

CHAPTER 6

COMPENSATION

Access to compensation

6.1 Access to compensation as a result of workplace exposure to toxic dust is a complex issue. All Australian workers, excluding employees of the Commonwealth who are covered by the *Safety, Rehabilitation and Compensation Act 1986*, may access workers' compensation via separate legislation in every State and Territory as well as having the ability to apply for compensation under common law entitlements. The lack of a uniform compensation system results in inconsistent application of legal standards and precedence in compensation proceedings. The Australian Manufacturing Workers Union (AMWU) stated:

The predominant difficulty we have with [dust-related compensation] claims is the definition of what is eligible under workers compensation schemes, where the definition will be a significant and contributing factor related to people's work. For instance, there are issues around how much someone's work contributed versus how much someone's cigarette consumption contributed et cetera. We have dealt with that and sorted that out much better in the asbestos area, just because we have killed so many people. We do not know how that all works out in terms of other toxic dusts. That is very difficult to work out. There are problems about eligibility. There are then problems about causation and we do not know who has been exposed and all of those things...¹

6.2 The NSW Government established the Workers' Compensation (Dust Diseases) Board, a statutory authority that grants awards of compensation to all persons disabled for work as a consequence of a dust disease reasonably attributable to exposure to the inhalation of dust in a NSW occupation. Compensation may also be available to the dependents of these victims and their widows.

6.3 As well as compensation under the *Workers' Compensation (Dust Diseases) Act 1942*, victims of dust diseases may be entitled to damages at common law. Those claims are conducted before the Dust Diseases Tribunal of NSW, a highly specialised tribunal that deals solely with diseases caused by dust.²

6.4 In Victoria, the *Victorian Accident Compensation Act 1985* provides compensation for persons who have sustained an injury or health condition due to workplace injury or exposure. The Victorian Workcover Authority stated that 'the onset of a work-related disease (resulting from exposure to toxic dust) is treated no differently from an acute injury. Injured persons are entitled to be compensated for

1 *Committee Hansard* 29.9.05, p.84 (AMWU).

2 *Submission* 32, pp.8-9 (Dust Diseases Board).

loss of earnings and medical expenses and also have common law rights that can be exercised'.³

6.5 In November 2005, the Dust Diseases Bill was introduced into the South Australian Parliament. The Bill provided for a new regime for compensation for people injured as a result of dust disease, defined in the Bill as including asbestos related diseases or other diseases or pathological conditions resulting from exposure to dust. Following amendments, both in the Legislative Council and the House of Assembly, the operation of the Act was restricted solely to diseases resulting from exposure to asbestos.⁴ Workers affected by exposure to other dusts will remain covered by the South Australian *Workers Rehabilitation and Compensation Act 1986*.⁵

6.6 The AMWU provided the following comments on the Workers' Compensation (Dust Diseases) Board:

The current common law damages system that operates in New South Wales through the Dust Diseases Tribunal of New South Wales (the Tribunal) has been acknowledged as "world's best practice" by numerous commentators. Accordingly, extensive reform of the existing system for compensating victims of dust disease through the Tribunal is...both unnecessary and inappropriate.⁶

6.7 The Dust Diseases Board of NSW has been commended for assisting workers to gain compensation for exposure to toxic dust. However, Dr Thomas Faunce, Senior Lecturer at the Medical School and Law Faculty, Australian National University and the Construction, Forestry, Mining and Energy Union (CFMEU) highlight some restrictions of this State-based model:

Although organisations such as the Dust Diseases Board in New South Wales have done a good job and have a certain amount of money to fund resources, obviously that is limited by the financial restrictions of the fact that it is just a state.⁷

Authorities such as the Dust Diseases Board of NSW are instrumental in gaining compensation for workers. However, they are able to help only if the worker approaches them.⁸

6.8 The complexity surrounding State-based compensation schemes is confirmed by Dr John Bisby's, a consultant on Medical, Toxicology and Control Systems representing Cement Concrete and Aggregates Australia, statement on dust monitoring and medical testing processes:

3 *Submission 35*, p.2 (Victorian Workcover Authority).

4 Ebrief, www.normans.com.au/news/empl_issue37_jan2006.html

5 The Hon P Holloway, *Legislative Council Hansard*, 1.12.05.

6 *Submission 15*, Additional information, p.2. (AMWU).

7 *Committee Hansard* 10.11.05, p.49 (Dr T Faunce).

8 *Submission 13*, p.4 (CFMEU).

The Dust Diseases Board has various functions. They have a branch that does medical testing of workers. The WorkCover Authority of New South Wales has people who do dust monitoring, so both are done in New South Wales. To a certain extent this applies in all states. Each state really organises things differently. For example, Western Australia has regulations that require slightly different medical testing to any of the other states - and, indeed, different to the Commonwealth national recommendations. All X-rays in Western Australia go to the state government and they are reviewed medically at the state level, which I do not think happens in any other state.⁹

6.9 To reduce the inconsistencies in each State, the Australian Sandblasting Diseases Coalition (ASDC) recommended the creation of a national regulatory body, a National Toxic Dust Diseases Board. This board would investigate, adjudicate and where appropriate provide financial compensation for employees and their families whose health has been adversely affected by toxic dust diseases.

6.10 The ASDC further recommended that the:

National Toxic Dust Diseases Board would apply standards established on the best available scientific evidence by medical and epidemiological experts. In addition to this, the regulatory body would be in charge of distributing funds from the responsible employer corporations, to compensate for any medical, or other financial expenses, incurred by toxic dust associated diseases.¹⁰

6.11 The ability to seek compensation for exposure to toxic dust in the workplace is at times restricted by an employer structuring its corporate identity to protect assets from legal action and minimise liability. The AMWU provided this example:

James Hardie exploited the Corporations Act for its own purposes. Unfortunately this practice has become all too common. The AMWU is aware of both large and small corporations who put in place asset protection schemes which result in their employees, or victims and potential victims as the case may be, being unable to access the full and true assets and resources of the company in the event that the company enters administration or liquidation.¹¹

6.12 Dr Faunce recommended that the Committee consider the compensation improvements which are coming out of the British coal dust inquiry in terms of making it much more science based. Dr Faunce explained:

The long latency periods of silica are similar to asbestos, even though it is only a small aspect of the inquiry. All of these things create capacity for companies that want to avoid liability, to delay actions, to wait until people die, to obfuscate, to put on delay motions and to keep pushing things away

9 *Committee Hansard* 30.9.05, p.13 (Dr J Bisby)

10 *Submission* 25, p.2 (ASDC).

11 *Submission* 15, Additional Information p.4 (AMWU).

because of this long period. We need to have a compensation system that does not facilitate that sort of tactical gaming by an industry that does not want to pay compensation.¹²

6.13 Accessing compensation for a work related exposure to toxic dust is often confounded by a worker having a prior history of cigarette smoking. The Committee heard from many witnesses on the effect of cigarette smoking when determining compensation claims for respiratory illness from workplace exposure to toxic dust.

Over the past ten years Coal Miners Insurance (CMI) has not seen any cases of lung disease consistent with exposure to respirable coal dust or silica. The issue of workers' compensation for health effects from these two dusts is greatly confounded by self-inflicted exposures such as smoking.¹³

One of the main areas of controversy in this area, responsible for denying compensation, involves health problems such as asthma, silicosis, emphysema or excess sputum being ascribed exclusively to uncompensable cigarette smoking in workers with that history, regardless of exposure to toxic dust. This conclusion is not in accordance with the best recent scientific evidence or the approach emerging from the recent UK coal mining disease litigation and enquiry.¹⁴

6.14 The Committee notes the evidence provided by Dr Faunce on a British coal compensation case where the court recommended an approach to addressing the effect of cigarette smoking in toxic dust claims:

Disability in a toxic, dust-exposed cigarette smoker should not be regarded for compensation purposes as if it were entirely due to one cause or the other. Rather, [during the British coal litigation] the court decided that it should attempt to estimate as far as possible the contribution of each cause and then award compensation proportionally. A related recommendation was that compensation should prima facie be paid to any worker with chronic obstructive airways disease who had worked underground for 20 years in coalmining. But you could apply that to 20 years in sandblasting, even in the absence of pneumoconiosis on a chest X-ray. In other words, if you work in sandblasting for 20 years you are entitled to compensation if you have something wrong with your lungs. You do not have to go through this process. That is one approach that at least needs to be considered.¹⁵

6.15 To assist workers with the complexity as well as reduce the traditional adversarial nature of common law actions, Professor E Haydn Walters commented on the option of establishing a neutral expert panel to aid workers' access to compensation.

12 *Committee Hansard* 10.11.05, p.39 (Dr Faunce).

13 *Submission* 21, p.7 (Coal Services).

14 *Submission* 25, p.3 (ASDC).

15 *Committee Hansard* 10.11.05, p.38 (Dr Faunce).

In these situations, it is always difficult if you are advocating for somebody. I think it would probably be much better if the courts in some way could have a fairly neutral group who could try to dissect these issues. As you say, it is complex...A professional body, perhaps, which could give information to the courts, and perhaps in a neutral way to the plaintiffs themselves, would be quite useful...I think what you need is not confrontation with people being hired on one side or the other; what you need is neutral professional commentary from people who are aware of all the facts.¹⁶

Limitations in seeking legal redress

6.16 All Australian States have Limitations of Actions legislation which limit the time within which proceedings can be issued in relation to claims for damages for personal injuries. Limitation legislation is intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce a right or rights claimed by the plaintiff.

6.17 The ASDC noted that for cases where exposure to dust have occurred in NSW, there is no statute of limitation. If the exposure to dust occurred in other States, then the limitation laws of those States will apply.¹⁷ As silicosis has a latency period of anywhere between 10 to 30 years, this could dramatically effect the outcome for employees across Australia affected by the exposure of toxic dust and negligent work practices/regulations. The ASDC recommended that the Senate establish a regulatory body to allocate compensation claims nationally for those employees affected by toxic dust related diseases.¹⁸

6.18 Each jurisdiction in Australia now has a provision that allows for a limited extension of time in certain circumstances for civil claims. The circumstances in which extensions will be granted are, however, extremely restrictive in most jurisdictions. Generally a number of factors must be considered before leave can be given to issue proceedings out of time. These include the reasons for the delay, the prejudice that the defendant has suffered by the delay and the merit of the substantive claim.

6.19 Applications for an extension of time within which to issue proceedings are costly (in the range of \$10 000 to \$15 000 for each side) and there is no guarantee that leave to issue proceedings will be granted. If the application is unsuccessful, the applicant in addition to his or her own legal costs will be liable for the other side's legal costs.

16 *Committee Hansard* 10.11.2005. p,30 (Prof Walters).

17 *Submission 25*, p.10 (ASDC).

18 *Submission 25*, p.10 (ASDC).

6.20 Mr Fraser Hobday provided an example of problems in Western Australia with Statute Limitations and applications for extensions.

The proposal to change the current Limitations Act may assist some toxic substance victims, but the WA State Solicitor's Office argues against full discretionary extension powers to the judiciary that are exercised in nearly all other Australian States. So in this case, only plaintiffs that fit the fixed criteria will be granted an extension of time from a 3-year limitation period.

Unfortunately this will prevent the judiciary from being informed of all the reasons causing delay and acting in any discretionary manner. Therefore circumstances will arise where plaintiffs would have legitimate cause for a damages claim in other states in Australia, but not WA.¹⁹

6.21 The Australian Lawyers Alliance (ALA) identified the main barriers to legal redress for workers injured as a consequence of workplace exposure to toxic dust:

- the inadequacy of workers compensation benefits (including limits on compensation, inadequate provision for lump sums for permanently disabled workers and recovery of only a percentage of usual weekly income);
- the statutes of limitation;
- thresholds to the access of common law benefits both in employee and public liability claims (insofar as such claims are work-related through the use of defective products or injury at the premises of others);
- that damages available to an injured worker in lifetime do not enure for the benefit of their estate or dependants after death; and
- the abolition of claims for exemplary damages.²⁰

6.22 One barrier encountered by many witnesses when claiming compensation for occupational toxic dust exposure included the high cost of legal representation and process. The AMWU suggested that:

Necessary reforms should be directed to improving the delivery of damages to victims of dust disease in the most timely and cost effective manner possible. Procedures should be streamlined so as to reduce legal costs. The reduction of legal costs in the processing of compensation claims is a fundamental principle that UADFA supports. A reduction in legal costs, long term, maintains the pool of money available to compensate victims of dust disease. UADFA's primary aim is to ensure that the pool of money necessary to compensate victims remains available indefinitely into the future.²¹

19 *Submission 42*, p.6. (Mr AF Hobday).

20 *Submission 27*, p.4 (ALA).

21 *Submission 15*, Additional Information, p.2 (AMWU). The UADFA is collectively, the Asbestos Diseases Foundation of Australia, the Queensland Asbestos Related Diseases Support Society, the CFMEU (Construction Division – NSW), Maritime Union of Australia (NSW) and AMWU.

Alternative models of financial support

6.23 The Dust Diseases Board offers compensation to two types of categories of injured worker applicants including those still working and those who have retired. Retired workers certified by the Board as being disabled by a dust disease as a result of employment in New South Wales receive a compensation payment for the actual disability suffered, rather than for loss of earnings caused by the dust disease. These workers are paid according to the level of disability experienced, as assessed by the Medical Authority. Workers who are below retirement age or still in the workforce and who have been certified as being disabled by the dust disease will be paid according to the economic loss suffered.

6.24 Workers are entitled to receive weekly benefits which include an amount to acknowledge dependants as well as medical, hospital, ambulance, home care, palliative care and any other associated costs reasonably and properly incurred in the treatment of a dust disease.

6.25 The weekly amount varies, according to degree of disability, as certified by the Medical Authority. This normally ranges from 10 per cent disablement to 100 per cent disablement and is based upon the medical evidence provided. The Dust Diseases Board has a policy of reviewing the medical condition of all workers on a two to three year basis to monitor the level of their disability and ensure that the correct compensation entitlements are being distributed. Workers whose condition has deteriorated and who are able to produce supporting medical evidence can have their level of disability reviewed by the Medical Authority at their request.²²

6.26 Mr Richard White recommended a compensation scheme based on the 'Bernard Collaery model, which is basically the Veterans' Affairs model, including pension and entitlement with lump sum and flow-on entitlements that go with that'.²³

6.27 The ACTU provided the following comments relating to alternative models of financial support:

Statutory benefit schemes must be adequate to compensate workers for loss of income, medical expenses and ongoing care, dependants' support, travel, funeral and other expenses as well as projected superannuation entitlements up to retirement age. The provisions contained in statutory schemes ought to ensure that a claimant is entitled to weekly payments of compensation for total incapacity in situations where a worker may have some residual capacity for work like activity but is genuinely unable to obtain suitable employment.

In addition most schemes provide for lump sum payments for permanent impairment. It is critical to ensure that the assessment methods utilised by Compensation Schemes adequately assess the extent of impairment and

22 *Submission 32*, p.9 (Dust Diseases Board of NSW).

23 *Committee Hansard 10.11.05*, p.35 (Mr R White).

disability. Most schemes rely on the various editions of the American Medical Association Guides for the Evaluation of Permanent Impairment. These Guides are notorious for under assessment of respiratory conditions (other than for advanced conditions). Modification of the Guides, as is currently under consideration in Victoria, may be necessary.²⁴

6.28 The Committee discussed the value of having a scheme to compensate people for their medical expenses associated with getting diagnoses and treatment when they have been exposed to toxic dust. Mr Nickolas Karakasch, who has worked in sandblasting and protective coating industry for 40 years, supported the idea of such a scheme and stated:

At the moment it is a very long drawn-out process. The legal profession probably rub their hands and make a lot of money out of it, but if you can take that aspect out of it – there will always be the legal profession involved but I think that is a good idea – that would short-circuit all of these long delays, grief and heartache imposed on individuals and families associated with this sort of litigation.²⁵

6.29 The ALA provided their opinion on an alternative model of financial compensation being a levy scheme which would include no-fault arrangements and limited compensation paid to affected workers. The ALA stated:

As a fall-back, if all the other potential areas of compensation were exhausted without being able to be accessed and a worker was then left only with an ability to access medical costs because of the problems in accessing compensation, then I think it has merit. But there is no doubt the best means of addressing compensation is a combination of a statutory scheme and common law entitlements, which have been significantly restricted in recent years but, nonetheless, still serve a useful purpose.²⁶

6.30 Workers who become ill after working in occupations exposing them to toxic dust face many issues. Perhaps the most pressing are the need for accurate diagnosis, appropriate treatment and the ability to access a consistent, fair and clear compensation process. Evidence suggests that access to compensation for toxic dust exposure is difficult and vastly different depending on the State in which the claim is made. Various limitations, not only legislatively, exist to prevent access to compensation. A further factor causing confusion for these workers, who require help and need assistance, is the fact that a number of models for financial support exist. Each of these models differ in the way they compensate either the worker or their dependents for economic loss, non-economic loss, treatment and medical costs as a result of occupational exposure to toxic dust. There is a compelling case for compensation mechanisms to be available other than through litigation, and in circumstances that are more nationally consistent.

24 *Submission 28*, p.8 (ACTU).

25 *Committee Hansard 29.9.05*, p.43 (Mr N Karakasch).

26 *Committee Hansard 29.9.05*, pp.50 (ALA).

Recommendation 9

6.31 That State and Territory Governments move as soon as possible to set up nationally consistent identification, assessment and compensation mechanisms for persons affected by workplace related exposure to toxic dust and their families to at least the current New South Wales standard.

Recommendation 10

6.32 That the State and Territory Governments use the New South Wales *Workers' Compensation (Dust Diseases Act) 1942* as the model for this mechanism.

Recommendation 11

6.33 That the State and Territory Governments, other than New South Wales, move as soon as possible to adopt the approach of New South Wales to remove statutes of limitation that restrict legal proceedings for claims for personal injuries resulting from exposure to toxic dust.

