

2018 review of the Dust Diseases Scheme

Submission to the Standing Committee on Law and
Justice

2 November 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to make a submission to the Standing Committee on Law and Justice (Standing Committee) as it conducts its 2018 review of the Dust Diseases Scheme (DSS).
2. The ALA notes that this review appears to be limited to the iCare scheme. The ALA submits that this review should also consider the legislation and regulations that govern common law claims commenced in the Dust Diseases Tribunal of NSW.

Eligibility for compensation for dust diseases

3. A person who contracts a respiratory disease as a consequence of occupational exposure to a dust may have two complementary rights to compensation: common law rights and statutory rights.
4. A person who is totally or partially disabled for work as a consequence of a recognised dust disease is entitled to compensation pursuant to the *Workers' Compensation (Dust Diseases) Act, 1942* (the Act). The person must be a worker (or at least was a worker when exposed to the relevant dust) and must have a dust disease as defined by section 3 of the Act, which states:

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.

5. The diseases listed in Schedule 1 are: 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.
6. The determination as to whether a person has a dust disease is made by the Medical Assessment Panel of the Dust Diseases Authority (the Authority), the agency that determines claims for compensation under the Act.
7. Compensation payable pursuant to the Act includes payment of periodic compensation and payment/reimbursement of medical and related expenses.

8. The ALA has received reports from those who are in receipt of an award of compensation from the Authority which indicate that the scheme is presently working well. The Act and the Authority enjoy almost universal recognition by treating respiratory physicians, oncologists and cardiothoracic surgeons, such that a patient with a dust disease is invariably directed by the treating specialist to make contact with the Authority.

Definition of Dust Diseases

9. While there are 14 dust diseases listed in Schedule 1 of the Act, almost all compensation recipients suffer from just five of those diseases, those being the asbestos related diseases and silica-related diseases. There have been very few awards made with respect to the other diseases at all. Some (for example, byssinosis, a condition related to the inhalation of cotton dust) are almost redundant due to the decline of the relevant industries in Australia. Consequently, the list of diseases in Schedule 1 requires updating. An increasingly common form of respiratory disease arising from the inhalation of particulate matter in the work place is occupationally induced asthma. This is commonly caused by the inhalation of welding fumes and the like. Occupational asthma includes reactive airways dysfunction syndrome (RADS), chronic obstructive pulmonary disease (COPD) and the aggravation of pre-existing asthma. There are other occupational respiratory diseases which as a matter of common sense should be compensated under the Act on the basis that the prospective compensation recipients would have the same rights to common law damages as do current compensation recipients.
10. In the previous 2017 review several submissions called for a review of the definition of a dust disease covered by the Scheme as it had become outdated in terms of the diseases now commonly suffered by workers. The ALA submits that the definition should be extended to include such diseases as occupational asthma including RADS, dust-induced pulmonary fibrosis, COPD related to dust, fume and mist exposure. The ALA supports widening the definition to the catchall definition as covered by the *Dust Diseases Tribunal Act 1989*. This was discussed in the 2017 review at length and was highlighted in submissions made at the time, including by the Thoracic Society.²

² Thoracic Society of Australia and New Zealand (2017), *Submission to the NSW Legislative Council's Standing Committee Regarding the First Review of the Dust Diseases and Lifetime Care and Support Schemes*, available online at

11. Further to expanding the definition of dust disease covered by the scheme, the ALA notes that the incidence of silicosis from caesarstone cutting and manufactured stone continues to rise. The emergence of this disease was observed in the 2017 Review. The ALA submits that given the rising incidence of this disease, more education of the community about it and the risks involved is needed.

Issues of note in the iCare scheme

12. One outcome from the 2017 review was a simplified application form and the facility to complete an online application form. The ALA considers this to be a positive development which has eased the burden for those suffering by allowing them to lodge an application quickly and electronically. A feature of the new form is its relative brevity and the fact that the applicant no longer has to provide an exhaustive employment history in the application as was once the case.
13. Although initially reluctant, the Authority has approved funding in appropriate cases to cover the cost of immunotherapy in treatment of malignant mesothelioma. While limitations on the number of treatments still apply, the cost of such treatment is prohibitive (immunotherapy is not covered by the PBS) and this change in policy has been of great benefit to compensation recipients who have contracted mesothelioma.
14. The ALA understand that most recipients of compensation under the Act are satisfied with the manner in which the Authority deals with them and the manner in which the Authority delivers relevant services whether directly or through a contractor.
15. The ALA is concerned that as the overwhelming majority of recipients of compensation under the Act are elderly people, many are unaware of their potential entitlement to the provision of services such as lawn mowing and gardening paid for by the Authority. A person whose recognised level of disablement is 15% or more may qualify for the provision of such services as well as paid nursing care and related services. Where the recipient has a malignant and terminal condition, the need for such services is an inevitable consequence of the progression of the disease and so the person will ultimately find out, one way or another, that the Authority will pay for such services. However, a person with a benign condition often remains

<<https://www.parliament.nsw.gov.au/lcdocs/submissions/57597/0004%20The%20Thoracic%20Society%20of%20Australia%20and%20New%20Zealand.pdf>>

ignorant of the fact that he or she can apply to the Authority for the provision of services. While it is true that information published by the Authority makes the existence of these services plain, it is often the case that elderly persons do not read or comprehend the material for one reason or another.

16. The ALA recommends that the Authority review the claim of each compensation recipient with a level of disability of 15% or more to proactively determine if they have a need for such services.
17. As noted above, the overwhelming majority of recipients of compensation under the Act are elderly people. Many are retired working people of limited means. Almost all are in receipt of the Age Pension from Centrelink. Periodic compensation payments paid by the Authority to the recipient are treated as income by Centrelink. Consequently, there is a reduction in Centrelink benefit received by the compensation recipient. This leads to the situation where the compensation awarded by the Authority is of no practical benefit to the recipient in many cases. In fact, it increases the burden on the recipient because they now have income coming from two sources and must satisfy the administrative requirements of both. The ALA considers that this issue should be considered by the state and federal governments. Given the low number of people receiving compensation under the Act, consideration could be given to 'quarantining' the periodic compensation paid from the income test used by Centrelink or making periodic payments of compensation tax-free. Such initiatives would result in compensation payments being just that: compensation.
18. In addition, when elderly workers already in receipt of a Centrelink age pension receive periodic compensation payments paid by the Authority, this may result in the cancellation of their Centrelink age pension. This results in them losing their pensioner concession card which entitles them to a range of concessional benefits including public transport concessions, concessional rebates on their council and water rates, and reductions on car registration fees and the like. As a result they are at risk of incurring significant financial penalties merely by virtue of the fact that their age pension has been replaced by the periodic compensation payment from the Authority.
19. In relation to iCare - Dust Diseases Care, the ALA submits that the amount available for funeral expenses for deceased workers is inadequate. The amount has been capped at \$9,000 and has not increased since 2004. The ALA submits that an increase in the funeral expenses is warranted.

The Dust Diseases Tribunal

20. Unlike other compensation regimes, a person with an occupational dust disease can exercise his or her common law rights as well as continuing to receive statutory compensation under the Act. The ALA notes that this review appears to be focused on iCare - Dust Diseases Care. The ALA submits that this review should also consider the legislation and regulations that govern common law claims commenced in the Dust Diseases Tribunal ('DDT') of NSW.
21. In relation to claims before the DDT, the ALA is concerned that an increasing number of plaintiffs are dying before their claim is finalised. This is due to the fact that the practical effect of the Regulations that govern a claim is to extend the time frame in which a claim can be finalised, simply to allow cross claims to be issued and apportionment issues between a defendant and cross defendants to be addressed. This is despite the fact that the plaintiff's claim is often made against a former employer and the plaintiff may have little knowledge about the connection between the employer and the cross defendants joined. Further, the Regulations require a plaintiff to grant a defendant further time to file cross claims, even in circumstances where a defendant knows full well the identity of prospective cross defendants from prior experience. The ALA considers that these delays cause considerable hardship and distress to the plaintiffs, many of whose claims to compensation are not finalised prior to their death. The ALA considers this to be manifestly unjust.
22. The ALA notes that there is no overlap between the scheme and the DDT. A worker who is awarded compensation under the iCare scheme receives a pension, medical expenses and some assistance around their home. The same worker is entitled to bring a common law claim in the Tribunal for damages. If a claim is brought in the DDT the worker cannot claim the medical expenses as they are already paid by the Scheme. In addition, if the worker receives damages from a Tribunal claim, she/he will continue to receive their benefits from iCare. The ALA submits that this interaction between the scheme and the common law system works well and should not be amended or altered in any way.

Conclusion

23. The ALA welcomes the opportunity to have input into the 2018 review of the Dust Diseases Scheme conducted by the Standing Committee. The ALA would also welcome the opportunity to appear before the Committee at the scheduled hearing for this inquiry.

Yours Sincerely,

Andrew Stone SC

A handwritten signature in blue ink that reads "Andrew Stone". The signature is written in a cursive, flowing style.

NSW President

Australian Lawyers Alliance