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Ms Kathrina Lo
Director
Justice Policy
Department of Attorney-General & Justice
GPO Box 6
SYDNEY NSW 2001

Dear Ms Lo

CONSULTATION ON PROPOSED DUST DISEASES TRIBUNAL REGULATION 2013

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

Our firm acts for parties regularly involved in dust diseases litigation in New South Wales who would be directly reflected by the proposed amendments in the proposed Regulations. We make this submission on behalf of our firm only.

In providing this response, we have had regard to the Regulatory Impact Statement (**RIS**) published by the Department of Attorney-General & Justice in conjunction with the proposed Regulations.

The RIS intimated that 3 options were considered in relation to previous consultations. These options were:-

1. Ending current arrangements – we agree with the evaluation of that option as set out in the RIS concluding that the costs involved in ending the current arrangements far outweigh any benefit.
2. Continuing current arrangements – in this regard we had made previous submissions on previous public consultations recommending amendments would be necessary to the Regulations to improve the efficacy of the Claims Resolution Process (**CRP**). We are pleased that it has been considered and recommend that changes are necessary.
3. Continuing current arrangements with refinements to the CRP – we are in agreement that the current arrangements should be retained but with amendments. We have made comments below in relation to the specific amendments that we believe should be addressed further. We believe these amendments would add to the overall efficiency of the CRP, improving its operation and delivering appropriate outcomes for all parties.

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We have addressed our comments under each of the headings contained in the RIS, rather than addressing the specific items in the proposed Regulations.

1. PRACTICAL OPERATION OF THE CRP TIMETABLE

In regard to the proposed amendments, we commend the introduction of proposed Regulation 25 placing the obligation upon the Registrar to provide all parties (Plaintiff and each original Defendant) with a Timetable applicable to the particular claim. In our opinion the obligation in regard to the monitoring of the Timetable and the issuing of Amended Timetables should remain with the Registrar rather than with the Plaintiff and/or original and non-original Defendants.

In our opinion draft Regulation 26 should be amended to include at Clause 6 (26.6) a provision requiring the Registrar to notify all parties that an extension of time within which to file and serve Cross Claims has been provided and outlining new commensurate dates in the Timetable.

In relation to the proposed Clause 35(2) wherein the parties must notify the Registrar within 1 business day of the claim being settled, we consider this to be unnecessarily onerous upon the parties, particularly in circumstances where the Registrar will, upon settlement of the claim, enter Judgment in the proceedings. We support the proposed amendments outlined in the RIS and the proposed Regulations.

1.1 Filing and Service of Cross Claims by Defendants

We note that the draft Regulation does not propose any amendment to Clause 26(2) regarding the time within which Cross Claims by all Defendants must be filed and served.

In our submission, it is unfair and at many times unreasonable to expect Defendants to make proper investigations (in regard to indivisible proceedings) to enable them to properly evaluate whether Cross Claims should be issued within 10 days. It is our submission that Clause 26(2)(a) should be amended to allow that Cross Claims by all Defendants in malignant claims should be filed within 15 days, not the current 10 day minimum.

2. SUSPENSION OF THE CRP IF THE PLAINTIFF DIES AND APPLICATION OF THE CRP TO COMPENSATION TO RELATIVE CLAIMS

We commend the amendment to the Regulation suspending the CRP upon the death of a Plaintiff as outlined in Clause 22 of the proposed Regulations. We believe the further steps outlined in that clause provide the parties with some certainty in regard to how matters involving reconstituted claims (where the Estate has been substituted for a deceased Plaintiff) should be managed.

We do submit however that it should be clear within that clause, that upon resumption of the CRP in respect of the Estate claim that the applicable Timetable should be the applicable Timetable in respect of non-malignant claims. Any urgency in respect of the claim has been removed upon the death of the previous Plaintiff. If

there is urgency in respect of the proceedings, then the Plaintiff(s) may make those submission in their resumption proposal as provided in Clause 22(2).

3. MEDICAL EVIDENCE TO SUPPORT REMOVAL OF CLAIMS FROM CRP

We support the proposed amendments to the proposed Regulations as outlined.

4. RESUMPTION OF CLAIMS AFTER THE DEATH OF THE PLAINTIFF

We have addressed our comments in relation to the proposed amendments under paragraph 2 above. We reiterate our comment that upon resumption of the Plaintiff's claim, the applicable Timetable should be the non-malignant Timetable.

5. JOINDER OF ADDITIONAL DEFENDANTS

We have addressed our issues in regard to the extension of time within which to join additional Defendants in malignant claims under paragraph 1.1 above. We support however the proposed amendments as set out in Clause 28 regarding the temporary suspension of the CRP Timetable upon the joinder of a new Defendant by a Plaintiff and believe this is in the interest of fairness in regard to all parties.

6. INTERLOCUTORY DISPUTES

We support the proposed amendments as outlined in the RIS and make no further comment in regard to these matters.

7. MEDIATION

We support the amendment proposed in the RIS but would propose a further amendment in regard to Clause 50 of the proposed Regulations regarding the cost of the Mediation.

Currently, and under the proposed Regulations, it is deemed that if a Mediation is unsuccessful then the cost of the Mediation will be borne by the Defendants only. We believe this is in the circumstances unreasonable, particularly in circumstances where it may be the intractability of a Plaintiff that leads to an unsuccessful Mediation. We believe it is more appropriate that the cost of Mediation, as is common in most other jurisdictions, should be borne by all parties, including the Plaintiff, and would propose that Clause 50 be amended to reflect this position.

8. EFFECT OF CONTRIBUTIONS ASSESSMENT

We support the proposed amendments outlined in the RIS and the proposed Regulations.

9. ROLE OF SINGLE CLAIMS MANAGER (SCM)

We note the comments in the RIS regarding the usefulness of the SCM and was a matter that we had addressed in our previous submissions regarding the CRP.

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To: Ms Kathrina Lo, Department of Attorney-General & Justice

We do not believe that the appointment of a SCM has aided in any settlement negotiations, nor has it assisted in minimising costs. There has been insufficient regulation of the SCM process and resistance in most cases appropriate to a SCM handling negotiations.

We support the proposed amendment to the CRP (Clause 64) confirming that the appointment of a SCM is not mandatory and may only be adopted in circumstances where multiple Defendants all agree that a SCM should be adopted.

10. TRANSITION ARRANGEMENTS

We support the transition arrangements outlined in the RIS.

11. INFORMATION GATHERING

We note Part 7 Clause 98 of the proposed Regulations continues the current obligations upon legal practitioners to provide information to the Tribunal in accordance with Form 3 of the Schedule. Defendants regularly comply with this obligation.

We note to date that no information, appropriately identified, has been made available to participants in the litigation regarding this useful information and we would propose that the information be published and made available to parties on an annual basis to assist in appropriate and proper decision making processes within the organisations.

We thank you for the opportunity to provide our comments in regard to the proposed Regulations and amendments.

Yours faithfully

HOLMAN WEBB LAWYERS BRISBANE

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