause 54(3) provides that the Contributions Assessor is entitled to remuneration even if a matter is incorrectly referred in these circumstances.

Effect of a contributions assessment

The Issues Paper noted that some stakeholders had suggested that there may be uncertainty about the effect of a contributions assessment when there is an indivisible injury (and so joint and several 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). The Issues Paper noted the intention behind the contributions assessment provisions was to:

- Provide incentives for defendants to adopt a commercial approach to settlement, and
- Prevent the final determination of the plaintiff's claim being delayed by contribution disputes.

It was also noted that there was no intention to replace joint and several liability for indivisible injuries.

One submission suggested that the Regulation should make it clear that the contributions assessment is not binding on the plaintiff, does not change any law relating to causation between the plaintiff and the defendants, does not displace any law relating to the joint and severable liability of the defendants, or prevent the taking of, or determination of, a dispute between defendants as to apportionment. This suggestion has been adopted in the proposed Regulation (clause 53(9)).

The words 'in a separate proceeding' have been added to end of clause 56(2) to clarify that a challenge to a contributions assessment is separate proceeding.

The role of Single Claims Managers

All submissions received about SCMs questioned their usefulness. Almost all submissions expressly stated that SCMs should only be appointed with the agreement of all defendants. Overall the submissions suggest that SCMs do not assist in resolving claims or in minimising costs.

The aim of the SCM role is that, in a multiple defendant claim, one person manages and negotiates resolution of a plaintiff's claim on behalf of defendants, and that this streamlines the process and potentially reduces costs. It is not clear whether this objective is being met.

It is therefore proposed that it no longer be mandatory to use a SCM. Instead, it is proposed that multiple defendants may use a SCM if all defendants agree that they wish to do so (clause 64).

Transitional arrangements

The changes to the CRP set out in the proposed Regulation would apply to all new claims from commencement on 1 September 2013.

It is proposed that the changes to the CRP apply to existing claims from 1 March 2014 to allow practitioners and parties time to adjust to the new process given it would otherwise be a short period of time between consultation on the proposed changes and commencement.

The following transitional arrangements are also proposed:

- The changes apply only to future progress of a claim within the CRP. The Registrar and the parties would not be required to complete actions to comply with changes that apply to stages of the process that have already been completed.
- Where mediation is part way through on 1 March 2014, it is proposed that division 4 of the current Regulation apply to the mediation. This is because otherwise the powers of the mediator would change partway through.
- Where an apportionment process is part way through on 1 March 2014, the requirements of division 5 of the current Regulation would apply. This is because otherwise the material the Contributions Assessor may consider would change part way through.

These matters are set out in Schedule 2 of the proposed Regulation.

A number of transitional provisions in the current Regulation are now spent and have not been replicated in the proposed Regulation. These are listed in the table comparing the current and proposed Regulation at **Attachment A**.

Consultation

In July 2008, stakeholders were invited as part of the 2008-09 review to raise issues about the CRP for consideration in the Issues Paper. The Registrar of the Tribunal subsequently held a Practitioners' Forum in August 2008 where practitioners raised a number of issues about the CRP. The issues identified through this consultation were then used as the basis for the development of the Issues Paper released in January 2009 for public comment. The submissions received in response to the Issues Paper informed the proposed changes to the CRP outlined in this RIS.

Comments and submissions are now sought on the proposed Regulation and RIS. Targeted stakeholders will be invited to provide comments. Information about the proposed Regulation and how to make a submission will be published in the *Government Gazette*, in the Government Notices section of the *Sydney Morning Herald* and the *Daily Telegraph* and on the Department of Attorney General and Justice website.

Review

The majority of submissions received as part of the 2008-09 review suggested that given the CRP has been in operation for some time, frequent reviews were no longer necessary. It is therefore proposed that the next review of the Regulation be undertaken in advance of when the Regulation would otherwise be automatically repealed in 2018 under the Subordinate Legislation Act.

Attachment A: Comparison between the current and proposed Regulation

Note: The table below identifies the differences between the current and proposed Regulation clause by clause.

Provisions	Current Regulation	Proposed Regulation	Change
Name of Regulation	cl 1	cl 1	Updated to refer to the <i>Dust Diseases Tribunal Regulation 2013</i>
Commencement	N/A	cl 2	To commence on 1 September 2013
Notes	cl 3	N/A	Clause removed
Transitional provisions	cl 16, 47(3) & 47(4)	Schedule 2	The changes are as follows: <ul style="list-style-type: none"> • Provides general savings for acts, matters and things that had effect under the current Regulation. • Provides that the CRP does not apply to pending claims until 1 March 2014. • Where mediation is partway through on 1 March 2014, it is proposed that Division 4 of the current Regulation apply to the mediation. • Where an apportionment is partway through on 1 March, the requirements of Division 5 of the current Regulation would apply.
Which claims are subject to the CRP	cl 18	cl 17	Subclause (5) is a new subclause requiring the parties to notify the Registrar of any agreement to extend the timetable. There are also consequential changes to cross references in this clause.
Effect of claim being subject to the CRP	cl 19	cl 18	Paragraph 18(2)(i) of the proposed Regulation makes it clear that the Tribunal is able to make directions or orders to give effect to or consequent on amendment of the statement of the claim to add a new party or to substitute a party. Consequential changes to cross-references have also been made in this clause.

Provisions	Current Regulation	Proposed Regulation	Change
Suspension of CRP if plaintiff dies	cl 20	cl 19	<p>Subclause (1) has been amended to provide that if the plaintiff dies the CRP is suspended until the Tribunal amends the statement of claim to substitute the plaintiff or to add a compensation to relatives claim.</p> <p>Subclause (2) has been amended to require the deceased plaintiff's authorised representative to notify the mediator of the plaintiff's death.</p> <p>Subclause (6) is a new subclause added to clarify that a Compensation to Relatives claim need not be added to the claim of the deceased plaintiff.</p> <p>Subclauses 19(2) & (5) have been amended to refer to the actual date of commencement (12 March 2007) of the current Regulation.</p>
Removal of certain claims from the CRP	cl 22	cl 21	<p>Subclauses (8) is a new subclause setting out when a claim that has been removed will return to the CRP.</p> <p>Subclause (9) is a new subclause providing that medical evidence can be provided by means of an affidavit setting out a medical opinion that has been given orally. The medical evidence does not need to comply with the Expert Witness Code of Conduct.</p>
Resumption of claims in CRP following plaintiff's death	N/A	cl 22	<p>This is a new clause providing for the resumption of claims in the CRP following the death of a plaintiff if the claim has been suspended under clause 19 or removed from the CRP under clause 21. It requires the deceased plaintiff's authorised legal representative to prepare a proposal for the resumption of the claim in the CRP. If the parties cannot agree to the proposal, the Tribunal is to determine the matters in dispute.</p>

Provisions	Current Regulation	Proposed Regulation	Change
Claimant to provide statement of particulars of claim	cl 24	cl 24	Consequential change to cross reference only
Registrar to provide parties with a timetable for CRP	N/A	cl 25	This is a new clause that requires the Registrar to provide the plaintiff and each original defendant with a timetable for the CRP in its application to the claim. The timetable is to be provided as soon as practicable after the Registrar has received notice that the plaintiff's statement of particulars has been served on the last of the original defendants.
Cross-claims by defendant	cl 25	cl 26	Subclause (6) has been amended to require the original defendant to notify the Registrar of the number of days of any extension to the time for filing a serving a cross-claim as well as the extension itself. There is also a consequential change to refer to actual date of commencement of the current Regulation. Subclause (12) is a new subclause requiring an original defendant who is a sole defendant to notify the plaintiff if a cross-claim is filed.
Defendant to provide reply to claim	cl 26	cl 27	Consequential changes to cross referencing only
Joinder of additional defendants in proceedings for divisible claims	N/A	cl 28	This is a new clause setting out the process to apply if a plaintiff who has a claim relating to an asbestos-related condition that is a divisible disease joins additional defendants to the proceedings.
Party changing facts relied on	cl 29	cl 31	Consequential change to cross reference only
Application to cross-defendants	N/A	cl 33	New clause to clarify that a reference to a defendant in any part of Part 4, Division 4, includes a reference to a cross-defendant.
Timetable for referral for mediation	cl 32	cl 35	Subclause (2) has been amended to require the parties to notify the Registrar within one business day of the claim being settled or being referred for mediation. Currently the requirement is to notify the Registrar 'as soon as' one of these events occurs. There is also a consequential change to a cross-reference.

Provisions	Current Regulation	Proposed Regulation	Change
Referral for mediation – appointment of mediator	cl 34	cl 37	The proposed Regulation includes new subclauses (6) and (7). Subclause (6) provides that if the Registrar revokes a mediator’s appointment, they must appoint a new mediator within one business day and notify the former mediator and the parties of the revocation and new appointment. Subclause (7) extends the timetable for conclusion of mediation by two business days.
Nature of mediation	cl 35	cl 38	Consequential change to cross reference only
Mediator may direct parties to provide additional information	N/A	cl 39	This is a new clause that provides that the mediator may direct the parties to provide additional information within 5 business days for a malignant claim or 10 business days for a non-malignant claim. The mediator may issue a certificate under clause 38(3) if a party does not comply.
Representation at mediation sessions	cl 36	cl 40	Consequential changes to remove the reference to ‘cross-defendants’ as this is now dealt with by clause 33.
Challenge to defendant’s contributions after successful mediation	cl 39	cl 43	Consequential changes only (ie cross referencing and removing reference to ‘cross-defendants’ as this is now dealt with by clause 33)
Taking evidence by telecommunication link	cl 40	cl 44	Changes to cross-referencing only
Taking evidence outside NSW	cl 41	cl 45	Changes to cross-referencing only
Agreements and arrangements arising from mediation	cl 43	cl 47	Changes to cross-referencing only
Costs of mediation	cl 46	cl 50	Subclause (4) is a new subclause providing that the costs of mediation include costs resulting from a failure to notify the Registrar of a claim being referred to mediation or settled.
Application to cross-defendants	cl 47	cl 51, Schedule 2 item 4	Change to cross-referencing. The transitional provisions in this clause of the current Regulation are in Schedule 2 of the proposed Regulation.

Provisions	Current Regulation	Proposed Regulation	Change
Determination of apportionment failing agreement	cl 49	cl 53	<p>Subclause (5) is a new clause providing that the Contributions Assessor may take into account amendments to a statement of particulars or a reply or a late reply.</p> <p>Subclause (5) of the current Regulation, which excludes matters referred to a Contributions Assessor before 2 March 2007 is spent and has not been included in the proposed Regulation.</p> <p>Subclause 10) of the current Regulation, which excludes mistakes or errors made before 2 March 2007 is spent and has not been included in the proposed Regulation.</p>
Contributions Assessors	cl 50	cl 54	<p>Subclause (3) of the proposed Regulation is a new subclause providing that if referral to a Contributions Assessor occurs by mistake due to a failure to file an apportionment statement the Contributions Assessor is entitled to remuneration.</p>
Contributions Assessors – special provision for conflict of interest	cl 51	cl 55	<p>Subclause (1) requires any notification from the Contributions Assessor to include relevant details about their having acted for any of the defendants to the claim or any person against any of the defendant in the 12 months before referral.</p> <p>Subclause (2) requires a defendant making an objection to include the particulars of the grounds for objection. A note has been added under subclause (2) to make it clear that a defendant may make an objection before being formally notified of the conflict of interest by the Contributions Assessor.</p> <p>Subclause (7) of the proposed Regulation has been added to make it clear that nothing in clause 55 prevents the Registrar from revoking a referral to a Contributions Assessor.</p>

Provisions	Current Regulation	Proposed Regulation	Change
			Subclause (7) of the current Regulation is a transitional provision that is now spent. It has not been replicated in the proposed Regulation.
Effect of agreement or determination as to apportionment	cl 52	cl 56	The words 'in a separate proceeding' have been added to the end of subclause (2) for clarity. Subclause (5) of the current Regulation is a transitional provision that is now spent. It has not been replicated in the proposed Regulation.
Cost penalties where defendant disputes another defendant's defence	cl 53	cl 57	Subclause (2) of the current Regulation is a transitional provision that is now spent. It has not been replicated in the proposed Regulation.
Application and interpretation	cl 54	cl 58	Subclauses (3) and (4) of the current Regulation, which concern application of the division to cross-claims made before 2 March 2007 are now spent and have not been replicated in the proposed Regulation.
New cross-claim subject to claims resolution process	cl 55	cl 59	Consequential changes to cross referencing only
Notice of original claim defendants of new cross-claim	cl 57	cl 61	The proposed Regulation includes a new subclause requiring the initiating defendant to give the Registrar notice in writing of the commencement of proceedings on the new cross-claim. There are also differences due to consequential changes to cross-referencing.
New apportionment under Division 5	cl 58	cl 62	Consequential changes to cross referencing only
Requirement for single claims manager	cl 60	cl 64	The proposed Regulation removes the requirement for a SCM unless all of the defendants agree that one should be selected.

Provisions	Current Regulation	Proposed Regulation	Change
Selection of SCM	cl 61	N/A	Under the proposed Regulation, there is no requirement for an SCM to be used. Consequently there is no need for an equivalent to cl 61 of the current Regulation.
Limitations on SCM's role	cl 63	cl 66	Consequential changes to cross referencing only
Non-urgent claims to be subject of directions hearing	cl 65	cl 68	Subclause (1) now includes claims that have ceased to be part of the CRP under cl 59(1)(b). Paragraph (3)(e) has been amended to remove the reference to rule 8A of Part 33 of the <i>Supreme Court Rules 1970</i> as this rule has been replaced by the Uniform Civil Procedure Rules.
Subpoenas – interpretation and application	cl 68	cl 71	Subclause (2) of the current Regulation is a transitional provision that is now spent and so is not included in the proposed Regulation.
Notice to be given to other parties concerning subpoenas requiring production	cl 73	cl 76	Consequential changes to cross referencing only.
Subpoena to medical expert	cl 78	cl 81	Consequential change to cross referencing only.
Expense and loss	cl 80	cl 83	Consequential change to cross referencing only.
Repeal and savings	cl 97	Items 1 and 2 Schedule 2	Savings provisions are mirrored in proposed regulation.
Forms	Schedule 2	Schedule 3	The forms have been amended to properly provide for Compensation to Relatives claims (see part 8 of Form 1 and part 10 of Form 2).

Attachment B: Claims Resolution Process data for 2008-09 to 2011-12

Outline of data used

This report is based on data recorded by the Dust Diseases Tribunal Registry for claims lodged each year and on information provided by the legal representatives of parties to claims by completion of a 'Form 3 - Claims Information' form (**Form 3 return**). Data is for years 2008-09, 2009-10, 2010-11 and 2011-12, as 2007-08 was the last year that data was previously reported.

Claims commenced

The table below shows the number of statements of claim lodged each financial year over the reporting period, excluding cross-claims.

Year	Malignant	Non-malignant	Total
2008-09	195	123	315
2009-10	216	133	349
2010-11	209	121	330
2011-12	230	133	363

Source: DDT Registry May 2013

Time taken to finalise claims and stage finalised

The length of time taken to finalise a claim is highly variable and depends to a large degree on the nature of the claim itself. Consequently, it is difficult to determine to what extent the length of time taken to finalise a claim is attributable to the effectiveness of the claims resolution process (**CRP**). Approximately a third of claims lodged in 2010-11 and 2011-12 were finalised in less than 60 business days (from the date of service of the statement of claim) and within that total a significant proportion of claims were finalised in less than two weeks. The majority of claims lodged in the same period were finalised within 180 business days (from the date of service of the statement of claim). Generally only particularly complex claims involving multiple defendants take longer to resolve.

Based on the information provided in Form 3 returns, in 2008-09 and 2009-10 most claims were finalised either during mediation, after unsuccessful mediation but before the claim is returned to the Tribunal or after the claim was returned to the Tribunal but before the Tribunal made a determination. In 2010-11, most claims settled either during mediation or after unsuccessful mediation but before the claim was returned to the Tribunal. In 2011-12 there was a much stronger trend towards claims being finalised during mediation.

Finalisation of claims

The following table shows the total number of claims finalised based on the year of finalisation, excluding cross-claims.

Year	Malignant	Non-malignant	Total
2008-09	162	134	296
2009-10	169	111	280
2010-11	177	115	292
2011-12	182	114	296

Source: DDT Registry May 2013

Legal and other claim costs

Plaintiff legal and other costs are very variable. Both plaintiff and defendant costs vary depending on the complexity of the plaintiff's claim. This can depend on factors such as how the exposure occurred, the types of loss for which damages are sought, the number of defendants involved and whether the claim raises novel issues. Changes to the cost of legal services also affect defendant and plaintiff costs.

Given the high degree of variability in legal costs, averages of the reported costs are not indicative of typical costs. The analysis below instead considers typical costs. The amounts adjusted for inflation are shown in square brackets using the Australian Bureau of Statistics (**ABS**) consumer price index for March 2013.

In 2008-09, plaintiff solicitor/client costs (excluding cross-claims) were typically around \$30,000 [\$33,247]. This has increased over time and plaintiff costs were typically around \$40,000 [\$41,042] in 2011-12.

Reported medical costs also increased over the same period with reported costs of between \$1,500 [\$1,662] and \$3,000 [\$3,324] being common in 2008-09, whereas reported costs of between \$3,000 [\$3,078] and \$5,000 [\$5,130] were more common in 2011-12.

Reported mediation costs have remained fairly constant. In 2008-09 mediation fees were generally between \$550 [\$609] and \$1,375 [\$1,524]. In 2011-12 mediation fees were generally between \$800 [\$821] and \$1,375 [\$1,411].

While reported defendant costs also varied greatly, in 2008-09 reported costs were costs typically being between \$10,000 [\$11,082] and \$30,000 [\$33,247]. In 2011-12, reported defendant solicitor/client costs were typically between \$12,000 [\$12,313] and \$25,000 [\$25,651].

Source: Form 3 returns

Damages

The damages amounts reported in Form 3 returns are highly variable. The table below sets out the highest and lowest damages amounts reported each year. All amounts shown are inclusive of costs and are shown in 2013 dollars. The adjustments for inflation were calculated using the ABS Consumer Price Index for March 2013.

	2008-09	2009-10	2010-11	2011-12
Mesothelioma				
- Highest	\$4,654,545	\$1,954,000	\$2,589,000	\$1,498,000
- Lowest	\$7,758	\$13,574	\$27,298	\$7,695
Other asbestos-related condition				
- Highest	\$432,208	\$477,794	\$845,408	\$589,980
- Lowest	\$16,623	\$16,288	\$5,284	\$5,130

Source: Form 3 returns

Urgent claims

Where medical evidence shows a plaintiff to be gravely ill, an application can be made to remove the claim from the usual CRP procedures, in the interests of urgency. The table below shows the number of urgent claims removed from the CRP process reported by the year that the statement of claim was filed.

Year	No of urgent claims	% of claims
2008-09	41	13%
2009-10	36	10%
2010-11	36	11%
2011-12	44	12%

Source: DDT Registry 2013

Death of plaintiff before claim is resolved

As there is often only a short period between diagnosis and death, timely resolution of claims is an important measure of the effectiveness of the CRP. The table below shows the number of people who had filed claims with the Tribunal who died before their claim was finalised. This includes people who had claims removed from the CRP prior to their death. The information is reported by the year that the statement of claim was filed.

Year	No of deaths	% of claims
2008-09	26	8%
2009-10	49	14%
2010-11	60	18%
2011-12	36	10%

Source: DDT Registry 2013