



**Maurice
Blackburn**
Lawyers
Since 1919

**FURTHER SUBMISSION TO
THE COAL WORKERS'
PNEUMOCONOSIS
SELECT COMMITTEE,
QUEENSLAND
PARLIAMENT**

June 2017

Extended Terms of Reference

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

- (a) Occupational respirable dust exposure for:
 - (i) Coal port workers;
 - (ii) Coal rail workers;
 - (iii) Coal-fired power station workers;
 - (iv) Other workers.
- (b) The legislative and other regulatory arrangements of government and industry which have existed in Queensland to prevent or reduce the harm caused by occupational respirable dust exposure to port, rail, power station and other workers.
- (c) Whether these arrangements were adequate and effectively maintained over time.
- (d) The roles of government departments, agencies, industry, health professionals and unions in these arrangements.
- (e) The efficacy and efficiency of adopting methodologies and processes for respirable dust measurement and mitigation, including monitoring regimes, engineering measures, personal protective equipment, statutory requirements, and industry policies and practices, including practices in jurisdictions with similar industries.
- (f) Other matters the committee determines are relevant to occupational respirable coal or silica dust exposure.

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

Occupational lung disease does not discriminate and can affect anyone exposed to toxic dusts.

The International Labour Organisation estimates that 2 million of the world's 2.5 billion workers die each year from occupational accidents or disease¹. Whilst most of these workers live and work in the developing world, it is naïve to assume that alarming rates of occupational lung disease are not found in Australia, including amongst Australian workers who are one or more degrees removed from the coalface.

Setting aside the alarming revelations unearthed by this Committee to date, one need only look to the United States, where the US Department of Labour has paid out almost \$45 billion in Coal Workers Pneumoconiosis (**CWP**) claims since 1975², and the United Kingdom, where approximately 570,000 compensation claims for lung disease amongst coal miners were received from 1998 to 2004³, to debunk the myth that occupational lung disease is not a widespread problem in industrialised nations.

Equally alarming is the high rates at which occupational lung disease are underreported. Experts suggest that up to 25% of all lung cancer deaths are attributable to occupational exposures to dusts and fumes, a figure that is just shy of the lung cancer mortality rate attributable to smoking⁴. Nonetheless, given the underreporting, many lung cancers are mischaracterised as idiopathic, as opposed to the product of a preventable occupational exposure.

Compounding this underreporting is a lack of knowledge surrounding the causation of occupational lung disease from novel exposures. The rate of technological change and new innovations across all industries has produced many new and little understood sources of occupational lung diseases, the tragic legacies of which may take many years to fully realise.⁵

¹ International Labour Organisation. (2002). *Decent Work-Safe Work*, Introductory report on the XVth World Congress on Safety and Health at Work, Vienna, 26-31 May 2002.

² US Department of Labor, Division of Coal Mine Workers' Compensation, *Black Lung Program Statistics* <https://www.dol.gov/owcp/dcmwc/statistics/TotalBenefitsPayment.htm> Accessed 22 June 2017.

³ McIvor A, Johnston R (2007). Miners' lung: A history of dust disease in British coal mining, *Studies in Labour History*, Aldershot, Ashgate.

⁴ Lim SS, Vos T, Flaxman AD, et al. (2012). A comparative risk assessment of burden of diseases and injury attributable to 67 risk factors and risk factor clusters in 21 regions, 1990-2010: a systematic analysis for the Global Burden of Disease Study 2010. *Lancet*, 380, 2224-60.

⁵ Cullinan P, Munoz X, Suojalehto H et al. (2017). Occupational lung diseases: From old and novel exposures to effective preventative strategies. *Lancet*, 5: 445-55.

In these circumstances, we strongly support the Select Committee's decision to expand the Terms of Reference to include additional industrial sectors and not focus solely on coal related industries.

Coal port workers, coal rail workers and coal fired power station workers

Over the past thirty years our firm has represented many coal-fired power station workers who have been diagnosed with occupational lung diseases, particularly mesothelioma, asbestos-related pleural disease, asbestosis and occupational Chronic Obstructive Pulmonary Disease (**COPD**). These workers were exposed to extremely high levels of coal and asbestos dust while working inside the confines of notoriously dusty power stations. Sadly, it is not uncommon to hear stories of power stations where more than half of a former workforce has succumbed to mesothelioma, lung cancer or asbestosis. Given the latency periods attached to coal dust and asbestos related conditions, we expect to continue to see high levels of occupational lung disease in these workers in the future.

More recently, we have fielded numerous enquiries from coal port workers and coal rail workers in relation to CWP, occupational COPD occupational asthma and lung cancer. Most of these workers have shared concerns with us not only about themselves, but also for the hundreds of other men and women they worked alongside over the course of their working lives.

These workers were exposed to coal dust during the loading and transporting of coal. Anecdotally, we have heard stories of coal rail workers covered from head to toe in coal dust released from open coal cars as they travelled from pit to port. On this basis, we believe there is a pressing need to consider these workers and their exposure to respirable dust.

There may also be grounds to investigate the exposures of communities situated along rail corridors to coal dust, a concern that was raised by residents in the Hunter Valley of New South Wales.

Other workers

We welcome the Committee's decision to investigate the exposure of other workers to respirable dust.

Every year our firm Nationwide represents dozens of workers not involved in coal mining who are diagnosed with occupational lung disease. To date, the vast majority of these workers were employed in workplaces and industries that exposed them to asbestos. Indeed, many hundreds of thousands of Queenslanders have had occupational exposure to asbestos in the past, and continue to be at risk of one of the various asbestos-related diseases marked by long latency periods.

Recently though, we have seen an increasing number of workers who have never been exposed to asbestos presenting with occupational lung disease which are not asbestos related.

A non-exhaustive cross-section of these workers includes:

- Tunnelers;
- Construction workers;
- Demolitionists;

- Stonemasons;
- Quarry workers;
- Glass, ceramic, brick and tile manufacturers;
- Sandblasters; and
- Foundry workers.

These workers are all employed in industries that involve high levels of exposure to respirable silica dust. Silica is the leading cause of occupational respiratory disease worldwide and is recognised as a lung carcinogen⁶. By far the most common condition we encounter is silicosis, however we are either currently or have represented individuals with progressive massive fibrosis (i.e. complicated silicosis), rheumatoid arthritis, occupational asthma and occupational COPD.

We strongly encourage this Committee to consider and investigate the non-coal related workers and the dust-related conditions identified above. Indeed, we refer the Committee to our initial submissions at page 9.⁷

Regulatory Arrangements

Whilst the risk of occupational lung disease cannot be totally eliminated, the vast majority of occupational lung diseases are preventable. In our experience representing many workers with occupational lung disease in Queensland, the regulatory pendulum has swung too far in favour of large employers, such that a culture of reckless indifference, if not gross negligence, has been allowed to thrive in Queensland's workplaces.

Accordingly, we repeat our previous submission that the current legislative and regulatory arrangements are vastly inadequate.

Other Matters

One issue that has not received attention from this Committee is the matter of the absence of common law "provisional damages" for dust-related conditions in Queensland.

We note that in its report of May 2017 this Committee recommended an enhancement to the current Queensland Workers Compensation regime which effectively permits workers with a diagnosed dust disease to claim statutory benefits for permanent impairment a second time if their dust disease worsens at some point in future.⁸ This welcome enhancement to the statutory benefits available to workers draws attention to the absence of a similar provision in respect of common law claims.

As a general starting point, under the common law, plaintiffs who have suffered a personal injury are awarded damages in accordance with the "once and for all" rule. The "once and for all" rule provides that damages for all past and future losses can only be claimed once, such that a plaintiff cannot obtain any further damages in relation to the original tortious conduct even if they develop a different or more serious injury once their initial claim has been finalised.

⁶ Steenland K, Ward E. (2014). Silica: A lung carcinogen. *Cancer Journal for Clinicians*, 64: 63-69.

⁷ Maurice Blackburn Lawyers, *Submissions to the Coal Workers' Pneumoconiosis Select Committee*, November 2016, 9.

⁸ Parliament of Queensland, Coal Workers' Pneumoconiosis Select Committee, (2017). *Black lung white lies: Inquiry into the re-identification of Coal Workers' Pneumoconiosis in Queensland*, 43.

The “once and for all” rule has the potential to cause significant injustice to individuals who claim common law damages for occupational lung diseases. This is because individuals exposed to toxic dusts have the potential to contract not only progressive diseases, but also multiple but separate diseases at different points in time. For example, individuals diagnosed with asbestosis can (but not in every case) go on to develop malignancies such as mesothelioma and asbestos-related lung cancer and individuals diagnosed with silicosis can (but not in every case) go on to develop silica-related lung cancer. Under the “once and for all” rule, individuals who bring claims for their initial disease are foreclosed from bringing damages claims for their later, more serious disease.

Some jurisdictions have modified the common law “once and for all” rule by passing legislation which allows a Court to make an award of common law “provisional damages”. An award of provisional damages involves an immediate assessment of all losses, except those attributable to the happening of a future event, most usually the development of a new or more serious injury or disease. On the happening of that event, the plaintiff is given the right to apply to the Court for further damages to account for the new or more serious injury or disease.

Legislation providing for provisional damages for dust-related conditions has been passed in Victoria⁹, New South Wales¹⁰, South Australia¹¹ and Tasmania¹². It has also been recommended by the Law Reform Commission of Western Australia¹³.

At present, there is no such legislation in Queensland. As such, individuals who bring common law claims for a dust disease are precluded from claiming damages for new, typically more serious, diseases, once their initial claim has been finalised.

We submit that the “once and for all” common law rule should be modified by legislation in Queensland, such that where a plaintiff develops an injury or disease which is new or of a more serious character than the injury or disease from which they suffered at the time of a judgement for an earlier claim for damages, a court will be authorised to award further common law damages to that individual.

We submit that this reform would bring Queensland into line with other states and provide greater justice and fairness to occupational lung disease sufferers.

Conclusion

We welcome the Committee’s decision to expand the Terms of Reference to include additional industrial sectors. Besides coal-port, coal-rail and coal-fired power station workers, we encourage the Committee to consider the occupational dust exposure of tunnelers, construction workers, demolitionists, stonemasons, quarry workers, glass, ceramic, brick and tile manufacturers, sandblasters and foundry workers.

In addition, we encourage the Committee to consider legislation that would modify the common law “once and for all” rule and allow for awards of provisional damages for individuals diagnosed with occupational lung diseases.

⁹ *Asbestos Diseases Compensation Act 2008 (Vic)*.

¹⁰ *Dust Diseases Tribunal Act 1989 (NSW)*.

¹¹ *Dust Diseases Act 2005 (SA)*

¹² *Civil Liability Act 2002 (Tas)*.

¹³ Law Reform Commission of Western Australia (June 2016), *Provisional Damages and Damages for Gratuitous Services*, Quality Press, Perth.