**ANNEXURE A**

**SUBMISSIONS**

Introduction

While The Asbestos Diseases Foundation of Australia supports the Claims Resolution Process (CRP) is non malignant claims we remain concerned that malignant claims are subject to the CRP until such time as the plaintiff's condition becomes urgent with the Tribunal having no power to case manage such claims. Our experience is that doctors find it very difficult to provide an accurate prognosis for person's suffering from mesothelioma and commonly rely on the statistical average of 9 to 12 months from diagnosis. It is not until the plaintiff's condition greatly deteriorates that the claim can be removed and by this time a plaintiff is often on high levels of morphine and unable to give detailed evidence. Our position remains that the Tribunal should case manage all malignant claims utilising the provisions of Divisions 4 and 5 (contributions assessments and mediation). This would allow increased flexibility without increasing costs.

We make the following comments in relation to specific clause of the draft Regulations

Clause 18- Jurisdiction of the DDT during the CRP

Clause 19.1 of the *Uniform Civil Procedure Rules* allow the plaintiff to amend a Statement of Claim within 28 days of the claim being filed otherwise a plaintiff requires the leave of the Court. In malignant cases, the Statement of Claim is filed as quickly as possible in order to preserve the plaintiff's right to general damages. Mesothelioma claims, given the long latency period, involve exposure to asbestos 30 plus years ago. It is not uncommon for a plaintiff at first instance to provide general information allowing the claim to be commenced and over subsequent weeks the information becomes more specific. For instance the dates of the plaintiff's employment with the defendant may change. While such an amendment will not involve a new party being joined or removed, it may change the identity of the insurer and therefore the identity of the entity conducting the defence on behalf of the defendant. Another example is where a plaintiff recalls further exposure to asbestos with the defendant, which may result in the defendant being able to per sue further cross claims.

We submit that in place of Clause 19.1 of the *Uniform Civil Procedure Rules* the Regulations provide for a plaintiff to amend his/her Statement of Claim without leave prior to the Statement of Particulars being served.

We further submit that Clause 18 should include a provision to enable an application to be made to amend a Statement of Claim during the CRP with leave of the Court.

Clause 19- Suspension of Claims Resolution Process if Plaintiff Dies

1. To the extent there is any uncertainty the Regulations should provide that the time for the service of a Statement of Claim pursuant to clause 6.2(4) of the *Uniform Civil Procedure Rule*s is suspended until such time as an order is made substituting the plaintiff. This would avoid a situation where a Statement of Particulars must urgently be filed and served to prevent the 6 month period for service of the claim expiring and the Statement of Claim going stale with the result being the Estate can no longer claim damages for pain and suffering or loss of expectation of life.

Clause 21- Removal of Claims from the CRP

* 1. The clause requires the plaintiff to make an application to remove a claim from the CRP on the basis of urgency. At present this requires the plaintiff to file a Notice of Motion with an Affidavit in Support. Given the urgent nature of the application short service of the Motion is required (Clause 18.4 of the *Uniform Civil Procedure Rules* requires 3a Motion to be served 3 days before the date for the Motion is fixed.) At present the Registrar of the Dust Diseases Tribunal requires an Application for Short Service along with an Affidavit in Support to be filed. The preparation and processing of this documentation takes time at a point where urgency is paramount and unnecessarily increases costs.

1. Given the urgent nature of the application we submit that a plaintiff should be at liberty to list a matter before a Judge of the Dust Diseases Tribunal at any time without the requirement for a Notice of Motion and Affidavit in Support to be filed. Notice would of course be given to a defendant(s) of the listing of the matter before the Tribunal along with a copy of the medical report or Affidavit deposing as to the opinion of a medical practitioner the plaintiff relies on.

Clause 28- Cross Claims

* 1. In an indivisible injury a plaintiff will most commonly sue one defendant to reduce the time and costs of the claim. It is therefore not uncommon for proceedings to be issued against a defendant (single defendant claim) and a defendant to issue multiple cross claims. We submit that the time and costs of dealing with cross defendants should be borne by the defendant and not the plaintiff. The Regulations should provide that it is sufficient that the plaintiff communicate with the defendant and that it is the defendant's responsibility to communicate with the parties it has joined including arranging for them to attend mediation.

Another issue has arisen with single defendant claims where the defendant issues cross claims. There has been some confusion as to whether the issuing of cross claims converts the claim to a multiple defendant matter. Our advice is that this is not the case however we believe the Regulations should make this clear. In the vast majority of malignant cases a defendant will seek a 10 day extension to issue cross claims which the plaintiff cannot reasonably refuse. This in turn extends for 10 business days all dates under the CRP. If once a cross claim is issued the matter is classed as a multiple defendant claim then time for mediation is extended by a further 20 business days. This means that 30 business days (6 weeks) have been added to the time in which mediation will take place. The Regulations should make clear that the filing of a cross claim does not convert a single defendant claim to a multiple defendant claim.

Clause 29- Request for More Information about Dispute

We agree with the suggested clause but believe that clause should go further and provide that if a defendant does not provide witness statements and other documentary evidence requested by the plaintiff pursuant to the clause, then the defendant cannot rely on such evidence at trial. This will avoid the standard practice of defendants not admitting any issue in their Reply without providing any basis for doing so. It will also allow the plaintiff to meet such evidence at the earliest possible time and prevent a common occurrence of mediations being adjourned to allow a plaintiff to deal with issues not particularised by the defendant until the mediation.

Further a practice has developed whereby defendants following an unsuccessful mediation put all matters in issue to protect their position. The matter is therefore set down for multiple hearing days and the plaintiff prepares his or her case accordingly. Invariably when the matter proceeds to trial a number of the issues are no longer in dispute. This situation could be prevented by the Regulations prohibiting a defendant putting a fact or issue in dispute for the purpose of a Mediator's Certificate unless it has provided witness statements or other documentary evidence requested by the plaintiff under clause 29. This will result in a substantial saving in time and costs.

Clause 31- Party Changing Facts Relied On

There appears to be a conflict between the comments in Clauses 24(3) and 31. We are concerned that Clause 31 requires a plaintiff prior to serving a Statement of Particulars to complete all investigations noting that the CRP process takes a minimum of 7 weeks to reach mediation. To comprehensively investigate a claim relating to events 30 plus years prior can take months. Clause 31 needs to be read in light of the comments in Clause 24(3). Otherwise the filing of a Plaintiff's Statement of Particulars will be delayed to allow investigations such as locating and interviewing of lay witnesses making it is increasingly likely that the matter will become urgent and require removal from the CRP and that the plaintiff may die before a Statement of Particulars can be filed. The costs will also be substantially increased by investigating issues which may not be put in dispute by the defendant.

Clause 37- Mediation

1. The Regulations should allow a mediator, in the event a mediation cannot be arranged in the prescribed time and in the event the mediator declines to defer the mediation (or has already deferred the mediation) to issue a certificate that the mediation has been unsuccessful. This will prevent a plaintiff having to repeatedly attempt to organise a mediation where a defendant and/or cross defendant(s) is un-cooperative or alternatively requiring a plaintiff to file an application to remove a claim from the CRP on the basis of a defendant's non- compliance.

Clause 38- Mediation

1. We do not believe the powers in clause 38 are sufficient to prevent the all too common scenario whereby a matter does not settle at mediation because a cross defendant, who may only be liable for small percentage of the damages, will not contribute further monies. This situation places the defendant in an invidious position. We are aware of numerous matters where the defendant wishes to keep negotiating but is restrained by one or more cross defendants. The mediation is therefore unsuccessful and the matter is returned to the Tribunal. A hearing date is appointed and at the same time the cross claims are severed. The defendant is then left to further negotiate, the result being a substantial increase in costs. We submit that consideration needs to be given to allowing the Single Claims Manager (SCM) (who will almost always be the original defendant) the power at mediation to determine what quantum is reasonable for the purpose of the settlement of the plaintiff’s claim. This will avoid a claim failing to resolve as a result of a party whose contribution to the settlement may be less than 5%.

Clause 41- Unsuccessful Mediation- Agreement as to Issues in Dispute

* 1. It has become increasingly common for parties to attend a mediation not being in a position in the event that the mediation is unsuccessful to advise the mediator as to what the issues in dispute are. The Regulations should require all parties attending a mediation to be in a position, in the event that the mediation is unsuccessful, to advise the mediator as what issues are in dispute. This will prevent the delay in a mediation certificate being issued and the matter being listed before the Tribunal. It also allows discussions as to what the issues are and prevents the common approach of defendants having left the mediation putting all matters in dispute.