Institute of Actuaries of Australia

Asbestos - Implications of the NSW Government's Legislative Reforms

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ABSTRACT

When the public liability tort reforms were implemented in 2002, asbestos was specifically excluded from those reforms.

Since that time, the Medical Research & Compensation Foundation ("MRCF") in particular has experienced a considerable increase in claim activity involving it and following an announcement in October 2003 of its funding position, a Special Commission of Inquiry was set up.

Following the Special Commission of Inquiry's finding that the MRCF had a funding shortfall and would not likely be able to meet all its future claims obligations, negotiations began to establish the basis on which the funding may take place and one aspect of those negotiations considered the potential to achieve an efficient delivery of benefits and reducing legal costs which KPMG Actuaries had estimated at some $432m of $1536m of liabilities.

On 18 November 2004, the Premier of NSW, Mr Bob Carr announced a Review of Legal and Administrative Costs in Dust Diseases Compensation Claims.

The NSW Government Review sought submissions on a range of matters from interested parties by 14 January 2005 and finalised its report on 8 March 2005.

On 1 July 2005, the Government implemented legislation which was designed to reduce the time and cost of administering and settling these claims, with particular focus on the legal costs incurred in settling these claims.

This paper has been written to consider and discuss the potential impact of the NSW Government's Review into Legal and Administrative Costs of Dust Diseases Compensation in NSW which was enacted into legislation on 1 July 2005.

Within this paper we have sought to outline some of the processes that have been changed and we have also sought to provide some information and observations we made during that Review.

Keywords: Asbestos, Dust Diseases, Legal costs, NSW Government Review

ACKNOWLEDGEMENTS

The authors would like to thank the MRCF for the provision of their data for the purpose of those previous submissions we made and which we have used within this paper and within our presentation.

In addition, we would also like to thank Richard Wilkinson for his review of this paper and his insights and observations.

The views expressed herein are entirely those of the authors, Neil Donlevy (ndonlevy@kpmg.com.au) and Jonathan Perkins (jperkins@kpmg.com.au), and do not necessarily reflect those of the Institute of Actuaries of Australia or their employer, KPMG Actuaries.

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1.1 Background

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Since that time, the Medical Research & Compensation Foundation ("MRCF") in particular has experienced a considerable increase in claim activity involving it and following an announcement in October 2003 of its funding position, a Special Commission of Inquiry was set up.

Following the Special Commission of Inquiry's finding that the MRCF had a funding shortfall and would not likely be able to meet all its future claims obligations, negotiations began to establish the basis on which the funding may take place and one aspect of those negotiations considered the potential to achieve an efficient delivery of benefits and reducing legal costs which KPMG Actuaries had estimated at some $432m of $1536m of liabilities.

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On 1 July 2005, the Government implemented legislation which was designed to reduce the time and cost of administering and settling these claims, with particular focus on the legal costs incurred in settling these claims.

1.2 Purpose of this paper

This paper has been written to consider and discuss the potential impact of the NSW Government's Review into Legal and Administrative Costs of Dust Diseases Compensation in NSW which was enacted into legislation on 1 July 2005.

Within this paper we have sought to outline some of the processes that have been changed and we have also sought to provide some information and observations we made during that Review.

The information contained in this report is already available in various public documents but this paper has sought to bring such observations and information together into one document as a reference point.

The paper is not intended to be exhaustive in its consideration of the facts, and nor is it intended to speculate potential further developments or areas where further savings are achievable.

1.3 Caveats

Readers of this paper should also note that any estimates contained within this report, or our presentation at the General Insurance Seminar, are measured by reference to a particular client and their circumstances.

Such estimates may not be directly comparable or applicable for other companies (particularly relating to savings from the single claims manager model and contribution apportionment). Any estimates of the potential savings are necessarily subject to inherent uncertainty being, as they are, dependant on the behaviours of lawyers and defendants alike following the reforms.

1.4 Acknowledgements

This paper has been written by Neil Donlevy and Jonathan Perkins of KPMG Actuaries.

The views and conclusions expressed in this paper are those of the Authors of this paper, and do not, nor are they intended to, necessarily represent the views of their employer or those of any of its clients.

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2 A MARKET OVERVIEW

Before addressing the NSW Government Review, its objectives and its consequences, we thought it would be useful to provide some background context of the asbestos-related liabilities of Australia and also by comparison to the US and UK.

Given the focus of the NSW Government Review was on legal and administrative costs, we also thought it beneficial to consider the level of legal expenditure in Australia and those other countries.

2.1 Australian Asbestos Liabilities

Prior to any consideration of the possible impact that the legal reforms may have on the legal costs, it is important to gain some context to the situation with regard to asbestos in Australia.

In August 2004, KPMG Actuaries performed a high-level estimate of the asbestos liabilities of Australia. We estimated a present value of liabilities of between $6.8bn and $9.6bn and quoted a "median" estimate of in excess of $8bn[1].

This median estimate was:

- Inflated and discounted (at yields consistent with that time, of around 6% p.a.);
- Included allowance for legal costs (prior to the implementation of legislation resulting from the NSW Government Review);
- Based on information available to KPMG Actuaries with some moderate allowance for "unknown" exposures;
- Assuming a continuation of legal environment, insofar as no substantial change in basis of compensation (e.g. unimpaired claims and strict pleural plaque claims remaining uncompensated); and
- Exclusive of past payments (which we have estimated to be of the order of $1.5bn).

The range was not intended to reflect an upper and lower bound of potential scenarios but rather reflected different scenarios of allowance for future claims incidence, future claim cost

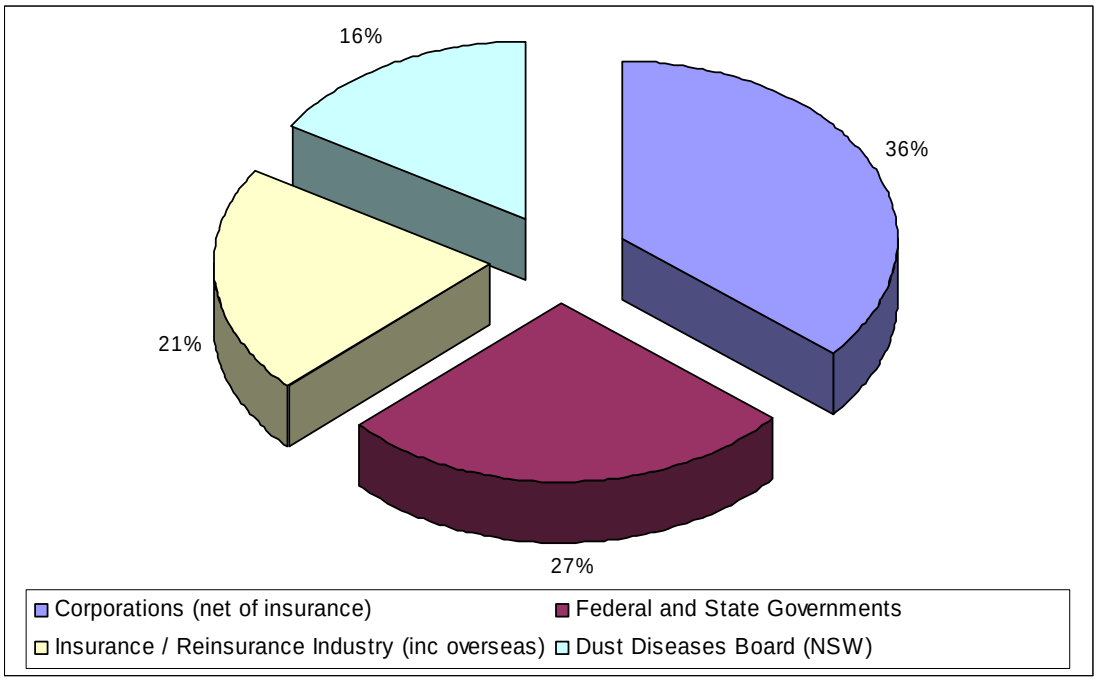
[1] KPMG General Insurance Survey, August 2004

inflation and emergence of "unknown exposures".

In line with other countries (US and UK especially) market estimates for Australia have grown considerably since the early 1990s, particularly with the continued growth in claims numbers which have far exceeded original and updated projections.

The following chart shows a representation of how the median estimate was broken down:

Split of future national asbestos related liabilities of Australia



Source: KPMG General Insurance Survey 2004

2.2 Legal Costs of Asbestos-Related Claims

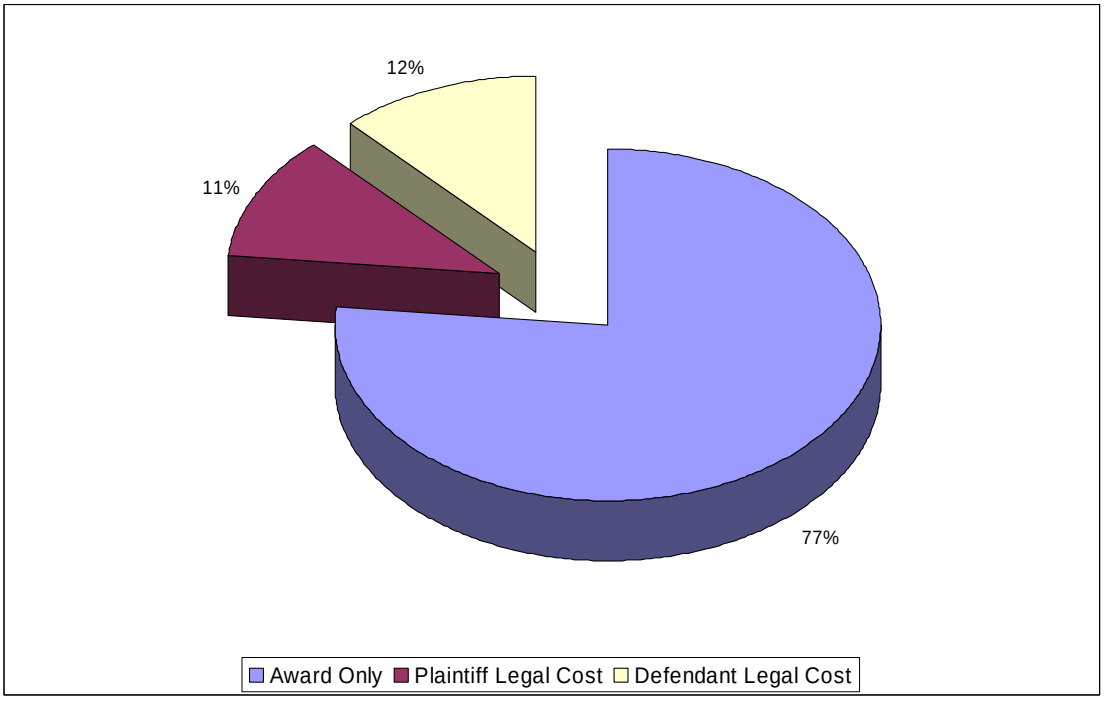
It is first worth explaining the nature of legal costs that liable (and non-liable) defendants may have to bear:

- **Plaintiff costs**, which includes all costs associated with any advice provided to the plaintiff such as medical opinions, opinions of experts relating to the amount of medical and care needs the plaintiff requires and solicitor fees. These are usually allocated in proportion to the award between the various defendants who are held liable for the claim.

- **Defendant costs relating to the claim**, which includes all fees incurred by the defendant in defence of the claim in relation to liability or negligence on the part of the defendant. At present, each defendant will defend itself in the action (although there can be agreements between defendants to share a defence).

- **Defendant costs relation to the costs of contribution**, which relates to all legal costs incurred in relation to the resolution of the contribution to the overall settlement of the individual defendants. This will include the costs of making any cross-claims, or of defending against being joined in a claim through cross-claims. It will also include any costs incurred in trying to identify other parties to co-join in a claim.

Current split of national asbestos liabilities of non Dust Disease Board liabilities

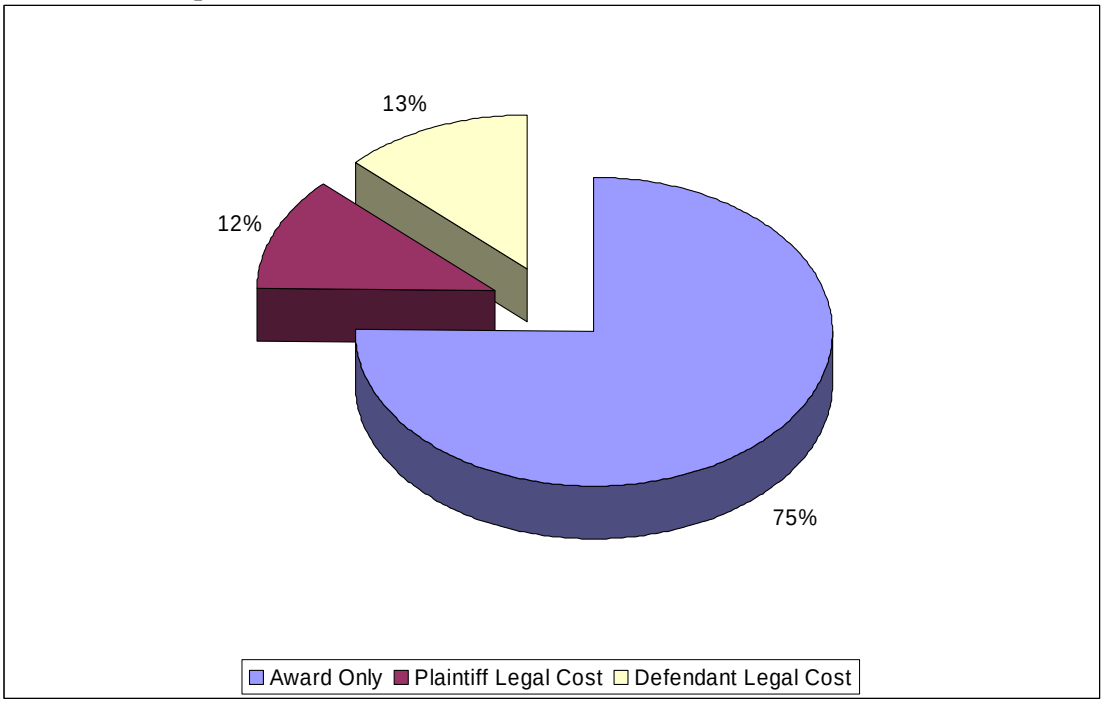


Source: MRCF Claims Data to 18 October 2004

We estimate the legal and administrative costs of dust disease claims to be in the region of $1.5bn - $2.0bn in NPV terms.

Legal costs within NSW for the MRCF are slightly higher than across other States, as shown in the following chart.

Current split of NSW asbestos liabilities of non Dust Disease Board liabilities



Source: MRCF Claims Data to 18 October 2004

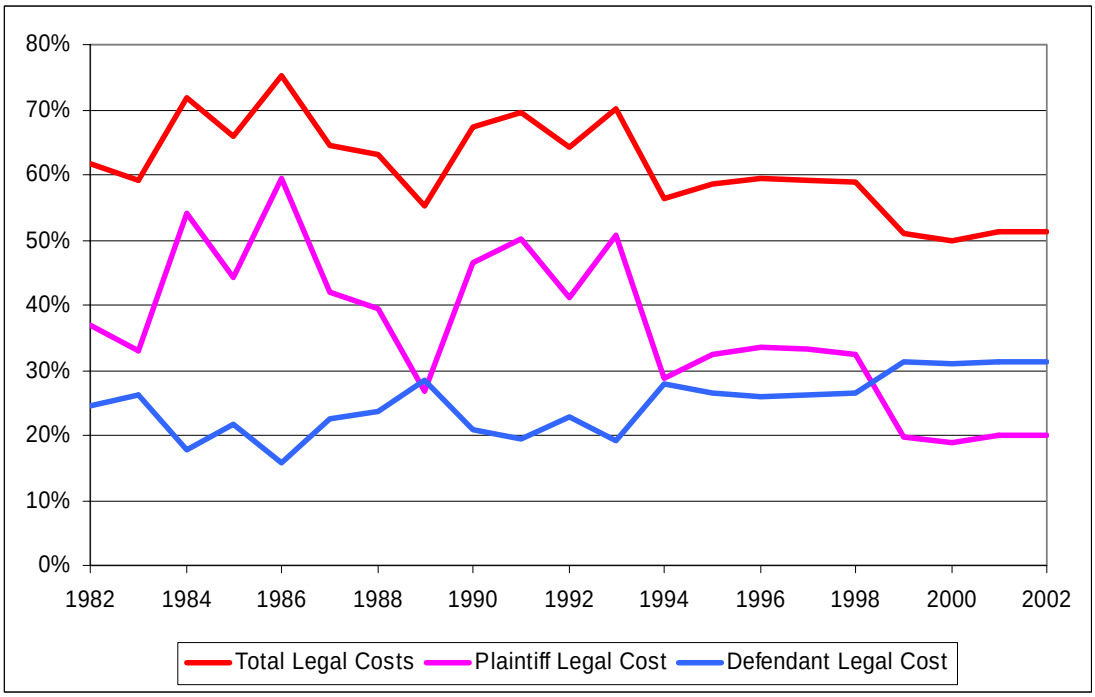
2.3 US and UK Experience

In Australia we have indicated the legal costs to be of the order of 30% of claims awards whilst in the UK, the legal cost is thought to be in the region of around 15%.[2]

In the US, it is common for legal and administrative costs to be much higher as is shown in the following figure.

[2] Institute of Actuaries GIRO 2004 Working Party report "UK Asbestos - The Definitive Guide"

Legal and Administrative Costs as a proportion of total costs in the US



Source: "Asbestos Litigation" by RAND Institute for Civil Justice

As can be seen this appears to suggest that legal and administrative costs in the US are broadly equal to the compensation paid.

This difference in legal costs can, in part, be attributed to:

- The relative low award cost of unimpaired claims within the US system, which therefore have a relatively high legal cost component.

- The US plaintiff lawyer system, which typically have a generally high notional cost than other legal systems.

- The increased fragmentation of claims in the US and the impact of bankruptcies, each leading to a large number of defendants. Typically an average claimant sues 60 defendants[3].

- Generally, defence expenses relative to plaintiffs' awards are considerably higher for these peripheral defendants and aids in the explanation of the high percentage of defendant costs. Also, plaintiff's costs will also naturally be higher due to the need for plaintiff lawyers to communicate with such a large number of defendants.

3 This figure was quoted by Ms Jennifer Biggs, Tillinghast-Towers Perrin, in her testimony to the United States Senate Committee in relation to the Fairness in Asbestos Injury Resolution Act of 2003

3 NSW LEGAL COSTS BY DISEASE TYPE

3.1 Plaintiff and Defendant Legal Costs by Disease Type

In this section, we have analysed how legal and administrative costs vary by disease type. This information was contained within our submission to the NSW Government Review dated 14 January 2005.

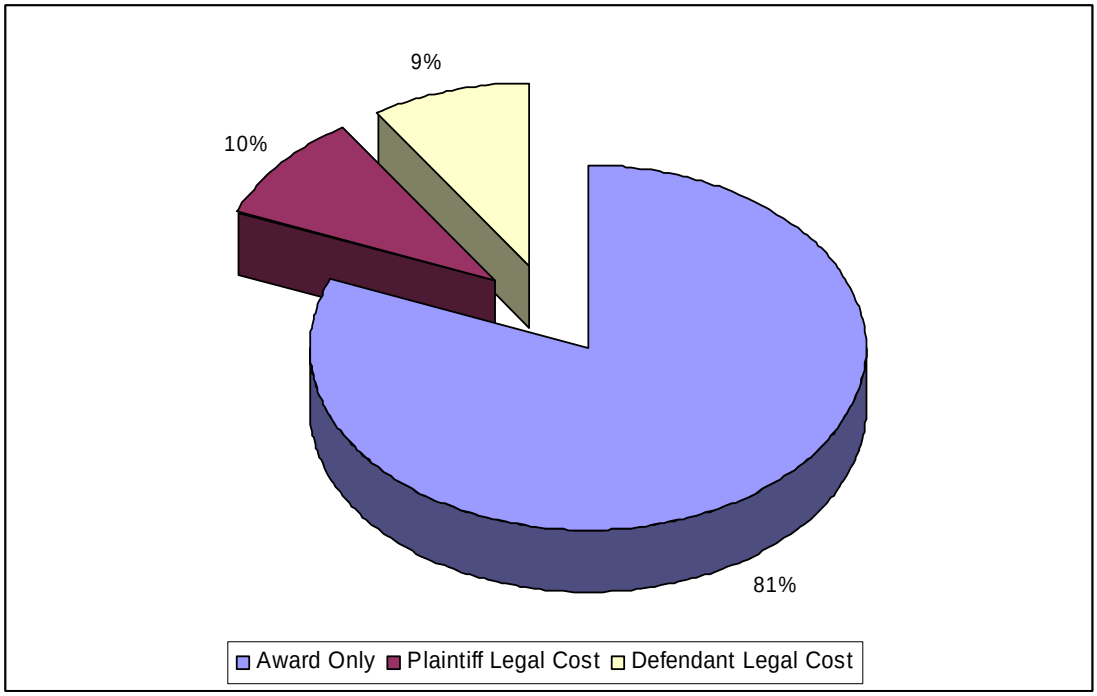
The figures shown in this section are for claims within NSW only including those which settle for an award amount of zero and relate to claims settled in the period 2000 to 2004.

We have had to form an assumption for plaintiff legal costs, as the majority of cases are settled on a costs inclusive basis. Therefore we have limited visibility to plaintiff legal costs in all cases. We have formed this assumption based on the plaintiff legal costs from claims which have been settled on a cost exclusive basis.

3.2 Mesothelioma

The following figure shows the split of total costs for mesothelioma claims.

Split of total cost of mesothelioma claims



Source: MRCF Claims Data to 18 October 2004

The figures above are the equivalent to the total legal cost being 23% of the total award, i.e. 10% plus 9% divided by 81%.

This is slightly below the 33% overall average of total award shown in section 2.2 for a number of reasons, including:

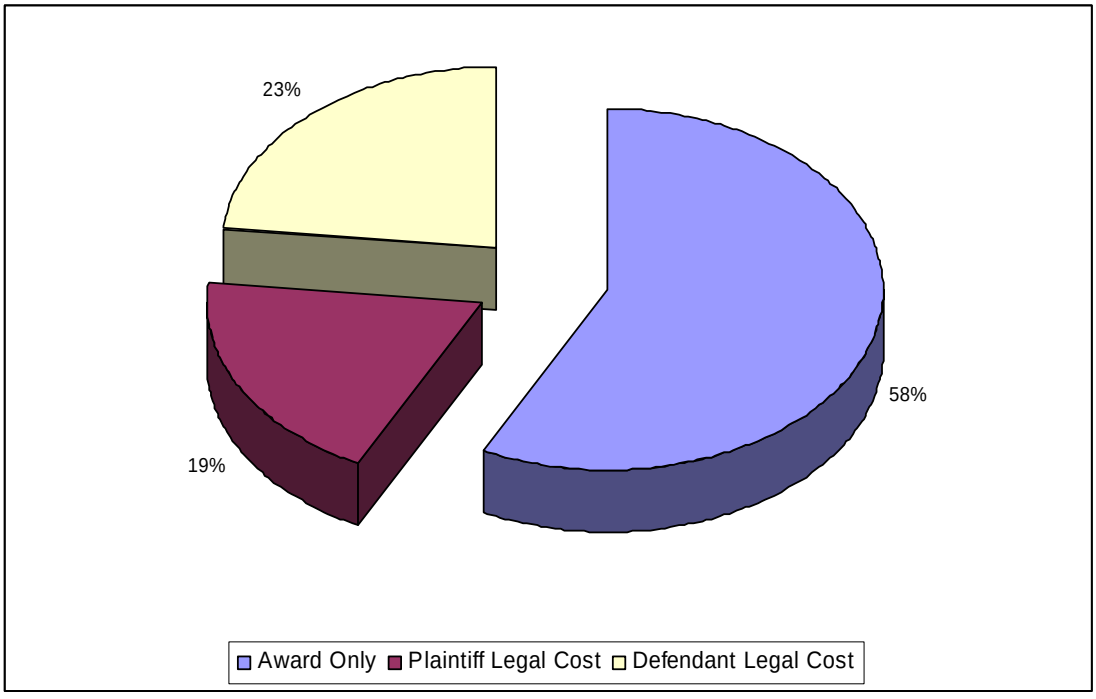
- Mesothelioma has a relatively high average award, with the total settlement being between $350,000 and $400,000 for a typical case. Therefore, legal costs as a percentage of the award will be lower than is the case for other diseases such as asbestosis where awards are typically lower.

- Mesothelioma claims typically have fewer aspects which are disputed or contested, other than the exposure did not happen due to the defendants product or workplace. These disputes are generally easier to prove based on records held both by the plaintiff and any defendants. Therefore costs associated with this disease type tend to be lower than for other disease types.

3.3 Asbestosis

The following figure shows the split of total costs for asbestosis claims.

Split of total cost of asbestosis claims



Source: MRCF Claims Data to 18 October 2004

This is equivalent to legal costs being 73% of the total award, i.e. 23% plus 19% divided by 58%.

This is above the 33% overall average of total award shown in section 2.2 and for Mesothelioma for a number of reasons, including:

- Asbestosis in comparison to mesothelioma has a substantially lower average award, with the total settlement being between $200,000 and $250,000 for a typical type of case. This is because asbestosis in itself is not a fatal disease but instead causes irreversible scarring of the lung, causing future breathing difficulties and therefore disability. Therefore, legal costs (with a certain fixed level of costs) as a percentage of the award will be higher than is the case for Mesothelioma where awards are typically much higher as discussed above.

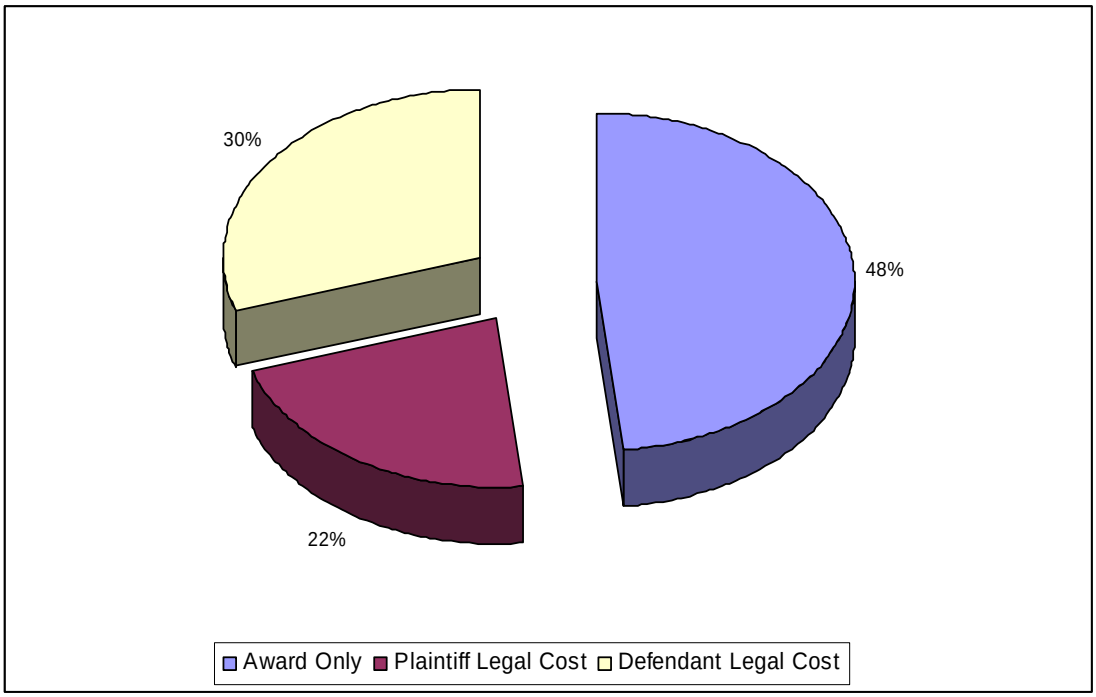
- Asbestosis claims typically have a relatively large number of possible lines of defence, including:

    - the relative potency of the different types of exposure;
    - the likelihood of damage caused by that type of asbestos; and
    - Issues pertaining to dosage, whereby low dose asbestosis cases tend to have much higher legal costs due to the disputation of the relative award level.

3.4 Lung Cancer

The following figure shows the split of total costs for lung cancer claims.

Split of total cost of lung cancer claims



Source: MRCF Claims Data to 18 October 2004

This is equivalent to legal costs being 108% of the total award, i.e. 30% plus 22% divided by 48%.

Although, Lung Cancer cases tend to have a relatively high average award size close to that of Mesothelioma, it has a significantly higher percentage of legal costs compared to Mesothelioma.

The relatively high percentage of legal costs in this disease type can primarily be attributed to defences related to the contributory effect of smoking and the possible causal effect that this may have on the likelihood of the disease becoming apparent, which is significant.

This disease type has also seen a number of test cases in recent times such as:

- McDonald vs. State Railway (1998) (16 NSWCCR 695);
- Judd vs. Amaca (2002) (NSWDDT 25, Case Number 341); and
- Restuccia vs. Dust Disease Board (2005) (2172/2001 & 2173/2001).

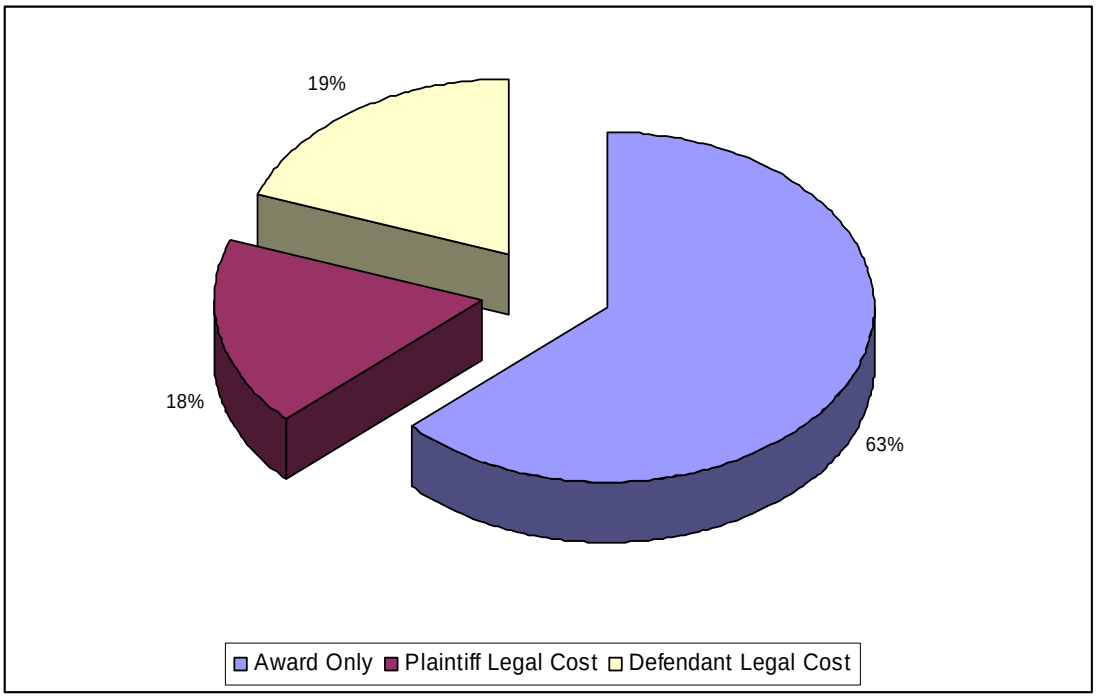
This is likely to have artificially increased the percentage shown above; however at present it

is difficult to assess this spreading as the verdicts in these cases are critical in all other Lung Cancer claims in the future. Therefore, it could be argued that the costs associated with these claims should be spread over all future claims.

3.5 Asbestos Related Pleural Disease ("ARPD") & Other

The following figure shows the split of total costs for ARPD and Other claims.

Split of total cost of ARPD and Other claims



Source: MRCF Claims Data to 18 October 2004

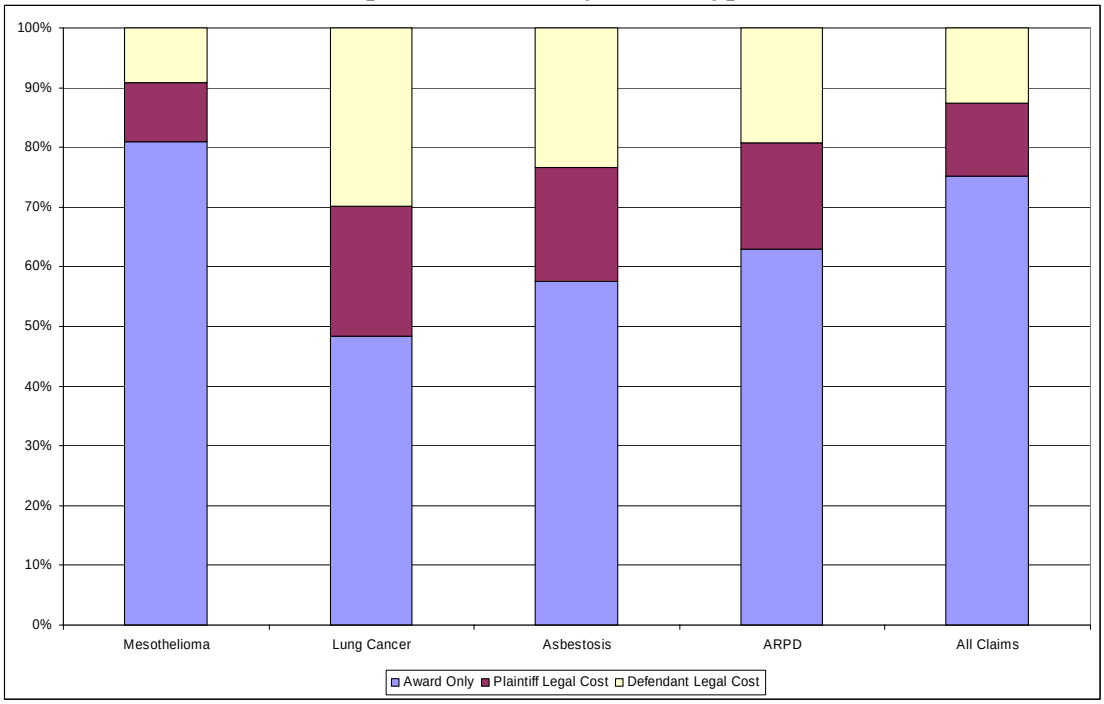
This is equivalent to legal costs being 59% of the total award, i.e. 19% plus 18% divided by 63%.

Similarly to Asbestosis, APRD & Other claims have significantly higher legal costs as a percentage of the total award as is shown in the above figure. This can be attributed to the same reasons as discussed above for Asbestosis claims.

3.6 Summary

A comparison of the above pie charts is shown in the following figure.

Split of total cost by disease type



It can be seen that the legal costs for non-mesothelioma claims are more than double the percentage of total costs compared to that of mesothelioma claims. However, given the high relative frequency of mesothelioma claims in data that we have available, this gives a weighted average over all claims which is significantly closer to that shown for mesothelioma.

4 THE NSW GOVERNMENT REVIEW

4.1 The Issues Paper

Within the issues paper, there were 18 key issues to consider and these are discussed briefly below.

Issue 1 – Diagnosis

Could costs be reduced by requiring the claimant to be examined by an agreed medical expert with the medical report to be provided to the claimant and to any parties that are potentially liable? The current situation at present is that plaintiffs are usually subjected to a number of medical examinations in order for each party to be able to confirm. This includes both plaintiff lawyers and all parties which are potentially liable for the claimant's conditions. Therefore, if this can be reduced to only one medical examination by an agreed medical expert then costs relating to these expenses would be significantly reduced in aggregate over all defendants.

Issue 2 – Investigation of exposure

Should a database be constructed and held in order to help with the building of information for exposure? If so who should maintain and be able to use this database?

A substantial cost in the claim process is the collection of information to enable plaintiffs to be able to proof the liability of the defendants. If information was collected over time such as material supplier and firms working on particular construction projects then this would reduce the need for as substantive investigation. Therefore, with the reduction in the need for investigation then costs would also be reduced.

Issue 3 – Commencing the claim

Should the process for initiating claims be modified and if so how?

Currently claims are initiated with a Statement of claim which is typically presented early in the process in order to preserve the claimants' estate entitlements for pain and suffering if the claimant were to die. If the right to delay until full information was available or not requiring a full Statement of claim on presentation then legal costs may be reduced in the future.

Issue 4 – Data concerning pre-claim procedures

Is there any data relating to costs incurred in preparing claims?

It was generally asserted during the commission and negotiations with James Hardie Industries NV that legal costs incurred in the process of settling dust disease claims is high, however there is little data to confirm this. Is it possible that this could be confirmed?

Issue 5 – Early settlement

Is there any data available to clarify the legal costs involved in various stages of the settlement process by disease type?

It has been observed that the majority of claims are settled either prior or on the first day of hearings for settlement. However, the majority of these still involve preparation for trial and is there any data to confirm the legal costs in these cases to ascertain any potential inefficiencies of settling on or just before the start of the hearing.

Issue 6 – Exchange of information

Should all information be disclosed on filing of a claim and if not what information should be disclosed?

It has been seen that the majority of information used in the settlement of a claim is not disclosed initially on the commencement of the claim. It could be possible that if all information needed to be disclosed on the commencement of a claim then this may improve the probability of early settlement and therefore lead to the reduction of costs associated with dust disease claims. However, important consideration needs to be made based on the information which is only available after commencement of the claims and how this could be later added to the Statement of claim.

Issue 7 – Settlement conferences and alternative dispute resolution

Do issues and listing conferences aid in achieving the early settlement of claims, or do they still mean claims are usually settled on the first day of the hearing?

Commonly, issues and listing conferences are used as an informal settlement conference in order to settle issues which may be in dispute. However, it is common for these issues not to be settled until the first day of a hearing and therefore do issues and listing conferences really aid early settlement.

Issue 8 – Offers of settlement and cost penalties

Should parties be required to make mandatory offers of settlement and should cost penalties be exercised in order to promote early settlement?

Currently there is no mandatory requirement for each party to make reasonable offers of settlement at any stage in the settlement process. If there is a requirement to make mandatory offers of a reasonable size then this may led the early settlement of claims, in order for defendants to reduce legal costs as the preparation for hearings is not required. Also, introduction of cost penalties would mean that a reasonable offer being declined would lead to later penalties if the claim reached a hearing and a better award was not achieved.

Issue 9 – Request for particulars

Could information sought in the particulars stage be obtained more efficiently by complete and free disclosure of information within the Statement of claims?

If information was disclosed freely and without prejudice during the Statement of claim or when this information became available then this would lead to two consequences. Firstly, claims would be more likely to experience early settlement due to this free disclosure. Secondly, the cost of achieving information through the request of particulars would be eliminated and therefore reduce the total cost of administering dust disease claims.

Issue 10 – Discovery and interrogatories

Is the process of discovery and interrogatories helpful in the process of settling claims prior to the commencement of a hearing?

It is common for the process of discovery and interrogatories to be useful in the process of early settlement given the large list of standard questions which are generally used. This process not only adds to the legal costs of administrating such claims but also fails to add resolution due to the high volume of information generated, which is generally of little use in the settlement of claims.

Issue 11 – Subpoenas

Do subpoenas help with the obtaining of information and could the costs associated with subpoenas be reduced?

It is common for subpoenas to be issued for information for the dust disease board file. This involves substantial costs in administrating this process and could this be reduced by not

being required to produce a subpoena for this information.

Issue 12 – Tribunal's streamlined procedures

Could the current tribunal process be streamlined as for instance currently the case where there is the power to avoid litigation on matters which are not in dispute?

Issue 13 – Use of expert witnesses

Can the process of obtaining expert witnesses be streamlined in order to reduce the number of reports which are presented during hearings?

It is common for many expert reports to be commission by each party for example regarding medical issues. Costs could be reduced for instance if an independent report was commissioned for all parties to rely on.

Issue 14 – Streamlining the process for contribution disputes

Can the process for contribution disputes be resolved earlier and is there any data relating to the costs involved in this stage of the process?

Possible options include:

- Settlement of agreed shares with a claimant
- Provision of certain evidence
- Discussing contribution at settlement conferences
- Nominating a claims manager

Issue 15 – Data concerning legal costs

What data is available concerning legal costs in the dust disease compensation system? In particular, what information is available on:

- The main compensable condition

- The time to resolve the claim

- The legal costs incurred at each stage in the process

- The number of defendants

- The legal costs in regards to the primary claim and any subsequent issues on contribution

This information was requested in order to ascertain the current level of costs and to confirm the stance made by a number of stakeholders that legal costs could be as much as 40% of the total payments.

Issue 16 – Regulating legal costs

Should legal cost be regulated and if so what system should be put in place to regulate them? The options given include the following:

- Introduce fee scales based on time cost

- Introduce fee scales based on activities undertaken

- Introduce event based costing

- Cost caps

This would mean that legal fees could be more stringently regulated and therefore reduce any excess costing by any party.

Issue 17 – Cost assessment

Should costs be assessed by an officer of the court?

This would mean that all costs could be assessed for reasonableness but would any efficiency gained be greater than the cost of this position?

Issue 18 – Reducing legal costs for difficult claims

Should a nominal defendant approach be used for claims where it is difficult to identify the party responsible for any exposure?

If this approach was used then the costs associated with cases where it is difficult to identify the responsible party as this can be a significant cost. However, are these types of claims

common enough to gain a benefit from taking this type of approach?

4.2 General Themes within the Submissions

There were more than 30 papers and submissions made, and there were a number of general themes running throughout them including:

- **Diagnosis**: In general, it was felt that there was little support for a change in the way in which diagnosis is achieved, with the majority of respondents believing that the current process for diagnosis is sufficient. It is clear that currently there is very little dispute over the diagnosis (especially for mesothelioma) and therefore medical testing was not a major concern for the majority of respondents.

- **Exchange of information**: The early provisioning and distribution of information including a possible database to aid future information gathering exercises was noted. It appeared to be the consensus opinion that at present the system provides little incentive to fully disclose all relevant information during the early stages of settlement and negotiation. It was noted that this acted as a natural barrier to any successful early resolution of claims as there could be a suspicion that relevant information that may have a bearing is being withheld.

  Drip-feeding of information acts as an additional burden on costs due to the requirement of duplication of efforts in the search for information. For example, the plaintiff's and defendants' solicitors and various experts may take and produce the same information multiple times in the case of resolution at various stages including the commencement of the claim, during the request for particulars and in the taking of the Affidavit.

- **Central claims data collection**: There was a note of disagreement between parties as to whether the holding of a central claims database to aid future information gathering exercises was a good or a bad proposal.

  From some points of view, this was seen as a positive step as it would reduce the need for some costly, repetitive exercises such as the need to identify particular suppliers over relevant periods. However, this was seen by others, as being prejudicial to a fair legal process.

  In particular, it was argued that the database may be used as the sole source of investigation rather than proper investigation being carried out to investigate exposures.

  It was considered that any database may allow plaintiff lawyers to build a case around defendants where exposures were very limited in nature, rather than the current process, where cases are built around the plaintiff's independent recollection of the actual work conditions experienced during their employment.

- **Early settlement**: It was generally felt that early resolution of claims would drive down costs by the way of alternative dispute resolution and streamlining of the current system. This being a natural derivation from the fact that if claims are both settled earlier and with less work involved in the settlement that costs will be reduced.

- **Ongoing monitoring**: The need for ongoing review by the Government into the relative success of any legislation which may be implemented based on the conclusions of the Government Review was mentioned frequently.

  It was felt that any legislation which may be introduced is potentially subject to manipulation by either side either to potentially harm plaintiff's interests or fail to substantially reduce legal and administrative costs. It was therefore the consensus opinion that the Government should partake in a second review when evidence from any change was available, approximately between 12 to 18 months after the implementation of any legislation.

- **Use of expert witnesses**: The general theme of the submissions in regard to expert witnesses appeared to be that the process at present is generally appropriate and that substantial savings could not be made in this area. Although, it was agreed that a standard form of instructions could be compiled for some experts to result in a standard formal report which could be used as a basis for all parties if necessary.

- **Apportionment**: It was believed that the process of apportionment and cross claiming adds significant costs to the settlement of claims from the defendant's point of view. Therefore a standard process for apportionment of claims would necessarily reduce the need for cross claims to be made and therefore reduce costs associated with such claims.

- **Use of a single claims manager**: A number of submissions noted that defendants sometimes already agree amongst themselves to appoint a "single claims manager". Therefore they noted that there would be no need for the introduction of this form of legislation and in some cases it would be difficult to appoint a single claims manager who would be seen as being impartial. However, the compulsory appointment of single claims manager was supported in some submissions to the Review.

- **Data concerning legal costs**: The lack of data either held within, or submitted by, legal, insurance and industrial firms regarding the cost and process of settlement of asbestos claims was evident. In particular, it was surprising the lack of data that was made available from the various legal firms or legal professional bodies regarding the costs charged in relation to both plaintiff and defendant representation.

  It was also clear that the insurance industry either did not have, or did not submit data in regard to the split of costs between awards, plaintiff and defendant legal costs against insurance policies in relation to asbestos claims.

Overall, as the NSW Government Review later noted there was little information presented to the NSW Government to evidence that the level of legal costs incurred within the system as being either excessive or appropriate.

- **Regulation of legal costs**: Most submissions opposed any form of regulation of legal costs. In particular, it was noted by some submissions that caps on legal costs, event based costing or activity based costing could severely disadvantage claimants. It was argued, the work involved in dust diseases claims varies widely between claims. For example, while in some cases exposure may be attributable to a discrete source, in other cases multiple exposures might be involved which each require investigation. This process is complicated by the long latency period of dust diseases, failing memories and limited records. It was also noted by some parties that event or activity based scales, or legal cost caps, could impact on claimants' rights if they make it uneconomical to litigate some claims.

- **Reducing legal costs for difficult claims**: General views were that the nominal defendant approach should not be established for dust disease related claims. There were a number of arguments as to why this would not be practical including:

    - At present, defendants were unaware of a significant number of cases of which they were unable to proceed due to the inability to find appropriate liable defendant. Therefore, this would be providing a framework for a type of case which did not practically exist, so specific legislation was not felt to be necessary.
    - It was felt that by introduction of a nominal defendant scheme, this would be seen by some as a convenient method to avoid complex investigation and research into who were the actual liable entities. So reducing the necessary scope for plaintiff lawyers in these complex cases, where appropriate defendants were not obvious.
    - It was felt that the additional burden of the nominal defendant scheme on other defendants could lead to some pressure on their own funding and financing arrangements. This would be especially the case if they had a small asbestos related liability or already had limited resources to compensate their own plaintiffs.

5 THE LEGISLATION

5.1 NSW Government Findings

The NSW Government made a number of key findings following the submission in response to the Issues Paper and the meetings that were held with the various parties involved. These findings were released on the 8 March 2005 and included:

- Any reforms made to the current system would be most effective in reducing legal, administrative and other costs if the following conditions were encouraged.

    - Encouragement of early settlement to reduce the number of claims reaching litigation.
    - Encouragement of early settlement through early and complete disclosure of information.
    - Encouragement of settlement of disputes of contribution between defendants without delaying resolution with plaintiff.

- Any reforms will only lead to cost savings if all parties approach resolution with the aim of fair and efficient settlement including defendants acting commercially.

- That access to the tribunal should not be removed, so not adversely affecting claimants' compensation rights but the tribunal should only become involved in those cases that are due to proceed to litigation, whether due to urgency or failure of resolution.

- That there is little data available and therefore it is difficult to estimate the effect that this review will have on the legal and administrative cost of dust disease claims.

5.2 NSW Government Recommendations

The Review recommendations to support cost reductions were:

- the early provision of as much information as possible by claimants in a prescribed form prior to actively litigating the claim in court;

- a formal process of settlement offers and mediation prior to active litigation in court;

- streamlining of Dust Diseases Tribunal procedures for matters that are not resolved by settlement offers and which proceed to a court hearing; and

- cost penalties if litigation proceeds and the result is not materially different from the settlement offers.

Following the release of the Review findings further issues were addressed at a meeting of defendants and insurers joined in claims in the Dust Diseases Tribunal and this addressed proposals for:

- upfront apportionment of liability between prospective defendants to allow the settlement or determination of the plaintiff's claim to proceed without being delayed by disputation as to contribution between defendants; and

- representation of defendants by a Single Claims Manager for the purpose of making offers of settlement and attending pre-court compulsory mediation with the Plaintiff.

Both of these were implemented into the legislation in some form.

5.3 The Dust Disease Tribunal Amendment (Claims Resolution) Act 2005

The recommendations of the Review have been given legislative effect by the Dust Diseases Tribunal Amendment (Claims Resolution) Act 2005 passed by the New South Wales Parliament on 26 May 2005 and which became effective on 1 July 2005. The Act incorporates new regulations for the claims resolution process in respect of asbestos claims.

We have summarised some of the legislation implemented and provided some qualitative assessments on how this may affect the resolution and settlement process.

Change in Asbestos claims resolution	Effect on claim settlement
A required information exchange at the commencement of the claim between parties by way of Statements of full particulars by plaintiffs and detailed replies from defendants.	This will give all parties a clear and full understanding of the issues of the claim and those that are to face dispute. This understanding should lead to the promotion of earlier settlement in the claims resolution process, so reducing total legal costs.
The requirement to use standardised forms at the commencement of the claim by the plaintiff and by the defendants in their response.	This should add efficiency to the commencement and response in claim commencement as issues will be able to be dealt with in a standard manner and using a standard template Statement of Claim, removing unnecessary costs.
The option of the plaintiff to have only one additional medical examination rather than each defendant being able to use separate medical examinations	This not only adds convenience on the part of the plaintiff in not having to attend a large number of medicals. It will also reduce costs if this option is taken by all defendants. The associated medical cost could be divided amongst all defendants rather than each bearing their own costs of medical tests they seek to be conducted and by avoiding duplicating tests.
A single claims manager model to represent multiple defendants in the negotiation of settlement and failing settlement, mediation of plaintiff claims.	This provides all defendants with the opportunity to utilise efficiencies caused by one party dealing with the plaintiff and therefore leading to the avoidance of duplication of investigation and discussion by multiple defendants.
A compulsory mediation of claims failing settlement by agreement.	This will give all parties the ability and opportunity to openly discuss any issues in dispute and resolve these such that settlement can occur without the need for costly and time consuming court preparation.

Change in Asbestos claims resolution	Effect on claim settlement
Cost penalties will apply in circumstances where parties: • breach the rules of the new claims resolution process; • fail to participate in mediation in good faith including where defendants may unreasonably limit a single clams manager's authority to settle the claim; • unreasonably leave issues in dispute following an unsuccessful mediation; and • where any subsequent litigation does not result in a materially different position to that of settlement offers made by the parties.	This will give the opportunity to provide all parties a fair chance of resolution without unreasonably problematic disputation from any party. Hence promoting earlier settlement and lower legal and administrative costs. This is hoped to lead to all parties acting commercially such that issues can be closed earlier and therefore reduce potential legal costs.
The requirement that in the event of an unsuccessful mediation all issues in dispute and all issues agreed upon are fully documented.	This will mean that it is clear which issues need to be resolved during any potential hearing process. This will lead to more prompt hearings, fewer issues being re-opened and requiring legal debate and will lead to less potential for issues to remain in dispute.
Cost penalties are also imposed if a defendant challenges the decision of a Contributions Assessor and fails to better its position by the greater of $20,000 or 10% of the amount otherwise payable by it.	This avoids unnecessary disputation of Contribution Assessors opinion, which at present is a significant proportion of legal and administrative costs which can be eliminated.

Change in Asbestos claims resolution	Effect on claim settlement
Amendment of procedures for the issue of subpoenas and the making and acceptance of offers of compromise	The removal and streamlining of some processes is aimed at reducing the administrative burden in processing claims and therefore eliminate their associated costs.
Amendment of procedures for the hearing of claims that have failed to be settled by removing the ability of parties to invoke pre trial procedures such as interrogatories, discovery or request for particulars, except in very limited circumstances	The removal of steps in the process which are seen as being unnecessary following unsuccessful mediation and therefore elimination of the costs associated with these steps.
Amendment of provisions to clarify that the Dust Diseases Tribunal has jurisdiction to deal with claims for contribution between defendants or other tortfeasors liable in respect of any damages	To encourage defendants and other tortfeasors to settle claims through mediation rather than through the strict interpretation of the Dust Disease Tribunal.
Requirements for Dust Diseases Tribunal judgements to identify those issues of a general nature that are determined on the basis of prior judgements, thereby reducing the number of common issues being re litigated or re argued	To streamline the process of settlement by collating relevant prior cases, which have a bearing on the current case. This will drive defendant expectations and hopefully made the process of early settlement through a process of mediation rather than court findings.
Legal representatives of parties to dust diseases claims will also be required to provide information to the Dust Diseases Tribunal in relation to the compensation awarded or agreed and the amount of legal costs recovered following the settlement or determination of a claim.	To provide some clarity as to the nature of the charging structure used by legal representatives on all sides to ensure that the legal costs are appropriate to the work done. This will also aid in the determination as to whether the implementation of this legislation has been successful or not.

Change in Asbestos claims resolution	Effect on claim settlement
Urgent cases as defined by the Act will still be dealt with by the Dust Disease Tribunal if they cannot be addressed in an expedited timetable for the new claims resolution process but in keeping with revised Dust Disease Tribunal hearing procedures.	Given the reduced level of time in these cases, it is likely that this will not provide the same level of savings as one may be expected to be seen within non-urgent cases. Although, we would still expect to see some savings from these types of claims due to the elimination of unnecessary issues and listing conferences.
The reduction of original claim filing and cross-claim filing fees.	The change in the legislation reducing the amount payable for filing will naturally lead to a reduction in legal and administrative costs.
The establishment of a framework whereby the process of establishing damages for the settlement of the claim with the plaintiff and the process apportionment to each defendant is separated.	The will encourage the prompt and early settlement of the claim for plaintiffs, so reducing both plaintiff and defence costs. As there will be no need to dispute factors which have no bearing on damages but solely influence contribution. This will also stop the potential for matters affecting contribution leading to a delay and disputes arising around matters relating to the settlement.

6 WHERE TO FROM HERE?

6.1 Implications on Future Behaviour

There are a number of future areas where the legislation will impact the behaviour of a number of the key counterparties in dust disease related claims, other than the plaintiff.

This is expected to include defendants, defendant lawyers and plaintiff lawyers.

As the NSW Government noted, it was imperative that all parties to a claim should act commercially if there are to be cost savings.

Depending how these parties act under the new legislation the extent of cost savings may or may not be material. We now discuss some of the possible outcomes of the reforms.

6.1.1 Front Loading of Work

The front loading of work by plaintiff lawyers beyond that which is typically needed in order to complete a Statement of claim and the associated documentation as discussed in the previous section.

This could lead to costs could rise or remain static rather than fall, particularly as claims which settle at mediation or earlier would have had work done that is ultimately not required.

For instance, one possible view that we have heard is that work will now be front loaded by plaintiff lawyers as the work that is done at the moment is the "minimum" required to ensure that there clients are adequately represented and therefore have their interests protected. This has the possibility of increasing costs as the work would need to be prepared in all cases, not just those claims in dispute.

Cases will require full disclosure of costs so front-loading and unjustified/unreasonable costs will be identifiable and challenged (we would expect).

The 12-month review should be able to identify if this is taking place and we would also expect defendants to appeal against costs if they are front loaded and incommensurate with the point at which the claims settles.

6.1.2 Provision of legal cost information

The provision within the legislation of a process of information collection could potentially provide visibility on the relative differences in legal costs between lawyers.

This could potentially lead to reduction in defendant and plaintiff legal costs due to competitive pressures rather than from the legislation directly.

Furthermore, disclosure on party-to-party legal costs will also provide a more complete view of the levels of legal costs incurred in the system.

6.2 Potential Future Areas of Reform

As mentioned previously, the Government has the option to perform regular reviews on the success of the legislation in reducing legal costs in relation to dust disease claims, in particular 12 months after implementation.

Certainly, there are numerous areas of further reform, but a few areas of further development could certainly consider:

- **Diagnosis and expert medical opinion**: Standard diagnostic and medical panels in order to reduce the need for independent medical experts acting on the various parties behalf and to deliver direct cost reductions via

  - Standardised reporting;
  - A single opinion which was not felt to be disputable; and
  - Significant levels of expertise.

  This is partially introduced in the current legislation, given the ability of the defendants to use only one medical opinion jointly within each of their defences.

- **Centralised claims database**: Development of a claims database providing full visibility of the entire claim. This would provide a consistent form of data for the Government to review at later reviews. Visibility of the total claims costs, total legal expenditure and a link to the operational processes around when claims settle would be highly useful.

- **Collection of Exposure Information**: Development of an exposure database relating to claims filed in the Courts, using information contained within the claimant's Statement of Claim.

This would aid investigation and confirmation of future asbestos related claims and easier identification of potential defendants. In theory, this could lead to speedier settlement, less disputation around contribution and less cost incurred in the provision of evidence.

- **Reforms in Other States**: The legislation passed in NSW was passed after considerable review of the processes in NSW and how they could be modified. Whilst there is commitment to making the outcomes of the NSW Government Review available to other States, implementation is by no means certain.

  It also needs to be considered to what extent such reforms could be applicable in other States or how effective they may be.

  In Victoria, the legal system is believed to be as formal and complex as that in NSW prior to the New Process and that a number of reforms could potentially be applied, including:

  - The early exchange of information;
  - Absence of formal pleadings and process for information exchange and evidence gathering;
  - Evidence and expert reports only required on matters of dispute;
  - Mediation occurring earlier in the process than currently happens in Victoria which is a jury-based Court system;
  - The Apportionment process to determine contribution between liable parties, which shall be used as the standard presumption; and
  - The use of a single claims manager.

  In Western Australia, claims appear to settle at an earlier stage than in NSW and Victoria. Furthermore, it appears that exchange of information on a more informal basis takes place earlier. The procedures which could have the ability to bring about legal cost savings include:

  - Evidence and expert reports only required on matters of dispute;
  - A formal process of mediation to promote earlier settlement;

- The Apportionment process to determine contribution between liable parties, which shall be used as the standard presumption; and

- The use of a single claims manager.

6.3 Summary

As we have noted in this paper, the Review undertaken by the NSW Government has aimed to speed up the process of settlement and deliver benefits more efficiently and less costly.

There has also been signalled a process of potential ongoing review with the first being in approximately 12 months.

One of the points coming from the NSW Government review was the absence of information on legal costs (whether it was not held or was not provided).

If we as valuation, and indeed auditing or peer review, actuaries are to respond to these reforms as they emerge and to quantify their impact or allow for them in valuations (just as we do with the benefits of tort reforms in public liability), improved data collection relating to legal costs and administrative costs is necessary.

Improved data would also then help with assessing whether savings envisaged are being delivered upon or identifying areas where costs are spiralling.