

NSW DUST
DISEASES
TRIBUNAL
REGULATION 2013

SUBMISSION BY
COMCARE

TO: NSW Department of
Attorney General & Justice



Australian Government

Comcare

PUTTING YOU *FIRST*

INTRODUCTION

Thank you for your correspondence, received by Comcare on 3 July 2013.

As you are aware, Comcare provided a Submission to the Review of the Dust Diseases Claims Resolution Process in February 2009 (copy attached).

Comcare continues to support the notion of early and equitable compensation to asbestos disease sufferers, and considers the Claims Resolution Process (CRP) assists to facilitate early resolution of claims.

Comcare has reviewed the Regulatory Impact Statement and the proposed *Dust Diseases Tribunal Regulation 2013*, which is expected to take effect from 1 September 2013 and to replace the existing *Dust Diseases Tribunal Regulation 2007*. Comcare has noted the content of the proposed Regulation, and does not wish to comment in relation to the majority of the proposed amendments and new Clauses.

However, there are two areas in the proposed Regulation in relation to which Comcare would like to make submissions in response to your review. Comcare is grateful for the opportunity to do so, and those Submissions are set out below for your consideration:

FURTHER SUBMISSIONS:

(1) Clause 39 : Mediator may direct parties to provide additional information

As you are aware, prior to mediation, the plaintiff is required to file and serve a Statement of Particulars (Form 1) on the defendant, and the defendant is required to file and serve a Reply (Form 2) on the plaintiff.

Comcare endeavours to settle all claims on or before mediation where possible, and this approach is embedded within Comcare's Asbestos Litigation Policy Statement. However, this can be difficult to achieve in circumstances where the information to enable a claim to be assessed and quantified has not been provided to Comcare within a reasonable period of time before mediation (see Comcare's comments at Issues 2 and 15 of Comcare's Submission of February 2009).

Your Regulatory Impact Statement indicates most of the concerns raised by stakeholders regarding interlocutory disputes centre on the adequacy of information provided in the Statement of Particulars and the Reply before mediation. We note you propose to increase the power of the mediator to deal with this issue.

Comcare has noted there are provisions in the new draft Regulation dealing with the type of information which is to be provided to a Contributions Assessor (see Clause 53), but there is no corresponding provision dealing with the type of information to be provided to a mediator.

In respect of Division 4 – Compulsory Mediation, Comcare makes the following submission:

- There should be provisions dealing with:
 - (a) The type of documentation to be provided to the mediator before the mediation is due to take place (for example, the Statement of Particulars & Reply are mandatory, but the parties can also provide expert evidence if they choose to do so); and / or

- (b) The time frame by which that information needs to be provided to the mediator and the other parties (for example, could be 10 working days before the mediation date);
- If a mediation date is deferred, or a mediation is adjourned part heard, due to the failure of a party to provide the outstanding information on time then:
 - (a) The timetable for conclusion of the mediation should be extended (see Clause 36); and
 - (b) There should be cost penalties that apply to the non-compliant party.

(2) Dormant Claims

In the 2009 Issues Paper, one of the matters asked of stakeholders was whether dormant claims create any difficulties or unfairness for any parties.

Comcare's 2009 submission stated that because there was no mechanism by which a dormant claim in the CRP could be moved along (such as, directions or motion) this could cause difficulty to a defendant, for example by preventing the defendant from setting realistic actuarial claims assessments. There could also be costs implications.

However, the issue of dormant claims does not appear to have been addressed in the Regulatory Impact Statement nor in the draft Regulation. Comcare submits that it would be appropriate for the new draft Regulation to provide a mechanism for dormant claims in the CRP to be expedited where appropriate.

CONCLUSION:

Thank you for the opportunity to provide further submissions. If we can be of any further assistance, please do not hesitate to contact us.

Nicky Nicolaou

Acting General Counsel

Comcare

**Review of the Dust Disease Claims
Resolution Process:**

Issues Paper February 2009

Submission by

Comcare

Review of the Dust Disease Claims Resolution Process:

Issues Paper February 2009

INTRODUCTION

Comcare is pleased to make submissions in relation to this review.

Comcare supports the NSW Dust Diseases Tribunal's Claims Resolution Process.

Comcare also supports the notion of early and equitable compensation to asbestos disease sufferers where liability is not in issue.

To that end, Comcare has issued a Policy Statement which is available for public view (annexed to this submission). This Policy Statement, in essence, provides that malignant asbestos disease claims should be managed with priority (subject to any Court/Tribunal orders to the contrary). This approach appears to be consistent with the objectives of the CRP process.

However, Comcare has experienced some practical issues in the CRP jurisdiction which it considers could be improved for the benefit of the scheme overall and to facilitate more efficient outcomes for the parties.

Comcare has consulted with its panel of external legal service providers, the Department of Employment, Education and Workplace Relations, and with the Office of Legal Services Co-Ordination, Commonwealth Attorney General's Department, prior to finalising this submission.

If we can be of any further assistance, please do not hesitate to contact us.



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Issue 1 Overall operation of the CRP

Is the CRP operating effectively? Do stakeholders have any comments in relation to the overall operation of the CRP?

In general terms, the CRP operates quite well. However, we consider there are a few areas of suggested improvement set out below.

Issue 2 Delays in serving the Statement of Claim and Statement of Particulars

Does the period between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars cause any difficulties for defendants? What are they?

Yes.

Problems can arise when the Statement of Claim is filed and, by the time it is served with the Statement of Particulars, the plaintiff is quite ill and the matter has to be investigated and dealt with urgently. In between the filing and Serving of the Statement of Claim, a defendant/cross defendant may have lost the opportunity to conduct early investigations into the matter and its defence can be prejudiced.

Could the period be reduced or made subject to specified limits, without creating unfairness to plaintiffs? How?

Yes.

The Statement of Particulars should be served at the same time as the Statement of Claim, or no later than 7 days afterwards. The provision of all relevant particulars by plaintiffs at an early time could assist to facilitate more efficient outcomes for all parties. It is difficult to understand why they need to be filed separately in any event.

Should plaintiffs be encouraged or required to serve the Statement of Claim within a certain period of filing, even if the Statement of Particulars is not yet available?

Yes.

Again, defendants can be prejudiced when they are provided with Statements of Claim or Statements of Particulars at the last moment.

Comcare has experienced several instances where plaintiffs serve the documents on us and force the matter on to mediation quickly, even though the Statement of Claim was filed some time beforehand. This puts us under considerable pressure.

As a general principle of procedural fairness, and to enable us to reasonably conduct investigations at an early time (if only into liability/exposure issues) Comcare would like to see the Regulations amended to provide that Statements of Claim should be served within 20 days of filing (as is the case with Cross Claims).

Do parties, in some circumstances, not follow the requirements of the CRP as to Statements of Particulars? If so, in what circumstances? Does this help or hinder resolution of claims?

In many instances, plaintiffs serve a Statement of Claim without a filed Statement of Particulars. In such cases, defendants are prevented from commencing thorough investigations into the plaintiff's claim. This is problematic because there is often a considerable time lag between the alleged exposure and the disease. Often defendants face significant evidentiary problems in trying to locate relevant evidence many decades after the alleged exposure.

In addition, when the Statement of Particulars is filed after the Statement of Claim, the period in between could have been used for investigating potential cross-claims, but is essentially lost to the defendant.

The result is that cross-claims may have to be commenced outside of the CRP process for the primary claim, which can result in delay and extra costs to defendants as the total time period for resolving the claim may be lengthened. Further, cross defendants may have lost the opportunity to contribute towards any resolution of the primary claim if that matter is not dealt with within the primary claim.

Issue 3 Operation of the CRP in relation to malignant claims

Are changes required to the operation of the CRP in relation to malignant claims? If so, why and what changes should be made?

Malignant claims have the potential to be considered urgent and removed from the CRP. To avoid any difficulties for defendants and cross defendants, perhaps all malignant disease claims could be subject to an initial directions hearing in the Tribunal? At the directions hearing, any issues which might prevent the matter from proceeding through the CRP process could be ventilated.

In addition, at the directions hearing, defendants and cross defendants might have the opportunity to seek an order regarding service of the Statement of Particulars within a particular period of time and, if necessary, a bedside hearing could be considered.

Issue 4 Conduct of urgent claims after a plaintiff's death

Should urgent claims be returned to the CRP after a plaintiff's death? If so, what timetable should apply to these claims once they are returned to the CRP?

The purpose of an urgent hearing appears to be twofold:

- a) to enable the plaintiff's evidence to be taken before death, and for all parties to be given an opportunity to cross-examine the plaintiff; and
- b) to facilitate a resolution of the matter whilst the plaintiff is still alive.

On balance, we consider estate claims should be returned to the CRP after a plaintiff's death - although there could be a judicial discretion to leave the claims in the urgent category which could be exercised in appropriate circumstances.

Are any other changes required to the Regulation, if an urgent claim is returned to the CRP after a plaintiff's death? If so, what changes should be made?

No comment.

Could returning an urgent claim to the CRP after a plaintiff's death cause any unfairness to a plaintiff's estate? If so, please provide specific examples.

This question is best answered by plaintiff practitioners.

Issue 5 Removal of urgent claims

Are the provisions of the Regulation relating to the removal of urgent claims sufficient? If not, how have those provisions caused difficulty or prejudiced parties? Please provide specific examples.

Not really. They could more clearly define what is 'urgent'. One suggestion is that all malignant matters should be considered 'urgent' as could any matters where a diagnosis of death has been made by a medical expert.

Is there a need for any changes to the provisions which stipulate when a claim is urgent? If so, what changes should be made?

See above.

Issue 6 Further grounds for removal of claims

Are there circumstances other than those currently prescribed by the Regulation where claims should be removed from the CRP? If so, for what reason? How have such cases caused difficulty in claims under the Regulation to date?

Yes.

These provisions (regulation 22) are too restrictive. Apart from the power of the Tribunal to remove a matter on the basis of the medical evidence (which is itself restrictive), the only other ground is found in 22(1)(b) which requires all parties to agree to the removal. This is problematic.

Some liberalisation of the 'opt-out' rules would be desirable – or perhaps the Tribunal could be given a role in assessing the merits of any opt-out application by one of the parties or, perhaps, provide a majority opt-out provision.

Furthermore, it would be helpful to have the power to apply to the Tribunal for an interlocutory hearing on substantive issues, for example a limitation period point which should ideally be dealt with prior to a hearing on the merits of the proceeding overall.

Issue 7 Dormant claims

Do dormant claims create any difficulties or unfairness for any parties? If so, what difficulty or unfairness is experienced?

Yes.

One of the difficulties for defendants is that they need to set realistic reserves in their financial statements and budget (set actuarial assessments) on matters to be paid out in any given financial year. Allowing matters to lay dormant for many years can interfere with this practice.

Dormant claims create difficulties and unfairness for defendants as there is no mechanism by which a dormant claim, once in the CRP process, can be 'moved along' by directions or, in extreme examples, struck out for want of prosecution.

That said, the problem is not significant for Comcare at this time because there is only one instance of this problem which we have experienced over the past two years (which matter is still before the Tribunal and has been since 2001).

It would be useful if the Tribunal had a general discretionary power to deal with interlocutory matters, and monitor timetables using directions hearings, in appropriate cases.

Is there 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? If so, how?

No.

Comcare does not have any transitional claims.

Issue 8 Operation of the CRP in relation to late cross-claims

Should an opportunity be given for late cross-claims, which are commenced outside of the prescribed timeframes, to be subject to the CRP in a way which would not delay a plaintiff's claim? If so, how?

Yes.

Not having cross-claimants involved in the CRP process is a disadvantage to a defendant in that, if the cross-defendants are not present at mediation and contribution issues have not been decided, costs can increase due to the time taken in between settling the primary claim and subsequently resolving contribution issues.

Arguably an informal cross defendant may not have to contribute to the mediator's costs if they are not a party to the proceedings which is unfair to the defendant if a liability to contribute to or indemnify the defendant in respect of the plaintiff's claim is found.

Furthermore, cross defendants at times have most of the liability in a matter. It can be beneficial to have all interested parties participate in the mediation to achieve an early resolution of all issues. Whilst cross defendants can participate informally in the process, a mechanism to compel them to deal with all substantive issues may be the better approach.

This is particularly so with liabilities Comcare inherited from the Stevedore Industry Finance Committee (SIFC), because most of the cross defendants we seek contribution from were former employers of the plaintiff and often have a liability to contribute arising out of their employment relationship with the plaintiff.

Conversely, Comcare would prefer to be involved in the primary proceedings, and assess the merits of the cross claims on the facts and evidence, rather than simply being sued separately by the defendant. Challenging a claim on the basis of the reasonableness of any settlement between the defendant and plaintiff after it has occurred is expensive and complex.

Issue 9 Flexibility of the timetable

Have concerns around the lack of flexibility in the CRP timetable diminished as

practitioners have become more accustomed to the Regulation?

No comment.

Are there specific parts of the CRP timetable that are posing particular difficulties for parties?

No comment.

Are there other steps in the CRP timetable that should be capable of variation and if so by what means (bearing in mind the need to ensure the prompt and cost effective resolution of claims)?

No comment.

Issue 10 Notification of service of the Statement of Particulars

Should plaintiffs be required to file and serve a timetable based on the date of service of the Statement of Particulars on the last original defendant, rather than just notifying the date of service? Would this result in plaintiffs incurring unnecessary extra costs which would ultimately be borne by defendants?

Yes.

Having a filed and updated copy of the Timetable would assist defendants. The benefits would outweigh the costs and would be minimal in any event.

Issue 11 Timetable for filing and service of the Defendant's Reply

Is the timeframe for the filing and service of the Defendant's Reply appropriate?

No.

The timeframe for filing a Reply is very strict and there is no ability under the Regulations for an agreement for an extension of time for filing a Reply. The defendant usually does not have sufficient information at an early stage to file any useful Reply because it is still conducting its preliminary investigations (including in relation to employment and/or exposure (Parts 3, 4, 5, and 6) and damage (Parts 2 and 9 etc)). This is particularly so for Comcare, which deals with many unusual circumstances of exposure, nationally and on a large scale.

The early timeframe for filing a Reply, without the ability to extend time, only serves to unnecessarily increase costs in circumstances where a defendant is rarely able to usefully plead its case in the Reply at such an early time.

Also, because Replies are required to be filed at such an early time, the defendants rarely have their medical evidence ready before filing which leads to pleadings of *'the defendant is awaiting medical evidence'* etc in relation to parts 2 and 9.

It may be a good idea, from a practical and cost perspective, for the Reply to be required to be filed say 3 to 4 weeks after the last date for the medical examination takes place (but say 2 weeks plus in advance of the mediation), so that costs are not wasted on filing an earlier Reply which does not contain any useful information and then costs also being spent on an amended Reply being prepared and filed.

We note that it is more likely that any investigation on employment/exposure would be complete by this time as well. Essentially, the early time requirement for filing a Reply actually leads to increased costs in many cases. Note that if this were to occur the timeframes would need to coordinate properly in relation to filing of apportionment statements.

Issue 12 Timetable for commencement of cross-claims

Is there a need for any changes to the timetable for commencing cross-claims? If so, what changes are necessary?

Yes.

The period for filing and serving of any cross-claims should be extended to 20 business days for malignant claims, with the possibility of a consent extension by a further 20 business days. If necessary, an amendment to this rule could be coupled with a judicial discretion, exercised at the time of any application for a matter to be dealt with urgently, to abridge the time for service of cross-claims.

Currently, the Regulations make a distinction between malignant and non-malignant claims in respect of cross-claims. There is no sound basis for this distinction as, if the a malignant claim is urgent, it is likely to be brought on for hearing before the 10 days has expired and cross-claims will have to be issued as and when the defendant obtains appropriate knowledge or has the ability to issue a cross-claim.

Are plaintiffs regularly declining to extend the time for the filing and service of cross-claims?

Not in Comcare's experience.

Have there been difficulties or disputes between parties over the meaning of "substantial prejudice" in this context? Is it necessary or desirable to define this term or provide guidance about its meaning? If so, how should the term be defined?

No comment.

Has anything changed since the 2005-06 financial year to such an extent that it would be appropriate to reconsider the issue of allowing non-original defendants to request an extension of the timetable to file and serve a cross-claim?

No comment.

If so, what changes could be made to the Regulation without creating any unfairness to plaintiffs?

No comment.

Issue 13 Application of timetable where additional defendants are joined by the plaintiff

Should the Regulation be amended to provide for circumstances where further defendants are joined by the plaintiff?

No comment.

***Is this a common scenario and does it cause particular difficulties?
If so, what changes are required to the Regulation?***

Not in Comcare's experience.

Issue 14 Timeframe for medical examinations

Have stakeholders encountered difficulties securing medical examinations of the plaintiff within the prescribed period? If so, what are these difficulties and how might they be addressed, while still providing for the efficient progression of the plaintiff's claim?

No comment.

Do stakeholders consider that unnecessary medical examinations are being arranged by defendants?

No comment.

Has it been difficult to obtain other parties' consent to extend the timeframe for conducting medical examinations?

No comment.

Have difficulties arisen because any extension to the timeframe for arranging medical examinations does not affect the rest of the CRP timetable?

No comment.

Issue 15 Adequacy of the Statement of Particulars and Reply

Do Forms 1 and 2 identify all relevant and necessary information that should be provided in the Statement of Particulars and the Reply?

No comment.

Is all information required in the Statement of Particulars and Reply being provided?

Generally, plaintiff's fail to provide sufficient particulars of their claim (including particulars relating to employment, exposure and damages claimed) to allow defendants to properly assess the claim, to file a responsive Form 2 Reply, consider evidentiary cross claim issues and to proceed to early resolution if possible.

Perhaps plaintiff's should be required to serve the evidence upon which they intend to rely at the time of filing and serving the Statement of Particulars. Plaintiff's could also be required to properly particularise exposure and employment allegations and to quantify all claims for damages so that Defendants can conduct proper investigations and assess and resolve claims at an early time.

Matters should not be progressed to mediation until the plaintiff has filed a complete and informative Form 1 Statement of Particulars.

Are parties clearly identifying information and documents that are not available and indicating when they will become available?

In Comcare's experience, plaintiff's often state that particulars of quantum (for example, out of pocket expenses, particulars of care) 'are to be provided' without stating a timeframe within which that might occur.

Not having those particulars hampers Comcare's ability to be able to properly assess a claim and, therefore, participate in meaningful settlement discussions with a plaintiff.

Are parties updating their information and documents when new or updated information and documents become available?

In Comcare's experience, plaintiff's will not provide outstanding particulars until one or two days before a mediation, if at all. It is frustrating that there is no way to compel a plaintiff to provide the particulars prior to mediation.

There is also another concern in relation to updating Replies. The timetable requires the defendant to prepare a Reply almost immediately upon receipt of the Statement of Particulars. It is not uncommon for further issues to arise, in respect of the Reply of a particular defendant, after that defendant has had the opportunity of reading the Replies filed by other defendants.

This may have particular relevance in respect of the categorisation of the defendant for the Standard Presumptions or the period of exposure alleged against the defendant insofar as it relates to the Standard Presumptions and apportionment among the various defendants.

Whilst we accept all relevant evidence in support of each party's case ought to be served on the other side upon receipt, it is inefficient and expensive to repeatedly file Amended Reply's. Instead, the focus of time and money could be on settlement.

What improvements to the system could be made to ensure better compliance in this area?

As noted, perhaps the Regulations could provide that mediation cannot take place unless a plaintiff has provided comprehensive answers to the categories of particulars contained in the Form 1.

In addition, each defendant should be permitted, after service of a Reply by another defendant, to file and serve any supplementary comments arising from those Replies, at any time prior to the commencement of the mediation or Contributions Assessment. This would not be a change of facts within the ambit of Rule 29, but rather a modification of the matters already raised by the defendant in its Reply. This would not require an alteration to the timetable for mediation under Rule 32.

Issue 16 Medical authorities

Has anything changed since the 2006 Review to such an extent that it would be appropriate to reconsider the issue of mandatory medical authorities?

Not in Comcare's experience.

Issue 17 Objections to mediators

Are there any new or compelling reasons why parties should be able to object to a

mediator appointed by the Registrar, given the role of the mediator and the nonbinding nature of mediation?

Not in Comcare's view.

Issue 18 Costs of mediation

How have the provisions in the Regulation dealing with the costs of mediation been operating in practice?

No comment.

Do the provisions promote early settlement in an appropriate manner?

We have not seen any evidence to support this proposition.

Issue 19 Mediator fees

Should the fees of mediators be regulated? If so, how?

Perhaps there could be a cap on the maximum amount of fees a mediator can charge. Comcare notes that some mediations are more complex than others. For that reason, the cap could be higher for Senior Counsel in each matter.

Issue 20 Preparation for mediations

Are further measures needed to encourage or require parties to better prepare for mediation? If so, what are they?

As discussed above at Issue 15, a plaintiff should be required to provide meaningful and informative particulars before mediation occurs. In addition, plaintiff's should be required to serve all evidence on which they intend to rely in support of their claims regarding liability and damages prior to the mediation being held.

In several matters Comcare has been a party to, plaintiff's have served medical reports and/or provided particulars of out of pocket expenses at the mediation. This leaves very little time for the defendant to properly investigate and assess the claim and can, if the mediation must be adjourned, increase costs of the proceedings, usually for the defendant only.

Issue 21 Opportunity to have a mediation vacated

Should parties have any further opportunities to approach the Tribunal to have a mediation vacated? If so, in what circumstances?

Parties should have the opportunity to vacate a mediation in circumstances where adequate particulars of a claim have not been provided by a mediation date or either party's expert report is still outstanding.

This is because it is difficult for meaningful negotiations to take place in the absence of these items which are normally required to assess damages. Mediations are expensive and time consuming and they can also be stressful for plaintiff's.

If the matter is not realistically going to resolve for the above reasons, the better approach seems to be to wait until all evidence is in and then proceed to mediation, with the general power to list the matter for directions if necessary.

Issue 22 Unsuccessful mediations

Do stakeholders consider that the number of unsuccessful mediations has increased? If so, why, and is there a need for any changes to the CRP as a result?

No comment.

Issue 23 Operation of the contributions assessment provisions

Are defendants behaving more commercially in relation to contributions disputes? If not, why not?

No comment.

Are challenges to contributions assessments increasing? Should alternative dispute mechanisms, such as arbitration, be considered?

Not in Comcare's opinion.

Is there a need to change specific aspects of the apportionment process?

See below in relation to consistency of Contributions Assessments and mechanisms for challenging them.

Issue 24 Impecunious defendants and indivisible injuries

Are defendants refusing to accept joint and several liability for indivisible injuries because of clause 52 or clause 49? Is this causing a problem when there are impecunious defendants or in any other circumstances?

No comment.

Does the Regulation need to be amended to clarify that it does not affect joint and several liability?

The Regulation should provide that all cross-defendants must pay the plaintiff damages in accordance with the Contributions Assessment and that any dispute as to apportionment and reimbursement of damages paid should be reserved for subsequent challenge.

In addition, the Regulations should account for the situation where the insurer of one defendant relies on an indemnity limit less than the amount the defendant is liable for. In those circumstances, there should be something in the Regulations to govern the way the remaining defendants should cover the gap.

Issue 25 Obligation of cross-defendant to pay

Is there uncertainty about the obligations on cross-defendants to pay following a

contributions assessment and resolution of the plaintiff's claim that requires clarification?

Yes.

In Comcare's experience, cross-defendants seem uncertain of their obligation to pay following a Contributions Assessment. Perhaps the Regulations should make it clear that, unless the party wishes to challenge the Assessment, the contribution amount must be forwarded within a certain number of days (say, 20 business days), following the Contributions Assessment, and refer to appropriate penalties for non-compliance.

Is there uncertainty about the verdicts and judgments that should be entered that requires clarification?

Yes, in Comcare's opinion there is, including the time for payment and costs of the Determination.

Issue 26 Disputes between defendants as to apportionment

Is there uncertainty about the nature of challenges to contributions assessments that requires clarification in the Regulation? If so, should the Regulation be amended to clarify the position? If so, how?

Proper procedures should be established and forms provided for challenging Contributions Assessments.

The provisions for challenging a Contributions Assessment are confusing and there is great uncertainty as to how they operate and what legal rights exist. They come with significant costs consequences irrespective of the merits of the application (see Regulation 39 and in particular Regulation 52(3) of the cost consequences in Regulation 52(7)).

There are currently at least three competing theories of how the Contributions Assessment challenge operates:

1. Issue a Cross-Claim and the matter proceeds as a section 5 contribution claim.
2. The cause of action is in the nature of a restitution claim, as one is attempting to recover from somebody else money that they should have paid, but which one has paid on their behalf. This view is expressed by Justice Handley in *QBE Australia (Australia) Ltd v Wallaby Grip Limited & Ors* [2007] NSWCA 43.
3. The Tribunal is required to conduct an administrative review and step into the shoes of the Contributions Assessor, and redo the assessment under the Standard Assumptions.

Regulation 51(2) requires clarification, and the procedure for taking a dispute to the Tribunal as to apportionment, as envisaged by Regulation 52(2) must be set out, as well as the nature of the determination of the review to be undertaken by the Tribunal; hearing de novo or administrative review.

Issue 27 Material to be considered by a Contributions Assessor

Should Contributions Assessors be required to also consider the Statement of Claim and any Cross-Claims?

It depends on the matter.

The parties should be given the opportunity to provide the Contributions Assessor with any relevant material upon and/or submissions which they rely and within a reasonable period in advance of the assessment taking place. This material should also be provided to the other party/ies to the contributions assessment.

Comcare was recently involved in a matter in which we had filed a Reply at an early time with scant information in relation to the contribution issues. The matter was then referred to a contributions assessor for determination without any notice to Comcare and we were deprived of the opportunity of putting forward any further evidence or submissions. Comcare found out about this Determination only by searching the DDT web-site.

We would thus emphasise that the parties should be given adequate notice of a contributions assessment taking place in order to properly prepare. This is important because the contribution's assessor's Determination is binding on the parties.

Are Replies being filed late and considered by Contributions Assessors? Does this disadvantage parties who comply with the timeframes? Should the Regulation be amended, and if so, how?

No comment.

Should Contributions Assessors consider late and/or amended documents (e.g. Replies)?

No comment.

Issue 28 Contributions assessments and assumption of liability

Are the 'innocent defendant' provisions working to assist defendants with no liability or do they need improvement?

Comcare does not have any strong views on this issue.

Should the assumption that all defendants are liable for the purpose of a contributions assessment be retained?

On balance, no. The contributions assessor often has very limited access to information, no power to call or cross examine witnesses etc and therefore should not be empowered to determine liability as that would probably lead to further challenges to the assessment on liability grounds.

Issue 29 Quality of contributions assessments & lack of consistency

Are there any issues with the quality and consistency of contributions assessments? If so, what measures should be taken to address this?

Comcare often commences cross-claims against the SIFC employers of plaintiffs' exposed to asbestos on the waterfront (usually in Sydney or Brisbane). When deciding how to apportion liability between Comcare and those employers, the difference in decisions is remarkable, given the facts (in relation to relative liability) are almost identical in every case.

In cases such as *(Re Bowie) Stevedoring Industry Finance Committee v James Patrick & Co Pty Ltd (in liq) [2005] NSWDDT 59* and *(Re Cassar) Stevedoring Industry Finance Committee v James Patrick & Co Pty Ltd (in liq) [2005] NSWDDT 60*, the DDT has apportioned liability between SIFC and an employer in the ratio 85:15 in relation to exposure on the Sydney waterfront. In a Form 2 Reply, Comcare will routinely refer to these cases and ask the Contributions Assessor to apportion liability accordingly.

In many cases, a DDT Contributions Assessor will state that they are bound by parts of the Standard Presumptions and can only vary the starting position between Category 2 defendants (50:50) in favour of one defendant by a maximum of 20%. On that basis, they will apportion liability 30% to Comcare and 70% to the stevedore employer.

In other cases, despite the guidance of *Bowie* and *Cassar*, the Contributions Assessor will apportion liability 50/50. In other cases still, the Contributions Assessor will take the view, correctly in Comcare's opinion, that there is an unfettered discretion to vary the standard 50/50 apportionment between Category 2 defendants who are concurrently liable, resulting in a 15% liability to Comcare and 85% to the employer.

Issue 30 Standard presumptions relating to apportionment

Do the standard presumptions set out in the Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2007 require amendment? In particular, do any of the terms in the Order (including the term 'installer of asbestos products' require clarification?

Yes, as referred to in the preceding issue, some clarification is required to make it clear that, when apportioning liability between concurrently liable Category 2 defendants, Contributions Assessors have an unfettered discretion to vary the standard presumption of 50/50 liability.

That is unlike the 20% limitation on varying the standard presumptions between Category 1 and Category 2 defendants.

Issue 31 Effectiveness of the SCM

Have parties found SCMs useful in managing multiple defendant claims and reducing costs?

No comment.

Have there been any advantages or disadvantages for plaintiffs or defendants arising from the use of SCMs?

No comment.

Should SCMs only be appointed with the agreement of all defendants?

No comment.

Issue 32 The role, functions and authority of the SCM

Have defendants using SCMs experienced difficulties or disagreement over the scope of the SCMs' role, functions and authority?

No comment.

Is it desirable to amend the Regulation to expressly provide that the SCM is only able to negotiate settlement once it has received instructions from the original and non-original defendants?

No comment.

Issue 33 Fees of the SCM

*Have parties encountered difficulties over the issue of costs in the SCM scheme?
Would it be desirable for the Minister to establish a scale of costs for use in
determining the operational costs of an SCM?*

No comment.

**Issue 34 Treatment of plaintiff's claim and Compensation to Relative Claims
when the plaintiff dies**

*Is there a need to clarify that after a plaintiff's death, a Compensation to Relatives
claim may be dealt with separately from the plaintiff's claim? If so, how?*

No comment.

*What changes should be made to clarify how the CRP timetable applies to a
Compensation to Relatives claim?*

A directions hearing should be set to determine the issues.

*Are there any other amendments that could be made to improve the application of the
CRP when a Compensation to Relatives claim is made?*

No comment.

Issue 35 Opportunity to apply to the Tribunal for directions

*Are parties encountering difficulties with other parties not complying with the
provisions of the CRP or with prolonged disputes?*

Yes.

As referred to above, often meaningful particulars are not provided a reasonable period
before mediation and often a plaintiff's claim will become dormant.

*If so, should there be an opportunity to apply to the Registrar of the Tribunal to seek
enforcement of the provisions of the CRP or resolution of a prolonged dispute?*

Yes.

Parties should be provided with the opportunity to apply to the Tribunal at any stage of the
CRP and the Tribunal should be empowered to make orders as to case management in
appropriate circumstances.

*If stakeholders do support introducing such a provision, what would be an
appropriate threshold to limit this opportunity, so as not to delay the progression of
the plaintiff's claim and increase costs?*

No comment.

Issue 36 Form 3s

Is the information required on the Form 3 sufficient and appropriate?

No comment.

In what way could the layout and drafting of Form 3 be improved?

No comment.

Issue 37 Plaintiff and defendant costs

Could further changes be made to the operation of the CRP or the Regulation to reduce plaintiff and defendant costs in connection with resolving claims? If so, how?

This is a difficult question. Perhaps the suggestions outlined in this paper, if adopted, could result in more efficient and cost effective ways of managing these claims for both parties.

In relation to multiple defendant claims, would stakeholders prefer to be provided with the average costs for all defendants to a claim or the average costs for each defendant to a claim?

Yes.

Issue 38 Further review and publication of data

When should a further review of the CRP's operation be conducted?

Reviews should be conducted annually or bi-annually, subject to the views of all relevant stakeholders.

For how long should data in relation to the operation of the CRP be provided?

No comment.

Should any additional data be provided in future years?

No comment.

Do stakeholders consider it no longer necessary to provide any of the data published in Appendix A?

No comment.



Australian Government

Comcare

ASBESTOS LITIGATION POLICY STATEMENT

1. Introduction

- 1.1 The *Asbestos-Related Claims (Management of Commonwealth Liabilities) Act 2005 (Cth)* ('the Act') provides for Comcare to:
 - (a) assume the liability for any common law asbestos-related personal injury claims made against the Commonwealth or, with certain exceptions, a Commonwealth authority; and
 - (b) respond to the claim and manage the conduct of the proceedings (including any contribution or cross claim against any other liable party).
- 1.2 The claims referred to in paragraph 1.1 include claims against current and former Australian Government agencies, statutory corporations and controlled companies, but do not include claims made against the Australian Postal Corporation, Telstra Corporation Ltd and their respective subsidiaries.
- 1.3 Comcare has made delegations to legal officers of the Australian Government Asbestos Litigation Unit within Comcare and to legal officers within the Asbestos Litigation Cell of the Defence Legal Litigation Directorate for these purposes.
- 1.4 This policy statement was developed in consultation with the Asbestos Policy Unit of the Department of Employment and Workplace Relations, the Asbestos Litigation Cell of the Defence Legal Litigation Directorate and the Office of Legal Services Coordination of the Attorney-General's Department.

2. Application

- 2.1 This policy statement sets out the policy to be followed by the Australian Government Asbestos Litigation Unit and the Asbestos Litigation Cell of the Defence Legal Litigation Directorate in managing common law asbestos-related claims made against the Commonwealth and cross claims brought on behalf of the Commonwealth.
- 2.2 This policy statement is to be read together with the *Legal Services Directions 2005 (Cth)* issued by the Attorney-General under the *Judiciary Act 1903 (Cth)*.

3. Commencement

- 3.1 This policy statement takes effect on and from 1 May 2008.

4. Management Objectives

- 4.1 Asbestos-related claims shall be managed under the Act:
- (a) in accordance with legal principle and practice; and
 - (b) in compliance with the Legal Services Directions, and in particular the 'model litigant obligation' at Appendix B, and requirements regarding the handling of monetary claims, at Appendix C; and
 - (c) with the objectives of -
 - (i) expediting the payment of compensation where liability is admitted or established; and
 - (ii) reducing the Commonwealth's overall liabilities by recovering contributions from any liable persons or corporations ('third parties') where appropriate.
- 4.2 To facilitate the objectives of this policy statement, a claimant may be required to provide evidence on oath or affirmation, or by way of affidavit, which to the best of his or her recollection:
- (a) identifies or assists in identifying any third party who may be liable to indemnify the Commonwealth or contribute to the claim; and
 - (b) provides an account and details of the acts or omissions of that third party tending to establish its liability before the claim is resolved.
- 4.3 Cross claims brought on behalf of the Commonwealth against third parties shall be managed:
- (a) in accordance with legal principle and practice; and
 - (b) in compliance with the Legal Services Directions, and in particular the 'model litigant obligation' at Appendix B, and requirements regarding the handling of monetary claims, at Appendix C; and
 - (c) with the objective of reducing the Commonwealth's overall liabilities by recovering contributions from any liable third parties where appropriate.
- 4.4 Subject to any contrary Court/Tribunal timetable or Orders (which prevail), priority in the management and resolution of asbestos-related claims and cross claims by Comcare may be given in the following order:
- (a) asbestos-related claims by claimants who are near death over -
 - (i) other asbestos-related claims and
 - (ii) cross claims;
 - (b) asbestos-related claims by claimants who suffer malignant conditions (such as asbestos induced cancer or mesothelioma) over -
 - (i) asbestos-related claims by other claimants and

- (ii) cross claims;
- (c) asbestos-related claims by claimants who suffer asbestosis over -
 - (i) asbestos-related claims by claimants who suffer asbestos related pleural diseases;
 - (ii) asbestos-related claims by dependants or estates of deceased asbestos-related condition sufferers,
 - (iii) asbestos-related claims by claimants who suffer pleural plaques, and
 - (iv) cross claims;
- (d) asbestos-related claims by claimants who suffer asbestos related pleural disease over -
 - (i) asbestos related claims by dependants or estates of deceased asbestos-related condition sufferers,
 - (ii) asbestos-related claims by claimants who suffer pleural plaques;
 - (iii) cross claims;
- (e) asbestos-related claims by dependants or estates of deceased asbestos-related disease sufferers over -
 - (i) asbestos-related claims by claimants who suffer pleural plaques, and
 - (ii) cross claims; and
- (f) cross claims over asbestos-related claims by claimants who suffer pleural plaques.

5. Service of Claims

- 5.1 An asbestos-related claim or cross claim may be served on Comcare, the Commonwealth or a Commonwealth authority by:
- (a) facsimile, marked for the attention of the Australian Government Asbestos Litigation Unit, Comcare to (02) 6274 8521; or
 - (b) delivery to Comcare at its head office at the following address -

**Level 1, 14 Moore Street
CANBERRA ACT 2601**

- 5.2 In accordance with subsection 5(3) of the Act, Comcare may be named as the defendant in an asbestos-related claim or cross claim made against the Commonwealth or a Commonwealth authority. However, the claim should identify the current or former Australian Government agency or Commonwealth authority whose conduct is alleged to have caused or contributed to the asbestos-related condition.

Approved:

Martin Dolan
A/G Chief Executive Officer, Comcare

