Submission No 13

INQUIRY INTO 2021 REVIEW OF THE DUST DISEASES SCHEME

Organisation: Maurice Blackburn Lawyers

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

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

Dear Madam/Sir,

We welcome the opportunity to provide feedback in relation to the 2021 Review of the Dust Diseases scheme.

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

Yours faithfully,

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Submission in Response to the 2021 Review of the Dust Diseases Scheme

December 2021

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 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.

Our Submission

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 both the 2017 and 2019 review processes.

We note from the inquiry website[1] that:

> *This year's review will provide the opportunity to evaluate the progress of the recommendations made in the 2019 review on the management of silicosis in the manufactured stone industry.*

To that end, we have structured our response around providing commentary on our observations in relation to advances that have been made (or otherwise) in the implementation of the Committee's recommendations from the 2019 review.

We have restricted our comments to those recommendations where our role as legal professionals, assisting victims of workplace related silicosis and related illnesses, gives us standing to make comment.

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.

We present our input in the spirit of process improvement, and would welcome the opportunity to more fully share our experiences and expertise with the Committee.

[1] https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2833#tab-otherdocuments

Our Observations in relation to Progress on the 2019 Recommendations

Recommendation 2

That iCare provide a free screening service for all workers within the manufactured stone industry, with this service to be offered and actively promoted over the next 12 months, and exiting and new workers in the manufactured stone industry to be tested regularly.

Our response:

Maurice Blackburn is unaware whether a free screening service for all workers within the manufactured stone industry has been created and implemented.

If it has been implemented, it would be fair to say that a number of our clients have been completely unaware of the existence of the scheme.

Evidently, education around the existence of the screening service needs significant improvement.

Our anecdotal experience indicates that awareness of the availability of screening for new, current and exiting workers is only happening via word of mouth, or through workers finding out that screening is available via media reports.

Maurice Blackburn suggests that it is important that the government accept responsibility for the development and roll-out of any education campaigns. It is important to NOT rely on employers to provide information about the availability of screening services and the like. In our experience, across the board, a large number of employers cannot be relied upon to provide such information in a predictable or accessible manner.

It is also vital to ensure that any screening must be at no-cost to the worker.

We noted in our submission to the 2019 review[2] that a worker screening process needs to operate hand-in-hand with a process for auditing workplaces for safety compliance. We wrote that:[3]

> *….ongoing measures to audit workplaces and screen workers over time is necessary to enable early diagnosis of artificial stone related silicosis.*
>
> *Researchers have also noted that the screening program undertaken by the Queensland Government should be promoted and encouraged worldwide for the purposes of:*
>
> - *obtaining reliable and statistically consistent epidemiological data;*
> - *establishing the prevalence of silicosis in the artificial stone industry; and*
> - *defining the correlation between the occurrence of silicosis and any shortcomings of preventative or protective measures in the workplace.*
>
> *Maurice Blackburn submits that combining health screening programs with workplace audits would enable the collection of high quality data on artificial stone related silicosis that will:*

[2] https://www.parliament.nsw.gov.au/lcdocs/submissions/64881/0008%20Maurice%20Blackburn%20Lawyers.pdf
[3] Ibid: p.10

- *inform risk assessment and management strategies, administrative controls, health and safety policies, training and information courses;*
- *guide effective health surveillance programs; and*
- *assist with the clinical management of at-risk workers.*[4]

Specialist physicians trained in occupational and environmental medicine have only noted a handful of cases of artificial stone related silicosis in NSW.[5] *However, clinical assessments have often overlooked current and previous employment. Furthermore, accurate occupational histories are critical to avoid reported misdiagnoses of sarcoidosis.*[6]

Maurice Blackburn suggests that an effective and ongoing audit regime and screening of at-risk workers will promote greater awareness of artificial stone related silicosis among physicians that will assist with early diagnosis.

We remain of the view that this two-pronged approach is important.

Once the recommended free screening service has been put in place for all workers within the manufactured stone industry, Maurice Blackburn urges the Committee to ensure that the scheme be expanded to cover other at-risk workers. Stonemasons are not the only at-risk workers to silica exposure – tunnelling, quarrying, metalliferous mining, general construction, abrasive blasting, concreting, concrete manufacturing and many other industries pose huge risks to workers for silica related diseases.

Recommendation 4

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.

Our response:

Maurice Blackburn has observed no difference in iCare's approach to the retraining of workers since the 2019 report was handed down.

We continue to represent a number of sufferers of workplace silica-related conditions who have been left with little or no viable choices when it comes to return to work.

For many low-disability workers, it is important that they are not returned to the workplace where they acquired their disease. Their only alternative, at present, is to terminate their relationship with that employer. Under these circumstances, that worker would not be covered for WorkCover, and would have no source of income after six months.

Maurice Blackburn believes that statutory compensation for lost wages (at pre-injury levels) should be payable for up to 2 years following a diagnosis of silicosis when a doctor recommends that the worker immediately cease exposure.

Consider the following case study:

[4] V Leso et al, 'Reply to Accelerated Silicosis—An Emerging Epidemic Associated with Engineered Stone. Comment on Leso, V. et al. Artificial Stone-Associated Silicosis: A Systematic Review. Int. J. Environ. Res. Public Health 2019, 16(4), 568, doi:10.3390/ijerph16040568' (2019) 16 *International Journal of Environmental Research and Public Health* 7

[5] Ibid, above n I.

[6] R Hoy, 'Occupational Lung Diseases in Australia' (2017) 207 *Medical Journal of Australia* 10, 443.

> *Maurice Blackburn assisted a 50 year old stonemason client, who was provided a form of retraining assistance. iCare referred him on to an independent provider. They assisted him with job applications – all for delivery driver roles. Our client was not offered a single interview.*
>
> *iCare also paid him statutory benefits for 6 months, although the legislative basis of the payments is unclear. They appear to have been discretionary payments.*

Maurice Blackburn believes that a more consistent and structured approach to retraining would be beneficial for a number of our clients. The current system is based on old law and outdated understandings of workplace silica-related injury.

The language in the *Workers' Compensation (Dust Diseases) Act 1942* is archaic and no longer fit for purpose. It is pitched at retired workers, or workers approaching retirement, based on the experience at the time – that the latency period related to the onset of dust diseases meant that workers were at the tail end of their career when symptoms commenced. That Act therefore does not focus in any meaningful way on retraining of a younger cohort of worker who are closer to the start of their careers than they are to retirement.

The definition of 'Dust Disease' in the 1942 Act is vastly different to that in the *Dust Diseases Tribunal Act 1989* – especially in what constitutes an industrial disease.

As a result, there are a number of conditions that iCare does not recognise as a workplace related dust disease – such as chronic obstructive lung disease (COPD) and a vast number of silica induced auto-immune conditions including silica scleroderma, rheumatoid arthritis, lupus and renal failure where there is no evidence of silicosis. The Board, in our experience, only looks at the condition – not its potential causes. Modern medical practice is now able to untangle causality related to, for example smoking, from workplace exposure and confidently draw causal links with silica induced autoimmune diseases in the absence of silicosis itself.

It should and is a simple step to legislate to expand the definition of dust diseases, by adopting language such as "*any pathological condition caused by exposure to dust*." This would broaden the definition and encompass all types of dust injuries and emerging dust diseases including silica induced autoimmune diseases.

In addition to COPD and autoimmune diseases, this could capture other rare diseases that are associated with dust exposure – such as retroperitoneal fibrosis (recognised as an asbestos-related condition for the purposes of workers' compensation in some European countries).

Recommendation 4 calls for iCare to review and expand the financial assistance it provides for retraining and vocational support. Maurice Blackburn has not seen notification of any review process. We would welcome such a review, along with a genuine commitment to stakeholder and worker engagement in the process.

Recommendation 7

That the Minister for Better Regulation ensure that steps are taken to further reduce the workplace exposure standard to a time weighted average of 0.02 mg/m^3 for non-mining industries as soon as possible, to ensure workers are protected from the harmful effect of silica dust

Our response:

In our submission to the 2019 review, we wrote:

> *The current Australian respirable crystalline silica exposure limit is 0.1 mg/m^3 (8-hour time-weighted average).[7] This limit, however, is double the legal limit in both the United States and the United Kingdom.*
>
> *In 2016 the United States Occupational Safety and Health Administration advised that the rate of 0.1 mg/m^3 was associated with significant risk to health. The 8-hour standard was developed in the context of traditional industries where silicosis was a risk. It does not provide guidance as to the risk associated with less traditional, high-intensity, short-duration exposures, such as cutting artificial stone.[8]*

Recent moves to reduce the national benchmark to 0.05 mg/m^3 (8-hour time-weighted average) is a welcome interim move, but it will still leave Australia lagging a long way behind international best practice.

We applaud the NSW scheme for recommending a maximum time weighted average of 0.02 mg/m^3 for non-mining industries.

We encourage the Committee to:

- Utilise its standing within national structures to advocate for a reduction in the national benchmark to 0.02 mg/m^3 (8-hour time-weighted average).
- Consider expanding the 0.02 mg/m^3 (8-hour time-weighted average) target beyond non-mining industries over time.

Recommendation 8

That the NSW Government introduce a legislative amendment to ensure all manufactured stone fabrication sites and employers are registered with SafeWork NSW and will maintain such registration every 12 months, and are conducting regular air monitoring and regularly providing the results to SafeWork NSW.

Our response:

Maurice Blackburn has seen no evidence of proposed legislative change to this effect.

We would be supportive of this legislative amendment.

Recommendation 9

That the NSW Government immediately introduce an explicit ban on dry cutting.

Our response:

[7] Safe Work Australia, 'Workplace Exposure for Airborne Contaminants', 27 April 2018
[8] Hoy R F et al, 'Artificial stone-associated silicosis: a rapidly emerging occupational lung disease', *Occupational and Environmental Medicine* (2018);75:3-5

In our submission to the 2019 review, we wrote[9]:

> *Dry cutting of artificial stone with a masonry saw is the simplest way to cut the product. This practice is common amongst workers who perform cutting work onsite. Despite a requirement that dust extraction suppression equipment be made available, often this is not the case.*
>
> *Dry cutting of Artificial Stone products can result in workers being exposed to levels of respirable crystalline silica excess of 44 mg/m^3 (over a 30 minute sampling period).[10] Such a level of exposure is an unjustifiable risk to workers.*
>
> *Accordingly, Maurice Blackburn submits that a total ban on dry-cutting of Artificial Stone Products should be implemented.*

We were delighted that this was reflected in the Committee's recommendations.

Anecdotal evidence from our clients, post the 2019 Review, is that dry cutting continues. Maurice Blackburn staff have heard that some factories have prohibited dry cutting in the factory however dry cutting continues on-site during the installation of the product. This occurs when further finishing work is required, such as when a hotplate or sink needs to be cut out or when the installer discovers that the slab was cut to incorrect dimensions in the factory.

If a ban on dry cutting has been initiated, our observations are the this has not been made explicit – or not explicit enough.

An explicit ban will only be as successful as the policing of that ban. To this end, better monitoring of dry cutting needs to be matched by better monitoring of workplace conditions – both in factories and on worksites.

Recommendation 12

That the NSW Government immediately establish the Silicosis Health Register and ensure that it captures not only diagnosed cases of silica-related disease but also screening results and investigative reports undertaken for workers exposed to crystalline silica.

Our response:

Maurice Blackburn is confident that the Committee will receive detailed information about the current status of the register from those charged with the responsibility for its development and implementation.

We urge the Committee to satisfy itself that the data collected through the register enables those reviewing that data to identify trends, both in industry sectors and in individual workplaces.

To that end, the structure of the register must go further than merely collecting medical data.

[9] https://www.parliament.nsw.gov.au/lcdocs/submissions/64881/0008%20Maurice%20Blackburn%20Lawyers.pdf: p.8

[10] Cooper H L et al, 'Respirable silica dust suppression during artificial stone countertop cutting', *Annals of Occupational* Hygiene (2015) 59:122–6

Recommendation 13

That SafeWork NSW, when reviewing its education and awareness campaigns, specifically consider how best to promote safe practices to independent contractors and installers in the manufactured stone industry. In doing so, SafeWork NSW should consult with suppliers, fabricators, installers and unions involved in the manufactured stone industry.

Our response:

Please see our response to Recommendation 2 for our thoughts in relation to education and awareness campaigns.

Maurice Blackburn was delighted to see the requirement in Recommendation 13 that: "*SafeWork NSW should consult with suppliers, fabricators, installers and unions involved in the manufactured stone industry".* The 'cottage industry' nature of many workplaces means that direct union engagement in those workplaces can be thin. It is important that union consultation at the industry-wide level is maintained.

Recommendation 14

That the NSW Government provide additional funding to the Dust Diseases Board and Centre for Work Health and Safety specifically for research projects related to the prevention, management and treatment of silicosis, and in terms of sourcing additional funding for research projects, commission iCare to scope out possible funding models that would be based on a cost recovery basis from the industry.

Our response:

Maurice Blackburn notes that the Dust Diseases Authority has renewed its grants program for the 2022/2023 Financial Year.

We further note that the upcoming iteration of the grants program is specifically focused on research projects related to the prevention, management and treatment of dust diseases.

We are unsure whether the commencement of the 2022/2023 grants round represents new money, or an increased investment in this important research.

Regardless, Maurice Blackburn applauds the continued commitment to research in the area, and we encourage the Committee to continue to advocate for ensuring that grants program remains well-funded into the foreseeable future.

In Summary and Looking Forward

Overall and based on our on-the-ground observations, Maurice Blackburn would give the Government's response to the Committee's 2019 recommendations a D- grading. There simply has not been sufficient urgency applied to the implementation of the life-saving measures explicit in the recommendations.

In terms of future reviews of the NSW Dust Diseases Scheme, 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.

The research note which accompanies this Review[11] reveals that 'Trades' (including stonemasons) account for 21.05% of cases in the past 12 months. While this is significant, it reminds us that there is a wide variety of occupations where silicosis is a real threat to the wellbeing of workers.

In our response to the 2019 Review, we wrote:[12]

> *Another reason why the current epidemic of silicosis should be distinguished from the challenges traditionally posed by asbestos-related diseases is that, whilst Australia was successful in implementing a blanket ban on asbestos in 2003, we are not likely to ever ban the use of crystalline silica.*
>
> *Silica is found everywhere modern society, from the concrete that holds together our skyscrapers to the microchips which power our smartphones.*
>
> *Accordingly, rather than an outright ban, prevention of silicosis will have to be achieved by employing and enforcing stringent occupation health and safety standards in the workplace to protect workers from exposure to silica.*
>
> *Despite this it appears the current regulatory framework and hygiene standards relating to crystalline silica may be insufficient to protect against the current wave of silicosis in the Artificial Stone industry, even when properly enforced.*

We believe this still represents the current situation.

Maurice Blackburn respectfully offers the following suggestions, as to what we believe the Committee's focus should include as a result of this review, and as priorities are set for 2022:

1. Continue to advocate for the full and immediate implementation of all recommendations from the 2019 review.

2. Expand the purview of the Committee's work on workplace silicosis from a tight focus on stonemasons, to all sectors and occupations where workers are contracting these insidious diseases.

3. Utilise the Committee's position to advocate nationally for the rapid finalisation of the strategies and priority areas for action identified by the National Dust Diseases Taskforce, and the implementation of their recommendations.

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[11] https://www.parliament.nsw.gov.au/lcdocs/other/16152/Silicosis%20in%20the%20manufactured%20stone%20industry%20-%20developments.pdf: ref Table 6, p.6

[12] https://www.parliament.nsw.gov.au/lcdocs/submissions/64881/0008%20Maurice%20Blackburn%20Lawyers.pdf: p.7

4. Recommend legislative change to expand the definition of “dust diseases”, by adopting language such as “*any pathological condition caused by exposure to dust*.” This would broaden the definition and encompass all types of dust injuries and emerging dust diseases including silica induced autoimmune diseases.