***Dust Diseases Tribunal Regulation 2007* –** Report on consultation

1 Introduction

The claims resolution process (CRP) for dust diseases claims was established as a result of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims.

A review of the CRP (Current Review) was initiated in August 2006 and stakeholders were invited by the Current Review to raise issues for consideration in an Issues Paper which was released in October 2006 for public comment.

A Report was released in January 2007 which outlined the Current Review's conclusions in relation to the matters raised in the Issues Paper and made a number of recommendations for minor amendment of the ***Dust Diseases Tribunal Regulation 2001*** (Existing Regulation).

As the Existing Regulation is due for Staged Repeal under the provisions of the ***Subordinate Legislation Act 1989*** on 1 September 2007, the Government also released for public comment the proposed ***Dust Diseases Tribunal Regulation 2007*** (the Consultation Draft Regulation) and a Regulatory Impact Statement (RIS), in compliance with the ***Subordinate Legislation Act***. Four submissions were received.

The ***Dust Diseases Tribunal Regulation 2007*** (the Final Regulation) was made on 28 February 2007 and will be published in the Gazette on 2 March 2007. The commencement date for most of the provisions of the regulation is 2 March 2007, although some provisions will commence on 12 March 2007. The Final Regulation can be found at www.legislation.nsw.gov.au. A summary of how the Final Regulation differs from the Existing Regulation is at Appendix A.

This paper has been prepared to highlight how the Final Regulation differs from the Consultation Draft Regulation and to respond briefly to other issues raised in the submissions on the Consultation Draft Regulation. The Current Review thanks all parties who made submissions on the Issues Paper, Consultation Draft Regulation and the RIS.

2 Summary of changes to the ***Dust Diseases Tribunal Regulation 2007*** following consultation

The Final Regulation differs from the Consultation Draft Regulation in the following respects:

- Clause 9 - Schedule 1 of the Consultation Draft Regulation included amendments to clarify that the first directions hearing fee is payable in relation to a cross-claim. One submission raised a concern that the first directions hearing fee will be payable when a cross-claim is brought before the Dust Diseases Tribunal (Tribunal) simply to give effect to the terms of settlement for the cross-claim. This is not the case and an amendment has been made to clause 9 in the Final Regulation to put this issue beyond doubt.

- Clause 20 - Clause 20(2) in the Consultation Draft Regulation provided that contributions assessment should continue if the plaintiff's claim is suspended because of the plaintiff's death, unless all of the defendants agree otherwise. A further minor amendment has been made to clause 20 in the Final Regulation to require the plaintiff's solicitor, or where the plaintiff does not have a solicitor, the plaintiff's estate, to notify defendants of the plaintiff's death, and to clarify that the obligation to notify the Registrar, if all of the defendants agree to suspend the contributions assessment process, rests with the Single Claims Manager (SCM), or if a SCM has not been appointed, the first defendant.

- Clause 25 - Under clause 25 in the Existing Regulation, a defendant may request an extension of time from the plaintiff to file and serve a cross-claim. This clause has been amended in the Final Regulation so that where the plaintiff consents to an extension of time for filing a cross-claim, the defendant is required to notify the Registrar of that extension when filing a cross-claim.

- Clause 32 – Under the Consultation Draft Regulation, if a claim is not referred for mediation within the time required by clause 32, the Registrar is required to refer the claim for mediation on the next business day. To assist the Registrar to comply with this obligation, clause 32 has been further amended in the Final Regulation to require parties to inform the Registrar if they have agreed to settle a claim or if they have referred a claim to mediation before the date for referral in clause 32. Clause 32 has also been amended in the Final Regulation to provide that the Registrar can delegate, in writing, the function of referring a claim for mediation to a member of staff of the Tribunal.

- Clauses 49 and 51 - Similar amendments to those made to clause 32 have been made to clauses 49 and 51 in relation to the appointment of a Contributions Assessor.

- Clause 49(10) – Under clause 49(9) in the Consultation Draft Regulation, a party may make an application for a Contributions Assessor's determination to be corrected if there is a clerical mistake or error in that determination. This clause has been further amended in the Final

Regulation (now clause 49(10)) to clarify that the person to whom such an application should be made is the Contributions Assessor who made the determination in question.

- Clause 51 – Clause 51 of the Consultation Draft Regulation allows a defendant to object to the appointment of a Contributions Assessor who has acted for one of the other defendants to the claim in the last 12 months. This clause has been further amended in the Final Regulation to also allow a defendant to object to a Contributions Assessor who has acted against that defendant in the previous 12 months. This responds to a concern raised in a submission.

- Clause 53 – In the Consultation Draft Regulation, under clause 53, cost penalties can be imposed on a defendant to a claim if that defendant refuses to agree that another defendant is not liable for the purpose of a contributions assessment in certain circumstances. In response to a submission which suggested the operation of the provision is unclear, a drafting note to clause 53 has been inserted in the Final Regulation.

- Clauses 55 to 57 – In the Consultation Draft Regulation, clause 55 provides for modified contributions assessment provisions to apply to "new cross-claims," that is, cross-claims made after the plaintiff's claim, and cross-claims which proceed in conjunction with the plaintiff's claim, are finalised. Given the modified contributions assessment provisions will only work in relation to a new cross-claim if all of the parties involved have sufficient information about the plaintiff's claim and each of the original defendants' defences in order to assess their positions as to apportionment, the modified contributions assessment provisions have been further amended in the Final Regulation so that they will only apply to a new cross-claim if the plaintiff's claim was filed on or after 1 July 2005.

  Clauses 56 and 57 have been further amended to address issues raised in submissions relating to the procedures which will apply to the cross claims brought after the plaintiff's claim is finalised. In the Final Regulation, these clauses now provide that:
  - If a Statement of Particulars was not filed in relation to the original claim, the initiating defendant is required to provide sufficient particulars of the plaintiff's claim (with a cost penalty applying to the initiating defendant for providing insufficient particulars);
  - The initiating defendant is required to serve on the new defendant and each of the original claim defendants a revised Part 8 of its Reply (or a Reply if one was not filed in respect of the original claim); and
  - A deadline of 10 business days has been imposed for each original claim defendant to elect to be subject to the new contributions assessment and each must serve a revised Part 8 of the Reply if it

wishes to be subject to the new contributions assessment (or a Reply if one was not filed in respect of the original claim).

- Schedule 1 - Schedule 1 has been amended in the Final Regulation to specify that a fee is payable to the Tribunal for issuing a notice to produce under Part 34 of the ***Uniform Civil Procedure Rules 2005.*** This is the same amount as the fee for issuing a subpoena for production in Schedule 1.

- A number of amendments have been made to deal with transitional issues. These are set out in more detail in Appendix A.

3 Other comments in submissions

The Current Review does not consider it necessary to make any changes in relation to a number of matters raised in submissions. These matters are discussed below (except where those matters were already considered in the Final Report).

Objectives – clause 13

One submission notes that the objectives of the CRP (clause 13), while noble in scope, cannot be enforced. Another submission notes that the objectives relate solely to the time and costs associated with claims and not with factors such as the development of legal principle and whether time and cost factors resonate in fairer compensation for injured plaintiffs.

The Current Review notes that clause 13 was inserted in the Consultation Draft Regulation to specify the key objectives of the CRP and as such the clause is intended to express goals rather than enforceable obligations. It is through the other substantive provisions of the Final Regulation which underpin the CRP that costs are expected to be minimised. Further, the objective of the CRP and its mediation process is not to develop legal principles, but to provide a structure within which parties can settle claims outside of the Tribunal process. If parties wish to take a test case to develop a legal principle (for example for novel issues), provision is made in the Existing Regulation for the claim to be removed from the CRP and dealt with by the Tribunal.

Suspension of claim where plaintiff dies – clause 20

One submission states that the CRP timetable should be suspended if the plaintiff dies. This is already the case under clause 20(1). Clause 20(3) (which continues the contributions assessment process) does not affect the suspension of the timetable, other than to require defendants to seek agreement as to the apportionment of liability or have apportionment determined by a Contributions Assessor (unless all of the defendants agree otherwise).

Mediation – Division 4

One submission suggests that extensions of time for referring a claim to mediation are warranted in certain situations. Changes are not considered to be necessary, however, as the Existing Regulation already provides that the Registrar may defer referring a claim for mediation on one occasion if all of the parties to a claim agree.

Another submission suggests that the "mediation" process under the CRP should be afforded a more accurate name as it is an evaluative rather than purely facilitative process, which is normally the case with mediation, and that the mediator should not be able to make recommendations to the parties concerning the acceptance of offers and the likely outcome of proceedings.

The Current Review does not consider it necessary to change the name of the process under the CRP from "mediation" to "conciliation." The National Alternative Dispute Resolution Advisory Council's comments that "both "mediation" and "conciliation" are now used to refer to a wide range of processes and that overlap in their usage is inevitable." Any change in the name of the process at this stage will simply cause confusion.

It is unclear to the Current Review why actual or perceived injustice to the parties may be caused by the mediator making recommendations to the parties. These are not binding and the parties may choose whether or not to accept any recommendations. The Current Review also notes that this is not a jurisdiction in which many (or perhaps any) parties are unrepresented.

Issues left unreasonably in dispute – clause 38

Under clause 38, a cost penalty applies to a party who leaves an issue in dispute after an unsuccessful mediation and the Tribunal determines that that issue was unreasonably left in dispute. One submission comments that there is no indication how the Tribunal will determine whether an issue has been left "unreasonably" in dispute and recommends that provisions be included which indicate how, and from whom, evidence should be adduced.

Clause 38(2) already provides that the Tribunal, when determining whether an issue was unreasonably left in dispute, must consider the steps taken by a party to ascertain whether there was a reasonable basis for the party's actions. The Current Review considers that this is sufficient guidance for the Tribunal and it should otherwise remain in the Tribunal's discretion to determine whether an issue was left unreasonably in dispute.

Mediator's role in taking evidence – clause 39

If mediation is unsuccessful and a defendant intends to dispute the contribution that it is liable to make, it may require the plaintiff to give evidence on oath before the mediator (clause 39). While a submission suggests that the mediator should not be able to take such evidence as it is more likely to result in an unsuccessful mediation, the Existing Regulation

currently provides that the defendant may only make this requirement and the mediator may only take evidence after a successful mediation. The taking of evidence cannot, therefore, compromise the independence of the mediator nor result in an unsuccessful mediation.

SCM – clause 63

One submission suggests that where liability is in issue, in particular where supply of a product is in issue, it is not practicable for all parties to use a SCM. This requirement, it is argued, requires parties to share the same expert evidence or Counsel at mediation sessions. It was suggested that the SCM should relinquish his or her role in circumstances where the parties cannot agree on these issues.

The Current Review considers that changes are not necessary in this regard. Appointment of a SCM does not interfere with the right of a defendant to attend at, and be represented at, a mediation (clause 63(2)(b)). Also, there is nothing in the Existing Regulation which requires defendants to share counsel or expert evidence where a SCM has been appointed.

APPENDIX A

Summary of how the ***Dust Diseases Tribunal Regulation 2007*** differs from the ***Dust Diseases Tribunal Regulation 2001***

Note: This is intended as a summary guide to assist practitioners to identify the changes. Practitioners should study the Final Regulation carefully to ensure they are familiar with the changes. The summary below should not be relied on in substitution for a review of the precise drafting.

- Clause 9 – This clause has been amended to clarify that the first directions hearing fee is not payable when a cross-claim is brought before the Tribunal simply to give effect to the parties' settlement of the cross-claim.

- Clause 13 – The objectives of the CRP are set out in clause 13.

- Clause 20 - This clause has been amended to provide that contributions assessment should continue if the plaintiff's claim is suspended because of the plaintiff's death, unless all defendants agree otherwise and the Registrar has received notification of such agreement within a certain time. The obligation to notify the Registrar rests with the SCM, or if a SCM has not been appointed, the first defendant. Clause 20 now also requires notification of a plaintiff's death. ***Practitioners should note that this clause commences on 12 March 2007 and will apply to claims where the plaintiff dies after commencement. That part of the clause requiring contributions assessment to continue will also apply to claims commenced before commencement of this clause which have been suspended because the plaintiff has died, unless the Registrar is notified within 10 business days of the commencement of this clause that all of the defendants have agreed that it should not apply.***

- Clause 25 – This clause has been amended so that where the plaintiff consents to an extension of time for filing a cross-claim, the defendant is required to notify the Registrar of that extension when filing a cross-claim. This will only apply to extensions relating to cross-claims filed after the commencement of this amendment. ***This amendment commences on 12 March 2007.***

- Clause 26 – This clause now allows defendants to file joint replies where they are "related bodies corporate" within the meaning of the ***Corporations Act 2001 (Cth)*** and are represented by the same solicitor or firm of solicitors.

- Clause 32 – This clause now requires the parties to notify the Registrar in writing as soon as a claim is referred for mediation or the claim is settled. If a claim is not referred for mediation by the parties within the time required by clause 32, the Registrar is required to refer the claim for mediation on the next business day. Clause 32 has also been amended to

provide that the Registrar may delegate, in writing, the function of referring a claim for mediation to a member of staff of the Tribunal.

- Clause 47 – This clause now provides that the contributions assessment provisions continue to apply to a cross-claim, even if the claim with the plaintiff has been resolved. ***This clause will apply to cross-claims which remain outstanding where the plaintiff's claim was resolved before commencement of these provisions, if the first directions hearing for the cross-claim has not been held before the date of commencement of these provisions, unless the Registrar is notified within 10 business days that all of the defendants have agreed that contributions assessment should not proceed.***

- Clause 49 - If a contributions agreement has not been filed with the Registrar within the required period, this clause now clarifies that the Registrar must refer the claim to a Contributions Assessor on the next business day after the required period. The Registrar is also required to notify each defendant of the referral of a claim to a Contributions Assessor and give each defendant a copy of the Contributions Assessor's determination. The Registrar may now delegate these functions to a member of staff of the Tribunal.

  Clause 49 now also provides that all of the defendants may agree that a particular defendant should not be presumed to be liable for the purposes of a contributions assessment by a Contributions Assessor and that that defendant is then to be excluded from the contributions assessment. ***This clause will apply to all claims currently subject to the CRP, but only where the matter has not yet been referred to a Contributions Assessor.***

  Clause 49 now also permits a Contributions Assessor to amend a contributions assessment if there is a clerical mistake, or an error arising from an accidental slip or omission, with such amendments to be made on his or her own motion within seven days of the determination or on the request of a party made to the Contributions Assessor and copied to each other defendant (within seven days of the contributions assessment).

- Clause 51 – This clause deals with conflicts of interest and now requires a Contributions Assessor to disclose if he or she has acted for one of the defendants or for any person against any of the defendants, in the previous 12 months. A defendant may object to the Contributions Assessor on the ground that he or she has acted for any of the other defendants or against that defendant, in which case the Registrar must appoint another Contributions Assessor (and the Registrar may now delegation this function). Clause 51 also sets out the procedure for referring the claim to another Contributions Assessor if there is an objection and the consequences of this on the CRP timetable.

- Clause 52 – This clause has been amended to clarify that a defendant is not liable to a costs penalty for failing to materially improve its position if it establishes before the Tribunal that it was not liable in respect of the injury to the plaintiff for the reasons given by the defendant in its Reply. ***This clause will apply to all claims currently subject to the CRP, but only where the matter has not yet been referred to a Contributions Assessor.***

- Clause 53 – This clause has been amended to provide that where one defendant provides in its Reply evidence showing that it is not liable, a cost sanction will apply to each of the other defendants to the claim that refuses to agree that the defendant which provided the evidence is not liable for the purpose of a contributions agreement or assessment if that defendant is later found not to be liable on the basis of the evidence it provided in its Reply. ***This clause will apply to all claims currently subject to the CRP, but only where the defendants have not made a contributions agreement or the matter has not yet been referred to a Contributions Assessor.***

- Division 6 (clauses 54 to 58) – Division 6 has been inserted into the Final Regulation. It provides for modified contributions assessment provisions to apply to "new cross-claims," that is, cross-claims made after the plaintiff's claim and cross-claims which proceed with the plaintiff's claim are finalised. The Division sets outs the materials to be provided by the parties, the process for defendants to the original claim to elect to be subject to the new apportionment of liability and matters concerning the determination of liability by the Contributions Assessor. ***It should be noted that this clause will only apply to cross-claims made in respect of plaintiffs' claims made on or after 1 July 2005. In addition, it will apply to these cross-claims where they were filed before the commencement of the Final Regulation in certain circumstances – see clause 54(3).***

- Form 3 – Form 3 has been amended to require practitioners to provide additional information relating to claims.

- Schedule 1 - Schedule 1 has been amended to specify that a fee is payable to the Tribunal for issuing a notice to produce under Part 34 of the ***Uniform Civil Procedure Rules 2005.***