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Ms Kathrina Lo
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By Post and Email : lpclrd@agd.nsw.gov.au

Dear Ms Lo

CONSULTATION ON THE PROPOSED DUST DISEASES TRIBUNAL REGULATION 2013

We refer to Mr Glanfield's letter dated 3 July 2013 and the proposed *Dust Diseases Tribunal Regulation 2013* (**proposed Regulation**).

Our firm acts for a number of parties regularly involved in dust diseases litigation in New South Wales.

We set out below our response to the proposed amendments.

We refer to the Regulatory Impact Statement (**RIS**) published by the Department of Attorney General & Justice. For the purpose of consistency, we have adopted the same abbreviations and headings regarding the proposed amendments used within the RIS in our submissions.

We note the three options put forward with regards to the CRP namely:

(a) Ending the current arrangements;

(b) Continuing the current arrangements with no changes;

(c) Continuing current arrangements with some refinement.

We agree with the proposal adopted by the Department, this being that the current arrangements be continued with some refinements.

Whilst we accept the majority of the refinements proposed, we submit the following ought also to be considered and included in the proposed Regulation.

PART A - EXECUTIVE SUMMARY

We set out below a brief summary of our submissions responding to the proposed Regulation.

Part B will contain the more detailed submissions.

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Replace the filing of a Reply by Defendants (including cross-defendants) with the filing of a Defence

1. We note the details currently required to be completed in a Reply. In our submission a number of those details are repetitive and often do not respond to the Plaintiff's claim as pleaded or particularised.

2. The preparation of a Reply on behalf of a Defendant is a very onerous and costly process.

3. Currently, if a matter cannot be resolved at Mediation the Defendant will be required to file and serve a Defence.

4. We submit that the current requirement for the filing of a Reply on behalf of a Defendant ought to be replaced with a requirement that the Defendant file a Defence within the time limits prescribed by the CRP.

5. In our opinion defence costs would be reduced if a Defendant was only required to file a Defence rather than a Reply.

6. Where there is more than one defendant or a cross-claim has been issued, submissions relating to apportionment may be made within a prescribed time or at the same time as the filing of the Defence by the Defendants / Cross-defendants once the matter has been referred to a Contributions Assessor.

7. The form of those submissions can be as currently set out in Part 8 of the Form 2.

Medical evidence to support removal of urgent claims from the CRP

8. We are strongly opposed to the inclusion of the proposed clauses 21(9)(a) and (b) for reasons which we set out below.

9. We submit that the only amendment which ought to be included in the proposed Regulations is the *written* medical evidence ought to refer to whether or not the Plaintiff is *compos mentis* for the purpose of giving evidence.

Resumption of claims after the death of a Plaintiff

10. We submit that the timetable for a non-malignant multi-defendant claim should apply once the claim is resumed after the death of a Plaintiff and subsequent substitution. This submission is based on the premise that the claim should not take precedence over other urgent claims within the CRP and the new Plaintiff is not prejudiced by the virtue of the continued accrual of interest.

Joinder of additional Defendants

11. We submit that the proposed amendment should apply to both divisible and indivisible diseases for the sake of avoiding uncertainty.

Interlocutory disputes

12. We submit that the Mediator should have the following additional powers regarding the provision of outstanding particulars:

    12.1 Issue a request on a party for outstanding particulars prior to a Mediation being held;

    12.2 Delay a Mediation if outstanding particulars are not provided;

    12.3 Declare a failed Mediation if outstanding particulars are not provided and the Mediation cannot be delayed further;

    12.4 Order the party that failed to provide the outstanding particulars to pay the costs of the failed Mediation.

13. We submit that where a Plaintiff is ordered to pay the costs of a failed Mediation, those costs ought to be declared to be non-party/party costs and therefore not recoverable from any Defendant by the Plaintiff.

Mediation

14. We submit that regardless of whether the Mediation fails or succeeds, the costs of the Mediation should be paid by all the parties in equal shares.

15. The costs paid by the Plaintiff are not party/party costs. Therefore they cannot be claimed back as part of any costs order made during or at the end of the proceedings.

Contributions Assessment

16. We submit that the Contributions Assessor ought to consider all pleadings filed (other than those interlocutory in nature). In our opinion the current limitation imposed on the Contributions Assessor has resulted in Contributions Assessment Determinations which are inconsistent with the pleadings.

17. We submit that Defendants/ Cross-Defendants ought only be permitted to file an Amended Reply (or Amended Defence) if there is new evidence which requires the filing of an Amended Reply and/or Amended Defence.

18. We also submit that further amendments are required to the proposed Regulation regarding the approach to be adopted by Contributions Assessors with regards to an "empty chair" component associated in a claim involving a divisible disease.

19. We submit the proposed Regulation ought to include a provision to the effect that where there is an "empty chair" component in a divisible disease case, the Contributions Assessor should assess and allow a contribution for that "empty chair". Where this occurs, there will be no contribution payable in respect of the "empty chair" component, as is the position at Common Law.

Effect of a Contribution Assessment

20. We submit the wording adopted in clause 53(9) of the proposed Regulation is not appropriate. We submit the wording in clause 49(8) of the current Regulation ought to be adopted in clause 53(9).

21. We submit that further amendments should be made in the proposed Regulation regarding:

    21.1 The manner in which challenges ought to be mounted between Defendants / Cross-Defendants;

    21.2 The time in which the challenges ought to be mounted.

22. We submit that clause 53(11) of the proposed Regulation ought to be amended to include that the Contributions Assessor may correct a Contributions Assessment Determination in divisible disease cases where a Defendant/Cross-Defendant has been inadvertently apportioned liability for a period of exposure where that party has not been implicated.

The role of Single Claims Managers

23. We submit that a SCM when appointed, ought to be a primary Defendant. A Cross-Defendant should not be appointed SCM.

Transitional arrangements

24. We accept as suitable the proposed Savings and Transitional Provisions set out in Schedule 2 of the proposed Regulation.

Part 7 - Miscellaneous: Plaintiff's costs disclosure Form 3 data collection and release

25. We note there have been no recommendations made regarding proposed amendments to this provision within the current Regulations.

26. We take this opportunity to make a submission regarding the current Regulations and the need for change.

27. We submit data arising from the information contained in Form 3 filed on behalf of Plaintiffs and Defendants ought to be released on an annual basis by either the Registrar of the Tribunal or the Attorney General's Department to the firms who routinely act for litigants within the Dust Diseases Tribunal. Alternatively, the data could be made available on the Tribunal's website for general public access.

28. We submit a provision for the publication of this data should be included as new clause 98 (6) under Part 7 of the proposed Regulation.

PART B - DETAILED SUBMISSIONS

PRACTICAL OPERATION OF THE CRP TIMETABLE

29. We agree with the inclusion of a requirement that the Registrar provide all parties with a timetable based on the date of service of the statement of particulars on the last original defendant and therefore we consider the proposed clause 25 to be suitable.

30. Similarly, we take no objection to the proposed clauses 17(5), 19(2)(c), 26(6), 26(12), 35(2) and 61(8).

Application of the suspension of the CRP to Division 5

31. We submit that clause 19(3) should be amended so that the suspension of the CRP under this clause also apply to the operation of Division 5. Given the Plaintiff's claim cannot proceed, the process of apportionment should be delayed.

32. Often times the Defendants cannot complete their submissions with regards to apportionment as they are waiting on further particulars from the Plaintiff. Frequently, these submissions are not provided until a new Plaintiff is substituted into the proceedings. Therefore the Replies which are filed on behalf of Defendants because of the continued operation of Division 5 are inadequate and often require amendments.

33. The new Plaintiff will not be prejudiced by the suspension of Division 5 as interest continues to accrue and there is no urgency.

SUSPENSION OF THE CRP IF THE PLAINTIFF DIES AND APPLICATION OF THE CRP TO COMPENSATION TO RELATIVES CLAIMS

Mandatory inclusion of Compensation to Relatives Claim in Estate Claim in certain circumstances

34. We propose that the Regulations be amended further to provide that where the Plaintiff and beneficiaries of the Compensation to Relatives Claim are the same as the Plaintiff and beneficiaries of the Estate Claim, then the Compensation to Relatives Claim must be brought together with the Estate Claim, This is more cost effective and efficient. The only basis upon which the Compensation to Relatives Claim should be brought in separate proceedings is where the Plaintiff and/or beneficiaries are different to those of the Estate Claim.

35. We submit that this requirement is consistent with the stated objections of the proposed Regulations being the effective and efficient resolution of asbestos-related claims without incurring unnecessary legal, administrative and other costs.

36. We otherwise agree with the inclusion of proposed clauses 22(2)-(3).

Service of Resumption Proposal

37. In relation to proposed clause 22(5) we submit that whilst this is reasonable, there ought to be included within the proposed Regulations that the Motion substituting the Plaintiff and/or adding the new Compensation to Relatives Claim be filed and served at least 5 business days before the hearing of the Motion to allow the Defendant(s) sufficient time to consider the Resumption Proposal.

Proposed Amendments to Form 1

38. We refer to the proposed amendments to Form 1 (Plaintiff's Statement of Particulars) in relation to Compensation to Relatives Claims.

39. We consider the proposed amendments to be inadequate. The Plaintiff should be required to provide full particulars including the facts, circumstances and evidence on which the Plaintiff intends to rely. The proposed amendments do not require the Plaintiff to provide these particulars. The absence of such particulars will result in the Defendant(s) being prejudiced by delay particularly as the CRP timetable will apply once the Plaintiff is substituted and the Compensation to Relatives claim is added.

40. The requirement that the Plaintiff provide full particulars at the time of the filing of the Amended Form 1 is not onerous. Ultimately, these particulars will need to be provided in any event. Furthermore, the requirement for full particulars at the outset of the new claim will avoid duplication of costs and result in efficient and cost effective resolutions of the claims.

Proposed Amendments to Form 2

41. Our primary submission is that the Reply ought to be replaced with a Defence. The Reply is a lengthy document with a number of questions which are repetitive. The questions often do not respond to the pleadings. Ultimately, if a matter cannot be resolved prior to the conclusion of the CRP, the defendant(s) will be required to file a Defence. This additional cost could be avoided. A Defence allows the Defendant to plead only to the Plaintiff's claim as particularised in the Statement of Claim against it.

42. Where a Compensation to Relatives Claim is included in the Amended Statement of Claim an Amended Defence can be filed to respond to this new claim.

MEDICAL EVIDENCE TO SUPPORT REMOVAL OF URGENT CLAIMS FROM THE CRP

43. We strongly oppose the inclusion of proposed clauses 21(9) (a) and (b). The majority if not all medical practitioners who treat patients suffering from asbestos-induced illnesses would be well aware of what is currently required by the Tribunal to remove a matter from the CRP. In our experience the practitioners are very co-operative with Plaintiff's solicitors in relation to assisting them with the expeditious resolution of the patient's claim.

44. Only medical practitioners should give a medical opinion and this should be done in writing for the purpose of removing the claim from the CRP. The written requirement is not onerous. The Tribunal has been known to remove matters from the CRP based on a two line hand written report. The majority of the medical practitioners who are familiar with these diseases are also very familiar with the practices of the Tribunal and the terms of the Expert Code of Conduct.

45. The proposed clause regarding evidence which has been given orally to another person is open to misinterpretation. Medical practitioners ought to be required to give a prognosis based on time and not simply the word "urgent". "Urgent" is a matter of opinion and is subjective. Only then can the Tribunal determine whether the prognosis is such that the requirements of the CRP can be completed before the demise of the Plaintiff.

46. Further, the medical opinion should refer to whether or not the Plaintiff is *compos mentis* and what medication the Plaintiff is currently taking in order for the Tribunal to determine whether the Plaintiff is in a fit condition to give cogent evidence and be cross-examined.

RESUMPTION OF CLAIMS AFTER THE DEATH OF A PLAINTIFF

Which timetable to apply

47. We submit that once the new Plaintiff is substituted, the claim should not take precedence over other claims within the CRP where the Plaintiff is still alive.

48. Therefore we propose that the newly substituted claim be returned to the CRP with the timetable for a multi-defendant non-malignant claim applying.

49. The new Plaintiff will not be prejudiced as interest will continue to accrue and in any event the claim may be resolved informally by the Defendant(s) at any time if sufficient particulars are provided.

Concurrent timetable for Estate and Compensation to Relatives Claims

50. We agree with the filing of a resumption proposal.

51. We also agree that where a Compensation to Relatives Claim is added to the Estate Claim, the two claims should run together under the same timetable or if the estate claim has already been given a hearing date, both claims should remain before the Tribunal and a timetable entered for the future concurrent conduct of both claims.

JOINDER OF ADDITIONAL DEFENDANTS

52. We agree with the proposed clause 28.

53. However, we submit that this clause should apply equally and in the same manner to indivisible diseases for the sake of avoiding uncertainty.

54. Whilst the joinder of an additional defendant in an indivisible disease is rare, it has been known to occur. Settlement of the claim would be greatly assisted if the claim against both Defendants ran to the same timetable.

INTERLOCUTORY DISPUTES

When a Mediator should request outstanding particulars be provided and additional powers for a Mediator

55. Subject to our submissions regarding the filing of Replies, we agree with the aim of the proposed clause.

56. However, we submit that there be greater clarification as to when the Mediator should make these requests.

57. We submit the Mediator should make such requests 15 business days before a Mediation (for malignant claims) or 20 business days before a Mediation (for non-malignant claims).

58. Costs of attending Mediation when adequate particulars are outstanding would be avoided if the Mediator was to exercise the proposed power before the Mediation rather than following the Mediation.

59. Further, the Mediator should be empowered to delay the Mediation or declare a failed Mediation should a party fail to provide adequate particulars within the prescribed time.

60. A party who fails to provide such particulars should bear the Mediator's fees. The fees should not be claimed as a party/party cost where those fees are payable by the Plaintiff.

MEDIATION

61. We agree with each of the proposed new clauses subject to our comments below regarding the sharing of mediation costs.

Mediation costs

62. We submit that regardless of whether the Mediation fails or succeeds, the costs of the Mediation should be paid by all the parties in equal shares. In our submission this would exert equal pressure on all parties to Mediate in good faith.

63. The costs paid by the Plaintiff are not party/party costs. Therefore they cannot be claimed back as part of any costs order made during or at the end of the proceedings.

CONTRIBUTIONS ASSESSMENT

Documents to be considered by a Contributions Assessor

64. In addition to the documents currently required to be considered by a Contributions Assessor, we submit that the Contributions Assessor should be required to consider the Statement of Claim as this contains the allegations and in essence, the basis of the claim.

65. Further, a Contributions Assessor should be required to consider any cross-claim pleadings.

66. In short, the Contributions Assessor should be required to consider all pleadings (other than those which are interlocutory in nature).

<u>Amended Replies</u>

67. With regard to the filing of Amended Replies and whether these should be considered by a Contributions Assessor, we submit firstly Amended Replies should only be permitted to be filed where there is new evidence (such as the filing of either an Amended Statement of Claim or Amended Statement of Particulars or the receipt of additional expert, medical or lay evidence which was not available at the time of the filing of the original Reply) to warrant amendments to a Reply.

68. Amended Replies should not be used as an opportunity for a Defendant to obtain an extension in time to draft and file its Reply.

69. Unfortunately, we have witnessed this on a number of occasions. For example, Defendant X has filed an initial Reply with responses of "To be provided" in relation to questions of duty, breach, knowledge and apportionment, and then some time later (usually just before the claim is referred to the Contributions Assessor) filed an Amended Reply which included detailed submissions on those very issues notwithstanding there had not been any additional evidence served between the time of filing the initial Reply and the time of filing the Amended Reply.

70. This has resulted in significant prejudice to the other Defendants and caused delay in the resolution of the Plaintiff's claim.

71. We submit the proposed Regulation ought to provide that where a Defendant/ Cross-Defendant seeks to file an Amended Reply, the Defendant / Cross-Defendant should, seven business days prior to the filing of the Amended Reply, serve on all the parties (including Cross-Defendants) an Affidavit sworn by the Defendant's solicitor as to the reason for the Amended Reply along with a copy of the Amended Reply which is proposed to be filed.

72. The parties should then be allowed five business days within which to object in writing to the Defendant to the filing of this document.

73. Any such objection should be forwarded to the Registrar at the time the proposed Amended Reply is to be filed with the Registrar to decide within two business days whether or not to accept the Amended Reply.

74. If the Amended Reply is accepted by the Registrar then the Contributions Assessor ought to consider the Amended Reply at the time of preparing the Contributions Assessment Determination.

"Empty chair" component in a divisible disease claim

75. There is no provision in either the current Regulation or the proposed Regulation as to what approach a Contributions Assessor ought to adopt where it is evident in a divisible disease claim that there is an "empty chair" component.

76. This has led to inconsistent approaches being adopted by the various Contribution Assessors in their Determinations. Some Contribution Assessors have assessed the liability of the "empty chair" others have not.

77. Ultimately, neither the Plaintiff or Defendant(s) have been satisfied with the approach taken by a Contributions Assessor. Submissions are commonly made at Mediation in relation to whether or not a Contributions Assessor has made the correct determination.

78. This has resulted in excessive costs being incurred and delays in the resolution of the Plaintiff's claim, both of which are inconsistent with the stated aims of the CRP.

79. If a Plaintiff's divisible claim was to proceed to hearing, a deduction would be made for any causative exposure which was not the responsibility of the Defendant(s).

80. In our opinion the Contributions Assessor should be empowered to apply a process which is consistent with Common Law principles. Therefore the proposed Regulation should include a provision to the effect that where there is an "empty chair" component in a divisible disease case, the Contributions Assessor should assess and apply a contribution for that "empty chair". Where this occurs, the Plaintiff will need to bear the liability for the "empty chair" component.

EFFECT OF A CONTRIBUTIONS ASSESSMENT

Proposed clause 53(9)

81. We do not support the inclusion of proposed clause 53(9). We consider the wording of this clause to be ambiguous.

82. In our submission, there is no basis for the proposed amendment. The Plaintiff is reassured of payment of settlement monies by virtue of clause 52 of the current Regulation which we note is repeated as clause 56 in the proposed Regulation.

Inclusion of "separate proceeding" to end of clause 56(2)

83. In our submission the inclusion of the words "separate proceeding" is inadequate for the purpose of removing the ambiguity which continues to surround how a challenge to a Contributions Assessment between Defendants ought to be mounted.

84. Does the challenging Defendant/ Cross-Defendant file a Cross-Claim or does it commence new proceedings by way of filing a new Statement of Claim? There are ramifications for both: the new Statement of Claim will be subject to a new CRP timetable (pursuant to Division 6) whereas a new Cross-Claim will not be.

85. We note that when a new Statement of Claim is issued joining new Cross-Defendants, the new Statement of Claim often does not join the primary Cross-Defendant who are either challenging or against whom a challenge has been mounted.

86. Whilst the primary Cross-Defendant may elect to be part of the new proceedings, there is ambiguity surrounding what the primary Cross-Defendant ought to do with regards to any cross-claims which it may have issued in the primary action.

87. This has not been addressed in the proposed Regulation.

88. Issues surrounding the time in which the challenge ought to be mounted also have not been addressed in the proposed Regulation. We note we made submissions in relation to this on 19 February 2009 in response to Issues Paper December 2008.

89. In our submissions of 19 February 2009, we raised that there were a number of uncertainties about the nature of challenges to contribution assessments which required clarification. These include the time limit within which to mount the challenge and the manner in which the challenge ought to be mounted.

90. Further, we submitted that a 28 day time limit apply after the resolution of the Plaintiff's claim within which to mount a challenge to the contribution assessment.

91. This has not been addressed in the RIS.

92. Given the purpose of the proposed Regulation, this being to refine the operation of the CRP by providing more efficient and cost effective means for the resolution of claims, we are firmly of the view that the proposed Regulation ought to address the issue of precisely:

    92.1 How a challenge ought to be mounted between Defendants / Cross-Defendants;

    92.2 The time within which a challenge ought to be mounted.

Use of "slip rule" - amendments to clause 53(11)

93. There have been occasions where a Contributions Assessor has inadvertently apportioned a Defendant / Cross-Defendant liability for a period of exposure where that party has not been implicated in a divisible disease.

94. The provisions in clause 53(11) of the proposed Regulation do not permit the Contributions Assessor to correct this mistake or error.

95. We submit that clause 53(11) of the proposed Regulation ought to be amended to include that a Contributions Assessor may correct such a mistake or error.

THE ROLE OF SINGLE CLAIMS MANAGER

Appointment of a SCM

96. Whilst we agree with the inclusion of clause 64 of the proposed Regulation, we submit that where the Defendants/ Cross-Defendants agree to the appointment of a SCM, the SCM should be a primary Defendant even if the primary Defendant regardless of the outcome of the Contributions Assessment.

97. This is because a Plaintiff is not obliged to deal with a Cross-Defendant and ultimately will enter Consent Orders only with the Defendant(s).

TRANSITIONAL ARRANGEMENTS

98. We accept as suitable the proposed Savings and Transitional Provisions set out in Schedule 2 of the proposed Regulation.

DISCLOSURE OF PLAINTIFF'S COSTS

Part 7 - Miscellaneous: Plaintiff's costs disclosure Form 3 data collection and release

99. Currently, Defendants and Plaintiffs are required to provide details of the costs they have incurred in proceedings to the Dust Diseases Tribunal after the completion of proceedings.

100. However the data which is collected is not released to the parties.

101. We submit data arising from this information ought to be released on an annual basis by either the Registrar of the Tribunal or the Attorney General's Department to the firms who routinely act for litigants within the Dust Diseases Tribunal. Alternatively, the data could be made available on the Tribunal's website for general public access.

102. This information will be useful for analysts setting financial reserves with regards to future claims. Further the data will be useful for the assessment of the reasonableness of offers made by Plaintiffs in relation to their costs, and in our opinion, may lead to more expeditious and effective resolution of cost claims.

103. We submit a provision for the publication of this data should be included as new clause 98 (6) under Part 7 of the proposed Regulation.

Yours sincerely

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