

**Submission
No 7**

INQUIRY INTO 2024 REVIEW OF THE DUST DISEASES SCHEME

Organisation: Maurice Blackburn Lawyers

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The Secretary
Standing Committee on Law and Justice
Parliament of New South Wales

By email: law@parliament.nsw.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide input to the 2024 Review of the Dust Diseases scheme.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 34 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, abuse law, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn is grateful for the opportunity to participate in this important and timely review. As the Committee will be aware, Maurice Blackburn provided submissions to the 2017, 2019 and 2021 review processes. We note from the inquiry website¹ that:

This year's review will focus on two key areas.

The first will be the support available to younger workers within the Scheme, including:

- *How younger workers can readily access appropriate supports to maintain or extend their working life in suitable duties,*
- *When this is not possible due to dust disease, how the Scheme can provide financial supports commensurate to their situation in flexible ways, and*
- *Related medical, care and treatment supports for them, and when appropriate, their families.*

The second focus will be other risk areas for silicosis, including, but not limited to, tunnelling and quarrying.

Our comments are drawn directly from our experiences in working with those impacted by these dreadful, yet preventable diseases. It is their stories, and their experiences with 'the system' that drive our push for a better, more compassionate approach to improving the lives of these workers.

¹ <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3068>

The ban on the importation of engineered stone products is a welcome development since the previous review of the scheme. It is important to note, however, that while the ban is an essential first step, it is not a complete solution to the issue. Further work needs to be done to safeguard the welfare of Australian workers, including:

- Establishing robust systems for the effective enforcement of the ban to ensure that employers are not sidestepping their responsibilities, and that the NSW Regulator is doing its job.
- Strengthening the Dust Diseases compensation scheme in New South Wales with a particular emphasis on younger workers, to ensure support for those already suffering from dust-related diseases, as well as those who may face a diagnosis in the future.
- Focusing on other high-risk sectors and workplaces to ensure the epidemic experienced in the stonemasonry industry is not repeated.

The latter two points are addressed in our submissions below. They are presented in the spirit of process improvement, and we would welcome the opportunity to more fully share our experiences and expertise with the Committee.

Supporting Young Workers Within the Scheme

The compensation scheme established under the *Workers' Compensation (Dust Diseases) Act 1942* and administered by *iCare Dust Diseases Care* (“**iCare**”) has historically supported older workers, most of whom had already ceased working prior to the onset of their dust diseases.

However, the scheme is currently ill-suited to address the needs of younger workers who have comprised the majority of those diagnosed with silica-related diseases in the current epidemic.

Maurice Blackburn believes there are two areas that the Committee should focus on when considering the experiences of young workers who have received a diagnosis of a dust related injury. They are:

- Improving support for those willing and able to return to work, and
- Implementation of individualised and enforceable care plans for affected workers.

These are explored in more detail below.

Return to Work Programs

We note that Recommendation 4 from the 2019 review of the scheme reads:

That iCare review and expand the financial assistance it provides for retraining and vocational support when an individual has been diagnosed with a silica-related health condition, to ensure workers feel appropriately supported to leave the industry if they wish.

Most workers diagnosed with silica-related diseases in the stonemasonry industry have been between the ages of 20 and 50. They have also tended to be diagnosed at very early stages

of their disease, which has allowed for interventions to prevent or slow the progression of their diseases.

Accordingly, many workers, given the right support, would be able to return to the workforce in other capacities.

Maurice Blackburn notes that supporting workers in returning to the workforce provides numerous benefits. For the individual, it increases their financial freedom as well as improving their psychological well-being. For the community, it means that workers are not unnecessarily dependent on taxpayer funded compensation benefits and are instead working, paying taxes, and generally contributing to the economy.

However, in practice it is difficult for workers to transition to secure alternative work. Trades such as stonemasonry and tunnelling are highly specialised, and the skills and experience gained by workers in these jobs do not easily transfer to other industries (especially not to industries where the workers would not be at risk of further exposure to silica).

The impact of identifying disease but effectively permitting a worker to return to the workplace(s) in which they were exposed to silica is demonstrated no clearer than in the following two deidentified case studies of Maurice Blackburn tunnelling clients:²

Case Study 1: Simon**

Simon entered the tunnelling industry in 1993. In 1998, Simon was screened by the NSW Dust Board and was told he 'only' has sarcoidosis and was fit to return to work. He wasn't screened again.

In 2010 Simon had developed severe Rheumatoid Arthritis (**RA**), which by 2014 required bilateral hip and knee replacements. In 2018, Simon was diagnosed Progressive Massive Fibrosis (**PMF**) otherwise known as Advanced Silicosis. He was only 52 years old.

In 2021, Maurice Blackburn Lawyers obtained expert medical evidence, which confirmed that not only was Simon's PMF and RA related to his exposure in tunnels, Simon actually had developed silicosis (not sarcoidosis) in 1998.

Case Study 2: Chris**

Chris entered the tunnelling industry in 1993. In 2012, Chris was screened by the NSW Dust Board and was told he had simple silicosis. He was advised that he should be okay to go back into the industry, that he will be screened every year and that he should do what his employer requires of him in terms of dust control and PPE.

His employer did none of these things and Chris believed that he was fine to work in the same conditions.

In 2020, Chris was told that he had developed PMF. He was only 46 years of age.

² ** indicates that it is not our client's real name.

Given the correct retraining or reskilling, it would be possible for workers suffering from silica-related diseases to seek alternative career paths. However, in our experience iCare has provided inadequate support to injured workers.

Without proper retraining or re-education, these injured workers may be forced into low-paid jobs, leading to a significant loss of earning capacity, as well as further mental pain and suffering. This creates a perverse incentive for workers to remain in their current roles, where they face continued exposure to crystalline silica and the risk of worsening of their diseases.

Case Study 3: Aaron**

Aaron began working as a stonemason in 2006 where he suffered heavy exposure to crystalline silica from working with engineered stone products.

In 2016, Aaron was diagnosed with early silicosis. However, lacking any formal skills or experience in anything other than stonemasonry and with a young family to support, he felt he had no choice but to continue working in the industry where he continued to be exposed to high levels of crystalline silica.

By the time Aaron consulted Maurice Blackburn Lawyers in 2023, his silicosis had progressed to the stage he was no longer physically capable of working in any capacity, and he requires an immediate lung transplant.

Maurice Blackburn submits that workers who have developed silica-related diseases, should not under any circumstances return to workplace(s) where they were or could be exposed to crystalline silica. Further, such workers should not work in any other environment which exposes them to dusts, whether that be in construction, mining or manufacturing.

In our experience iCare's return to work programs are currently insufficient, usually limited to organising periodic consultations with a Vocational Assessor. Many of our clients report that the only alternative work options they are provided are in lower-skilled and lower-paid jobs such as truck drivers, cleaners, or security guards. These types of roles are simply and wholly inappropriate for the following reasons:

- Truck driving roles are primarily available in mining, tunnelling, quarrying and other heavy industry. Despite the rhetoric that truck drivers do not get exposed to dust, the practical reality is that truck drivers are exposed (often excessively) to dust as a result of the lack of properly sealed cabins and the need to get into and out of the cabin multiple times per shift;
- Often the wages offered in these industries are significantly inferior to what they were earning as an experienced tunneller or stonemason; and
- It is pointless to retrain in another industry if jobs in that industry do not exist in their area. This is particularly so in the case of security roles or other sedentary and high supply roles in regional NSW.

Further, it is almost always the case that the worker has developed a profound sense of achievement in gaining the specialised skills that they have acquired in working in industries like stonemasonry and tunnelling. Suggesting that they should be satisfied with a lesser skilled job can severely impact their sense of self-worth and mental health.

Case Study 4: Omar**

Omar began working as a stonemason in 2003 where he suffered heavy exposure to crystalline silica from working with engineered stone products.

In 2019, Omar was diagnosed with early silicosis. In 2021, on the advice of his doctors, Omar decided to leave the stonemasonry industry, to avoid any further exposure to silica dust.

At the time he left the stonemasonry industry he was a very senior and skilled stonemason, and earned a good wage, but he lacked any training or experience in any other industries.

Omar consulted a Vocational Assessor who provided him with limited alternative job options including delivery truck driver or forklift driver. Both jobs represented a significant pay reduction compared to his earnings in the stonemasonry industry.

Maurice Blackburn therefore submits that iCare should establish robust policies and programs for supporting young injured workers in retraining and reskilling, enabling them to pursue alternative career paths.

An effective program would encourage and support workers to engage in further studies or retaining such as Vocational Certificates, Diplomas, and University Degrees, and then assist them in finding jobs in relevant industries.

Most workers will be eligible for Commonwealth schemes such as HECS/FEE-HELP, meaning iCare would not have to cover the actual cost of retraining.

Recommendation: That iCare be empowered and properly resourced to:

- Provide access to proper career and educational counselling services to assist workers in identifying and mapping out alternative career paths, to assist them in accessing the proper retraining and education, and to assist them in finding jobs in their chosen industries once they complete their courses; and
- Provide income support (at a rate equal to the workers' pre-injury income – subject to reasonable limits) to workers undertaking retaining or further education for the duration of their courses and until they have secured alternative employment.

Workers from Culturally and Linguistically Diverse Backgrounds

Many of Maurice Blackburn's young clients who have been diagnosed with silica-related diseases speak English as a second language, and so often experience significant language barriers when navigating the iCare scheme.

Our experience tells us that the issue of language barriers in navigating injury claims and return to work processes has broad impacts sector-wide, with English skills being very limited among a significant number of young stonemasons.

The impact of limited English language skills leads to a profound lack of confidence and personal agency when faced with injury. When combined with limited capacity to work in

other manual roles (as discussed above), plus associated psychological impacts, it is tough for these workers to return to work.

Case Study 5: Sami**

Sami is an Iraqi-Australian stonemason in his late 30s, for whom Arabic is his first language. Following his diagnosis of silicosis, he experienced severe secondary psych injury symptoms.

iCare are pushing Sami to return to work in some capacity, but the combination of his injuries and severe language barriers have dented his confidence to the extent that he just can't do it.

Despite his physical impairment being relatively limited, Sami's incapacity for work is deep and life-changing.

Recommendation: That the Committee recommend that iCare put in place policies and resources to ensure it is able to provide proper support to workers from culturally and linguistically diverse backgrounds, and this should extend to any return-to-work programs instituted by iCare.

Individualised Care Plans

Maurice Blackburn submits that all injured workers need a written plan, to which iCare is accountable. This is especially so with younger workers. Often, in our experience, this is not being provided.

While it is a requirement for a PCBU to have a documented return to work process,³ there is no accompanying requirement that an individualised return to work plan be negotiated with the injured worker.

Maurice Blackburn believes that an enforceable requirement to provide an individualised plan for the worker would be desirable. The elements of a good and useful plan would include:

- A focus on the current skills of the worker – not the deficits.
- A focus on the career aspirations of the worker – not 'this will have to do'.
- A focus on maintaining the current lifestyle of the worker, including reasonable financial commitments such as a mortgage and car.
- A realistic assessment of the career opportunities available within the worker's geographic sphere.

An aspirational approach would be focused on career development, with resources directed accordingly.

A care plan should also fully explore the ancillary benefits available to the injured worker - especially in relation to associated psychosocial injury. In our experience, this is not currently

³ <https://www.safework.nsw.gov.au/legal-obligations/employer-business-obligations/return-to-work-programs>

proactively offered by iCare - instead the worker needs to fight for those benefits. A care plan should contain an assessment of eligibility for such entitlements.

More effectively resourcing the provision of individualised supports would be better for the public purse in the long run. Effective return to work processes would ensure that the injured worker, if their condition is stabilised, can find meaningful alternative employment and not end up drawing on other safety nets.

As discussed earlier, adequate support should ensure that young workers are not being forced, by circumstance, to consider returning to the industry that caused their injury. This happens in far too many cases that Maurice Blackburn has acted in where workers have had, simply put, a terrible experience with a return to work program which has neither provided them with new skills or any decent job opportunities. As a result, they have made decisions to return to mining, tunnelling and/or stonemasonry work at great risk to their personal health.

Other Risk Areas for Silicosis

In our submission to the 2021 review of the scheme, we wrote:

Maurice Blackburn urges the Committee to now broaden its view on workplace silicosis from a tight focus on stonemasons, to all sectors and occupations where workers are contracting these insidious diseases.

We are grateful that a wider view on causes of silicosis, broader than engineered stone, has been included in this Review.

We are also grateful that the experience of those who work in tunnelling and quarrying has been brought into focus.

The nature and risk of work-related respiratory disease for those who work in tunnelling and quarrying have changed greatly over the years. While advances have been made in awareness and increasing protections, the risk is just as prevalent. Increased use of machinery means that fewer people are required underground. However, the predominance of twelve hour shifts means that those who do work under these conditions are exposed to risk for longer.

In many cases, technical improvements in ventilation and other engineering controls cannot keep pace with the rate of extraction. In addition, the willingness and actions of employers in these industries to spend more time and capital on engineering controls including PPE for workers is, in our view, very poor.

There are several core issues which we urge the Committee to consider, and to recommend appropriate actions to remove current inconsistencies. These are detailed below:

Multi-state exposure and the inadequacy of the iCare pension entitlements

A feature of a career in road and rail tunnelling work is that workers will be required to go to wherever the work is needed, which they do. Over the course of a career, a worker will probably work on a number of projects, across various jurisdictions.

If a worker is diagnosed with a work related respiratory illness, it is almost always the case that the ultimate cause of the disease is a result of the cumulative effect of that worker's

exposure over his/her entire working life up to that point. As a result, a worker may be covered by a range of statutory compensation schemes which reflects the various States and Territories where he/she worked. And this is when the complexity and difficult decisions for a worker actually commences.

Case Study 6: Max**

Max is a seasoned 55 year old tunneller whose career spans multiple states - in NSW (50%), QLD (20%) and VIC (20%) and even includes international projects (10%). After years of dedicated service, he developed simple silicosis.

Under the current iCare Dust Diseases Scheme (iCare DDC) scheme, if Max were to successfully lodge a worker's compensation claim with iCare DDC, iCare DDC would pro-rata his pension entitlement to 50% of his actual entitlement. The reason is that iCare DDC only pays compensation equivalent to the amount of NSW dust exposure this worker experienced.

As a result, Max would have his pension entitlement reduced by 50% and, in addition, as he lodged a claim with iCare DDC, he would be unable to receive workers' compensation from any other scheme.

By way of comparison, if Max were to successfully lodge a workers' compensation scheme in Queensland or Victoria, he would receive his full entitlements to lost wages (in accordance with the local state regulations) but would not receive the lifetime medical expenses from iCare DDC.

Accordingly, iCare DDC glaringly stands apart from every other workers' compensation scheme in the country. As a result, workers like Max who are exposed in NSW and then develop dust-related illnesses are not entitled to adequate benefits and, with that knowledge, are choosing not to lodge claims but instead return to work in dangerous workplaces because at least they can continue to earn a decent wage.

In short, the current iCare DDC pension entitlements are a massive barrier and disincentive to lodging a claim through iCare.

Recommendation: That iCare pension entitlements being brought into line with every other State and Territory scheme by removing entirely the requirement that a NSW worker needs to be exposed in NSW for 100% of the time in order to receive full pension entitlements.

Multi-state exposure and the chaos of the intersection of multiple state schemes leading to time consuming and costly litigation

The decision for the worker on where to lodge a workers' compensation claim has ramifications not only for his/her entitlements to basic compensation but also to his/her right to pursue common law damages.

The impact on a worker's entitlement to pursue common law entitlements is based on the individual requirements of not only the NSW scheme, but other State workers compensation schemes.

Considering the same 55-year-old tunneller in case Study #6 once more, for this worker (notwithstanding the fact that he has a right to lodge both a workers' compensation claim in NSW and a common law claim for damages in the Dust Diseases Tribunal of NSW) the following applies:

- His silicosis is considered to be a 'divisible' disease such that each employer is only liable for the proportion of damage they caused this worker as a result of exposure in their period of employment;
- In order to be able to recover 100% of his common law damages, this worker must therefore sue every employer in NSW, QLD and VIC which exposed him to dust;
- However, before he can pursue his common law claim in the DDT against all of his NSW, VIC and QLD employers, this worker must first:
 - Lodge and have accepted an workers' compensation claim in Queensland; and
 - Lodge, have accepted and be assessed as having a 'Serious Injury' in accordance with Victorian workers compensation laws.

Accordingly, as a result of the individual requirements of each state and territory workers' compensation scheme (including NSW), in order for workers with dust diseases to lodge and pursue their legitimate common law damages, they must navigate a labyrinth of legal systems and regulations, often resulting in excessive legal cost and time, all of which these workers can ill afford.

Indeed, at the time of being told about a diagnosis of silicosis, and the attended fear and emotion that such a diagnosis entails, a worker is then required to make a very important decision about where to lodge his/her workers' compensation claim and commence the process of navigating a complex intersection of multiple schemes in order to be adequately compensated.

While his/her legal claim is navigating multiple jurisdictional requirements, the worker is forced to continue with life as best he/she can, until these steps are undertaken.

It should not be this hard, complex, costly and time consuming for affected workers to access just compensation. But it is.

The nation-wide ban on the import of engineered stone gives us confidence that jurisdictions can work together effectively to achieve a positive outcome for workers. It is our hope that this 'can do' approach may be used to fix other gaps, such as the one described above.

Recommendation: That the Review give consideration to how workers' compensation schemes nationally can better align to improve the provision of supports and entitlements to people who have worked across jurisdictions.

Recommendation: That the Review recommend and procure a national summit of workers' compensation schemes, regulators and responsible Ministers to discuss and make recommendations to reform individual schemes to remove all procedural barriers for affected workers to be able pursue common law damages where they are exposed in multiple states and territories.

The Nominal Insurer Claims Model:

In recent years the stonemasonry, tunnelling, and mining industries in New South Wales have been increasingly dominated by a range of smaller entities, including contractors, sole operators, and labour hire firms.

Under New South Wales law, all employers are mandated to obtain workers' compensation insurance. However, in recent cases, Maurice Blackburn has identified a growing number of smaller employers who are inadequately insured or hold no insurance whatsoever.

The consequence of an employer not having proper workers' compensation insurance is potentially dire. Ordinarily, where an employer does not have proper insurance, they will be personally liable to pay compensation to a worker. However, these smaller players usually do not have sufficient cash or assets to be able to satisfy an award of compensation.

While the scheme established under the *Workers' Compensation Act 1987* ("**the Act**") does establish a limited safety net for workers of uninsured employers in the form of the 'Nominal Insurer', the current construction of the Act is such that this protection may not extend to common law claims brought by workers suffering from dust-related diseases (as distinct from other types of workplace injuries).

Accordingly, under the current scheme, workers suffering from silica-related diseases may be prevented from recovering their entitlements to compensation, including:

- Damages for pain and suffering;
- Damages for past loss of income, and future loss of earning capacity;
- Damages for past and future medical expenses;
- Damages for past and future gratuitous home care; and
- Damages for past and future loss of capacity to provide care to their dependents.

In our view the current system is manifestly unjust, as it should not be the worker's responsibility to ensure their employer is properly insured before accepting a job. Furthermore, when an employer fails to meet their insurance obligations, it is the injured workers who bear the most serious consequences, as they are unable to recover the compensation to which they would otherwise be legally entitled.

The current system is also unfair to employers who comply with their insurance obligations, as they are forced to compete in the marketplace against uninsured employers who significantly reduce their overhead costs by evading insurance requirements.

Recommendation: That surveillance of employers' workers compensation insurance compliance be substantially strengthened, and penalties for failing to take out proper insurance be significantly increased (including potential criminal penalties for company Directors and Office Holders)

Recommendation: That the Act be amended to ensure that workers suffering from dust diseases can recover their entitlements to both statutory and common law damages from the Nominal Insurer in circumstances where their employer(s) was inadequately insured.

Better Regulation of Tunnelling and Quarrying sites:

Maurice Blackburn believes that the concentration of quarrying sites in regional NSW makes the regularity of on-site inspections difficult. Our experience tells us, however, that this is exactly where heightened regulation is most required.

Maurice Blackburn believes there is a clear case for increasing the number of proactive site inspections, given the increasing prevalence of dust related injury in these sites. Clearly, quarry operators require more incentives to ensure the safety of their workers. It would be folly to expect the rate of respiratory disease to reduce if there is no change in regulation.

A recent independent audit by the Audit Office of NSW⁴ was critical of SafeWork NSW's effectiveness as a regulator, noting that the regulator lacks an effective strategic and data-driven approach to respond to emerging WHS risks. At least some of this, alongside the need for additional proactive inspections, can be attributed to resourcing.

We urge the Committee to consider commissioning specific research into how NSW's approach to effective regulation compares to other jurisdictions.

Potential Areas for Future Focus

Foundries are 'flying under the radar' in terms of workplace inspections. We are seeing more and more cases where respiratory illnesses in welders are not being picked up.

Given that a number of impacted foundry workers will have retired or moved on, consideration should be given to the most suitable and efficient way to advertise and implement an appropriate screening process.

We believe this could be a valuable future focus for the Committee.

Please do not hesitate to make contact if we can further assist with the Committee's important work.

Yours faithfully,

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<https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-safework-nsw-in-exercising-its-compliance-functions>