



New South Wales

# Dust Diseases Tribunal Regulation 2007

under the

Dust Diseases Tribunal Act 1989

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Dust Diseases Tribunal Act 1989*.

Attorney General

## Explanatory note

The object of this Regulation is to repeal and remake the *Dust Diseases Tribunal Regulation 2001*, which includes provisions introduced in 2005 that established a claims resolution process for asbestos-related claims.

The Regulation is to be remade in substantially the same form with minor changes to the claims resolution process for asbestos-related claims, including changes:

- (a) to state the objectives of the claims resolution process for claims involving asbestos-related conditions, and
- (b) to provide additional incentives for defendants to agree that a particular defendant is not liable on a claim and should be released, and
- (c) to extend the contribution assessment provisions to new classes of claims, and
- (d) to alter the procedures for the referral of apportionment matters to Contributions Assessors, including by providing for objection to the referral of a matter to a Contributions Assessor who has acted for any of the defendants in the 12 months before referral, and
- (e) to allow defendants to file a joint reply to a claim if the defendants are related bodies corporate with the same legal representation, and
- (f) to provide for the correction of a clerical mistake or an error arising from an accidental slip or omission in a determination of a Contributions Assessor, and
- (g) to limit the requirement to provide the Registrar with information about finalised claims to claims in respect of asbestos-related conditions, and

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Explanatory note

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- (h) to expand the information required to be provided by legal practitioners about finalised claims, and
- (i) to make consequential or ancillary changes.

This Regulation is made under the *Dust Diseases Tribunal Act 1989*, including section 32H.

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## **Dust Diseases Tribunal Regulation 2007**

under the

Dust Diseases Tribunal Act 1989

### **Part 1 Preliminary**

#### **1 Name of Regulation**

This Regulation is the *Dust Diseases Tribunal Regulation 2007*.

#### **2 Definitions**

In this Regulation:

**corporation** has the same meaning as in section 57A of the *Corporations Law*.

**initiating process**, in relation to any proceedings, means the document by the filing of which the proceedings are commenced.

**the Act** means the *Dust Diseases Tribunal Act 1989*.

#### **3 Notes**

Notes included in this Regulation (other than those in Schedules 1 and 2) do not form part of this Regulation.

## **Part 2    Fees**

### **4    Fees chargeable**

- (1) The fees to be taken in respect of the business of the Tribunal are the fees set out in Schedule 1.
- (2) However, a reference in that Schedule to a corporation does not include a reference to a corporation that produces evidence, satisfactory to the registrar:
  - (a) that its turnover, in the financial year of the corporation immediately preceding the financial year in which the fees are to be taken, was less than \$200,000, or
  - (b) if the corporation has not been in existence for a full financial year—that its turnover in its first financial year is likely to be less than \$200,000.

### **5    Fees not chargeable to the Crown**

- (1) No fee is chargeable to the Crown or any other person with respect to any document or service filed or provided:
  - (a) for the Government of New South Wales, or
  - (b) for any New South Wales Government Department, or
  - (c) for any statutory body whose expenditure is paid out of the Consolidated Fund.
- (2) The registrar may require evidence to be furnished for the purpose of deciding whether a statutory body's expenditure is paid out of the Consolidated Fund.
- (3) This clause does not prevent the recovery from any person by the Crown or by any such statutory body of any such fee that, had it been paid, would have been recoverable from that person.

### **6    Pro bono cases**

- (1) The taking of a fee for the filing of any initiating process (or a cross-claim) on behalf of a pro bono party to proceedings is to be postponed until judgment has been given in the proceedings.
- (2) The fee is not to be taken at all, or if taken must be remitted, if in relation to the claim (or cross-claim):
  - (a) judgment is against that party, or
  - (b) judgment is in favour of that party, but damages are not awarded (or only nominal damages are awarded) in his or her favour and costs are not awarded in his or her favour.



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- (3) The registrar must not refuse to file or issue any document relevant to proceedings merely because, in accordance with this clause, a fee has not been taken for the filing of any initiating process (or cross-claim) on behalf of a *pro bono* party to those proceedings.
- (4) For the purposes of this clause, a party is a *pro bono party to proceedings* if:
- (a) he or she is being represented under the pro bono scheme of the Law Society of New South Wales or the pro bono scheme of the New South Wales Bar Association, and
  - (b) a solicitor (in the case of the Law Society's scheme), or a barrister (in the case of the Bar Association's scheme), acting for the party certifies in writing to the registrar, with whom the initiating process (or cross-claim) is lodged on behalf of the party that the party is being so represented.

#### **7 Postponement of fees in certain other cases**

- (1) The taking of any fee in respect of the business of the Tribunal in relation to proceedings involving a pensioner party or legally assisted party is, if the fee is payable by the pensioner party or legally assisted party, to be postponed until judgment has been given in the proceedings.
- (2) The fee is not to be taken at all, or if taken must be remitted, if:
- (a) judgment in the proceedings is against the pensioner party or legally assisted party, or
  - (b) judgment is in favour of the pensioner party or legally assisted party, but damages are not awarded (or only nominal damages are awarded) in his or her favour and costs are not awarded in his or her favour.
- (3) The registrar must not refuse to file or issue any document relevant to proceedings merely because, in accordance with this clause, a fee in respect of any business of the Tribunal has not been taken on behalf of a pensioner party or legally assisted party to those proceedings.
- (4) For the purposes of this clause:
- (a) a party to proceedings is a *pensioner party* if he or she is the holder of any card issued by the Commonwealth Government that entitles the holder to Commonwealth health concessions, and
  - (b) a party to proceedings is a *legally assisted party* if he or she is receiving legal assistance through a complying community legal centre within the meaning of section 240 of the *Legal Profession Act 2004*.

**8 Persons by and to whom fees payable**

- (1) Any fee charged under this Regulation for any document or service is payable by the person at whose request the document is filed or the service rendered to the registrar.
- (2) If a document is filed or a service rendered at the request of a person acting as an agent for another person, each of those persons is jointly and severally liable for payment of any such fee.
- (3) A reference in Schedule 1 to a fee payable in the case of a corporation is a reference to a corporation on whose behalf a request is made to file a document or render a service.

**9 First directions hearing fee**

- (1) A first directions hearing fee in relation to any proceedings is payable:
  - (a) except as provided by paragraph (b), by the plaintiff, or
  - (b) if the Tribunal makes any order as to the payment of the fee, by the parties and in the proportions so ordered.

**Note.** This fee is recoverable as a disbursement and may be the subject of an award of costs.

- (2) If a person is acting as agent for a party to any proceedings, the person and the party are jointly and severally liable for payment of the first directions hearing fee.
- (3) A first directions hearing fee becomes payable:
  - (a) immediately after a date is allocated for the first directions hearing in the Tribunal, as referred to in clause 65 (Non-urgent claims to be subject of directions hearing), or
  - (b) immediately after a date is allocated for the first directions hearing in the Tribunal for a claim determined to be urgent by the Tribunal on application by the claimant under Division 2 of Part 4, or
  - (c) when the Tribunal or Registrar notifies the parties in writing of the Tribunal's intention to allocate a date for a first directions hearing for the proceedings,whichever occurs first.
- (4) A first directions hearing fee is not payable in relation to any hearing for the purpose of the Tribunal making orders to give effect to any agreement or arrangement between the parties as to settlement of the claim or cross-claim.

**10 Other provisions relating to fees**

- (1) A fee charged under this Regulation becomes payable when the document concerned is filed or the service concerned is rendered.
- (2) However, the registrar, when requested to file a document or render a service:
  - (a) may require any fee for the document or service to be paid before the document is filed or the service rendered, or
  - (b) may, by order in writing, direct that the whole or any part of any such fee be postponed, waived or remitted, subject to such conditions (if any) as the registrar thinks fit to impose.
- (3) The registrar may delegate his or her power under this clause to direct that the whole or any part of any fee be postponed, waived or remitted to any person holding office as, or appointed to act temporarily as, deputy registrar of the Tribunal.
- (4) A reference in subclause (2) to the registrar includes a reference to a person to whom the registrar delegates his or her powers in accordance with this clause.
- (5) This clause is subject to clauses 6 and 7.

Clause 11      Dust Diseases Tribunal Regulation 2007

Part 3          Investment

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## **Part 3    Investment**

### **11    Percentage of interest etc payable to Treasurer**

The registrar must deduct 2.5% of any amount received by way of interest or dividends on funds that are paid to the Tribunal and invested, in accordance with the *Supreme Court Rules 1970* (as applied by the *Dust Diseases Tribunal Rules*), and must pay any amount so deducted to the Treasurer for payment into the Consolidated Fund.

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## Part 4 Claims resolution process for asbestos-related conditions

### Division 1 Preliminary

#### 12 Definitions

(1) In this Part:

***asbestos-related condition*** means a dust-related condition that is asbestosis, asbestos induced carcinoma, an asbestos-related pleural disease or mesothelioma.

***business day*** means a day that is not a Saturday, a Sunday or a public holiday throughout New South Wales.

***claim*** means a claim in proceedings in the Tribunal brought or to be brought under section 11 of the Act or transferred under section 12 of the Act.

***claims resolution process*** means the provisions of this Part.

***compensation to relatives claim*** means a claim on a cause of action under the *Compensation to Relatives Act 1897*.

***Contributions Assessor*** means a Contributions Assessor appointed under Division 5 (Apportionment).

***first defendant*** on a claim means the defendant first named in the plaintiff's statement of claim.

***malignant claim*** means a claim in respect of asbestos induced carcinoma or mesothelioma (whether or not the claim is also in respect of any other dust-related condition).

***mediation*** means mediation under this Part.

***non-malignant claim*** means a claim in respect of an asbestos-related condition that is not asbestos induced carcinoma or mesothelioma (and that is not a malignant claim).

***original defendant*** on a claim means a defendant on the claim before the joinder of any other person as a defendant and does not include any defendant to a cross-claim on the claim.

***party*** to a claim includes any cross-defendant on the claim.

***Registrar*** means the Registrar of the Tribunal.

***required information exchange*** means the service on each defendant or cross-defendant of the statement of particulars of the claim against the defendant or cross-defendant and the service by each defendant or cross-defendant of the defendant's or cross-defendant's reply to the claim or cross-claim, as required under this Part.

Clause 13            Dust Diseases Tribunal Regulation 2007

Part 4                Claims resolution process for asbestos-related conditions

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*rules of court* means rules under section 33 of the Act or uniform rules under the *Civil Procedure Act 2005* applicable to proceedings on a claim.

*single claims manager* means a single claims manager as provided for by Division 7.

- (2) Unless the parties otherwise agree, the period from the beginning of 25 December until the end of 9 January next following is to be ignored for the purpose of reckoning the time fixed by this Regulation for the doing by a party of any act in connection with the claims resolution process.
- (3) Subclause (2) does not prevent any business in connection with the claims resolution process from being conducted during the period referred to in that subclause.

### **13 Objectives of claims resolution process**

The objectives of the claims resolution process are as follows:

- (a) to foster the early provision of information and particulars concerning claims in respect of asbestos-related conditions,
- (b) to encourage early settlement of those claims,
- (c) to reduce legal and administrative costs in connection with those claims.

### **14 Part applies only to asbestos-related claims**

This Part applies to a claim in respect of an asbestos-related condition that is made by the person who is or was suffering from the asbestos-related condition (or by a person claiming through that person, including a compensation to relatives claim) or that is a cross-claim by a defendant on such a claim.

### **15 Service of statement of particulars on last of original defendants**

A reference in this Part to the service of the plaintiff's statement of particulars on the last of the original defendants is a reference to service under Division 3 of the plaintiff's statement of particulars:

- (a) if there is only one original defendant—on that defendant, or
- (b) if there is more than one original defendant—on the last of the original defendants to be served.

### **16 Transitional**

- (1) This Part applies only to the following claims:
  - (a) claims commenced by statement of claim filed on or after 1 July 2005,

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- (b) claims commenced by statement of claim filed before 1 July 2005 (*current claims*) but only if:
- (i) a hearing date for the claim has not been set before 1 July 2005 (but not if each of the parties to the claim has notified the Registrar in writing that the parties have agreed that this Part is not to apply to the claim), or
  - (ii) all of the parties to the claim have agreed that this Part is to apply to the claim.
- (2) If this Part applies to a current claim, the plaintiff must (when the plaintiff is ready to proceed) provide each defendant and cross-defendant with a proposal in writing (a *current claim proposal*) as to how this Part should apply to the claim.
- (3) The plaintiff's current claim proposal is to identify the following:
- (a) the steps already taken by the parties in connection with the claim that should be taken to constitute performance of particular steps in the claims resolution process,
  - (b) the point in the claims resolution process that the claim should be regarded as having reached,
  - (c) any further steps that need to be taken by the parties to bring the claim to a particular point in the claims resolution process (including a timetable for completing any required steps),
  - (d) any modifications to the timetable for completion of the claims resolution process that may be necessary to enable completion of the claims resolution process, while giving effect to the maximum extent possible to the timetable for completion of that process as set out in this Part.
- (4) The parties must act reasonably in trying to reach agreement on the plaintiff's current claim proposal.
- (5) If the parties have not reached agreement within 10 business days after the plaintiff's current claim proposal is provided to the last defendant or cross-defendant to be provided with the proposal, any party may notify the Registrar that agreement has not been reached and the Registrar is then to determine the matters in dispute.
- (6) The matters agreed by the parties or determined by the Registrar for the purposes of a current claim proposal have effect for the purpose of varying the requirements of this Part as to the time within which any

relevant aspect of the claims resolution process must be completed, and this Part is varied accordingly in its application to the current claim concerned.

**Note.** Clause 22 (Removal of certain claims from claims resolution process) provides for claims that are determined to be urgent to be removed from the claims resolution process. This is available for current claims.

### **17 Procedural law of the State**

The provisions of this Part form part of the procedural law of the State for the purposes of the determination of any claim.

## **Division 2 Claims subject to the claims resolution process**

### **18 Which claims are subject to the claims resolution process**

- (1) A claim to which this Part applies is subject to the claims resolution process once the claim is filed.

**Note.** Clause 22 provides for some claims to be removed from the claims resolution process.

- (2) A claim remains subject to the claims resolution process:
- (a) until the claim is settled by mediation or otherwise and the Tribunal makes an order to give effect to the settlement, or
  - (b) if the claim is not settled by the time mediation is concluded—until mediation is concluded and clause 37 (Unsuccessful mediation—agreement as to issues in dispute) has been complied with.
- (3) The parties to a claim can agree to extend the period for which the claim remains subject to the claims resolution process.
- (4) If a significant change in the medical condition of the plaintiff occurs after the claim is filed, the parties to the claim can agree (on one or more occasions) to suspend the claims resolution process for a period of up to:
- (a) 10 business days for malignant claims, or
  - (b) 20 business days for non-malignant claims,
- with the result that during any such suspension time does not run for the purposes of any period within which anything is required to be done by a party under the claims resolution process.

### **19 Effect of claim being subject to claims resolution process**

- (1) While a claim is subject to the claims resolution process:
- (a) the parties to the claim must comply with the provisions of this Part, and



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- (b) proceedings in the Tribunal to determine the claim are deferred and the claim is not subject to case management by the Tribunal, and
  - (c) the claim is not subject to the provisions of rules of court, or any direction or order of the Tribunal under a provision of the Act, any other Act or rules of court, as to any steps to be taken in proceedings on the claim or for the referral of the claim for alternative dispute resolution, such as mediation.

**Note.** Clause 22 provides for the removal of certain claims from the claims resolution process.

- (2) This clause does not affect the application of the practice and procedures of the Tribunal with respect to:
  - (a) the service of the statement of claim on the defendant, including the service of the statement of claim outside Australia, or
  - (b) the amendment of the statement of claim to join a party before the plaintiff's statement of particulars is served, or
  - (c) the amendment of the statement of claim to join a party to the claim at the request of the plaintiff where the Tribunal is satisfied that it is necessary to do so to preserve the plaintiff's cause of action, or
  - (d) the amendment of the statement of claim to add a compensation to relatives claim after the death of the plaintiff, or
  - (e) the making of cross-claims, except to the extent of any inconsistency with clause 25 (Cross-claims by defendant), or
  - (f) the making of orders to give effect to any agreement or arrangement between the parties, whether resulting from an offer of compromise or otherwise, or
  - (g) the issue and return of subpoenas, or
  - (h) the granting of leave to commence an action under section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*, or
  - (i) the amendment of the statement of claim to discontinue proceedings against a party.

**Note.** If a claim is not settled through the claims resolution process, proceedings in the Tribunal can proceed or the parties can decide to continue with attempts to settle the claim.

## **20 Suspension of claims resolution process if plaintiff dies**

- (1) If the plaintiff dies, the claims resolution process is suspended until:
  - (a) the Tribunal amends the statement of claim to add a compensation to relatives claim, or

- (b) the claimant notifies the parties to the claim that the matter is ready to proceed,  
with the result that during that suspension time does not run for the purposes of any period within which anything is required to be done by a party under the claims resolution process.
- (2) If the plaintiff dies, the person who represented the plaintiff in the proceedings or (if the plaintiff was not represented) the plaintiff's legal personal representative must notify each defendant and the Registrar in writing of the plaintiff's death as soon as practicable after becoming aware of the plaintiff's death (unless the death occurred before the commencement of this subclause).
- (3) The suspension of the claims resolution process under this clause does not apply to the operation of Division 5 (*the apportionment process*) and the apportionment process is to proceed, unless all the defendants agree that the apportionment process is to be suspended and the Registrar has been notified in writing of that agreement within 3 business days after the defendants received notice of the plaintiff's death or within 10 business days after the commencement of this subclause if the plaintiff died before that commencement.
- (4) It is the responsibility of the single claims manager or (if there is no single claims manager) the first defendant to notify the Registrar in writing (within the time required by subclause (3)) of an agreement by all the defendants that the apportionment process is to be suspended.
- (5) If the plaintiff died before the commencement of this subclause but the apportionment process proceeds pursuant to this clause, Division 5 applies for that purpose as if a requirement that anything be done by a party within a specified period after service of the plaintiff's statement of particulars were a requirement that the thing be done within that specified period after 26 March 2007.
- (6) Subclauses (2)–(6) commence on 12 March 2007.

## 21 Service of documents

- (1) Rules 10.5–10.19, 10.21 and 10.22 of the *Uniform Civil Procedure Rules 2005* apply to and in respect of the service of documents for the purposes of this Part in the same way as they apply to and in respect of the service of documents for the purposes of proceedings in the Tribunal.
- (2) In the case of a defendant who is outside Australia, any document to be served for the purposes of this Part may be served on the defendant:
- (a) in the same manner as that in which the relevant statement of claim was served on the defendant, or

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- (b) in such other manner as the parties may agree.

## 22 Removal of certain claims from claims resolution process

- (1) A claim is removed from (and is therefore not subject to) the claims resolution process if:
- (a) the Tribunal determines, on application by the claimant and on the basis of medical evidence presented for the claimant, that the claim is urgent, or
  - (b) all the parties to the claim agree, following the required information exchange, that the claim should not be the subject of the claims resolution process and notify the Registrar accordingly, or
- Note.** For example, the parties may consider that the claim raises novel issues (in the nature of a “test case”) that are unlikely to be resolved by the claims resolution procedures.
- (c) the Tribunal determines on application by a party (*the applicant*) that the claim should be removed from the claims resolution process because another party to the claim has failed to comply with a requirement of the claims resolution process and that failure has resulted in substantial prejudice to the applicant or substantial delay.
- (2) A claim is **urgent** only if the Tribunal is satisfied that, as a result of the seriousness of the claimant’s condition, the claimant’s life expectancy is so short as to leave insufficient time for the requirements of the claims resolution process to be completed and the claim finally determined by the Tribunal, if required, on an expedited basis.
- (3) If a non-malignant claim would not be urgent if it were to be treated for the purposes of the claims resolution process as a malignant claim, the Tribunal must (instead of determining that the claim is urgent) order that the claim is to be treated as a malignant claim for the purposes of the claims resolution process.
- (4) A non-malignant claim is also to be treated as a malignant claim for the purposes of the claims resolution process if all the parties to the claim agree that the claim should be treated as a malignant claim and notify the Registrar accordingly.
- (5) An application for a determination by the Tribunal that a non-malignant claim is urgent must not be made until the parties have used their best efforts to reach agreement as provided by subclause (4).

- (6) The Tribunal is not to determine that a claim should be removed from the claims resolution process because a party to the claim has failed to comply with a requirement of the claims resolution process unless the Tribunal is satisfied that the failure is continuing and that the party has been notified of and requested to remedy the failure.

**Note.** A claim that is removed from the claims resolution process by agreement of the parties is required under clause 65 (Non-urgent claims to be subject of directions hearing) to be referred to the Tribunal for directions.

- (7) If a claim is removed from the claims resolution process because the Tribunal determines under this clause that the claim is urgent, the Tribunal must consider whether to order the application to the claim of the provisions of Divisions 4 (Compulsory mediation) and 5 (Apportionment), and:

- (a) if the Tribunal does so order:
- (i) those provisions apply as if the claim were still subject to the claims resolution process (subject to any modifications ordered under subparagraph (ii)), and
  - (ii) the Tribunal may, in ordering the application of those provisions to the claim, order that those provisions apply subject to specified modifications, and
  - (iii) the Tribunal must by its order specify the period within which mediation or apportionment under the applied provisions must be completed, or
- (b) if the Tribunal does not so order despite an application for such an order by a party to the claim, the Tribunal must give its reasons for not so ordering.

### **Division 3 Required information exchange**

#### **23 General obligations to update documents and information**

A party to a claim who is required by a provision of this Part to provide documents or information to another party by way of a statement of particulars or reply must, while the claim is subject to the claims resolution process, update or notify any necessary changes to the documents and information provided (as and when any relevant new or changed documents or information becomes available).

#### **24 Claimant to provide statement of particulars of claim**

- (1) The plaintiff on a claim must file and serve on each original defendant (with the plaintiff's statement of claim) a statement of particulars of the plaintiff's claim.

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- (2) The plaintiff's statement of particulars:
- (a) must be in the form set out in Form 1 in Schedule 2, and
  - (b) must specify the information that is required to complete that form, and
  - (c) must be accompanied by such documents and information as that form requires (and is not required to be accompanied by any other documents or information).
- (3) If documents or information required to accompany the plaintiff's statement of particulars is not available to the plaintiff when the statement of particulars is filed and served:
- (a) the statement must indicate this, and
  - (b) the plaintiff must provide the documents or information to each original defendant as and when they become available to the plaintiff.

**Note.** The plaintiff should not obtain witness statements and expert or other reports before filing the statement of particulars. The defendant will indicate under clause 26 (7) whether further information is required, having regard to the issues that remain in dispute.

- (4) The plaintiff's statement of claim in the proceedings is not properly served on the defendant until the statement of particulars has been served on the defendant.
- Note.** Rules of court provide for the period for which a statement of claim remains valid for service after it is filed.
- (5) Within 5 business days after serving the plaintiff's statement of particulars on a defendant the plaintiff must notify the Registrar and each of the original defendants of the date on which the statement of particulars was served on the last of the original defendants.
- (6) A defendant is entitled to be informed by the Registrar, on request to the Registrar, of the date of service of the plaintiff's statement of particulars on the last of the original defendants.
- (7) This clause does not apply if the plaintiff's statement of claim is filed in conjunction with an application by the claimant under clause 22 (Removal of certain claims from claims resolution process) for a determination by the Tribunal that the claim is urgent and that application results in the making of such a determination by the Tribunal.

**Note.** When subclause (7) applies, the statement of claim will be regarded as having been served when it was actually served and a statement of particulars is not required.

**25 Cross-claims by defendant**

- (1) An original defendant in proceedings must make any cross-claim as soon as practicable after being served with the plaintiff's claim in the proceedings.
- (2) Cross-claims by all defendants (including original defendants) must be filed and served within:
  - (a) 10 business days for malignant claims, or
  - (b) 30 business days for non-malignant claims,after service of the plaintiff's statement of particulars on the last of the original defendants.
- (3) An original defendant may request the plaintiff to extend the time for filing and serving a cross-claim but can only make such a request before the end of the period within which a cross-claim is required to be filed and served.
- (4) The time for filing and serving a cross-claim cannot be extended in total by more than:
  - (a) 10 business days for malignant claims, or
  - (b) 20 business days for non-malignant claims.
- (5) A plaintiff is required to consent to a request to extend the time for filing and serving a cross-claim unless the plaintiff is able to demonstrate that the extension requested would result in substantial prejudice to the claimant.

**Note.** A failure by the plaintiff to consent despite being required to do so constitutes a failure to comply with a provision of this Part and may be taken into account by the Tribunal in making an order for the payment of costs.
- (6) If the time for filing and serving a cross-claim is extended, the original defendant must notify the Registrar in writing of the extension without delay (but only if the cross-claim is filed and served after the commencement of this subclause). This subclause commences on 12 March 2007.
- (7) An extension of the time for filing and serving a cross-claim operates to extend (for the period of the extension) all subsequent time periods within which anything is required to be done under the claims resolution process in respect of the claim concerned.
- (8) If a person is identified as the insurer of a defendant only after expiry of the period within which a cross-claim is required under this clause to be filed and served on the insurer:
  - (a) a cross-claim may, with the consent of the plaintiff, be filed and served on that insurer after the expiry of that period, and

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- (b) the plaintiff must not refuse that consent unless the plaintiff can establish that the joining of the insurer will result in substantial prejudice to the plaintiff, and
  - (c) once joined, the insurer is entitled to update the defendant's reply, and
  - (d) the joining of the insurer does not affect the running of any time period for the purposes of the claims resolution process.
- (9) A cross-claim that is not filed and served as required by this clause cannot be made in the proceedings (but without affecting any right of a defendant to pursue the claim in separate proceedings commenced by the defendant).
- (10) A defendant must serve a copy of the plaintiff's statement of claim and statement of particulars with the defendant's cross-claim. A defendant's cross-claim is not properly served until a copy of the plaintiff's statement of claim and statement of particulars is served.
- (11) A defendant's cross-claim must notify the cross-defendant of the date on which the plaintiff's statement of particulars was served on the defendant (or on the last of the original defendants on the claim to be served if there was more than one original defendant) as required by this Division.

## **26 Defendant to provide reply to claim**

- (1) A defendant in proceedings must file and serve on the claimant and each other party to the claim (including other defendants) a reply to the claim against the defendant.
- (2) The defendant's reply:
  - (a) must be in the form set out in Form 2 in Schedule 2, and
  - (b) must specify the information that is required to complete that form, and
  - (c) must be accompanied by such documents and information as that form requires (and is not required to be accompanied by any other documents or information), and
  - (d) in the case of the reply served on the plaintiff, need not specify the information required by Part 8 (Apportionment of liability among defendants) of that form.
- (3) If information or documents required to accompany a defendant's reply is not available to the defendant when the reply is filed and served:
  - (a) the statement must indicate this, and

- (b) the defendant must provide the documents or information to the claimant and each other party as and when they become available to the defendant.
- (4) A reply by an original defendant must be served within:
  - (a) 20 business days for malignant claims, or
  - (b) 30 business days for non-malignant claims, after the claim is served on the defendant.
- (5) A reply by a defendant other than an original defendant must be served within:
  - (a) 30 business days for malignant claims, or
  - (b) 60 business days for non-malignant claims, after service of the plaintiff's statement of particulars on the last of the original defendants.
- (6) If the plaintiff's claim alleges that the asbestos-related condition with which the claim is concerned occurred in the course of employment, the plaintiff's statement of particulars can require an early response on that issue from a defendant who is alleged to be an employer, in which case the defendant must, within 10 days after the claim is served on the defendant, provide the response and attach the evidence required by 3.1–3.3 of Part 3 (Response to claim relating to employment) of Form 2 in Schedule 2.
- (7) A defendant's reply must indicate whether the defendant requires more information from the plaintiff about the plaintiff's claim and the nature of that information, and must indicate whether the defendant requires an opportunity to inspect any premises or place.
- (8) The plaintiff must comply with any reasonable requirement of the defendant for more information concerning the plaintiff's claim (whether made as part of the defendant's reply or subsequently) and must provide that information as soon as practicable and in any case no later than 5 business days before the start of mediation.
- (9) If 2 or more defendants to a claim are related bodies corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) and represented in the proceedings by the same legal practitioner or firm of legal practitioners, those defendants may file and serve a joint reply to the claim (instead of each filing and serving individual replies) and are not required to serve the joint reply on each other.
- (10) In this clause:
  - claim** includes a cross-claim.
  - defendant** includes a cross-defendant.



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**27 Requests for more information about dispute**

- (1) If a defendant does not admit an issue, the plaintiff may request the defendant to provide the plaintiff with information not already provided to the plaintiff on which the defendant proposes to rely in respect of that issue, including documentary evidence, witness statements and a summary of expert medical opinions.
- (2) A defendant must comply with any reasonable requirement of the plaintiff under this clause and must provide that information as soon as practicable and in any case no later than 5 business days before the start of mediation.

**28 Medical examinations**

- (1) An original defendant who requires the plaintiff to attend for a medical examination in connection with the plaintiff's claim must notify the plaintiff of that requirement within:
  - (a) 10 business days for malignant claims involving only one defendant, or
  - (b) 20 business days for malignant claims involving more than one defendant, or
  - (c) 30 business days for non-malignant claims involving only one defendant, or
  - (d) 50 business days for non-malignant claims involving more than one defendant,after service of the plaintiff's statement of particulars on the last of the original defendants.
- (2) Any medical examination of the plaintiff that an original defendant requires must take place within:
  - (a) 20 business days for malignant claims involving only one defendant, or
  - (b) 30 business days for malignant claims involving more than one defendant, or
  - (c) 40 business days for non-malignant claims involving only one defendant, or
  - (d) 60 business days for non-malignant claims involving more than one defendant,after service of the plaintiff's statement of particulars on the last of the original defendants.

- (3) The period within which a medical examination is required to take place under subclause (2) may be varied by agreement between all the parties to the claim. Any such variation has no effect on the running of any other time period for the purposes of the claims resolution process.
- (4) If more than one original defendant requires the plaintiff to attend for a medical examination in connection with the plaintiff's claim, the plaintiff is entitled to choose to have those medical examinations conducted as a joint examination (with one examination on one occasion by the medical practitioners concerned) as an alternative to attending each examination separately.
- (5) Subclause (4) does not apply to a medical examination required by a defendant if the defendant objects to the examination being conducted as part of a joint examination of the plaintiff.
- (6) An original defendant who obtains a report of the results of a medical examination of the plaintiff must on request by any cross-defendant provide the report to the cross-defendant.

**Note.** Once a claim is no longer subject to the claims resolution process, a cross-defendant can seek the leave of the Tribunal under rules of court to attend for a medical examination.

## **29 Party changing facts relied on**

- (1) After serving the party's statement of particulars or reply on a claim, a party to a claim may only change the facts on which the party relies (whether by way of addition, deletion or correction) if the change is due to:
  - (a) the discovery by the party of facts that were not known to and not reasonably discoverable by the party before serving the party's statement of particulars or reply, or
  - (b) the plaintiff remembering facts only after serving the plaintiff's statement of particulars, or
  - (c) a change by another party to the facts on which that other party relies.
- (2) In determining whether facts were reasonably discoverable by a party, regard is to be had to what would be likely to be discovered by the party in the reasonable pursuit of the party's claim or defence.
- (3) A fact is not reasonably discoverable by a party if the only way in which it could be discovered is by the exercise of a power of the Tribunal.
- (4) A change to the facts on which a party relies must be notified to the other parties to the claim as soon as practicable after the party making the change becomes aware of the need for the change.

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- (5) This clause does not prevent a party changing the facts on which the party relies but any change that is not authorised by this clause constitutes a contravention of this clause for the purposes of clause 67 (Costs penalties).

**30 Access by parties to Dust Diseases Board file**

- (1) The Dust Diseases Board must, at the request of any party to a claim, give the party access to and allow the party to make a copy of, or provide the party with a copy of, any file of information maintained by the Board for the purpose of or in connection with a claim by the plaintiff for payment of compensation under the *Workers' Compensation (Dust Diseases) Act 1942*.
- (2) The Dust Diseases Board may require payment of a fee by a party to cover the Board's reasonable costs incurred under this clause.

**Division 4 Compulsory mediation**

**31 Compulsory mediation**

- (1) A claim that is subject to the claims resolution process must be referred for mediation under this Division.
- (2) Referral of a claim for mediation does not prevent or interfere with the parties pursuing settlement negotiations outside of mediation.

**32 Timetable for referral for mediation**

- (1) The claim must be referred for mediation within:
- (a) 30 business days for malignant claims involving only one defendant, or
  - (b) 50 business days for malignant claims involving more than one defendant, or
  - (c) 60 business days for non-malignant claims involving only one defendant, or
  - (d) 100 business days for non-malignant claims involving more than one defendant,
- after service of the plaintiff's statement of particulars on the last of the original defendants.
- (2) The parties must notify the Registrar in writing as soon as the claim is referred for mediation or the claim is settled.
- (3) If a claim is not referred for mediation within the time required by this clause, the Registrar is to refer the claim for mediation on the next business day following the end of that period.

- (4) Until the Registrar has been notified that a claim has been settled the Registrar is to presume that the claim has not been settled and is to presume that a claim has not been referred for mediation unless the Registrar has been notified that the claim has been referred for mediation.
- (5) If a claim involves more than one defendant, the claim must not be referred for mediation until:
  - (a) the defendants have reached agreement as to the contribution that each is liable to make to the plaintiff's damages, or
  - (b) if the defendants cannot reach agreement as to that apportionment, until the Contributions Assessor has determined the matter.
- (6) The Registrar may, with the agreement of all the parties to a claim, defer referring the claim for mediation on one occasion only for the period agreed by the parties, but not exceeding:
  - (a) 5 business days for a malignant claim, or
  - (b) 20 business days for a non-malignant claim.
- (7) The period of any such deferral is to be added to the relevant period in clause 33 (1), so as to extend the period within which mediation of the claim concerned must be concluded.
- (8) The Registrar can delegate to any member of staff of the Tribunal any function of the Registrar under this clause (except this power of delegation).

**33 Timetable for conclusion of mediation**

- (1) Mediation of a claim must be concluded within:
  - (a) 45 business days for malignant claims involving only one defendant, or
  - (b) 60 business days for malignant claims involving more than one defendant, or
  - (c) 90 business days for non-malignant claims involving only one defendant, or
  - (d) 120 business days for non-malignant claims involving more than one defendant,after service of the plaintiff's statement of particulars on the last of the original defendants.

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- (2) A mediator may defer mediation (on one or more occasions) to allow the parties sufficient time to properly consider information provided before or during mediation or to allow time for information not yet available to be provided, but must not defer mediation if the mediator is of the opinion that deferral would result in substantial prejudice to a party or substantial delay.
  - (3) Deferral of mediation may be for a period not exceeding (on each occasion of deferral):
    - (a) 5 business days for a malignant claim, or
    - (b) 20 business days for a non-malignant claim.
  - (4) The period of any such deferral is to be added to the relevant period in subclause (1), so as to extend the period within which mediation of the claim concerned must be concluded.

#### **34 Referral for mediation—appointment of mediator**

- (1) A claim is referred for mediation by the appointment of a mediator to conduct the mediation.
- (2) A mediator can be appointed:
  - (a) by the parties by agreement, or
  - (b) by the Registrar at the request of the parties, or
  - (c) by the Registrar if the claim is referred for mediation by the Registrar.
- (3) A mediator appointed by the Registrar must be appointed from a list of mediators compiled by the President.
- (4) The President is to compile a list of persons considered by the President to be suitable to be mediators for the purposes of this Part. As far as practicable, mediators should be persons with experience in claims in respect of dust-related conditions.
- (5) The persons chosen by the President are to be chosen from among a list of persons nominated jointly by the Law Society of New South Wales and the New South Wales Bar Association or, failing such a nomination, of the President's own choosing.

#### **35 Nature of mediation**

- (1) Mediation for the purposes of this Part is a structured negotiation process in which the mediator, as a neutral and independent party:
  - (a) assists the parties to a claim to achieve their own resolution of the claim, and
  - (b) assists the parties to narrow the issues in dispute, and

- (c) makes recommendations to the parties concerning the acceptance of offers and the likely outcome of proceedings.
- (2) It is the duty of each party to a claim that is referred for mediation to participate, in good faith, in the mediation.
- (3) A mediator may issue a certificate to the effect that in the mediator's opinion a party to a claim referred for mediation did not participate in good faith in the mediation.

**Note.** A defendant may impose a monetary limit on the authority of a single claims manager to settle a claim on behalf of the defendant but must act reasonably in imposing that limit. The imposition of such a limit is an aspect of participation by a defendant in mediation and can be the subject of a certificate of the mediator under this clause. See clause 62.

### **36 Representation at mediation sessions**

- (1) Each defendant to a claim must be present or represented at a mediation session.
- (2) If there is a single claims manager for a claim:
  - (a) the single claims manager must be present or represented at a mediation session, and
  - (b) (despite subclause (1)) no other defendant for whom the single claims manager acts is required to be present or represented at a mediation session unless the mediator otherwise directs.
- (3) The plaintiff must be present at a mediation session (either in person or by telecommunications link) unless a medical practitioner has certified that the plaintiff is not fit to be present.
- (4) The mediator may control who is in attendance at a mediation session and may limit the number of representatives that a party has at a mediation session.
- (5) A party represented at a mediation session must be represented by a person with sufficient authority to make binding decisions on behalf of the party with respect to the claim. The mediator may refuse to allow a person to represent a party at the mediation unless satisfied that the person has that authority.
- (6) The mediator may require that a defendant be represented at a mediation session by a designated officer of the defendant whose functions include the management or control of the administration of claims against the defendant (such as the officer designated by the title of Claims Manager or a similar title).
- (7) In this clause:  
***defendant*** includes cross-defendant.

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**37 Unsuccessful mediation—agreement as to issues in dispute**

- (1) If a claim that is the subject of mediation is not settled before the mediation is required to be concluded, the mediator must:
  - (a) notify the Registrar that the claim has not been settled, and
  - (b) require the parties to the mediation to agree on which issues are in dispute between the parties and on the facts that are relevant to those issues.
- (2) The mediator is to certify as to what the parties have agreed as the issues in dispute and the facts relevant to those issues and is to file the certificate with the Registrar and provide a copy of the certificate to each of the parties.
- (3) When a claim that is the subject of a mediator's certificate under this clause is before the Tribunal for determination:
  - (a) the Tribunal must determine the claim on the basis that the issues agreed to be in dispute are the only issues in dispute between the parties and on the basis of the agreed facts, as certified by the mediator, and
  - (b) the parties are not permitted to raise any other issue as an issue in dispute between the parties.
- (4) If the parties to mediation do not agree on which issues are in dispute, each party must lodge with the Tribunal a statement of the issues that the party considers are in dispute and a statement of the facts as alleged by the party that are relevant to those issues.

**38 Costs penalties for unmeritorious disputes**

- (1) If a party to proceedings includes in its statement of the issues that the party considers are in dispute an issue that in the proceedings is not determined in favour of the party and that the Tribunal determines was unreasonably left in dispute, the party is liable to pay the costs of any other party to the proceedings, assessed on an indemnity basis, that are occasioned by establishing, or by preparation for the purpose of establishing, how the issue is to be determined.
- (2) In determining whether an issue was unreasonably left in dispute by a party, consideration must be given to the steps taken by the party to ascertain whether there was a reasonable basis for doing so.
- (3) For the purposes of this clause, when a party to proceedings admits that an issue is not an issue in dispute in the proceedings, the issue is considered to be an issue that has not been determined in favour of the party.

- (4) If a party to proceedings disputes a fact and subsequently that fact is proved in the proceedings or admitted for the purpose of the proceedings by the disputing party, and the Tribunal determines that the fact was unreasonably left in dispute, the disputing party is liable to pay the costs of any other party to the proceedings, assessed on an indemnity basis, occasioned by proof of the fact or preparation for the purpose of proving the fact.

### **39 Challenge to defendant's contribution after successful mediation**

- (1) If mediation of a claim results in settlement of the claim, the mediator may, on the application of a defendant who intends to dispute in subsequent proceedings the contribution that the defendant is liable to make to the damages recovered by the plaintiff, require the plaintiff to give evidence on oath before the mediator in respect of any matter that appears to the mediator to be relevant to the liability of any person to contribute in respect of damages payable on the claim.
- (2) If the plaintiff is to be required to give evidence under this clause, the mediator is to determine the arrangements for the taking of that evidence and advise the parties of those arrangements.
- (3) That evidence is to be given immediately following the conclusion of mediation unless the mediator determines that the giving of that evidence should be delayed.
- (4) A defendant who wants a plaintiff to give evidence pursuant to this clause must give notice to the mediator, the plaintiff and each other party to the claim.
- (5) That notice must be given at least 2 business days before the start of mediation. If the decision to require the plaintiff to give evidence is made after that (including after the start of mediation), the notice may still be given but this constitutes a failure to comply with this clause for the purposes of clause 67 (Costs penalties).
- (6) Once the plaintiff has given that evidence, the plaintiff cannot be required to give evidence in proceedings before the Tribunal in respect of the dispute unless the Tribunal is satisfied that a failure by the plaintiff to give the evidence concerned will cause substantial injustice to a defendant.
- (7) A record of the evidence given by the plaintiff before the mediator is admissible in proceedings before the Tribunal in respect of the dispute.
- (8) The hearsay rule (within the meaning of the *Evidence Act 1995*) does not prevent the admission of a record of that evidence of the plaintiff or the use of that record to prove the existence of a fact that the plaintiff intended to assert by a representation made in that evidence.



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- (9) For the purposes of this clause, the mediator may:
- (a) require the plaintiff to take an oath or to make an affirmation in a form approved by the mediator, and
  - (b) administer an oath to or take an affirmation of the plaintiff.
- (10) A defendant at whose request evidence is given by the plaintiff under this clause is liable for the costs of and associated with the taking of that evidence (including the costs of transcription services and costs for the time of the mediator but not including the costs of other parties). If more than one defendant makes the request, the defendants are liable in equal shares for those costs.
- (11) In this clause:  
*defendant* includes cross-defendant.

#### **40 Taking evidence by telecommunications link**

- (1) This clause applies to a plaintiff, whether in New South Wales or elsewhere:
- (a) who is the subject of a medical practitioner's certificate under clause 36 (3) to the effect that he or she is not fit to be present at a mediation session, or
  - (b) in respect of whom the parties are in agreement that he or she should be allowed to give evidence by means of a telecommunications link.
- (2) For the purposes of clause 39, a plaintiff to whom this clause applies may give evidence by means of a telecommunications link and, for that purpose, anything that needs to be done in order to enable the plaintiff's evidence to be so given (such as the administration and taking of an oath) may also be done by such means.

#### **41 Taking evidence outside New South Wales**

- (1) For the purposes of clause 39, a plaintiff may give evidence on oath before a mediator outside New South Wales, but only if:
- (a) the plaintiff is the subject of a medical practitioner's certificate under clause 36 (3) to the effect that he or she is not fit to be present at a mediation session, and
  - (b) the defendant on whose application the plaintiff is required to give evidence requests that the plaintiff's evidence be so given, and
  - (c) the mediator is satisfied that it is appropriate in all of the circumstances for the plaintiff's evidence to be so given.

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- (2) Without limiting clause 39 (10), a defendant at whose request evidence is given by the plaintiff under this clause is liable for the costs incurred by the mediator and the plaintiff's legal representatives in travelling to the place at which the evidence is to be given. If more than one defendant makes the request, the defendants are liable in equal shares for those costs.

**42 Application of Uniform Civil Procedure Rules 2005 to giving of evidence**

Rules 24.9 and 24.11–24.15 of the *Uniform Civil Procedure Rules 2005* apply for the purposes of clause 39 in the same way as they apply for the purposes of proceedings in the Supreme Court, and so apply as if a reference in those rules to an examiner were a reference to a mediator.

**43 Agreements and arrangements arising from mediation**

- (1) The Tribunal may make orders to give effect to any agreement or arrangement arising out of the mediation of a claim.
- (2) The Tribunal is not to make an order entering judgment in favour of the plaintiff if the plaintiff has failed to provide any evidence that the plaintiff has been required to provide by the mediator under clause 39 (Challenge to defendant's contribution after successful mediation) and that failure is continuing, unless the failure is due to the death or permanent incapacity of the plaintiff.
- (3) This Division does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of mediation of a claim, in relation to the matters the subject of a mediation.

**44 Liability of mediators**

No matter or thing done or omitted to be done by a mediator subjects the mediator to any action, liability, claim or demand if the matter or thing was done or omitted to be done in good faith for the purposes of a mediation under this Part.

**45 Privilege and secrecy**

- (1) In this clause, *mediation session* means a meeting arranged for the mediation of a claim and includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
- (2) Subject to subclause (3), the same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
- (a) a mediation session, or

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- (b) a document or other material sent to or produced to a mediator, or sent to or produced at the Tribunal or the office of the Registrar, for the purpose of enabling a mediation session to be arranged.
- (3) The privilege conferred by subclause (2) only extends to a publication made:
- (a) at a mediation session, or
  - (b) as provided by subclause (2) (b), or
  - (c) as provided by subclause (7).
- (4) Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body except as is otherwise specifically provided by this Part.
- (5) Except as provided by this Part, a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document:
- (a) is not admissible in evidence in any proceedings before any court, tribunal or body, and
  - (b) cannot be the subject of a subpoena issued in any proceedings before any court, tribunal or body.
- (6) Subclauses (4) and (5) do not apply with respect to any evidence or document:
- (a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons identified in the document, consent to the admission of the evidence or document, or
  - (b) in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under subclause (7).
- (7) A mediator may disclose information obtained in connection with the administration or execution of this Part only in any one or more of the following circumstances:
- (a) with the consent of the person from whom the information was obtained,
  - (b) in connection with the administration or execution of this Part,
  - (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,

- (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
- (e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

#### **46 Costs of mediation**

- (1) The costs of mediation, including remuneration payable to the mediator, are to be borne by:
  - (a) the parties to the claim in such proportions as they may agree among themselves if mediation results in settlement of the claim or the claim is otherwise settled, or
  - (b) the defendant (or all the defendants in equal shares) if mediation does not result in settlement of the claim and the claim is not otherwise settled.
- (2) If there is a single claims manager for the claim, any costs of mediation payable by the defendants for whom the single claims manager acts are payable by the single claims manager, and any such payment by the single claims manager is to be reimbursed as a disbursement in accordance with clause 64 (Costs of the SCM).
- (3) Subclause (1) does not interfere with the power of the Tribunal to include costs of mediation in an award of costs to the party that is successful before the Tribunal but the Tribunal may decline to include costs of mediation in an award of costs if the Tribunal is satisfied that the party in whose favour the award is to be made did not participate in good faith in the mediation.

### **Division 5 Apportionment**

#### **47 Application to cross-defendants**

- (1) A reference in this Division to a defendant includes a reference to a cross-defendant.
- (2) The settlement or determination of a plaintiff's claim (*the original claim*) does not affect the continued operation of this Division in relation to a cross-claim on that original claim and the apportionment of liability among cross-defendants on the cross-claim. For that purpose (and despite clause 18) the cross-claim remains subject to the claims resolution process.

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- (3) Subclause (2) extends to a case where the original claim was settled or determined before the commencement of this clause where the first directions hearing for the cross-claim had not been held as at that commencement but does not extend to such a case if all of the cross-defendants agree that it should not apply to the case and the Registrar is notified by the cross-claimant in writing of that agreement within 10 business days after the commencement of this clause.
  - (4) If subclause (2) extends to a case because of the operation of subclause (3), this Division applies to the case as if a requirement that anything be done by a party within a specified period after service of the plaintiff's statement of particulars were a requirement that the thing be done within that specified period after 16 March 2007.

#### **48 Defendants to agree as to apportionment**

- (1) The defendants to a claim who are alleged to be liable to contribute to any damages recovered by the plaintiff must agree among themselves as to the contribution that each is liable to make to those damages.
- (2) Agreement must be reached no later than:
  - (a) 35 business days for malignant claims, or
  - (b) 70 business days for non-malignant claims,after service of the plaintiff's statement of particulars on the last of the original defendants.
- (3) The first defendant must file with the Registrar an apportionment statement setting out details of the apportionment of liability that the defendants have agreed to.

#### **49 Determination of apportionment failing agreement**

- (1) If by the end of the period within which the defendants are required to reach agreement as to apportionment an apportionment statement setting out details of the apportionment of liability that the defendants have agreed to has not been filed with the Registrar, the Registrar is to refer the matter to a Contributions Assessor for determination on the next business day following the end of that period.
- (2) The Registrar can delegate to any member of staff of the Tribunal any function of the Registrar under this clause (except this power of delegation).
- (3) The Registrar is to notify each defendant of the referral of a matter to a Contributions Assessor.

- (4) The Contributions Assessor to whom a matter is referred is to determine the contribution that each defendant is liable to make and is to make that determination on the assumption that the defendants are liable and solely on the basis of:
- (a) the plaintiff's statement of particulars and the defendants' replies on the claim, and
  - (b) standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette.

**Editorial note.** For the standard presumptions as to apportionment determined by the Minister see the *Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2005*.

- (5) The defendants may agree that for the purposes of the Contribution Assessor's determination a particular defendant should not be assumed to be liable to contribute, in which case the defendant is not to be assumed to be liable for that purpose (including for the purposes of the application in that case of the standard presumptions as to apportionment). This subclause does not apply in a case in which the matter was referred to the Contributions Assessor before the commencement of this clause.
- (6) A Contributions Assessor's determination is to be made within:
- (a) 40 business days for malignant claims, or
  - (b) 80 business days for non-malignant claims,
- after service of the plaintiff's statement of particulars on the last of the original defendants.
- (7) Neither the referral of a matter for determination by a Contributions Assessor nor a determination of the matter by a Contributions Assessor prevents the defendants concerned from agreeing among themselves at any time as to the contribution that each is liable to make to the plaintiff's damages.
- (8) A determination of a Contributions Assessor under this Division cannot be challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings. This subclause does not prevent the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment.
- (9) The Registrar is to provide each defendant with a copy of the Contribution Assessor's determination as soon as practicable after the determination is made.

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- (10) If there is a clerical mistake, or an error arising from an accidental slip or omission, in a determination of a Contributions Assessor (not being a mistake or error made before the commencement of this clause), the Contributions Assessor or another Contributions Assessor may correct the mistake or error:
- (a) of the Contributions Assessor's own motion within 7 business days after the determination is made, or
  - (b) on the application of any defendant (made to the Contributions Assessor whose determination is in question within 7 business days after the determination is made) as soon as practicable after the application for correction is made.
- (11) A defendant who applies for the correction of a mistake or error must give notice of the application to each other defendant.
- (12) If a mistake or error is corrected, the Contributions Assessor is to provide the corrected determination to the Registrar and the Registrar is to provide a copy of the corrected determination to each of the defendants.

#### **50 Contributions Assessors**

- (1) The Director-General of the Attorney General's Department is to appoint a panel of legal practitioners to be Contributions Assessors for the purposes of this Division.
- (2) A Contributions Assessor is entitled to such remuneration in connection with the exercise of functions as a Contributions Assessor as the Director-General may determine from time to time.
- (3) The amount of the remuneration of a Contributions Assessor is payable by the defendants in respect of whose liability to contribute the Contributions Assessor is making a determination, and is payable by each in proportion to their determined shares of contribution.
- (4) If there is a single claims manager for the claim, any remuneration of a Contributions Assessor that is payable by the defendants for whom the single claims manager acts is payable by the single claims manager, and any such payment by the single claims manager is to be reimbursed as a disbursement in accordance with clause 64 (Costs of the SCM).
- (5) If there is no single claims manager for the claim, the defendant whose determined share of contribution is greatest is required to pay to the Registrar the full amount of the Contributions Assessor's remuneration and has a right of contribution against the other defendants concerned for their proportionate shares of that remuneration.

**51 Contributions Assessors—special provision for conflict of interest**

- (1) If the Contributions Assessor to whom a matter is referred has acted for any of the defendants to the claim, or for any person against any of the defendants, within the period of 12 months before the matter is referred, the Contributions Assessor must notify the Registrar and each of the defendants in writing by the end of the next business day following the day on which the matter was referred to the Contributions Assessor.
- (2) A defendant (*the objector*) may object to the referral of the matter to the Contributions Assessor on the ground that the Contributions Assessor has acted for any of the other defendants, or for any person against the objector, within that 12 month period but objection can only be made by giving notice in writing of the objection to the Registrar by the end of the next business day following the day on which the objector was notified of that fact by the Contributions Assessor.
- (3) If the Registrar receives such an objection, the Registrar must by the end of the next business day following the day on which the objection is received:
  - (a) refer the matter to another Contributions Assessor, and
  - (b) give notice in writing of that referral to each of the defendants and to the Contributions Assessor to whom the matter was previously referred.
- (4) When a matter is referred to another Contributions Assessor following an objection, the time periods provided for by the following provisions are each extended by 2 business days:
  - (a) clause 32 (1) (period within which claim must be referred for mediation),
  - (b) clause 33 (1) (period within which mediation must be concluded),
  - (c) clause 49 (6) (period within which Contributions Assessor's determination is to be made).
- (5) When a matter is referred to another Contributions Assessor following an objection, this clause applies to that referral in the same way as it applies to the original referral, with the result that if the matter is again referred to another Contributions Assessor following an objection the time periods referred to in subclause (4) are each further extended by 2 business days.
- (6) The Registrar can delegate to any member of staff of the Tribunal any function of the Registrar under this clause (except this power of delegation).



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- (7) This clause (except subclause (6)) commences on 12 March 2007 and does not apply in the case of a matter referred to a Contributions Assessor before that date.

## **52 Effect of agreement or determination as to apportionment**

- (1) An agreement or determination as to apportionment among defendants for the purposes of this Division is conclusively binding on the defendants for the purposes of the settlement, or determination by the Tribunal, of the plaintiff's claim and payment of the plaintiff's damages.
- (2) The agreement or determination is not binding for the purposes of the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment.
- (3) If a defendant disputes the contribution that the defendant is liable to make to damages recovered by the plaintiff and the judgment of the Tribunal in the dispute does not result in the defendant materially improving the defendant's position, the defendant is liable to pay the costs of each other party to the dispute occasioned by the dispute, assessed on an indemnity basis.
- (4) Even if the Tribunal's judgment does not result in the defendant materially improving the defendant's position, the defendant is not liable to pay costs under subclause (3) if:
- (a) the Tribunal determines that the defendant is not liable on the claim, and
  - (b) the ground on which the Tribunal makes that determination is a ground on which the defendant disputed liability on the claim and of which the defendant provided evidence in the defendant's reply to the claim, and
  - (c) the Tribunal determines that the ground was the principal or only ground on which the defendant disputed liability on the claim.
- (5) Subclause (4) does not apply in a case in which the matter was referred to a Contributions Assessor before the commencement of this clause.
- (6) To the extent of any inconsistency between this clause and Part 6 (Offers of compromise), this clause prevails.
- (7) For the purposes of this clause, the defendant is considered to *materially improve* the defendant's position only if the Tribunal's determination of the dispute results in a reduction of the defendant's contribution of at least 10% of the amount of the defendant's agreed or determined contribution or \$20,000, whichever is the greater.

**53 Costs penalties where defendant disputes another defendant's defence**

- (1) If the reply of a defendant (*the innocent defendant*) to a claim or cross-claim disputes liability on a ground that the innocent defendant's reply provides evidence of, any other defendant who disputes that ground is liable to pay the innocent defendant's costs, assessed on an indemnity basis, occasioned by the dispute if:
  - (a) subsequently that ground is established in the proceedings by the evidence provided in the reply or admitted for the purpose of the proceedings by the disputing defendant, and
  - (b) the Tribunal determines on that ground that the innocent defendant is not liable on the claim or cross-claim, and
  - (c) the Tribunal determines that the ground was the principal or only ground on which the innocent defendant disputed liability on the claim.

**Note.** The costs penalty provided by this clause does not apply if the innocent defendant escapes liability on a ground not raised in the innocent defendant's reply.

- (2) This clause does not apply in a case if, before the commencement of this clause:
  - (a) the defendants reached agreement as to apportionment, or
  - (b) the matter was referred to a Contributions Assessor.

**Division 6 Special provision for apportionment claims commenced after plaintiff's claim finalised**

**54 Application and interpretation**

- (1) This Division applies to a claim for contribution (*the new cross-claim*) made by a defendant (including a cross-defendant) to a claim (*the original claim*) when proceedings on the new cross-claim are commenced after the original claim has been settled or determined, but only if the original claim was commenced by statement of claim filed on or after 1 July 2005.
- (2) The plaintiff on the new cross-claim is referred to in this Division as the *initiating defendant* and a defendant on the new cross-claim is referred to as a *new defendant*. The defendants (including any cross-defendants) on the original claim are referred to as the *original claim defendants*.
- (3) This Division applies to a new cross-claim made before the commencement of this Division only in the following cases:
  - (a) if a first directions hearing in respect of the claim was not held before the commencement of this Division, this Division applies to the new cross-claim unless the initiating defendant and each

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new defendant agree that this Division is not to apply and the initiating defendant notifies the Registrar in writing of that agreement within 10 business days after the commencement of this Division,

- (b) if a first directions hearing in respect of the claim was held before the commencement of this Division, this Division applies to the new cross-claim only if the initiating defendant and each new defendant agree that this Division is to apply and the initiating defendant notifies the Registrar in writing of that agreement within 10 business days after the commencement of this Division.
- (4) The following modifications apply for the purposes of the application of this Division to a new cross-claim made before the commencement of this Division:
- (a) the initiating defendant must give notice in writing under clause 57 (1) within 25 business days after the commencement of this Division, and
  - (b) any material required to be served by the initiating defendant with or at the same time as the statement of claim for the new cross-claim must instead be served within 25 business days after the commencement of this Division, and
  - (c) any action required to be taken within a specified period of time after the statement of claim for the new cross-claim is served must instead be taken within that period after material is served as provided by paragraph (b).

#### **55 New cross-claim subject to claims resolution process**

- (1) Despite clause 18, a new cross-claim to which this Division applies is subject to the claims resolution process once the claim is filed and until:
    - (a) the defendants to the claim agree as required by Division 5 to the contribution that each is liable to make to damages recovered by the plaintiff on the original claim, or
    - (b) failing agreement, a Contributions Assessor has determined under Division 5 the contribution that each defendant is liable to make.
- Note.** Under clause 19, proceedings in the Tribunal to determine the new cross-claim are deferred while the claim is subject to the claims resolution process. Under clause 26, a defendant to a cross-claim is required to file and serve a reply to the cross-claim, subject to subclause (2). Cross-claimants are not required to provide a statement of particulars for their cross-claim.
- (2) Despite clause 26 (5), a reply under clause 26 by a new defendant must be served within 30 business days after service of the new cross-claim statement of claim on the last of the new defendants.

**56    Copies of original claim particulars and replies to accompany new cross-claim statement of claim**

- (1) The initiating defendant must serve with the statement of claim for the new cross-claim copies of each of the following:
  - (a) the statement of particulars of the plaintiff on the original claim, and
  - (b) the replies of each of the original claim defendants to the original claim, and
  - (c) an appropriately revised version of Part 8 (Apportionment of liability among defendants) of the initiating defendant's reply to the original claim against the defendant, and
  - (d) any agreement among the original claim defendants as to the contribution that each is liable to make to damages recovered on the original claim, and
  - (e) any determination by a Contributions Assessor as to the contribution that the original claim defendants are liable to make to damages recovered on the original claim.
- (2) If the plaintiff on the original claim did not file and serve a statement of particulars of the plaintiff's claim, the initiating defendant must (instead of serving a copy of the plaintiff's statement of particulars with the statement of claim for the new cross-claim) provide and serve with the statement of claim for the new cross-claim a statement that provides sufficient particulars of the original claim, based on information provided by the plaintiff in the plaintiff's statement of claim on the original claim and any other information provided by the plaintiff.
- (3) If the Tribunal determines that the initiating defendant failed to provide sufficient particulars of the original claim as required by subclause (2) and that as a result an issue was left in dispute between the initiating defendant and a new defendant in proceedings on the new cross-claim (being an issue subsequently determined in favour of the new defendant), the initiating defendant is liable to pay the new defendant's costs, assessed on an indemnity basis, occasioned by the dispute.

**57    Notice to original claim defendants of new cross-claim**

- (1) The initiating defendant must give notice in writing of the commencement of proceedings on the new cross-claim to each of the original claim defendants who was a party to the original claim at the time of the agreement or determination as to contribution on the original claim and must give that notice before or at the time that the statement of claim in the new cross-claim proceedings is served.

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- (2) The initiating defendant must also serve on each of those original claim defendants, at the same time as the statement of claim for the new cross-claim is served:
    - (a) a copy of the statement of claim for the new cross-claim, and
    - (b) a copy of the appropriately revised version of Part 8 (Apportionment of liability among defendants) of the initiating defendant's reply to the original claim against the defendant (as served with the statement of claim for the new cross-claim).
  - (3) Each original claim defendant may elect whether or not to be subject to a new apportionment of liability on the original claim among defendants including any new defendants.
  - (4) An election must be made within 10 business days after the original claim defendant is served with a copy of the statement of claim for the new cross-claim
  - (5) An election is made by giving notice of the election in writing to the Registrar, the initiating defendant and each of the other original claim defendants, accompanied by an appropriately revised version of Part 8 (Apportionment of liability among defendants) of the original claim defendant's reply to the original claim.
  - (6) Failure to elect within the required time constitutes an election not to be subject to a new apportionment of liability.
  - (7) If the initiating defendant or another original claim defendant did not file a reply to the original claim, an obligation under this Division to serve a copy of an appropriately revised version of Part 8 of the reply is to be read instead as an obligation to file and serve a reply under clause 26.

#### **58 New apportionment under Division 5**

- (1) The provisions of Division 5 apply again in respect of the original claim and the original claim defendants (with the new defendants included as defendants to the claim), subject to the following modifications and clarifications:
  - (a) agreement as to apportionment must be reached no later than 70 business days after service of the statement of claim for the new cross-claim on the last of the new defendants,
  - (b) agreement as to apportionment is only required to be reached by (and is only binding under clause 52 on) such of the original claim defendants as have elected to be subject to a new apportionment of liability on the original claim and the new defendants,

- (c) a Contribution Assessor's determination as to apportionment under Division 5 is to be made within 80 business days after service of the statement of claim for the new cross-claim on the last of the new defendants,
  - (d) the Contribution Assessor's determination is to be a determination of the contribution that each defendant is liable to make, including (in addition to new defendants) all original claim defendants whether or not they have elected to be subject to a new apportionment of liability on the original claim but is not binding under clause 52 on an original claim defendant unless the defendant elected to be subject to the new apportionment of liability,
  - (e) the Contribution Assessor's determination cannot increase any contribution already determined by a Contribution Assessor in respect of an original claim defendant.
- (2) A reference in this clause to the service of the statement of claim for the new cross-claim on the last of the new defendants is a reference to service of that statement of claim:
- (a) if there is only one new defendant—on that defendant, or
  - (b) if there is more than one new defendant—on the last of the new defendants to be served.

**Note.** Clause 52 provides costs sanctions if a defendant disputes the contribution that the defendant is liable to make and the judgment of the Tribunal does not result in material improvement of the defendant's position.

## **Division 7 Multiple defendant claims—single claims manager**

### **59 Application to cross-defendants**

A reference in this Division to a defendant includes a reference to a cross-defendant.

### **60 Requirement for single claims manager**

- (1) If there is more than one defendant to a plaintiff's claim, the defendants must use a claims manager to manage and negotiate the resolution of the plaintiff's claim on their behalf, and for that purpose the defendants must all use the same claims manager (a *single claims manager* or *SCM*).
- (2) The defendants are not required to use an SCM if all the defendants agree not to use an SCM.

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**61 Selection of SCM**

- (1) The defendants can agree on the selection of an SCM for the claim and for that purpose they can select one of the defendants or some other person (such as a claims management company).
- (2) Failing agreement between defendants on the selection of an SCM for a claim, the first defendant must notify the Registrar (before the end of the period within which the defendants are required to reach agreement on apportionment) that the defendants have not agreed on the selection of an SCM.
- (3) The selection of an SCM is then to be made by:
  - (a) the Registrar if the defendants have agreed (within the required period under the claims resolution process) on the apportionment of liability between them, or
  - (b) the Contributions Assessor when determining the apportionment of liability between the defendants if the defendants have not agreed within the required period on that apportionment.
- (4) The procedure for the selection of an SCM by the Registrar or a Contributions Assessor is as follows if there is no primary defendant:
  - (a) the selection of an SCM is to be made by selecting a defendant at random from among those defendants who each have an apportioned share of at least 15% or, if only one of the defendants has an apportioned share of at least 15%, by selecting that defendant,
  - (b) if none of the defendants has an apportioned share of at least 15%, the selection of an SCM is to be made by selecting a defendant at random from among all of the defendants.
- (5) The procedure for the selection of an SCM by the Registrar or a Contributions Assessor is as follows if there is a primary defendant:
  - (a) if no other defendant has an apportioned share of at least 15%, the primary defendant is selected as the SCM,
  - (b) if one or more of the other defendants has an apportioned share of at least 15%, the primary defendant becomes the first possible SCM and a second possible SCM is to be chosen,
  - (c) the second possible SCM is to be chosen by selecting a defendant at random from among the group of defendants comprising the primary defendant and such of the other defendants as each have an apportioned share of at least 15%,
  - (d) if the same defendant is both the first and second possible SCMs, that defendant is to be selected as the SCM for the claim,

- (e) if the first and second possible SCMs are different defendants, the defendant who is first possible SCM is to be selected as the SCM but the selection of the defendant does not operate unless the defendant accepts selection by notifying each of the other defendants in writing within 2 business days after selection that the defendant will act as the SCM,
  - (f) if the first possible SCM does not accept selection as the SCM, the defendant who is second possible SCM is to be selected as the SCM.
- (6) The defendant who is finally selected under this clause as the SCM for a claim must act as the SCM for the claim.
- (7) The person selected as the SCM for a claim must notify the plaintiff and each defendant in writing as soon as practicable after selection that the person will act as the SCM. Notification is required only to the plaintiff if the primary defendant has already notified each of the other defendants (as provided for by the SCM selection process) that the defendant will act as the SCM.
- (8) For the purposes of determining a defendant's apportioned share for a claim in connection with the operation of this clause, the defendant may choose to have included in the defendant's share of responsibility any responsibility in connection with the claim of a related body corporate of the defendant (within the meaning of the *Corporations Act 2001* of the Commonwealth).
- (9) In this clause:  
**apportioned share** for a claim means the proportion of the claim for which a defendant is responsible, determined on the basis of the apportionment of liability agreed to by the defendants or determined by the Contributions Assessor, whichever is applicable in the particular case.  
**primary defendant** for a claim means:
- (a) the defendant whose apportioned share for the claim is more than 50%, or
  - (b) if there is no such defendant—the defendant with the largest apportioned share for the claim, being a share of responsibility that is at least 20 percentage points greater than that of the defendant with the next largest apportioned share for the claim.



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**62 Role and functions of SCM**

- (1) The role of the SCM is to manage and negotiate and seek to resolve the plaintiff's claim on behalf of all of the defendants and for that purpose the SCM has and may exercise on behalf of each defendant all the functions of a defendant.

**Note.** The SCM's role includes the selection of expert evidence on behalf of all the defendants but this does not prevent a defendant from obtaining their own expert reports.

- (2) Anything done or omitted to be done by the SCM in purported exercise of the functions of the SCM is taken to have been done or omitted to be done by the relevant defendant or defendants.
- (3) A defendant who is the SCM for a claim is entitled to perform the role of the SCM in accordance with the defendant's usual arrangements for managing claims (which can include managing the claim themselves or an arrangement whereby particular kinds of claim are managed on behalf of the defendant by an insurer).
- (4) Each defendant is taken to authorise the SCM to settle the matter with the plaintiff, both informally and at any formal mediation.
- (5) A defendant may impose a monetary limit on the authority of the SCM to settle a claim on behalf of the defendant but must act reasonably in imposing that limit.
- (6) The imposition of a monetary limit on the authority of the SCM to settle a claim on behalf of a defendant is, for the purposes of the mediation of the claim, an aspect of participation in mediation, and the power of a mediator to issue a certificate to the effect that in the mediator's opinion a defendant did not participate in good faith in the mediation extends to this aspect of the defendant's participation in mediation.
- (7) If a claim that is the subject of mediation is not settled before mediation is required to be completed, each defendant is taken to authorise the SCM to agree on its behalf on which issues are in dispute between the parties and on the facts that are relevant to those issues, unless in the case of any particular defendant the defendant has notified the SCM that the SCM is not authorised to do this on behalf of the defendant.

**63 Limitations on SCM's role**

- (1) The SCM does not have any role or functions in respect of apportionment of liability between defendants or any later dispute between the defendants as to apportionment of liability.
- (2) The role of the SCM does not limit or otherwise interfere with:
- (a) the responsibility of a defendant for preparing and serving the defendant's reply to the plaintiff's statement of particulars, or

- (b) the right of a defendant to attend at and be represented at the mediation of a claim, or
  - (c) a defendant's responsibility to comply with a requirement by the mediator that a defendant be represented at mediation by a particular officer of the defendant, or
  - (d) a defendant's responsibility for questioning the plaintiff on issues relevant to contribution (if necessary) at the conclusion of a successful mediation.
- (3) The role of the SCM concludes:
- (a) if the plaintiff's claim is settled through mediation or otherwise before mediation of the claim is required to be completed—on final implementation of the settlement or on finalisation of any costs assessment in respect of the settlement, whichever is later, or
  - (b) if the plaintiff's claim is not settled before mediation of the claim is required to be completed—when the parties or the defendants reach agreement on which issues are in dispute between them or conclude their efforts to reach agreement.
- (4) The parties may agree to the use of an SCM beyond the time when the role of the SCM would otherwise conclude under this clause and any such agreement has effect to continue the operation of this Part in respect of the SCM (including clause 64 with respect to the costs of the SCM) in accordance with that agreement.

#### **64 Costs of the SCM**

- (1) If the SCM is not one of the defendants, the costs of the SCM are payable as agreed between the defendants and the SCM.
- (2) If the SCM is one of the defendants, each of the other defendants is liable to reimburse the SCM in respect of the SCM's costs an amount that is the sum of the following amounts:
  - (a) the amount calculated by dividing half the amount of the SCM's costs by the number of defendants (including the SCM),
  - (b) a share of half the amount of the SCM's costs in the same proportion as the defendant's apportioned share of responsibility for the plaintiff's claim.
- (3) For the purposes of this clause, the *costs* of the SCM are the costs and expenses incurred by the SCM in the exercise of functions as the SCM, including:
  - (a) any costs of mediation or the remuneration of a Contributions Assessor borne by the SCM, and

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- (b) in relation to an SCM who is not one of the defendants, the remuneration of the SCM, and
  - (c) in relation to an SCM who is a defendant, the defendant's operational costs (including internal legal costs) and its external costs (including expert reports and external legal costs).
- (4) The Minister may by order published in the Gazette establish a scale of costs for use in determining the operational costs of an SCM that are allowable for the purposes of this clause.
- (5) The external legal costs of an SCM are subject to assessment under the *Legal Profession Act 2004* on the application of a defendant required under this clause to reimburse the SCM for any amount of those costs.

## **Division 8 Return of claims to the Tribunal**

### **65 Non-urgent claims to be subject of directions hearing**

- (1) This clause applies to the following claims:
- (a) a claim that has completed the claims resolution process without being settled,
  - (b) a claim that has ceased under Division 2 to be part of the claims resolution process pursuant to the agreement of the parties,
  - (c) a claim that the Tribunal has determined under Division 2 should be removed from the claims resolution process because of a failure to comply with a requirement of the claims resolution process.
- (2) The following provisions apply to claims to which this clause applies except a claim described in subclause (1) (c):
- (a) the Registrar must set the claim down for a directions hearing before the Tribunal to take place within 10 days for malignant claims or 20 days for non-malignant claims,
  - (b) the plaintiff or, if the plaintiff's claim has been settled and cross-claims remain to be determined, the first defendant must propose in writing to the remaining parties what further steps (if any) need to be taken to prepare the matter for hearing, together with a timetable for completing those steps,
  - (c) if the parties agree on those steps and the timetable, written notice of the agreement must be provided to the Registrar and the Tribunal must enter orders to give effect to that agreement.

- (3) The following provisions apply to all claims to which this clause applies:
- (a) the Tribunal may, subject to this subclause, make orders and give directions to the parties as to the steps to be taken to prepare the claim for hearing and for that purpose may order the amendment of the plaintiff's statement of claim,
  - (b) a defence is taken to have been filed to the claim and to any cross-claims, unless the Tribunal orders that a defence must be filed,
  - (c) the Tribunal may only order that a defence be filed in relation to matters that remain in dispute and only if the Tribunal is satisfied that it is necessary to do so to ensure that the outstanding issues in dispute are properly tried,
  - (d) the parties to the claim cannot administer interrogatories, order discovery or issue requests for particulars unless leave to do so is granted by the Tribunal, and the Tribunal may only grant that leave where it is satisfied that:
    - (i) the information sought by the party has not been provided as part of the information exchange process, and
    - (ii) the information relates to issues that remain in dispute, and
    - (iii) the order is necessary to ensure that the outstanding issues in dispute are properly tried,
  - (e) rule 8A (Personal injuries cases; particulars) of Part 33 of the *Supreme Court Rules 1970* and rules 15.12 and 15.13 of the *Uniform Civil Procedure Rules 2005* do not apply to the claim,
  - (f) the plaintiff may file an affidavit (but only in relation to issues that remain in dispute) and for that purpose may rely on the plaintiff's statement of particulars,
  - (g) the Tribunal cannot require the plaintiff to file an affidavit if the plaintiff elects to rely on the plaintiff's statement of particulars served under Division 3 (or specified parts of that statement) as the plaintiff's affidavit (including any necessary changes made to that statement in the course of information exchange),
  - (h) the Tribunal may not refer the claim or any aspect of the claim to mediation or neutral evaluation and may not refer a dispute as to apportionment concerning the claim to arbitration.

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**66 Procedures for urgent claims**

If the Tribunal has determined that a claim is urgent on application by the claimant under Division 2, the statement of claim for the claim is, for the purposes of any provision of rules of court as to the serving of a defence, taken to have been served when the Tribunal made that determination.

**Division 9 Costs**

**67 Costs penalties**

- (1) In making an order as to the payment of costs in proceedings, the Tribunal must take into account any failure by a party to proceedings to comply with a provision of this Part.
- (2) In particular, the Tribunal must take into account any increase in the costs of the proceedings that is attributable to any such failure and may order the party responsible for the failure to pay the costs of each other party to the dispute occasioned by the failure, assessed on an indemnity basis.
- (3) The Tribunal may take into account a certificate issued by a mediator to the effect that in the mediator's opinion a party to a claim referred for mediation did not participate in good faith in the mediation.

## Part 5    Subpoenas

### 68    Interpretation and application

(1)    In this Part:

**access order**, in relation to a subpoena requiring production, means an order of the Tribunal granting access to specified documents or things produced pursuant to the subpoena (whether with or without conditions).

**person named** means, in relation to a subpoena, the person to whom the subpoena is addressed.

**privileged document or thing**, in relation to a subpoena, means:

- (a)    a document or thing of which evidence could not be adduced in an action over the objection of any person, by virtue of the operation of Part 3.10 (other than sections 128 and 130) of the *Evidence Act 1995*, or
- (b)    if the party on whom the subpoena is served is a natural person—a document or thing the contents or production of which may tend to prove that the party:
  - (i)    has committed an offence against or arising under an Australian law or a law of a foreign country, or
  - (ii)   is liable to a civil penalty, within the meaning of the *Evidence Act 1995*, or
- (c)    a document that relates to matters of state within the meaning of section 130 of the *Evidence Act 1995*, unless and until the Tribunal directs that it cease to be a privileged document.

**requesting party** for a subpoena means a person who is requesting, or who has requested, the issue of the subpoena.

**return date** for a subpoena means the date on which the subpoena is returnable.

(2)    This Part applies to subpoenas issued on or after the commencement of this Part.

(3)    The provisions of this Part apply to the exclusion of the equivalent provisions of rules of court.

**Note.** This Part applies to all claims, not just claims that are subject to the claims resolution process under Part 4.

### 69    Conduct money

(1)    A subpoena must not require the person named to attend or produce any document or thing on any day on which the person's attendance is required unless an amount sufficient to meet the reasonable expenses of

the person named of complying with the subpoena in relation to that day is paid or tendered to the person at the time of service of the subpoena or not later than a reasonable time before that day.

- (2) The amount mentioned in section 20 (6) of the Act is to be, in respect of a person duly served with a subpoena in any proceedings, the amount which would be payable in respect of that person if the party issuing the subpoena were entitled to claim witness' expenses in respect of that person as costs in the proceedings.

#### **70 Production by non-party**

- (1) Where the person named in a subpoena for production of any document or thing is not a party to the proceedings, the subpoena must, unless the Tribunal otherwise orders, permit the person to produce the document or thing to the Registrar not later than the day before the first date on which the person's attendance is required, instead of attending and producing the document or thing as required by the subpoena.
- (2) Where a document or thing is produced to the Registrar pursuant to subclause (1), the Registrar must:
  - (a) give a receipt to the person producing the document or thing, and
  - (b) produce the document or thing as the nature of the case requires or as the Tribunal may direct.
- (3) This clause does not apply to so much of a subpoena as requires the person named to attend to testify in any proceedings.

#### **71 Return of exhibits**

- (1) Exhibits in any proceedings must be returned to the persons who produced them (whether on subpoena or otherwise) to the Tribunal or the Registrar:
  - (a) if the Tribunal makes no order that the exhibits be retained—immediately after judgment is given or a final order made, or
  - (b) if the Tribunal makes an order that the exhibits be retained—at the expiration of the period of 30 days after judgment is given or a final order made or such other period as may be specified in the order.
- (2) A person to whom exhibits may be returned under subclause (1) must obtain the return of, and give to the Registrar a receipt for, the exhibits as soon as practicable, and the Registrar is responsible for the safe custody of any exhibits in the Registrar's keeping for a period only of 14 days after the first day on which the exhibits may be so returned.

**72 Issue**

- (1) On request by a party, the Registrar must issue a subpoena to give evidence or a subpoena for production or a subpoena both to give evidence and for production.
- (2) Subclause (1) does not prevent the issue of a subpoena to give evidence and a subpoena for production to the same person in the same proceedings.
- (3) Subject to subclause (4) a party requesting the issue of a subpoena must produce the subpoena to the Registrar in duplicate.
- (4) Where a party requests in any proceedings the issue of several subpoenas to give evidence in similar terms but addressed to different persons, the party need produce only one original, but that original must contain the name of each person to whom any of the subpoenas is addressed.
- (5) The Registrar is not required to place a copy of the subpoena on the Tribunal's file.
- (6) A subpoena for production may be made returnable on the day fixed for the hearing of the proceedings in which it is issued, or, with the leave of the Tribunal or the Registrar, on any other day.
- (7) While a claim is subject to the claims resolution process under Part 4, a subpoena for production of any document or thing:
  - (a) is to be made returnable on a day that is no later than 5 business days before the start of mediation on the claim under that Part, and
  - (b) must permit the person named in the subpoena (whether or not the person is a party) to produce the document or thing to the Registrar, and
  - (c) does not require leave under subclause (6) if a copy of the subpoena is served at least 10 business days before the return date of the subpoena.

**73 Notice to be given to other parties concerning subpoenas requiring production**

- (1) The requesting party for any subpoena requiring production must serve each other party who has an address for service in the proceedings with a copy of the subpoena:
  - (a) if the return date of the subpoena is on a day that is 14 days or more after the subpoena is issued—within the period of 7 days after the subpoena is issued, or



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- (b) if the return date of the subpoena is on a day that is less than 14 days after the subpoena is issued—within 24 hours after the subpoena is issued.
  - (2) The requesting party for a subpoena requiring production who fails to comply with subclause (1) must notify the Tribunal of that failure at the next date on which the subpoena is returnable.
  - (3) The requesting party for a subpoena requiring production must notify each other party to the proceedings who has an address for service in the proceedings of any new return date for the subpoena fixed after the subpoena is first issued:
    - (a) if the return date of the subpoena is on a day that is 14 days or more after the new date is fixed—within the period of 7 days after the new date is fixed, or
    - (b) if the return date of the subpoena is on a day that is less than 14 days after the new date is fixed—within 24 hours after the new date is fixed.
  - (4) The Tribunal or the Registrar may make an order for costs against a requesting party for a subpoena requiring production if that party fails to comply with subclause (2) or (3), but only in respect of costs incurred by reason of that failure.
  - (5) A requesting party for a subpoena requiring production need not comply with a requirement under subclause (1), (2) or (3) if the person named is excused from compliance with the subpoena by the requesting party under clause 81 (2) (Alteration to obligations) before the time when the requesting party had to comply with that requirement.
  - (6) Nothing in this clause affects the operation of clause 78 (Subpoena to medical expert).

#### **74 Access to subpoenaed material**

- (1) The Tribunal may make an access order in relation to a subpoena requiring production at the time the subpoena is issued or at any time after it is issued.
- (2) If an access order has effect in relation to a subpoena for production, a party or the party's barrister or solicitor may (subject to the terms of the order):
  - (a) inspect documents or things produced in compliance with the subpoena, and
  - (b) take copies of any documents so inspected.

**75 Proposed access orders**

- (1) Unless the Tribunal orders otherwise, the requesting party for a subpoena requiring production must endorse a proposed access order on the subpoena.
- (2) Without limiting clause 74 (Access to subpoenaed material), the Tribunal may:
  - (a) endorse a proposed access order on a subpoena requiring production if the requesting party has not endorsed such a proposed order, or
  - (b) endorse a proposed access order on a subpoena requiring production in different terms to a proposed order endorsed by the requesting party.
- (3) Unless the Tribunal orders otherwise, any such proposed access order has effect as an access order immediately after the next return date for the subpoena if:
  - (a) documents or things are produced in compliance with the subpoena on or before that date, and
  - (b) no person appears before the Registrar or Tribunal on the return date in opposition to the proposed order.
- (4) Without limiting subclause (3), the Tribunal may take into account a failure to comply with subclause (5) or (6) or clause 73 (1), (2) or (3) in determining whether a proposed access order should have effect according to its tenor or whether an order is to be made to modify or revoke the proposed access order.
- (5) A party or a person named in a subpoena requiring production who proposes to object to the proposed access order on the return date for the subpoena must notify the requesting party of the objection:
  - (a) if the party or person is served with a copy of the subpoena on a day that is 14 days or more before the return date—within the period of 3 days after the party or person is served, or
  - (b) if the party or person is served with a copy of the subpoena on a day that is less than 14 days before the return date—within the period of 24 hours after the party or person is served.
- (6) A requesting party who has received notice of an objection to a proposed access order must notify all of the other parties who have an address for service in the proceedings of the objection within 24 hours after receiving that notice.

**76 Exercise of functions by Registrar**

The functions of the Tribunal under clauses 74 and 75 may, unless the Tribunal otherwise orders, be exercised by the Registrar.

**77 Time for service**

- (1) A subpoena must be served on the person named within a reasonable time.
- (2) Without affecting the generality of subclause (1), where a subpoena requires attendance or production or both on a specified date, the subpoena may not be served on the person named later than 5 days before the date so specified unless the Tribunal or Registrar otherwise orders.
- (3) Subject to subclause (4), service of a subpoena for production which requires production on a specified date, being a date not later than 21 days before the hearing of the proceedings in which the subpoena is issued, may be effected by sending a copy of the subpoena by pre-paid post addressed to the person named at that person's usual or last known residence or place of business.
- (4) Service pursuant to subclause (3) is not effective unless and until the subpoena is actually received by the person named.

**78 Subpoena to medical expert**

- (1) Where a subpoena requires a medical expert to attend in Sydney on a specified date for the purposes of giving evidence on medical matters, the subpoena may not be served on the expert later than 21 days before the date so specified unless the Tribunal otherwise orders.
- (2) A party may request the issue of a subpoena for production in the approved form requiring a medical expert to attend and produce medical records or clear sharp photocopies of them.
- (3) A subpoena requested under subclause (2) must not require the person named to attend or produce any document on any date specified unless the amount of \$28 is paid or tendered to the person at the time of service of the subpoena or not later than a reasonable time before that specified date.
- (4) Clause 69 (Conduct money) does not apply to a subpoena requested under subclause (2).
- (5) Clause 70 (Production by non-party) applies to the photocopies as it applies to the records.

**79    Setting aside**

The Tribunal may, of its own motion or on the motion of any person having a sufficient interest, set aside a subpoena wholly or in part.

**80    Expense and loss**

Where a person named is not a party and, in consequence of service of the subpoena, reasonably incurs expense or loss substantially exceeding any sum paid under clause 69 (Conduct money), the Tribunal may order that the party who requested the issue of the subpoena pay to the person named an amount in respect of the expense or loss.

**81    Alteration to obligations**

- (1) A party who has requested the issue of a subpoena to give evidence may, by written or oral notice to the person named, alter the day specified in the subpoena for attendance to a day which is:
  - (a) later than the day specified in the subpoena and the day, if any, as last altered pursuant to this subclause, and
  - (b) the day of the hearing of the action.
- (2) Where the person named in any subpoena has not been called to give evidence, or produce documents, before the Tribunal in compliance with the subpoena, the party who requested the issue of the subpoena may, by written or oral notice to the person named, excuse that person from compliance with the subpoena.

**82    Special powers of Tribunal**

- (1) The Tribunal may, by order, dispense with any requirement of this Part if satisfied that it is appropriate to do so in the circumstances of the case.
- (2) The Tribunal may, by order, extend or abridge any time fixed under this Part.
- (3) The Tribunal may extend time under this clause, either before or after the time expires, and may do so after the time expires even if an application for extension is made after the time expires.

**83    Application of Part 3.10 of Evidence Act 1995**

Nothing in this Part compels a person on whom a subpoena is served to produce a privileged document or thing.

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## Part 6 Offers of compromise

### 84 Part displaces rules

This Part displaces any provision of rules of court with respect to the acceptance or rejection of an offer of compromise.

**Note.** This Part applies to all claims, not just claims that are subject to the claims resolution process under Part 4.

### 85 Definitions

In this Part:

*defendant* includes cross-defendant.

*final deadline* for an offer means the time at which the Tribunal begins to give its decision or its reasons for decision, whichever is the earlier, on a judgment (except an interlocutory judgment).

*offer* means an offer of compromise referred to in clause 86 (Making of offer).

*plaintiff* includes a cross-claimant.

*period for acceptance* for an offer means the period from when the offer is made until:

- (a) the expiration of the time limited by the offer or, if no time is limited, the expiration of 28 days after the offer is made, or
- (b) the final deadline for offers in respect of the claim to which the offer relates,

whichever first occurs.

### 86 Making of offer

- (1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.

**Note.** This Part extends to offers between a cross-claimant and cross-defendant. An offer does not have to be made to all the parties to proceedings.

- (2) An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.
- (3) A notice of offer:
  - (a) must bear a statement to the effect that the offer is made in accordance with this clause, and
  - (b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.

- (4) An offer made by the plaintiff or the defendant to the other to compromise a claim (other than a claim removed from the claims resolution process under clause 22) may be expressed to be limited as to the time it is open to be accepted but the time expressed cannot be less than:
  - (a) 28 days after the offer is made if the offer is made before the required information exchange under Part 4, or
  - (b) 14 days after the offer is made if the offer is made after the required information exchange under Part 4 but before mediation of the claim under the claims resolution process has been concluded, or
  - (c) 7 days after the offer is made if the offer is made after mediation of the claim under the claims resolution process has been concluded.
- (5) An offer made by the plaintiff or the defendant to the other to compromise any claim removed from the claims resolution process under clause 22 may be expressed to be limited as to the time it is open to be accepted but the time expressed cannot be less than:
  - (a) 14 days after the offer is made, unless paragraph (b) applies, or
  - (b) if the offer is made after an Issues and Listing Conference has been held in respect of the claim, 7 days after the offer is made.
- (6) Unless the notice of offer otherwise provides, an offer providing for the payment of money, or the doing of any other act, is taken to provide for the payment of that money, or the doing of that act, within 28 days after acceptance of the offer.
- (7) An offer is taken to have been made without prejudice, unless the notice of offer otherwise provides.
- (8) A party may make more than one offer in relation to the same claim.
- (9) Unless the Tribunal orders otherwise, an offer may not be withdrawn during the period of acceptance for the offer.
- (10) A notice of offer that purports to exclude, modify or restrict the operation of clauses 87 and 88 is of no effect for the purposes of this Part.

**87 Where offer not accepted and judgment no less favourable to plaintiff**

- (1) This clause applies if the offer concerned is made by the plaintiff, but not accepted by the defendant, and the plaintiff obtains an order or judgment on the claim concerned no less favourable to the plaintiff than the terms of the offer.

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- (2) Unless the Tribunal orders otherwise in an exceptional case and for the avoidance of substantial injustice, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim:
- (a) assessed on a party and party basis up to the time from which those costs are to be assessed on an indemnity basis under paragraph (b), and
  - (b) assessed on an indemnity basis:
    - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
    - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.
- (3) If the Tribunal in an exceptional case and for the avoidance of substantial injustice otherwise orders as referred to in subclause (1), the Tribunal must give its reasons for so ordering.

**88 Where offer not accepted and judgment as or less favourable to plaintiff**

- (1) This clause applies if the offer concerned is made by the defendant, but not accepted by the plaintiff, and the plaintiff obtains an order or judgment on the claim concerned as favourable to the plaintiff, or less favourable to the plaintiff, than the terms of the offer.
- (2) Unless the Tribunal orders otherwise in an exceptional case and for the avoidance of substantial injustice:
- (a) the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, to be assessed on a party and party basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and
  - (b) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis:
    - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
    - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.
- (3) If the Tribunal in an exceptional case and for the avoidance of substantial injustice otherwise orders as referred to in subclause (1), the Tribunal must give its reasons for so ordering.

**89    Costs with respect to interest**

- (1) If a plaintiff obtains an order or judgment for the payment of damages and:
  - (a) the amount payable under the order or for which judgment is given includes interest or damages in the nature of interest, or
  - (b) the Tribunal, by a separate order, awards the plaintiff interest or damages in the nature of interest in respect of the amount,then, for the purpose of determining the consequences as to costs referred to in clause 87 or 88, the Tribunal must disregard so much of the interest, or damages in the nature of interest, as relates to the period after the day on which the offer was made.
- (2) For the purpose only of this clause, the Tribunal may be informed of the fact that the offer was made, and of the date on which it was made, but must not be informed of its terms.

**90    Acceptance of offer**

- (1) A party may accept an offer by serving written notice of acceptance on the offeror at any time during the period of acceptance for the offer.
- (2) An offer may be accepted even if a further offer is made during the period of acceptance for the first offer.
- (3) If an offer is accepted in accordance with this clause, any party to the compromise may apply for judgment to be entered accordingly.

**91    Withdrawal of acceptance**

- (1) A party who accepts an offer may withdraw the acceptance in either of the following circumstances by serving written notice of withdrawal on the offeror:
  - (a) if the offer provides for payment of money, or the doing of any other act, and the sum is not paid to the offeree or into the Tribunal, or the act is not done, within 28 days after acceptance of the offer or within such other time as the offer provides,
  - (b) if the Tribunal grants the party leave to withdraw the acceptance.
- (2) If acceptance of an offer is withdrawn:
  - (a) except as provided by paragraphs (b) and (c), all steps in the proceedings that have been taken as a consequence of the offer having been accepted cease to have effect, and
  - (b) the Tribunal may give directions:
    - (i) to restore the parties as nearly as may be to their positions at the time of the acceptance, and



- (ii) to give effect to any steps in the proceedings that have been taken as a consequence of the offer having been accepted, and
- (iii) to provide for the further conduct of the proceedings, and may do so either after the offer is withdrawn or when granting leave to withdraw the offer, and
- (c) if the claim was subject to the claims resolution process when the offer was accepted, the claim is once again subject to the claims resolution process at such stage and with such steps having been taken as part of that process as was the situation immediately before the offer was accepted.

**92 Failure to comply with accepted offer**

- (1) If the plaintiff, being a party to an accepted offer, fails to comply with the terms of the offer, the defendant is entitled:
  - (a) to such judgment or order as is appropriate to give effect to the terms of the accepted offer, or
  - (b) to an order that the proceedings be dismissed, and to judgment accordingly,as the defendant elects, unless the Tribunal orders otherwise.
- (2) If the defendant, being a party to an accepted offer, fails to comply with the terms of the offer, the plaintiff is entitled:
  - (a) to such judgment or order as is appropriate to give effect to the terms of the accepted offer, or
  - (b) to an order that the defence be struck out, and to judgment accordingly,as the plaintiff elects, unless the Tribunal orders otherwise.
- (3) If a party to an accepted offer fails to comply with the terms of the offer, and a defendant in the proceedings has made a cross-claim that is not the subject of the accepted offer, the Tribunal:
  - (a) may make such order or give such judgment under this clause, and
  - (b) may make such order as to the further conduct of proceedings on the cross-claim,as it thinks fit.

**93 Disclosure of offer to Tribunal or arbitrator**

- (1) No statement of the fact that an offer has been made may be contained in any pleading or affidavit.

- (2) If an offer is not accepted, no communication with respect to the offer may be made to the Tribunal at the trial or, as the case may require, to the arbitrator.
- (3) Despite subclause (2), an offer may be disclosed to the Tribunal or, as the case may require, to the arbitrator:
  - (a) if a notice of offer provides that the offer is not made without prejudice, or
  - (b) to the extent necessary to enable the offer to be taken into account for the purpose of determining an amount of interest up to judgment, or
  - (c) after all questions of liability and relief have been determined, to the extent necessary to determine questions as to costs.

**94 Offer to contribute**

- (1) If in any proceedings:
  - (a) one party (*the first party*) stands to be held liable to another party (*the second party*) to contribute towards any damages which may be recovered against the second party in the proceedings, and
  - (b) the first party, at any time after entering an appearance, makes an offer to the second party to contribute to a specified extent to the damages, and
  - (c) the offer is made without prejudice to the first party's defence, the offer must not be brought to the attention of the Tribunal or any arbitrator until all questions of liability or amount of damages have been decided.
- (2) In subclause (1), *damages* includes any interest up to judgment claimed on any damages.

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## Part 7 Miscellaneous

### 95 Legal practitioners to provide information about claims

- (1) This clause applies to a claim in respect of an asbestos-related condition (within the meaning of Part 4) settled or determined on or after 1 July 2005.
- (2) For the purposes of section 32I of the Act, a legal practitioner who acts for a party to a claim to which this clause applies that is settled or determined by judgment must:
  - (a) within 30 business days after the claim is finalised, provide to the Registrar the required information concerning the claim, and
  - (b) within 30 business days after any appeal in respect of the claim is finalised, provide to the Registrar any revision of the required information provided under paragraph (a) made necessary by changes resulting from the appeal.
- (3) The *required information* is the information required to complete Form 3 in Schedule 2. The required information and any revision of the required information must be provided using that Form.
- (4) A claim is *finalised*:
  - (a) when the claim is settled or determined, unless the claim is settled or determined on the basis that costs are to be agreed or assessed, or
  - (b) if the claim is settled or determined on the basis that costs are to be agreed or assessed—when costs have been agreed or assessed.
- (5) If a party's costs are assessed after the claim is finalised and the assessment results in the information provided under subclause (2) by a legal practitioner acting for the party being incorrect, the legal practitioner must, within 30 business days after the assessment, provide to the Registrar any necessary revision of the required information.

### 96 Costs assessment

The provisions of the *Legal Profession Act 1987* and the *Legal Profession Act 2004* are modified in their application to the assessment of costs in respect of a claim as follows:

- (a) a reference to the Manager, Costs Assessment, is to be read as a reference to the Registrar of the Tribunal,
- (b) a reference in sections 208S and 208SA of the *Legal Profession Act 1987* to the Chief Justice of New South Wales is to be read as a reference to the President of the Tribunal,

Clause 97          Dust Diseases Tribunal Regulation 2007

Part 7              Miscellaneous

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- (c) a reference in sections 390 and 391 of the *Legal Profession Act 2004* to the Chief Justice of New South Wales is to be read as a reference to the President of the Tribunal.

**97 Repeal and savings**

- (1) The *Dust Diseases Tribunal Regulation 2001* is repealed.
- (2) Any act, matter or thing that, immediately before the repeal of the *Dust Diseases Tribunal Regulation 2001* had effect under that Regulation continues to have effect under this Regulation.
- (3) A provision of this Regulation extends to a claim that is pending immediately before the commencement of the provision, except as otherwise provided by this Regulation.

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## Schedule 1 Fees

(Clause 4)

	<b>\$</b>
1 Filing an initiating process	294 (in the case of a corporation) or 147 (in any other case)
2 Filing a cross-claim	294 (in the case of a corporation) or 147 (in any other case)
3 Filing request for first directions hearing (for a claim or cross-claim)	1,142 (in the case of a corporation) or 571 (in any other case)
4 Filing notice of motion	294 (in the case of a corporation) or 147 (in any other case)
5 To open or keep open the registry or part of the registry:	
(a) on a Saturday, Sunday or public holiday	1,012 (in the case of a corporation) or 506 (in any other case)
(b) on any other day:	
(i) before 8.30 am or after 4.30 pm	1,012 (in the case of a corporation) or 506 (in any other case)
(ii) between 8.30 and 9 am or 4 and 4.30 pm	106 (in the case of a corporation) or 53 (in any other case)
6 To furnish a copy of the written opinion or reasons for opinion of any member of the Tribunal:	
(a) for a printed copy	50
(b) for any other kind of copy	31
<b>Note.</b> A party to proceedings before the Tribunal is entitled to one copy of the opinion or reasons for opinion in relation to the proceedings without charge.	
7 Making a copy of any document, otherwise than as provided for by item 5, for each page (minimum fee of \$10)	2
8 Supply of duplicate tape recording of sound-recorded evidence, for each cassette	36

Dust Diseases Tribunal Regulation 2007

Schedule 1 Fees

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		\$
9	For each copy of the transcript of any proceedings:	
	(a) for each page, where the matter being transcribed is under 3 months old (minimum fee for 1 to 8 pages of \$66)	7.90
	(b) for each page, where the matter being transcribed is 3 months old or older (minimum fee for 1 to 8 pages of \$78)	9
10	To issue a subpoena for production	114 (in the case of a corporation) or 57 (in any other case)
11	To issue a subpoena for production and to give evidence	114 (in the case of a corporation) or 57 (in any other case)
12	To issue a subpoena to give evidence	56 (in the case of a corporation) or 28 (in any other case)
13	To issue a notice to produce under Part 34 of the <i>Uniform Civil Procedure Rules 2005</i>	114 (in the case of a corporation) or 57 (in any other case)
14	The fee for a service not otherwise provided for in this Schedule <b>Note.</b> This fee is chargeable only with the approval of the Registrar.	60 (in the case of a corporation) or 30 (in any other case)

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## Schedule 2 Forms

### Form 1 Plaintiff's statement of particulars

(Clause 24)

#### Instructions for completing this form

You must complete Parts 1 to 4 and 6 to 8 of this form. Part 5 must also be completed unless the condition in respect of which you are claiming is mesothelioma.

You must create a covering index which lists each Part you have completed.

Where the form indicates that material must be attached to the statement of particulars, you should number each attachment sequentially and identify the number of that attachment in the relevant answer. You must also list the attachments in the covering index.

If you do not know the answer to a particular question you should state this in your answer.

You have a continuing obligation to provide information. In the event that you remember additional facts or information, you should update your answers.

It is not necessary for you to obtain and provide material with this form (such as documentary evidence and reports) on which you would generally rely in proceedings before the Tribunal, except where the form indicates that specific material is required to be attached.

By providing comprehensive answers to the questions in this form, the defendant will be able to make an assessment of the answers provided and can then make a decision as to whether further material (such as documentary evidence or an expert report) is required to assess the claim. Where further material is required by a defendant, you should provide that further material as soon as practicable.

If you already have additional material such as documentary evidence or expert reports then you may wish to provide that material now, or indicate that you have that material.

Where specific material is required to be attached to this form, but you do not have the material requested available to you at the time you complete the form you must indicate that you will forward this material to the defendant/s when it becomes available to you. You must provide an indication of when you expect this further material to be available.

Your solicitor may complete this form on your behalf, however, you must still swear or affirm the statutory declaration at the end of this form.

If your claim is made under the *Compensation to Relatives Act 1897*, you should complete the Exposure section in respect of the person as a result of whose death you are claiming.

#### Part 1 Claimant's personal details

Family name:

Given names:

Title:

Date of birth:

Place of birth:

Gender:

Have you been known by any other name? If so, provide in full the name(s) by which you were known:

Solicitor:

Solicitor's address:

Solicitor's phone and fax number:

Please complete the details below if you are not represented by a solicitor:

Home address of claimant:

Postal address (if different to home address):

Home and mobile telephone numbers:

## **Part 2 Medical evidence**

### **Medical condition**

- 2.1 What asbestos-related condition have you been diagnosed with (*your condition*)?
- 2.2 When was your condition diagnosed?
- 2.3 What is the name of the medical practitioner who diagnosed your condition?
- 2.4 Attach a short report from the medical practitioner who diagnosed your condition and any medical evidence which relates to your current condition (including X-rays, pathology reports, ultrasounds etc) on which you intend to rely and which is currently available to you.
- 2.5 What disabilities has your condition resulted in?
- 2.6 What treatments have been prescribed for you and what operations have you had for your condition? Describe in detail or attach any reports on which you intend to rely in proceedings that you have obtained to date which set out this information.
- 2.7 Do you have any other continuing medical conditions? If so, describe in detail.
- 2.8 Do you have any disabilities that have not arisen from your condition?

### **Treating medical practitioners**

- 2.9 Provide the following details for all medical practitioners or other health care providers (including all medical experts, surgeons and rehabilitation providers) who have treated you for your condition:
  - Name of practitioner
  - Name of practice
  - Address
  - Telephone number
  - Period of consultation
  - Treatment provided

### **Other medical practitioners or health care providers**

- 2.10 Provide details of all other medical practitioners or health care providers who have consulted you for any condition in the last five years:
  - Name of provider
  - Name of practice
  - Occupation
  - Address



- Telephone number
- Period of consultation

2.11 Do you authorise the persons against whom you bring this claim to access your medical records? If so, complete the following authority as a separate document and attach it to this statement:

**Medical authority**

I, [*Name*], authorise any medical practitioner or other health care professional who has treated or examined me to give [*Insert all defendants' names*], and any other person who is joined as a party to the proceedings commenced by me, photocopy access to my medical records to assist in the proof and settlement of my claim. A photocopy or faxed copy of this authority can be acted upon as if it were the original.

Signature:

Date:

2.12 Do you authorise a medical practitioner nominated by the defendant to access your pathological and histopathological material for the purpose of confirming your diagnosis? If so, complete the following authority as a separate document and attach it to this statement:

**Authority to access pathology results**

I, [*Name*], authorise a pathologist nominated by each defendant and cross-defendant to the proceedings commenced by me to be given access to my pathological and histopathological material for the purpose of confirming my diagnosis.

Signature:

Date:

**Part 3 Summary of work and exposure history**

3.1 Complete the following details relating to all employment and work, including periods where you were self-employed or employed as a contractor. Include ALL interstate and overseas employment details. Include additional rows in the Table as required.

Start Date	End Date	Name and address of employer (including any other names by which the employer may have been known)	Employer's industry	Occupation, a brief description of duties and status (eg full time, part-time, casual)	Exposure to asbestos (Yes or No)

3.2 Complete the following details relating to all non-work related exposure (including interstate and overseas exposures). Include additional rows in the Table as required.

Start date of exposure period	End date of exposure period	Address where exposure occurred	Brief description of activity you were engaged in (eg home renovation, washing clothes)

**Part 4 Detailed exposure history**

Complete an exposure history for each separate period of exposure listed in Part 3 (including work and non-work related exposures).

You must answer all of the general questions. You must also answer the specific questions relevant to your circumstances.

**4A General questions (To be answered for each exposure period)**

- 4.1 How were you exposed to asbestos?
- 4.2 What were you doing at the time you were exposed to asbestos?
- 4.3 What is the address of the premises where exposure occurred, if different from that specified in Part 3? If the address is unknown, please describe the premises and their general location.
- 4.4 Do you know who owned the premises where exposure occurred?
- 4.5 How often were you exposed to asbestos during the period of exposure (including the number of occasions and/or the frequency with which this occurred)?
- 4.6 Describe the level or intensity of exposure as you perceived it (including whether you consider the level or intensity was low, medium or high). Where there are multiple premises you should do this for each location, unless there is no material difference in the level or intensity of exposure at the different sites (for example, where as a contractor you attended multiple sites and the level or intensity of exposure was about the same at a number of the sites). You should indicate whether the exposure changed over time and if so, describe how it changed.
- 4.7 If you have had more than one exposure period, estimate (if you can reliably do so) as a percentage the proportion that this period of exposure constitutes of your total exposure?
- 4.8 What asbestos products were you exposed to, including the product trade-name if known? If you do not know the trade-name of the product, describe the product.
- 4.9 Do you know who was the manufacturer and/or supplier of those asbestos products?
- 4.10 Do you know where the products were purchased from?

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- 4.11 If there was more than one product during this period, estimate (if you can reliably do so) as a percentage the relative exposure to each product.
- 4.12 Do you recall any identifying features or markings on those asbestos products?

**4B Specific questions—to be completed for each exposure which is work-related**

- 4.13 Did your exposure result from working directly with asbestos or from working in the vicinity of others who were working with asbestos?
- 4.14 What specific activities or duties were you engaged in at the time you were exposed to asbestos?
- 4.15 How often did you engage in these duties or activities?
- 4.16 If your exposure occurred whilst you were working in the vicinity of others who were using asbestos, what activities were the others who were working with asbestos engaged in?
- 4.17 Were there any persons other than your employer who directed or controlled the work at those premises such as the owner or occupier of the premises or a contractor?
- 4.18 Were you provided with any relevant protective gear? If so, describe the gear you were provided with.
- 4.19 Were you required to wear protective gear whilst exposed to asbestos?
- 4.20 Did you comply with this requirement? If not, why not?
- 4.21 Did your employer advise you of any safety measures to protect you from being exposed to asbestos? If so, describe these measures.
- 4.22 Did the employer or occupier take any precautions to minimise the generation or dissemination of dust?
- 4.23 Do you know whether any companies other than your employer:
- (a) specified the use of the asbestos products to which you were exposed?
  - (b) designed or installed plant or equipment containing the asbestos to which you were exposed?
- 4.24 Were you using or working on particular plant or equipment which contained asbestos when the exposure to asbestos occurred? Please identify the plant or equipment and state what you were doing?
- 4.25 Did any products you handled, or the machinery you used, have any instructions or guidance as to safe usage to avoid exposure to asbestos?
- 4.26 What was the date of your last exposure to asbestos, if this was not your last date of employment?
- Attach documents you currently hold evidencing your employment with this employer (eg tax returns, references etc)

**4C Specific questions—exposure while self-employed**

- 4.27 If you were engaged as an independent contractor, identify the principal contractor?
- 4.28 Do you know who controlled the work which you were undertaking?

4.29 Did you have any insurance, including workers compensation insurance?

4.30 Did you employ any other people?

**4D Specific questions—secondary exposure as a result of the work of another member of your family or household**

4.31 Were you exposed to asbestos as a result of the work of another member of your family or household?

4.32 What was the name of the other person?

4.33 What was your relationship with that other person?

In addition to providing the above information, you must complete Part 4A and/or Part 4B in respect of the member of your family or household through whose work you were exposed (in addition to completing Part 4A in relation to your own exposure). In completing these Parts you should construe a reference to you as a reference to the person who it is alleged was exposed during the course of employment and/or self-employment. You are only required to provide detailed information about their exposure if you are able to do so.

**Part 5 Smoking history**

You do not need to complete this Part of the form if the condition from which you suffer is mesothelioma.

5.1 Do you currently or did you ever smoke? If so, provide the following information:

- Over what period have you smoked?
- What brand(s) of cigarettes or other tobacco products have you smoked?
- Provide the following information for each brand of cigarette or other tobacco product you have smoked:
  - How often have you smoked?
  - How many cigarettes or other tobacco products have you smoked a day?
  - Has your smoking pattern changed over time? If so, how?
  - Have you sustained any illnesses as a result of smoking?
  - Have your illnesses been treated by a medical practitioner? If so, what is the name of the medical practitioner?

**Part 6 Compensation**

In completing this Part you should not obtain medical or occupational therapist's reports to support your answers. The defendant may subsequently indicate that they require such material to assess your claim. You may also need to obtain these reports for proceedings in the Tribunal.

6.1 If you are claiming compensation for any of the damages categories listed below, provide brief particulars of your claim. You may be requested by the defendant to provide further detailed particulars, including setting out in detail the facts, circumstances and evidence on which you intend to rely. The information provided should include the details listed below each category:

- General damages (pain and suffering, loss of expectation of life)
  - Include details on your prognosis

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- Past economic loss and future loss of earning capacity including:
    - Per weekly loss alleged
    - Period of time over which the loss has occurred, or will continue to occur
    - The personal expenditure of the plaintiff if the plaintiff had not been injured (if the claim relates to mesothelioma or lung cancer)
    - Attach any tax returns, wage slips invoices or other documentation that may be relevant to your claim.
  - Cost of future medical care
  - Out of pocket expenses
  - Personal care costs
    - Specify the nature of the care required
    - Include details of the provider, including their relationship to you
    - Specify how often the care is to be provided
  - Damages for services provided to third parties
    - Specify the nature of the services provided
    - Identify to whom the services are to be provided
    - The nature of the recipient's relationship to you
    - The nature of the services
    - How long you have provided the services
    - The frequency with which you have provided these services
  - Home modifications
- 6.2 If you are claiming economic loss, are you receiving any Government benefit? If yes, please specify the benefit and the date on which that benefit commenced.
- 6.3 Have you received any compensation from a workers compensation or other insurer in respect of your condition? If yes, please specify the benefit paid and the date received.
- 6.4 Although you are not required at this stage to provide a notice of past benefits from the Health Insurance Commission, have you requested such a notice? If you have received this information you should attach it.

**Part 7 Dust Diseases Board claims**

- 7.1 Have you previously or are you currently making a claim in relation to your condition with the Dust Diseases Board? If so, provide the following information:
- Date of claim
  - Was the claim accepted?
  - If yes, what benefit was awarded?

### Part 8 Statutory declaration

I, [Name], of [Address], solemnly declare that the answer to each and every question on this form and the particulars contained therein or attached hereto, are true. I make this declaration in accordance with the *Oaths Act 1900*, and subject to the punishment by law provided for the making of any wilfully false statement in any such declaration.

Claimant's signature:

Date:

Declared before me:

Title:

Signature:

Date:

### Form 2 Defendant's reply

(Clause 26)

#### Instructions for completing this form

All defendants must complete Parts 1, 2, 7, 9 and 10 of this form. Part 8 of the form only needs to be completed where there is more than one defendant.

You must complete and submit the remaining Parts of the form which are relevant to the claim made against you.

You must create a covering index which lists the Parts of the form which you have completed and which identifies those Parts of the form which have not been completed.

Where the form indicates that material must be attached to the Reply, you should number each attachment sequentially and identify the number of that attachment in the relevant answer. You must also list the attachments in the covering index.

Where you require further information from the claimant in order to answer a particular question, you must state this in your answer and specify what information you require in order to answer the question.

You have a continuing obligation to provide information and update your answers as new information becomes available.

If you answer a question with "Do Not Know" and you are undertaking further investigations you must clearly indicate this and state when you expect those investigations to be complete. Once complete you must update your answer and the information in the form as soon as practicable.

You are not required to obtain and provide material (such as expert reports) with this form, except where the form indicates that specific material is required to be attached.

By providing comprehensive answers to the questions in this form, the plaintiff and other defendants will be able to make an assessment of the answers provided and will then be able to make a decision as to whether further material (such as documentary evidence or an expert report) is required to assess your defence. Where further material is required by a claimant or other defendant, you must provide that further material as soon as practicable.

Where this form requires you to summarise the type of evidence on which you intend to rely to support your position, you must describe that evidence in sufficient detail for the plaintiff and other defendants to fully understand the basis of your position. A response that refers to material in general terms which may be obtained through other processes (such as discovery or interrogatories) is not considered adequate.

The term "evidence" in this form includes statements of witnesses, documents over which you have custody or control, documents you have obtained from third parties, verified answers to interrogatories provided in other claims and expert reports.

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In some cases the form requires you to attach evidence. Where the form indicates that evidence must be attached you are only required to provide evidence that is available to you at the time you complete this form. You are, however, required to provide details of all evidence that you are aware of or that is reasonably discoverable by you. You should indicate if you intend on obtaining further evidence (such as an expert report). If so, you should specify when you expect to receive the further evidence.

If you are the insurer for a person against whom the claim is made you must complete this form and construe a reference to you as a reference to the insured. If you do not know the answer to any of the questions because you have been unable to obtain this information specify this and indicate whether you expect that further information will become available to you, and if so when. You should update your answer at that time.

### **Part 1 Defendant details**

Name of defendant:

ABN/ACN:

Postal address:

Address for Service:

Email address:

Phone:

Fax:

Name of claimant:

Date of service of the statement of particulars on you:

Were proceedings commenced against you directly by the claimant or are you a cross-defendant?

Have you made any cross-claims in this matter? If yes, list those cross-defendants.

Do you need to inspect particular premises or a place where the exposure is alleged to have occurred in order to respond to the claimant's claim? If yes, please specify those premises.

**Note.** Where a request to inspect premises or a place is made, you still must answer all of the questions in this reply.

### **Part 2 Diagnosis of the claimant's injury**

- 2.1 Do you admit that the claimant has the alleged condition?
- 2.2 Do you accept the medical evidence on the claimant's diagnosis that the claimant has provided with his or her Statement of Particulars? If you only accept some of the evidence provided by the claimant, specify those parts which you accept.
- 2.3 Do you admit that the alleged condition was caused by exposure to asbestos?
- 2.4 Do you admit that the claimant has the disabilities claimed? If you only admit that the claimant has some of the disabilities claimed please specify which disabilities you admit the claimant suffers from.
- 2.5 If you did not answer yes to questions 2.1 to 2.4, do you have any medical evidence to support your position? Attach the evidence. If you do not have evidence to support your position but you have arranged for such evidence to be obtained you should indicate when you expect to receive this evidence and provide that evidence as soon as it is received.

**Part 3 Response to claim relating to employment**

*To be completed by a defendant who is alleged to have employed the claimant.*

**Note:** If the claimant alleges that his or her condition was caused by exposure to asbestos which occurred as a result of contact with another person whom the claimant alleges was employed by you, you should also complete this Part.

In so doing you should construe a reference to the claimant as a reference to the person who it is alleged you employed except in relation to questions 3.7 to 3.13 where you should answer each question with respect to both the claimant and the person you employed.

3.1 Do you admit that you employed the claimant, as alleged?

Yes  No  Do not know

If yes, proceed to question 3.2.

If no, set out the basis on which you do not admit that you employed the claimant. What evidence do you have and what evidence do you intend to obtain to contradict the claimant's or other defendant's version of events? If you know who employed the claimant during the period, identify that person. Any evidence which you have at present should be attached to this form.

If you do not know, do you have any evidence to contradict the claimant's allegation? Any evidence which you have at present should be attached to this form.

3.2 Did you occupy or control the premises at which the claimant alleges he or she was exposed to asbestos?

Yes  No  Do not know

If you answered yes to this question you must also complete Part 4 of this form.

If you do not know or do not admit the allegation, on what basis do you assert that you do not know or do not admit to the allegation? Summarise the type of evidence on which you intend to rely to support your position.

3.3 Do you admit that the time period during which the claimant is alleged to have been employed by you is correct?

Yes  No  Do not know

If yes, proceed to question 3.4.

If no:

- (a) do you admit that you employed the claimant in another period and, if so, what period?
- (b) what evidence do you have to support this admission?

If you do not know or do not admit you employed the claimant in any period, on what basis do you assert that you do not know or do not admit that you employed the claimant? Do you have any evidence to contradict the claimant's allegation?

Attach all relevant evidence.



3.4 Do you admit that the claimant was exposed to asbestos in the course of or arising out of employment by you?

Yes  No  Do not know

If yes, proceed to question 3.5.

If no, on what basis do you dispute the claimant's allegation that he or she was exposed to asbestos arising out of or in the course of employment by you. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

3.5 Do you agree with the claimant's description of:

(a) the circumstances in which exposure occurred (including the duties or activities engaged in by the claimant and the frequency with which exposure occurred);

Yes  No  Do not know

(b) the intensity and duration of exposure;

Yes  No  Do not know

(c) the products to which the claimant was exposed?

Yes  No  Do not know

If you answered yes to all of the above questions, proceed to question 3.6.

If you answered no to one or more of the above questions, set out the basis on which you disagree with the claimant's description for each question to which you answered no. Summarise the type of evidence on which you intend to rely to support your position.

If you answered that you do not know the answer to one or more of the above questions, do you have any evidence to contradict the claimant's allegation? If so, summarise the type of evidence on which you intend to rely to support your position.

3.6 Do you admit that you knew or ought to have known that exposure to asbestos gave rise to a risk of personal injury (either of the kind suffered by the claimant or other personal injury) at the time of the alleged exposure?

Yes  No

If yes, proceed to question 3.7 (although you may provide further information on your knowledge at the time of the alleged exposure if you consider this to be relevant).

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If no, set out in detail your basis (including the evidence on which you intend to rely) for not admitting that you had such knowledge, including references to any decided cases which support your position.

3.7 Do you admit that you owed a common law duty of care to the claimant as an employer during the period of alleged exposure?

Yes  No

If yes, proceed to question 3.8.

If no, on what basis do you claim that you did not have a duty?

3.8 Regardless of whether or not you admit that you had a duty, did you discharge the common law duty to the standard of a reasonable person, for example, by having a safe system of work, by providing instructions on the safe use and handling of asbestos or by taking reasonable precautions?

Yes  No  Do not know

If yes, set out the basis on which you assert that you discharged your duty and provide detailed information concerning the steps taken which you consider discharged the duty of care. Summarise the type of evidence on which you intend to rely to support your position.

If no, proceed to question 3.9.

If you do not know, do you have any evidence to contradict the claimant's allegation? If so, summarise the evidence on which you intend to rely to support your position.

3.9 Do you admit that you owed a statutory duty to the claimant as an employer or otherwise during the alleged period of exposure?

Yes  No  Do not know

**Note:** A statutory duty may otherwise arise if you:

- employed persons in the premises where the claimant was carrying out the work that he or she alleges exposed him or her to asbestos;
- the premises at which you were carrying out work were a factory within the meaning of the *Factories and Shops Act 1912* or the *Factories, Shops and Industries Act 1962*;
- a person was carrying out building or construction work within the meaning of the *Construction Safety Act 1912*;
- the claimant was engaged in building or construction work within the meaning of the *Construction Safety Act 1912*.

If yes, proceed to question 3.10.

If no or do not know, on what basis do you claim that you did not have a duty?

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3.10 Do you admit that you failed to discharge the statutory duty said to apply to you?

Yes  No  Do not know

If yes, proceed to question 3.11.

If no, set out the basis on which you assert that you discharged your duty and provide detailed information concerning the steps taken which you consider discharged the duty of care. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? If so, summarise the type of evidence on which you intend to rely to support your position.

3.11 Do you admit that your breach of duty (whether common law or statutory) is a cause of the alleged asbestos related injury?

Yes  No  Do not know

If yes, proceed to question 3.12.

If no, set out the basis of your argument as to why you do not admit the breach caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? If so, summarise the type of evidence on which you intend to rely to support your position.

3.12 Regardless of whether you admit that the claimant has an asbestos related injury, whether or not you admit that you owed a duty (whether common law or statutory) or whether or not you admit that you breached that duty, do you admit that the conduct alleged by the claimant to have been engaged in by you is a cause of the asbestos related injury alleged by the claimant?

Yes  No  Do not know

If yes, proceed to question 3.13.

If no, set out the basis of your argument as to why you do not admit that the conduct caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? If so, summarise the type of evidence on which you intend to rely to support your position.

3.13 Do you intend to rely on any other defence which you say defeats the claimant's claim in whole or in part (such as a limitation defence or that the risk of injury to the claimant was not foreseeable)?

Yes  No

If no, proceed to Part 4.

If yes, provide details of that defence and summarise the type of evidence on which you intend to reply.

#### Part 4 Response to claim as an occupier

*To be completed by a defendant who is alleged to have occupied premises at which the claimant was alleged to have been injured*

**Note:**

1 If you answered yes to question 3.2, you must also complete this Part. If you also employed the claimant, and have completed all of Part 3, you only need to answer questions 4.1–4.4, and 4.7 to 4.10.

2 If the claimant alleges that his or her injury was caused by exposure to asbestos which occurred as a result of contact with another person whom the claimant alleges was exposed to asbestos at premises occupied or controlled by you, you should also complete this Part. In completing this Part you should construe a reference to the claimant as a reference to the person who it is alleged you employed except in relation to questions 4.7 to 4.12 where you should answer each question with respect to both the claimant and the person you employed.

4.1 What are the premises to which the claim relates?

4.2 Do you admit that you occupied or controlled the premises at the time of the alleged exposure?

Yes  No  Do not know

If yes, proceed to question 4.3.

If no, what evidence do you have and what evidence do you intend to obtain to support your position? If you know who occupied the premises during the period, identify that person. Any evidence which you have at present should be attached to this form.

If you do not know, do you have any evidence to contradict the claimant's allegation? Any evidence which you have at present should be attached to this form.

4.3 Do you admit that you occupied the premises for the whole of the period during which exposure is alleged to have occurred?

Yes  No  Do not know

If yes, proceed to question 4.4.

If no:

- (a) for what period do you admit that you occupied the premises?
- (b) what evidence do you have to support this admission?

If you do not know or do not admit you occupied the premises during any period, on what basis do you assert that you do not know or do not admit that you employed the claimant? Do you have any evidence to contradict the claimant's allegation.

Any evidence which you have at present should be attached to this form.

4.4 Do you admit that the claimant was exposed to asbestos at the premises occupied or controlled by you?

Yes  No  Do not know

If yes, proceed to question 4.5.

If no, on what basis do you dispute the allegation that the claimant was exposed to asbestos at premises controlled or occupied by you? Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

4.5 Do you agree with the claimant's description of:

(a) the circumstances in which exposure occurred (including the duties or activities engaged in by the claimant and the frequency with which exposure occurred);

Yes  No  Do not know

(b) the intensity and duration of exposure;

Yes  No  Do not know

(c) the products to which the claimant was exposed?

Yes  No  Do not know

If you answered yes to all of the above questions, proceed to question 4.6.

If you answered no to one or more of the above questions, set out the basis on which you disagree with the claimant's description for each question. Summarise the type of evidence on which you intend to rely to support your position.

If you answered that you do not know the answer to one or more of the above questions, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

4.6 Do you admit that you knew or ought to have known that exposure to asbestos gave rise to a risk of personal injury (either of the kind suffered by the claimant or other person injury) at the time of the alleged exposure?

Yes  No

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If yes, proceed to question 4.7 (although you may provide further information on your knowledge at the time of the alleged exposure if you consider this to be relevant).

If no, set out in detail your basis (including the evidence on which you intend to rely) for not admitting that you had such knowledge, including references to any decided cases which support your position.

4.7 Do you admit that you owed a common law duty of care to the claimant as an occupier during the period of alleged exposure?

Yes  No

If yes, proceed to question 4.8

If no, on what basis do you claim that you did not have a duty?

4.8 Regardless of whether or not you admit that you had a duty, did you discharge the common law duty to the standard of a reasonable person, for example, by providing instructions on the safe use and handling of asbestos or by taking reasonable precautions?

Yes  No  Do not know

If yes, set out the basis on which you assert that you discharged your duty and provide detailed information concerning the steps taken which you consider discharged the duty of care. Summarise the type of evidence on which you intend to rely to support your position.

If no, proceed to question 4.9.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

4.9 Do you admit that you owed a statutory duty to the claimant as an occupier or otherwise during the alleged period of exposure?

Yes  No  Do not know

**Note:** A statutory duty may otherwise arise if you:

- employed persons in the premises where the claimant was carrying out the work that he or she alleges exposed him or her to asbestos;
- the premises at which you were carrying out work were a factory within the meaning of the *Factories and Shops Act 1912* or the *Factories, Shops and Industries Act 1962*;
- a person was carrying out building or construction work within the meaning of the *Construction Safety Act 1912*;
- the claimant was engaged in building or construction work within the meaning of the *Construction Safety Act 1912*.

If yes, proceed to question 4.10.

If no or do not know, on what basis do you claim that you did not have a duty?

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4.10 Do you admit that your breach of duty (whether common law or statutory) is a cause of the alleged asbestos related injury?

Yes  No  Do not know

If yes, proceed to question 4.11.

If no, set out the basis on which you assert that you discharged your duty and provide detailed information concerning the reasons why you do not admit the breach of duty caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

4.11 Regardless of whether you admit that the claimant has an asbestos related injury, whether or not you admit that you owed a duty (whether common law or statutory) or whether or not you admit that you breached that duty, do you admit that the conduct alleged by the claimant to have been engaged in by you is a cause of the asbestos related injury alleged by the claimant?

Yes  No  Do not know

If yes, proceed to question 4.12.

If no, set out the basis of your argument as to why you do not admit that the conduct caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

4.12 Do you intend to rely on any other defence which you say defeats the claimant's claim in whole or in part (such as a limitation defence or that the risk of injury to the claimant was not foreseeable)?

Yes  No

If no, proceed to Part 5.

If yes, provide details of that defence and summarise the type of evidence on which you intend to rely to support your position.

### Part 5 Response to claim as a manufacturer or supplier of asbestos

*To be completed by a defendant who is alleged to have manufactured or supplied asbestos which has injured the claimant. This includes products which are manufactured or supplied as part of plant or equipment.*

**Note:** If the claimant alleges that his or her injury was caused by exposure to asbestos which occurred as a result of contact with another person whom the claimant alleges was exposed to asbestos manufactured or supplied by you, you should also complete this Part. In completing this Part you should construe a reference to the claimant as a reference to the person who it is alleged was exposed to the product manufactured or supplied by you.

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5.1 What are the asbestos products to which is it alleged that the claimant was exposed as set out in the claimant's statement of particulars?

5.2 Do you admit that you manufactured or supplied those products at any time?

Yes  No  Do not know

If yes, proceed to question 5.3.

If no, on what basis do you assert that you did not manufacture or supply those products? If you know who supplied or manufactured those products, identify that person. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

5.3 Do you admit that the claimant was exposed to products manufactured or supplied by you in the circumstances alleged by the claimant or otherwise.

Yes  No  Do not know

If yes, proceed to question 5.4.

If no, on what basis do you disagree with the claimant's version of events? Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

5.4 What was the composition of each asbestos product you admit to manufacturing or supplying, including the type and quantity of asbestos?

5.5 Do you agree with the description of:

(a) the circumstances in which exposure occurred (including the duties or activities engaged in by the claimant and the frequency with which exposure occurred);

Yes  No  Do not know

(b) the intensity or duration of exposure?

Yes  No  Do not know

If you answered yes or do not know to both of the above questions, proceed to question 5.6.

If you answered no to one or both of the above questions, set out the basis on which you disagree with the claimant's description. Summarise the type of evidence on which you intend to rely to support your position.



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If you do not know, do you have any evidence to contradict the claimant's allegation?  
Summarise the type of evidence on which you intend to rely to support your position.

- 5.6 Do you admit in the period alleged that you failed to provide to the persons who used your products instructions as to the steps to be taken to handle asbestos in a safe manner or warnings as to the risks associated with asbestos?

Yes  No

If yes, proceed to question 5.7.

If no, set out in detail the instructions or warnings which you say were provided, including details on how or by what means those instructions were conveyed to the user of the product. Specify for each relevant product the date on which you claim that warnings or instructions first appeared. Summarise the type of evidence on which you intend to rely to support your position.

- 5.7 Do you admit that you owed a common law duty of care to the claimant during the period of alleged exposure?

Yes  No

If yes, proceed to question 5.8.

If no, why do you believe that you did not have a duty?

- 5.8 Do you admit that you knew or ought to have known that exposure to asbestos gave rise to a risk of personal injury (either of the kind suffered by the claimant or other person injury) at the time of the alleged exposure?

Yes  No

If yes, proceed to question 5.9 (although you may provide further information on your knowledge at the time of the alleged exposure if you consider this to be relevant).

If no, set out in detail your basis (including the evidence on which you intend to rely) for not admitting that you had such knowledge, including references to any decided cases which support your position.

- 5.9 Do you admit that you failed to discharge your common law duty of care to the standard of a reasonable person?

Yes  No  Do not know

If yes, proceed to question 5.10.

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If no, provide a detailed response setting out how you discharged the duty to the standard of a reasonable person, for example, by providing instructions on the safe use and handling of asbestos or by providing warnings. Provide a detailed description of those measures and summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

5.10 Do you admit that your breach of duty of care is a cause of the alleged asbestos related injury?

Yes  No  Do not know

If yes, proceed to question 5.11.

If no, provide detailed information concerning the reasons why you do not admit the breach of duty caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

5.11 Regardless of whether or not you admit that the claimant has an asbestos related injury, whether or not you admit that you owed a duty of care and whether or not you admit that you breached any duty of care, do you admit that the conduct alleged by the claimant to have been engaged in by you (in particular the manufacture or supply of the products) is a cause of the asbestos related injury alleged by the claimant?

Yes  No  Do not know

If yes, proceed to question 5.12.

If no, provide detailed information concerning the reasons why you do not admit the conduct caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

5.12 Do you intend to rely on any other defence which you say defeats the claimant's claim in whole or in part (such as a limitation defence or that the risk of injury to the claimant was not foreseeable)?

Yes  No

If no, proceed to Part 7.

If yes, provide details of that defence and summarise the type of evidence on which you intend to rely to support your position.

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**Part 6 Response to other claims**

*This part is to be completed by a defendant who does not fit within the categories in Part 3, 4 or 5. You do not have to complete this Part if you have completed Part 3, 4 or 5.*

6.1 Do you admit that the claimant was exposed to asbestos in the manner alleged by the claimant?

Yes  No  Do not know

If yes, proceed to question 6.2.

If no, on what basis do you dispute the claimant's allegation that they were exposed to asbestos in the manner alleged. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

6.2 Do you agree with the claimant's description of:

(a) the circumstances in which exposure occurred (including the frequency with which exposure occurred)?

Yes  No  Do not know

(b) the intensity and duration of exposure?

Yes  No  Do not know

(c) the products to which the claimant was exposed?

Yes  No  Do not know

If you answered yes to all of the above questions, proceed to question 6.3.

If you answered no to one or more of the above questions, set out the basis on which you disagree with the claimant's description for each question. Summarise the type of evidence on which you intend to rely to support your position.

If you answered that you do not know the answer to one or more of the above questions, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

6.3 Do you admit that you knew or ought to have known that exposure to asbestos gave rise to a risk of personal injury (either of the kind suffered by the claimant or other person injury) at the time of the alleged exposure?

Yes  No

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If yes, proceed to question 6.4 (although you may provide further information on your knowledge at the time of the alleged exposure if you consider this to be relevant).

If no, set out in detail your basis (including the evidence on which you intend to rely) for not admitting that you had such knowledge, including references to any decided cases which support your position.

6.4 Do you admit that you owed a duty to the claimant (either common law or statutory) during the period of alleged exposure?

Yes  No

If yes, proceed to question 6.5.

If no, on what basis do you claim that you did not have a duty?

6.5 Regardless of whether or not you admit that you had a duty, did you discharge the duty?

Yes  No  Do not know

If yes, set out the basis on which you assert that you discharged the duty and provide detailed information concerning the steps taken which you consider discharged the duty. Summarise the type of evidence on which you intend to rely to support your position.

If no, proceed to question 6.6.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

6.6 Do you admit that your breach of duty is a cause of the alleged asbestos related injury?

Yes  No  Do not know

If yes, proceed to question 6.7.

If no, set out the basis for your reasons as to why you do not admit the breach of duty caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

6.7 Regardless of whether you admit that the claimant has an asbestos related injury, whether or not you admit that you owed a duty or whether or not you admit that you breached that duty, do you admit that the conduct alleged by the claimant to have been engaged in by you is a cause of the asbestos related injury alleged by the claimant?

Yes  No  Do not know

If yes, proceed to question 6.8.

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If no, set out the basis for your reasons as to why you do not admit that the conduct caused the injury. Summarise the type of evidence on which you intend to rely to support your position.

If you do not know, do you have any evidence to contradict the claimant's allegation? Summarise the type of evidence on which you intend to rely to support your position.

- 6.8 Do you intend to rely on any other defence which you say defeats the claimant's claim in whole or in part (such as a limitation defence or that the risk of injury to the claimant was not foreseeable)?

Yes  No

If no, proceed to Part 7.

If yes, provide details of that defence and summarise the type of evidence on which you intend to rely to support your position.

### Part 7 Insurance

Do you believe that you may be entitled to recover all or part of the damages from your former or current insurer?

Yes  No  Do not know

If yes, specify the insurer, the type of insurance, the period of cover and whether there is any limit to the cover provided. If you answered that you do not know you should indicate when you expect to be in a position to answer this question.

### Part 8 Apportionment of liability among defendants

A standard presumption set out in the Table in clause 5 (1) of the *Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2005* will be used to apportion liability among the defendants if the defendants cannot agree on apportionment.

A standard presumption will be used to assign a share of liability to each defendant depending on which category it falls into. The standard presumptions vary according to the period in which the exposure occurred and the category of defendant. The Contributions Assessor may vary the standard presumption applying to a claim having regard to the factors set out in clause 5 (5) and (6) of the Order, but the Contributions Assessor may not vary the standard presumptions outside of the permitted range.

Answer the following questions.

- 8.1 Into which category should each defendant be placed?
- 8.2 How should the standard presumptions be varied to take account of the level of knowledge which you believe should be assigned to each Category 2 defendant, (including yourself if relevant)? Set out the basis for your position.

**Note.** Please note, the standard presumptions have been prepared on the basis that Category 1 defendants are presumed to have had actual knowledge of the risks of asbestos, so it cannot be argued that the presumption should be varied against a Category 1 defendant on the basis of its level of knowledge.

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- 8.3 What level of knowledge should be attributed to each Category 2 defendant, including yourself, as to the risks of asbestos (either of the kind suffered by the claimant or other personal injury) at the time of the alleged exposure? Set out the basis for your position, including references to any cases on which you intend to rely to support your position.
- 8.4 If other findings have been made in relation to your knowledge of the risks of asbestos at the time of the alleged exposure, provide details of those cases. Do you intend to rely on or dispute those findings? If you intend to dispute those findings, on what basis?
- 8.5 Should the standard presumptions be varied on the basis of the identity, capacity, size or state of sophistication of a particular defendant (including yourself), including the industry, and nature of the industry in which the defendant was engaged? Set out the basis for your position.
- 8.6 Should the standard presumptions be varied on the basis of the number of defendants identified in each category as being at fault in connection with the claim? Set out the basis for your position.
- 8.7 Should the standard presumptions be varied having regard to the steps which a particular defendant (including yourself) took, ought to have taken and/or was capable of taking to minimise the risk of harm? Set out the basis for your position.
- 8.8 Should the standard presumptions be varied for any other reason? Set out the basis for your position.
- 8.9 If there are more than two defendants in any one category, are there any particular factors relating to the blameworthiness of those defendants which would justify sharing the apportioned liability between those defendants other than on an equal basis? Set out the basis of your position.

**Part 9 Compensation**

*To be completed by all defendants, including cross-defendants*

Provide a detailed response to each question indicating whether you agree with the claimant's assessment of damages. If you disagree with the claimant's assessment, you must specify the facts and circumstances on which you rely on to establish your position.

- 9.1 Are there any other conditions or injuries which you believe contributed to the claimant's damage?

Yes

No

If yes, specify the other conditions or injuries.

- 9.2 Set out the facts and circumstances on which you say the level of general damages should be calculated and the amount which should be awarded. Your response should indicate the extent to which you say other conditions or injuries contribute to the claimant's pain and suffering and loss of enjoyment of life, whether you dispute the claimant's evidence as to prognosis and details of any previous awards of the Tribunal which you think are relevant. Summarise the type of evidence on which you intend to rely to support your position.

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9.3 Do you agree with the claimant's assessment of:

- (a) the alleged per weekly loss;
- (b) the period of time over which such loss is alleged to occur;
- (c) the assessment of the personal expenditure of the claimant?

Yes  No  Not applicable

If yes, proceed to question 9.4.

If no, set out the basis on which you dispute each of the matters set out above. Summarise the type of evidence on which you intend to rely to support your position.

9.4 Do you agree with the claimant's assessment of the cost of future medical care?

Yes  No  Not applicable

If yes, proceed to question 9.5.

If no, set out the basis on which you say future medical care should be assessed. Summarise the type of evidence on which you intend to rely to support your position.

9.5 Do you agree with the claimant's assessment of out of pocket expenses?

Yes  No  Not applicable

If yes, proceed to question 9.6.

If no, set out the basis on which you say out of pocket expenses should be assessed. Summarise the type of evidence on which you intend to rely to support your position.

9.6 Do you agree with the claimant's assessment of personal care costs, both past and future?

Yes  No  Not applicable

If yes, proceed to question 9.7.

If no, set out the basis on which you say personal care costs should be assessed, with particular attention to the nature and level of care required and the cost of that care. Summarise the type of evidence on which you intend to rely to support your position.

9.7 Do you agree with the claimant's assessment of the cost of services provided to third parties?

Yes  No  Not applicable

If yes, proceed to question 9.8.

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If no, set out the basis on which you say the cost of services provided to third parties should be assessed, with particular attention to the nature of the services and the claimant's circumstances. Summarise the type of evidence on which you intend to rely to support your position.

9.8 Do you agree with the claimant's assessment of the cost of home modifications?

Yes  No  Not applicable

If yes, proceed to Part 10.

If no, set out the basis on which you say the cost of home modifications should be assessed. Set out the evidence on which you intend to rely to support your position.

**Part 10 Certification**

*The form must be completed by the defendant's claims manager or a solicitor acting for the defendant.*

I, [name], [position], [company/solicitor's firm], certify that I reasonably believe on the basis of provable facts and a reasonably arguable view of the law that the defence set out in this reply has reasonable prospects of success if the matter were to be litigated before the Tribunal.

Claims manager's or defendant's solicitor's signature:

Date:

Title:

Date:

**Form 3 Claims information**

(Clause 95)

**Information concerning claims**

Claim details	
Proceedings number	
Name of claimant	
Name of each defendant	
Name of each cross-defendant	
If you are a solicitor, party for which you acted	
If you are a solicitor, name of your firm and solicitor on the record	



Nature of claimant's injury	<input type="checkbox"/> Mesothelioma <input type="checkbox"/> Asbestosis <input type="checkbox"/> Asbestos related cancer <input type="checkbox"/> Asbestos related pleural diseases
<b>Compensation awarded or agreed</b>	
Was the claim settled or determined by the Tribunal?	<input type="checkbox"/> Settled <input type="checkbox"/> Judgment <i>(Tick the appropriate box)</i>
At what stage was the claim settled or determined	<input type="checkbox"/> After filling the statement of claim but before serving the statement of claim and statement of particulars <input type="checkbox"/> After serving the statement of claim and statement of particulars but before the defendant or defendants file a reply <input type="checkbox"/> Where there is only one defendant, after the reply is filed but before the claim is referred for mediation <input type="checkbox"/> Where there is more than one defendant, after the defendants file their replies but before they agreed on contribution or the claim is referred to a Contributions Assessor <input type="checkbox"/> Where there is more than one defendant, if the defendants agree on contribution, after that agreement but before the claim is referred for mediation <input type="checkbox"/> Where there is more than one defendant, if the claim is referred to a contributions assessor, after that referral but before the Contributions Assessor makes a determination <input type="checkbox"/> Where there is more than one defendant, if the claim is referred to a Contributions Assessor, after the Contributions Assessor makes a determination but before the claim is referred to mediation

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	<input type="checkbox"/> After the claim is referred for mediation but before the mediation occurs <input type="checkbox"/> During mediation <input type="checkbox"/> After an unsuccessful mediation but before the claim is returned to the Tribunal <input type="checkbox"/> After the claim is referred to the Tribunal but before the Tribunal makes a determination <input type="checkbox"/> Judgment by the Tribunal
If the claim was settled, state the amount for which the claim was settled (including the amount of any costs included in the statement or assessed separately)	Total amount (including costs): Costs (if separately agreed or assessed):
If the claim was not settled, state the quantum of damages awarded at judgment (including the amount of any costs agreed or assessed)	Total amount (including costs): Costs (if separately agreed or assessed):
Have you previously been awarded provisional damages for an asbestos related injury	
<b>Legal costs and disbursements</b>	
Total solicitor/client costs (including amounts recovered from the defendants)—excluding disbursements	
Counsel's fees	
Cost of expert reports obtained (list each report separately, identifying the nature of the report including specialty (eg medical report (pathology), occupational therapist, industrial hygienist) and the cost of each report	
Other disbursements	
<b>Costs recovered</b>	
Specify the amount of legal costs recovered. List the amount recovered from each other party separately and identify that party.	
Specify the amount of disbursements recovered. List the amount recovered from each other party separately and identify that party.	

Were costs recovered on an indemnity basis? List the amount recovered from each other party separately and identify that party.	
If costs were recovered on an indemnity basis, describe the circumstances in which this order was made	
If a defendant, the amount paid to a single claims manager (whether another defendant or an independent claims manager)	
<b>Contributions Assessor</b>	
Was any matter referred to a Contributions Assessor for determination?	
<b>Single claims manager</b>	
Was a single claims manager used or did all the defendants decide not to use a single claims manager?	
Name of single claims manager	
Who selected the single claims manager (defendants, Registrar or Contributions Assessor)?	
<b>Single claims manager costs and disbursements (to be completed by those acting as a single claims manager only)</b>	
Operational costs—excluding disbursements	
External legal costs—excluding disbursements	
Counsel’s fees	
Cost of expert reports obtained (list each report separately, identifying the nature of the report including specialty (eg medical report (pathology), occupational therapist, industrial hygienist) and the cost of each report	
Other disbursements	

Signature: