NSW GOVERNMENT

REVIEW OF THE DUST DISEASES CLAIMS RESOLUTION PROCESS

Report and Proposed Dust Diseases Tribunal Regulation 2007

ATTORNEY GENERAL'S DEPARTMENT OF NSW
& THE CABINET OFFICE

Review of the Dust Diseases Claims Resolution Process - Report and Proposed *Dust Diseases Tribunal Regulation 2007*

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GLOSSARY

AMWU/ADFA	Australian Manufacturing Workers Union/ Asbestos Diseases Foundation of Australia (Joint Submission)
Allianz	Allianz Australia Insurance Limited
ARPD	Asbestos-related pleural disease
CRP	Claims resolution process established by the *Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005*
Current Review	The review currently being undertaken as recommended by the Final Report
Final Report	Final Report of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims – March 2005
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
Goldricks	Goldrick Farrell Mullan Solicitors
ICA	Insurance Council of Australia Ltd
Issues Paper	Issues Paper released as part of the Current Review
JHI-NV	James Hardie Industries – NV
Middletons	Middletons (acting for Wallaby Grip Limited and Wallaby Grip (BAE) Pty Limited)
Regulation	The *Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005* which established the CRP
Reply	The Reply prepared by each defendant to the plaintiff's Statement of Particulars
Review	The Review of Legal and Administrative Costs in Dust Diseases Compensation Claims which reported in March 2005
SCM	Single Claims Manager which may be appointed under the Regulation in multiple defendant claims to act for all defendants
Transitional Claims	Claims which were commenced before 1 July 2005 and which are subject to the CRP through the operation of transitional provisions.
Tribunal	Dust Diseases Tribunal

Chapter 1 Introduction

1.1 The 2004 and 2005 Review

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

The Review was conducted by Mr Laurie Glanfield AM, Director-General of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General of The Cabinet Office. The Review was to:

- consider current processes for handling and resolving dust diseases compensation claims; and

- identify ways in which legal, administrative and other costs can be reduced within the existing common law system in New South Wales.

The Final Report of the Review was released in March 2005 and the Government accepted all of the recommendations of the Review. The main recommendation of the Report proposed the establishment of the Claims Resolution Process (CRP) to provide a mechanism to require the parties to exchange information and participate in settlement discussions. The CRP was established by the *Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005* (the Regulation).

The main features of the CRP are that it involves the early exchange of information by the parties, and then compulsory mediation. Multiple defendant claims are subject to a system of Contributions Assessment if apportionment cannot be agreed. Claims which do not resolve through the CRP return to the Tribunal. A more detailed description of the CRP is contained in the Issues Paper.

1.2 The Current Review

The Final Report of the Review recommended that the CRP be reviewed after data in relation to its first 12 months of operation are available. The Current Review was therefore initiated to act upon this recommendation. The Current Review was again conducted by Mr Laurie Glanfield AM, Director-General of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General of The Cabinet Office.

The Current Review was to consider:

- 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.

In August 2006, stakeholders were invited by the Current Review to raise issues for consideration in the Issues Paper which was released in October 2006 for public

comment. There were 32 specific issues which were raised for comment in the Issues Paper. Nine submissions were received in response to this Issues Paper. These submissions are listed at **Appendix A**.

In this Report, submissions from organisations such as asbestos victims support groups, plaintiff solicitors or unions are identified as submissions from "plaintiff representatives". Likewise, submissions from defendants (including employers and insurers), industry associations or lawyers representing defendants are generally identified as being from "defendant representatives".

1.3 Outcomes of the Review

This Report has been prepared to outline the Current Review's conclusions in relation to the matters raised in the Issues Paper. A number of recommendations are made for minor amendment of the 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 is releasing the proposed *Dust Diseases Tribunal Regulation 2007* (**Appendix B**), incorporating the changes recommended by this Report which are highlighted in "track changes" format, and a Regulatory Impact Statement, in compliance with the *Subordinate Legislation Act* (**Appendix C**).

1.5 The Next Steps

Submissions are invited on the proposed *Dust Diseases Tribunal Regulation 2007*, in particular, the changes recommended by this Report, and the associated Regulatory Impact Statement. Submissions should be addressed to:

Review of the Dust Diseases Claims Resolution Process

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

By mail: GPO Box 5341
Sydney NSW 2001

For further enquiries, please contact Legal Branch The Cabinet Office on (02) 9228 5599.

The closing date for submissions is 12 February 2007.

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

2.1 Introduction

Chapter 2 of the Issues Paper sets out data on the first full 12 months' operation of the CRP in respect of claims which were commenced between 1 July 2005 and 30 June 2006. The data are based on data sources held by the Registry of the Tribunal and are subject to a number of limitations which are highlighted in Section 1.5 of the Issues Paper.

Based on the data which has been collected and collated to date, a number of comments are contained in the Issues Paper.

First, as the number of claims commenced after 1 July 2005 and resolved under the CRP is relatively small, the Current Review considers it difficult to draw conclusions from the information which is available. It appears that the level of activity within the CRP was low initially, but it increased in the second six months of the period under review.

The Issues Paper also notes that relatively few Statements of Particulars were served in the period under review, and only a small number of mediations and contribution assessments were held, with much of the activity as part of the CRP occurring in the second six months of the period under review. It appears, however, that in some cases matters were being resolved by the parties without the filing or serving of Statement of Particulars. This was particularly the case for transitional claims where it appeared that formal action had been taken as part of the CRP in relatively few of the transitional claims resolved in the period under review. Similarly, matters were being resolved without a mediator being appointed.

The Current Review welcomes the fact that parties appear to be attempting to resolve matters, within or outside the CRP. Early settlement, regardless of whether steps are taken as part of the CRP, is strongly encouraged by the Current Review as it is likely to eliminate unnecessary costs. The Issues Paper notes that the existence of the CRP provides both the context for these less formal processes and an important mandatory process for those cases which are unable to be resolved through less formal processes.

The Issues Paper also states that although comparisons can be drawn for pre 1 July 2005 claims and claims commenced between 1 July 2005 and 30 June 2006 in respect of plaintiff legal and other costs, caution must be exercised as the samples remain small and could be distorted by costs in a single claim. That said, it appears that overall plaintiff costs are slightly lower in the period under review.

The Issues Paper notes that there is no comparative data for legal costs for defendants because of limitations with the data submitted in relation to pre 1 July 2005 claims. When this data is compared to data in Chapter 2 of the Final Report (which contained estimates of the costs in claims involving the former James Hardie subsidiaries), it appears that there has been a substantial reduction in costs for defendants during the period under review.

2.2 Comments in submissions

A number of submissions have commented on the overall operation of the CRP, and the preliminary comments outlined in the Issues Paper.

A number of stakeholders evaluated the overall operation of the CRP positively.

AMWU/ADFA say in their submission that their experience of the CRP to date has been positive with most claims settling at or before mediation. Consequently, in most cases, plaintiffs' costs have reduced significantly and relatively few claims in their experience have progressed to a final hearing before the Tribunal. They also note that there has been a period of adjustment and that as practitioners have become more familiar with the system, claims have resolved at an earlier stage.

Turner Freeman (Qld) note that the CRP has been successful in streamlining and simplifying litigation in the Tribunal, has led to earlier resolution of claims compared to the previous system and has reduced legal costs. It has experienced significant reductions in legal costs when comparing claims which commenced prior to 1 July 2005 and those commenced after this date. There has been a reduction of about 24.9 percent of legal costs for non-malignant claims and 31.1 percent of legal costs for malignant claims. As only a small pool of claims has been dealt with under the new system, it suggests that no major change is currently required to the CRP.

Amaca also considers that the CRP works well and in most cases, facilitates the early resolution of claims. Its experience has been positive with most claims resolving either before, or at mediation and it has found early exchange of information instrumental to the initial success of the CRP. Again, however, the relatively short period in which the CRP has been operating is noted.

Other stakeholders, however, highlight some concerns and suggest that particular problems are limiting the operation and effectiveness of the CRP.

For example, **JHI-NV** suggests that settlement of claims (particularly non-malignant claims) does not appear to be occurring quickly enough. Contributing factors to delays in settlement are said to be delays in providing Statements of Particulars, the withholding of medical information, the refusal to provide medical authorities, difficulties in meeting the timetable for joining cross defendants and serving Replies, and delays and disputes about the appointment of a Single Claims Manager. That said, it believes that a lot of these problems are cultural and given the immaturity of the data, wide ranging changes to the Regulation would be difficult to justify at this stage. **JHI-NV** suggests incorporating clear objectives into the Regulation specifying the key objectives of the CRP.

In relation to the data, **JHI-NV** has provided information prepared by KPMG which argues that the true cost of managing and settling claims is likely to be understated in aggregate because of the exclusion of Compensation to Relatives claims and cross claims and because the claims which have settled in the first 12 months are likely to be more straightforward.

Allianz queries whether the reforms will be sufficient to deliver significant cost savings or prove to be long lasting. It states that because of the pro-active approach by major defendants, 87 percent of claims have settled prior to a final mediation or hearing but still at significant cost. As such, it states that significant cost savings appear unlikely because the reforms to date do not appear to have brought about a change in culture.

2.3 Conclusions

The Current Review considers that there are initial positive signs in relation to the operation of the CRP, particularly with the more recent growth in activity of claims under the CRP. That said, it is too early to draw definitive conclusions given the short period in which the CRP has been operating. Clearly, a period of adjustment is required for participants in the new system.

There is also a continuing need for cultural change within the jurisdiction. The Final Report also highlighted the need for cultural change. A key objective of the reforms was to give defendants the tools to be commercial and to pursue early settlement so as to avoid unnecessary costs, but the Final Report also noted that defendants would need to ensure that they and their lawyers use these tools. Clearly this still needs to occur. The Current Review supports the suggestion to include the objectives of the CRP in the Regulation.

Recommendation 1 - Objectives in the Regulation

The Current Review recommends that the Regulation be amended to include a statement of the objectives of the CRP, that is, to foster the early provision of information and particulars of claims, encourage early settlement and reduce legal and administrative costs.

Chapter 3 Commencement of proceedings and the CRP

3.1 Issue 1 - Delays in serving the Statement of Claim and Statement of Particulars

3.1.1 Introduction

Under the Regulation, a Statement of Claim may be filed with the Tribunal, but it is not validly served on the defendant unless it is served with the Statement of Particulars. Under the Uniform Civil Procedure Rules, a Statement of Claim is valid for service within six months of being filed with the Tribunal.[1]

The Issues Paper noted concerns raised by defendant representatives regarding delays between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars. Such delays, defendant representatives argue, disadvantage defendants because either an urgent hearing before the Tribunal is sought or because defendants have little or no time to prepare their Reply due to the CRP timetable.

As set out in the Issues Paper, overall 40 percent of Statements of Claims are served within 90 calendar days. In the case of mesothelioma claims, where issues of urgency are most likely to arise, 61 percent are served within 90 calendar days (although the remaining 39 percent of mesothelioma claims, which one would expect to be dealt with urgently, are served after 90 calendar days).

Submissions were sought in the Issues Paper as to whether delays between filing and serving the Statement of Claim cause any difficulties for defendants, and if so, what those difficulties are. Submissions were also sought as to whether the period for serving the Statement of Claim could be reduced or made subject to specified limits, without creating unfairness to plaintiffs, and if so, how. Submissions were also sought as to whether parties, in some circumstances, do not follow the requirements of the CRP as to Statements of Particulars and whether this helps or hinders resolution of claims.

3.1.2 Comments in submissions

Most of the submissions from defendant representatives highlight the issue of delay, and several of these submissions make the following points:

- defendants are disadvantaged as plaintiff lawyers gain additional time to build their case by delaying service of the Statement of Particulars, whereas defendants must file their Reply in a short amount of time;
- delay becomes a problem if the plaintiff's condition worsens and becomes grounds to remove a claim from the CRP; and
- while a claim remains idle until a Statement of Particulars is served, an insurer is required to set aside reserves for potential claims.

[1] Prior to 15 August 2005, this period was 12 months.

A number of suggestions for change are made by these submissions which range from amending the Regulation to require service of the Statement of Particulars at the earliest opportunity, to prescribing a period less than six months within which the Statement of Particulars must be served.

The plaintiff representatives consider, however, that delays are not significant, that they do not cause a problem for defendants and that no changes are required. They suggest that there is no basis for suggesting that plaintiff lawyers are delaying service of the Statement of Particulars until the plaintiff's condition deteriorates in order to remove claims from the CRP. They also suggest a number of reasons for legitimate delay in serving a Statement of Particulars and that there is no advantage to the plaintiff in delaying service of the Statement of Particulars. In fact, it is in the plaintiff's interests to serve a complete Statement of Particulars as soon as possible, as the sooner the Statement of Particulars is served, the sooner settlement negotiations and mediation can proceed.

3.1.3 Conclusion

The Current Review does not consider it necessary to make any changes at this stage. In light of the data in the Issues Paper, it does not appear that plaintiff solicitors are delaying service of the Statement of Particulars. The Current Review considers that there really is no advantage to plaintiffs in delaying service and that it is critical that plaintiffs are able to commence proceedings in order to preserve their entitlements to general damages.

One of the main criticisms from defendants in relation to the system in place prior to the CRP was that Statements of Claim lacked adequate information to properly assess the claim. The Statement of Particulars should provide defendants with adequate information to assess the claim in a short timeframe, and some period of time must be allowed for the necessary information to be collected. The costs to defendants also appear to be marginal. Further, plaintiffs should be given the time they require (within reason) to build the best possible case against defendants, particularly given that this is the one and only opportunity plaintiffs have to get compensation for serious, and often fatal, injuries suffered as a result of the defendants' negligence.

3.2 Issue 2 - Removal of urgent claims from the CRP

3.2.1 Introduction

A claim may only be removed for urgency under clause 18(2) if, as a result of the seriousness of the plaintiff's condition, the plaintiff's life expectancy is so short as to leave insufficient time for the requirements of the CRP to be completed. In this case, the claim may be determined by the Tribunal on an expedited basis.

The Issues Paper raised for consideration whether the provisions of the Regulation relating to the removal of urgent claims are operating as intended and, if not, how they should be changed.

Some defendant representatives suggested during preliminary consultation that claims removed for urgency should follow the same process as non-urgent claims, albeit with the Tribunal having discretion to set the timetable and make variations as required.

3.2.2 Submissions

Submissions from plaintiff representatives suggest that the provisions relating to the removal of urgent claims are operating as intended. In contrast, one submission from a defendant representative suggests that it is too easy to have a claim removed for urgency and that claims are removed on the slightest evidence as to deterioration of a plaintiff's condition. It suggests that the evidentiary criteria for removing a claim for urgency be tightened up by requiring a medical report which is evidentiary in form (that is, complies with the Expert Witness Code of Conduct) and which includes a statement from a qualified medical practitioner addressing the criteria in clause 18(2).

Two defendant representative submissions suggest that urgent claims should still follow the CRP (filing of the Statement of Particulars, mediation, Single Claims Manager and perhaps apportionment). One suggests that it should be subject to a faster timetable. The other states that the CRP should apply unless the Tribunal makes an order that the CRP, or parts of the CRP, should not apply. Both suggest that where a claim is removed on the basis of urgency and the plaintiff dies before it is finalised, the claim should be returned to the CRP.

3.2.3 Conclusions

In the absence of any evidence that claims are being removed for urgency in circumstances where this is not justified, no change is warranted. Of the claims filed between 1 July 2006 and 30 June 2006, only 16 were removed for urgency and the medical evidence relied upon by the Tribunal to remove a claim for urgency generally suggested a prognosis of weeks or 1-2 months to live. Given the serious consequences for the plaintiff of not having his or her claim determined before he or she dies, it would be preferable to err on the side of ensuring potentially urgent claims can be removed from the CRP.

It also does not appear necessary to further amend the Regulation to require additional aspects of the CRP to apply to urgent claims. The Regulation already requires the Tribunal to consider if mediation and the contributions assessment procedures should apply and to provide written reasons if it does not consider this to be the case. It would not be feasible to require for all urgent claims service of the Statement of Particulars and use of a SCM. In urgent claims, there may be insufficient time to complete a Statement of Particulars and any further information may be obtained by other means (for example, a bedside hearing). Similarly, it may be too early in the process to appoint and use a SCM, particularly if apportionment remains in dispute.

3.3 Issue 3 - Removal of claims prior to information exchange

3.3.1 Introduction

The Issues Paper raised for consideration whether there are circumstances, other than those currently prescribed by the Regulation, where claims should be removed from the CRP and how such cases have caused difficulty in claims under the Regulation to date.

This issue was raised because in preliminary consultation it was suggested that there should be greater scope to remove claims before information exchange occurs, particularly in relation to disputes about employment or insurance issues.

3.3.2 Submissions

A number of defendant representative submissions suggest that claims should be removed from the CRP prior to information exchange where employment of a plaintiff is in dispute and a defendant can prove it was not the employer of the plaintiff at an early stage in the claim, where there is a genuine dispute as to liability or insurance or where all parties agree prior to service of a Statement of Particulars or a Reply that the claim is a test case.

In contrast, submissions from both plaintiff and some defendant representatives suggest that there should be no new circumstances created in which claims can be removed from the CRP. Further, one plaintiff representative argues that if claims can be removed after the Statement of Particulars has been served but before a Reply has been served, this would prejudice the plaintiff. This might increase costs as filing a Reply narrows the issues in dispute and benefits all parties.

3.3.3 Conclusions

The Current Review does not consider there are circumstances other than those prescribed in the Regulation where a claim should be removed from the CRP prior to information exchange. There is a strong argument that until information exchange occurs, parties cannot really be said to be in a position to properly assess their positions and decide whether the claim is more likely to be resolved outside the CRP.

The Current Review is also concerned that allowing more claims to be removed from the CRP may increase costs.

There may, however, be a need for greater incentives for defendants in multi-defendant claims to act commercially where a particular defendant provides evidence that it is not liable, for example, because it did not employ the plaintiff. If a defendant has evidence that it is not liable, the defendant should provide this evidence in its Reply to the other defendants. The other defendants would then consider the evidence and could decide either to maintain their position (that the defendant is liable) or agree that the defendant is not liable and "release" the defendant from the claim. If the defendant which provides the evidence is subsequently found not to be liable by the Tribunal on the basis of that evidence, those defendants that refuse to "release" that particular defendant would be subject to cost penalties. If only some of the defendants refuse to release the defendant that provides evidence, only those defendants will be subject to the cost penalty.

Recommendation 2 - Release of non-liable defendants early in a claim

The Current Review recommends that, in circumstances where one defendant provides in its Reply evidence showing that it is not liable, a cost sanction should 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 determination if that defendant is later found not to be liable on the basis of the evidence it provided.

3.4 Issue 4 - Dormant claims

3.4.1 Introduction

The Issues Paper raised the issue of the Tribunal's jurisdiction over dormant claims. While pre 1 July 2005 claims are subject to the CRP, clause 14(2) of the Regulation provides that no action needs to be taken on the claim until a "current claim proposal" has been served on all of the defendants by the plaintiff. The Tribunal no longer has jurisdiction to strike out claims (except with consent) or to case manage dormant claims while they remain subject to the CRP.

Submissions were sought in the Issues Paper as to whether dormant claims impose costs on any parties and if so, what costs and how they arise. Submissions were also sought on whether there is a need to amend the Regulation to require that steps be taken in relation to transitional claims where no action is taken by the plaintiff within a reasonable period of time.

3.4.2 Submissions

All of the defendant representatives state that dormant claims impose costs on them. The most commonly identified cost was for reviewing files on a regular basis (as defendants request a yearly estimate of liabilities from solicitors) and having to set aside reserves for these claims. Defendant representatives suggest that a defendant should be entitled to call on the plaintiff to serve a current claims proposal and, if the plaintiff does not then take action, the claim should be listed before the Tribunal for consideration as to whether it should be struck out for want of prosecution. Alternatively, it is suggested the Tribunal should be able to case manage dormant claims and where appropriate dismiss them.

The plaintiff representatives do not consider there is any need to amend the Regulation in relation to dormant claims. Both submissions point to the high disposal rate of transitional claims and suggest that there is no merit to defendant representatives' statements that claims need to be reviewed on a regular basis when they are dormant. They suggest that only minimal costs would be incurred in any event. It is also noted that there will be a small portion of claims that will not be resolved in the next 12 to 24 months for legitimate reasons, for example, those claims which were commenced prior to the introduction of provisional damages in 1996 when limitation periods still applied in dust diseases claims. To require plaintiffs to finalise these claims when they are not ready to do so would greatly prejudice plaintiffs.

3.4.3 Conclusions

The Current Review does not support any changes at this stage. It appears that transitional claims are being finalised at an acceptable rate. The Current Review also notes the potentially prejudicial effects highlighted in submissions by plaintiff representatives. That said, plaintiff lawyers should progress these claims unless there are good reasons not to. Further, the Current Review will carefully consider this issue in the future reviews if it appears that the rate of disposal of these claims is unacceptable.

3.5 Issue 5 - Flexibility of the timetable for the CRP

3.5.1 Introduction

The Issues Paper raised the issue of whether there is a need for greater flexibility of the timetable for the CRP. During preliminary consultation for the Issues Paper, some stakeholders suggested that at times, the goals of the CRP are frustrated by the rigidity of the CRP framework as there is no ability to delay (even with consent) key steps in the CRP. Similarly, they argued that there is no mechanism to approach an officer of the Tribunal to resolve a specific issue, without removing the whole claim from the CRP.

3.5.2 Submissions

All of the defendant representatives' submissions express difficulty in complying with the timetable, particularly for malignant claims. Particular problems include:

- plaintiffs not providing sufficient information regarding potential cross defendants and therefore, defendants must undertake their own investigations;

- mediations being postponed as necessary information, such as medical reports, is not provided on time; and

- difficulties filing and serving cross claims in malignant cases on cross defendants that are companies registered overseas, as defendants only have 10 days within which they must investigate, draft, file and serve the cross claim.

One defendant representative suggests that a defendant should be able to request an extension of time to serve a cross claim and to serve a Reply and that a plaintiff should be required to consent to such a request unless he or she is able to demonstrate that the extension would result in substantial injustice to the plaintiff. If the parties cannot agree on an extension, it is suggested that the defendant should be able to apply to the Tribunal for an order extending the time limit.

Another defendant representative suggests that the Registrar should be able to vary the timetable generally on a needs basis and that parties should be able to vary the timetable if all parties consent.

In contrast, one plaintiff representative does not believe that there are any particular stages of the CRP where the timetable is creating difficulties for parties. It notes that if flexibility is built into the timetable then parties' legal representatives could agree to regular extensions in the timetable resulting in delay and additional legal costs.

Similarly, if power is given to the Registrar or Tribunal to vary the timetable, this also will result in increased costs.

3.5.3 Conclusions

While a number of defendant representatives state in their submissions they have difficultly in meeting the timetable, particularly for malignant claims, this may be because they are still becoming familiar with the new system. Therefore, the Current Review does not support any extensions to the timetable for malignant claims generally.

The Current Review also does not support the suggestion that parties should be able to vary the timetable if all of them consent or that the Registrar should be able to vary the timetable generally on a needs basis. A general power to vary the timetable is likely to result in lawyers for the parties agreeing to extend the timetable, resulting in delay and additional costs. Similarly, the Current Review does not support any changes in the timetable in respect of cross claims generally. The Regulation already allows original defendants to request an extension of time for serving cross claims including where overseas service is required.

3.6 Issue 6 - Filing fees for the commencement of cross claims

3.6.1 Introduction

The filing fee to commence proceedings (including proceedings to commence a cross claim) was reduced from $615 to $147 for individuals and from $1,230 to $294 for corporations. The fee structure recognises that, under the new system which requires most claims to proceed through the CRP, the only step taken by parties involving the Tribunal is filing the Statement of Claim. Otherwise, the claim is subject to the CRP. A separate fee of $571 for individuals or $1,142 for corporations was introduced for filing a request for a first directions hearing with the Tribunal, which would be the point at which the claim returns from the CRP to the Tribunal.

The Issues Paper sought submissions on whether there is a need to clarify the provisions of the Regulation to make it clear that the first directions hearing fee applies to cross claims.

3.6.2 Submissions

One defendant representative suggests in its submission that the same fee structure should apply to all claims and the Regulation should be clarified in this regard. Others suggest that the fee for commencing cross claims and the first directions hearing fee should be combined into a single fee.

3.6.3 Conclusion

The Current Review does not support combining the fee for commencing cross claims and the first directions hearing fee. The split fee structure recognises that the need to take substantive action involving the Tribunal is not required in most cross claims. This is because cross claims may be resolved under the CRP without returning to the Tribunal other than to record the settlement.

Schedule 1 of the Regulation lists all the fees that are payable and it was intended that the same fee structure should apply to all claims, including the payment of the first directions hearing fee in respect of cross claims. The Regulation could be amended, however, to make this more clear.

Recommendation 3 - Application of first directions hearing fee to cross claims

The Current Review recommends that the Regulation be amended to make explicit that the first directions hearing fee applies to cross claims.

3.7 Other Issues – Progress of claims where the plaintiff dies

Allianz suggests that where the plaintiff's estate is substituted for the plaintiff in a malignant claim, the estate's claim should be classified as a non-malignant claim and dealt with under that timetable as there is no urgency remaining for the claim to be dealt with under the malignant timetable.

The Current Review supports this suggestion. A similar change should also be made to apply in cases where a compensation to relatives claim is made in respect of an injured person who did not personally make a claim before he or she died. It does not appear to the Current Review that the estate's malignant claim or a compensation to relatives claim would be prejudiced by being dealt with on the longer timetable. The Current Review suggests, however, that the relevant party should be able to object to its claim being treated as a non-malignant claim if it would result in substantial prejudice.

Recommendation 4 - Compensation to Relative Claims

The Current Review recommends that the Regulation be amended to provide that:

- if a person who suffered from an asbestos related condition did not commence a claim before he or she died, the compensation to relatives claim is to be dealt with under the timetable for non-malignant claims unless the plaintiff is able to demonstrate that this would result in substantial prejudice to the plaintiff;

- where a plaintiff in a malignant claim dies before the claim is finalised and the claim is then progressed by the plaintiff's estate, the defendant may request the estate to treat the claim (and any further compensation to relatives claim which is made in respect of the plaintiff) as a non-malignant claim for the purpose of the timetable and the estate is required to consent unless the estate is able to demonstrate that this would result in substantial prejudice to the estate.

Chapter 4 Information Exchange

4.1 Issue 7 - Adequacy of the Statement of Particulars and Reply

4.1.1 Introduction

The Issues Paper raised for consideration the adequacy of information provided in the Statement of Particulars and the responses provided in the Reply. It was suggested during preliminary consultation that full and complete answers are not being provided. It was also suggested that the timetable should be suspended while orders are sought to compel the relevant party to provide the information.

The following questions were asked in the Issues Paper:

- Is all necessary and relevant information being provided as part of the Statement of Particulars and Reply?

- Are parties clearly identifying information which is not available and indicating when it will be available?

- Are parties updating the information as and when required? Is information required by the forms which are not really necessary?

4.1.2 Submissions

One defendant representative said that all necessary and relevant information is being provided but usually well after the time prescribed by the timetable.

All other submissions from defendant representatives and the plaintiff representatives suggest that insufficient information is being provided in Statements of Particulars and Replies in some cases.

The areas which defendant representatives highlight as problematic are inadequate employment and exposure histories and the plaintiffs' general medical condition and health. One submission argues that a complete medical history, a medical authority and a Health Insurance Commission notice of past benefits should be provided before a claim can proceed. A plaintiff representative notes that the quality of Replies depends on whether defendants have an independent medical report available (where they disputed aspects of the plaintiff's diagnosis of injury or medical evidence).

Submissions are mixed as to whether parties are identifying which information is not available and indicating when it will be available. Plaintiff representatives and some defendant representatives note that this process is working well, although it is difficult to indicate precisely when the further material will be available. Other defendant representatives argue that this is not occurring at all. A similar mixed response is made in response to the issue of whether parties are actually updating information.

One defendant representative suggests that no changes should be made to the Statement of Particulars at this stage as the CRP has been operating only for a short time. Another defendant representative, however, suggests that the timetable should

be suspended if a plaintiff does not provide information required by the Statement of Particulars before the Reply is due and the defendant has requested such information, with the Tribunal to have the power to determine any disputes between these parties

4.1.3 Conclusions

The Review does not support any changes at this stage. While most of the submissions suggest that insufficient information is being provided on the forms, it is unclear whether this is because the information is not available at the time the forms are completed (but will be obtained later) or if information is never going to be available (for example, because of the difficulties in identifying employers from 30 years ago or in circumstances where the plaintiff may be very sick). While there may be an issue with the adequacy of some Statements of Particulars, the CRP should be given a further period of time in which to operate to determine if this is a problem which is widespread, and if there is a better solution, before changes are proposed.

In particular, suspension of the timetable while information is outstanding is not supported. This will result in delays which are unlikely to encourage the early settlement of claims. Similarly, the proposal to increase the Tribunal's role is likely to increase litigiousness and costs without any appreciable contribution to settling the claim.

The Current Review also considers that it should not be mandatory to provide a Health Insurance Commission notice of past benefits in Statements of Particulars before claims can proceed. It is not essential for defendants to have such notices before they can consider the compensation sought by plaintiffs and requiring it at this stage is likely to increase costs for no appreciable benefit.

4.2 Issue 8 - Part 6 of the Statement of Particulars – Compensation

4.2.1 Introduction

The Issues Paper sought submissions as to whether Part 6 should remain as part of the Statement of Particulars. Part 6 of the Statement of Particulars requires the plaintiff to provide information concerning the compensation which is being sought, including information concerning general damages, lost wages and future economic loss, medical care, personal care needs and gratuitous services provided to third parties.

4.2.2 Submissions

Submissions from most defendant representatives and both of the plaintiff representatives state that Part 6 should remain as part of the Statement of Particulars and do not suggest any changes.

The other submissions from defendant representatives suggest the following changes:

- Part 6 should not be completed where the claim is limited to general damages and medical costs only;
- plaintiffs should not give an opinion regarding life expectancy or the care and medical treatment required in the future as such information requires medical expertise;

- plaintiffs' solicitors should estimate general damages and the cost of personal care and medical treatments in a separate document as these are statements which a lawyer would make rather than a lay person;
- where damages are claimed for services plaintiffs would have provided to third parties (*Sullivan v Gordon* damages), they should provide information to satisfy the legal grounds for obtaining such damages as set out in s15B of the *Civil Liability Act 2002***.**

4.2.3 Conclusions

The Review supports retaining Part 6 of the Statement of Particulars in its current form. If defendants wish to have medical evidence to support plaintiffs' opinions regarding life expectancy etc, the Statement of Particulars already provides that defendants may request such evidence from plaintiffs. To require this information routinely would simply increase costs. Further, the proposal that a solicitor should prepare a separate document to the Statement of Particulars which estimates certain damages is unnecessary. Solicitors would already be completing the Statement of Particulars on behalf of the plaintiff (on the plaintiff's instructions, of course, where relevant). It is also likely to increase costs.

The Current Review also does not consider any changes are necessary in relation to *Sullivan v Gordon* damages. Part 6 already requires plaintiffs to provide sufficient information in relation to these damages. Plaintiffs should provide the information required to assess the claim under the tests established by the *Civil Liability Act.* If they do not, defendants should request the necessary information.

4.3 Issue 9 - Medical authority

4.3.1 Introduction

It was suggested to the Current Review that some plaintiffs are refusing to authorise defendants to access their medical records in the Statement of Particulars, primarily on the grounds of legal professional privilege. The Issues Paper sought submissions as to whether additional measures are necessary to encourage plaintiffs to provide a medical authority to enable defendants to access medical records without the need to issue a subpoena.

4.3.2 Submissions

The plaintiff representatives suggest that no change is necessary. They state that a subpoena is a quicker and cheaper way of obtaining medical records and is to be preferred as all parties will get access to the materials at the same time.

Most defendant representatives suggest that additional measures are necessary to encourage plaintiffs to provide a medical authority, with one noting that privilege is not a compelling reason to not provide a medical authority. These submissions make a number of suggestions for change ranging from requiring plaintiff solicitors to obtain the medical information where a medical authority is not provided and to serve those documents which are not subject to privilege to placing conditions on any medical authority which is granted (such as requiring documents to be provided to the plaintiff first to give him or her a chance to make claims for privilege).

4.3.3 Conclusion

The Current Review does not support making medical authorities mandatory or any other changes to the granting of medical authorities at this stage. As the Issues Paper notes, although issues of privilege are less likely to arise in respect of practitioners who have only treated plaintiffs, the difficulty is that in many cases, the treating practitioner may also have provided an expert report. Requiring the plaintiff solicitor to obtain, review and serve documents in every case would seem to be likely to increase costs unnecessarily. The Current Review notes that the defendant always has the option of issuing a subpoena to obtain the material using the streamlined subpoena process under the Regulation.

4.4 Issue 10 - Timeframe for serving the defendant's Reply

4.4.1 Introduction

During preliminary consultation for the Issues Paper, a number of defendant representatives highlighted that the time for defendants to file their Reply is extremely tight and that this places them at a significant disadvantage. The Issues Paper sought submissions as to whether the current timetable for defendants to file their Reply is appropriate. The Issues Paper notes that in considering any proposal to extend the timetable for defendants, the potential impact on plaintiffs will need to be considered carefully.

4.4.2 Submissions

Most of the defendant representatives state that the current timetable to file the Reply is too short, with one noting that it is particularly unfair to defendants who are not familiar with the jurisdiction. Some suggest that disputation and additional costs have arisen from the fact that some matters have had to be left unanswered in a Reply pending further investigations. This could be avoided by a fairer timetable.

Two proposals for changing the Regulation are made, namely, extending the time to file a Reply by a certain period (particularly for cross defendants) or empowering the Tribunal to grant extensions on a case by case basis.

There is also some support from plaintiff representatives for the position of defendants. One plaintiff representative suggests that changes to the timetable seem justified as defendants cannot prepare adequate Replies unless medical evidence is available to them. Contrary to this, however, another plaintiff representative notes that any change to the timetable may be premature given that practitioners are still becoming familiar with the CRP, and practitioners have provided more complete responses over time.

4.4.3 Conclusions

The Current Review does not support any changes at this stage. While most of the submissions suggest that the timeframe within which the Reply must be provided should be extended, it appears premature to change the timetable given practitioners are still becoming familiar with the CRP. The greatest concerns appear to relate to issues which arise between defendants (such as the impact on cross-defendants), and it is difficult to justify delaying resolution of the plaintiff's claim because of these issues.

Further, the Regulation allows defendants to update the Reply when information which was not available at the time the Reply must be served becomes available. The Current Review notes that a cross defendant already has approximately the same amount of time in which to file a Reply as the first defendant.

4.5 Issue 11 - Standard Defence Replies and Joint Replies

4.5.1 Introduction

The Issues Paper sought submissions on what would be the advantages and disadvantages, if any, of a system which enables a Standard Reply to be filed with the Tribunal. This issue was raised after some defendant representatives argued that they should be able to file with the Tribunal a Standard Reply or parts of a Standard Reply, similar to the process used in the Tribunal for filing a Standard List of Documents for the purposes of discovery.

The Issues Paper also sought submissions on whether defendants should be able to file joint Replies, for example where defendants have a common interest in a matter.

4.5.2 Submissions

All submissions from the defendant representatives (with the exception of one) and the plaintiff representatives do not support a Standard Reply as the majority of questions in the Reply respond to specific matters raised by the plaintiff in the Statement of Particulars.

One defendant representative, however, considers it may be appropriate for defendants to file with the Tribunal a set of general materials to which defendants could refer in different Replies to avoid duplication with each new Reply.

Another suggests that defendants should be able to file joint Replies where defendants are "associated entities" and are represented by the same firm of solicitors, others suggest that joint Replies are not feasible given defendants' different interests and the delays which may be caused in preparing a joint document.

4.5.3 Conclusion

In light of the submissions received, the Current Review does not support a system which enables a Standard Reply to be filed with the Tribunal.

Similarly, the Current Review considers it preferable for defendants to continue setting out any materials which they consider necessary to support their claim in their Replies. If general materials were able to be filed with the Tribunal by defendants, solicitors' costs are likely to increase for both the plaintiff and the other defendants to a claim as solicitors may need to inspect all the materials at the Tribunal, irrespective of whether they are directly relevant to the particular claim. If materials could be filed with the Tribunal rather than being set out in a Reply, defendants also may be less discriminating about the amount of material provided or referred to.

The Current Review supports, however, the proposal to allow defendants to file a joint Reply but only where they are "related bodies corporate" within the meaning of the *Corporations Act* and represented by the same firm of solicitors. While such cases are

unlikely to arise often and the overall savings of such a proposal are likely to be marginal, it may be of some benefit to those defendants able to make use of it. The Current Review sees no reason to oppose this, as it is unlikely that the arguments against joint replies would arise.

Recommendation 5 - Joint Replies

The Current Review recommends that the Regulation be amended to allow defendants to file joint replies where they are "related bodies corporate" within the meaning of the *Corporations Act* and represented by the same firm of solicitors.

4.6 Issue 12 - Sanctions for failing to comply with the timetable

4.6.1 Introduction

The Issues Paper sought submissions on whether additional measures are necessary to ensure that parties comply with the timetable. Some stakeholders had suggested that there should be stronger sanctions available for delays in progressing claims, including delays in filing Replies.

4.6.2 Submissions

Some submissions suggest that parties should be able to approach the Tribunal for orders to require a party to comply with the timetable. Another suggests that some consideration should be given to whether solicitors responsible for delays should have costs awarded against them personally. In contrast, others do not consider that additional measures are necessary at this stage given practitioners are becoming familiar with the new system. They note that this issue should be reviewed later.

4.6.3 Conclusions

The Current Review agrees that practitioners are still becoming familiar with the new system and therefore does not consider further measures are necessary to ensure that parties comply with the timetable at this stage.

Chapter 5 Medical Examination and Disputes

5.1 Issue 13 - Medical and Expert Reports - Plaintiffs

5.1.1 Introduction

One of the objectives of the Statement of Particulars is to reduce the number of unnecessary medical reports obtained by defendants by ensuring they have basic information about the plaintiff's condition when the Statement of Particulars is served. Limited data is available to the Current Review to determine whether this aspect of the reforms has been effective. The Issues Paper therefore sought submissions on whether the overall number of medical and other expert reports obtained by plaintiffs has declined, and whether reports are still being obtained unnecessarily by plaintiffs.

5.1.2 Submissions

Most submissions (including both defendant and plaintiff representatives) suggest that the number of reports obtained by plaintiffs has declined. The remainder of submissions do not consider there has been a decline or consistent change in the number of reports obtained.

Some submissions suggest that occupational therapist reports are still being served with some Statements of Particulars (despite them not being required). Plaintiff representatives note this but state that where these are provided, matters have settled shortly after the serving of the Statement of Particulars as parties can calculate compensation accurately. They suggest that the cost of obtaining such reports is outweighed by the savings in costs resulting from the early resolution of claims.

5.1.3 Conclusions

The Current Review does not consider it necessary to make any changes at this stage to further reduce the number of reports obtained in light of the anecdotal evidence in submissions. Form 3 should be amended, however, to make it even more explicit that the cost and type of each report must be identified separately.

The Statement of Particulars directs plaintiffs not to obtain occupational therapist reports. While the Current Review notes the comments made in relation to the claims which have settled shortly after the serving of the Statement of Particulars where such reports were provided, it remains of the view that these reports should only be obtained where requested by the defendant and considers that this issue should be kept under review.

Recommendation 6 – Reporting on the number of Expert Reports

The Current Review recommends that Form 3 be amended to require the cost and type of each report to be identified separately.

5.3 Issue 14 - Medical and Expert Reports - Defendants

5.3.1 Introduction

The Issues Paper sought submissions as to whether the overall number of medical and other expert reports obtained by defendants has declined as part of the CRP. Submissions were specifically sought as to whether plaintiffs are being required to undergo medical examination unnecessarily and whether reports are being obtained by defendants unnecessarily.

5.3.2 Submissions

Some submissions state that the number of reports obtained by defendants has declined. One plaintiff representative suggests that for mesothelioma cases, it is now rare for defendants to have the plaintiff medically examined or the plaintiff's pathology examined.

The plaintiff representatives suggest that there should be more recourse to joint examinations under clause 24(4) in multiple defendant cases, particularly where a plaintiff lives outside a metropolitan area (as travelling to multiple examinations is onerous). It is also suggested that in multiple defendant cases, it is unnecessary for plaintiffs to undergo more than one examination per speciality. It is not, however, clear from these submissions whether multiple examinations are being requested by plaintiffs, or whether these are being refused by defendants.

5.3.3 Conclusions

The Current Review does not consider any changes are necessary to further encourage defendants to minimise the number of unnecessary reports at this stage. The changes observed by submissions in relation to the number of reports being obtained suggests the CRP is operating as intended in this respect.

In relation to the issue of requiring plaintiffs to undergo multiple examinations, the Regulation already allows plaintiffs to elect to have a joint examination in multiple defendant claims. A defendant, however, can object to a joint examination. While the plaintiff representatives have suggested that more recourse should be given to joint examinations, it is unclear whether defendants are objecting to such requests and whether these objections, if any, are reasonable. The Current Review, therefore, considers it too early to consider any changes in this regard.

Chapter 6 Mediation

6.1 Issue 15 - Resolution prior to mediation

6.1.1 Introduction

The Issues Paper noted that some stakeholders have suggested that most claims are capable of resolution prior to mediation, however, other parties have rejected attempts to resolve the claim prior to mediation at informal conferences and have expressed a preference for mediation. Others noted, however, that they are generally successful in negotiating resolution prior to mediation.

The Issues Paper sought submissions as to whether the Regulation could better encourage parties to enter into settlement discussions prior to mediation.

6.1.2 Submissions

A number of submissions note that settlement is occurring prior to mediation for various reasons, including plaintiff solicitors are making detailed rather than ambit claims, parties are becoming more familiar with the process and the fact there are powerful cost incentives to avoid mediation. These submissions do not consider that amendments are necessary and note that there would be difficulties with the enforcement of any obligations to enter into settlement discussions prior to mediation. Some submissions note that encouraging settlement prior to mediation requires cultural change, and this will take time.

There are, however, two suggestions for changes to the Regulation as follows:

- to provide that the plaintiff's lawyer should make an offer of settlement at an early date, as defendants could face offers of compromise from other defendants before they know the quantum of the claim; and
- that clause 27(2) should be restated positively so that parties should consider settlement negotiations prior to mediation and to the extent possible undertake those discussions.

6.1.3 Conclusions

The Current Review agrees that it is too early to tell whether further reform is required and notes that cultural change may take some time. Further, the cost of mediation appears to provide an incentive to pursue settlement and it appears that pre-mediation settlement discussions are in fact occurring.

The Final Report noted that there would be difficulties in enforcing a positive obligation for parties to pursue settlement negotiations prior to mediation. Similarly, introducing a requirement for the plaintiff to make a mandatory offer of settlement is not considered necessary.

6.2 Issue 16 - Additions or alternatives to mediation

6.2.1 Introduction

Suggestions were made to the Current Review that claims which currently resolve at mediation would have, under the old system, resolved at Issues and Listings

Conferences presided over by the Registrar. Some practitioners suggested that consideration should be given to reintroducing Issues and Listings Conferences.

Although the data available to the Current Review suggests that parties are taking steps to resolve claims themselves without the need for formal mediation, the Issues Paper sought submission on whether additions or alternatives to compulsory mediation should be considered.

6.2.2 Submissions

Two submissions argue for the introduction of ILCs. They suggest that ILCs would facilitate agreement on apportionment (particularly in relation to recalcitrant defendants), could narrow issues in dispute and would avoid matters being referred unnecessarily to mediation and/or contributions assessment.

The remaining submissions, however, do not support introducing ILCs. They note that informal discussions are occurring anyhow and past experience in relation to ILCs was not positive. They also note that parties are taking mediation seriously due to its cost and mediation is more effective than a ILC because it is structured and there are effective cost sanctions.

6.2.3 Conclusion

No changes to the Regulation are proposed at this time. The Current Review considers that the introduction of another regulated process would simply add to the costs of parties. Further, the Current Review notes that there is a real difference of opinion among submissions as to whether ILCs were effective prior to the introduction of the CRP. Indeed, the ineffectiveness of ILCs was an issue raised with the Review in 2005.

6.3 Issue 17 - Mediators' fees

6.3.1 Introduction

Submissions were sought as to whether fees charged by mediators should be regulated and, if so, in what manner.

6.3.2 Submissions

A number of submissions do not support the regulation of mediators' fees noting that the current system ensures there is a wide range of mediators from whom the parties can choose. For example, it is suggested that where Senior Counsel conducts the mediation, there is a high success rate (and presumably regulated fees might stop Senior Counsel agreeing to conduct mediations). One submission notes, however, that it is difficult to see why Senior Counsel would be needed to mediate unless the claim is a significant or complex matter.

Others note that mediators' fees are the subject of negotiation and market forces determine if a mediator is too expensive.

Some submissions suggest, however, that the Regulation should provide some guidance as to how mediators charge (eg per hour rate, per mediation or a daily rate).

Only one submission argues that mediators' fees should be regulated by way of set half and full day rates and it was argued that this will provide incentives for parties to settle (prior to the half day being completed).

6.3.3 Conclusion

Regulation of fees is not supported at this stage as it could discourage certain mediators, particularly those with substantial experience, from seeking appointment as a mediator. The current system ensures there is flexibility so that parties are able to agree on the most appropriate mediator to be appointed. While some concern is raised about Senior Counsel being used, parties should be able to determine in which mediations this is appropriate.

Further, it is not clear that prescribing the manner in which fees are charged would promote settlement, given that settlement would already occur before mediation if the mediator's fees were of sufficient influence.

6.4 Issue 18 - Objections to mediators

6.4.1 Introduction

Some stakeholders noted during preliminary consultation that there is no fixed procedure for a party to raise concerns about the potential for conflict of interest in respect of a particular proposed mediator. The Registrar also had acknowledged at the Practitioners' Forum that objections were being lodged with him. He noted that it was unclear whether he was able to take these into account, although he said he tried to avoid appointing a particular mediator who was the subject of an objection, as to do otherwise would not aid resolution of the matter.

Submissions were sought as to whether a process should be introduced which requires mediators to disclose to the Registrar for whom they have acted in dust diseases litigation.

6.4.2 Submissions

Most submissions do not consider that an objections process is necessary. Submissions note that as the mediators are well known, there is no need for a conflicts register, and it should be left to the individual mediator who has ethical obligations. In contrast, one submission supports disclosure obligations, arguing there is an inherent conflict in acting for a party one day, and then mediating the next. Another submission argues that mediators should declare conflicts, and parties should have the right to object.

One submission notes that mediators should have experience in dust diseases matters. Contrary to this, another submission notes that solicitors practising in the jurisdiction should not be mediators as they lack the necessary independence.

6.4.3 Conclusions

Given the non-binding nature of mediation, it is difficult to see why an objections process is necessary. Mediators have professional obligations and can decide whether it is appropriate for them to continue to act.

The current Regulation requires that the list of mediators should "as far as practicable" include practitioners with experience in dust diseases matters.

6.5 Issue 19 - Participation in mediation

6.5.1 Introduction

Currently, the Regulation enables the mediator to certify that a party has not participated in the mediation in good faith, and this may be taken into account by the Tribunal in awarding costs. Cost sanctions also apply where a party unreasonably leaves an issue in dispute. The Issues Paper sought submissions as to whether there is a need for additional measures to encourage parties to engage in mediation in good faith, and if so, what form these measures should take.

6.5.2 Submissions

Most defendant representatives do not consider that further measures are necessary. One such submission notes that an appropriate mediator should be able to overcome any issues and that existing measures are effective. Others note that parties are already taking mediation seriously.

In contrast, one plaintiff representative notes that in some transitional cases, parties are attending mediation without preparing fully and are then seeking to obtain and introduce additional material when the matter proceeds to the Tribunal. They suggest that the Regulation could be amended to define in more detail what conduct would constitute "not participating in mediation in good faith."

One defendant representative suggests that problems arise through the inadequacy of particulars, and these issues should be dealt with before mediation. It also suggests that the Regulation should be amended so that there is a right for the parties to give reasonable notice to require certain things to occur at mediation (including requiring the attendance of the plaintiff, requiring the instructing officer of a defendant to attend, requiring particular issues to be addressed by a party at mediation and requiring a party to produce particular documents).

6.5.3 Conclusions

No changes to the Regulation are proposed at the current time. Submissions generally indicate that parties are taking mediation seriously and there are adequate sanctions available to assist in this regard.

In relation to the proposals to strengthen mediators' powers, the plaintiff is already required to attend mediation (unless he or she is too ill to attend). The mediator also has the power to require the instructing officer of a defendant to attend the mediation and, if a party considers this to be necessary, it could request the mediator to make such an order, either prior to, or at the mediation. Similarly, if parties require particular documents, they have the option of issuing a subpoena. Also, there is nothing to prevent a party from notifying another party that it wishes to have certain matters addressed at mediation.

Chapter 7 Contributions assessment

7.1 Issue 20 - Delays in finalising contributions assessment

7.1.1 Introduction

While preliminary consultation showed that the contributions assessment provisions are reducing disputation amongst defendants, making it easier to reach settlement with each other and the plaintiff, it has been suggested that this has not led to settlements occurring significantly earlier in the CRP.

Some stakeholders suggested that the inclusion of cross claims in the CRP delays settlement negotiations with the plaintiff while apportionment is disputed. Providing a means of severing cross claims was raised for consideration. In contrast, others argued that it is preferable to have all defendants represented as part of the CRP as defendants tend to be less commercial when all other defendants are not involved.

Delays in referring claims to Contributions Assessors were also identified as an issue. The Issues Paper therefore sought submissions on whether there is any evidence to suggest that the inclusion of cross claims within the system is contributing to delay for plaintiffs, and whether or not Contributions Assessors are being appointed, failing agreement of the parties, as and when required by the Regulation.

7.1.2 Submissions

A number of submissions note that there is only anecdotal evidence that the inclusion of cross claims in the system is causing delay and that too few matters have proceeded through the system at this stage. These submissions note that the timetable and cost penalties have meant that some defendants do not settle, unless they can settle with all parties.

Three defendant representative submissions expressly support keeping cross claims in the CRP.

Technical issues are, however, identified as potential causes of delay. Specifically, some suggest that settlement of the plaintiff's claim is delayed while the parties wait for a Contributions Assessor to be appointed (although this delay should not be occurring as the Regulation requires a Contributions Assessor to be appointed at a particular date). One submission notes that the Registrar has been keen to ensure that the parties resolve matters by agreement, and the submission suggests it is preferable to promote settlement by delaying the appointment, notwithstanding the delay in the timetable.

One submission from a plaintiff representative suggests that all parties are not being notified when a Contributions Assessor has been appointed or of the Contributions Assessor's decision.

7.1.3 Conclusions

There is general support for retaining cross claims as part of the CRP.

The CRP timetable is very tight and it is important that a Contributions Assessor is appointed as soon as the deadline for agreement has passed. While the Registrar's position, that defendants should try to reach agreement without an assessor being appointed, is noted, this is contrary to the intention of the Regulation. The timetable for the CRP depends upon a Contributions Assessor being appointed immediately once the date by which the defendants must agree on contribution passes without an agreement being reached.

The Current Review also agrees that all defendants should be notified when the Contributions Assessor is appointed and when a decision has been made.

Recommendation 7 – Appointment of Contributions Assessors

The Current Review recommends that the Regulation be amended to provide that:

- A Contributions Assessor must be appointed by the Registrar immediately once the date by which the defendants must agree on contribution passes;
- All defendants should be notified when a Contributions Assessor has been appointed; and
- A copy of the Contributions Assessors determination is to be provided to all defendants to the claim by the Registrar as soon as practicable.

7.2 Issue 21 - Fairness of the contributions assessment system

7.2.1 Introduction

The Issues Paper sought submissions as to whether defendants are behaving more commercially in relation to contributions disputes, and if not, the reasons why. Submissions were also sought as to whether the system disadvantages particular defendants.

During preliminary consultation, some stakeholders suggested that the system works real injustice because of the cost of challenging an apportionment and because Contributions Assessors are required to presume that each defendant is liable.

7.2.2 Submissions

Submissions express mixed views as to whether defendants are acting more commercially. A number note that some defendants are not behaving commercially, but state that this is a cultural issue. Others do not believe that there is sufficient experience to suggest significant changes at this time.

One submission notes that defendants are relying on the standard presumptions for apportionment to refuse what would ordinarily be a reasonable offer of apportionment. It suggests that this is particularly the case with suppliers who receive an artificially low contribution.

As to whether particular classes of defendants are disadvantaged by the apportionment system, each defendant that comments on this issue suggests that its interests are disadvantaged.

7.2.3 Conclusions

No changes to the Regulation are proposed at this stage in relation to apportionment issues generally.

The Current Review considers, however, that some change is warranted to address the position of defendants that are not liable.

As currently structured, the standard presumptions assume that all defendants are liable and there is no mechanism for the other defendants to agree that a particular defendant should have no liability. Where apportionment is disputed before the Tribunal, costs sanctions apply unless the defendant "materially" improves its position (that is, by improving its position before the Tribunal by at least 10 percent or $20,000 (whichever is the greater)).

While this encourages defendants to take a commercial approach in deciding whether to challenge a decision (including where they argue they are not liable at all), there is a disparity of approach. If a defendant says it is not liable at all, but is apportioned a large share of liability, it can challenge the decision in the Tribunal, and if successful, will avoid the operation of the cost penalty. By contrast, if another defendant says it is not liable at all, but is apportioned a small share of liability (that is, less than $20,000), it can never "materially improve" its position by at least $20,000 and will always be subject to a cost penalty, even if its position is upheld in the Tribunal. While this anomaly should be addressed, it should be recognised that a defendant might consider it to be worth challenging a decision (even with cost penalties) to establish a precedent.

Recommendation 8 – Contributions Assessment and defendants that can establish they have no liability

The Current Review recommends that the Regulation be amended to:

- clarify that a defendant should not be 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; and

- provide 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 and that that defendant is then to be excluded from the Contributions Assessment (including the standard presumptions).

7.3 Issue 22 - Adequacy of the standard presumptions on apportionment

7.3.1 Introduction

The contributions assessment provisions, and the standard presumptions which underpin them, were introduced to provide greater incentives to defendants to adopt a commercial approach to settlement. Some stakeholders suggested during preliminary consultation that some defendants may be being assigned too great a share of liability

when compared to manufacturers and suppliers. Other stakeholders suggested that the share of liability assigned by the standard presumptions to employers is too low, especially for large employers.

Submissions were therefore sought as to whether there is a need to vary specific aspects of the standard presumptions set out in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2005* as a result of recent decisions, or for other reasons.

7.3.2 Submissions

Middletons (acting for two Wallaby Grip companies) submits that the standard presumptions need to be varied because they have an unfair operation on the two Wallaby Grip companies which separately were suppliers and manufacturers of asbestos products at different times. They state that where both companies are sued with Amaca, each party takes a third of the liability (even though the two Wallaby Grip companies operated in different periods). Middletons suggests that the standard presumptions should be varied so that the Contributions Assessor must take into account the period of operation of each company, so that a company such as Amaca (which operates over the full period) does not gain an advantage.

Amaca submits that manufacturers may be disadvantaged, particularly against large employers who possess similar knowledge but are not faced with the same liability. It suggests that those in mining, and or government, should be reclassified as Category 1 defendants.

Contrary to this, **Allianz** suggests that Category 1 defendants are being subsidised by Category 2 defendants, particularly in disputed employment cases.

Goldrick suggests that not enough matters have been determined to establish that changes need to be made and the recent Court of Appeal decisions do not provide any grounds for changing the presumptions. It suggests, however, that suppliers and manufacturers should be placed in a separate category, with the remaining Category 1 defendants forming their own category with the percentage apportionment currently apportioned to Category 1 to be divided between the two categories (with suppliers and manufacturers to have the major share).

ICA suggests that Category 1 should also include major employers. In light of the non-delegable duty of care, it argued that employers should have an equal share with manufacturers and suppliers in post 1990 claims.

7.3.3 Conclusions

Treatment of the Wallaby Grip companies

In the decision about which Middletons is concerned, the Contributions Assessor decided to make an adjustment between the Category 1 defendants (which includes the two Wallaby Grip companies) and Category 2 defendants in favour of the former, and in so doing took into account the different periods during which the Wallaby Grip companies operated.

It is also noted that Clause 5(4) states that if there is more than one defendant in each Category, then the Contributions Assessor is to treat each defendant as equal in contribution unless satisfied that a variable contribution ought to apply. Clause 5(7) also provides that in the case of indivisible injuries the apportionment will apply to the whole claim, unless the Contributions Assessor decides that, by reason of separate periods of exposure, a differential determination of the contribution of each period of exposure should apply.

It is not clear that there is a deficiency with the standard presumptions. There is already the capacity to make adjustments between different Category 1 defendants, and one of the factors which could be considered is the different periods in which the companies operated. To the extent that particular companies are unhappy with the decisions of Contributions Assessors, it is open to them to challenge those decisions before the Tribunal, of course, subject to cost sanctions.

Other issues
Miners are already Category 1 defendants. It is also not clear why miners and installers should be placed in a separate category as the need to adjust between miners and installers can be dealt with on a case by case basis.

There is no reason why major employers or Government should be treated the same as suppliers or manufacturers. No recent cases have been provided which show that major employers or Government had actual knowledge of the risks of asbestos which is comparable to suppliers or manufacturers. The assigned shares can also be adjusted on a case by case basis, where this is necessary.

It is not clear why the existence of a non delegable duty of care means that employers' liability in this period should be reduced, or why it is only in this period that it should be varied.

7.4 Issue 23 - Should cross claims be subject to the CRP where the plaintiff's claim has resolved or is suspended?

7.4.1 Introduction
The Issues Paper sought submissions as to whether contributions assessments should continue to be undertaken in circumstances where progress of the plaintiff's claim through the CRP has been suspended due to the death of the plaintiff and where cross claims remain after the plaintiff's claim has settled or where cross claims are brought separately from the plaintiff's claim.

7.4.2 Submissions
In relation to the continuation of contributions assessment where the plaintiff has died, there is strong support for the continuation of contribution assessment in these cases, either with or without the agreement of all of the defendants. Submissions suggest that this will create certainty when the claim is reactivated and facilitates appointment of a Single Claims Manager.

Similarly, a number of submissions suggest that there is no reason why the conclusion of the plaintiff's claim should effect whether the cross claim is subject to the CRP and contributions assessment procedure. Contrary to this, one submission considers that the matter should be referred back to the Tribunal, while another submission does not support the cross claim being subject to the CRP once the plaintiff's claim is resolved.

Some submissions argue that there is no reason why separate cross claims should not be subject to the CRP and contributions assessment procedure. Others do not support such a change, however, they argue that the matter should be referred back to the Tribunal.

7.4.3 Conclusions

Nearly all claims which are suspended because the plaintiff dies would be reactivated by the estate at some stage, and a contributions assessment would be necessary. As such, providing for contributions assessment to continue in these circumstances is supported.

There is also a good argument that a contributions assessment should still be made once the plaintiff's claim has resolved to provide an incentive for the defendants and cross defendants not to litigate the cross claims further.

Likewise, applying the contributions assessment provisions and associated cost sanctions if a new cross claim is brought would provide an incentive to the existing and new defendants to act commercially in resolving the cross claim. Such a system would operate by:

- requiring the initiating defendant to serve with the cross claim a copy of the plaintiff's Statement of Particulars, all of the defendants' Replies and, as applicable, a copy of the agreement as to contribution or contributions assessment;
- all of the defendants who were a party when the original contributions assessment was prepared should be notified and may elect whether to be subject to the new apportionment;
- each new cross defendant would need to prepare a Reply;
- the defendants (including those who elect to be subject to the new contributions assessment) and new cross defendants should then be required to agree contribution, and failing that, the matter would be returned to a Contributions Assessor for redetermination;
- the Contributions Assessor would be required to apportion liability using the Standard Presumptions between all of the defendants (on the assumption that they are all participating in the new assessment), however, only those defendants that elect to be part of the new contributions assessment would be entitled to recover from the new defendant(s) to the extent they improve their position;
- the share of any defendants that were part of the original contributions assessment cannot be increased;
- cost sanctions would apply if either the defendant or cross defendant proceeded to litigation, notwithstanding the Contributions Assessor' s determination, and did not materially improve its position.

Recommendation 9 – Extension of the Contributions Assessment Provisions

The Current Review recommends that the Regulation be 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;
- that the contributions assessment provisions should continue to apply, even if the claim with the plaintiff has been resolved; and
- that modified contributions assessment provisions should apply where a separate claim for contribution is brought in separate proceedings after the conclusion of the plaintiff's claim.

7.5 Issue 24 - Arguments being put to the Contributions Assessor

7.5.1 Introduction

The Issues Paper sought submissions as to whether significant costs are being incurred in preparing detailed submissions for Contributions Assessors, and whether or not this is causing any delay. Submissions were also sought on whether measures are necessary to discourage this practice.

This issue arose after some stakeholders suggested during preliminary consultation that parties have been making extensive submissions to Contributions Assessors. Currently, the Regulation limits the Contributions Assessor to considering the Statement of Particulars, the Replies and the standard presumptions.

7.5.2 Submissions

While one submission argues that significant costs are not being incurred in preparing detailed contributions submissions, others note that detailed contributions submissions are being prepared. They suggest that this increases costs and therefore, such contributions submissions should be discouraged. Others support the view that the Contributions Assessor should be able to invite these submissions.

7.5.3 Conclusions

The Current Review does not consider that any changes to the Regulation are required at this time.

7.6 Issue 25 - Power of the Contributions Assessor to vary the contributions assessment

7.6.1 Introduction

Submissions were sought as to whether a power should be introduced to enable a Contributions Assessor to correct his or her determination. Submissions were sought as to what limits should apply to such a power in order to ensure that the existence of such

a power is not abused by defendants seeking to challenge apportionment determinations.

7.6.2 Submissions

There was strong support for the introduction of a "slip rule" limited to correcting mathematical or calculation errors or an error on the face of the record. One stakeholder suggested that there should be a time limit of seven days within which the error can be corrected and the rule should be subject to a requirement to notify all parties if the Contributions Assessor is to be approached.

7.6.3 Conclusions

A power to correct a clerical mistake, or an error arising from an accidental slip or omission, is supported.

Recommendation 10 – Correction of errors

The Current Review recommends that the Regulation be amended to permit a Contributions Assessor to amend a decision if there is a clerical mistake, or an error arising from an accidental slip or omission, with such amendments to be on their own motion within seven days of the determination or on the request of a party (made within seven days of the determination) as soon as practicable.

7.7 Issue 26 - Objections to Contributions Assessors

7.7.1 Introduction

As was the case with mediators, some stakeholders during preliminary consultation noted that there is no fixed procedure for a party to raise concerns about the potential for conflict of interest in respect of a particular proposed Contributions Assessor. Submissions were therefore sought on whether there is a need for a more formal process to require Contributions Assessors to address conflicts of interest where they have acted for, or against, one or more defendants.

7.7.2 Submissions

Some submissions do not support a conflicts register, and consider that the issue of conflicts of interest should be left to the individual Contributions Assessor, who has ethical obligations, to determine.

Contrary to this, others support the introduction of disclosure obligations. One submission argues there is an inherent conflict in acting for a party one day, and then acting as a Contributions Assessor the next. Another notes that Contributions Assessors have a quasi judicial role that requires actual and perceived independence.

7.7.3 Conclusions

Unlike mediators, Contributions Assessors make decisions which defendants cannot challenge without risking significant cost penalties. Sufficient variations can be made to the standard presumptions by the Contributions Assessor to have a significant financial impact on defendants. It is therefore important that the Contributions Assessor is, and is seen to be, impartial.

Recommendation 11 – Addressing conflicts of interest for Contributions Assessors

The Current Review recommends that the Regulation be amended to require Contributions Assessors to disclose if they have acted for one of the defendants in the previous 12 months, and to permit defendants to object, in which case the Registrar must appoint another Contributions Assessor.

7.8 Issue 27 - Joining other defendants

7.8.1 Introduction

Submissions were sought as to whether or not there is a need for additional measures to ensure that all defendants which should be party to a claim are joined. During preliminary consultation, some stakeholders argued that plaintiff's should be obliged to name all potential defendants. Concerns were also raised in relation to defendants being inappropriately named by plaintiffs as defendants.

A number of specific points are made in the Issues Paper in relation to this issue:

- The information exchange process should ensure that all defendants have sufficient information to enable them to identify whether other parties should be joined and, if appropriate, defendants can join those other parties.

- The problem of a defendant being named by a party in circumstances where it has little or no liability is an issue that would arise even if the CRP had not been established. Such a defendant would be left in the position of incurring costs in defending the action regardless of the new process set out in the CRP.

7.8.2 Submissions

Most of the defendant representatives argue that there is a need for additional measures to ensure that all defendants who should be party to a claim are joined.

The main change which defendant representatives argue should be made is to require plaintiffs to join defendants (for example, to require plaintiffs to join any relevant employers or manufacturers identified by the Dust Diseases Board, or to join all defendants reasonably known by the plaintiff).

Another defendant representative notes there is nothing to compel a plaintiff to provide relevant information which may assist defendants with cross claims. It also notes that clause 35 (which requires the plaintiff to give evidence if the claim is resolved) does not assist as it only applies in multiple defendant claims, is only relevant to challenging a contributions assessment and only applies if mediation is successful. It argues that the plaintiff should be required to give evidence to assist defendants in pursuing cross claims either at mediation or earlier, with such evidence to be admissible in proceedings.

Another defendant representative notes that there is effectively no opportunity for non-original defendants to lodge further cross claims. It argues that flexibility in relation to

this aspect of the timetable would result in more parties being joined and made subject to the contributions assessment.

7.8.3 Conclusions

The Current Review does not support changes being made to the Regulation in relation to the joining of other defendants.

For the reasons set out in the Issues Paper, the Current Review does not support imposing an obligation on plaintiffs to join all potential defendants. The Current Review considers that it is unfair to impose this obligation on plaintiffs. It is a matter for plaintiffs to identify sufficient defendants that have injured them to recover full damages. It is unreasonable to require the plaintiff to go beyond this to identify all possible defendants. Joining all possible defendants does not primarily benefit the plaintiff – it really only benefits other defendants which then have the prospect of reducing their share of total damages.

Further changes are also not considered necessary to require plaintiffs to provide additional information to assist in identifying other potential defendants. Plaintiffs must already complete a comprehensive employment history, which includes questions about potential suppliers and manufacturers.

Currently, the Regulation permits original defendants to seek an extension of time to make cross claims, and the plaintiff cannot refuse unless he or she can demonstrate that it would result in substantial prejudice. This provision was deliberately limited to original defendants, because to enable non-original defendants to do this could be potentially open-ended and result in unacceptable delay. Again, joining other defendants helps other defendants, not the plaintiff, and the plaintiff's claim should not be delayed further to assist the defendants. In any event, a non-original defendant can initiate a cross claim in separate proceedings to the plaintiff's claim.

7.9 Issue 28 - Single Claims Manager

7.9.1 Introduction

During preliminary consultation, some stakeholders suggested that while effective, SCMs are not being used in enough cases. This, it was suggested, is partly a result of cultural issues within the jurisdiction and the fact that the SCM only has a role once apportionment issues are resolved. The Issues Paper sought submissions on whether using a SCM has been effective in reducing costs, or has benefits for plaintiffs or defendants and whether improvements (if any) could be made to the system.

7.9.2 Submissions

The submissions express a range of views on SCMs. Some argue that there is no advantage in appointing a SCM, and suggest that there are inherent conflicts in having one, especially for defendants that have no or limited liability.

In contrast, others suggest that it is too soon to assess the effectiveness of SCMs and note that a major cultural shift is required as the SCM has not been embraced by all defendants, presumably because of the perceived loss of control. They also note that

use of a SCM has been limited and there have been issues with effectiveness, however, it was argued that further use should be encouraged.

Others comment that even though an SCM is being used, defendants are also attending the mediation themselves.

Some submissions also note that an SCM should be appointed earlier in the proceedings (following receipt of Replies) as this would achieve cost benefits, and consideration should be given to making the SCM compulsory. Further, the SCM should have authority to settle on the basis of reasonable and good faith limits set by defendants (although this is already provided for by the Regulation).

7.9.3 Conclusions

The Current Review does not support changes to the Regulation at this time regarding SCMs. SCMs have only been used in a few claims. Given that it appears there is cultural resistance to using SCMs, those defendants who consider there would be significant benefits in using a SCM should take a leadership role to encourage more widespread use among defendants.

Chapter 8 - Other Issues

8.1 Issue 29 - Collection of information contained in Form 3 Returns

8.1.1 Introduction

Submissions were sought as to whether any additional information should be collected as part of the Form 3 Return and whether the layout of the form could be improved. Comment was also sought as to whether any information required by the Form 3 Return is not useful.

8.1.2 Submissions

One stakeholder suggests that the following information should be collected:

- at what stage the claim settled as part of the CRP;
- number of claims proceeding to contributions assessment failing agreement of the parties;
- number of SCMs being appointed in multi-defendant claims.

Another stakeholder suggests that the deadline for lodging the return should be 28 days from payment of the last account, rather than 28 days after settlement, because there are often delays in resolving issues around legal costs.

Anther suggests that the Form 3 Return should not be required to be filed in non-asbestos cases (for example, silicosis) and that defendants should be able to file a joint Form 3 Return where there are a number of defendants involved in a single claim.

8.1.3 Conclusions

The Current Review supports collecting the suggested additional information and clarifying that the Form 3 Return does not need to be filed in relation to non-asbestos related conditions. The Current Review does not support changing the time for filing the Form 3 Return so that it runs from the day the last account is paid as this is too imprecise and may be a considerable period of time after the claim is resolved. Similarly, the proposal for a joint return is not supported; each defendant's costs should be separately recorded for the purposes of data analysis.

Recommendation 12 – Collection of additional information concerning costs

The Current Review recommends that the Form 3 Return of the Regulation be amended to record:

- at what stage the claim settled as part of the CRP;
- whether a SCM was appointed and if so by whom (the defendants, Registrar or Contributions Assessor);
- a decision by all defendants not to use a SCM; and
- whether a Contributions Assessor was appointed.

Recommendation 13 – Collection of costs information on non-asbestos claims

The Current Review recommends that the Regulation be amended to provide that Part 7 only applies to asbestos related conditions.

8.2 Issue 30 - Party-party costs and costs inclusive settlements

During preliminary consultation, some stakeholders suggested that plaintiffs should be required to provide information as to party-party costs, in addition to solicitor-client costs which are required to be provided by the Regulation. Some stakeholders suggested that cost-inclusive settlements should be prohibited.

Submissions were sought in the Issues Paper as to whether anything had changed in the last 12 months to such an extent that it would be appropriate to reconsider the issue of cost-inclusive settlements.

In response to the Issues Paper, no submissions argue that information on party-party costs should be reported, or that cost-inclusive settlements should be prohibited. Accordingly, the Current Review has concluded that no further action on this issue is required.

8.3 Other issues in relation to legal and other costs

8.3.1 Barristers' fees

One submission expresses concern about the incidence and level of barristers' fees in Tables 2.17 and 2.18 of the Issues Paper. It suggests that it is unnecessary to brief a barrister in most cases being managed under the CRP unless there is a particularly complex issue regarding liability or assessment of damages (such as complex economic loss claims).

While the Current Review agrees that it should not be necessary to brief barristers in most claims under the CRP, it does not consider it appropriate at this time to regulate when barristers can be used.

8.3.2 Plaintiffs' legal costs

Some submissions express a concern that plaintiffs' legal costs do not appear to have decreased significantly with the introduction of the CRP, in contrast to defendants' legal costs. These submissions suggest that defendants have typically allocated significantly lower plaintiff legal costs in their calculations for settlement negotiations than the actual plaintiff legal costs reported in the Form 3 Returns. The submissions suggest that the Government should consider providing guidance on legal costs by way of a scale of fees on an events based costing basis if plaintiffs' legal costs do not decrease. Further, one submission suggests there should be a simpler system for the Registrar to assess costs, rather than needing a full costs assessment to be undertaken.

The Current Review considers that it is too early to assess whether plaintiffs' legal costs are declining and plaintiff lawyers need to become more familiar with the new system. It should be noted that the CRP requires plaintiff lawyers to undertake more work

upfront (that is, preparing the Statement of Particulars) than the old system. It should also be recognised, however, that the Government takes seriously the need for consumer protection measures in relation to legal fees, and has in place a comprehensive cost disclosure regime to address the information asymmetry problems for consumers in this area.

8.3.3 Plaintiffs' disbursement charges

One submission also raises concerns in relation to plaintiffs' average disbursement charges which are considered to be high, particularly as filing fees have been substantially reduced.

Considering the small sample size available to analyse plaintiffs' disbursements in the Form 3 Returns, the Current Review considers that it is too early to tell whether plaintiffs' average disbursement costs are high.

8.4 Issue 31 - Data provided in the Issues Paper

8.4.1 Introduction

The Issues Paper contained data available from the Tribunal's records and the Form 3 Returns. Submissions were sought as to whether the data presented in Chapter 2 of the Issues Paper were useful, in whole or in part, and whether there is any other breakdown or analysis of the data which stakeholders would consider useful.

8.4.2 Submissions

Submissions generally advise that the data contained in the Issues Paper is useful. They suggest data should continue to be collected, analysed and made publicly available. It was also suggested that the following additional data should be collected or processed:

1. Comparative data for resolution of single and multiple defendant claims;
2. Average number of defendants for both malignant and non-malignant matters;
3. Number of successful mediations;
4. Total number of defendants in the DDT in a 12 month period;
5. The data tables collected for plaintiff claims should be provided for cross claims;
6. Number of claims resolved by settlement post 1 July 2005;
7. Further details of the methodology used to collect and present the data.

One submission suggests that further consideration needs to be given to how the CRP data can be better collated and classified so that the data in future years can be used effectively for comparative purposes and that the data should be published regularly (every six months or annually). The submission suggests that the analysis should be conducted in such a way as to separately measure the experience for each settlement (or reporting) period and in a form that would be able to easily measure and extract performance trends (as opposed to simply an aggregate of the experience under the CRP).

The submission also suggests that some experts in the collection of information for statistical purposes should review the data collection processes and where appropriate set standardised rules for information to be collected and used in the preparation of this data and rules should be established in relation to the data analysis.

8.4.3 Conclusions

The Current Review considers that there is a strong case for improving data collection, storage, analysis and reporting to support future reviews. The Current Review notes that further consideration should be given to establishing a single, comprehensive database which can assist the Registry in case management, while also having adequate reporting functions. Careful consideration will, however, need to be given to the funding of this database, including whether such a database is cost effective.

Recommendation 14 – Data collection and analysis

The Current Review recommends that further consideration be given to the development of a centralised database with comprehensive case management and data analysis and reporting functions, with the database to be funded from the Tribunal's budget, with particular attention to be given to establishing consistent rules on the classification of information and its analysis.

8.5 Issue 32 - Further Review

Submissions were sought in the Issues Paper as to whether a further review of the CRP's operation should be conducted in 12 months time.

Some submissions support conducting another review in 12 months time, while others suggest a further review should be conducted three years after the commencement of the CRP. Another suggests, however, that data should be made available annually.

Recommendation 15 – Further review

The Current Review recommends that data be published each 12 months and consideration be given to whether a further review is required at that time, with a preference for a further review to be conducted only where there has been sufficient experience using the CRP (perhaps in July 2008).

APPENDIX A

LIST OF SUBMISSIONS RECEIVED IN RESPONSE TO THE ISSUES PAPER

1. Allianz Australia Limited
2. Comcare – Australian Government Asbestos Litigation Unit
3. Amaca Pty Limited
4. Insurance Council of Australia
5. James Hardie Industries N.V
6. Turner Freeman Lawyers (QLD office)
7. Australian Manufacturing Workers' Union (NSW State Office) and Asbestos Diseases Foundation of Australia Inc
8. Middletons (acting for Wallaby Grip Limited and Wallaby Grip (BAE) Pty Limited)
9. Goldrick Farrell Mullan Solicitors