

REGULATORY IMPACT STATEMENT

Dust Diseases Tribunal Regulation 2007



Attorney General's
department of nsw



THE CABINET OFFICE
NEW SOUTH WALES

TITLE OF REGULATORY PROPOSAL:

Dust Diseases Tribunal Regulation 2007

PROPONENTS:

Attorney General's Department and The Cabinet Office.

RESPONSIBLE MINISTER:

Bob Debus
Attorney General,
Minister for the Environment and
Minister for the Arts

RELEVANT ACT:

Dust Diseases Tribunal Act 1989

INTRODUCTION

1.1 What is a Regulatory Impact Statement (RIS)?

The preparation of a RIS is required under the *Subordinate Legislation Act 1989*. This Act provides for regulations to have a limited life.

In most cases, regulations are automatically repealed five years after they are made. 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, and make a decision about whether the regulation should be remade. The results of this review are required to be published in a RIS and submissions invited from the public.

The *Subordinate Legislation Act 1989* does not require a RIS to be prepared where the regulation deals with matters that are machinery in nature, and is not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

1.2 Staged repeal of the *Dust Diseases Tribunal Regulation 2001*

The *Dust Diseases Tribunal Regulation 2001* (the existing Regulation) is scheduled for repeal on 1 September 2007.

The RIS proposes that the existing Regulation be remade under the regulation making powers set out in sections 32H and 34 of the *Dust Diseases Tribunal Act 1989* (the Act). The proposed Regulation repeals and remakes, with certain changes, the existing Regulation. The RIS is concerned with all parts of the Regulation.

1.3 Review process and consultation to date

Substantial amendments were made to the Regulation in 2005 to establish the Claims Resolution Process (CRP). These amendments were made after Mr Laurie Glanfield AM, Director-General, Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General, The Cabinet Office conducted the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims in 2004 and 2005.

The Final Report of the Review recommended that the CRP be reviewed after data in relation to its first 12 months of operation are available. The Current Review has therefore been initiated to act upon this recommendation and is again being conducted by Mr Laurie Glanfield and Ms Leigh Sanderson.

In August 2006, stakeholders who had participated in the 2005 Review were invited to raise issues for consideration as part of the Current Review and the staged repeal process.

An issues paper was prepared to facilitate discussion for the purpose of the Current Review. Submissions were also invited on any other issues relating to the Regulation as part of the five yearly review which is required by the *Subordinate Legislation Act 1989*. The release of the Issues Paper was also advertised in the Daily Telegraph and the Sydney Morning Herald. Again, stakeholders who participated in the 2005 Review

were advised of the release of the Issues Paper. A list of those who made submissions to the Issues Paper is at **Appendix A of the Report**.

The RIS is being released in conjunction with the report of the Current Review (Report of the 2006 Review of the Dust Diseases Claims Resolution Process).

1.4 Submissions

Further information on making submissions can be found at page 3 of the Report of the Current Review.

1.5 Additional Information

Copies of this RIS are available from the Attorney General's Department's website at www.lawlink.nsw.gov.au/lpd, The Cabinet Office website www.cabinet.nsw.gov.au or by telephoning (02) 9228 5543.

Copies of the *Dust Diseases Tribunal Act 1989* and the *Dust Diseases Tribunal Regulation 2001* are accessible online at www.legislation.nsw.gov.au.

2. BACKGROUND

2.1 The Dust Diseases Tribunal

Compensation claims for dust related diseases in NSW are currently resolved by the Dust Diseases Tribunal (the Tribunal). The Tribunal was established by the *Dust Diseases Tribunal Act 1989*. The Tribunal is a specialist court, specifically designed to resolve claims for compensation for personal injuries and death caused by dust related diseases.

To receive compensation from defendants, the plaintiff must establish before the Tribunal a number of matters. These matters include that:

- the plaintiff has a dust related disease;
- the defendant was negligent or in breach of a statutory duty; and
- the plaintiff has suffered damage or loss.

The Act contains a number of provisions designed to assist plaintiffs in pursuing their claims in recognition of the particular difficulties facing persons with dust diseases, particularly the long latency period of such diseases. These include removal of the statute of limitations for dust related conditions, provisions to preserve entitlements general damages in the event of the death of the plaintiff and various evidentiary provisions to assist plaintiffs to establish and bring their claims.

Plaintiffs currently file a statement of claim in the Tribunal to initiate their claim for compensation.

2.2 The Dust Diseases Tribunal Regulation 2001

The *Dust Diseases Tribunal Regulation 2001* (Regulation) as originally enacted dealt with the following main matters.

1. Clause 4 of the Regulation prescribed certain fees to be paid by parties to commence proceedings in the Tribunal (including cross claims), take certain steps in the course of those proceedings (such as filing a notice of motion or issuing subpoenas) and obtain certain documentary material, including transcripts and recordings.
2. The Regulation established certain rules for the payment of fees. Clause 5 exempted the Crown from certain fees. Clauses 6 and 7 postponed until judgment the payment of fees for pro bono cases, claims involving pensioners and claims involving persons assisted by community legal centres. Clauses 9 and 10 respectively specified by whom fees are payable and when.
3. Clause 11 of the Regulation prescribed the percentage (2.5 percent) that must be deducted from amounts paid into the Tribunal and invested, to cover the costs of the Tribunal in managing those funds.

These provisions have been amended since 2001 to increase the amounts required to be paid by way of fees by changes in the Consumer Price Index (CPI). Such changes were made each year before 30 June, other than in 2006.

2.3 *The Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005*

Substantial amendments were made to the Regulation in 2005 following the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims, which was conducted in late 2004 and early 2005. The Terms of Reference for the Review required it to consider the processes for handling and resolving dust diseases compensation claims and identify ways in which legal, administrative and other costs can be reduced within the existing common law system in New South Wales.

The main recommendation of the Final Report for that Review proposed the establishment of the Claims Resolution Process to provide a mechanism to require the parties to exchange information and participate in settlement discussions. The *Dust Diseases Tribunal Act 1989* was amended to include new regulation making powers to facilitate establishment of the CRP. The CRP was established by the *Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005* (the Amending Regulation).

The CRP is set out in Part 4 of the Regulation. The main features of the CRP are that it involves the early exchange of information by the parties, and then compulsory mediation. Multiple defendant claims are subject to a system of Contributions Assessment if apportionment cannot be agreed. Claims which do not resolve through the CRP return to the Tribunal. A more detailed description of the CRP is contained in the Issues Paper (at page 3).

The Amending Regulation made a number of other changes to facilitate the resolution of claims both before the Tribunal and as part of the CRP including:

1. New provisions were introduced to streamline the process for issuing subpoenas. These new provisions were based on the procedures used in the District Court – Part 5 of the Regulation.
2. Provisions relating to the making of offers of compromise were strengthened, so that parties would have stronger incentives to consider seriously settlement offers made by other parties – Part 6 of the Regulation.
3. To ensure that adequate data are available to monitor the operation of the CRP, and the compensation system more generally, legal practitioners are required to report to the Registrar of the Tribunal on the damages and legal and other costs incurred in progressing or defending claims.

The changes made by the Amending Regulation commenced on 1 July 2005.

3. THE REGULATORY PROPOSAL

3.1 Objectives of the Regulatory Proposal

3.1.1 *Description of objectives of the proposed Regulation*

The objectives of the *Dust Diseases Tribunal Regulation 2007* (proposed Regulation) are:

- to ensure that dust diseases claims are resolved effectively and efficiently;
- to encourage early settlement and reduce legal and administrative costs; and
- to ensure that users of the Tribunal system contribute equitably to the costs of operating the Tribunal.

The means by which the proposed Regulation achieves these objectives are:

- in relation to asbestos related claims, providing for a process which:
 - (i) fosters the early provision of information and particulars of claims;
 - (ii) encourages defendants to resolve disputes regarding liability quickly and commercially without delaying resolution of the plaintiff's claim;
 - (iii) provides incentives for offers of compromise to be considered seriously;
 - (iv) includes a structured mediation process; and
 - (v) enables urgent claims to be dealt with by the Tribunal on an expedited basis; and
- providing for fees to be payable in respect of the business of the Tribunal.

3.1.2 *Rationale for the Regulation*

The proposed Regulation is required mainly to address two issues: the efficient resolution of dust diseases claims and Tribunal fees.

Claims Resolution Process

In order to ensure that as much money as possible is available for plaintiffs in asbestos related claims, these claims need to be resolved efficiently and without incurring unnecessary legal, administrative and other costs. To do this, an alternative to resolving these claims through the Tribunal system was identified by the Final Report (that is, the CRP).

The Final Report found that the existing common law system of resolving claims through the Tribunal was not promoting early settlement of claims and that a forum was needed in which early settlement discussions can take place. Data provided to that Review also showed that legal costs in other jurisdictions which had adopted systems to promote early settlement appeared to have significantly lower legal costs than New South Wales.

The Final Report also found that the Tribunal system does not do enough to encourage the open and early disclosure of information between the parties and this inhibits early settlement.

The proposed Regulation, therefore, is required as it provides (as recommended by the Final Report) for a process for claims to be resolved informally outside of the Tribunal

system. The CRP requires parties to exchange information early and requires parties to conduct compulsory mediation (if the claim has not been resolved before mediation).

The Final Report also identified claims involving multiple defendants as a significant cost driver in the system. Not only does the number of parties potentially increase costs but the difficulty in having defendants agree among themselves as to their respective contribution to damages results in more protracted settlement negotiations and possibly ongoing disputes.

The proposed Regulation provides that defendants in a multi-defendant claim must either agree as to their respective contribution to a plaintiff's damages or failing agreement, their contribution will be assessed by an independent Contributions Assessor. While the Regulation allows defendants to challenge a Contributions Assessor's determination, a cost penalty applies if that defendant does not materially improve its position.

The Final Report also found that some defendants may not be taking a realistic approach to settlement, for example, by refusing to admit matters that should not be in dispute and thus incurring substantial additional costs in preparing all issues for the trial, even though the defendant subsequently admits liability either in whole or in part.

The proposed Regulation has incentives for parties to act commercially as a cost penalty will apply if a party disputes a fact and that fact is either proven or admitted and the Tribunal determines that that fact was left unreasonably in dispute.

The Final Report found that the data it was provided with was not sufficient to identify accurately the level or nature of legal, administrative and other costs in the existing common law system. It found that better data collection in the future will greatly assist in assessing and guiding the need for further reform and in informing the parties of unnecessarily high costs so that they can modify their behaviour if they wish to reduce costs.

The proposed Regulation requires legal practitioners to report the costs incurred in resolving asbestos related claims to the Registrar of the Tribunal.

Fees

The Tribunal, however, retains a fundamental role in resolving asbestos related claims. Not all claims are resolved informally through the CRP and urgent claims may need to be resolved by the Tribunal on an expedited basis. Also, plaintiffs need to continue commencing their claim by filing a Statement of Claim with the Tribunal to ensure that entitlements to general damages for the plaintiff and the plaintiff's estate are preserved.

The courts exist both to state the law for the benefit of the community as a whole and to determine the rights of litigants. Like most other Government funded services, the civil courts provide a mixture of private and public benefits, and the Government recognises the need to allocate costs fairly between taxpayers and the parties who use the Tribunal. The prescribed schedule of fees set out in the proposed Regulation is intended to ensure

that users of the Tribunal contribute in a fair and equitable manner a portion of the total cost associated with determining those claims.

3.2 Options to achieve the objectives

Option 1 Do nothing (allow the existing Regulation to lapse)

If the existing Regulation is permitted 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, therefore, would need to be case managed by the Tribunal and if not settled through the Tribunal system, would need to proceed to a hearing.

There would be no legislative prescription of fees for the business of the Tribunal.

Option 2 Remake the existing Regulation in its current form

If the existing Regulation is remade in its current form, the CRP would be retained in the same form in which it was established in July 2005. The key features of the CRP are outlined in section 2.3.

The Government would also be able to recover some of the costs of the Tribunal's business from users through fees payable to the Tribunal.

Option 3 Remake the existing Regulation with the amendments recommended in the Report of the Current Review

Under this option, the Regulation would be remade with the amendments recommended in the Report of the Current Review.

The Report of the Current Review considered that significant changes are not required to the CRP as it has only been operating for 12 months and appears to be operating as intended.

The Report does recommend, however, some minor changes to the Regulation in response to stakeholders' comments, mainly to further encourage defendants to resolve disputes regarding liability quickly and commercially, including amendments to:

- clarify the objectives of the Regulation;
- encourage defendants to release early in the CRP process other defendants that can provide sufficient evidence that they are not liable to reduce costs, and to provide cost sanctions where defendants refuse to release other defendants;
- clarify the procedures for appointment of Contributions Assessors to reduce delay and manage conflicts of interest and to make minor corrections to their determinations;
- clarify that defendants should continue to resolve apportionment disputes even though the plaintiff's claim is suspended (when the plaintiff dies before a claim is resolved) and to extend the contributions assessment provisions to cross claims that remain after a plaintiff's claim has been resolved and to cross claims which are commenced separately from the plaintiff's claim;

- clarify reporting obligations to strengthen future data analysis.

No changes are recommended to the level of fees prescribed by the existing Regulation.

3.3 Option 1 – Do Nothing

3.3.1 *Costs of this option*

Case management by the Tribunal

Parties to asbestos related claims will incur costs in progressing or defending a claim regardless of whether the claim is resolved through the Tribunal's case management system (without being considered as part of the CRP) or through the CRP. The level of costs, however, will differ depending on which process is used.

Allowing the Regulation to lapse would mean that all claims would proceed through the Tribunal. It is not possible to quantify the costs of resolving a claim through the Tribunal system, however, as consolidated data is not available in relation to these claims. That said, it is likely that these costs would be higher than under the other options. This is likely to be the case because if parties are not subject to the CRP, they would not be required to exchange information early, thereby increasing costs as parties conduct their own investigations. There would also be less incentive for defendants to resolve contribution disputes quickly and commercially and therefore, defendants are likely to incur increased costs in defending claims. Costs also are likely to increase as parties will not have access to incentives to consider offers of compromise seriously and parties would have to return to the old process for issuing subpoenas, which is less streamlined and more costly than the process under the existing Regulation.

There is only preliminary data on the costs of finalising a claim through the CRP as the number of claims which have been resolved under the CRP is relatively small. Some information is available, however, from the Tribunal Registry and Form 3 Returns which have been filed with the Tribunal from which an indicative picture can be drawn (the limitations of using these sources of data are described in Chapter 2 of the Issues Paper).

For example, there is indicative data regarding the legal costs for defendants who were parties to claims subject to the CRP which commenced between 1 July 2005 and 30 June 2006. Chapter 2 of the Final Report also contained estimates of the costs in claims involving the former James Hardie subsidiaries. When the legal costs for defendants that were subject to the CRP (for claims commenced between 1 July 2005 and 30 June 2006) are compared to the data collated in Chapter 2 of the Final Report, there appears to be a substantial reduction in costs for defendants that defended claims through the CRP. Allowing the Regulation to lapse would effectively remove the CRP, and would therefore increase costs.

Allowing the Regulation to lapse may also result in claims being resolved over a longer period of time than if they were subject to the CRP. The CRP aims to encourage early settlement of dust diseases claims by promoting the early exchange of information and providing incentives to defendants to resolve disputes commercially. A number of

submissions made to the Current Review state that their experience is that claims subject to the CRP have resolved earlier than claims that were managed by the Tribunal under the previous system, and that the streamlined process under the CRP facilitates the early resolution of claims. It has not, however, been possible to verify this with data.

Fees

If the existing Regulation is allowed to lapse, the power of the Tribunal to collect court fees would be doubtful and the Government, therefore, would not be able to recover a proportion of the costs of the Tribunal's business from users of the Tribunal. This would have a large impact on the revenue of the Tribunal and the Government would need to find alternative funding to recover these costs.

If these costs are not recovered from users of the Tribunal, inevitably, they would need to be subsidised by other sectors of the community, 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 would adversely affect the level of service provided by the Tribunal and this in turn could lead to delays in progressing claims which could prejudice the parties involved (particularly the plaintiff). There would also be no capacity to fund further improvements to the administration of the Tribunal.

A lack of court fees could also encourage frivolous and vexatious claims to be made in the Tribunal. This would impair the Tribunal's ability to deal with bona fide claims expeditiously.

3.3.2 Benefits of this option

Case management by the Tribunal

It might be argued that there is a benefit to allowing the Regulation to lapse as all parties involved in asbestos related claims will have access to the Tribunal to resolve their claims, without being subject to the CRP first. Less regulation of the parties' resolution of disputes might therefore be seen as a benefit of this option.

The existing Regulation, however, already makes provision for the Tribunal to deal with appropriate cases. The existing Regulation allows urgent claims to be resolved by the Tribunal (without having to complete steps in the CRP) and allows a claim which involves a test case to be resolved by the Tribunal after the exchange of information required by the CRP. Also, if a claim is not resolved under the CRP, it will be returned to the Tribunal system for resolution.

Another benefit of returning all claims to the Tribunal for resolution may be the legal precedents which are established with Tribunal judgments. This benefit may be marginal, however, as even without the CRP, the overwhelming majority of claims do

not require determination by the Tribunal. Also, test cases can be resolved by the Tribunal even under the CRP and claims which are unsuccessful at mediation will be returned to the Tribunal for resolution.

This option would allow the Tribunal to play a greater role in the resolution of claims than is currently the case under the CRP. Some may perceive this to be a benefit as the system would have more flexibility, for example, by allowing parties to seek orders from the Tribunal and allowing the Tribunal to set timetables for the resolution of matters. However, reverting to case management by the Tribunal may also result in plaintiffs' claims being resolved over a longer period of time and at more cost than is currently the case under the CRP (see section 3.3.1).

Fees

The Tribunal may save some administrative costs by not having to collect court fees, although this benefit is outweighed by the loss of revenue from not collecting court fees.

3.4 Option 2 – Remake the Regulation in its current form

3.4.1 *Costs of this option*

Current CRP

If the existing Regulation is remade in its current form, claims would be subject to the CRP.

As stated in section 3.3.1, there is only preliminary data at this stage on the costs of finalising a claim through the CRP. Although resolving a claim through the CRP does impose costs on parties to a claim, it is likely, however, that these costs would be lower than option 1 (resolving claims through the Tribunal system) for the reasons given in section 3.3.1.

The Report of the Current Review has made some recommendations to improve the operation of the CRP. If these recommendations are implemented, as proposed under option 3, it is envisaged that the CRP will operate more efficiently and effectively and at a lower cost than is currently the case. If, on the other hand, the Regulation is remade in its current form, parties will not benefit from the proposed improvements to the CRP.

Fees

There will also be administrative costs involved in collecting fees payable to the Tribunal.

3.4.2 *Benefits of this option*

Current CRP

The main benefit of this option, which would retain the CRP, 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. Stakeholders have also suggested that the CRP has facilitated the earlier resolution of claims, as compared to case management by the Tribunal. Under a continuation of the CRP, the early resolution of claims could be expected to improve over time as parties become accustomed to the system.

Fees

The fees collected by the Tribunal would assist the Tribunal to meet some of its operational costs.

3.5 Option 3 – Remake the Regulation with changes in form

3.5.1 *Costs of this option*

CRP with changes

Under this option, the CRP would be retained but with some changes to the process. The costs of this option to parties to a claim are likely to be similar to option 2 (see section 3.4.1).

This option may in fact entail less cost than option 2, however, as the proposed Regulation contains changes to facilitate even more efficient resolution of claims through the CRP (see the description of changes in section 3.2).

Fees

Like option 2, there will also be administrative costs involved in collecting fees payable to the Tribunal.

3.5.2 *Benefits of this option*

CRP with changes

As claims are likely to be resolved even more efficiently, the cost of resolving claims is likely to be less than resolving claims through the Tribunal system and resolving claims under the current CRP.

In particular, it is possible that defendant's costs in resolving disputes regarding liability will be reduced. The proposed Regulation has further incentives to encourage defendants to resolve these disputes quickly and commercially as cost sanctions will apply if defendants do not agree that a particular defendant is not liable for the purpose of a contributions agreement or assessment and that defendant is later found to have no liability. The proposed Regulation will also clarify that defendants should continue to assess their positions and proceed to apportionment dispute even though the plaintiff's claim being suspended (that is, when the plaintiff dies before a claim is resolved).

The cost for defendants to finalise cross claims may also be reduced as the proposed Regulation will extend the contributions assessment provisions to cross claims that remain after a plaintiff's claim has been resolved and to cross claims which are commenced separately from the plaintiff's claim. Currently, cross claims in these circumstances would not be subject to the CRP and the Tribunal would need to case manage these claims.

In addressing some concerns identified by the Current Review and in clarifying the operation of some procedures under the CRP, it is envisaged that the CRP will operate more efficiently and effectively and that users of the CRP will be able to proceed with more certainty in resolving claims under the CRP.

Fees

Like option 2, the fees collected by the Tribunal would also assist the Tribunal to meet some of its operational costs.

4 Assessment of Options

Option 3 (the proposed Regulation) should be supported as it is likely to impose the least costs on parties to resolve asbestos related claims and may improve the speed with which such claims are resolved. Therefore, from the options available, it is the option most likely to ensure that as much money as possible is available to pay compensation to plaintiffs.

Option 3 should also be supported so that the Tribunal has the power to collect fees, which are necessary to meet some of the Tribunal's operational costs.