Submission No 2

FIRST REVIEW OF THE DUST DISEASES SCHEME

Organisation: Maurice Blackburn Lawyers

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SUBMISSION TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

Review of the Dust Diseases Scheme

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About Maurice Blackburn

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.

The need for reform

Our experience in working with clients suffering from Dust Diseases is that there are significant and unfair differences between the Worker's Compensation (Dust Diseases) Act 1942 (NSW) and the associated Dust Diseases Scheme and the Dust Diseases Tribunal arrangements.

Despite medical and legal consensus on the types of occupational dust diseases that tragically kill our fellow citizens every day, large numbers are excluded from the current Scheme due to out of date definitions and poor design.

We also regularly work with clients who come to us with only days to live. We see the stress and anguish unnecessarily imposed on them and their families because the unrealistic timelines to register for compensation could mean they lose the opportunity to secure their family's future economic dignity.

As if these people don't have enough to worry about during such a tragic and difficult time.

This review presents an opportunity to remove these unfair features of the Scheme and provide consistency, certainty and dignity for injured and dying workers, and their families.

Maurice Blackburn commends these proposed changes to the Committee.

Limited nature of compensable diseases under the dust diseases scheme

The "dust diseases" which are compensable under the dust diseases statutory scheme (the scheme) are considerably more limited in number than the "dust-related conditions" which enable common law proceedings for damages to be brought before the Dust Diseases Tribunal of New South Wales (DDT).

The definition of a "dust disease" pursuant to Section 3 of the *Worker's Compensation (Dust Diseases) Act 1942* (NSW) (hereafter referred to as "the DDA Act") is:

> *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.*

The requirement that any pathological condition of the lungs, pleura or peritoneum must also be caused by a dust that may also cause a disease specified in Schedule 1 limits the ambit of causative agents, or dust, that may lead to a compensable condition under the scheme.

The definition of a "dust-related condition" pursuant to Section 3 of the *Dust Diseases Tribunal Act 1989* (NSW) (hereafter referred to as "the Tribunal Act") is not subject to the limitation described at [2] above (underlined) and is defined as:

> *(a) a disease specified in Schedule 1[i], or*
> *(b) any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.*

In practice, common law proceedings for damages may be pursued for a far greater number of dust-related conditions than those compensable under the statutory scheme, mainly due to the operation of the "catch-all" provision contained in section 3 of the Tribunal Act, as described above.

In contrast, the much more restrictive definition of "dust disease" contained within Section 3 of the DDA Act means that eligibility for compensation is generally limited to applicants suffering from the specific conditions listed. However there are a number of dust-related conditions which fall outside the ambit of Schedule 1 of the DDA Act, including conditions which fall into the following categories:

Other types of pneumoconiosis

Pneumoconiosis is a broad group of lung diseases caused by inhalation of mineral and metal based dusts. Pneumoconiosis is generally a restrictive lung disorder, and is often (but not exclusively) characterized by pulmonary fibrosis.

Schedule 1 of the DDA Act recognises a number of specific subtypes of pneumoconiosis, being: aluminosis; asbestosis; coalworkers' pneumoconiosis; hard metal pneumoconiosis; silicosis; and talcosis.

However, there are a significant number of occupational pneumoconioses recognised by current medical science, but which are not reflected in the legislation. These include: bauxite fibrosis (also known as "Shavers' Disease"); carborundum pneumoconiosis; corundum pneumoconiosis; diatomaceous earth pneumoconiosis; mixed-dust pneumoconiosis (also known as "mixed-dust fibrosis"); siderosis (also known as "Welders' Lung"); and stanosis.

There is no good reason why sufferers of one subtype of occupationally induced pneumoconiosis should be entitled to compensation form the Dust Diseases Authority, while

sufferers of other subtypes of occupationally induced pneumoconiosis are not so entitled, simply because their specific subtype of pneumoconiosis is not specified in Schedule 1 of the DDA Act.

Other types of hypersensitivity pneumonitis

Hypersensitivity pneumonitis (also known as “allergic alveolitis” or “extrinsic allergic alveolitis”) is an inflammatory lung condition characterised by the development of an allergic reaction to organic materials (including bacterial, plant, fungal, and animal matter) and simple chemicals, usually as a result of repeated exposures.

While hypersensitivity pneumonitis can be transient and reversible, in some instances it can cause permanent damage to a sufferer’s airways.

Schedule 1 of the DDA Act recognises a number of specific subtypes of hypersensitivity pneumonitis, being: bagassosis; berylliosis; and Farmer’s Lung.

Those types of hypersensitivity pneumonitis referred to in Schedule 1 of the DDA Act are each caused by exposure to a particular and distinct antigen. However, there are a very large number of antigens which are known to cause hypersensitivity pneumonitis in occupational settings[ii] and fall outside the scope of the schedule.

Some examples of subtypes of hypersensitivity pneumonitis (and the source antigen) that are not listed in Schedule 1 of the DDA Act include: sequoiosis (contaminated wood dust); wood pulp-workers’ disease (contaminated wood pulp), humidifier or air conditioner lung (contaminated humidifiers and/or air conditioners); officer-workers’ or home HP (dust from ventilation or heating systems); bird-fanciers’ lung (bird products); and grain-workers’ lung (grain dust).[iii]

The inclusion of only a few select subtypes of hypersensitivity pneumonitis in Schedule 1 is particularly arbitrary considering the underlying pathophysiology of different types of hypersensitivity pneumonitis are often the same.

Occupational asthmas

This is asthma caused by, or made worse by, certain occupational conditions, such as exposure to respirable dusts. It should be noted that occupational asthma can also be caused by factors not related to exposure to respirable dust. For example, occupational asthma can be caused by physical exertion or exposure to extreme temperatures.

Currently Schedule 1 of the DDA Act only covers one accepted type of occupational asthma, being byssinosis – a dust disease associated with exposure to cotton dust.

There are a variety of agents that may cause occupational asthma including, but not limited to: cereals; flours; laboratory animals; shellfish; latex; enzymes; anhydrides used in epoxy resins; metals; industrial chemicals (di-isocyanates); cleaning agents; wood dusts; soldering fluxes; pesticides; pharmaceuticals; and reactive dyes.[iv]

As with hypersensitivity pneumonitis, the underlying pathophysiology of different occupational asthmas are generally the same. Accordingly the inclusion of only one type of occupational asthma in Schedule 1 of the DDA Act is arbitrary.

Chronic obstructive pulmonary disease

This is a category of lung disease caused by progressive airflow obstruction.

The most common type of COPD (and arguably the most well-known) is emphysema caused by tobacco smoking. However COPD has also been attributed to exposure to a number of respirable substances, usually in the workplace[v].

Schedule 1 of the DDA Act does not currently recognise any type of occupational COPD. Accordingly, the only way a sufferer of occupational COPD can obtain compensation under the current scheme is if the cause of their COPD satisfies the alternative definition of "dust disease" under section 3 of the DDA Act.

The case for change

The reason why some types of occupational dust related lung diseases are listed in Schedule 1 of the DDA Act while many others are omitted mayreflect the diseases which were most prevalent at the time of the instrument's drafting. Alternatively, at the time Schedule 1 was drafted the medical science regarding the occurrence and classification of other diseases may not have been as advanced as it is now.

However, in our experience medical physicians and academics are becoming increasingly aware of occupational lung diseases due to advances in medical knowledge and patient history-taking resulting in a correlative increase in reported cases and diagnoses of occupational lung diseases not listed in Schedules 1 of the relevant Acts[vi].

In our experience, the scheme is unable to respond to this increase in reported cases of occupational lung diseases by providing workers (or their dependants) with compensation for occupational exposures to dust during the course of their employment in New South Wales due to the limitations described above.

This often leads to circumstances where a sufferer of a lung disease caused by exposure to occupational dust can bring a common law claim in the Dust Diseases Tribunal of NSW, but is ineligible for compensation from the Dust Diseases Authority because their condition does not fall within the restrictive scope of the DDA Act.

It seems irrational that a sufferer of one type of a medically recognised dust related occupational lung disease should not be eligible for compensation from the Dust Diseases Authority simply because the name of the specific condition from which they suffer is not listed in Schedule 1 of the DDA Act.

Accordingly, we would recommend that the DDA Act should be amended with the following objectives:

a. To better reflect the current state of medical science regarding occupational dust related diseases; and
b. To achieve better coverage of workers and former workers suffering from a wider range of occupational dust related diseases.

To achieve these ends, we would recommend that the definition of "dust disease", as contained in section 3 of the DDA Act, should be amended to include:

a. Broader categories of conditions caused by occupational dust exposures (such as those categories set out at paragraph [6]) rather than simply listing certain specific subtypes of diseases; and
b. A "catch-all" provision similar to that set out in section 3 of the Tribunal Act.

Applications submitted by claimants after date of death

In our experience, claimants and their dependants confront significant physical and emotional hardship which hinders their submission of an application for workers' compensation benefits under the scheme. This typically manifests in an application for benefits under the scheme and supporting documents not being submitted with urgency or within the lifetime of the claimant. This is despite the fact that many of these conditions are challenging to diagnose and when a prognosis is finally made, the individual typically has only weeks or months to live.

The scheme places an onus on the claimant to submit their application as soon as they are aware of their entitlements. The submission of an application is contingent on the claimant understanding whether entitlements are available to them and any implications regarding the timeliness of their application.

The issues arising from the circumstances described above are as follows:

a. For non-malignant claims, compensation is paid from the date of the application and not the date of diagnosis;
b. An application by the deceased, submitted after the date of death, will not be accepted by the DDA unless it can be proven that it was sent prior to the date of death; and
c. An application for benefits for dependants of a deceased worker does not provide compensation for medical and hospital expenses incurred prior to death and disability benefits of the deceased are not realised for the dependants (or otherwise the Estate).

We <u>recommend</u> that the DDA:

a. Produce a fact sheet for distribution with an emphasis on the timing of applications affecting the availability of entitlements;
b. Provide compensation from the date of diagnosis for both malignant and non-malignant claims; and
c. Accept and assess applications by the deceased submitted within a reasonable time following the date of death, securing any relevant entitlements of the deceased for the dependants (or otherwise the Estate).

[i] The list of prescribed dust diseases in Schedule 1 of the *Dust Diseases Tribunal Act 1989* (NSW) are identical to the list of dust diseases in Schedule 1 of the *Workers' Compensation (Dust Diseases) Act 1942* (NSW). Namely, Aluminosis, Asbestosis, Asbestos induced carcinoma, Asbestos related pleural diseases, Bagassosis, Berylliosis, Byssinosis, Coal dust pneumoconiosis, Farmers' lung, Hard metal pneumoconiosis, Mesothelioma, Silicosis, Silico-tuberculosis and Talcosis.

[ii] Fink J N, et al, 'Needs and Opportunities for Research in Hypersensitivity Pneumonitis' (2004) 171, *American Journal of Respiratory and Critical Care Medicine*, 792-798

[iii] A comprehensive list of the most frequent causes of hypersensitivity pneumonitis were published by the American Thoracic Society in a chapter on occupational lung diseases: American Thoracic Society, Breathing in America: Diseases, Progress, and Hope (2010) ch 13, 136–138

[iv] Malo J and Chan-Yeung M, 'Agents Causing Occupational Asthma' (2009) 123 American Academy of Allergy, Asthma & Immunology 545–549. For a comprehensive list of agents see: Mapp C E, 'Agents, Old and New, Causing Occupational Asthma' (2001) 58 Occupational and Environmental Medicine 289–290.

[v] Fishwick D et al, 'Occupational Chronic Obstructive Pulmonary Disease: a Standard of Care' (2015) 65, *Occupational Medicine*, 270-282

[vi] See above (i).