

Law and Justice Committee
Legislative Council,
Parliament of NSW

17 January 2025

By email

To the Chair and Members of the Law and Justice Committee,

2024 REVIEW OF DUST DISEASES SCHEME

I am writing to you **on behalf of the Australian Lawyers Alliance (ALA)**.

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

The ALA is grateful to have been invited to provide evidence to the Law and Justice Committee ('Committee') on 29 November 2024, represented by Nicole Valenti and Timothy McGinley.

Arising from Ms Valenti's and Mr McGinley's appearance before the Committee, please find enclosed responses to the four supplementary questions sent to the ALA by the Committee.

Thank you for your attention on these important matters, and please do let the ALA know if we can be of further assistance.

Yours sincerely,

Jonathan Walsh
Chair, Dust Diseases Special Interest Group
Australian Lawyers Alliance

Enclosed: Responses to Supplementary Questions put to the Australian Lawyers Alliance by the Law and Justice Committee, Legislative Council, Parliament of NSW



2024 Review into the NSW Dust Diseases Scheme:

Responses to Supplementary Questions put to the Australian Lawyers Alliance by the Law and Justice Committee, Legislative Council, Parliament of NSW

1. Can you provide an inter-state comparison of the benefits and supports provided by different state schemes for workers with dust diseases?

Australian Capital Territory

- 1.1. Statutory Compensation: Governed by the *Workers Compensation Act 1951* (ACT), and overseen by WorkSafe ACT.
- 1.2. Statutory compensation claims are commenced by way of lodging an Application Form and a Certificate of Capacity with their employer.
- 1.3. Eligible workers are entitled to:
 - (a) Payment for lost wages:
 - (i) For the first twenty-six (26) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (ii) After twenty-six (26) weeks: based on level of permanent incapacity. Totally incapacitated workers will continue to receive average pre-disease earnings (subject to statutory floors and ceilings), while those deemed partially incapacitated will receive a “top-up” rate of between 65.00% to 100.00% of their average pre-disease earnings (the more w worker is able to return to work the higher their “top-up” rate); and
 - (iii) Payments continue indefinitely until the worker reaches the statutory retirement age.
 - (b) Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
 - (c) Workers assessed as being wholly and permanently disabled from will receive a single lump-sum payment (assessment cannot be made until two (2) years have elapsed since onset of disease).
 - (d) Vocational rehabilitation.
 - (e) Death benefits for work- related deaths.

- 1.4. Common Law Claim: Ordinarily brought in the ACT Supreme Court (but claims are often brought in Dust Diseases Tribunal of NSW as many claims have cross-border employment) and are governed by the *Civil Law (Wrongs) Act 1951* (ACT).
- 1.5. Section 51 of the *Civil Law (Wrongs) Act 1951* (ACT) imposes pre-claim notice requirements which must be complied with prior to filing a common law claim.
- 1.6. Types of common law damages recoverable under ACT law include:
 - (a) General damages for pain and suffering (i.e. non-pecuniary loss);
 - (b) Damages for past and future out-of-pocket expenses (such as medical expenses, commercial care, aids and equipment);
 - (c) Damages for past loss of income and future loss of earning capacity;
 - (d) Damages for past and future gratuitous care provided to the injured person (*Griffiths v Kerkemeyer* [1977] HCA 45 type damages) (section 100 of the *Civil Law (Wrongs) Act 1951*); and
 - (e) Damages for loss of the injured person's past and future loss of capacity to provide gratuitous care and assistance to household (*Sullivan v Gordon* [1999] NSWCA 338 type damages) (section 100 of the *Civil Law (Wrongs) Act 1951*).
- 1.7. Statutory compensation and common law compensation are mutually exclusive under ACT law. If a worker receives an award of common law damages they cease to be entitled to statutory compensation, and they must repay any benefits they have already received (section 184 of *Workers Compensation Act 1951*).
- 1.8. Time Limits: Both statutory compensation and common law compensation claims must be commenced within three (3) years of diagnosis.

Queensland

- 1.9. Statutory Compensation: Governed by the *Workers Compensation and Rehabilitation Act 2003* (Qld); and *Workers Compensation and Rehabilitation Regulation 2014* (Qld), and overseen by WorkCover Queensland..
- 1.10. Statutory compensation claims are commenced by way of lodging an Application Form and Work Capacity Certificate with their employer.
- 1.11. Eligible workers are entitled to:
 - (a) Payments for lost wages:
 - (i) For the first twenty-six (26) weeks: At a rate of 85% of workers average pre-disease earnings (subject to statutory maximum);
 - (ii) For the period from (26) weeks to one-hundred-and-four (104) weeks: 75.00% of average pre-disease earnings (subject to statutory maximum);

- (iii) After one-hundred-and-four (104) weeks: workers suffering from more than 15.00% whole person impairment will be entitled to an ongoing payment at the single pension rate; and
 - (iv) Any entitlement to payments ends after five (5) years, or once a worker reaches the statutory retirement age.
 - (b) Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
 - (c) Additionally, workers medically certified as suffering from an imminently terminal disease (i.e. a disease that will likely terminate their life within five (5) years of their diagnosis) are entitled to a single lump terminal illness benefit (calculated at a rate based on the workers' age and dependency status).
 - (d) Retraining and reskilling assistance.
 - (e) Death benefits for work-related deaths.
- 1.12. Common Law Claim: Brought in the Supreme Court of Queensland and governed by the *Civil Liability Act 2003* (Qld).
- 1.13. Before a worker can bring a common law claim, they must have lodged an application for statutory compensation (see above) and have had their degree of permanent impairment assessed by WorkCover Queensland (section 179 of the *Workers Compensation and Rehabilitation Act 2003*).
- 1.14. Workers assessed as having 0.00% to 19.00% permanent impairment must make an irrevocable election between receiving statutory benefits or pursuing a common law claim, while workers assessed as having 20.00% permanent impairment may receive statutory entitlements (commuted to a lump-sum offer by WorkCover QLD) and also pursue a common law claim.
- 1.15. Types of common law damages recoverable under Queensland law include:
- (a) General damages for pain and suffering (i.e. non-pecuniary loss);
 - (b) Damages for past and future out-of-pocket expenses (such as medical expenses, commercial care, aids and equipment);
 - (c) Damages for past loss of income and future loss of earning capacity;
 - (d) Damages for past and future gratuitous care provided to the injured person (*Griffiths v Kerkemeyer* [1977] HCA 45 type damages) (section 59A of the *Civil Liability Act 2003*);
 - (e) Damages for loss of the injured person's past and future loss of capacity to provide gratuitous care and assistance to a dependant (*Sullivan v Gordon* [1999] NSWCA 338 type damages) can be claimed except where the claim is brought against an employer (as opposed to a claim against a third-party tortfeasor such a manufacturer or occupier).

- 1.16. Time Limits: Initial application for statutory compensation must be commenced within six (6) months of diagnosis. After initial application is made, there is no time limit for commencing a common law claim for a dust-related disease.

Northern Territory

- 1.17. Statutory Compensation: Governed by the *Return to Work Act 1986* (NT) and the *Return to Work Regulations 1986* (NT), and overseen by NT WorkSafe.
- 1.18. Statutory compensation claims are commenced by way of lodging an Application Form and a Certificate of Capacity with their employer.
- 1.19. Statutory compensation claims are commenced by way of lodging an Application Form and Work Capacity Certificate with their employer.
- 1.20. Eligible workers are entitled to:
- (a) Payments for lost wages:
 - (i) For the first twenty-six (26) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (ii) For the period from twenty-six (26) weeks to two-hundred and sixty (260) weeks: At a rate of 75.00% of workers pre-disease earnings (subject to statutory minimums and maximums); and
 - (iii) After two-hundred-and-sixty (260) weeks: payments cease unless the worker is assessed as suffering 15.00% or more whole person impairment.
 - (iv) Any entitlement to payments ends once a worker reaches the statutory retirement age.
 - (b) Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
 - (c) Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
 - (d) Vocational rehabilitation access available.
- 1.21. Common Law Claim: The Act abolishes common law entitlements for any diseases occurring post 1 January 1986 (common law may be available for dust-related which first occurred before this date).
- 1.22. Limitation Dates: Application for statutory compensation must be commenced within six (6) months of diagnosis.

Victoria

- 1.23. Statutory Compensation: Governed by the *Accident Compensation Act 1985* (Vic) and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), and overseen by WorkSafe Victoria.
- 1.24. Statutory compensation claims are commenced by way of lodging an Application Form and a Certificate of Capacity with their employer:
 - (a) Payments for lost wages:
 - (i) For the first thirteen (13) weeks: At a rate of 95.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (ii) For the period from fourteen (14) weeks to one-hundred-and-thirty (130) weeks: 80.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (iii) After one-hundred-thirty (130) weeks: payments cease unless the worker is assessed as suffering 20.00% or more whole person impairment; and
 - (iv) Any entitlement to payments ends once a worker reaches the statutory retirement age.
 - (b) Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
 - (c) Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
 - (d) Access to retraining and reskilling services.
- 1.25. Common Law Claim: Ordinarily brought in the Supreme Court of Victoria and subject to the *Wrongs Act 1958* (Vic).
- 1.26. Workers must first obtain a “Serious Injury Certificate” before they can commence a common law claim.
- 1.27. Types of common law damages recoverable under Victorian law include:
 - (a) General damages for pain and suffering (i.e. non-pecuniary loss);
 - (b) Damages for past and future out-of-pocket expenses (such as medical expenses, commercial care, aids and equipment);
 - (c) Damages for past loss of income and future loss of earning capacity;
 - (d) Damages for past and future gratuitous care provided to the injured person (*Griffiths v Kerkemeyer* [1977] HCA 45 type damages) (subject to limits contained in section 281A of the *Wrongs Act 1958*); and

- (e) Damages for loss of the injured person's past and future loss of capacity to provide gratuitous care and assistance to household (*Sullivan v Gordon* [1999] NSWCA 338 type damages) (section 281D of the *Wrongs Act 1958*).

1.28. Time Limits: Common law claims must be commenced within six (6) years of diagnosis.

Western Australia

1.29. Statutory Compensation: Governed by the *Workers Compensation and Injury Management Act 2023* (WA) and the *Workers Compensation and Injury Management Regulations 2024* (WA) and overseen by WorkCover WA.

1.30. Statutory compensation claims are commenced by way of lodging an Application Form and a Certificate of Capacity with their employer. Workers suffering from occupational diseases much then be assessed by WorkCover WA's "Dust Diseases Medical Panel".

(a) Payments for lost wages:

- (i) For the first thirteen (13) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
- (ii) For the period from fourteen (14) weeks to one-hundred-and-thirty (130) weeks: 80.00% of workers average pre-disease earnings (subject to statutory maximum);
- (iii) After thirteen (13) weeks: Workers covered by an Industrial Award will receive 100.00% of award rate, while workers not covered by an Industrial Award will receive 85.00% of average pre-disease earnings (subject to a statutory maximum); and
- (iv) Any entitlement to payments ends once a worker reaches the statutory retirement age.

(b) Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services (up to a statutory lifetime cap).

(c) Rehabilitation services available

1.31. Common Law Claim: Ordinarily brought in the District Court of WA or Supreme Court of WA.

1.32. Worker cannot commence a common law claim until they are certified as suffering a minimum level of whole person impairment by the Dust Diseases Medical Panel:

- (a) No common law entitlements for diseases assessed as causing less than 15.00% impairment;
- (b) Common law entitlements for diseases assessed as causing 15.00% to 24.00% impairment are subject to statutory caps on damages recoverable; and
- (c) Common law entitlements for diseases assessed as causing 25.00% or more impairment are not subject to any cap on damages recoverable.

- 1.33. Worker must also complete and lodge an irrevocable election to pursue common law damages with WorkCover WA prior to commencing a common law claim. This election terminates any entitlement to statutory benefits.
- 1.34. Types of common law damages recoverable under Western Australian law include:
- (a) General damages for pain and suffering (i.e. non-pecuniary loss);
 - (b) Damages for past and future out-of-pocket expenses (such as medical expenses, commercial care, aids and equipment);
 - (c) Damages for past loss of income and future loss of earning capacity; and
 - (d) Damages for past and future gratuitous care provided to the injured person (*Griffiths v Kerkemeyer* [1977] HCA 45 type damages).
- 1.35. Time Limits: Claims for statutory compensation must be commenced within twelve (12) months of diagnosis. Common law claims for asbestos and silica-related diseases must be commenced within three (3) years from the date on which the Dust Diseases Medical Panel assessed the worker as suffering at least 25.00% whole person impairment. Claims for any other type of dust disease must be commenced within three (3) years of diagnosis.

South Australia

- 1.36. Statutory Compensation: Governed by the *Return to Work Act 2014 (SA)*, and overseen by SafeWork SA.
- 1.37. Statutory compensation claims are commenced by way of lodging an Application Form and a Certificate of Capacity with their employer.
- 1.38. Eligible workers are entitled to:
- (a) Payment for lost wages:
 - (i) For the first fifty-two (52) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (ii) For the period from fifty-three (53) weeks to one-hundred-and-four (104) weeks: At a rate of 80.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (iii) For the period from one-hundred-and-five (105) weeks to one-hundred-and-thirty (130) weeks: payments cease, unless worker is deemed to be suffering a “serious injury”, in which case payment continue a rate of 80.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (iv) For the period after one-hundred-and-thirty (130) weeks: payments cease, unless worker is deemed to be suffering a “serious injury” causing 30.00% or more whole person impairment, in which case payment

continue a rate of 60.00% of workers average pre-disease earnings (subject to statutory maximum);

- (v) Payments continue indefinitely until the worker reaches the statutory retirement age; and
 - (vi) Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
- (b) Payment of medical, surgical, equipment, rehabilitation and hospital expenses.
- 1.39. Common Law Claim: Ordinarily brought in the District Court of South Australia and subject to the *Civil Liability Act 1936* (SA) and the *Dust Diseases Act 2005* (SA).
- 1.40. Common law damages are not recoverable unless the disease causes the worker at least 35.00% whole person impairment.
- 1.41. Types of common law damages recoverable under South Australian law include:
- (a) General damages for pain and suffering (i.e. non-pecuniary loss);
 - (b) Damages for past and future out-of-pocket expenses (such as medical expenses, commercial care, aids and equipment);
 - (c) Damages for past loss of income and future loss of earning capacity;
 - (d) Damages for past and future gratuitous care provided to the injured person (*Griffiths v Kerkemeyer [1977]* HCA 45 type damages) (section 58 of the *Civil Liability Act 1936*);
 - (e) Damages for loss of the injured person's past and future loss of capacity to provide gratuitous care and assistance to household (*Sullivan v Gordon [1999]* NSWCA 338 type damages) (section 9(3) of the *Dust Diseases Act 2005*); and
 - (f) Exemplary damages (section (2) of the *Dust Diseases Act 2005*).
- 1.42. If common law damages are recovered, the worker ceases to be entitled to any further statutory benefits, and their common law damages will be set-off against any statutory benefits they have already received.
- 1.43. Time Limits: Common law claims must be commenced within three (3) years of diagnosis.

Tasmania

- 1.44. Statutory Compensation: Governed by the *Workers Rehabilitation and Compensation Act 1988* (Tas), the *Workers Rehabilitation and Compensation Regulations 2011* (Tas), and overseen by WorkCover Tasmania.
- 1.45. Statutory compensation claims are commenced by way of lodging an Application Form and a Certificate of Capacity with their employer.
- 1.46. Eligible workers are entitled to:

- (a) Payment for lost wages:
 - (i) For the first twenty-six (26) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - (ii) For the period from twenty-seven (27) to seventy-eight (78) weeks: At a rate of 90.00% of workers average pre-disease earnings (subject to statutory maximum), or 95.00% “top-up” rate for workers able to return to work;
 - (iii) For the period after seventy-nine (79) weeks: At a rate of 80.00% of workers average pre-disease earnings (subject to statutory maximum), or 85.00% “top-up” rate for workers able to return to work;
 - (iv) Payments will only continue beyond nine (9) years if worker satisfies permanent whole person impairment thresholds;
 - (v) Payments continue until the worker reaches the statutory retirement age; and
 - (vi) Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
 - (b) Payment of medical, surgical, hospital, equipment and rehabilitation expenses.
 - (c) Access to workplace rehabilitation services.
- 1.47. Common Law Claim: Ordinarily brought in the District Court of Tasmania and subject to the *Workers Rehabilitation and Compensation Act 1988* (Tas).
- 1.48. Common law damages are not recoverable unless the disease causes the worker at least 20.00% whole person impairment.
- 1.49. Types of common law damages recoverable under Tasmanian law include:
- (a) General damages for pain and suffering (i.e. non-pecuniary loss);
 - (b) Damages for past and future out-of-pocket expenses (such as medical expenses, commercial care, aids and equipment);
 - (c) Damages for past loss of income and future loss of earning capacity; and
 - (d) Damages for past and future gratuitous care provided to the injured person (*Griffiths v Kerkemeyer [1977]* HCA 45 type damages)
- 1.50. If common law damages are recovered, the worker ceases to be entitled to any further statutory benefits, and their common law damages will be set-off against any statutory benefits they have already received.
- 1.51. Time Limits: Common law claims must be commenced within six (6) years of diagnosis.

2. Can you elaborate on the legal complexities surrounding claims for non-lung related dust diseases, and the potential for expanding the scope of compensable diseases under the Act?

- 2.1 The definition of 'dust disease' under the Act is confined to a "pathological condition of the lungs, pleural or peritoneum" plus diseases listed as Schedule 1 of the Act.
- 2.2 This narrow definition excludes our clients who had heavy exposure to respirable silica dust in the course of their work, and now present with silica induced dust diseases not covered under the Act, including silica induced autoimmune conditions such as rheumatoid arthritis and systemic lupus, chronic renal disease or airways diseases including chronic obstructive pulmonary disease and asthma. These conditions can all be caused by exposure to respirable silica dust however workers diagnosed with these conditions are not eligible for compensation under the Act for those particular injuries. These clients instead need to lodge a claim under the *Worker's Compensation Act 1987* ("WC Act").
- 2.3 If workers suffer from both a condition accepted under the Act, and a further silica induced injury excluded from the Act, they are only entitled to compensation for the condition accepted under the Act and are only compensated for their impairment arising from the Act accepted injury. These workers need to consider making an additional claim under the WC Act and are required to navigate two statutory schemes, before even bringing a common law claim.
- 2.4 On a practical level, these workers are required to make two applications, one to iCare for the lung injury, and the other through the WC Act for additional support in respect of the diseases that fall within the gaps of the iCare Scheme. Their entitlements under the WC Act are not as supportive, and they need to meet the threshold of at least 15% permanent impairment to access the WC Act. This leads to a greater likelihood of this cohort of workers continuing to work in dusty environments.
- 2.5 This is a problem faced exclusively by workers in NSW, as workers in other states and territories all fall within the one workers compensation scheme. It is our view that the iCare Scheme should be all encompassing of these additional diseases, to assist these workers with silica induced dust diseases to leave the industry and the dusty environments aggravating their conditions and simplify an already stressful and challenging time in their lives. They are after all suffering from "dust diseases".

3. What potential legislative reforms are required to strengthen Safework's enforcement powers and ensure greater compliance with dust control regulations on tunnelling projects?

- 3.1 This question is outside of our area of expertise and would be best directed to an occupational hygienist. There may also be some merit in commissioning specific research into how NSW's regulations on tunnelling projects compare to other states and territories.
- 3.2 From our experience, however, more consistent proactive onsite inspections and dust sampling is required on these tunnelling projects.

4. Can you elaborate on the issues regarding the effectiveness of the Nominal Insurer in protecting workers' common law entitlements when their employers are uninsured or inadequately insured?

4.1 Section 4(c) of the *Workers Compensation Act 1987* (hereafter referred to as the “**WC Act**”) provides that an injury under the Act:

“does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.”

4.2 Section 3 of the *Workers' Compensation (Dust Diseases) Act 1942* (hereafter referred to as the “**DD Act**”) defines a “dust disease” as follows:

“any disease specified in Schedule 1, and includes any pathological condition of the lungs, pleura or peritoneum, that is caused by dust that may also cause a disease so specified.”¹

4.3 Accordingly, any disease that falls within the scope of the definition of a “dust disease” within the DD Act is effectively carved out of the WC Act. No benefits are payable in respect of that disease under the WC Act, and instead benefits are determined under the DD Act.

4.4 In addition to the statutory compensation available under each of the respective WC and DD Acts, injured workers may be entitled to pursue a common law claim for a lump sum of damages against their former employers.

4.5 For workers suffering from “dust diseases” as defined in the DD Act, the right to bring a claim exists at common law.

4.6 For workers suffering from injuries which do not constitute “dust diseases”, then the right to bring a common law claim, known as a “work injuries damages” claim, is established in the legislation.

4.7 “Work injury damages” claims are defined under section 250(1) of the associated *Workplace Injury Management and Workers Compensation Act 1998* (hereafter referred to as the “**WIM Act**”) as:

“work injury damages” means damages recoverable from a worker's employer in respect of –

(a) an injury to the worker caused by the negligence or other tort of the employer, or

(b) the death of the worker resulting from or caused by an injury caused by the negligence or other tort of the employer,

¹ Schedule 1 contains a list of medically recognised dust-related diseases which are updated from time to time.

whether the damages are recoverable in an action for tort or breach of contract or in any other action ...

4.8 Like the WC Act, section 4(c) of the WIM Act states that an “injury” under the Act:

“does not include (except in the case of a worker employed in or about a mine)” –

(i) a dust disease, or

(ii) the aggravation, acceleration, exacerbation or deterioration of a dust disease.”

4.9 Accordingly, any disease that falls within the scope of the definition of a “dust disease” within the DD Act is excluded from the definition of a “work injury damages” act.

4.10 Under section 155(1) of the WC Act all employers is required to obtain a and maintain a policy of workers compensation insurance (hereafter referrer to “**WC Insurance**”), and states:

“An employer (other than a self-insurer) shall obtain from a licensed insurer, and maintain in force, a policy of insurance that complies with this Division for the full amount of the employer's liability under this Act in respect of all workers employed by the employer and for an unlimited amount in respect of the employer's liability independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country) for any injury to any such worker.”

4.11 The *Workers Compensation Nominal Insurer* (hereafter referred to as the “**WCNI**”) is established as a legal entity under section 154A(1) of the WC Act, which states:

(1) There is established by this Act a Workers Compensation Nominal Insurer.

(2) The Nominal Insurer –

(a) is a legal entity, and

(b) may take proceedings and be proceeded against in the name of the Workers Compensation Nominal Insurer, and

...

4.12 Under section 154B of the WC Act, the WCNI is also established as a licenced insurer and underwriter of policies of WC Insurance issued under the scheme.

4.13 Section 140 of the WC Act the WCNI is liable to step in and play compensation to an injured worker where their employer was uninsured:

(1) *A claim under this Division may be made against the Nominal Insurer by any person who considers he or she has a claim against an employer for compensation under this Act or work injury damages in respect of an injury to a worker, if -*

(a) *the employer is uninsured, or*

(b) *the person claiming the compensation has been unable, after due search and inquiry, to identify the relevant employer.*

(2) *An employer is considered to be "uninsured" if the employer –*

(a) *had not obtained, or was not maintaining in force, a policy of insurance for the full amount of the employer's liability under this Act in respect of the injured worker at the relevant time, or*

(b) *having been a self-insurer at the relevant time, has ceased to undertake liability to pay compensation to the employer's own workers (but only if the claim cannot be paid under section 216 from any money deposited with the Authority or under any arrangement relating to the refund of any such deposit).*

...

4.14 The potential issue arises under first paragraph of section 140(1) of the WC Act that the WCNI is stated as being liable for any claims for compensation under the Act (that is, statutory workers compensation) or "work injury damage".

4.15 As previously discussed, while workers suffering from a disease which falls within the scope of the definition of a "dust disease" within the DD Act have a right to bring a common law claim, this is arguably separate and different type of claim to a "work injury damages" claim which explicitly excludes dust diseases under section 250(1) of the WIM Act.

4.16 Accordingly, one reading of these provisions would suggest that, on the one hand the WCNI is liable to meet a work injury damages claim brought by an employee of an uninsured employer who suffers from an injury/disease that is not a "dust disease", but the WCNI would not be liable to meet a common law claim brought by an employee of the same uninsured employer who suffers from a "dust disease".

4.17 It appears that this discrepancy is accidental, and the loophole created due to multiple amendments to the Act (the uninsured scheme was first introduced in 1942 and has undergone several amendments since this time). It seems highly unlikely that Parliament possessed such an arbitrary intention as to ensure that workers suffering from non-dust disease could pursue a claim for damages against an uninsured employer, but to disenfranchise workers suffering from a "dust disease" from doing the same thing.

4.18 **This matter could be remedied by inserting an amendment in section 140 of the WC Act which specifies that a common law claim for damages may be made against the WCNI by a person suffering from a "dust disease" within the meaning of the DD Act, in circumstances where that person's employer was uninsured.**