Supplementary Submission No 2a

INQUIRY INTO 2024 REVIEW OF THE DUST DISEASES SCHEME

Organisation: Australian Lawyers Alliance

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Standing Committee on Law and Justice
Legislative Council,
Parliament of NSW

1 June 2025

By email

To the Chair and Members of the Standing Committee on Law and Justice,

2024 REVIEW OF THE DUST DISEASES SCHEME

We are writing to you as **Senior Members of the Australian Lawyers Alliance (ALA) Dust Diseases Special Interest Group (SIG)**. The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Further to the ALA's written submission (dated 2 October 2024) to the Standing Committee on Law and Justice ('Committee') as part of the Committee's 2024 Review of the Dust Diseases scheme, and our appearance at the Committee's 29 November 2024 public hearing, we submit for the Committee's consideration the following correspondence.

1. Coverage of the Workers Compensation Nominal Insurer in claims for Dust Diseases

1.1. In light of the recent decision of the NSW Court of Appeal in *Workers Compensation Nominal Insurer v Sako* [2025] NSWCA 12 ('***Sako***'), the ALA believes it prudent to make a further submission to the Committee in respect of the deficiencies of the current NSW Workers Compensation Nominal Insurer ('**WCNI**') in respect of workers suffering from dust-related diseases claims, and the need for urgent legislative reform to rectify the Dust Diseases scheme's shortcomings.

1.2. In summary, the legal effect of the NSW Court of Appeal's above-mentioned decision means that the WCNI is not liable to pay critical common law damages to an employee who develops a

work-related dust disease in circumstances where their employer failed take out a mandatory Workers Compensation Insurance ('**WC Insurance**'). This is despite the fact that the WCNI would otherwise still be liable to pay work injury damages to an employee of an uninsured employer who is suffering from a non-dust-related injury.

1.3. In NSW, WC insurance is mandatory for employers. To help injured workers whose employers do not comply, a liability scheme for uninsured employers was created to ensure workers could obtain their statutory entitlements and bring a claim.

1.4. Currently, section 155(1) of the *Workers Compensation Act 1987* (NSW) ('**WC Act**') places an obligation on all NSW employers to obtain and maintain approved policies of WC Insurance to cover all liabilities the employer may owe to an injured worker, including both statutory compensation and damages at common law.

1.5. However, the legislation also includes protections for workers in circumstances where an employer fails in their statutory duty to take out any or adequate WC Insurance. Section 140 of the WC Act makes the WCNI responsible for paying compensation to injured workers of uninsured employers. This liability of the WCNI extends to paying both statutory compensation under the WC Act, as well as "work injury damages" (modified common law damages under the WC Act).

1.6. However, section 4(c) of WC Act specifies a "dust disease" – within the meaning of the separate *Workers' Compensation (Dust Diseases) Act* 1942 ('**DD Act**') – is not a type of compensable injury under the WC Act. In a nutshell, this means that workers suffering from dust-related diseases are not entitled to compensation under the Act, and instead their entitlements are governed by the DD Act.

1.7. This provision of the WC Act means that a workers suffering from a non-dust-related injury (such as a physical injury, psychological injury, or non-dust induced industrial disease) will still be able to claim compensation for their injury from the WCNI in the event that their employer failed to take out WC Insurance. However, the effect of the exclusion of workers suffering from a dust-related disease from the general provisions of the WC Act raises a question as to whether these workers benefit from the same protections in the event their employer was uninsured.

1.8. This was the central issue before the NSW Court of Appeal in the case of *Sako.*

2. *Workers Compensation Nominal Insurer v Sako* [2025] NSWCA 12

2.1. The Respondent, Mr Sako alleged that he suffered from silicosis caused by his exposure to respirable crystalline silica during various periods of employment as a stonemason working in NSW.

2.2. Mr Sako had originally brought a common law claim in the Dust Diseases Tribunal of NSW ('**the Tribunal**') against multiple defendants, including his former employers, and the manufacturers/distributors of the engineered stone products he alleged he had been required to work with.

2.3. It was alleged that one of Mr Sako's former employers, Mr Harmes, had failed to obtain policies of WC Insurance. As a result, Mr Sako sought to sue the WCNI, alleging it was liable pay him common law compensation in respect of the portion of his disease which was attributable to his employment with the uninsured Mr Harmes.

2.4. The WCNI disputed Mr Sako's claim, arguing that the current construction of the WC Act meant that it was not liable to pay common law compensation to workers suffering from "dust diseases".

2.5. A first instance, Judge Scotting of the Tribunal found the legal arguments to be sufficiently arguable and allowed Mr Sako to amend his claim to sue the WCNI (although, the Tribunal did not make a determination as to the actual issue as to whether or not the WCNI was liable to pay Mr Sako damages). The WCNI then appealed the decision to the NSW Court of Appeal.

2.6. Mr Sako argued that the WCNI scheme was intended to be a remedial measure benefiting all workers and that the legislation should be interpreted in a way that allowed him access to the scheme despite the unique treatment of dust disease claims.

2.7. The WCNI argued that claims for "dust disease" claims for non-dust-related workplace injury claims were historically distinct and referenced the different compensation pathways provided under the DD Act and the WC Act. It pointed to the specific statutory wording that associates the scheme with "injuries" under the WC Act. They argued that if Parliament had intended for "dust disease" workers to access the WCNI scheme, then it would have explicitly stated so in section 140 of the WC Act.

2.8. The NSW Court of Appeal unanimously found that the WCNI scheme was strictly limited to workers who suffer an "injury" within the meaning of the WC Act. The absence of any statutory

reference to dust diseases in section 140 of the WC Act reinforced the proposition that NSW Parliament did not intend for workers suffering from dust-related diseases to benefit from the scheme.

2.9. The immediate effect of the NSW Court of Appeal's decision was that Mr Sako could not pursue the WCNI for damages in respect to his employment with Mr Harmes, despite the fact that his employer's lack of WC Insurance was no fault of his own.

3. Submissions of the Australian Lawyers Alliance

3.1. **The ALA submits that the decision in *Sako* highlights that the current Workers Compensation scheme in NSW provides inadequate protection to workers who suffer dust-related diseases in circumstances where their employer(s) failed to obtain mandatory WC Insurance**.

3.2. *Sako* shows that in such circumstances a worker suffering from a dust disease will be unable to bring a claim against the WCNI in circumstances where a worker suffering from a non-dust-related diseases would be able to bring a claim. Instead, the only recourse for a worker suffering from a dust disease would be statutory benefits under the DD Act.

3.3. The ALA's position is that statutory benefits available under the DD Act are currently insufficient to properly compensate workers suffering from dust diseases, particularly younger workers, and workers who develop terminal or highly disabling diseases. The DD Act also provides no coverage for workers to pursue common law damages in respect of an uninsured employer. Therefore, employees of uninsured employers are at severe risk of being severely undercompensated for their injuries.

3.4. Further complicating matters for workers is the fact that there is no complete centralised registry of pre-1987 policies of WC Insurance issued to employers in NSW. This means that where employers no longer exist, claimants must undertake exhaustive investigations to attempt to establish whether an employer was properly insured. This can include searching historical Workers Compensation Commission archives, or attempting to track down former company Directors of Office Holders. This is an expensive and a time-consuming process, in an area of litigation where time is often of the essence. If a Statement of Claim is not filed in a worker's lifetime in NSW, their rights to General Damages are extinguished. Workers with a "dust disease" have the onerous task of trying to identify that insurance did exist.

3.5. **The ALA submits that no worker should be punished for their employers' failure to fulfil their legal obligations to take out proper insurance**. However, *Sako* shows that this is effectively what the current legislative scheme does in respect to workers suffering from dust-related diseases. It means that it is now the responsibility of employees to make sure that they are properly insured.

3.6. The uninsured indemnity scheme was first introduced to the NSW Workers' Compensation scheme by the *Workers' Compensation Act and Workmen's Compensation (Broken Hill) Act (Amendment) Act 1942* (NSW) which amended the *Workers' Compensation Act 1926* (NSW). This amendment allowed for statutory compensation under that Act to be paid to workers where their employer was uninsured.

3.7. Speaking in support of the Bill, the Honourable Hamilton Knight MLA, Minister for Labour, Industry, and Social Services told the Parliament:[1]

> *The most material defect in competitive compulsory insurance, which operates in this State and which does not arise with monopoly insurance which pays all injured workers – is the fact that there are some employers who, although "men of straw", employ workers but do not insure their liability to pay compensation to them when injured. The injured worker may obtain an award against the uninsured employer, but is unable to obtain any payment under it because the employer is without means of any kind and there is no insurer, and the injured worker or his widow, is left without any redress at all. We propose to remedy that material defect by constituting an uninsured liability scheme, to be administered by the Workers' Compensation Commission.*

3.8. **There is no evidence during any of the NSW Parliamentary debates of any desire of the legislature to differentiate between dust-related diseases and non-dust-related workplace injuries**.

3.9. The scheme was extended to an entitlement for injured workers to pursue modified common law damages (work injury damages) in related to uninsured employers by the *Workers Compensation Legislation Further Amendment Bill 2001* (NSW). This amendment followed specific recommendations by the Commission of Inquiry into Workers Compensation Common Law Matters conducted by the Honourable Justice Terry Sheahan. During the Second Reading speech for this amending Bill, the Honourable Henry Tsang MLC told the Parliament:[2]

> *The Bill improves the arrangements for workers whose employers are uninsured …*

[1] *Hansard*, NSW Legislative Assembly, 14 May 1942.
[2] *Hansard*, NSW Legislative Council, 19 November 2003.

The intention is to simplify the arrangements governing uninsured liability and place workers whose employers are uninsured on a similar footing to other workers making claims …

3.10. Once again, there was no suggestion of any intention to differentiate between workers suffering from dust diseases or non-dust injuries.

3.11. **The ALA, therefore, submits that it was never the intention of NSW Parliament when establishing the uninsured employer's scheme to specifically exclude workers suffering from dust diseases. We submit that Parliament had intended to establish the scheme as a universal safety net, and so the deficiency in the scheme highlighted in the decision of *Sako* is an accidental by-product of the defect in the drafting of the legislation**.

3.12. The ALA submits that there is no compelling policy reason for denying workers suffering from debilitating dust-related diseases access to common law damages in circumstances where their employer was uninsured.

3.13. **The Australian Lawyers Alliance makes the following further submissions to the Committee**:

1. **That the WC Act and/or DD Act be amended to make the WCNI liable to indemnify uninsured employers (or defunct employers where evidence of insurance cannot otherwise be located) for common law damages in claims brought by workers suffering from dust-related diseases; and**

2. **That surveillance and auditing of NSW employers' WC Insurance compliance be significantly improved, with increased penalties employers who fail in their obligations, including potential penalties for company Directors and Office Holders.**

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Thank you for your attention on this important matter. Please direct correspondence to Elenore Levi, ALA Policy and Advocacy Manager, at

Yours sincerely,

Nicole Valenti
Senior Member, Dust Diseases SIG
Australian Lawyers Alliance

Timothy McGinley
Senior Member, Dust Diseases SIG
Australian Lawyers Alliance