

Our Ref: ADMIN  
Principal: Theodora Ahilas  
Contact: Jonathan Walsh  
T: (02) 9261 1488  
F: (02) 9261 3318  
E: JWalsh@mauriceblackburn.com.au

Maurice Blackburn Pty Limited  
ABN 21 105 657 949

Level 20  
201 Elizabeth Street  
Sydney NSW 2000

PO Box A266  
Sydney South 1235

DX 13002 Sydney Market  
Street

T (02) 9261 1488

F (02) 9261 3318

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Director Justice Policy  
Department of Attorney General & Justice  
GPO Box 6  
**SYDNEY NSW 2000**

**By email only: [lpclrd@agd.nsw.gov.au](mailto:lpclrd@agd.nsw.gov.au)**

Dear Sir/Madam

**Re: Proposed Dust Diseases Tribunal Regulation 2013 (Proposed Regulation)**

Thank you for your invitation to provide submissions in relation to the Proposed Regulation.

Maurice Blackburn is proud to represent the victims of dust disease in Australia, especially those who have suffered damage and loss as a result of asbestos exposure. Maurice Blackburn litigates claims in Dust Disease Tribunal of New South Wales (**Tribunal**) and also in Victoria, Queensland, South Australia and now Western Australia. We represent hundreds of victims each year. As such we believe that we are uniquely placed to provide insight into what is the most efficient and effective civil procedure when it comes to commencing and finalising claims for asbestos disease in the Tribunal.

## 1. Introduction

As a starting point, we welcome any amendments to the *Dust Diseases Tribunal Regulation 2007 (Current Regulation)* which improves the speed and efficiency of the "claims resolution process" (**CRP**).

Set out in Section 2 of this letter are our specific submissions and comments in relation to each of the 11 proposed amendments to the Current Regulation as contained in the *Regulatory Impact Statement – Proposed Dust Diseases Tribunal Regulation 2013 – July 2013 (RIS)*.

Set out in Section 3 of this letter are two (2) further proposed amendments to the Current Regulation. We acknowledge that our further proposed amendments were not originally addressed in the *Review of the Dust Diseases Claims Resolution Process Issues Paper December 2008 (Issues Paper)*. Nevertheless, we believe that our further proposed amendments should be addressed by the legislature in order to add further procedural efficiency to the current system and we urge the

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Attorney General to consider our proposal closely for inclusion in the Proposed Regulation.

## **2. The Proposed Regulation**

### **2.1 Practical Operation of the CRP timetable**

Maurice Blackburn's experience is that establishing and maintaining a single timetable from which all parties operate is less of an issue than the Issues Paper may suggest. It is less of an issue because Maurice Blackburn takes a proactive approach to drafting, filing and serving of timetables (and any amendments as appropriately requested by the defendants in accordance with the Current Regulation) with the Registry and defendant counsel.

On this basis we believe that proposed clause 25 would place an unnecessary additional burden on the Registrar of the Tribunal.

In addition, we believe that the plaintiff's legal representatives can more efficiently handle this administrative task. Indeed, the plaintiff is the party bringing the litigation and it is incumbent on them (or, more accurately, their legal representatives) to file and serve all relevant evidence once a claim is commenced and the CRP is effectively triggered. Accordingly, the plaintiff's legal representatives are naturally therefore better placed to draft, file and serve the relevant timetable which applies to their client's matter (and indeed, any amendments to it) and to continue to drive the administrative and procedurally focussed CRP.

Recommendation: In contrast to the Proposed Regulation, we submit that it would be more efficient if proposed clause 25 nominates the plaintiff's legal representatives as the party required to draft, file and amend the timetable in accordance with the existing rules.

Further, all proposed amendments and/or additions in clauses 17(5) and 26(6) should be similarly left to the plaintiff's legal representatives and the Proposed Regulation should reflect this.

For clarity, we agree with the proposed amendments and/or additions to clauses (19)(2)(c), 26(12) and 61(8). In particular, we support new clause 26(12) as we are not often aware of all cross claims that are filed in a particular matter until an original defendant's Reply is filed and served, or indeed, when an issue arises as to the timing of a claims contributions assessment.

### **2.2 Suspension of the CRP if the plaintiff dies and application of the CRP to compensation to relatives claims**

In the CRP context, an estate claim (a claim by the representatives of the estate of a deceased asbestos victim) and a compensation to relatives claim (a claim by a dependant of a deceased asbestos victim) are two fundamentally separate causes of action. From a pure legal perspective, we are of the view that two separate statements of claim must be filed and served for each cause of action. To conflate

the two together under the one statement of claim would add unnecessary confusion and lack of clarity to both claims.

**Recommendation:** Accordingly, we submit that proposed clause 19(6) should be amended to include a statement to the effect that a separate statement of claim must be filed in relation to a compensation to relatives claim.

We agree with all other proposed amendments under this category.

### 2.3 Medical evidence to support removal of urgent claims from the CRP

Due to the sheer number of mesothelioma sufferers that plaintiff legal representatives confer with and bring claims on behalf of, we are often well placed to see the signs and symptoms of the rapidly declining health of a particular plaintiff.

However, the difficulty in obtaining supportive written medical evidence from a plaintiff's treating medical practitioner for the purposes of expediting a claim under clause 22, proves time and time again to be a monumental task.

This is especially the case in rural areas of Australia where it is often the case that a plaintiff's only regular treating medical practitioner is a family doctor (usually because oncology treatment has ceased and the patient has moved into a purely palliative phase of treatment) and they are unfamiliar with the symptomatic progression of mesothelioma and the speed with which it progresses. As such, our task in bringing a case on urgently for the purposes of protecting the legal rights of the plaintiff and their estate is made very difficult.

It is for these reasons that Maurice Blackburn wholeheartedly supports the proposed amendments to clauses 21(9)(a) and 21(9)(b).

However, we believe further two amendments are necessary.

First, the current wording of the Current Regulation is too vague and ambiguous to be of proper assistance to medical practitioners when it comes to a proper consideration of Regulation 22. Whilst it may well be the view of the some judges of the Tribunal and legal representatives who act in this jurisdiction that Regulation 22(2) means a life expectancy of less than 3 months, we believe that the Regulation needs to explicitly state what "level" of evidence is needed before the "urgency" trigger is effected. We also believe, that the clause should be extended not simply to include whether the plaintiff is able to give oral evidence at the end of the CRP but **also** whether they are able to **meaningfully participate** in any court process, including mediation, and **be able to give verbal instructions** regarding their claim.

Second, we believe that the requirement to have only a qualified and registered medical doctor to provide an opinion on life expectancy is too narrow and fundamentally ignores the expertise which exists outside the registered medical practitioner field. Our experience is that oncology nurse practitioners who deal regularly with mesothelioma sufferers are very well placed to give an expert and informed opinion to the Tribunal on matters of life expectancy. These highly skilled and informed practitioners are often much more accessible than specialist

respiratory or oncology medical practitioners and offer a real alternative when it comes to giving an opinion on matters of life expectancy.

**Recommendation:** We submit that the following amendments and additions be added to the Proposed Regulation:

- (a) Existing clause 22(2) be amended to explicitly state that a claim will be "urgent" if there is medical evidence which opines that:
  - (i) a plaintiff's life expectancy is 2 months or less; and/or
  - (ii) the plaintiff will be unable to give oral evidence in two month time even if they are alive; and/or
  - (iii) the plaintiff is unable to meaningfully participate in any court process, including mediation, in two months' time even if they are alive.
- (b) New clause 21(9)(c) be added which states that medical evidence as to the plaintiff's life expectancy can be provided by a "suitably qualified and expert medical or nurse practitioner."

#### **2.4 Resumption of claims after the death of the plaintiff**

Maurice Blackburn agrees with the recommended suite of amendments to various clauses of the Current Regulation.

#### **2.5 Joinder of additional defendants**

We agree with the recommended amendments as they relate to divisible diseases (like asbestosis and ARPD).

However, no recommendations have been suggested for indivisible disease (mesothelioma). It is sometimes the case that new potential defendants come to light after statement of claim and statement of particulars have been filed and a plaintiff make steps to join an additional defendant or defendants. In these circumstances, it would be inefficient and prejudicial to the plaintiff if the CRP timetable were to simply "re-set" in relation to the new defendant(s).

**Recommendation:** Accordingly, for indivisible diseases, we recommend that in the event that the plaintiff seeks orders to add an additional defendant or defendants, that new clauses be added which address the following:

- (a) The matter is automatically removed from the CRP; and
- (b) At the hearing of the motion to join further defendant(s), the plaintiff must prepare a timetable for the further case management of the matter for the court to consider (or indeed for the parties to agree upon).

#### **2.6 Interlocutory disputes**

We strongly disagree with these recommendations.

In our view, proposed clauses 39(1) and (2), which empowers the mediator to require parties to obtain and serve further evidence, effectively elevates the appointed mediator to the position of an arbitrator or quasi-judicial officer. This is something completely inconsistent with the purpose and role of mediator in the CRP.

The role of the mediator is to facilitate resolution of a claim on the basis of the evidence filed and served. The role of the mediator is to not become a quasi-judicial officer and/or arbitrator and start making evaluative judgements on the evidence served by parties in a proceeding and issuing requests, which if not adhered to by a party, has costs consequences. Such powers should be left with the President or presiding Judge of the Tribunal and no one else.

## 2.7 Mediation

Maurice Blackburn agrees with these recommendations.

## 2.8 Contributions Assessments

Maurice Blackburn agrees with proposed clause 53(5), which permits a contributions assessor to consider late amended replies from defendants, so long as this does not impact upon the timing of the contributions assessment.

In relation to proposed clauses 55(2), which allows a defendant to object to the referral of a matter to a particular contributions assessor on conflict of interest grounds, this proposal ignores the plaintiff's perspective. That is, there is no provision to allow a plaintiff to object to the appointment of a contributions assessor. This position denies the plaintiff procedural fairness. In addition, in practice, the plaintiff is not always informed of the appointment of a contributions assessor to a particular matter and is not provided with a copy of the contributions assessment when it is handed down. Rather, the plaintiff has to inquire with the Tribunal's registry or indeed has to wait until the contributions assessment is posted on the Tribunal's website.

Recommendation: We recommend that the following clauses be added which explicitly states that:

- (a) the Tribunal is to inform the plaintiff of the appointment of the contributions assessor; and
- (b) the contributions assessor and/or the Tribunal is to provide the plaintiff with a copy of the contributions assessment as soon as it is received.

## 2.9 Effect of a contributions assessment

Maurice Blackburn agrees with the proposed clause 53(9).

However, in the case of indivisible disease claims where there is a "shortfall issue" – that is where a defendant is a deregistered company and/or a defendant has only limited workers compensation coverage, the Current Regulations are vague as to what happens in this scenario at mediation. The reality is that, as set out in the RIS, a plaintiff can recover full damages from one "live" defendant (who is not under any

encumbrance because they do not have limited insurance coverage or the like) if the matter were to proceed to trial and a judge found in favour of the plaintiff. Accordingly, at mediation, where defendants cannot agree on contribution where there is a shortfall issue, a plaintiff should not be effectively penalised.

**Recommendation:** Accordingly, we believe that there should be a trigger in the regulation which permits the mediator to require the defendants and/or cross defendants to accept/agree that they are to effectively "cover" a shortfall for the purposes of mediation (without any prejudice to their future rights to dispute contribution).

## **2.10 The role of Single Claims Managers**

Maurice Blackburn agrees with these recommendations.

## **2.11 Transitional Arrangements**

Maurice Blackburn agrees with these recommendations.

## **3. Further proposed amendment**

### **3.1 Timeframe for filing of Consent Judgement**

Where cases have settled at the mandatory mediation, the practice of the Tribunal is that such matters will not be listed before the President to enter Consent Judgement. This is because this step is a mere procedural matter and, rightly, the court's valuable time should not be taken up with such relatively trivial matters.

Historically, of course, all settled matters were listed before the previous President for filing of Consent Judgement. Whilst this may have been a relatively costly process, it gave all parties, particularly defendants, the impetus to draft, consent to, sign and eventually file Consent Judgement in a timely fashion. Indeed, where this was done quickly, it was often the case that one party would obtain the consent of the others to make an appearance before the Tribunal on their behalf by consent to hand up terms of settlement. This informal system of appearance at such directions hearing worked efficiently for the most part.

However, the current reality is that in practice much time is spent by the parties to draft, consent to, sign and eventually file Consent Judgement once a CRP matter has settled at the mandatory mediation. We have found that there is distinct lack of impetus for the parties to draft, consent to, sign and eventually file Consent Judgement quickly or within a reasonable timeframe and it is often left to plaintiff legal representatives to continue to chase, harass and follow up on defendants and cross defendants regarding judgement. In our view, this places an unacceptable and costly burden on plaintiffs.

Moreover, the delay in agreeing to and filing Consent Judgement, further adversely impacts plaintiff's because it has the net effect of further delaying when the defendant(s) are required to forward settlement monies in satisfaction of the consent judgement. This is because in almost all cases, irrespective of whether past and/or future economic loss is claimed by the plaintiff, defendants require an order that they receive a Centrelink clearance and the 28 period within which defendants are

required to forward settlement monies without penalty interest being applied does not start to run until they have received the Centrelink clearance.

In our experience, such a Centrelink clearance cannot be obtained until Consent Judgement has been filed and, further, requesting and obtaining a Centrelink clearance takes up to 6 weeks. Accordingly, when adding in time to draft and file Consent Judgement, a plaintiff will often not practically obtain their settlement monies for up to 10 - 12 weeks after mediation. This, in our view, is unacceptably long.

The process could be ably and very easily assisted if the Proposed Regulation included a clause to the effect that the parties have two business days to file Consent Judgement in the Tribunal Registry following successful conclusion of a matter at mediation or informal settlement conference (or indeed at any time prior to Trial). This in our view, would provide the right balance because it would provide impetus for all parties to move quickly to draft, agree to and file Consent Judgement whilst also not imposing a demonstrable burden on them.

**Recommendation:** we **strongly** recommend that Proposed Regulations includes a clause to the effect that the parties have two (2) business days to file Consent Judgement in the Tribunal Registry following successful conclusion of a matter at mediation or informal settlement conference.

### **3.2 Ability to seek leave of the Tribunal to amend pleadings against existing defendants**

Whilst a plaintiff has an ability to add a defendant in a proceedings whilst the matter remains in the CRP pursuant to clauses 19(2)(b) and (c) of the Current Regulation, there is no ability for a plaintiff to seek an order to merely amend pleadings against existing defendants. In our view, the ability to do one without the other is both incongruous to the purposes of the CRP and against basic procedural fairness. The inability to amend pleadings whilst the matter is in the CRP adds to the argument that a matter remains in a "time vacuum" until the CRP is complete.

For the very same reasons why a plaintiff may seek to add a defendant in a proceeding under clauses 19(2)(b) and (c) of the Current Regulation, new evidence may come to light which oblige a plaintiff to amend its current pleadings to add or subtract the essential facts which underpin its allegations against a defendant, add to allegations of breach of duty or adding further allegations or particulars of negligence, breach of contract or breach of statutory duty. Permitting a plaintiff to amend their Statement of Claim whilst the matter remains in the CRP will only serve to further define the issues in dispute and ultimately contribute to the resolution of matter (or indeed clarify the need for a claim to be decided by the Tribunal).

**Recommendation:** For the reasons, we recommend that a new clause 19(2)(j) be added to the Proposed Regulation which provides that "a plaintiff may seek to amend its Statement of Claim (in any fashion) where the Tribunal is satisfied that it is necessary to do so to preserve the plaintiff's cause of action or to clarify the issues in dispute."

Thank you again for the opportunity to provide comments on the Proposed Regulation. We welcome any future opportunity to be part of the fine tuning of the proposal, it's roll out and future function.

Should you wish to discuss our comments, please contact either Theodora Ahilas or Jonathan Walsh on (02) 9261 1488 or on [tahilas@mauriceblackburn.com.au](mailto:tahilas@mauriceblackburn.com.au) or [jwalsh@mauriceblackburn.com.au](mailto:jwalsh@mauriceblackburn.com.au).

Yours faithfully



**Theodora Ahilas**  
Principal  
MAURICE BLACKBURN



**Jonathan Walsh**  
Senior Associate  
MAURICE BLACKBURN



**Sean Behringer**  
Associate  
MAURICE BLACKBURN