WHEN THE DUST CLEARS ...

By Bernard McHardy

In his findings following the Special Commission of Inquiry in 2004, David Jackson QC said that between $1.5bn and $2.24bn was needed to cover all future asbestos-related claims. He found that funds set aside by the James Hardie Group in its move off-shore would be exhausted by early 2007, and concluded that while it was not legally obliged to fund those liabilities of its former subsidiaries, 'in my opinion it is right that it should do so'.[1]

Until 1996, the James Hardie Group (JH Group) had met its asbestos liabilities (judgments, settlements and legal costs) as they became due. The machinations thereafter of separating its asbestos liabilities from its core business were a failure as regards the group's responsibility to ensure that enough money was left in Australia to compensate victims. Following the report of the James Hardie Inquiry in September 2004, JH Group offered to fund future asbestos liabilities. The basis for that funding, however, has been the subject of protracted negotiations, which are currently still up in the air. One condition imposed by the JH Group prior to contributing more funds was that the NSW government put in place a review of the efficiency of the dust disease compensation process and implement its recommendations.

THE NEW BROOM

On 1 July 2005, the *Dust Diseases Tribunal Amendment (Claims Resolution) Act* and the amended *Regulations* came into operation in NSW to provide a new claims resolution process (CRP) for claims involving asbestos related conditions.

Significantly, the Act provided that all asbestos claims – with the exception of urgent cases, those removed from the process by agreement, or those removed for failure to comply with the CRP – be henceforth dealt with by the CRP.

Since 1 July 2005, proceedings are initiated by the statement of claim, which is still filed, but proceedings in the Tribunal are otherwise deferred and are not the subject of case management by the Tribunal while the CRP is under way.

In a nutshell, the plaintiff provides an extensive statement of particulars (Form 1) (PSP) whereafter timeframes apply (see Table 1 below), within which cross-claims must be made. Defendants must reply and medical examinations take place. In the absence of agreement, provision is made for apportioning liability between defendants. A contributions assessor (CA) is confined to considering the PSP and the replies as filed. The CA is directed in his assessment by standard presumptions.[2]

The Act and Regulations followed a review aimed, as the Minister for Justice said in his second reading speech on 25 May 2005,[3] to 'significantly reduce legal and administrative costs associated with resolving dust diseases compensation claims'. He went on to say, 'it should be emphasised that the new claims resolution process will provide a quick and streamlined process for resolving claims', and that the intent was to 'reduce the time that claims will take to settle'. In the second reading speech, he noted that the legislation implemented the recommendations of the review established by the NSW government.

Implementing the review was acknowledged by the Minister[4] to be a precondition for the provision of funding by the J H Group for asbestos compensation following the inquiry and report of David Jackson QC

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in September 2004. The review report was released on 8 March 2005, and the government adopted its recommendations on the same day.

The Minister also announced that a further review of the reforms and the system would be conducted after data in relation to the reforms' first 12 months of operation became available.

In keeping with that undertaking, the Attorney-General's Department has subsequently invited submissions from stakeholders who had previously made submissions during the initial review process conducted by Mr Laurie Glanfield AM, director-general of the Attorney-General's Department. Those submissions were required by 25 August 2006. Officers from the Cabinet Office have also visited the Dust Diseases Tribunal (DDT) gathering information, and at the time of writing, this report is awaited.

So what, then, is the up-to-date position of asbestos victims in terms of their rights in NSW and the processes involved?

SUMMARY OF AN ASBESTOS VICTIM'S RIGHTS IN NSW

Statutory rights

People in NSW suffering dust-related illnesses will first be directed to the *Workers' Compensation (Dust Diseases) Act* 1942 ('the 1942 Act').

The Dust Diseases Board will pay weekly compensation relevant to the level of disability caused by the disease, and for the medical treatment costs until the date of the worker's death, where the person:

- was a worker within the meaning of the 1942 Act, employed in NSW;
- was exposed to certain dusts, such as asbestos or silica dust during the course of their employment;
- contracted a dust disease as defined in s3 of the 1942 Act;[5]
- suffers disability as a consequence of the disease (reasonably attributable to exposure to dust through their employment.

A dependant may also secure a lump sum from the Board if the worker's death is caused by the dust disease.

Beyond these statutory rights, the victim of a dust disease is in a beneficial situation relative to other injured workers with entitlements under the *Workers' Compensation Act* 1987 (WCA). Under that Act, those who suffer occupational injuries are generally constrained by a mysterious formula to remain in receipt (or not) of a weekly pension under the approving eye of the insurer, which is licensed on terms by the government's authority, WorkCover. The worker is able to claim for the real earnings lost due to an employer's negligence only if the injury is determined by a set of guidelines administered by an approved medical specialist to result in at least a 15% of whole-person impairment.[6]

The dust diseases victim may, on the other hand, have entitlements to common-law damages in addition to any entitlement s/he has to compensation from the Dust Diseases Board without confronting this onerous hurdle. The reason for this apparent anomaly is beyond the scope of this paper, but is indicative of the lack of common principle in the legislative regimes governing the various areas of personal injury.

In any event, it is possible for the dust diseases victim to recover damages in the form of lump-sum compensation without proving that s/he overcomes any 15% thresholds, and without affecting his or her rights under the 1942 Act.

Modified common-law rights

Since 1 July 2005, the CRP has been determining claims for compensation for persons with asbestos-related diseases. Although it is an administrative rather than a litigated process, it is plain that had it been called the 'claims resolution administration process', a disrespectful acronym might have condemned the scheme from the outset.

Having coped, after all, with the procedural complications that have accompanied somewhat over-energetic reform over the past five or six years, the relatively untramelled vestiges of the (albeit modified) common law that survive in the >>

DDT have provided some consolation for a lawyer involved in personal injury litigation. Having said that, the motivation for CRP – the expeditious and less expensive resolution of claims by sufferers of asbestos-related illnesses – is nevertheless commendable.

CRP requires the early exchange between the parties of detailed information concerning a claim, including employment history, exposure to asbestos, the type of asbestos-containing products used, the frequency of exposure, the manufacturer of the products, the nature of the asbestos disease suffered and the way it affects the claimant, and details of any other conditions from which the claimant may have suffered that are unrelated to asbestos. The claimant must also provide medical reports on which s/he relies and all documentation supporting any economic loss claim.

All this information must be provided to a defendant when the statement of claim is served.

The PSP[7] provides all of these details. It must be in the prescribed form[8] and is served with the statement of claim. Service of the statement of claim is ineffective unless the PSP is also served.

Time then starts running and the regulations require each step thereafter to be taken in a timely and expeditious manner.

Within five days of serving the PSP on the last defendant being sued, the registrar of the DDT, and each of the defendants, must be notified of this date. The regulations impose a timetable that starts with the date of the PSP's service on the last defendant.

The defendant then files its reply to the claim, indicating those aspects of the claim that it accepts and those that it disputes. If it does not admit or dispute a particular aspect of the claim, it must explain why and set out the reasons for not admitting that part of the claim, providing evidence to support its position.

A longer timetable is allowed for non-malignant, compared with malignant, claims.

TABLE 1: THE TIMETABLE FOR CRP

	Last business day for step to occur (weeks during which step should occur)			
	Malignant claims		Non-malignant claims	
Step in claims resolution process	Single defendant	Multiple defendants	Single defendant	Multiple defendants
Plaintiff serves statement of claim & statement of particulars on original defendants	Day 0	Day 0	Day 0	Day 0
Original defendants cross-claim against any additional defendants cl 21(2)	N/A	10 (weeks 1-2)	N/A	30 (weeks 1-6)
Defendants and cross-defendants notify plaintiff if clinical examination required cl 22(1)	10 (weeks 1-2)	20 (weeks 1-4)	30 (weeks 1-6)	50 (weeks 1-10)
Original defendants file and serve reply cl 22(4)	20 (weeks 1-4)	20 (weeks 1-4)	30 (weeks 1-6)	30 (weeks 1-6)
Clinical examination(s) of plaintiff, if required cl 24(2)	20 (weeks 3-4)	30 (weeks 5-6)	40 (weeks 7-8)	60 (weeks 11-12)
Cross-defendants file and serve reply cl 22(5)	N/A	30 (weeks 3-6)	N/A	60 (weeks 7-12)
Defendants and cross-defendants agree on contribution & single claims manager cl 41(2)	N/A	35 (week 7)	N/A	70 (weeks 13-14)
Registrar refers contribution to CA or determines single claims manager, if required cl 42 (1)	N/A	35/36 (end weeks 7, start week 8)	N/A	70/71 (end week 14, start week 15)
CA determines contribution & single claims manager, if required cl 42(3)	N/A	40 (week 8)	N/A	80 (weeks 15-16)
Parties or registrar refer claim to mediation, if not settled cl 28(1) & (2)	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 cl 29	45 (weeks 7-9)	60 (weeks 11-12)	90 (weeks 13-18)	120 (weeks 21-24)

Does one size fit all?

The review process now being undertaken by the Attorney-General's Department will no doubt provide a detailed overview of how CRP is working after 12 months of operation. The writer's experience of two CRP matters illustrates the process.

Claimant 1

Instructions were received on 12 December 2005 from a 75-year-old man who had been diagnosed with mesothelioma in May 2005. The statement of claim was filed in the DDT on 22 December 2005. The plaintiff's employer was a (now deregistered) company; as a manager, the plaintiff had been exposed to asbestos insulation applied to the company's production equipment by a (now deregistered) contractor, which had used Bells asbestos products.

Enquiries identified insurer one as being liable for the company for one year of the plaintiff's 20 years' of service with the company. The plaintiff believed that he had been exposed to asbestos through his employment that year, so he commenced proceedings against that insurer under the *Law Reform (Miscellaneous Provisions) Act* 1946. He also sued the two companies responsible for the liability arising because of the use by the employer of Bells asbestos products.

Although the statement of claim had been filed in urgency on 22 December 2005 to protect the plaintiff's rights to damages, the PSP could not be completed and served with the statement of claim until 6 February 2006.

According to the CRP timetable for this malignant claim with multiple defendants, mediation in this matter should have been completed by weeks 11-12.

The matter was not, at the outset, suitable for removal from the CRP under clause 18 of part 4 of the regulations. But it became complicated by the insurer's argument that it did not insure the employer at the relevant time. Accordingly, the insurer objected to the matter proceeding to a CA. A cross-defendant to the action (another supplier) did not consent (as required by clause 18(1)(b)) to the removal of the matter from the CRP. (It should be noted that the parties to the claim by definition include any cross-defendant on the claim.) Confronted with this, the insurer instead moved that the plaintiff's action against the insurer be struck out by the Tribunal.[9] The president of the Tribunal decided that he had no power to do so while the matter was in the CRP. Ultimately the cross-defendant consented to removal from the CRP. But the process became further complicated when two other insurers of the employer were identified, triggering argument in respect of s151AB (WCA) (that is, who was the last insurer on risk for asbestos exposure to which the disease was due). The other insurers were identified only after the plaintiff gave bedside evidence at his home.

The fact that these other insurers appeared belatedly despite the plaintiff's enquiries before the matter was removed from the CRP introduced further complication and argument relating to:

- the operation of the *Law Reform Miscellaneous Provisions Act* (that is, the need for leave to join insurers for a deregistered company);
- the appointment of a designated insurer under s151AC (WCA) – one of the three insurers to conduct the proceedings;
- the questions of fairness to the latter two insurers of not being in the proceedings or having the opportunity to cross-examine on the contested issue of the plaintiff's last exposure to asbestos at the time that his evidence was taken; and
- the need to restore the deregistered company.

A settlement was achieved only on day 132 with terms – agreed by all parties – that gave the defendant *insurer* (by then appointed as the designated insurer) time to investigate for itself which of the three insurers was liable to pay the damages.

The parties were left wondering whether early directions before the Tribunal would have avoided delays incurred by the investigative process and constraints imposed by the CRP.

Claimant 2

Instructions were received on 14 December 2005 from a 68-year-old man who had been diagnosed with mesothelioma in November 2005. The statement of claim and PSP were filed in the DDT on 10 February 2006 and served on that day.

The plaintiff was an electrical fitter who from 1962 to 1998 worked predominantly in power stations throughout NSW. He sued four companies which had employed him, and the three corporations that now own the liabilities of the power stations where he worked.

Those seven defendants in turn joined another seven cross-defendants, being six companies that supplied asbestos insulation products and a company that designed and produced steam turbine equipment, which directed and incorporated the use of asbestos insulation products.

In keeping with the CRP, further time could have been sought by the defendants to make cross-claims, but this was not done. Apart from compliance with clause 22 of the regulations (the filing of replies) the plaintiff gave notice to the registrar of the DDT, but otherwise deferred taking action to remove his case from the CRP.

The plaintiff's first notification of the cross-claims was when he was served with notices of appearances by the cross-defendants on 30 March 2006. Replies from two of the cross-defendants were served on 13 April 2006. Enquiries were made of the legal representatives for the three power stations on 24 April 2006 as to progress, and the advice was that a reply was still awaited from one of the defendants, although according to the timetable the matter should already have proceeded to a CA in the absence of the defendants agreeing on the apportionment of liability.

Under regulation 42(3), the CA assessment should have been made within 40 business days after service of the PSP on the last of the original defendants – that is, by 14 April 2006. Telephone attendances with some of the defendants indicated problems with replies from cross-defendants.

The plaintiff was informed, by letter received 18 May 2006, that the registrar had appointed a CA on 9 May 2006. On 23 May 2006, legal representatives for two of the defendants told the plaintiff that a medical appointment had been arranged for 30 May 2006, although the timetable prescribed that this should happen within 30 business days – that is, by 31 March 2006. >>

Frustrated by the lack of progress, the plaintiff discovered, via a telephone enquiry, that the CA had reported and appointed a single claims manager (SCM). By 11 July 2006, the plaintiff wrote proposing a mediator and asking for a reply within seven days. After much toing and froing, including the SCM's suggestion of an informal settlement conference between the plaintiff and the SCM to discuss an offer put by the plaintiff on 9 May 2006, it was decided that the matter had to go to mediation. A mediator was finally agreed on 21 August 2006, and mediation convened on 28 August 2006.

On arrival at the mediation, the plaintiff learned that three of the defendants, represented by one firm of solicitors, were unhappy with the contributions assessment. They were first seeking the agreement of the other defendants and cross-defendants that a review of the CA's determination should be sought without the costs penalties under clause 44(5) of part 4 of the regulations.[10] The implications of indemnifying 11 other parties for their costs in such a dispute would obviously represent a significant penalty.

The plaintiff could not take apportioned damages directly from cross-defendants that he had not sued. He accordingly sought leave from the Tribunal to amend his statement of claim,[11] joining the cross-defendants as defendants to the proceedings, whereupon clause 44(1)[12] applied and the complaining defendants had no control over preventing payment pending review of the CA's determination.

After leave was obtained and the parties served, the matter was concluded by terms of settlement filed in the Tribunal on 5 September 2006 (day 142 relative to the clause 29 part 4 expectation that a malignant claim involving more than one defendant would be concluded within 60 business days after service of the PSP on the last of the original defendants).

CONCLUSION

These two examples demonstrate that one size does not fit all, and that without the co-operation of the parties involved the machinery may not always provide 'a quick and streamlined process for resolving claims'.

So does the new broom sweep clean?

The results of the 12-month review are keenly awaited. While part 4 expects compliance within a confined timetable, the realities of multi-defendant claims, historically obscured insurance situations and dissatisfaction with the operation and perceived lack of fairness of the standard presumptions as they apply to contribution assessments all go to show that replacing a judge-directed claim process with an administrative process must necessarily suffer some teething problems.

A requirement to report to the registrar of the DDT, at the appropriate time relevant to the timetable, either to make directions or encourage early discussion in a more formal context, might help.

As to whether the attorney-general's 12-month review will succeed in addressing the teething problems? The answer to that is 'wait and see' and, like waiting for Hardie's funding, hold your breath until the dust clears. ■

Notes: **1** Report of the James Hardie Inquiry, September 2004. **2** Prescribed in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2005. **3** NSW Legislative Council, *Hansard*, 25 May 2005, p16067. **4** *Ibid.* **5** A disease specified in sch1 to the 1942 Act, and any pathological condition of the lungs, pleura or peritoneum that is caused by a dust that may also cause a disease specified in sch1. **6** Section 151H *Workers' Compensation Act* 1987. **7** Required by cl 20(2) of the Regulations. **8** Form 1. **9** Pursuant to Rule 14.28 of the *Uniform Civil Procedure Rules* 2005. **10** The disputing party has to materially improve its position by reducing its contribution by at least 10% or $20,000, 'whichever is the greater, or else it must indemnify the other parties for their costs in the dispute'. **11** Clause 17(2)(b) Regulations would arguably not apply, as it was not an amendment to '...preserve the plaintiff's cause of action', but the defendants did not argue against the Tribunal's power while the matter was still in the CRP. **12** Determination as to apportionment among defendants is conclusively binding on the defendants for the purposes of settlement of the plaintiff's claim and payment of the damages.

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