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**Inquiry into the
re-emergence
of Coal Workers'
Pneumoconiosis in
Queensland**

Table of Contents

TERMS OF REFERENCE.....	1
WHO WE ARE	2
INTRODUCTION.....	2
Legislative and other regulatory arrangements of government and industry in Queensland to eliminate and prevent CWP.....	3
Are these arrangements adequate, and have they been adequately and effectively maintained over time?	5
The roles of government departments and agencies, mine operators, nominated medical advisers, radiologists, industry safety and health representatives and unions representing coal mine workers in these arrangements	6
The study into CWP undertaken by Monash University and the findings of the Senate Select Committee on Health (Fifth Interim Report) and other relevant reports and studies	8
The efficacy and efficiency of adopting methodologies and processes for coal mine dust measurement and mitigation, including monitoring regimes, engineering measures, personal protective equipment, statutory requirements and mine policies and practices, including practices in jurisdictions with similar coal mining industries	8
Other matters the committee determines are relevant, including other respiratory diseases associated with underground mining	9
CONCLUSION	11

Terms of Reference

The terms of reference for the Coal Workers' Pneumoconiosis Select Committee are as follows:

- (a) The legislative and other regulatory arrangements of government and industry which have existed in Queensland to eliminate and prevent CWP;
- (b) Whether these arrangements were adequate and have been adequately and effectively maintained over time;
- (c) The roles of government departments and agencies, mine operators, nominated medical advisors, radiologists, industry safety and health representatives and unions representing coal mine workers in these arrangements;
- (d) The study into CWP undertaken by Monash University and the findings of the Senate Select Committee on Health (Fifth Interim Report) and other relevant reports and studies;
- (e) The efficacy and efficiency of adopting methodologies and processes for coal mine dust measurement and mitigation, including monitoring regimes, engineering measures, personal protective equipment, statutory requirements, and mine policies and practices in jurisdictions with similar coal mining industries; and
- (f) Other matters the committee determines are relevant, including other respiratory diseases associated with underground coal mining.

Who We Are

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, 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.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Introduction

Each year, Maurice Blackburn's specialist dust lawyers assist Australians in resolving asbestos and dust disease claims as a consequence of work or other related exposure.

Our lawyers know firsthand the impacts that such diseases can have on workers and their families, and the critical role that appropriate safety and workplace standards must play both in seeking to minimise the risk of future exposure, as well as appropriately supporting those workers who have been exposed and have or may suffer illness as a consequence.

The firm has also continued to play an active role in advocating for the rights of workers suffering from or at risk of exposure-related illnesses, including specifically those impacted by Coal Workers' Pneumoconiosis (CWP).

The re-emergence of cases of CWP in Queensland over the course of this year is a significant and concerning development, and one that rightly warrants further examination to determine the full extent of such cases both currently and historically.

It is evident from the cases that have emerged to date that current regulatory frameworks that mandate self-regulation have failed in eliminating CWP.

It is hoped that the Committee's examination of these issues will help to ensure that appropriate protections for workers are put in place, not only with respect to CWP but for all types of dust diseases where mine workers may be at risk, and the firm thanks the Queensland Parliament for looking at this important matter.

Our submission will now consider each of the terms of reference outlined by the Committee in turn.

Legislative and other regulatory arrangements of government and industry in Queensland to eliminate and prevent CWP

Maurice Blackburn notes that the current legislative and regulatory arrangements are principally found in the following pieces of legislation:

- (a) *Coal Mining Safety and Health Act 1999 (Act)*; and
- (b) *Coal Mining Safety and Health Regulation 2001 (Regulation)*.

The above legislation establishes a number of offices, committees and positions to generally promote and enforce health and safety at and around coal mines as follows:

- (a) Commissioner for Mine Safety and Health who is the principal advisor to the Minister for Mines on safety and health matters (Part 5A of the Act);
- (b) The Coalmining Safety and Health Advisory Committee, whose primary function is to advise the Minister for Mines about promoting and protecting the safety and health of coal mine workers (Part 6 of the Act);
- (c) The Mines Inspectorate, which is made up of a number of qualified inspectors, who is principally responsible for enforcing the legislation, monitoring safety and health at mines and to inspect and audit coal mines amongst other matters (Part 9 of the Act);
- (d) Industry Health and Safety Representatives, who are full-time coal miners, are provided with certain powers in relation to health and safety at coal mines (Part 8 of the Act); and
- (e) Site Safety and Health Representatives, who are also full-time coal miners, are provided with more limited powers in relation to health and safety at coal mines (Part 7 of the Act).

As a supplement to the obligations of mine operators, section 72(1) of the Act provides that the Minister may make recognised standards to attempt to achieve an acceptable level of risk for people working in coal mines. Currently, there are eleven (11) Recognised Standards which cover a range of topics including mine monitoring and surveying. In addition, nine (9) Guidance Notes have been produced by the Mines Inspectorate to further assist in the management and functioning of coal mines in accordance with the legislation.

Finally, we note Part 6, Division 2 of the Regulation sets out the “coal workers health scheme” which provides the framework to assess the “fitness for work” of coal mine workers.

While on the face of it this may seem extensive, it is critical to note that the elimination and prevention of CWP is neither a stated aim nor the intended effect of the Act and Regulation as it is currently written.

The key object of the Act is set out in section 6(b) of the Act and it provides that:

*“... that the risk of injury or illness to any person resulting from coal mining operations be at an **acceptable level**”.* (Emphasis added)

The concept of what is an “acceptable level of risk” is addressed in section 29 of the Act and it provides that:

“(1) For risk to a person from coal mining operations to be at an acceptable level, the operations must be carried out so that the level of risk from the operations is—

*(a) within **acceptable limits**; and*

*(b) as low as **reasonably achievable**.*

(2) To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to—

*(a) the **likelihood of injury or illness** to a person arising out of the risk; and*

*(b) the **severity of the injury or illness**.” (Emphasis added)*

Further, at the recent public briefing to by the Committee on 14 October 2016, Mark Stone, Acting Chief Mine and Safety and Health Officer, Department of Natural Resources and Mines, noted the following:

*“The legislation may be described as being risk based. It underpinned by the requirement that the risk of injury and illness to any person resulting from coalmining operations be at an **acceptable level**.” (Emphasis added)*

Concepts like “acceptable level” and “reasonably achievable” make plain that unfortunately prevention and elimination of CWP was never the stated intention of the Act and Regulation.

Indeed, under current arrangements the risk of injury and disease, and actual development of injury and disease, are assumed and expected - just so long as they do not become unacceptable by the standards and measures set out in the legislation.

While it is understood that the Act and Regulation seek to strike a balance between the economic interests of coal mining and the health of workers; it appears that the unfortunate end result of these current frameworks is that ultimately the balance is a disturbing compromise, with the health and safety of workers not being prioritised over other objectives.

Compliance with the current regulation was not, and was never designed to prevent and eliminate CWP. Whilst one would hope that this is the outcome, the way in which the Act and Regulation are written means that this could never practically be achieved.

This is an important distinction for the Committee to understand; while the public view is that CWP had been eliminated in Queensland contrary to the facts, the relevant laws were not designed to specifically ensure CWP’s elimination and prevention.

Are these arrangements adequate, and have they been adequately and effectively maintained over time?

This term of reference has two parts:

- (a) Whether the legislative and regulatory arrangements were adequate; and
- (b) Whether the legislative and regulatory arrangements were adequately and effectively maintained over time.

Both matters canvass marginally different subject matters. In our view, they nevertheless inevitably draw the same conclusion.

Assessing the adequacy of the legislative and regulatory arrangements to achieve the stated statutory aim that *“the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level”* can perhaps best be simply measured by posing the following questions:

- (a) On any measure, are 16 confirmed cases of CWP amongst current and recently retired aboveground and underground coal miners within the past 12 months acceptable?
- (b) On any measure, are the tens, if not hundreds, of suspected historical CWP cases since 1984, acceptable?
- (c) On any measure, are the suspected tens, if not hundreds, of CWP cases in future, acceptable?

In our view, the actual, historical and anticipated rates of diagnosis of CWP in Queensland are completely unacceptable.

Consequently, the current legislative and regulatory arrangements that have allowed such cases to continue, in many instances undetected, have been shown to be vastly inadequate.

The following excerpt from Senate Select Committee Report (Fifth Interim Report) April 2016 conveniently sums up reasons for the purported re-emergence of CWP as being a result of:

“... a litany of regulator failure and regulatory capture, industry indifference and incompetence, inconsistent risk mitigation and patchy and sometimes compromised health monitoring in Australia.”

In truth, the only way to ensure the total elimination of diseases like CWP would be to ban mining activities altogether to prevent exposure, but it is recognised that this measure is not a practical reality with many industries and communities reliant on such activities.

It is therefore critical to ensure that stronger protections and oversight are in place within both the Act and Regulation that genuinely seek to reduce exposure for workers, including greater emphasis on safety over economic interests.

The roles of government departments and agencies, mine operators, nominated medical advisers, radiologists, industry safety and health representatives and unions representing coal mine workers in these arrangements

The various roles of government departments and agencies, mine operators, nominated medical advisers, radiologists, industry safety and health representatives and unions are defined by the Act and Regulation as detailed above in section 2 of these submissions.

It is clear that at the front end of the regulatory framework, much of the responsibility for the attainment of the stated objectives of the Act and Regulation were left with coal mine operators with some input from unions and oversight from the Mines Inspectorate and, from time to time, the Minister via the Recognised Standards. This model was deliberate. In the second reading speech for the introduction of the Act, the then Minister for Mines remarked:

“The provisions of these Bills will clearly place responsibility and accountability for safety and health where it belongs: with the people in the best position to ensure that this is achieved – the mining industry itself.”

As Mr Stone noted again in the recent public briefing to by the Committee on 14 October 2016:

“In developing the legislation it was recognised that modern safety management focuses on the creation of the concept of on-site ownership of safety and health issues ... The legislation focusses on outcomes rather than prescription. It provides a framework under which individual mines must have systems for appropriately managing risks to an acceptable level.

... The key instrument is a safety and health management system which underpins safety at the mine site. It incorporates risk management elements and practices to ensure the safety and health of persons at mines sites affected by coal mining operations.”

In this way mine operators were effectively permitted to self-regulate; not only were they required to come up their own plan on how to manage the health and safety of mine workers at their own mine sites, they were also required to conduct their own monitoring of dust levels within mines and assess the risks to mine workers from time to time and enforce safe work practices.

In theory, this framework was economically rational and practicably achievable. To require the parties with “skin in the game” to effectively self-regulate with oversight by government, was logical in circumstances where the more prescriptive regulation and control by government agencies could be seen to be inefficient and ineffective when the relevant parties did not, or could not, buy into the regulatory framework.

Notwithstanding the rationality of the current regulatory framework, it has nevertheless been shown to vastly inadequate to manage the actual safety risks to mine workers, and this is unacceptable.

The simple fact is that mine workers have continued to be excessively exposed to coal and other mining dusts generated by coal mining activities and CWP has developed. Unions have sought to raise valid concerns about this, but for the reasons set out in section 3 above, the self-regulation model has been proven to be a failure.

In our view stronger provisions within both the Act and Regulation are needed to ensure a genuine commitment to protecting the health and safety of workers engaging in mining activities who are at risk of exposure. Recognising that much more work needs to be done to better understand what is best practice in worker safety and mining technologies, we believe that such regulation should at least adopt the following in the short term:

- (a) The position taken by the Australian Institute of Occupational Hygienists of adopting a standard of permissible dust exposure to be 1.0mg/m³¹ (and not the current 3.0mg/m³ in place in Queensland);
- (b) A minimum standard be created which provides that all coal mine operators institute best practice dust suppression techniques and technologies and also personal protective equipment within coal mining operations with such standards to be continuously reviewed so as to ensure best practice is always adopted;
- (c) To broaden the powers of mine inspectors under Part 9, Division 4 of the Act to ensure mandatory inspections of any and all coal mines or coal mining operations at any time, without prior notice to, or consent, of coal mine operators, including during peak periods of coal operations and at the areas of highest points of activity within the coal mine;
- (d) Mandatory and continuous wearing of real time dust monitors by coal mine workers (both miners and other coal mine workers such as fitters, boilermaker's and the like) over prolonged and extended periods of time, so as to ensure that accurate and reliable measure of dust exposure can be continuously gathered and analysed;
- (e) Mandatory reporting of dust levels (whether they be excessive or not) by coal mine operators at regular intervals to the Mines Inspectorate or the Minister with such results to be made immediately available to the public at all times;
- (f) Greater independent oversight by the Minister or Mines Inspectorate to require shut down of coal mining operations or the imposition of significant monetary penalties where dust levels exceed the minimum standards; and
- (g) Impose greater and significant monetary penalties upon coal mining operators where a worker develops CWP in future and such exposure can be attributed to exposure at one or a number of coal mines (with such penalties to be independent of any personal injury claim brought by a worker); and
- (h) Amendments to the coal workers health scheme (Part 6, Division 2 of the Regulation) in line with the recommendation of the Review of Respiratory Component of the Coal Mine Workers' Health Scheme for the Queensland Department of Natural Resources and Mines Final Report dated July 2016.

These measures should be accompanied by closer and firmer external regulatory oversight. The self-regulation model is a demonstrable failure.

Effective occupational health and safety regulation is achieved by a judicious balance between the education and self-regulation, and serious sanctions for breaches. The correct balance will be struck by a far greater emphasis on the latter suite of measures.

¹ Australian Institute of Occupational Hygienists Exposure Standards Committee. Dusts not otherwise specified (Dust – NOS) and occupational health issues: position paper. Melbourne: AIOH, 2014.

The study into CWP undertaken by Monash University and the findings of the Senate Select Committee on Health (Fifth Interim Report) and other relevant reports and studies

Both the Senate Select Committee on Health (Fifth Interim Report) dated April 2016 (Senate Report) and the Review of Respiratory Component of the Coal Mine Workers' Health Scheme for the Queensland Department of Natural Resources and Mines Final Report dated July 2016 (Monash Report) are comprehensive in their review of the CWP issue. Save for one issue set out below, we wholly support the findings and recommendation of both reports.

We note that an eminent group of Australian respiratory physicians in a recent article published in the Medical Journal of Australia², have recommended the following when it comes to adequate screening of at risk workers for CWP:

- (a) High Resolution CT scanning be used, as opposed to simple chest x-rays, to screen for CWP. HRCT scanning is a far superior form of screening and will more effectively identify diagnosed CWP in combination with effective and comprehensive lung function testing.
- (b) All workers should be referred early to specialist respiratory physicians with an interest in occupational lung disease.

On the basis of acting for hundreds of workers who have been affected by various types of dust disease including asbestos and silica diseases, we wholly support the call to introduce mandatory HRCT scanning and specialist consultations as early as possible into the Coal Miners Health Scheme.

In our experience, such steps are the only effective means of appropriately and thoroughly confirming the diagnosis and severity of a dust disease.

The efficacy and efficiency of adopting methodologies and processes for coal mine dust measurement and mitigation, including monitoring regimes, engineering measures, personal protective equipment, statutory requirements and mine policies and practices, including practices in jurisdictions with similar coal mining industries

Much has already been reported on the comparison of the regulation of coal mining activities in New South Wales and Queensland.

While it is evident that stronger monitoring and mitigation efforts are required in Queensland, in our view it would be imprudent for Queenslanders to merely adopt the measures of other jurisdictions until a thorough review of those other jurisdictions has been undertaken to assess whether they are actually and practically effective, something we believe has not yet been done adequately.

We would urge such efforts to be undertaken as a priority, and we broadly support any regulatory model which ensures that workers' health and safety is the primary objective.

² *Coal Workers' pneumoconiosis: an Australian perspective* Medical Journal of Australia (11) 20 June 2016.

Other matters the committee determines are relevant, including other respiratory diseases associated with underground mining

Quite apart from the specific terms of reference, many other relevant matters regarding dust diseases more generally have importantly come to light as a result of the CWP issue in Queensland.

First, it is clear that from the dearth of information about CWP in Australia and around the world, that the problems related to the health and safety of mine workers are not merely confined in place and time to the mining of underground coal.

All workers who work on mine sites including all tradesmen of varying disciplines can, and are, affected by exposure to coal and other rock dusts generated in the course of coal mining activities whether such activities be above or below ground. It would be wrong to suggest that CWP is only an underground coal miner's disease. As the recent diagnosis of a surface coal miner with CWP shows, all coal mine workers both above and below ground can potentially be affected by CWP.

Secondly, and more broadly than simply CWP, the focus of the Committee should now justifiably be on all types of dust diseases which come about as a result of all types of mining activity in Queensland. In addition to coal, the following types of mining activities occur:

- (a) Minerals including but not limited to gold, copper, bauxite, cobalt, iron, lead, nickel, silver, zinc and tungsten
- (b) Industrial minerals and rocks including but not limited to sandstone, bentonite, granite, gypsum, limestone, magnesite, marble and silica;
- (c) Petroleum, oil shale and coal seam gas;
- (d) Gemstones; and
- (e) Mineral sands.

In short, there are many thousands of workers outside of the coal industry who can, and are, affected by dust diseases as a result of exposure of various types of mine sites.

Dust diseases affect many thousands of workers across all facets of mining activities in Queensland and in Australia. As has been demonstrated through the CWP cases, it would be naïve to think that the historical rates of diagnosis of all other types of dust diseases in Queensland truly reflects reality.

By way of example, we note that according to the Queensland Employee Injury Database, only six silicosis cases received compensation between 1992 and 2004. Given the thousands of workers who have worked in all types of above and below ground in and around any type of silica containing rock, there are questions as to whether these rates are accurate.

Accordingly, we support any action which would examine the historical, current and future health and safety of all workers of all types of mines who are at risk of developing any type of dust disease in Queensland. Indeed, failure to do so in light with what has been revealed in relation to CWP would be to unfairly prejudice non-coal mine workers. At a time when the coal mining industry is in crisis over CWP, it is our view that the light must firmly be shone on all types of dust diseases.

Thirdly, much has been spoken about the so called “workers compensation safety net” and what entitlements there are for workers affected by CWP. It is well known that Queensland has one of the best workers’ compensation schemes in the country, and in our view the current statutory and common law rights available to workers, including those impacted by dust diseases, are adequate and do not require further amendment. This is especially so when one considers the comparatively draconian entitlements available to workers in other states and territories.

In Queensland, statutory benefits (including lost wages, medical expenses and a lump sum where they have permanent impairment) are available under the *Workers Compensation and Rehabilitation Act 2003* where the worker can show that his/her employment was a significant contributing factor to their disease. In addition, should the worker be able to establish negligence, they can pursue common law damages against their employer or other party responsible for causing their disease with such damages to include damages for pain and suffering and loss of income and future loss of earning capacity. There are no time limits within which a worker must bring a common law claim for a “Dust Disease”. As with all types of asbestos disease, including mesothelioma, a worker is not required to bring a common law claim within 3 years as with other personal injuries.

One area beyond this however where it has been identified that further support is required with respect to specialist testing for workers who are suspected to be at risk for CWP and require specialist testing, but have not yet been diagnosed.

Currently, in the absence of specific employers or mine operators agreeing to cover the cost, workers who hold concerns about their health and want to obtain a chest x-rays and lung function tests, need to pay for this out of their own pocket. Such testing can be expensive given it is highly specialised and not readily available in regional centres.

If a worker is diagnosed and then lodges a workers’ compensation claim that is accepted by the insurer or likewise by a self-insured employer, then such medical costs are reimbursed. However, if a worker is found not to have CWP and a claim is subsequently rejected, then the worker bears the cost. This presents an obvious risk that some workers will opt to not take up this important testing, on the basis of cost.

Accordingly, we propose that appropriate measures be taken to provide reimbursement to all workers for testing and reasonable travel if required.

In our view, the reasonable costs associated with testing for CWP should be funded by coal mine operators responsible for exposure as a further measure directed towards the mitigation of the disease, rather than through the workers’ compensation scheme.

If screening reveals a diagnosis of CWP then the worker can either then opt to make a claim through the workers’ compensation scheme, or with their employer if self-insured.

Conclusion

This inquiry provides an important opportunity to remedy current deficiencies within the state's regulatory framework to help better ensure that the workplace health and safety of workers is prioritised in the fight against CWP.

In our view stronger protections with greater oversight are required, and with that a more thorough review of the actions and mitigation strategies of other jurisdictions to ensure that Queensland is adopting best practice approach for the prevention and management of CWP into the future.

Whilst we believe current statutory arrangements are sufficient to support workers who have been diagnosed with CWP, we would welcome further dialogue on other measures that can be adopted to ensure all at-risk workers have access to specialist testing when needed and in particular an assurance that workers will no longer be out-of-pocket for such testing.

The confirmation that CWP cases remain a problem in Queensland, with more cases likely to be identified, is an unacceptable outcome and it is crucial that all efforts possible are now directed towards mitigating future cases of this disease for workers as a priority.