NSW GOVERNMENT

REVIEW OF THE DUST DISEASES CLAIMS RESOLUTION PROCESS

ISSUES PAPER OCTOBER 2006

ATTORNEY GENERAL'S DEPARTMENT OF NSW
& THE CABINET OFFICE

Issues Paper: Review of the Dust Diseases Claims Resolution Process

Published by the Attorney General's Department and The Cabinet Office

October 2006

ISBN: 978-0-7313-5466-5

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GLOSSARY

ARPD	Asbestos-related pleural disease
CRP	Claims resolution process established by the ***Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005***
Current Review	The review currently being undertaken as recommended by the Final Report
Final Report	Final Report of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims – March 2005
Form 3 Return	Return lodged by all legal practitioners representing parties to proceedings and self-represented litigants which provide details of costs incurred in progressing or defending a claim
Regulation	The ***Dust Diseases Tribunal Amendment (Claims Resolution Process) Regulation 2005*** which established the CRP
Reply	The Reply prepared by each defendant to the plaintiff's Statement of Particulars
Review	The Review of Legal and Administrative Costs in Dust Diseases Compensation Claims which reported in March 2005
SCM	Single Claims Manager which may be appointed under the Regulation in multiple defendant claims to act for all defendants
Transitional Claims	Claims which were commenced before 1 July 2005 and which are subject to the CRP through the operation of transitional provisions.
Tribunal	Dust Diseases Tribunal

Chapter 1 Introduction

1.1 Background

In November 2004, the NSW Government established the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims to consider the issue of improving the efficiency with which dust diseases compensation claims are resolved.

The Review was conducted by Mr Laurie Glanfield AM, Director-General of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General of The Cabinet Office.

The Terms of Reference for the Review required it to consider the processes for handling and resolving dust diseases compensation claims and identify ways in which legal, administrative and other costs can be reduced within the existing common law system in New South Wales.

The Review was not to consider any proposal to introduce a statutory scheme to resolve dust diseases compensation claims or which would adversely affect plaintiffs' compensation rights.

The Review released an Issues Paper in December 2004 for public comment. The Final Report of the Review was released in March 2005.

1.2 Final Report of the Review

The Review concluded that reforms to the dust diseases system should be guided by the following principles.

1. Early exchange of information is the key to promoting early settlement and reducing legal costs and a claims resolution process should be designed to ensure that this happens.

2. Disputes as to contribution between defendants contribute significantly to legal costs. The claims resolution process must be designed to encourage defendants to resolve these disputes quickly and commercially, without delaying resolution of the plaintiff's claim.

3. The reforms should give defendants the tools to be commercial and to pursue early settlement so as to avoid unnecessary costs, but defendants would need to ensure that they and their lawyers use these tools.

4. The reforms should encourage early settlement so that fewer cases need to be determined by litigation before the Tribunal. For those fewer cases, the Tribunal's procedures should be streamlined and improved.

5. The new system should recognise the importance of the Tribunal. Plaintiffs must retain access to the Tribunal, especially when their claim is urgent or becomes urgent.

The Government accepted all of the recommendations of the Review.

1.3 The CRP

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

The main features of the CRP are as follows:

(i) Plaintiffs continue to commence their claim by filing a Statement of Claim with the Tribunal. This ensures that entitlements to general damages for the plaintiff and the plaintiff's estate are preserved.

(ii) Urgent cases (or cases which become urgent) proceed through the existing Tribunal litigation process. The Tribunal determines which claims are urgent.

(iii) All other claims proceed through the CRP. A claim is not subject to case management by the Tribunal while the claim is proceeding through the CRP.

The key steps in the CRP are as follows.

a. After filing (but not serving) the Statement of Claim, plaintiffs complete a standard form "Statement of Particulars", verified by statutory declaration, which includes expert reports and certain other documentary evidence. This is served with the Statement of Claim.

b. Defendants prepare a standard form "Reply" admitting, disputing or requiring further information on each point, with documents to support the defendant's position on any point it is disputing.

c. Defendants are required to join any other defendants as soon as practicable.

d. Defendants seek to agree on apportionment of liability. If they cannot agree, an independent third party will apportion liability among the defendants using standard presumptions. The determination can be challenged, but only after the plaintiff's claim is settled or determined.

e. If the claim does not resolve informally, compulsory mediation occurs between the plaintiff and defendants, conducted by a mediator.

f. The plaintiff attends the mediation personally unless he or she is too ill. Defendant claims managers must attend if requested by the mediator.

g. If defendants want to dispute contribution at a later date, the plaintiff can be required to give sworn evidence at the end of the mediation but only if the plaintiff's claim already has been settled with the defendants.

h. Parties will be able to encourage settlement by using "offers of compromise". New provisions were introduced to make these more effective.

1.4 The Current Review

The Final Report of the Review recommended that the CRP be reviewed after data in relation to its first 12 months of operation are available. The Current Review has therefore been initiated to act upon this recommendation.

The Current Review is again being conducted by Mr Laurie Glanfield AM, Director-General of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General of The Cabinet Office.

The Current Review is to consider:

- the impact of the CRP on legal, administrative and other costs; and

- whether further reforms should be implemented to reduce legal, administrative and other costs.

This issues paper has been prepared to facilitate discussion for the purpose of the Current Review.

This paper deals with issues in the order of the steps involved in resolving a claim under the CRP.

In August 2006, stakeholders were invited by the Current Review to raise issues for consideration in the paper. In addition, the Registrar of the Tribunal held a Practitioners' Forum in June 2006 where practitioners raised a number of issues. A transcript of the forum was made available to the Current Review by the Registrar.

1.5 Data review

The Current Review is based on data sources held by the Registry of the Tribunal. This includes the Tribunal Registry Database and consolidated material concerning the Form 3 Returns.

In addition, the Registry of the Tribunal has provided further assistance by enabling information to be obtained from various data sources it holds which record various actions taken by plaintiffs and defendants as part of the CRP.

The Current Review thanks the Registrar of the Tribunal for providing this information and thanks the staff of the Tribunal for their considerable assistance in accessing the information.

Other issues have been identified in the course of this research and are raised in the Issues Paper.

There are a number of points which should be noted about the data which has been used.

First, relatively few of the claims commenced by filing a Statement of Claim between 1 July 2005 and 30 June 2006 had progressed completely through the CRP by 30 June 2006. Relatively few Statements of Particulars have been served, and up to 30 June 2006 only a small number of mediations and contributions assessments have been held, with much of the activity as part of the CRP occurring in the second six months of the period under review. It also appears that much settlement activity, particularly in relation to transitional claims, is occurring outside of the CRP as parties are resolving matters without serving the Statement of Particulars or, in the case of transitional claims, a current claim proposal. As such, much of the information contained in Chapter 2 of the Report is based on small sample sizes. The Issues Paper has sought to identify where this is the case. More importantly, however, the data may not provide a representative picture of how the CRP will operate in future years.

Second, the information held by the Tribunal which records various actions taken by plaintiffs and defendants as part of the CRP includes all post 1 July 2005 claims once a Statement of Claim is filed. This information provides an indication of how claims have been dealt with as part of the CRP, however, it should be noted that the data source from which this information was extracted was created as a case management tool for the Tribunal, rather than as a source of statistics. As such, the data has some limitations and some minor inconsistencies arise.

Third, the CRP only applies to asbestos-related claims, in particular asbestosis, asbestos-related pleural disease (ARPD), carcinoma and mesothelioma. It does not, for example, apply to silicosis claims. Unless otherwise stated, the information in the Issues Paper relates to these four conditions. It should be noted that the data includes carcinoma. It is not possible to determine from the data whether the particular condition is asbestos-related because of the way in which data is recorded. It is, however, likely that the overwhelming majority of cases recorded in which the data as carcinoma are asbestos-related. It also is noted that while the CRP applies to claims under the ***Compensation to Relatives Act 1897*** this information is not included in the data.

Finally, cross-claims which are commenced by way of a separate Statement of Claim once the plaintiff's claim is resolved are not included in the data. This means that, where additional defendants are joined during the CRP (either by making them a party to the proceedings commenced by the plaintiff or by an original defendant making a cross-claim while the claim is subject to the CRP), they are included in these data. Where, a defendant pursues another defendant by cross-claim after the original

defendant has resolved the plaintiff's claim, however, the cross-claim against that second defendant will not be included in these data (because the CRP is not directly applicable to these cross-claims).

1.6 Submissions

Comments are sought, not only on the issues raised, but also on any other issues concerning the impact of the CRP on legal, administrative and other costs and whether further reforms should be implemented to reduce these costs, to ensure that as much money as possible is available for plaintiffs.

Submissions from all stakeholders are welcome. Submissions should be addressed to:

Review of the Dust Diseases Claims Resolution Process

By email: asbestosreview@cabinet.nsw.gov.au

By mail: GPO Box 5341
Sydney NSW 2001

For further enquiries, please contact Legal Branch NSW Cabinet Office on (02) 9228 5599

The closing date for submissions is Friday 24 November 2006.

Chapter 2 Overview of the operation of the CRP and the Tribunal

2.1 Introduction

The CRP commenced operation on 1 July 2005. As at that date, the following claims were to be subject to the CRP:

- Claims commenced by a Statement of Claim filed on or after 1 July 2005;
- Claims commenced by Statement of Claim filed before 1 July 2005 where:
    - A hearing date for the claim had not been set before 1 July 2005 (provided the parties have not notified the Registrar in writing that the parties have agreed the CRP should not apply); or
    - All the parties have agreed that the CRP is to apply.

2.2 Number of claims and claim outcomes

The Current Review has prepared an overview of the first full 12 months' operation of the CRP in respect of claims which were commenced between 1 July 2005 and 30 June 2006. Claims commenced by a Statement of Claim during this period proceed through the CRP (unless they are or become urgent). Transitional arrangements apply to transitional claims and these are discussed in section 2.7.

2.2.1 Claims commenced

The following table shows the number of claims commenced in the first 12 months of the CRP.

Table 2.1 Claims commenced between 1 July 2005 and 30 June 2006 by month

	Total Number [1]	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothel-ioma
July [2]	**14**	3	2	0	9
August	**21**	5	3	1	12
September	**33**	10	3	1	19
October	**24**	3	4	1	16
November	**17**	2	1	2	12
December	**27**	6	4	1	16
January	**19**	6	4	2	7
February	**23**	3	9	0	11
March	**37**	4	16	2	15
April	**20**	2	11	0	7
May	**20**	1	9	0	10
June	**35**	7	13	3	12
Total claims commenced between 1 July 2005 and 30 June 2006	**290**	**52**	**79**	**13**	**146**

Source: *Tribunal Claims Database*

Note 1: There were also eight *Compensation to Relatives Act* claims during this period, and although it is likely that these are asbestos-related, this is not separately identified by the Tribunal Claims Database. There were also a number of claims for asthma, emphysema, bronchitis and other conditions and, although these may be asbestos-related, these are not separately identified by the Tribunal Claims Database and so these claims have not been included.

Note 2 The month is the month in which the Statement of Claim was filed with the Tribunal.

2.2.2 Outcome of claims

Claims commenced between 1 July 2005 and 30 June 2006 either were resolved (by settlement or judgment) or remained pending at 1 July 2006 as set out in the table below.

Table 2.2 Outcome of claims commenced between 1 July 2005 and 30 June 2006

	Total Number[1]	By Disease Type			
		Asbestosis	**ARPD**	**Carcinoma**	**Mesothelioma**
Claims finalised [2] – commenced between 1 July 2005 and 30 June 2006	**66**	9	3	2	52
Claims discontinued [3] – commenced between 1 July 2005 and 30 June 2006	**4**	0	0	1	3
Claims pending – commenced between 1 July 2005 and 30 June 2006	**220**	43	76	10	91
Total	**290**	**52**	**79**	**13**	**146**

Source: *Tribunal Claims Database*

Note 1 See note 1 for Table 2.1.

Note 2 This includes claims which are settled by way of judgment and those which are finalised by way of settlement.

Note 3 This includes claims which are discontinued, struck out or transferred to another jurisdiction.

The Form 3 Returns lodged by practitioners distinguish between the number of claims which are resolved by judgment and those which are resolved by settlement.

Table 2.3 Claims commenced between 1 July 2005 and 30 June 2006 where a Form 3 Return has been filed

	Total Number	By Disease Type			
		Asbestosis	**ARPD**	**Carcinoma**	**Mesothelioma**
Claims resolved by judgment	**1**	0	0	0	1
Claims resolved by settlement	**66**	9	2	2	53
Total	**67** [1]	9	2	2	54

Source: *Form 3 Returns*

Note 1 Only claims which resolved on or before 30 June 2006 are included. This number is lower than the total number of claims which have been finalised as set out in Tables 2.2 because the Tribunal is still waiting for returns to be lodged in relation to a small number of claims, or a return has been lodged but the costs are to be agreed or assessed.

While claims have been classified in Table 2.2 as pending, it is important to point out that in many of these cases, the only action which has been taken is the filing of the Statement of Claim. It is not until the Statement of Claim is served with a Statement of Particulars that the CRP timetable is commenced. This is shown in the following table.

Table 2.4 Claims commenced between 1 July 2005 and 30 June 2006 which were pending at 1 July 2006 according to whether a Statement of Particulars has been served

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
Claims pending at 30 June 2006 where the Statement of Claim and Statement of Particulars have been served	**59**	25	11	2	21
Claims where Statement of Claim has been filed, but has not been served with the Statement of Particulars	**145**	57	26	6	56
Total claims pending	**204** [1] [2]	**82**	**37**	**8**	**77**

Source: *Tribunal Registry*

Note 1 There were also eight *Compensation to Relatives Act* claims during this period which are not included in the total.

Note 2 The total of claims filed between 1 July 2005 and 30 June 2006 recorded as outstanding is different from that recorded in the Tribunal Claims Database because the numbers included in this Table do not include those matters which remained outstanding as to 1 July 2006 which had been removed from the CRP and had returned to the Tribunal either on the grounds of urgency or by consent, or where otherwise discontinued.

2.3 Handling of claims within the CRP

2.3.1 Introduction

As noted in Chapter 1, the Registry of the Tribunal has separately kept details of all claims which have been dealt with through the CRP and this data source records what steps have been taken by plaintiffs and defendants as part of the CRP.

2.3.2 Serving the Statement of Claim and Statement of Particulars

A strict timetable applies to claims subject to the CRP once the plaintiff serves the Statement of Claim and Statement of Particulars on the defendant(s). The following shows the number of claims commenced between 1 July 2005 and 30 June 2006 where the timetable of the CRP has been commenced through service of a Statement of Particulars.

Table 2.5 Month in respect of which the CRP timetable has been commenced by service of the Statement of Particulars for claims commenced between 1 July 2005 and 30 June 2006

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
July	**0**	0	0	0	0
August	**2**	0	0	0	2
September	**3**	0	0	0	3
October	**4**	1	0	0	3
November	**4**	1	0	0	3
December	**9**	2	0	0	7
January	**9**	3	3	0	3
February	**12**	3	2	1	6
March	**9**	5	1	0	3
April	**5**	2	1	0	2
May	**12**	3	2	1	6
June	**13**	8	3	0	2
Total Statement of Particulars served	**82**	**28**	**10**	**2**	**40**

Source: *Tribunal Registry*

As appears from the above table, there was relatively little activity in relation to claims commenced between 1 July 2005 and 30 June 2006 as part of the CRP. Activity has increased significantly, however, in the second six months. It is also noted that in July and August 2006, a further 23 Statements of Particulars have been served, which is more than the number served in the first six months of the CRP's operation.

2.3.3 Outcomes of claims where active steps are taken as part of the CRP

The following table shows the outcome of claims in respect of which action has been taken as part of the CRP. The following data includes all claims commenced between 1 July 2005 and 30 June 2006.

Table 2.6 Status as at 1 July 2006 of claims commenced between 1 July 2005 to 30 June 2006 inclusive

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
Claims reported as settled while the claim is subject to the CRP	**53**	7	1	3	42
Claims discontinued	4	0	0	1	3
Claims removed for urgency	**15** [1]	0	1	1	13
Claims removed by agreement after information exchange	**2**	0	0	0	2
Claims removed for failure to comply with the CRP	**1**	0	0	0	1
Claims returned to Tribunal as mediation was unsuccessful	**2**	0	0	0	2
Claims outstanding on 30 June 2006 which remain subject to the CRP	**205**[2]	82	37	8	78
Total	**282** [3]	**89**	**39**	**13**	**141**

Source: *Tribunal Registry*

Note 1 It is likely that other transitional claims returned to the Tribunal by way of a notice of motion on the basis of urgency; however these are not recorded in this data source. A further four urgent claims have been removed after 30 June 2006.

Note 2 Of the outstanding claims, the Statement of Particulars has been served in 59 claims (and as such the claims are active as part of the CRP). As at 1 July 2006 the Statement of Claim and the Statement of Particulars have not been served in 145 claims. This is set out in Table 2.4.

Note 3 The total number of claims is lower than that reported in Table 2.1 because there are a number of claims where the outcome is not clear from the Tribunal Registry data.

2.4 Time frames as part of the CRP

The following information is based on data recorded by the Tribunal in respect of those claims where action is taken as part of the CRP.

2.4.1 Service of the Statement of Particulars

The following shows the average time taken between filing the Statement of Claim and serving the Statement of Claim with the Statement of Particulars. The shortest period taken to serve the Statement of Particulars after the Statement of Claim is filed is the same day, while the longest time taken is 243 calendar days.

Table 2.7 Calendar days between lodgement of a Statement of Claim and service of the Statement of Particulars on the last original defendant

		By Disease Type			
	Total	**Asbestosis**	**ARPD**	**Carcinoma**	**Mesothelioma**
Number	**104** [1]	38	16	4	46
Range	**0 - 243**	5 - 227	2 - 216	56 - 179	0 - 243
Median	**121**	160	128	57	76
Average	**111**	137	115	114	92

Source: *Tribunal Registry*

Note 1 In order to increase the sample size, the data set used in this table includes all claims in respect of which a Statement of Particulars was served before 31 August 2006. All claims where a Statement of Particulars has been served are included in the total, regardless of the outcome of the claim (that is, settled, outstanding, removed for urgency etc).

2.4.2 Time taken to resolve claims

The following table shows the average time taken to resolve a claim as part of the CRP from the time that the Statement of Particulars is filed. The shortest time which it has taken to resolve a claim (without the claim needing to return to the Tribunal after unsuccessful mediation) once a Statement of Particulars has been filed is 50 days, while the longest time taken is 220.

Table 2.8 Calendar days taken to finalise a claim as part of the CRP from service of the Statement of Particulars

		By Disease Type			
	Total	**Asbestosis**	**ARPD**	**Carcinoma**	**Mesothelioma**
Number	**39** [1]	8	2	0	29
Range	**50 - 220**	62 - 217	133 - 187	-	50 - 139
Median	**96**	144	133	-	76
Average	**109**	139	160	-	97

Source: *Tribunal Registry*

Note 1 The total number includes claims filed between 1 July 2005 and 30 June 2006 and includes claims which were resolved up until 31 August 2006. Claims only have been included where a Statement of Particulars has been filed and served.

When the number of Statements of Particulars served is compared to the number of matters which have settled while subject to the CRP (as set out in Tables 2.4 and 2.6), it is clear that a number of matters are being resolved as part of the CRP without a Statement of Particulars being served at all. In other words, parties are negotiating to resolve matters without formally taking action under the CRP by serving the Statement of Particulars.

2.4.3 Resolution of claims where there is no Statement of Particulars

The time taken to resolve matters without a Statement of Particulars having been filed and served is set out in the following table. This includes claims which are removed from the CRP on the grounds of urgency and which are subsequently determined by the Tribunal, or are otherwise settled without a Statement of Particulars being filed.

Table 2.9 Calendar days taken to finalise a claim from filing of the Statement of Claim in claims where a Statement of Particulars has not been served

		By Disease Type			
	Total	**Asbestosis**	**ARPD**	**Carcinoma**	**Mesothelioma**
Number	**51**	6	1	3	41
Range	**14 - 381**	52 - 381	114	35 - 195	14 - 224
Median	**117**	197	-	137	110
Average	**120**	205	114	122	116

Source: *Tribunal Registry*

Note 1 The table includes all claims resolved up to 31 August 2006, including those which were withdrawn from the CRP due to urgency but which were subsequently resolved.

2.5 Contributions assessment

Between 1 July 2005 and 30 June 2006 there were seven contributions assessments undertaken. Five of these were undertaken in respect of claims lodged between 1 July 2005 and 30 June 2006, and the remaining two were conducted in relation to transitional claims. It is not clear to the Current Review whether contributions assessments have yet been the subject of challenge before the Tribunal. The Registry also has advised that, since 30 June 2006, a number of other contributions assessments have been undertaken.

2.6 Mediation

Of the 53 claims commenced between 1 July 2005 and 30 June 2006 which resolved by way of settlement while subject to the CRP, the data appears to show that mediators were appointed in approximately 22 claims. It is not clear how many of these were actually mediated. Two claims which were not successfully mediated subsequently settled when the claim returned to the Tribunal.

2.7 Transitional claims commenced before 1 July 2005

Claims commenced by Statement of Claim filed before 1 July 2005 are subject to the CRP where:

- A hearing date for the claim had not been set before 1 July 2005 (provided the parties have not notified the Registrar in writing that the parties have agreed the CRP should not apply); or

- All the parties have agreed that the CRP is to apply.

To initiate action under the CRP, the plaintiff must provide the defendant(s) with a current claims proposal and the defendant(s) must then negotiate with the claimant as to which steps under the CRP will apply to the claim, and which will not. If the parties cannot agree on the application of the CRP to the claim, the Registrar must determine the dispute.

2.7.1 Outcome of transitional claims

The following table shows details of the number of transitional claims "on hand" in the Tribunal as at 1 July 2005 and the outcome of those claims. As was the case with Table 2.1, cross-claims are not included.

Table 2.10 Outcome of pre 1 July 2005 claims

	Total Number[1]	By Disease Type			
		Asbestosis	**ARPD**	**Carcinoma**	**Mesothelioma**
Claims on hand at 1 July 2005	**524**	256	145	33	90
Claims finalised [2] – commenced pre 1 July 2005	**272**	130	64	11	67
Claims discontinued [3] – commenced pre 1 July 2005	**18**	7	6	1	4
Claims pending as at 30 June 2006 – commenced pre 1 July 2005	**234**	119	75	21	19

Source: *Tribunal Claims Database*

Note 1 See note 1 for Table 2.1.

Note 2 These include claims which are settled by way of judgment and those which are finalised by way of settlement.

Note 3 These include claims which are discontinued, struck out or transferred to another jurisdiction.

2.7.2 Steps taken as part of the CRP on pre 1 July 2005 claims

Only 35 pre 1 July 2005 claims are recorded in the Registry's database which tracks progress through the CRP. From Table 2.10 above, there were 524 pre 1 July 2005 claims as at that date which potentially could have been subject to the CRP. Of the 35 claims recorded by the Registry, in only three of them were current claims proposals notified to the Registrar of the Tribunal.

Given the low number of claims recorded in this data source, it would appear that few pre 1 July 2005 claims have been formally the subject of action as part of the CRP, notwithstanding that 272 of these claims have been settled or finalised by judgment between 1 July 2005 and 30 June 2006. This could be for a number of reasons:

1. There is no requirement for the current claims proposal to be notified to the Registrar of the Tribunal;
2. The claims had a hearing date set as at 1 July 2005 and were not subject to the CRP (unless the parties agreed);
3. Parties progressed settlement discussions outside of the CRP; or
4. The claim was returned to the Tribunal on the basis that it was urgent. Whether this occurred in respect of transitional claims is not separately recorded by the Tribunal, although in light of the number of matters which were resolved by judgment in Table 2.10, it appears unlikely that this would be significant.

The Form 3 Returns lodged by practitioners distinguish between the number of claims which are resolved by judgment and those which are resolved by settlement.

Table 2.11 Claims resolved by settlement where a Form 3 Return has been filed – Pre 1 July 2005 and post 1 July 2005

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
Claims resolved by settlement – commenced pre 1 July 2005	254	130	46	11	67
Claims resolved by judgment– commenced post 1 July 2005	10	1	4	1	4
Total	264	131	50	12	71

Source: *Form 3 Returns*

Note 1 This number is lower than the total number of claims which have been finalised as set out in Table 2.10 because the Tribunal is still waiting for returns to be lodged in relation to a small number of claims, or a return has been lodged but the costs are to be agreed or assessed.

2.8 Legal and other claim costs

2.8.1 Plaintiff legal and other claim costs

Initial comments provided to the Current Review have suggested that, although defendant legal costs have decreased, plaintiff costs have not decreased significantly to date. (It is noted that most of the comments received by the Review to date were from defendant rather than plaintiff parties).

The following table includes information on the average solicitor-client costs, barristers' fees, cost of expert reports and cost of disbursements on a per claim basis for plaintiffs. It includes claims finalised by settlement and by judgment.

In calculating the average amount for each category of cost, claims are included only where an amount has been identified in the Form 3 Return for solicitor-client costs, as some returns at the date of filing had indicated that this amount still was to be advised or confirmed (for example, where the costs are still to be agreed or assessed).

It is not possible to present the information in Tables 2.12, 2.13 and 2.15 by disease type because the very small sample size in respect of some diseases would raise privacy concerns. It is noted, however, that in the case of the malignant category, the overwhelming majority of claims are for mesothelioma. In the case of non-malignant claims, the majority of claims are for asbestosis.

Table 2.12 Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 – Single defendant claims

		By Disease Type	
	Overall	**Non-malignant**	**Malignant**
Number	**52**	9	43
Solicitor-Client Costs	**25,961**	19,990	27,210
Barristers' Fees	**2,735**	1,861	2,918
Expert Reports	**4,192**	2,509	4,544
Other Disbursements	**2,447**	1,860	2,570
Total	**35,335**	26,220	37, 242

Source: *Form 3 Returns*

Table 2.13 Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 – Multiple defendant claims

		By Disease Type	
	Overall	**Non-malignant**	**Malignant**
Number	11	2	9
Solicitor-Client Costs	23,124	10,052	26,028
Barristers' Fees	2,497	1,100	2,807
Expert Reports	2,896	1,474	3,212
Other Disbursements	3,806	1,123	4,402
Total	**32,323**	**13,749**	36,449

Source: *Form 3 Returns*

There is some Form 3 claims information available in relation to pre 1 July 2005 transitional claims and in general the samples are much larger than those which are available for claims commenced between 1 July 2005 and 30 June 2006. Caution should be exercised in drawing direct comparisons between the two claim periods, however, particularly given the small sample in relation to claims commenced between 1 July 2005 and 30 June 2006.

Table 2.14 Average plaintiff legal and other costs for claims commenced prior to 1 July 2005 – Single defendant claims

		By Disease Type			
	Overall	**Asbestosis**	**ARPD**	**Carcinoma**	**Mesothelioma**
Number	161	71	21	8	35
Solicitor-Client Costs	26,764	24,986	24,854	26,483	31,584
Barristers' Fees	3,470	1,805	3,817	7,581	5,699
Expert Reports	5,239	6,076	3,874	4,642	4,497
Other Disbursements	2,866	2,759	2,128	3,279	3,431
Total	**38,340**	**35,627**	**34,674**	**41,986**	**45,213**

Source: *Form 3 Returns*

Table 2.15 Average plaintiff legal and other costs for claims commenced prior to 1 July 2005 – Multiple defendant claims

		By Disease Type		
	Overall	**Asbestosis**	**ARPD**	**Malignant**
Number	100	57	22	21
Solicitor-Client Costs	34,499	33,176	27,312	45,620
Barristers' Fees	5,545	2,860	3,908	14,546
Expert Reports	5,222	5,660	3,475	5,862
Other Disbursements	10,754	4,040	33,022	5,649
Total	**56,020**	**45,736**	**67,718**	**71,677**

Source: *Form 3 Returns*

The following table consolidates information concerning mesothelioma claims.

Table 2.16 Average plaintiff legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 – Mesothelioma

	By Disease Type			
	Claims commenced between 1 July 2005 and 30 June 2006		Claims commenced pre 1 July 2005	
	Mesothelioma (Single Defendant)	Mesothelioma (Multiple Defendant)	Mesothelioma (Single Defendant)	Mesothelioma (Multiple Defendant)
Solicitor-Client Costs	27,138	28,006	31,584	40,691
Barristers' Fees	2,863	2,405	5,699	13,003
Expert Reports	4,468	2,799	4,497	5,604
Other Disbursements	2,550	4,671	3,431	4,915
Total	37,019	37,881	45,213	64,213

Source: *Form 3 Returns*

2.8.2 Defendant legal and other claim costs

The following table includes information concerning the average solicitor-client costs, barristers' fees, cost of expert reports and cost of disbursements for defendants on a per claim basis. The average amounts specified in Table 2.18 are the average costs for all defendants to a claim. This includes claims where more than one defendant has been named in the Statement of Claim by the plaintiff, as well as defendants who are joined (either as a party to the plaintiff's claim or by a defendant commencing a cross-claim against one or more other defendants). Claims have not been included unless there has been full reporting by all defendants that were a party to the claim. It includes costs for claims finalised by settlement and by judgment.

It only has been possible to ascertain defendant legal costs for claims commenced between 1 July 2005 and 30 June 2006. While cost data has been collected for pre-1 July 2005 claims, much of this information is in relation to separate cross-claims where there is no cost data identifying defendant costs in defending a plaintiff's claim (as it was resolved well before commencement of the CRP). Similarly, while data is available for a primary claim which may have settled after 1 July 2005, there is not yet full reporting for all defendants or cross-claims remaining outstanding.

Table 2.17 Average defendant legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 – Single defendant claims

		By Disease Type	
	Overall	**Non-malignant**	**Malignant**
Number	**40**	8	32
Solicitor-Client Costs	**10,488**	9,364	10,770
Barristers' Fees	**492**	764	424
Expert Reports	**1,915**	2,989	1,648
Other Disbursements	**1,337**	990	1,424
Total	**14,233**	**14,107**	**14,107**

Source: *Form 3 Returns*

Table 2.18 Average defendant legal and other costs for claims commenced between 1 July 2005 and 30 June 2006 – Multiple defendant claims

		By Disease Type			
	Overall	**Asbestosis**	**ARPD**	**Carcinoma**	**Mesothelioma**
Number	6	0	0	0	6
Solicitor-Client Costs	**21,962**	-	-	-	21,962
Barristers' Fees	**2,812**	-	-	-	2,812
Expert Reports	**5,072**	-	-	-	5,072
Other Disbursements	**3,781**	-	-	-	3,781
Total	**33,628**	**-**	**-**	**-**	**33,628**

Source: *Form 3 Returns*

2.8.3 Expert reports

While the Form 3 requires the cost of each report to be separately identified, many returns have not done this. As a result, the Current Review has not been able to determine the average number of reports which have been obtained by plaintiffs and defendants, either as a whole, by report type or by medical speciality.

Data has been obtained on the average cost incurred on expert reports on a per claim basis which is reported in aggregate form in Tables 2.12 to 2.18 above.

2.9 Compensation recovered

The Form 3 Returns include information concerning the amount of compensation either awarded by the Tribunal or agreed between the parties.

Table 2.19 Average amount of compensation recovered

		By Disease Type		
	Asbestosis	**ARPD**	**Carcinoma**	**Mesothelioma**
Average compensation recovered by settlement (including costs) – commenced between 1 July 2005 and 30 June 2006	107,500	95,000	150,000	296,407
Average compensation recovered by settlement (including costs) – claims commenced pre 1 July 2005	135,901	112,148	133,000	340,885
Average compensation recovered by settlement (not including costs, with costs to be agreed or assessed) – claims commenced pre 1 July 2005 [1]	90,000	-	-	315,867

Source: *Form 3 Returns*

Note 1 There are no claims commenced between 1 July 2005 and 30 June 2006 which were settled on the basis that costs were to be agreed or assessed.

Tables 2.12 to 2.15 included average plaintiff legal and other costs. The information in those tables was calculated using those claims where information was provided as part of the Form 3 Returns concerning costs. Claims were necessarily excluded from the samples used to make those calculations (even though the settlement amount was known) where there was no information as to legal costs, either because it was not reported or it still was to be agreed or assessed.

To enable the average amounts being received by plaintiffs, after legal and other costs are accounted for, to be calculated, the "Average amount of compensation recovered" in the following tables has been calculated using the same data sets as were used for Tables 2.12 to 2.15. It includes amounts recovered by settlement and judgment.

It is not possible to present the information in Tables 2.20 and 2.21 by disease type because of the very small sample size in respect of some diseases would raise privacy concerns. It is noted, however, that in the case of the malignant category, the overwhelming majority of claims are for mesothelioma. In the case of non-malignant claims, the majority of claims are for asbestosis.

Table 2.20 Average amount of compensation recovered and plaintiff legal costs – Claims commenced between 1 July 2005 and 30 June 2006

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Malignant	304,158	37,242	266,916
Single Defendant – Non-malignant	108,333	26,220	82,113
Multiple Defendant - Malignant	237,000	36,449	200,551
Multiple Defendant – Non - malignant	50,000	13,749	36,251

Source: *Form 3 Returns*

Table 2.21 Average amount of compensation recovered and plaintiff legal costs – Claims commenced before 1 July 2005

	Average amount recovered (including plaintiff legal and other costs)	Average plaintiff legal and other costs	Average net amount recovered by plaintiff
Single Defendant – Asbestosis	131,447	35,627	95,820
Single Defendant – ARPD	110,839	34,674	76,165
Single Defendant – Carcinoma	125,000	41,986	83,014
Single Defendant – Mesothelioma	341,971	45,213	296,235
Multiple Defendant – Asbestosis	140,636	45,736	94,900
Multiple Defendant – ARPD	118,465	67,718	50,747
Multiple Defendant – Malignant	332,233	71,677	260,556

Source: *Form 3 Returns*

2.10 Conclusions

The number of claims commenced after 1 July 2005 and resolved under the CRP is relatively small, and it is difficult to draw conclusions from the information which is available. It appears that the level of activity within the CRP was very low initially,

but it has increased markedly in the second six months of the period under review as practitioners become more familiar with the system.

Specific issues in relation to the CRP are discussed in the remaining sections of this Issues Paper.

A key point should be noted. Relatively few Statements of Particulars have been served, and only a small number of mediations and contribution assessments have been held, with much of the activity as part of the CRP occurring in the second six months of the period under review. It appears, however, that in many cases matters are still being resolved by the parties without the need for the Statement of Particulars to be filed and served. This is particularly the case for transitional claims where it appears relatively few matters have been resolved with formal action being taken as part of the CRP. Similarly, matters are being resolved without the need for a mediator to be appointed.

The Current Review welcomes the fact that parties appear to be attempting to resolve matters, without the need for formal steps to be taken as part of the CRP. Early settlement, regardless of whether steps are taken as part of the CRP, is strongly encouraged by the Current Review as it is likely to reduce unnecessary costs. The Current Review assumes that the existence of the CRP provides both the context for these less formal processes and an important mandatory process for those cases which are unable to be resolved through less formal processes.

In relation to legal costs, comparisons can be drawn for pre 1 July 2005 claims and claims commenced between 1 July 2005 and 30 June 2006 in respect of plaintiff legal and other costs for all claims which have been finalised. While it appears that overall plaintiff costs are slightly lower, caution must be exercised as the samples remain small and could be distorted by costs in a single claim. In claims commenced before 1 July 2005, this distortion may be more likely due to some claims involving substantial costs from appeals and re-hearings.

There is no comparative data for legal costs for defendants because of limitations with the data submitted in relation to pre-1 July 2005 claims. When compared, however, to data collated in Chapter 2 of the Final Report which contained estimates of the costs in claims involving the former James Hardie subsidiaries, there appears to be a substantial reduction in costs for defendants.

Chapter 3 Commencement of proceedings and the CRP

3.1 Serving the Statement of Claim and Particulars

3.1.1 Introduction

Under the Regulation, a Statement of Claim may be filed with the Tribunal, but it is not validly served on the defendant unless it is served with the Statement of Particulars. Currently under the Uniform Civil Procedure Rules, a Statement of Claim is valid for service for six months of being filed with the Tribunal. Prior to 15 August 2005, this period was 12 months.

The Final Report noted that filing the Statement of Claim is critical for the plaintiff because it preserves the entitlement of the plaintiff's estate to damages for pain and suffering. If the plaintiff does not commence proceedings by lodging a Statement of Claim before he or she dies, the value of his or her claim will be significantly reduced.

The Final Report also recognised that defendants may incur unnecessary legal costs investigating claims before receiving adequate information from the plaintiff to inform their investigations.

Given these issues, the Final Report recommended the Statement of Claim should be able to be filed with the Tribunal in order to preserve the plaintiff's position in terms of damages, but that service of the Statement of Claim be deferred until the plaintiff's form containing information on the claim (the Statement of Particulars) is ready. This approach was designed to give the plaintiff enough time to collate the information needed so that the defendant could properly assess the claim, even if the Statement of Claim must be filed urgently to protect the plaintiff's position and before any detailed instructions can be taken.

Concerns regarding delays in serving the Statement of Claim have been raised by defendants. It is argued that there are numerous instances where the plaintiff's solicitor files a Statement of Claim and does not serve it until some months later when the plaintiff's condition has deteriorated. This, it is argued, disadvantages defendants because either an urgent hearing before the Tribunal is sought or because the defendants have little or no time to prepare their Reply due to the rigidity of the CRP timetable. Some have suggested that a stricter time limit should be introduced for service of the Statement of Claim, while at the Practitioners' Forum it was suggested that service should occur simultaneously with or immediately after filing.

3.1.2 Data concerning delays in service of the Statement of Claim and the Statement of Particulars

The following table shows the time taken between filing the Statement of Claim and service of the Statement of Claim with the Statement of Particulars.

Table 3.1 Time between filing the Statement of Claim and service with the Statement of Particulars for claims commenced between 1 July 2005 and 30 June 2006

	Total Number	By Disease Type			
		Asbestosis	ARPD	Carcinoma	Mesothelioma
30 days or less	**13**	2	4	0	7
31 to 60 days	**18**	3	1	2	12
61-90 days	**13**	3	1	0	9
91-120 days	**6**	5	0	0	1
121–150 days	**11**	5	2	0	4
151-180 days	**29**	12	5	2	10
More than 180 days	**14**	8	3	0	3
Total	**104**	**38**	**16**	**4**	**46**

Source: *Tribunal Registry*

There were 109 outstanding claims as at 31 August 2006 where no Statement of Particulars yet had been served, of which 39 had Statements of Claim that now are more than 180 days old.

It is noted that overall 40 percent of Statement of Claims are served within 90 calendar days. In the case of mesothelioma claims, where the issues of urgency are most likely to arise 61 percent are served within 90 calendar days. That said, it remains somewhat surprising that a large percentage of mesothelioma claims are taking longer than 90 days to serve (with three taking more than 180 days to serve).

As was noted in Table 2.9, 52 claims (of which 41 were for mesothelioma) appear to have been resolved without a Statement of Particulars being filed. The mean time from filing the Statement of Claim to settlement in these cases was 117 calendar days (with the shortest being 14 calendar days, and the longest being 381 calendar days).

Given that the CRP only has been operating for 12 months, it is difficult to draw firm conclusions from the above. Further, while the data provides a quantitative picture of the time which it takes to serve the Statement of Particulars, it does not address the qualitative issues around the time taken to serve the document. For example, the question arises as to whether claims are being better prepared so that they are able to be investigated and resolved more quickly? Was it necessary in particular cases for Statements of Claims to be filed as soon as possible to minimise the risk of the plaintiff's claim being compromised?

Of the 290 claims commenced between 1 July 2005 and 30 June 2006, 15 claims were removed by the Tribunal prior to 30 June 2006 on the grounds of urgency. As at 31 August 2006, a further four claims commenced between 1 July 2005 and 30 June 2006 have been removed on the grounds of urgency after 30 June 2006.

For pre 1 July 2005 claims, the Tribunal does not separately record, other than in each individual file, where an application for urgency has been sought or made.

There is no information available to the Current Review which has enabled it to determine if any applications for urgency have been sought, but refused by the Tribunal.

The files for the 16 cases removed prior to 30 June 2006 have been reviewed, and 15 provide a clear indication of the number of weeks between the filing of the Statement of Claim and the date when the claim was removed for urgency.

Table 3.2 Number of months between filing of the Statement of Claim and removal of the claim on the grounds of urgency

	Months from filing the Statement of Claim to urgency application					
	Less than 1 month	**After 1 month, but before 2 months**	**After 2 months but before 3 months**	**After 3 months, but before 4 months**	**After 4 months, but before 5 months**	**More than 5 months**
No of claims removed for urgency	10	0	3	1	1	0

Source: *Tribunal Registry*

Note The position in relation to one claim was unclear.

This data tends not to support the suggestion by some defendants that plaintiffs' solicitors are 'gaming' the system, although there is a small number of cases where the time taken between filing the Statement of Claim and the urgency application seems rather long. What is not clear from the data above, however, is whether urgency was sought in those cases involving longer periods between filing the Statement of Claim and seeking urgency because of a sudden change in the plaintiff's health.

3.1.3 Is there a need for amendments?

As noted above, the Uniform Civil Procedure Rules provide that Statements of Claim are valid for service for six months after being filed. While it is possible that this period could be shortened, this may detract from the quality of the Statement of Particulars. This might result in increased costs for defendants as they would not have sufficient information to properly investigate the claim.

If a case could be made out, options which could be considered include the following:

- An express obligation could be introduced to require the Statement of Particulars to be completed and served as soon as practicable.

- Cost sanctions could be applied in respect of cases which are removed on the grounds of urgency where more than a specified period has elapsed since the Statement of Claim was filed. Any cost sanction would need to be imposed by

the Tribunal, and the issue would arise as to whether it should be discretionary so that the individual circumstances of the case can be considered.

- Early notification of the claim could be required, for example, at or around the time that the Statement of Claim is filed. This might allow a defendant to carry out investigations to enable it to respond more quickly to the claim when the Statement of Particulars is served, and notify potential cross defendants. One of the key reasons the Final Report recommended the introduction of the Statement of Particulars, is that Statements of Claim generally include insufficient information to enable proper investigations to be undertaken. It could result in unnecessary costs for defendants if they commence investigations before the relevant information is provided by the plaintiff in the Statement of Particulars. That said, it appears that a number of claims are being settled by parties without the defendants insisting on the requirement for a Statement of Particulars.

Issue 1 Delays in serving the Statement of Claim and Statement of Particulars

Does the period between filing and serving the Statement of Claim cause any difficulties for defendants? What are they?

Could the period be reduced or made subject to specified limits, without creating unfairness to plaintiffs? How?

Do parties, in some circumstances, not follow the requirements of the CRP as to Statements of Particulars? If so, in what circumstances? Does this help or hinder resolution of claims?

3.2 Removal of claims from the CRP

In general, a claim remains subject to the CRP until it either settles or, if a claim does not settle following mediation, returns to the Tribunal. Proceedings in the Tribunal are deferred and the claim is not subject to case management by the Tribunal while the claim is subject to the CRP. The Tribunal may, however, exercise certain limited functions in relation to claims as set out in clause 17(2).[1]

Claims can be removed from the CRP in the following circumstances:

[1] These include: (i) amendment of a Statement of Claim to join a party before the Statement of Particulars is served, (ii) amendment of a Statement of Claim to join a party at the request of the plaintiff where it is necessary to do so to preserve the plaintiff's cause of action, (iii) amendment of the Statement of Claim to add a claim under the ***Compensation to Relatives Act*** after the death of the plaintiff, (iv) the making of orders to give effect to any agreement or arrangement between the parties, (v) subpoenas, (vi) granting of leave to commence proceedings under section 6 of the ***Law Reform (Miscellaneous Provisions) Act,*** and (vii) amendment of the Statement of Claim to discontinue proceedings against any party.

- The Tribunal determines, on application by the plaintiff and on the basis of medical evidence presented for the plaintiff, that the claim is urgent;
- All parties agree following the information exchange process that the claim should not be subject to the CRP;
- The Tribunal determines that the claim should be removed because another party to the claim has failed to comply with the requirements of the Regulation and this has resulted in substantial prejudice.

3.2.1 Removal on the grounds of urgency

Clause 18(2) provides that a claim only may be removed for urgency if, as a result of the seriousness of the plaintiff's condition, the plaintiff's life expectancy is so short as to leave insufficient time for the requirements of the CRP to be completed and the claim may be determined by the Tribunal on an expedited basis. The maximum time period, not allowing for any extension, for which a malignant claim will be subject to the CRP is 45 working days for a single defendant claim and 60 working days for a multiple defendant claim.

Further information was obtained for the 15 cases removed for urgency prior to 30 June 2006.

The medical evidence relied upon by the Tribunal to remove a claim for urgency generally suggested a prognosis of weeks or 1-2 months to live. Removal on the grounds of urgency was agreed to in one case, however, where the prognosis was up to 6 months.

Some defendants have suggested that claims removed for urgency still should follow the same process as non-urgent claims, albeit with the court discretion to set the timetable and make variations as required. For example, the plaintiff still should be required to file a Statement of Particulars and arrangements should be made for the taking of evidence if the plaintiff cannot complete the Statement of Particulars for medical reasons. It is also suggested that preliminary apportionment, a SCM and mediation should continue to apply, unless there are compelling reasons not to do so.

Clause 18(7) of the Regulation already provides that, if a claim is removed on the grounds of urgency, the Tribunal must consider whether to order that compulsory mediation or apportionment still should apply. The Tribunal may modify the application of the provisions of the Regulation relating to mediation and apportionment, and must specify the period within which such processes should be completed. If the Tribunal does not so order, then it must give reasons as to why it has not applied the provisions. The Current Review is aware of some cases where the mediation or contributions assessment provisions have continued to apply by order of the Tribunal. There are two reported cases where such orders were subsequently revoked.[2]

[2] *(Re Linquist) Burroughs Wellcome and Co and QBE Insurance v Wallaby Grip Ltd and Anor [2006] NSW DDT 28* and *(Re Doran) Eraring Energy v Amaca Pty Ltd and Ors [2006] NSWDDT 32.*

As such, the provisions of the Regulation already evidence an intention to apply certain aspects of the CRP even where the claim is one which ought to be removed from the CRP on the grounds of urgency. The Current Review has limited information available to it as to how these are being applied in practice, in particular, whether reasons are being given when this does not occur. Such information would be useful in assessing whether further reform in relation to this issue is necessary.

Issue 2 Removal of urgent claims

Are the provisions of the Regulation relating to the removal of urgent claims operating as intended? If not, how should they be changed?

3.2.2 Removal of claims prior to information exchange

It has been suggested that there should be greater scope to remove claims before information exchange occurs. For example, in cases where there are genuine disputes about employment or insurance issues, such as whether there is a complete indemnity under a contract of insurance, some parties have suggested that there should be a facility for early removal from the CRP.

There is no way of assessing from the available data the number of cases which raise employment or insurance issues. At the Practitioners' Forum, it was noted that a defendant employer who is unclear whether it has insurance is at some risk in agreeing to matters in advance of the insurance issue being resolved. Presumably this risk arises because the indemnity under any policy which is subsequently found to exist may be adversely affected.

It is not, however, clear what basis there would be for allowing the parties to agree to withdraw a claim from the CRP prior to the information exchange process. Nor is it clear that defendants would be required to agree to matters before or during information exchange if a genuine issue arises as to employment or insurance, and it might be possible to amend the Reply to address this concern. Until information exchange occurs, there is a strong argument that the parties cannot really be said to be in a position to properly assess their positions and decide whether it would be in their interests to withdraw from the CRP. It is noted that there are only two instances of claims being removed from the CRP by consent of the parties after information exchange. In the absence of specific examples of defendants being required to remain in the CRP in circumstances where employment or insurance issues have caused real disadvantage, reform in this area may not be warranted.

Even if such evidence were available, it is possible that other options might be available to address concerns, for example, by introducing flexibility to extend the CRP timetables at key steps in the process. Another submission notes that although there may be relevant insurance issues which go back up to 50 years, rather than simply allowing the claim to be removed from the CRP, it would be desirable if there

were some mechanism for severing the insurance dispute to avoid delaying the main case.

Issue 3 Removal of claims prior to information exchange

Are there circumstances other than those currently prescribed by the Regulation where claims should be removed from the CRP? If so, for what reason? How have such cases caused difficulty in claims under the Regulation to date?

3.3 Jurisdiction of the Tribunal in relation to dormant claims

While pre 1 July 2005 claims are subject to the CRP, clause 14(2) of the Regulation provides that no action needs to be taken on the claim until a "current claim proposal" has been served on all of the defendants by the plaintiff. The intention of the current claim proposal is to have the parties negotiate how the CRP should apply to the claim. This was designed to avoid the parties unnecessarily duplicating actions which had already been taken prior to the introduction of the CRP.

The Regulation leaves it to the plaintiff to commence the current claim proposal process. This approach was adopted because it was not considered feasible to require current claims proposals to be served for all claims within a specified period because of the workload pressures this might cause. Further, some claims have remained 'dormant' in the list because the plaintiff is not ready to proceed. There is an issue of fairness to the plaintiff if they are forced to proceed with their claim before they are ready.

According to the Tribunal claims database, 272 pre-1 July 2005 claims were finalised between 1 July 2005 and 30 June 2006. It appears that most of these resolved without steps formally being taken as part of the CRP, while 35 proceeded through the CRP. Only three current claim proposals were provided to the Registrar, although there is no requirement in the Regulation for such proposals to be provided.

The issue of fairness to defendants, however, also has been raised. Where claims remain dormant, defendants argue that they may still need to review the claims on a regular basis, thus incurring costs. Further, the longer a claim remains dormant, the more difficult it is to defend the claim (although arguably this problem arises inevitably in relation to asbestos claims because of the long latency period and it is difficult to see why, a claim is harder to defend, say, 35 years after exposure rather than 30 years after exposure).

As at 30 June 2006 there were 234 pre-1 July 2005 claims pending. Prior to the introduction of the CRP, the Tribunal would list 'dormant' claims annually for a status hearing. The Tribunal no longer has jurisdiction to strike out claims (except with consent) or to case manage these claims while they remain subject to the CRP. Theoretically, these claims can remain in the list indefinitely.

It has been suggested that the Tribunal should be able to continue to case manage and, if appropriate, strike out these claims. If this proposal were to be pursued, the Tribunal's role would need to be limited to ensuring that the claim commences and proceeds through the CRP to determine whether the claim can be resolved through that process. One option might be to amend the Regulation to provide the Tribunal with a limited power to order, on the application of a defendant, that the plaintiff prepare and serve a current claim proposal in relation to a claim. Alternatively, the Regulation could be amended to provide the Tribunal with a limited power to order a directions hearing of its own motion. The Tribunal would have the discretion to order that the plaintiff serve a current claim proposal.

Alternatively, it has been suggested that defendants should be able to activate the CRP by filing a current claim proposal.

Both options, however, raise the issue of fairness in forcing a plaintiff to proceed when he or she may not be ready.

Having regard to the information concerning the rate of disposal of pre 1 July 2005 claims, it may be that no action is necessary. Equally, however, matters may not be being disposed of quickly enough and some further action might be necessary.

Issue 4 Dormant claims

Do dormant claims impose costs on any parties? If so, what costs and how do they arise?

Is there a need to amend the Regulation to require that steps be taken in relation to transitional claims where no action is taken by the plaintiff within a reasonable period of time? If so, how?

3.4 Timetable for the CRP

The CRP adopts a strict timetable according to which claims must progress. The timeframe within which each step of the CRP must occur varies depending on the type of the claim (malignant or non-malignant) and on the number of defendants (one or more).

The timetable is set out in Appendix A.

Some stakeholders have suggested that at times, the goals of the CRP are frustrated by the rigidity of the CRP framework and the lack of opportunity afforded to practitioners to tailor the CRP to the needs of the specific case. In particular, they suggest there is no ability to delay (even with consent) key steps in the CRP. Similarly, there is no mechanism to approach an officer of the Tribunal to resolve a specific issue which may have arisen, without removing the whole claim from the CRP.

The Regulation provides for the timetable to be varied at a number of key stages in the CRP. For example:

- An original defendant can request the plaintiff to extend the time for filing and serving cross-claims by up to ten business days in the case of malignant claims and 30 business days in the case of non-malignant claims. The plaintiff can only refuse a request where they can establish that the extension would result in substantial prejudice. This has the effect of extending the due date for other steps in the CRP.

- The period within which medical examinations must occur may be varied by agreement of all parties, however, this does not extend the other dates by which steps are required to be completed as part of the CRP.

- The Registrar, with the agreement of parties, may defer referring a claim for mediation on one occasion only for five business days in the case of a malignant claim and 20 business days for a non-malignant claim. The Registrar has advised that he has delayed mediation in some cases pursuant to these provisions. The Registrar has also highlighted uncertainty with the provisions of the Regulation which requires him to appoint a mediator "immediately", and he has suggested that there may be a need to clarify this provision.

- Once a claim is deferred for mediation, the mediator may (on one or more occasions) defer mediation to allow parties sufficient time to consider information provided before or during mediation or to allow time for information not yet provided to be received and considered by the parties. Each deferral of mediation may be for a period not exceeding five business days in the case of a malignant claim and 20 business days in the case of a non-malignant claim, on each occasion.

There is no data available which has enabled the Current Review to determine whether these existing mechanisms to vary the timetable are being under or over utilised.

There is no capacity to extend the date on which the Defendants' Reply must be served. The Regulation provides in relation to the Statement of Particulars and Defendants' Reply, however, that if information is not available when either document is required to be lodged, the document should state this and indicate when the information will be available.

There is no capacity to extend the date by which defendants must reach agreement on apportionment. If defendants have not agreed by the required date, a contributions assessor is appointed by the Registrar, and then determines the apportionment which will apply for the purposes of resolving the claim.

A strict timetable has the advantage of ensuring that the parties remain active in pursuing a resolution of the claim. There is a risk that if flexibility is built into the

timetable, then parties (or practitioners) could agree to regular extensions of the timetable, with the resulting delay and additional legal costs. The Current Review also notes there are a number of key dates in the CRP which already can be deferred, and other mechanisms which provide flexibility in cases where parties are not ready at the required time (for example, the requirements relating to completion of the Statement of Particulars and Reply).

An alternative to a general mechanism to extend dates by agreement might be to amend the specific target dates which are required to be met by the Regulation, if it can be shown that there are particular stages in the CRP where the timeframes are too short and extending them would not cause prejudice to other parties, or by building on the current approach in the Regulation which allows certain dates to be extended in limited circumstances.

Another alternative is to give the Registrar the power to vary the timetable; this, however, would have the disadvantage of taking control of the timetable away from the parties and returning it to the Tribunal.

Issue 5 Flexibility of the timetable

Are there particular stages of the CRP where the timetable is creating difficulties for parties? What alternatives are there, if any, which would enable the timetable to be varied (either generally or in specific cases) while ensuring that claims continue to be resolved promptly?

3.5 Filing fee for the commencement of cross-claims

When the CRP was established, the fee structure for filing the Statement of Claim, and any cross claim, was reduced from $615 for individuals and $1,230 for corporations. This was recommended because only a small amount of judicial and Tribunal administrative resources would be incurred in relation to the claims (including cross-claims) unless and until the claim does not resolve during the CRP.

The filing fee to commence proceedings (including any cross claim) is currently $147 for individuals and $294 for corporations. A separate fee was introduced for filing a request for a first directions hearing, which is currently $1,142. The combined total of the cross claim filing fee and the request for a first directions hearing fee equalled the old filing fee to commence proceedings (adjusted for inflation).

At the Practitioners' Forum, it was noted that there is some uncertainty as to whether the "first directions hearing fee" applies to cross claims. The Registry's practice is to apply that fee to cross claims, however, members of the Tribunal have questioned in proceedings whether this is appropriate.

One option would be to clarify the Regulation to make this clear. It also may be appropriate, however, to consider whether a separate filing fee and hearings direction fee remains appropriate for cross-claims. A combined fee might encourage defendants to act more commercially before initiating a cross-claim (particularly against defendants with only a small potential share of liability). Contrary to this, however, a high directions hearing fee might provide an incentive for defendants not to challenge contributions determinations before the Tribunal.

Issue 6 Filing fees for the commencement of cross-claims

Is there a need to clarify the provisions of the Regulation to make it clear that the first directions hearing fee applies to cross-claims? Alternatively, should the separate fees for commencing cross claims and the first directions hearing fee be combined into a single fee?

Chapter 4 Information Exchange

4.1 Adequacy of the Statement of Particulars and Reply

The adequacy of information provided in the Statement of Particulars and the responses provided in the Reply has been raised as an issue. It has been suggested that full and complete answers are not being provided. It also has been suggested that the timetable should be stayed while orders are sought to compel the relevant party to provide the information.

There is no data available to the Current Review which would enable this concern to be tested. As such, the views of participants in the CRP on this issue would be appreciated, although it is important that the precise nature of the problem is clearly identified and specific examples from actual claims given.

The provisions of the current Regulation should be noted. The Regulation currently provides that, although the information and documents which are required by the form must accompany the form, if the material is not available, the statement must indicate this and provide an indication of when the information will be available. In addition, clause 19 of the Regulation provides that parties must update and notify any necessary changes to the documents and information provided, as and when that material becomes available.

It is not clear from the information provided to the Current Review whether the inadequacies in Statements of Particulars and Replies are a result of information not being available at the time the Statement of Particulars or Reply is provided and the deficiency is subsequently rectified, or whether there are systematic problems with completing the forms.

Issue 7 Adequacy of Statement of Particulars and the Reply

Is all necessary and relevant information being provided as part of the Statement of Particulars and Reply?

Are parties clearly identifying information which is not available and indicating when it will be available?

Are parties updating the information as and when required? Is information required by the forms which is not really necessary?

4.2 Statement of Particulars – Part 6 Compensation

Part 6 of the Statement of Particulars requires the plaintiff to provide information concerning the compensation which is being sought, including information concerning general damages, lost wages and future economic loss, medical care,

personal care needs and gratuitous services provided to third parties. The Statement of Particulars makes it clear that there is no need to obtain medical or occupational therapist reports at this stage, although the defendant may request these later.

It has been suggested that providing the information required by Part 6 can be distressing for plaintiffs, and that meaningful information (particularly with respect to care and medical expenses) is often not available when the particulars are otherwise ready to be provided. It has been suggested that Part 6 should be removed from the Statement of Particulars and replaced with a document prepared and signed by the plaintiff's solicitor, and provided in advance of mediation. Obtaining compensation is, however, generally the very purpose of making the claim and quantifying the amount sought can hardly be avoided.

It is recognised that the information contained in this section is sensitive. However, clause 20(3) of the Regulation notes that if the material is not available, the Statement of Particulars must indicate this and provide an indication of when the information will be available. As such, if information is not available at the time the Statement of Particulars is otherwise completed the Regulation allows this information to be provided later.

The difficulty with not having any information available concerning the amount of compensation sought when the Statement of Particulars is served is that defendants will not have information concerning the amount of compensation sought, and will not be able to assess their position so that they can make an offer of settlement, until mediation occurs. This could delay early settlement of claims and increase costs accordingly.

Issue 8 Part 6 of the Statement of Particulars

Should Part 6 remain as part of the Statement of Particulars?

4.3 Provision of a medical authority

It has been suggested that some plaintiffs are refusing to complete the section in the Statement of Particulars which authorises the defendants to access the medical records of the plaintiff. It is understood that some plaintiffs are objecting on the grounds of legal professional privilege.

The Final Report noted that the provision of the authority should not be mandatory because in some cases it may be necessary for the plaintiff's solicitors to have first access to that material to ensure that no issues of privilege arise. Where an authority is not provided, the defendant has the option of issuing a subpoena to obtain the material using the streamlined subpoena process under the Regulation.

Issues of privilege are less likely to arise in respect of medical practitioners who have simply treated the plaintiff, as opposed to those practitioners who have been engaged

to provide expert reports. The difficulty is that in many cases, the treating practitioner may also provide an expert report.

The issue of a medical authority removes the need for subpoenas and thus avoids unnecessary costs.

While the Current Review would be unlikely to support making the issue of a medical authority by plaintiffs mandatory, there may be other options available to encourage plaintiffs to routinely provide the medical authority in appropriate cases.

Issue 9 Medical Authority

Are additional measures necessary to encourage plaintiffs to provide a medical authority to enable defendants to access medical records without the need to issue a subpoena?

4.4 Timeframe for serving the defendant's Reply

A number of stakeholders have particularly highlighted that the time for defendants to file their reply is extremely tight and that this places them at a significant disadvantage.

Some defendants have suggested that while there are benefits in having all defendants which may be liable represented in the CRP, the current timetable does not allow all of the relevant investigations to be carried out.

There is some information concerning the time within which defendants' Replies are being served. Data held by the Tribunal concerning due dates for filing the Reply have been reviewed. As noted above, this information has been collected primarily as a management tool for the Tribunal and not for statistical purposes. The information therefore provides only an indication of whether the timetable for filing the Reply is being met.

The following table shows the number of claims where a Reply or Replies (in the case of multiple defendant claims) were required and whether they were served within time.

Table 4.1 Defendant's Reply – Compliance with the timetable for claims commenced between 1 July 2005 and 30 June 2006

	Total Number[1]
Served within or on time	32
Reply pending as at 30 June 2006 – reply is not yet late	12
Served up to 7 calendar days late	7
Served up to 14 calendar days late	4
Served more than 14 calendar days late	11
Reply pending as at 30 June 2006 – late	17
Total	**83** [1]

Source: *Tribunal Registry*

Note 1 There are approximately 24 claims where it is unclear whether the Reply was served on time. This is because either the due date is not recorded or there is no record of the Reply having been served but the claim has resolved in any event. These claims are not recorded in the Total.

Based on the data which is available, it is not possible to determine whether compliance has improved over the 12 months during which the CRP has been operating as practitioners have become more familiar with the system. As is noted elsewhere, defendants have the option of filing an incomplete return but specifying when additional information will be available. The Current Review is not aware if this provision is being utilised.

In considering any proposal to extend the timetable for defendants, the potential impact on plaintiffs would need to be considered. There is an argument that until such time as practitioners become fully familiar with the CRP, it may be premature to change the timeframes.

Issue 10 Defendant's Reply - Timeframe

Is the current timetable for defendants to file their Reply appropriate?

4.5 Standard Reply

It has been suggested that defendants should be able to file with the Tribunal a Standard Reply or parts of a Standard Reply, similar to the process used in the Tribunal for filing a Standard List of Documents for the purposes of discovery. It is suggested that the Standard Reply could be served on all regular parties and costs will be saved in drafting time as well as in copying charges. Part 8 (which deals with apportionment among defendants) is highlighted as a section which particularly would be particularly amenable to this approach.

It is unlikely that it would be feasible to allow defendants to file a complete Standard Reply, as the overwhelming majority of the questions in the Reply respond to specific matters raised by the plaintiff in the Statement of Particulars.

There are a small number of questions (such as those relating to duty) which would be amenable to a standard response. As such, there may be some merit in considering whether Standard Replies could be filed in respect of parts of the Reply.

The main disadvantage of a Standard Reply is that defendants could become over reliant on the Standard Reply, and would not consider properly whether the response in the Standard Reply is appropriate given the particular circumstances of the case. Even with those questions which most lend themselves to a Standard Reply (eg Do you admit that you had a duty of care to the plaintiff?), the answer to such questions may be affected by the individual circumstances of the case.

A Standard Reply also could shift responsibility onto the plaintiff and cross defendants to determine whether information from the Standard Reply is most relevant, therefore increasing their costs (and perhaps in an amount greater than any cost savings for the defendant arising from the use of a Standard Reply).

Further, while it is suggested that there would be savings in relation to copying costs and drafting costs, it is not clear that these costs are substantial particularly given the availability of word processing technology and the fact that the Reply does not require large amounts of copied material to be provided.

An issue was raised at the Practitioners' Forum as to whether it is feasible to allow defendants with a common interest to file a joint Reply, to minimise unnecessary paper work. The Current Review considers that the circumstances where this may arise would be rare, although it might be appropriate to consider this further.

Issue 11 Standard Defence Replies and Joint Replies

What would be the advantages and disadvantages, if any, of a system which enables a Standard Reply to be filed with the Tribunal? Would it assist in reducing costs?

Should defendants be able to file joint Replies?

4.6 Non compliance with the Regulations

Some stakeholders have suggested that there should be ramifications for delays in progressing claims, including delays in filing Replies. It is argued that this would provide a powerful incentive to properly prepare claims, and would avoid situations where, particularly in multiple defendant claims, a small player is able to frustrate genuine attempts at resolution.

The issue of non-compliance arises primarily in relation to serving the Reply. Where most other time frames are not met, the Regulation already provides for certain actions to occur (for example, if the defendants fail to agree on apportionment, a contributions assessor is appointed).

Options suggested include cost penalties, a role for the Registrar in enforcing compliance and new procedures for approaching the Tribunal to issue orders to comply with the timetable while ensuring that the claim remains within the CRP.

Under the current Regulation, there are two sanctions for failing to comply with the requirements of the Regulations, including the timetable.

- Under clause 53, in making an order as to costs, the Tribunal must take into account any failure of a party to the proceedings to comply with the Regulations. The Tribunal has the capacity to award costs on an indemnity basis.

- A party can apply to have the claim removed from the CRP because of the failure of another party to comply with the requirements of the CRP if the failure has resulted in substantial prejudice to the applicant or substantial delay. The other party must first have been notified of the breach and must have failed to remedy that breach.

The Current Review is aware of one claim being removed for delay. It is not aware of any cases where the Tribunal has taken into account the failure of a party to comply with the Regulations when awarding costs (although it should be noted that only two claims have returned to the Tribunal after they were unable to be resolved as part of the CRP). At the Practitioners' Forum, it was suggested that perhaps the threshold for removing claims on the grounds of non-compliance is too high and consideration should be given to lowering it.

If additional measures are considered necessary, such measures should be carefully designed so that they do not lead to increased delay or disputation within the system as this simply would increase costs. It also should be noted that the system still is relatively new, and parties still are becoming familiar with the system.

Issue 12 Sanctions for failing to comply with the timetable

Are additional measures necessary to ensure that parties comply with the timetable? If so, what measures should be introduced and how could they be made most effective?

Chapter 5 Medical Examination and Disputes

5.1 Introduction

The Statement of Particulars requires the plaintiff to provide certain medical evidence with his or her claim relating to diagnosis, in particular a short report from the medical practitioner who diagnosed the plaintiff's condition and associated X-rays, pathology reports, ultrasounds etc. A medical authority also may be provided by the plaintiff which authorises the defendant gaining access to records of treating practitioners and others who have prepared reports (thus avoiding the need for subpoenas). (See discussion at section 4.3)

This process was designed to reduce the number of reports obtained unnecessarily by defendants by ensuring they have basic information about the plaintiff's condition when the Statement of Particulars is served. Previously such information often was not available until immediately before the hearing. Defendants now should be able to review this material at an earlier stage and then make an informed decision whether to request a medical examination of the plaintiff and a resulting medical report.

While additional medical reports would be provided by plaintiffs to support claims for damages in proceedings before the Tribunal, the Statement of Particulars provides that these should not be obtained and provided with the Statement of Particulars. Rather, the defendant may subsequently indicate that they require such material in order to assess the claim. This process was adopted to reduce the number of unnecessary medical reports being obtained by the plaintiff, which the defendant may not require, and which are therefore an unnecessary expense.

An original defendant is entitled to request that the plaintiff be examined within a certain prescribed period, with the examination to be completed within a further prescribed period (and this period may be extended with the consent of the parties, but it does not delay the other steps in the CRP) – see Appendix [A]. A report obtained by an original defendant must be provided to any cross defendant.

5.2 Has the number of expert reports (including medical reports) obtained by plaintiffs declined?

An issue of interest to the Current Review is whether the Regulation has been effective in reducing the number of unnecessary reports which have been obtained by plaintiffs.

While the Form 3 Return requires the cost of each report to be separately identified, many Form 3 Returns have not done this. As a result, the Current Review has not been able to determine the average number of reports which have been obtained by plaintiffs and defendants, either as a whole, by report type or by medical speciality. Consideration therefore should be given to amending Form 3 to make this requirement explicit.

Limited data is, however, available in relation to the average cost of expert reports per claim. Comparative data is available which enables plaintiff costs for pre 1 July 2005 claims to be compared with those for claims commenced between 1 July 2005 and 30 June 2006.

Table 5.1 Average cost of medical and expert reports per claim - Plaintiffs

	By Disease Type	
	Claims commenced between 1 July 2005 and 30 June 2006	**Transitional claims**
Average for all claims – Plaintiffs (sample)	**3,965 (63)**	**4,536 (235)**
Average for malignant claims – plaintiffs (sample)	4,314 (52)	4,963 (64)
Average for non-malignant claims – plaintiffs (sample)	2,321 (11)	5332 (171)

Source: *Form 3 Returns*

In relation to plaintiff costs, it appears that there has been a reduction in the average cost per claim of reports, which perhaps suggests that the number of reports being obtained per claim is reducing.

Issue 13 Medical and Expert Reports - Plaintiffs

Has the overall number of medical and other expert reports obtained by plaintiffs declined as part of the CRP? Are reports still being obtained unnecessarily by plaintiffs? If so, what options should be considered to further encourage parties to minimise the number of unnecessary reports?

5.3 Level of Medical Disputation - Defendants

It has been suggested that medical disputes still seem to be a significant cause of delay in settlement of non-mesothelioma cases with defendants seeking their own expert evidence to confirm or clarify information provided by plaintiffs. It has been suggested that further consideration should be given to introducing an independent medical assessment system.

Data is available for defendant costs in obtaining expert reports for claims commenced between 1 July 2005 and 30 June 2006, but no comparative data is available for transitional claims. All expert reports are included in the calculations (including those which are not medical).

Table 5.2 Average cost of medical and expert reports per claim - Defendants

	By Disease Type	
	Claims commenced between 1 July 2005 and 30 June 2006	**Claims commenced pre 1 July 2005**
Average for all claims – Defendants (sample)	1,824 (46)	Not available
Average for malignant claims – Defendants (sample)	1,521 (38)	Not available
Average for non-malignant claims – Defendants (sample)	2,989 (8)	Not available

Source: *Form 3 Returns*

It is not possible to determine from the above information whether diagnosis of the plaintiff's condition is being disputed inappropriately by defendants. The Current Review would welcome submissions addressing the issue of whether defendants are accepting the plaintiff's medical evidence in more cases than was the case prior to the establishment of the CRP.

It also should be noted that independent medical assessment was considered carefully by the Review. Although the Final Report accepted that while the costs of obtaining medical experts potentially are significant, issues of fairness, the lack of disputation around diagnosis (possibly with the exception of carcinoma cases) and the risk that costs actually could increase meant that a requirement for binding medical assessment should be rejected. The Final Report noted that the early exchange of information is likely to place defendants in a position where they can decide whether they wish to obtain additional medical reports given the costs involved, and will therefore be able to avoid incurring costs in those cases where additional reports are unnecessary or obtaining them would be uneconomical.

Issue 14 Medical and Expert Reports - Defendants

Has the overall number of medical and other expert reports obtained by defendants declined as part of the CRP?

Are plaintiffs being required to undergo medical examination and are reports being obtained by defendants unnecessarily, particularly in regard to disputing diagnosis? If so, what options should be considered to further encourage parties to minimise the number of unnecessary reports?

Chapter 6 Mediation

6.1 Resolution prior to mediation

Some stakeholders have suggested that most claims are capable of resolution prior to mediation, however, other parties have rejected attempts to resolve the claim prior to mediation at informal conferences and have expressed a preference for mediation. It has been suggested that resolution prior to mediation at the lowest possible cost should be encouraged.

Another stakeholder has noted, however, that they are generally successful in negotiating resolution prior to mediation.

Table 2.6 shows that 53 claims commenced between 1 July 2005 and 30 June 2006 resolved by way of settlement while the claim was subject to the CRP. The data also shows that mediators were appointed in approximately 22 claims. It is not clear how many of these were actually mediated. Two claims which were not successfully mediated subsequently settled when the claim returned to the Tribunal.

For the remaining claims settled without a formal mediation, there are wide variations in terms of the stage at which they settled as part of the CRP. Some resolved without a Statement of Particulars being served at all, while others settled following service of a Statement of Particulars. Sometimes settlement occurred well after the time at which mediation should have occurred as part of the CRP. That said, at the Practitioners' Forum, it was noted that some parties had refused to settle matters or enter into discussions prior to mediation because certain other steps in the CRP process had not been completed.

Clearly, resolution at the earliest possible time should be encouraged. The issue arises as to whether this requires amendment of the Regulation or cultural change amongst practitioners. Compulsory mediation has the advantage of requiring the parties to be ready to discuss the claim on the relevant date. While ideally they might be ready to settle much earlier than this (and therefore more cheaply), the absence of a deadline may mean that claims take even longer to settle. Arguably, parties who wish to promote settlement discussions earlier in the CRP could do so by serving offers of compromise, which would focus the other party's mind on resolving a claim.

While one option might be to amend the Regulation to introduce a general duty on parties to attempt to resolve the claim prior to mediation, issues arise as to how enforceable such an obligation would be in practice.

Issue 15 Resolution prior to mediation

Could the Regulation better encourage parties to enter into settlement discussions prior to mediation? If so, how?

6.2 Alternatives to mediation

It has been suggested that claims which currently resolve at mediation previously would have resolved at Issues and Listings Conferences presided over by the Registrar. It is noted that while mediation is useful in many cases, the mandatory nature of mediation may add unnecessary cost burdens. Some practitioners have suggested that consideration should be given to reintroducing Issues and Listings Conferences.

It is noted that the data shows that of the 53 claims commenced between 1 July 2005 and 30 June 2006 which resolved during the period while the claim was subject to the CRP, only 22 required mediation. In other words, parties are taking steps to resolve claims themselves without the need for formal mediation. It is also noted that there is nothing to prevent parties from meeting prior to mediation in order to narrow the issues in dispute and discuss settlement. Indeed, the Current Review would encourage such action.

Issue 16 Additions or alternatives to mediation

Should additions or alternatives to compulsory mediation be considered?

6.3 Mediators' fees

Mediators are appointed by the parties by agreement or, failing agreement between the parties, by the Registrar from a list approved by the President of the Tribunal. The Regulation does not prescribe the fees charged by mediators.

The costs of mediation are to be borne by the parties in such proportion as they may agree if mediation results in settlement. If mediation does not result in settlement, the costs of mediation are to be borne by the defendant or, if there is more than one, by the defendants in equal shares.

Some stakeholders have suggested that there is a large disparity in mediators' fees, with some charging per claim, some per day and some by way of an hourly rate. No specific examples have been provided. It has been suggested that fees should be regulated to ensure consistency.

It should be remembered that mediators have only been appointed in respect of 22 claims commenced between 1 July 2005 and 30 June 2006 under the CRP. High mediation fees could unnecessarily increase claim costs, which are ordinarily borne by defendants. At the same time, however, regulating fees could discourage some persons from seeking selection as a mediator, particularly if the fees are set too low. Arguably, the expertise and quality of a mediator is commensurate to the mediator's fees. Mediators with substantial experience may be better able to assist the parties to resolve the claim quickly.

Issue 17 Mediators' Fees

Should fees charged by mediators be regulated? If so, how?

6.4 Objections to mediators

Some stakeholders have noted that there is no fixed procedure for a party to raise concerns about the potential for conflict of interest in respect of a particular proposed mediator. It has been suggested that mediators be required to disclose to the Registrar the identity of those parties or firms for whom they regularly act to avoid any potential conflict of interest when the Registrar makes an appointment in a particular case.

The Registrar acknowledged at the Practitioners' Forum that objections were being lodged with him. He noted that it was unclear whether he was able to take these into account, although he said he tried to avoid appointing a particular mediator who was the subject of an objection, as to do otherwise would not aid resolution of the matter.

A similar point is made in relation to the appointment of contributions assessors and this is discussed in section 7.8.

Mediators are appointed to a list by the President of the Tribunal who selects from nominations provided by the NSW Bar Association and the Law Society of NSW. Where an individual claim requires mediation, the parties are to agree on a mediator. Failing agreement, a mediator is selected by the Registrar from the list prepared by the President.

There are a number of points which should be noted in considering further whether a process should be introduced which requires mediators to disclose for whom they have acted.

Mediation by its very nature does not involve the determination of issues between the parties. Mediation is designed to bring parties together to encourage them to reach agreement. While a mediator can issue a certificate at the end of mediation which indicates that a party did not participate in good faith, this would be rare. While the mediator may take a position in a mediation which is unfavourable to a party, ultimately if the party thinks they are being disadvantaged, they can refuse to settle. The inability of the mediator to impose decisions on the parties needs to be considered in determining whether it is appropriate to impose additional costs and inconvenience by requiring disclosure of all persons for whom a mediator has acted.

The Current Review is not aware of any circumstances where a mediator has been appointed where he or she may have had a conflict of interest.

Also mediators in this jurisdiction may be more able to facilitate successful mediations if they have reasonably extensive practical experience in the jurisdiction. Seeking to "conflict them out" because of their experience risks undermining the quality of mediators.

Issue 18 Objections to mediators

Should a process be introduced which requires mediators to disclose to the Registrar for whom they have acted in dust diseases litigation?

6.5 Return of matters to the Tribunal

It was noted at the Practitioners' Forum that there is a lack of clarity as to whether parties should be presenting their full case at mediation. One practitioner noted that a party had explicitly advised that they were not presenting their full case to the mediator. The matter was not resolved at the mediation and the claim was returned to the Tribunal where a large amount of new evidence was introduced.

Currently, the Regulation enables the mediator to issue a certificate certifying that a party has not participated in mediation in good faith. Where such a certificate is issued, it may be taken into account by the Tribunal in awarding costs. Similarly, cost sanctions may apply where a party leaves an issue unreasonably in dispute, although it is not clear that this would apply in cases where the full case is simply not presented.

At the end of mediation, the parties are required to seek to agree on the issues which remain in dispute and a certificate is issued by the mediator outlining those issues. The parties are prevented from raising new issues in proceedings before the Tribunal. It is not clear, however, whether these provisions would operate to address the concern raised at the Practitioners' Forum as presumably the party who had refused to present their full case at the mediation would argue that the issue remained in dispute.

It is an issue of concern that a party would not present their full case at mediation (to the extent issues remain in dispute following the exchange of information). It is not clear whether other parties to the mediation are seeking the issue of certificates that a person has not acted in good faith in such cases.

Issue 19 Participation in mediation

Is there a need for additional measures to encourage parties to engage in mediation in good faith? If so, what form should these measures take?

Chapter 7 Contributions assessment

7.1 Introduction

As was noted in the Final Report, apportionment disputes contribute significantly to legal costs within this jurisdiction. The Final Report noted that it is difficult to see why there is such a high level of disputation, particularly as court and Tribunal decisions in more recent years have provided a greater degree of clarity as to the proportionate liability of each defendant for particular claims than had been the case when the Tribunal was first established.

The contributions assessment provisions, and the standard presumptions which underpin them, were introduced to provide greater incentives to defendants to adopt a commercial approach to settlement. The standard presumptions were based on existing case law on the apportionment of liability. Once the standard presumptions are applied by the independent contributions assessor, cost penalties apply to any defendant who subsequently seeks to challenge the contributions assessment before the Tribunal.

The contributions assessment provisions also were intended to provide a division of financial responsibility among the defendants which is binding for the purposes of settlement negotiations with the plaintiff. Each defendant is required to contribute to the settlement with the plaintiff as determined by the contributions assessor.

Between 1 July 2005 and 30 June 2006 there were seven contributions assessments undertaken. Five of these were undertaken in respect of claims lodged on or after 1 July 2005, while the remaining two related to transitional claims. It is not clear to the Current Review whether contributions assessment determinations have yet been the subject of challenges. Further contributions assessments have been undertaken since 30 June 2006.

7.2 Overall operation of the contributions assessment system

It has been suggested to the Current Review that the contributions assessment provisions are reducing disputation amongst defendants, making it easier to reach settlement with each other and the plaintiff. Due to technical and timing difficulties, however, it has been suggested that this has not led to settlements occurring significantly earlier in the CRP.

Some stakeholders have suggested that they have experienced delays in referring claims to contributions assessors.

Some stakeholders have suggested that the inclusion of cross-claims in the CRP delays settlement negotiations with the plaintiff while apportionment is disputed. Some plaintiff solicitors have noted that the presence of multiple defendants has frustrated the capacity of the plaintiff and defendant to resolve the principal claim, particularly where a defendant with a small share of liability refuses to settle. This is said to have

caused mediations to become more cumbersome and protracted. It has been suggested that there should be some means of severing cross-claims where problems arise. At the Practitioners' Forum, it was suggested that it might be appropriate to provide for severance in circumstances where there is no agreement on apportionment or one of the defendants has indicated that they intend to challenge the apportionment.

In contrast, some stakeholders argue that it is preferable to have all defendants represented as part of the CRP as they tend to be less commercial when only other defendants are involved. A mechanism to sever claims could be problematic if it simply defers the contributions dispute. This would be particularly unfortunate if the threat of disputing apportionment was sufficient to sever cross-claims, particularly where it is not clear that any contributions determination has yet in fact been disputed.

There is no data available to the Current Review which enables an assessment to be made of whether contribution disputes are causing delay or making mediations more complex. However, if the contributions assessment process works as intended (that is, a contributions assessor is appointed at a particular point in time of the process to apportion liability if the defendants have not agreed apportionment), it is not clear why this should result in delay. Perhaps, as was noted above, there may be technical and timing issues which have delayed appointment of a contributions assessor. The Registrar suggested at the Practitioners' Forum that it is unclear precisely when the contributions assessor should be appointed, and that this issue should perhaps be clarified in the Regulation. If the system is to operate as intended, and avoid delaying resolution of the plaintiff's claim, the contributions assessor should be appointed as soon as the statutory timeframe for agreement has passed.

Similarly, given the CRP has only been operating for twelve months, there is no experience as yet with the costs sanctions which apply where a defendant seeks to challenge contribution. Perhaps once these provisions are seen to be operating, it will ensure that greater attention is given to resolving the matter promptly.

It should be noted that the Regulation provides other parties with various tools which can be used to promote settlement, including the capacity to make offers of compromise. The Current Review has no information as to whether these are in fact being used at the current time.

Issue 20 Delays in finalising contributions assessment

Is there any evidence to suggest that the inclusion of cross-claims within the system is contributing to delay for plaintiffs? If so, how?

Are contributions assessors being appointed, failing agreement of the parties, as and when required by the Regulation? If not, why not? Should amendments be made to address any identified problems?

7.3 Fairness of the contributions assessment system

Some stakeholders have suggested that the system works real injustice because of the cost of challenging an apportionment. They suggest that, because contributions assessors are required to presume that each defendant is liable, this causes hardship for certain defendants (particularly smaller defendants) because they then have to incur the cost of challenging the 'administrative' determination of the contributions assessor and the cost of challenging the determination can be high.

Given the limited number of claims which have been the subject of contributions assessment, it is difficult to draw conclusions from the available data.
That said, some key points should be noted:

- The risk of a contributions determination being forced on defendants should encourage them to reach agreement in advance of proceeding to contributions assessment.

- The contributions assessment process is intended to provide an indicative assessment of liability, which is only binding for the purpose of resolving the plaintiff's claim (which then only can occur if all parties agree to settle). The defendant with little or no liability can make a commercial decision whether to settle the claim and either accept the amount apportioned to them or incur the additional cost of challenging the apportionment in the Tribunal, a cost which they would have incurred any way even if the CRP had not been established. (Challenging a determination does incur the risk of cost penalties if the defendant challenging the contribution assessor's determination does not materially improve its position). Arguably, the defendant is in a better position to make an informed decision as to whether to challenge a contributions determination before the Tribunal as a result of having obtained the contributions determination.

- AA defendant which is apportioned liability where it believes it has none, or where the liability apportioned to it is too large, simply can refuse to settle. The other defendants can then make a commercial decision whether to settle the claim with the plaintiff without assigning a share to that defendant in order to avoid a protracted dispute on apportionment before the Tribunal.

Issue 21 Operation of the contributions assessment provisions

Are defendants behaving more commercially in relation to contributions disputes? If not, why not? Does the system disadvantage any particular classes of defendants?

7.4 Adequacy of the standard presumptions on apportionment

The contributions assessment provisions, and the standard presumptions which underpin them, were introduced to provide greater incentives to defendants to adopt a commercial approach to settlement. If defendants do not agree on how liability is to be apportioned among them, then the independent contributions assessor is to apportion liability using the standard presumptions which are contained in the ***Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2005*** – see Appendix B**.**

The standard presumptions were based on existing case law on the apportionment of liability. Under the standard presumptions, liability is apportioned to each class of defendant according to fixed percentages which vary depending upon the date of exposure. The contributions assessor can vary the fixed percentage assigned to each class of defendant within a permissible range. Some of the factors which may be considered are:

(a) the state of actual knowledge of a defendant (other than those in category 1, that is manufacturers, suppliers and installers);

(b) the identity, capacity, size and state of sophistication of a particular defendant, including the industry, and nature of the industry, in which the defendant was engaged;

(c) the number of defendants identified within each category as being at fault in connection with the plaintiff's claim; and

(d) the steps which the particular defendant took, ought to have taken and / or was capable of taking, to minimise the risks of harm from the manufacture, supply, installation, exposure to and use of asbestos.

Liability is then divided equally among the defendants in each class, unless the contributions assessor is satisfied a different share should apply.

Some stakeholders have suggested that smaller defendants (particularly small employers) may be being assigned too great a share of liability having regard to the relative blameworthiness of them when compared to manufacturers and suppliers.

Other stakeholders suggest that the standard presumption for employers is too low, especially for large employers.

There also have been two apportionment cases determined during the last 12 months by the NSW Court of Appeal of which the Current Review is aware - ***BI (Contracting) Pty Ltd v The Public Trustee Of South Australia & Anor [2005] NSWCA 306***, *BI (Contracting) Pty Ltd v The Myer Emporium Limited* ***[2005] NSWCA*** *305*.

Issue 22 Standard presumptions relating to apportionment

Is there a need to vary specific aspects of the standard presumptions set out in the ***Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2005*** as a result of recent decisions, or for other reasons**?** If so, provide details of the basis for your view.

7.5 Should cross-claims be subject to the CRP where the plaintiff's claim has resolved or is suspended?

An issue has been raised as to whether the CRP should continue to apply to claims in circumstances where the plaintiff dies. It has been suggested that the Tribunal should be empowered to make orders as to which of the provisions of the CRP should continue to apply to such claims, in particular, it is argued that the provisions relating to apportionment (Division 5) of the claim can continue to apply.

A similar issue arises in relation to cross-claims which are made after the CRP has been completed, and a defendant seeks recovery from other possible defendants by commencing separate cross-claim proceedings.

7.5.1 Suspension of the claim following the death of the plaintiff

Where a plaintiff dies, the claim is not removed from the CRP. Pursuant to clause 17(3) of the Regulation, it is suspended to give the plaintiff's estate and solicitor an opportunity to reconstitute the claim. Once the claim ceases to be suspended, the CRP continues to apply. As such, it is not clear if it is necessary to give the Tribunal a power to order that the provisions still apply.

There may be an argument, however, that notwithstanding the suspension of the claim, the defendants should continue to assess their positions and proceed to apportionment. This could be specified by the Regulation. Whether such a proposal can be supported would depend on whether it is practical to proceed to this step if the plaintiff's solicitor is required to be involved in providing further information. This may not be an efficient use of resources because, at least in theory, a suspended claim may never be reactivated.

7.5.2 Application of the apportionment provisions to claims which have settled

Claims (including any cross-claim which has been lodged in respect of a plaintiff's claim) cease to be subject to the CRP once the Tribunal makes an order to give effect to a settlement. This was recently confirmed in the decision of ***(Re Linquist) Burroughs Wellcome and Co and QBE Insurance v Wallaby Grip Ltd and Anor*** [2006] NSWDDT 28, which noted that the provisions cease to apply to cross-claims once the plaintiff's claim has settled unless the Tribunal has made an order, in the context of an application for urgency, that the contributions assessment provisions should continue to apply. If a contributions assessment has not yet been completed, then technically

any contributions assessment would not be able to proceed. That said, it is not clear whether it is possible for the plaintiff's claim (which is subject to the CRP) to settle without the agreement of all defendants (including those joined by cross-claims). It appears possible that a plaintiff could agree to settle a claim with one of the defendants for the full amount of the plaintiff's claim. This would mean that the CRP would cease to apply, even though contributions assessment had not been completed, and the defendant would pursue the cross-claims which had not yet settled before the Tribunal.

If this is in fact occurring, there is an argument that a contributions determination should still be made to provide an incentive for the defendants and cross defendants not to litigate the cross-claims further. Similarly, there is an argument that, where new separate proceedings for a cross-claim are commenced in respect of a claim which was subject to the CRP, applying the contributions assessment provisions and associated cost sanctions if the claim is challenged would provide an incentive to the existing and new defendants to act commercially in resolving the cross-claim.

Issue 23 Application of the apportionment provisions once the claim with the plaintiff has settled

Should contributions assessments be undertaken in accordance with the current timetable in multiple defendant claims in circumstances where progress of the plaintiff's claim through the CRP has been suspended due to the death of the plaintiff?

Should the contributions assessment provisions be applied to cases where cross-claims remain after the plaintiff's claim has settled or where cross-claims are brought separately from the plaintiff's claim?

7.6 Arguments being put to the contributions assessor

Some stakeholders have suggested that parties have been making extensive submissions to contributions assessors to support their arguments in relation to how liability should be apportioned. The Tribunal has advised that while such submissions are sometimes made, the contributions assessors are advised not to consider them as the Regulation limits the contributions assessor to considering the Statement of Particulars, the defendants' Replies and the standard presumptions.

The intention of the provisions was not to burden defendants with the task of preparing detailed submissions in relation to apportionment, and this could be unnecessarily increasing costs. The information contained in the Reply should be sufficient to ensure that the contributions assessor has sufficient information. It has also been suggested that some defendants are incorporating detailed submissions into their Reply which may unnecessarily increase the costs incurred by plaintiff solicitors who would need to read that material.

Issue 24 Submissions to contributions assessors

Are significant costs being incurred in preparing detailed submissions for contributions assessors? Is this causing any delay? Are measures necessary to discourage this practice?

7.7 Power of the contributions assessor to vary the contributions assessment

Some stakeholders have suggested that some apportionments of liability made by the contributions assessor have had errors or the calculations are not accepted by the defendants.

There would appear to be a good argument to support amending the Regulation to provide that a contributions determination may be varied to correct a simple mathematical or calculation error on the face of the determination. (See, for example, the "slip rule" under rule 36.17 of the ***Uniform Civil Procedure Rules*** 2005). Any change would need to be carefully confined, however, to ensure that it does not result in defendants seeking routinely to open up determinations on other grounds.

Issue 25 Variation of contribution determinations

Should a power be introduced to enable a contributions assessor to correct his or her determination? If so, what limits should apply to such a power in order to ensure that the existence of such a power is not abused by defendants seeking to challenge apportionment determination?

7.8 Objections to contributions assessors

Some stakeholders have suggested that there is no fixed procedure for a party to raise concerns about the potential for conflict of interest in respect of a particular proposed contributions assessor. It has been suggested that contributions assessors be required to disclose to the Registrar the identity of those parties or firms for whom they regularly act to avoid any potential conflict of interest when the Registrar makes an appointment in a particular case.

A similar point is made in relation to the appointment of mediators and this is discussed in section 6.4.

Contributions assessors are appointed from a list prepared by the Director-General of the Attorney General's Department. The Registrar assigns a contributions assessor where the defendants fail to agree among themselves on apportionment.

While mediation by its very nature does not involve the determination of issues between the parties, the position is slightly different in relation to contributions assessors as their determinations can have cost consequences for defendants. It is not clear, however, whether existing rules for managing conflicts of interest are in some way inadequate. Practical considerations also need to be considered. The Tribunal is a relatively small jurisdiction with a small number of practitioners acting for a small number of defendants. Any arrangement which allows objections to be made to the appointment of a particular contributions assessor may result in few contributions assessors with experience in the jurisdiction from being able to perform this role.

Issue 26 Objections to contributions assessors

Is there a need for a more formal process to require contributions assessors to address conflicts of interest where they have acted for, or against, one or more parties who may be affected by their determination?

7.9 Joining other defendants

An issue has been raised concerning the fact that there is no obligation on plaintiffs to name all potential defendants. Further, it is argued that plaintiff solicitors can nominate a defendant who had little or no responsibility for asbestos exposure at the workplace, with the result that the onus is then placed on that defendant to prove their lack of liability. It seems unlikely, however, that plaintiff solicitors would recommend commencing proceedings against a defendant with little responsibility if a better defendant is available. (It would be improper to commence proceedings against a defendant who is known to have no liability.)

A number of points should be made here.

- The information exchange process should ensure that all defendants have sufficient information to enable them to identify whether other parties should be joined and, if appropriate, defendants can join those other parties.

- The problem of a defendant being named by a party in circumstances where it has little or no liability is an issue that would arise even if the new CRP had not been established. Such a defendant would be left in the position of incurring costs in defending the action regardless of the new process set out in the CRP.

- Any proposal to require plaintiffs to name all potential defendants assumes that plaintiffs are in a position to do this. For example, in an employment case, the plaintiff only may know who his or her employer is, and would not necessarily know which company manufactured the asbestos products that were used. It may be more expensive for plaintiffs to obtain this information than for defendants. Further, requiring every possible defendant to be named or joined by the plaintiff could unnecessarily increase costs and delay.

Issue 27 Joining other defendants

Are additional measures necessary to ensure that all defendants who should be party to a claim are joined?

7.10 Single Claims Manager

There is no data available concerning the effectiveness of reforms introduced with the CRP to provide for the appointment of a single claims manager. The single claims manager is appointed once issues around apportionment have been resolved.

Some stakeholders have suggested that while effective, single claims managers are not being used in enough cases. This, it is suggested, is partly a result of cultural issues within the jurisdiction and the fact that the SCM only has a limited role once apportionment issues are resolved.

Issue 28 Single claims manager

Has using a SCM been effective in reducing costs? Has using the SCM had benefits for plaintiffs? Has using a SCM had benefits for defendants?

What has been the experience of those defendants which have acted as SCMs?

What improvements (if any) could be made to the system?

Chapter 8 Costs

8.1 Collection of information contained in Form 3 Returns

Many stakeholders have highlighted the importance of the information which has been collected by the Part 3 Returns and have argued that detailed information should be included in the Issues Paper. This, it is suggested, will assist in determining whether savings have arisen in legal costs.

While the Current Review agrees that the collection of a comprehensive data set is of critical importance, it should be noted that it is difficult to draw comparisons with the position prior to establishment of the CRP. This is because, as the Final Report noted, there is no comprehensive data set available in respect of the dust diseases compensation system prior to introduction of the CRP. There is, therefore, no means of benchmarking the CRP against the earlier scheme.

That said, this Issues Paper contains the data available from the Tribunal's records and the Form 3 Returns as set out in Chapter 2.

In preparing the data for this Issues Paper, limitations have been identified with the layout of the current Form 3.

For example, the Current Review has found that although the cost of each expert report must be identified, this has not always been provided. Further, there is no requirement to separately identify the overall number of medical reports obtained. In addition, some defendants have been reporting together when the intention is for each defendant to report on its costs separately by way of a separate Form 3 Return.

Similarly, the stakeholders have suggested that additional information should be collected. Information which they have suggested should be collected includes:

- Information concerning party-party costs;
- Whether a matter proceeds to a contributions assessor;
- The time at which matters settle as part of the CRP, for example, at mediation, prior to mediation or after mediation.

Issue 29 Form 3 Returns

Should any additional information be collected as part of the Form 3 Return? How can the layout of the form be improved? Is any information required by the Form 3 Return not useful?

8.2 Information concerning party-party costs and costs inclusive settlements

Some stakeholders have suggested that plaintiffs should be required to provide information as to party-party costs, in addition to solicitor-client costs as required to be provided by the Regulation. This, it is suggested, would give some indication as to the amount which plaintiffs are actually receiving as part of their settlement. Others have suggested that the level of cost-inclusive settlements remains high, and that it is difficult for defendants to gauge the level of plaintiff costs claimed under the CRP. Some stakeholders have suggested that cost-inclusive settlements should be prohibited.

In recommending that solicitor-client costs be reported, the Final Report noted, that as a result of this change, it would be unnecessary to prohibit cost-inclusive settlements because, for the first time, it should be possible to identify the actual amount of compensation paid to plaintiffs and the full cost of providing that compensation. It is not clear what additional benefit would be gained by separately requiring the reporting of party-party costs, as the information which is already collected enables the actual amount of compensation paid to plaintiffs and the legal costs incurred to be determined.

Issue 30 Costs inclusive settlements

Has anything changed in the last 12 months to such an extent that it would be appropriate to reconsider the issue of cost- inclusive settlements?

8.3 Data provided in the Issues Paper

The Issues Paper contains the data available from the Tribunal's records and the Form 3 Returns as set out in Chapter 2.

Issue 31 Additional data

Is the data presented in Chapter 2 of the Issues Paper useful, in whole or in part? Is there any other breakdown or analysis of the data which stakeholders would consider useful?

8.4 Further Review

Given that the CRP only has operated for twelve months, the data which are available are limited, and it is difficult to draw definite conclusions from them. In addition, practitioners still are gaining experience in the operation of the CRP, particularly given the low level of activity during the first six months of the CRP's operation.

Issue 32 Further Review

Should a further review of the CRP's operation be conducted in 12 months time?

APPENDIX A

TIMETABLE FOR CLAIMS RESOLUTION PROCESS

	LAST BUSINESS DAY FOR STEP TO OCCUR (WEEKS IN WHICH STEP SHOULD BE OCCURRING)			
	MALIGNANT CLAIMS		NON-MALIGNANT CLAIMS	
STEP IN CLAIMS RESOLUTION PROCESS	**SINGLE DEFENDANT**	**MULTIPLE DEFENDANTS**	**SINGLE DEFENDANT**	**MULTIPLE DEFENDANTS**
Plaintiff serves statement of claim and statement of particulars on original defendants	0	0	0	0
Original defendants cross-claim against any additional defendants	N/A	10 (Weeks 1-2)	N/A	30 (Weeks 1-6)
Defendants and cross-defendants notify plaintiff if clinical examination required	10 (Weeks 1-2)	20 (Weeks 1-4)	30 (Weeks 1-6)	50 (Weeks 1-10)
Original defendants file and serve reply	20 (Weeks 1-4)	20 (Weeks 1-4)	30 (Weeks 1-6)	30 (Weeks 1-6)
Clinical examination(s) of plaintiff, if required	20 (Weeks 3-4)	30 (Weeks 5-6)	40 (Weeks 7-8)	60 (Weeks 11-12)
Cross-defendants file and serve reply	N/A	30 (Weeks 3-6)	N/A	60 (Weeks 7-12)
Defendants and cross-defendants agree on contribution and Single Claims Manager	N/A	35 (Week 7)	N/A	70 (Weeks 13-14)
Registrar refers contribution to Contributions Assessor or determines Single Claims Manager, if required	N/A	35/36 (End Week 7, start Week 8)	N/A	70/71 (End Week 14, start Week 15)
Assessor determines contribution and Single Claims Manager, if required	N/A	40 (Week 8)	N/A	80 (Weeks 15-16)
Preparation for mediation/possibility of early settlement	30 (Weeks 5-6)	50 (Weeks 9-10)	60 (Weeks 9-12)	100 (Weeks 17-20)
Parties or Registrar refer claim to mediation, if not settled	30/31 (End Week 6, start Week 7)	50/51 (End Week 10, start Week 11)	60/61 (End Week 12, start Week 13)	100/101 (End Week 20, start Week 21)
Mediation must be completed	45 (Weeks 7-9)	60 (Weeks 11-12)	90 (Weeks 13-18)	120 (Weeks 21-24)

APPENDIX B