



2024 REVIEW OF DUST DISEASES SCHEME
Hearing: 29 November 2024

Supplementary Questions: Joanne Wade, National Head of Asbestos and Dust Diseases, Nicole Valenti, Practice Leader Asbestos and Dust Diseases NSW, Slater and Gordon

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

In preparing our response below we have focused on a comparison of statutory schemes only.

Queensland

The applicable legislation that governs the statutory schemes for compensation in Queensland are the *Workers Compensation and Rehabilitation Act 2003 (Qld)*; and the *Workers Compensation and Rehabilitation Regulation 2014 (Qld)*. WorkCover Queensland and self-insurers manage claims pursuant to the scheme.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:
 - For the first twenty-six (26) weeks, at a rate of 85% of workers average pre-disease earnings (subject to statutory maximum);
 - For the period from (26) weeks to one-hundred-and-four (104) weeks, 75.00% of average pre-disease earnings (subject to statutory maximum);
 - 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 75% of average pre-disease earnings (subject to statutory maximum) or the single pension rate;
 - All entitlement to lost wages cease when a worker returns to work, receives a Notice of Assessment after being assessed as stable and stationary, once they have received weekly payments for five (5) years, once they reach the statutory maximum amount payable (\$398,731.90) as at January 2025) or once they reach the statutory retirement age.
2. Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services. Although these benefits cease when a worker receives a Notice of Assessment after being assessed as stable and stationary.

3. Retraining and reskilling support where requested.
4. Lump sum benefits for permanent impairment.
5. An additional pneumoconiosis payment for particular injuries like silicosis.
6. Workers medically certified as suffering from an imminently terminal disease are entitled to additional benefits.
7. Death benefits for work-related deaths.

Victoria

The applicable legislation that governs the statutory schemes for compensation in Victoria are the *Accident Compensation Act 1985 (Vic)* and the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:
 - For the first thirteen (13) weeks, at a rate of 95.00% of workers average pre-disease earnings, subject to a statutory maximum;
 - 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);
 - After one-hundred-thirty (130) weeks, payments cease unless the worker is assessed as suffering 20.00% or more whole person impairment; and
 - Any entitlement to payments ends once a worker reaches the statutory retirement age.
2. Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
3. Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
4. Eligible workers are provided with retraining and reskilling support from the New Employer Services (NES).

Western Australia

The applicable legislation that governs the statutory schemes for compensation in Western Australia are the *Workers Compensation and Injury Management Act 2023 (WA)* and the *Workers Compensation and Injury Management Regulations 2024 (WA)*.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:

- For the first thirteen (13) weeks, at a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - 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);
 - 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);
 - Any entitlement to payments ends once a worker reaches the statutory retirement age.
2. Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services (up to a statutory lifetime cap).
 3. Rehabilitation services are available to injured workers.

South Australia

The applicable legislation that governs the statutory scheme for compensation in South Australia is the *Return to Work Act 2014 (SA)*.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:
 - For the first fifty-two (52) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - 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);
 - 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);
 - 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);
 - Payments continue indefinitely until the worker reaches the statutory retirement age.
2. Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.

3. Payment of medical, surgical and hospital expenses, rehabilitation treatment (through the Rehabilitation and Compensation Scheme) and equipment expenses.

Tasmania

The applicable legislation that governs the statutory schemes for compensation in Tasmania are the *Workers Rehabilitation and Compensation Act 1988 (Tas)*, the *Workers Rehabilitation and Compensation Regulations 2011 (Tas)*.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:
 - For the first twenty-six (26) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - 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;
 - 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;
 - Payments will only continue beyond nine (9) years if worker satisfies permanent whole person impairment thresholds, and will continue until the worker reaches the statutory retirement age;
2. Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
3. Payment of medical, surgical hospital, rehabilitation and equipment services.
4. Access to workplace rehabilitation services, including assessing the functional capacity of a worker, rehabilitation counselling, and advice about job modification.

Australian Capital Territory

The applicable act that governs the statutory scheme for compensation is the *Workers Compensation Act 1951 (ACT)*.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:
 - For the first twenty-six (26) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - 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. These payments continue indefinitely until the worker reaches the statutory retirement age.

- Overtime is considered when calculating preinjury capacity weekly earnings in various circumstances (section 25).
2. Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
 3. Vocational rehabilitation is provided.
 4. Substantial death benefits for work-related deaths.

Northern Territory

The applicable act that governs the statutory schemes for compensation are the *Return to Work Act 1986 (NT)* and the *Return to Work Regulations 1986 (NT)*.

Eligible workers are entitled to various heads of compensation including:

1. An ongoing weekly compensation payment for wage loss calculated as follows:
 - For the first twenty-six (26) weeks: At a rate of 100.00% of workers average pre-disease earnings (subject to statutory maximum);
 - 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
 - After two-hundred-and-sixty (260) weeks: payments cease unless the worker is assessed as suffering 15.00% or more whole person impairment.
 - Any entitlement to payments ends once a worker reaches the statutory retirement age; and
2. Payment of medical, hospital, and pharmaceutical expenses, as well as eligible home nursing care and domestic services.
3. Workers suffering from a minimum of 5.00% whole person impairment are entitled to a single lump-sum permanent impairment benefit.
4. Access to approved vocational rehabilitation providers.

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?

To be eligible under the Act, a worker needs to suffer from either a Schedule 1 disease or a pathological condition of the lung, pleura, or peritoneum. In our experience we have noted a number of clients exposed to respirable crystalline silica dust (RCSD) who present with autoimmune disease such as rheumatoid arthritis and mixed connective tissue disease, airways diseases including asthma and renal conditions without a pathological condition of the lung, pleura or peritoneum or a

Schedule 1 disease. These conditions can be caused by exposure to RCSD, however, these workers are not eligible under the Act for compensation and instead need to lodge a claim under the *Worker's Compensation Act 1987*.

Additionally for those workers who are accepted under the Act for a Schedule 1 diseases or a pathological condition of the lung, pleura, or peritoneum, they are only compensated on those impairments. If they also suffer such rheumatoid arthritis, this condition is not compensated for and the worker needs to consider making an additional claim under the *Workers Compensation Act 1987* and to then deal with two statutory schemes, before even bringing a common law claim.

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

This question is outside of our expertise apart from Safework to conduct more regular dust sampling and site inspections. The question would be best directed to an occupational hygienist.

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?

The legislation as it currently stands needs to be amended. It is ambiguous and the Workers Compensation Nominal Insurer (WCNI) has interpreted the legislation such that a worker suffering from a dust disease is not covered by section 140(1) of the *Workers Compensation Act 1987 (WC Act)*. This means if a worker, was employed and exposed to dust causing a dust disease, and later brings a claim, and the employer is deregistered or no longer exists, unless the worker can prove there is an insurance policy that was taken out, then the WCNI will not indemnify the employer. There is no standard registry to search for an old workers compensation policy, and at times even where evidence is obtained that a director took out a policy of insurance, if the policy cannot be located the WCNI will not indemnify, and the worker will not have access to compensation at common law.

This issue was the subject of a decision of His Honour, Judge Scotting in the NSW Dust Diseases Tribunal of NSW, ***Sako v Workers Compensation Nominal Insurer [2024] NSW DDT6*** and it is currently the subject of an Appeal that was heard before the NSW Supreme Court of Appeal, late last year. Judgment has yet to be given.

This legislative anomaly could be remedied by amending section 140 of the WC Act to say 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.