

Dust Diseases Tribunal Regulation 2019

Regulatory Impact Statement

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Table of Contents

How to make a submission	4
Summary of abbreviations	5
Executive summary	6
Background	7
The need for a process to resolve asbestos-related claims	9
Options	10
Evaluation of options	10
Option 1: Do nothing and allow the Regulation to lapse	10
Option 2: Remake the Regulation without change	13
Option 3: Remake the existing Regulation with amendment	13
Recommended option	14
The proposed Regulation	15
1. Ensure that urgent claims are removed from the CRP in appropriate circumstances	15
2. Clarify the application of first direction hearing fees	18
3. Introduce a case management power to enable the Tribunal to manage inactive claims within the CRP	18
4. Clarify the application of the CRP to joinder of additional defendants	19
5. Introduce a time limit for defendants to challenge a contribution assessment determination	19
6. Clarify the application of Division 6 to claims for contribution made outside the timeframe for cross claims	20
7. Enable the Tribunal to charge for record searches and records produced for another court	21
8. Other minor amendments	22
Attachment A: Proposed Dust Diseases Tribunal Regulation 2019	23

How to make a submission

Interested organisations and individuals are invited to provide submissions on any matter relevant to the proposed Regulation, whether or not it is addressed in this Regulatory Impact Statement (**RIS**).

Submissions can be made via email to policy@justice.nsw.gov.au. Submissions can also be mailed to:

A/Director, Civil Law
Justice Strategy and Policy
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

If you would like to provide comments in an alternative format, please contact us on policy@justice.nsw.gov.au.

The closing date for submissions is Friday 19 July 2019.

Copies of the proposed Regulation and this RIS are available:

- On the NSW Department of Justice website at https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/lpclrd_statements.aspx.
- By emailing policy@justice.nsw.gov.au.

Copies of the *Dust Diseases Tribunal Act 1989* and the Dust Diseases Tribunal Regulation 2013 are available online at www.legislation.nsw.gov.au.

Please note that submissions may be made public, subject to the provisions of the *Government Information (Public Access) Act 2009*. The NSW Department of Justice will consider any requests for submissions to be treated on a confidential basis, subject to the provisions of the Act.

There is no set format for submissions; however short comments that refer to the part or clause of the proposed Regulation are encouraged. Matters covered by the *Dust Diseases Tribunal Act 1989* are not covered by this consultation process. Only comments relating to the draft Regulations will be considered. Not all comments may be incorporated into the final Regulations.

After the Attorney General has finalised the Regulation, it will be submitted to the Governor for approval. Once approved by the Governor, the Regulation will be published on the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au.

Summary of abbreviations

Current Regulation	Dust Diseases Tribunal Regulation 2013
CRP	Claims Resolution Process
DDT Act	<i>Dust Diseases Tribunal Act 1989</i>
Consultation Paper	Dust Diseases Tribunal Consultation Paper (April 2018)
Proposed Regulation	Proposed Dust Diseases Tribunal Regulation 2019
RIS	Regulatory Impact Statement
Tribunal	Dust Diseases Tribunal

Executive summary

The Dust Diseases Tribunal Regulation 2013 (**current Regulation**) establishes the Claims Resolution Process (**CRP**). The purpose of the CRP is to encourage timely and cost effective resolution of asbestos-related claims through early exchange of information between the parties and other arrangements to facilitate settlement.

The current Regulation also prescribes fees and establishes rules for the payment of fees, as well as providing a streamlined process for subpoenas, arrangements for making offers of compromise and reporting requirements for legal practitioners.

The *Subordinate Legislation Act 1989* provides for regulations to have a limited life and in most cases, regulations are automatically repealed after five years. The automatic repeal of the current Regulation was postponed in 2018. As a result, the current Regulation is due for repeal on 1 September 2019.

When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the need for the regulation. The agency must then make a decision about whether the regulation should be remade. The findings of that review are contained in this Regulatory Impact Statement (**RIS**).

The RIS examines the costs and benefits of the following options against the objectives of the regulatory proposal:

1. Do nothing and allow the Regulation to lapse
2. Remake the Regulation without change
3. Remake the existing Regulation with amendment

The RIS considers issues raised by stakeholders in response to an interim Consultation Paper released by the NSW Department of Justice in 2018, which sought feedback on specific proposals regarding the operation of the Regulation.

The RIS proposes that the current Regulation be remade with some amendments. The proposed Dust Diseases Tribunal Regulation 2019 at **Attachment A (proposed Regulation)** would implement the preferred option.

Background

Compensation claims for dust related diseases in NSW are dealt with by the Dust Diseases Tribunal (**the Tribunal**). The Tribunal was established by the *Dust Diseases Tribunal Act 1989 (DDT Act)*. It has exclusive jurisdiction to hear and determine damages claims for those who have been affected by dust diseases, including diseases related to asbestos exposure and claims made by the dependants of those who have died from dust diseases. Damages may include compensation for pain and suffering, reduction in life expectancy, and voluntary care and assistance provided by the person's family members.

The DDT Act includes various powers to make regulations in relation to the practice and procedure of the Tribunal. The primary purpose of the current Regulation is to establish a Claims Resolution Process (**CRP**), which is a mandatory pre-litigation process for all asbestos-related claims. Its objectives are to reduce the cost of claims and encourage settlement through the early exchange of information and compulsory mediation.

The Regulation also sets fees, prescribes forms and provides for subpoenas and offers of compromise for all proceedings in the CRP and before the Tribunal.

The original Dust Diseases Tribunal Regulation 2001 prescribed fees, established rules for their payment and the percentage that must be deducted from amounts paid into the Tribunal and invested. In late 2004 and early 2005 a review was conducted of the legal and administrative costs in dust diseases compensation claims.

The review's main recommendation was to establish the CRP to provide a mechanism to require parties to exchange information and participate in settlement discussions. The DDT Act was amended to include new regulation making powers to facilitate establishment of the CRP, and the CRP was established by the Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005.

The Dust Diseases Regulation has been remade twice with amendments since the introduction of the CRP. The Dust Diseases Tribunal Regulation 2007 implemented a number of minor changes identified in a 2006-2007 review of the CRP, mainly to further encourage defendants to resolve disputes regarding liability quickly and commercially.

In 2013, the current Regulation was made with amendments to improve the efficiency of CRP. These amendments included:

- The introduction of a common CRP timetable by the parties that is prepared by the Registrar
- Provision for the joinder of additional defendants
- Provision of a clearer process for the CRP's application to claims following the death of a plaintiff, including Compensation to Relatives claims
- Provision for the reinstatement of urgent claims in the CRP following a plaintiff's death.

The key elements of the CRP in the current Regulation are:

1. After filing the statement of claim (but before service), plaintiffs complete a standard statement of particulars form, which includes expert reports and certain other documentary evidence. This is served with the statement of claim.

2. Defendants prepare a standard reply form admitting or disputing each point, with documents to support the defendant's position on any point disputed. The defendant can also request further information.
3. Defendants are required to join any other defendants as soon as practicable and within 10 business days (30 business days for non-malignant claims).
4. Defendants seek to agree on apportionment of liability. If they cannot agree, an independent third party (the contributions assessor) will apportion liability among the defendants using standard presumptions as to liability. The determination can be challenged, but only after the plaintiff's claim is settled or determined.
5. If the claim is not resolved informally, compulsory mediation occurs between the plaintiff and defendants.
6. If defendants want to dispute their contribution at a later date, the plaintiff can be required to give sworn evidence at the end of the mediation but only if the plaintiff's claim has been settled with the defendants.
7. Parties are able to encourage settlement by using 'offers of compromise'.
8. If a claim is not settled by mediation or otherwise, the claim can be returned to the Tribunal for judicial determination.

The need for a process to resolve asbestos-related claims

Exposure to asbestos can cause a range of lung diseases, diseases of related tissue, asbestosis and mesothelioma. Mesothelioma is an aggressive form of cancer which is usually fatal. The five-year relative survival rate for mesothelioma averages 5.4%.¹

Australia has one of the highest incidence rates of mesothelioma in the world, with between 700 and 800 people diagnosed each year.² New South Wales has the highest number of new mesothelioma cases compared to other Australian jurisdictions.³ The number of cases of mesothelioma has increased over time and has quadrupled since 1982.⁴

Many people who lodge a dust diseases claim are dying from their illnesses at the time of making their application. In many asbestos-related cases there can be swift progression towards death after initial diagnosis. The average time between diagnosis and death from mesothelioma is around 11 months.⁵

While no amount of financial compensation will make up for the harm caused by asbestos-related illnesses, ensuring asbestos victims and their families receive appropriate compensation can help give victims and their families a sense of justice and closure.

The judicial determination of claims by the Tribunal plays an important role in stating the law for the benefit of the community as a whole and determining the rights of litigants. However, in most cases it is in the best interests of all parties to resolve claims through early information exchange and settlement discussions. The CRP provides an alternative process to judicial determination that is designed to promote this objective.

¹ Australian Institute of Health and Welfare, *Mesothelioma in Australia 2017* (2017) at <https://www.aihw.gov.au/getmedia/20d53684-98f3-4863-b95d-d56ac7a4cd66/aihw-can-121.pdf.aspx?inline=true>, 4.

² *Ibid*, 1.

³ *Ibid*, 4.

⁴ *Ibid*, 2.

⁵ *Ibid*, 1.

Objectives of the regulatory proposal

The objectives of the proposed Regulation are:

- The effective and efficient resolution of asbestos-related claims without incurring unnecessary legal, administrative and other costs
- Users of the Tribunal system contribute equitably to the costs of operating the Tribunal.

Options

The options evaluated to provide effective and efficient resolution of asbestos-related claims and arrangements for the Tribunal's operating costs were:

1. Do nothing and allow the Regulation to lapse
2. Remake the Regulation without change
3. Remake the existing Regulation with amendment.

Evaluation of options

In order to evaluate these options, in October 2017 the NSW Department of Justice began preliminary consultation with stakeholders regarding the new Regulation. As a result of this consultation process a number of potential improvements to the current Regulation were identified. These were included in a targeted Consultation Paper released in April 2018 to key stakeholders.

Eleven submissions were received in response to the Consultation Paper. The Department undertook further targeted stakeholder consultation in late 2018 and early 2019.

Option 1: Do nothing and allow the Regulation to lapse

Early exchange of information and settlement

If the current Regulation were to lapse, the CRP would no longer apply to asbestos-related claims, including the requirement for early exchange of information and mandatory mediation. All asbestos-related claims would be case managed by the Tribunal and, if not settled, would proceed to a hearing.

If the Tribunal case managed all claims, it could make tailored orders for the progression of claims on a case-by-case basis. This is in contrast to the CRP, which mandates a fixed timetable of procedural steps. Case management by the Tribunal may also allow urgent cases to be expedited from the outset of the claim and orders made as required, including for the immediate taking of evidence if the plaintiff's health is declining.

However, the CRP already tailors the procedural process to the type of claim, particularly in relation to malignant claims (involving asbestos-induced carcinoma or mesothelioma). Malignant claims are subject to a shortened timeframe, which recognises that the health of plaintiffs with malignant conditions can deteriorate rapidly and time is of the essence.

Stakeholders report that for the majority of asbestos-related claims, the CRP is the appropriate and preferred forum for resolution. If the CRP is no longer appropriate due to a plaintiff's deteriorating health, an application can be made to remove the claim from the CRP for expedited determination by the Tribunal.

An urgency application can be made at the point of filing a claim to ensure that urgent claims are handled by the Tribunal from the outset. Test cases can also be removed after the exchange of information required by the CRP. In addition, if a claim is not resolved under the CRP, it will be returned to the Tribunal system for determination.

Some stakeholders contend that fewer plaintiffs would die before the conclusion of their claims if malignant claims were case managed instead of being placed in the CRP. However, there is no evidence that the CRP has resulted in an increase in the rate of plaintiffs dying before their claims are resolved. In the 12 months before the CRP commenced (2004–2005), 14.89% of plaintiffs with malignant claims died before their claims were resolved. In 2017-18, approximately 14.5% of plaintiffs died before their claims were resolved.

These statistics indicate that the problem of plaintiffs dying before their claims are finalised is not related to the CRP. Rather, it is related to the short life expectancy associated with malignant dust diseases. This is unlikely to change if the CRP is repealed.

The CRP establishes a streamlined and standardised process for the exchange of information. Parties to a claim understand what information is required and can anticipate requests of the other party. This facilitates the early resolution of claims. Without this process, the exchange of information would be at the agreement of the parties or direction of the Tribunal. This would create uncertainty, add to legal costs and may delay the resolution of proceedings.

Parties to asbestos-related claims will incur costs in progressing or defending a claim regardless of whether the claim is resolved through case management by the Tribunal or through the CRP. The level of costs, however, will differ depending on which process is used. While data is not available to quantify the costs of resolving a claim through the Tribunal, it is likely that these costs would be higher than the costs of progressing a claim through the CRP.

Both plaintiff and defendant stakeholders submitted that reinstating case management in all cases would be a retrograde step that would result in additional and unnecessary costs with little benefit for the plaintiff. Stakeholders advise that for Tribunal managed claims, counsel would be engaged from the outset of the proceedings and additional directions hearings would be required. In contrast, under the CRP counsel are usually engaged only if the CRP has been unsuccessful and from the point of the first directions hearing, which occurs at the conclusion of the CRP.

Further, the CRP results in lower costs because parties are required to exchange information early rather than requiring parties to conduct their own investigations regarding information required from the other side. The additional involvement of the Tribunal in asbestos-related claims would also have a resource impact on judicial and registry staff.

Apportionment of liability

The apportionment process in the CRP creates an incentive for defendants to resolve contribution disputes quickly and commercially. The contributions assessment mechanism

facilitates early payment of a plaintiff's damages through the use of standard presumptions as to liability for different classes of defendants. If this process were repealed, agreement or determination as to liability would occur on a case-by-case basis and towards the end of a claim as negotiated between the parties or determined by the Tribunal. This would likely delay the resolution of the claim and involve increased legal costs.

The CRP encourages early resolution through compulsory mediation. While mediation may be ordered by the Tribunal under case management powers in the *Civil Procedure Act 2005*, this is at the discretion of the Tribunal.

One benefit of returning all claims to the Tribunal may be the legal precedents established by Tribunal judgments. This benefit may be marginal, as even without the CRP the overwhelming majority of claims do not require determination by the Tribunal. Also, the Tribunal can still resolve test cases under the current Regulation.

Fee recovery

The current Regulation prescribes fees and sets out rules for their collection. If the current Regulation is allowed to lapse, the power of the Tribunal to collect court fees would be doubtful. If fees are not recovered from users of the Tribunal, inevitably, they would need to be subsidised from other sources, either through a larger budget allocation to the Tribunal by the Government (thus impacting on taxpayers generally) or through increased funding from the Dust Diseases Board (which is primarily funded through insurance premiums paid by employers).

If the decrease in the Tribunal's revenue is not supplemented by other means, it could adversely affect the level of service provided by the Tribunal and this in turn could lead to delays in progressing claims that could prejudice the parties involved (particularly the plaintiff). There would also be reduced capacity to fund further improvements to the administration of the Tribunal. While the Tribunal could potentially save some administrative costs by not having to collect court fees, this benefit is outweighed by the loss of revenue that would result from not collecting court fees.

Data reporting requirements

Abolition of the data reporting requirements that apply to legal practitioners under the current Regulation would reduce costs to practitioners, which are ultimately passed on to plaintiffs and defendants. However, removal of reporting requirements would also reduce the evidence base available to support future reviews of the CRP.

Subpoenas and offers of compromise

The Regulations prescribe rules for the issuance and return of subpoenas and offer and acceptance of offers of compromise. If these provisions were repealed, costs would also be likely to increase with the removal of incentives to consider offers of compromise seriously and reinstatement of the old process for issuing subpoenas, which is less streamlined and more costly than the process under the current Regulation.

Conclusion

Both defendant and plaintiff representatives agree that the CRP is generally working well and largely achieving its aims. They also agree that for the majority of asbestos-related claims, the CRP is the appropriate forum, as it facilitates the early resolution of claims, which reduces the costs to the parties, and benefits plaintiffs and their families by providing

resolution and closure. This suggests that stakeholders view the benefits of the CRP as outweighing the costs.

Option 1 is therefore not recommended on the basis that the costs outweigh the benefits of this option.

Option 2: Remake the Regulation without change

If the current Regulation is remade in its current form, claims would continue to be subject to the CRP. The main benefit of this option would be the reduced costs of resolving asbestos-related claims when compared to the costs of resolving claims through case management by the Tribunal and, failing settlement, through a hearing. As this option would maintain the status quo, legal practitioners and the Tribunal would not have to incur costs resulting from adapting to new procedures.

Under this option, the Government would continue to recover some of the costs of the Tribunal's business from users through fees. The fees collected by the Tribunal would assist the Tribunal to meet some of its operational costs. Safeguards would continue to apply for people who might otherwise find the fees a barrier to having their claim resolved.

While there are administrative costs involved in collecting fees payable to the Tribunal, these are negligible relative to the funding received. However, the Tribunal would continue to absorb the costs of some services it provides to plaintiff and defendant representatives.

A further benefit relative to Option 1 would be continuation of current arrangements that provide incentives for considering offers of compromise and streamline the process for issuing subpoenas.

Submissions to the Consultation Paper noted that the CRP is largely serving its purpose but identified a number of possible refinements to improve the operation of the CRP. If these changes are implemented, the CRP is likely to operate more efficiently and effectively and at a lower cost than is currently the case.

While submissions found that the current CRP is operating effectively, one of the costs of this option is that users of the CRP would forego the potential benefits of improvements to the CRP under Option 3. If these changes are implemented, the CRP is likely to operate more efficiently and effectively than is currently the case.

Option 2 is therefore not the preferred option, as benefits are less relative to option 3.

Option 3: Remake the existing Regulation with amendment

Option 3 (the proposed Regulation) would remake the Regulation in its current form with some amendments to provisions relating to the CRP and to fees.

The proposed amendments aim to address issues identified in submissions from stakeholders in response to the Consultation Paper and in subsequent consultations. The proposed changes are:

1. Provide the Tribunal with greater discretion regarding the factors and evidence it can consider when determining urgency applications
2. Clarify the application of the first directions hearing fee

3. Introduce a case management power to enable the Tribunal to manage inactive claims within the CRP
4. Clarify the application of the CRP to joinder of additional defendants
5. Introduce a time limit for defendants to challenge a contribution assessment determination
6. Clarify the application of Division 6 to claims for contribution made outside the timeframe for cross claims
7. Update the Regulation to reflect current costs assessment rules
8. Enable the Tribunal to charge for record searches and records produced for another court.

By removing barriers to urgent claims being transferred from the CRP, allowing the Tribunal to manage inactive claims and clarifying the operation of some of the procedures of the CRP, it is envisaged that the CRP will operate more efficiently and effectively. Users of the CRP will have more certainty in resolving claims under the CRP and the Tribunal will have more control over its caseload and revenue.

There may be one off implementation costs for both legal firms and the Tribunal in modifying practices and procedures. However, these are outweighed by the overall benefits as the changes will clarify some aspects of the CRP that were previously unclear.

Option 3 is therefore the preferred option as it is likely to further the objectives of the Regulation, while imposing the least costs on the Tribunal and parties to resolve asbestos-related claims.

Recommended option

Based on the cost benefit analysis of each option outlined above, this RIS recommends Option 3, the proposed Regulation. The proposed Regulation aligns with the objectives of the regulatory proposal and will improve the operation of the CRP and Tribunal. The remainder of this RIS describes the proposed amendments to the Regulation.

The proposed Regulation

The changes proposed to the current Regulation, which are reflected in the proposed Regulation at **Attachment A**, are considered in detail below.

The proposed changes were developed based on the submissions to the Consultation Paper released by the Department of Justice in April 2018 and follow-up consultations within the context of the CRP's overall objectives:

1. To foster the early provision of information and particulars concerning claims in respect of asbestos-related conditions
2. To encourage early settlement of those claims
3. To reduce legal and administrative costs in connection with those claims.

All references to clauses below are references to the proposed Regulation unless otherwise stated. A comparison between the proposed Regulation and the current Regulation is at **Attachment A**.

1. Ensure that urgent claims are removed from the CRP in appropriate circumstances

<i>Current Regulation</i>	<i>Clause 21</i>
<i>Proposed Regulation</i>	<i>Clause 20</i>

All submissions received from plaintiff representatives, and four submissions from other stakeholders, supported adjusting the process for removing urgent claims from the CRP. Two proposals were considered to address this issue, which are assessed below. Option A was preferred and has been included in the proposed Regulation at **Attachment A**.

Option A: Provide the Tribunal with greater discretion regarding the evidence that can be taken into account when considering urgency applications

Currently, the Tribunal may remove a claim from the CRP if it determines, based on medical evidence, that the claim is urgent. A claim is urgent only if the Tribunal is satisfied that, as a result of the seriousness of the plaintiff's condition, the plaintiff's life expectancy is so short that there is not enough time for the requirements of the CRP to be completed, or that the claimant is not likely to be able to give oral evidence or participate in Tribunal processes once the CRP is completed. In these circumstances the claim can be removed from the CRP and determined by the Tribunal on an expedited basis.

An urgency application must be supported by medical evidence. Due to stakeholder concerns raised in the previous review about the difficulty in obtaining medical evidence, the current Regulation allows medical evidence to be presented in an affidavit from a person, such as the plaintiff's solicitor, who received an oral medical opinion from a medical practitioner. Medical evidence is admissible even if it does not comply with the Expert Witness Code of Conduct. These changes were intended to reduce the practical difficulties involved in obtaining evidence to support an application for removal of a claim.

However, stakeholders have reported continuing difficulty in obtaining evidence to support an urgency application. They advise that treating doctors are often fully occupied with patient care, especially in rural or regional NSW, and that it can be difficult to obtain a report, even orally, about a patient's prognosis at short notice. A delay in obtaining medical evidence may delay or prevent an urgency application from being filed. It can also lead to the plaintiff's health deteriorating so that they are no longer capable of giving evidence, even if the urgency application is successful and the claim returned to the Tribunal for expedited determination.

The Regulation prescribes that the Tribunal must base their decision on medical evidence alone. This prevents the Tribunal from taking evidence from lay witnesses, who may be well acquainted with the plaintiff and the seriousness of their condition. Stakeholders also queried the usefulness of medical evidence alone, noting that some doctors encounter mesothelioma patients infrequently and treating doctors may be reluctant to provide an opinion due to a belief that issuing a prognosis of short life expectancy may have a detrimental impact on a plaintiff's mental state.

Submissions from defendant stakeholders suggested that the current provisions adequately protect plaintiffs. They submitted that the current provisions establish an objective test and that medical evidence is the appropriate evidentiary standard. They also opposed the introduction of additional factors for judicial consideration, noting that these are already considered by medical practitioners when preparing medical reports and would be incorporated into medical evidence presented to the Tribunal.

In light of all submissions from stakeholders, it appears that difficulty in obtaining medical evidence is a genuine issue which prevents some urgent claims being dealt with on an expedited basis. This may delay or prevent urgency applications from being filed and increase the rate of plaintiffs dying before their claim is determined.

To address this, it is proposed that the Tribunal be given greater discretion about the evidence it can consider when determining whether or not a claim is urgent. It is proposed to amend the Regulation to provide that, if medical evidence is not available, evidence regarding a claimant's age, date of diagnosis, type of mesothelioma, co-morbidities, and if the claimant is receiving palliative treatment can be presented for the claimant. This evidence could be led by way of affidavit made by a non-expert, including a claimant's spouse or de facto partner, the claimant's legal practitioner or other similar person.

This amendment will allow the Tribunal to consider a broader range of matters in making its determination. It will also allow the Tribunal to take into account evidence from people who may have more contact with the plaintiff than a treating doctor and who can provide timely evidence about the deterioration of a plaintiff's condition.

The expanded discretion may result in more urgency applications being filed and more claims being determined as urgent by the Tribunal. This may result in higher legal costs and a greater resource impact on the Tribunal. However, it is likely that these increases will be marginal. Plaintiff representatives have noted that it is generally not in the interests of a client to proceed through litigation as it is stressful and there are significant cost implications. The removal of claims will still require a judicial determination and evidence from both sides will be heard if the application is contested.

Option B: List all claims for directions hearings at the commencement of proceedings

An alternative option was proposed to address difficulties in removing urgent claims from the CRP, which would involve listing all malignant claims before a judge for procedural directions within days of filing a statement of claim. Following this hearing, the judge could order that urgent claims be subject to judicial case management. Non-urgent claims would proceed through the CRP. This would allow judges to set a tailored timetable at the outset of a claim, including for the taking of evidence or an expedited hearing if the plaintiff's health was declining.

This option would also provide a mechanism for ensuring that urgent claims are removed from the CRP where a plaintiff's life expectancy is so short that there is not enough time for the CRP to be completed. However, on balance Option A is preferred as there are risks associated with Option B that do not apply to Option A.

For example, the proposal is likely to undermine the CRP as the primary mechanism for the resolution of asbestos-related claims, as it could result in a substantial increase in the number of claims which are judicially case managed. Approximately 70 per cent of claims are malignant and 30 per cent are non-malignant. Removing up to 70 per cent of claims from the CRP may require a reconsideration of the CRP's continued existence.

Stakeholders submit that this proposal would not result in an additional cost burden to parties, as judicial case management will ultimately require them to perform the same work that is required under the CRP. However, this is not necessarily the case.

Currently, most malignant claims successfully resolve in the CRP without requiring a hearing or involvement from the Tribunal. A directions hearing involving the plaintiff only occurs if the claim is returned to the Tribunal upon application (for instance, on the grounds of urgency) or if the claim does not settle at the conclusion of the CRP. However, if a hearing were to be required at the commencement of proceedings, parties would incur upfront legal costs briefing counsel. Judicial case management may also increase the litigiousness of the claim generally, resulting in additional directions hearings and other interlocutory matters.

The parties may also not be in a position to make informed submissions regarding the urgency of a claim immediately following the filing of a statement of claim. Plaintiff firms regularly file statements of claim immediately after receiving instructions in order to protect the position of their client. As a result, statements of claim often contain incomplete information and may be amended after the plaintiff's lawyers have obtained medical evidence. This may also result in additional directions hearings.

Requiring all malignant claims to be listed for directions will also place an additional burden on judicial and registry staff. The DDT Registry estimates that a minimum of approximately 300 additional hearings would be required each year. While the Tribunal may be able to absorb some of the judicial and registry costs associated with these extra hearings, any additional costs would need to be borne by the taxpayer or the Dust Diseases Board.

2. Clarify the application of first direction hearing fees

<i>Current Regulation</i>	<i>Clause 9 and Schedule 1, Item 3</i>
<i>Proposed Regulation</i>	<i>Clause 9 and Schedule 1, Item 3</i>

Clause 9 requires the plaintiff to pay a ‘first directions hearing fee’, unless the Tribunal orders the fee be split between the parties.

The concept of a ‘first directions hearing fee’ is unique to the Tribunal. Stakeholders have advised there is confusion about which hearing constitutes the ‘first’ directions hearing, particularly when multiple parties are involved. It can also be difficult for the Tribunal to recoup first directions hearing fees if parties file a notice of motion which later becomes a first directions hearing.

In order to address this confusion, the proposed Regulation clarifies that the first directions hearing fee is payable:

- If the Tribunal makes an order as to the payment of the fee—by the parties in the proportions so ordered
- If the hearing involves a cross-claim or more than one cross-claim only—by the cross-claimant or first cross-claimant in any cross-claim
- In any other case—by the claimant (and not by any cross-claimant).

The proposed Regulation also clarifies that the first directions hearing fee is payable once the first directions hearing occurs, and not when a request for a directions hearing is filed.

3. Introduce a case management power to enable the Tribunal to manage inactive claims within the CRP

<i>Current Regulation</i>	-
<i>Proposed Regulation</i>	<i>Clause 69</i>

The Tribunal has a large number of dormant or inactive claims sitting within the CRP. Claims can become inactive if a claim is filed but then abandoned in favour of other proceedings, or if a plaintiff dies and no new plaintiff is substituted. These claims affect the Tribunal’s statistics and take up storage space. In February 2019, 449 claims were categorised as dormant.

Currently, the Tribunal does not have an own-motion power that enables it to call over inactive claims. While the Regulations allow a delayed claim to be removed from the CRP and listed for case management directions before the Tribunal, this must be on application by a party.

To allow the Tribunal to manage inactive claims, it is proposed to include a provision in the Regulation that enables the Tribunal to dismiss inactive claims after 12 months. The Tribunal will be required to give written notice to the parties. If a party responds to the notice, the matter will be listed for a directions hearing under clause 67.

A 12 month period of inactivity is considered appropriate as it balances the need to progress the claim in a timely manner, while allowing for a reasonable delay in proceedings which may arise from a plaintiff's death.

In preliminary consultations most stakeholders supported this proposal. Two stakeholders indicated that the current provisions for removal of a claim for delay on the basis of substantial prejudice to the applicant or substantial delay were sufficient. However, removal on these grounds must be on application by a party. This provision will assist the Tribunal to manage inactive claims where the parties do not have an interest in doing so.

4. Clarify the application of the CRP to joinder of additional defendants

<i>Current Regulation</i>	<i>Clause 28</i>
<i>Proposed Regulation</i>	<i>Clause 27</i>

Clause 28 of the current Regulation provides a process for a plaintiff to join additional defendants to proceedings while a claim is within the CRP. If an additional defendant is joined, the existing CRP timetable is suspended temporarily until the new claim (in respect of the newly joined defendant) reaches the same point in the CRP timetable as the existing claim.

Stakeholders has advised this clause is difficult to apply where plaintiffs join new defendants at a very late stage of the CRP, including after a contributions assessment determination and mediation involving the original defendants has occurred. At this stage, the issues in dispute have been narrowed and apportionment of liability between the defendants has already been determined.

In this situation it is unclear whether a new defendant can still be joined, if a second apportionment process occurs to include the new defendant and whether the CRP timetable applies to the new defendant.

In order to clarify how this clause applies to late joinders, it is proposed to specify that if a plaintiff joins a new defendant after an agreement or determination as to apportionment has been made under Division 5, that agreement or determination is set aside and Division 5 applies to the original and new defendants.

This amendment will clarify the right to join an additional defendant at a late stage while the CRP is ongoing, making it more likely that all potentially liable parties will be joined to the original proceedings. This will also allow a newly-joined defendant to participate in a contributions assessment process alongside the original defendants.

5. Introduce a time limit for defendants to challenge a contribution assessment determination

<i>Current Regulation</i>	<i>Clause 56</i>
<i>Proposed Regulation</i>	<i>Clause 55</i>

In a claim with multiple defendants, the current Regulation requires defendants (including defendants joined by cross claim) to agree the division of liability for a plaintiff's claim

between them on an expedited basis. If defendants cannot agree on apportionment of liability, then a contributions assessor makes a binding determination under clause 56.

After a determination is made, cross claimants and cross defendants may conduct further investigations and determine that their actual liability is less than what was apportioned in the contributions assessment determination, and may wish to challenge the determination.

However, if a cross claim was filed during the course of a plaintiff's claim there is no time limit on when the determination can be challenged. This is because the cross claim remains on foot notwithstanding the conclusion of the plaintiff's claim.

It is in the interests of all stakeholders to have certainty about the finalisation of a claim. This allows defendants to manage their liabilities and the Tribunal to manage inactive claims. Therefore it is proposed to require all disputes regarding apportionment arising from a contributions assessment determination or agreement to be made within 12 months of the determination or agreement being made. This will also apply to cross claims that are already on foot.

Stakeholders supported the proposal to introduce a time limit, submitting that the absence of a time limit prevents matters being concluded and defendants knowing the final extent of their liability, and lead to open but inactive cases. Twelve months is a sufficient timeframe for a cross-party to assess and decide whether to challenge a determination.

Two stakeholders suggested that a defendant should be able to apply to have a dispute reinstated after the 12 month window expires. However, this is not considered necessary as the Regulation already allows defendants to utilise Division 6 once the plaintiff's claim is finalised to challenge apportionment if the defendant misses the 12 month window.

6. Clarify the application of Division 6 to claims for contribution made outside the timeframe for cross claims

<i>Current Regulation</i>	<i>Clause 26</i>
<i>Proposed Regulation</i>	<i>Clause 27</i>

Clause 26 of the current Regulation establishes a 10 day timeframe (or 30 days for non-malignant claims) for defendants to file a cross claim against other parties they believe are liable to contribute to a plaintiff's damages. However, defendants are also empowered to file a claim for contribution outside this timeframe under section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946*. This general power applies to all tort claims in NSW.

Stakeholders have advised that if defendants miss the timeframe for filing a cross claim, and the plaintiff does not agree to an extension of time, they often file a claim for contribution under the *Law Reform (Miscellaneous Provisions) Act 1946*. Unlike cross claims, there is no time limit for when claims for contribution must be made or process for their resolution if they are filed when a plaintiff's claim is ongoing and still within the CRP.

As both cross claims and claims for contribution proceedings are concerned with apportioning liability between multiple defendants, it is appropriate that the same process applies. This will ensure that disputes between defendants about liability take place separately and do not delay the resolution of the plaintiff's claim.

Division 6 establishes a separate apportionment process for claims for contribution filed after the plaintiff's claim has been settled or determined. To clarify when and how claims for contribution can be made while a claim is within the CRP, the proposed Regulation:

- Includes a note to clarify that Division 6 applies to all cross claims not filed and served in accordance with this clause (including both cross claims and claims for contribution)
- Provides that Division 6 applies to separate proceedings commenced by a defendant following a failure to comply with the timeframe.

This means that if a defendant wishes to file a claim for contribution after the timeframe has expired, they must issue a fresh statement of claim after the plaintiff's claim has been finalised.

The clause has also been amended to specify that a plaintiff is taken to have consented to an extension of time for filing and serving a cross claim, unless they demonstrate otherwise. The implied consent replaces the current positive obligation for the plaintiff to respond while ensuring the onus remains on the plaintiff to make a positive case to refuse an extension of time.

7. Enable the Tribunal to charge for record searches and records produced for another court

Current Regulation	-
Proposed Regulation	Schedule 1, Item 6

The Tribunal can charge fees for the activities and services set out in Schedule 1 of the Regulation. Unlike the Local Court, District Court, Supreme Court and Land and Environment Court, the Tribunal cannot currently charge fees for retrieving documents and requesting production of a document from another court. This places a burden on the Tribunal as it must absorb the costs involved with providing these services.

In order to allow the Tribunal to recoup its costs for these services, it is proposed to amend Schedule 1 to allow the Tribunal to charge fees for retrieving and providing access to a document, and requesting production of documents from another court. The new fees would be based on the District Court fee structure prescribed by the Civil Procedure Regulation 2017:

	Standard fee	Corporation fee
Retrieving, providing access to and furnishing a copy of any document	\$13, plus \$7 for each 10 pages (or part of 10 pages) after the first 20 pages	N/A
Requesting production to the court of documents held by another court	\$61	\$122

These additional fees will place a small cost burden on parties who request documents from the Tribunal. However, this proposal will bring the Tribunal into line with the standard powers of NSW courts to recover fees for undertaking these tasks.

8. Other minor amendments

A number of other minor amendments have been made to the proposed Regulation, which are listed below:

- References to the repealed *Legal Profession Act 2004* and *Legal Profession Act 1987* in clauses 7, 67 and 99 have been replaced with references to the *Legal Profession Uniform Law (NSW)* where required.
- The savings and transitional provisions in Schedule 2 of the current Regulation have not been replicated in the proposed Regulation as they are now spent. Clause 101 of the proposed Regulation instead provides that any act, matter or thing that, immediately before the repeal of the Dust Diseases Tribunal Regulation 2013, had effect under that Regulation continues to have effect under the proposed Regulation.
- The notes to 3.9 and 4.9 of Form 2 in Schedule 2 of the current Regulation have not been replicated in the proposed Regulation, as the Acts listed in those notes have now been repealed.

Attachment A: Proposed Dust Diseases Tribunal Regulation 2019