Slater & Gordon
Lawyers

Level 5
44 Market Street
Sydney NSW 2000

Ph: (02) 8267 0618
Fax: (02) 8267 0650

http://www.slatergordon.com.au

Correspondence to:

Lawyer: Joanne Wade
Legal Assistant: Agnieszka Wilk

GPO Box 1584
Sydney NSW 2001

DX 1163 SYDNEY

Direct Ph: 02 8071 2713
Fax: 02 8267 0650

Email: aggie.wilk@slatergordon.com.au

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Director
Justice Policy
Department of Attorney General & Justice
GPO Box 6
Sydney NSW 2001

Dear Sirs

Proposed Dust Diseases Tribunal Regulation 2013

Thank you for the opportunity to make submissions regarding the proposed *Dust Diseases Regulation* 2013 ("2013 Regulation") which implements modifications to the current Claims Resolution Process ("CRP") as contained in the current *Dust Diseases Tribunal Regulation* 2007 ("2007 Regulation").

I note that the proposed modifications to the 2007 Regulation include consideration of submissions made by stakeholders, including this law firm, in response to an Issues Paper released in January 2009.

Need for Modifications

In Slater & Gordon's response to the Issues Paper released in January 2009, we expressed an overall satisfaction with the operation of the CRP, whilst acknowledging that some minor changes to the CRP would improve the overall effectiveness of the scheme.

In making any changes to the CRP this firm expressed the importance of ensuring the proper balancing of the following objectives;

1. Ensuring that complete particulars and information is furnished by Plaintiffs to Defendants so that they understand the case they are to answer at the earliest possible time and;

2. A rapid resolution of claims, particularly those involving Plaintiffs with terminal illnesses and, if necessary, their swift judicial determination.

In our view the CRP as set out in the 2007 regulation was a good attempt to balance the inherent tensions between the objectives above. However, there remain improvements that could be made without making significant changes that would alter this important balance.

Submissions on Proposed Modifications

Overall the proposed modifications go a long way to implementing the minor modifications suggested in this firm's submissions in response to the January 2009 issues paper. However, we believe further improvements could be made.

This submission addresses proposed changes that, in our view, materially alter the way that claims will be litigated and managed under the proposed new CRP. We also re-iterate issues that were

raised in response to the January 2009 paper but have not been addressed in the proposed Regulation.

Application of CRP to Compensation to Relatives Claims

The insertion of proposed clause 19(6) to clarify that Compensation to Relatives Claims need not be an amendment to the original claim and may be commenced separately, as well as the new forms that provide for Compensation to Relatives claims, provide useful clarity in the litigation of these matters under the CRP.

However in our firm's submission, a Directions Hearing by the Dust Diseases Tribunal ("the Tribunal") is the appropriate first step in providing a guideline for the progression of such matters through the CRP. This is in line with our submissions below on the resumption of claims in the CRP following a plaintiff's death. Our submissions in this regard are elaborated on below under that heading.

Removal of Claims from CRP – Medical Evidence

The proposed clause 21(9) which provides that medical evidence can be provided by means of an affidavit setting out medical opinion given orally, is a change that, in our experience is completely necessary to ensure that delays associated with the obtaining of a written medical report, do not adversely affect the right of a terminally ill Plaintiff to have his or her case heard in their lifetime.

It is often near impossible to compel a busy medical practitioner to sit down and take the time to write a report that would constitute evidence for the purposes of removing a claim from the CRP on the basis of urgency.

It is also often a logistical problem, particularly when dealing with medical practitioners in regional or interstate hospitals, to obtain a report as quickly as possible.

It is a far more realistic proposition to have a medical practitioner express an opinion on a Plaintiff's life expectancy orally over the telephone, or in some circumstances, in person.

This proposed change should be implemented.

Resumption of Claims in the Claims Resolution Process Following Plaintiff's Death

The proposed changes to the Regulation that deals with the return of claims to the CRP following a Plaintiff's death are possibly the most significant with regard to the material changes to the work to be undertaken by the lawyers for both Plaintiff's and Defendant's.

Proposed clause 21(8) sets out when a claim is to be returned to the CRP. Essentially a claim is to be returned as a matter of course upon reformulation of the claim as an Estate claim or a dependant's action if no hearing date had been set prior to the original Plaintiff's death.

If a hearing date had been set then an agreement between the parties is necessary before a claim is returned to the CRP.

Proposed clause 22 is a new clause which provides that the Plaintiff's legal representative prepares a proposal for the resumption of the claim in the CRP following either its suspension under proposed clause 19, or removal from the CRP under proposed clause 21.

The conditions upon when a claim is to be returned to the CRP do not cause undue concern, nor does the general proposition that when a Plaintiff dies the urgency of the claim is, to a large extent, obviated.

What does cause concern is the requirement that the Plaintiff's representative be tasked with attempting to reach an agreement with the defendants on a timetable for the further steps to be taken following resumption of the claim.

First, such a proposal seemingly adds quite a deal of extra work to the normal management of a claim.

On the face of clause 22 the Plaintiff's lawyers will be required to:

- Draft quite a detailed document detailing the conduct of the matter to date and the further steps to be take, with any modifications that are deemed necessary (presumably with reasons for why such modifications are necessary; although clause 22 does not specifically state this it appears that it would be necessary for the Registrar to properly consider the proposal);

- Distribute this draft document to the other parties seeking their consent;

- Engage in any necessary further correspondence/communication with the other parties as to any requested changes to the resumption proposal and the reasons for same;

- Finalise the resumption proposal and convey the final document to the Registrar for approval.

The above steps, pursuant to proposed clause 22, will be mandatory in *every claim* where the CRP is resumed.

Even if the parties are unable to agree on a suitable proposal the Plaintiff's lawyers will still be required to go through all of the processes including the drafting of the proposal and the dissemination to other parties with the aim of reaching agreement.

The proposed clause 22 only gives scope for the Tribunal to become involved in determining the further progress of the matter if the parties have been unable to reach agreement prior to the first occasion that the matter is before the Tribunal.

It is possible to envisage circumstances whereby Plaintiff's lawyers will be engaged in extensive work, only for there to be no agreement and the same matters ventilated in totality again before the Tribunal.

This additional work will, of course, generate additional costs on both sides, but particularly to the Plaintiff.

If no agreement on the proposal is reached then these are costs that could arguably be categorised as unnecessary.

Aside from the issue of a timetable, parties are also asked to agree on what steps are undertaken in the progress of a matter, including matters removed from the CRP, and should constitute progress in the CRP.

Again it is possible to envisage some issues with this as lawyers performing their job and seeking to advance their client's position, debate as to whether particulars or information have been provided or adequate replies submitted.

In our submission a more suitable course of action, in returning cases to the CRP, is to have the issue of a further Timetable considered at a Directions Hearing before the Tribunal where the Tribunal is asked to consider, and then makes orders, on specific parts of the CRP that should be complied with in the circumstances of each case.

As stated in the Regulatory Impact Statement, matters will be listed before the Tribunal in any event as the Tribunal will hear the Notice of Motion to substitute the representative of the deceased's estate as Plaintiff.

We do not consider such direction by the Tribunal necessary when dealing with claims in which the CRP has merely been suspended due to the death of a Plaintiff and the claim has never been formally removed from the CRP. It is not controversial or for debate in these claims which parts of the CRP have been complied with, the cases will speak for themselves on this issue.

For this reason we submit it is neither necessary to prepare a proposal for the further progress of matters or have the Tribunal make specific orders on direction where the CRP has merely been suspended.

In our submission, proposed clause 22 **should not be adopted** and instead a clause which provides for an initial Directions Hearing by the Tribunal for claims that are to be resumed in the CRP after having formerly been removed should be adopted in its place.

This clause, in our firm's submission, need not require a claim where the CRP has merely been suspended due to the Plaintiff's death be subject to a Directions Hearing. Such a claim should merely resume where the claim had been suspended, as it already does.

Joinder of Additional Defendants

In our experience, the issue of the joinder of additional defendants in non-malignant cases does raise questions over the proper timetabling of the matter to ensure that any new defendants are afforded an opportunity to properly investigate any claim.

My firm does not take issue with having the CRP suspended for newly joined defendants to 'catch up' in the CRP in non-malignant matters provided issues such as urgency due to shortened prognosis are not present. However, I note that if a non – malignant case is urgent then application could be made to have it removed from the CRP in any event.

Interlocutory Disputes – Tribunal involvement

This is an area where submissions on the 2009 Issues Paper which proposed an extension of the ability of parties to apply to the Tribunal for direction were not adopted. This is on the basis that this would lead to an overuse of such an extension.

This firm acknowledges the risk in giving 'blanket' ability to apply to the Tribunal for directions following breach of the CRP. One can easily envisage that both Plaintiff and Defendant lawyers could see this as an opportunity to dispense with the CRP on the slightest of provocation.

However, this firm submits that some recourse to the Tribunal is essential with regard to malignant claims where there is a risk of a significant breach of the timetable for mediation, beyond the blunt instrument of having the matter removed from the CRP.

This is particularly important, in our experience when litigating claims involving economic loss, which, if not resolved in the Plaintiff's lifetime, usually means the Estate is not able to maintain the claim for such loss.

The effect of the much commented on *Strikwerda* principle which does in a lot of cases prevent dependants from recovering their loss of financial benefit, means that it is crucial that claims involving economic loss are resolved in a Plaintiff's lifetime.

Whilst the nature of malignant dust diseases does not always make this possible, this firm feels that an opportunity to apply to the Tribunal for enforcement of a mediation date will assist in reducing the occasions in which the ability to claim compensation for economic loss is lost through the death of a Plaintiff.

It is our experience that defendant's lawyers have utilised the perceived complexity of a claim for economic loss to unnecessarily delay matters. An order of the Tribunal would more effectively balance the need for particulars and information and the need for resolution of the claim.

This firm respectfully submits that it is necessary, and indeed important to families of people with malignant dust diseases, that changes to the Regulation should include a clause that allows for Parties to apply to the Tribunal for enforcement of the date for mediation where no agreement on said date can be reached by the parties.

Effect of Contributions Assessment

This law firm endorses the proposed clause 53 (9) which clarifies that the contributions assessment ("CA") has no biding effect on the Plaintiff.

This is of particular importance when dealing with the issue of impecunious defendants which are concurrent tortfeasors. If a CA can be argued to be binding on a Plaintiff then this may result in a Plaintiff being entitled to less than the whole amount of a verdict.

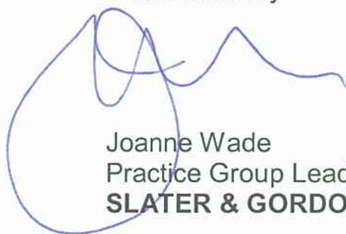
The proposed changes which clarify that a CA does not bind a Plaintiff nor alter the normal principles of causation or joint and several liability should most certainly be adopted.

Further Consultation

Please do not hesitate to contact me should you wish to discuss further any of the issues raised above.

I am happy to meet with a representative from the Department of Attorney General & Justice to discuss the issues raised above.

Yours faithfully



Joanne Wade
Practice Group Leader
SLATER & GORDON