

2021 Review of the Dust Diseases Scheme

Submission to the NSW Legislative Council Standing Committee on Law and Justice

Date: 8 December 2021

On behalf of: Daniel Walton, AWU National Secretary and Tony Callinan, NSW Secretary



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Overview

Thank you to the Committee for the opportunity to make this submission on the issues raised in the Review's Terms of Reference.

The Australian Workers' Union ('**AWU**') represents members in a diverse range of industries. Our workers in tunnelling, quarrying, cement work, mining and construction are among those facing the greatest risk from silica exposure in the workplace.

The AWU will focus this submission on the current silicosis epidemic. However, this does not reduce the importance of ongoing vigilance for other dust disease risks such as asbestosis and mesothelioma. Further, the use of the word 'silicosis' for the purpose of this submission includes silicosis and silicosis related diseases such as chronic obstructive pulmonary disease (COPD), kidney disease and renal failure, scleroderma, rheumatoid arthritis, tuberculosis, eye irritation and eye disease.

The AWU understands the terms of reference of this review are focused on the New South Wales Workers Compensation (Dust Diseases) Scheme ('**Dust Diseases Scheme**'), a no-fault scheme for New South Wales workers who have developed a dust disease from occupational exposure to hazardous dust – that is, all New South Wales workers who have developed a dust disease.

It is noted that the current review is concentrated on the engineered stone industry (as were prior reviews). While the AWU understands there is a particular crisis in this industry and supports swift preventative and regulatory action, the focus of the NSW Government must not be limited to the engineered stone industry.

Workers exposed to silica dust in tunnelling, quarrying, cement work, mining, construction, and other industries must be given equal consideration for the purpose of this review and any subsequent recommendations.

Silica dust does not discriminate based on what industry you work in. The state will see a tsunami of silicosis in the coming years and decades if swift preventative, regulatory and compensatory measures are not quickly adopted by governments to protect workers exposed to silica dust.

We would welcome the opportunity to appear before the Committee to provide further evidence.

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Recommendations

RECOMMENDATION 1: The current workplace health and safety crisis caused by silica dust is not limited to silicosis in the stone bench industry. Government responses must consider all industries where silica dust exposure is a risk, including, but not limited to:

- tunnelling
- quarrying
- cement work
- mining
- construction.

RECOMMENDATION 2: The NSW Parliament must overhaul the *Work Health and Safety Act 2011* and *Work Health and Safety Regulation 2017* (WHS Act and Regulations) to provide protections for all workers involved in high-risk silica work, based on the Victorian regulatory model. These changes must define high-risk silica work and require clear and concise standards for the person conducting a business or undertaking ('PCBU') to meet in order for work to commence, and to allow for work to cease if risk assessments and hazard statements are not complied with. The ability for a PCBU to rely upon the current regulatory 'reasonable grounds' provisions under clause 50(1)(a) must be removed for silica dust.

RECOMMENDATION 3: The NSW Government should ensure that continued support and assistance is provided to workers diagnosed with silicosis in the following ways:

- (i) Work with industry to ensure that full financial compensation is provided for more than 26 weeks, until a worker has found alternative employment or successfully receives common law compensation; and
- (ii) Ensure ongoing health and medical support, including mental health support, is provided to all workers. The mental health assistance must also be extended to a worker's immediate family.

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RECOMMENDATION 4: The NSW Government should immediately adopt and provide additional funding for High-Resolution Computed Tomography (HRCT) screening for all workers exposed to silica dust.

RECOMMENDATION 5: The NSW Parliament should amend the current WHS Act and Regulations to provide Health and Safety Representatives ('HSR') with rights equal to Safe Work Inspectors for the purpose of addressing silica exposure on site, and for representatives of HSRs to prosecute employers directly for non-compliance with minimum safety benchmarks.

RECOMMENDATION 6: The NSW Parliament should amend the WHS Act and Regulations to increase penalties for PCBU non-compliance.

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1 Silicosis risks extend beyond the stone benchtop industry

The current silica epidemic in the engineered stone industry in Australia is in part linked to the growth in popularity of artificial stone products (also known as ‘engineered stone’). Crystalline silica levels in manufactured stone are typically 93 per cent or higher. This increase in artificial stone products, coupled with poor regulatory measures and business structures, has exacerbated silicosis for workers in the industry. Silicosis, however, is not limited to the engineered stone industry. Crystalline silica levels in sandstone range from 70 to 100 per cent, cement and mortar from 25 to 70 per cent, granite typically 30 per cent and slate from 20 – 40 per cent.¹

The National Dust Diseases Taskforce’s Final Report to Minister for Health and Aged Care, published in June 2021, expressly accepted the AWU’s submission that risks associated with exposure to silica dust are not confined to the engineered stone industry.

The Final Report includes the following in its ‘Final Recommendations’:

The evidence presented also shows that the risk to workers of developing dust disease is not confined to the engineered stone industry which includes small business and domestic settings, but spans other industrial settings such as mining, sandblasting and construction. Systemic change is required to improve protection for all people who work in dust generating industries.²

The incidence of silicosis in industries outside the engineered stone benchtop industry has extraordinarily bad potential as there are approximately 600,000³ Australian workers currently exposed to silica dust. Stone masons only make up, 4,400⁴ of the 600,000 workers, that is, less than one percent.

For this reason, it is disappointing that the Committee has restricted its scope to the manufactured

¹ Office of Industrial Relations, Workplace Health and Safety QLD, Managing respirable crystalline silica dust exposure in the stone benchtop industry Code of Practice 2019, p6

² National Dust Disease Taskforce, Final Report to Minister for Health and Aged Care, June 2021, p 10

³ <https://www.cancerwa.asn.au/articles/news-2017/silica-dust-the-cancer-risk-tradies-cannot-see/>

⁴ <https://joboutlook.gov.au/occupations/stonemasons?occupationCode=331112>

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stone industry. The AWU submits that the Committee should consider silica dust exposure risks in all industries.

RECOMMENDATION 1: The current workplace health and safety crisis caused by silica dust is not limited to silicosis in the stone bench industry. Government responses must consider all industries where silica dust exposure is a risk, including, but not limited to:

- tunnelling
- quarrying
- cement work
- mining
- construction.

2 The impact of work health safety legislation and regulations

Given the projected increase in larger civil construction ‘mega projects’,⁵ it is expected that there will be increases in workplace illnesses brought on by exposure to crystalline silica dust. This highlights the need for a **stronger regulatory framework** which captures workers in all industries and **suitable worker compensation** laws that provide ongoing financial support and compensation.

The NSW Dust Strategy 2020 – 2022⁶ seemingly takes the view that the current silica epidemic is a compliance issue that can be fixed by safety inspections and audits under the existing WHS framework. Yet more and more cases of silicosis are being found, and most states have changed their regulations to protect workers from the specific risks of silica dust exposure – beginning in the engineered stone industry and increasingly for all industries. As a result, New South Wales is failing its workers by lagging behind other states’ regulatory protections. The Victorian Government, through WorkSafe, has strengthened the regulatory requirements in relation to exposure to respirable crystalline silica by

⁵ Australian Constructors Association, Sustaining the infrastructure industry Challenges, solutions and case studies Response to Infrastructure Australia’s Australian Infrastructure Audit 2019, <https://www.constructors.com.au/wp-content/uploads/2020/09/ACA-IA-Response-Final-Version.pdf>, September 2020, p 15

⁶ SafeWork NSW, NSW Dust Strategy 2020-2022, https://www.safework.nsw.gov.au/data/assets/pdf_file/0004/923431/NSW-Dust-Strategy-2020-2022.pdf

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developing the *Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021* (Vic). These regulations provide clear requirements for risk assessments and information relating to the control measures for reducing exposure to respirable crystalline silica dust. Importantly, the new regulations expressly provide protection for all workers exposed to high-risk silica work.

For this reason, the AWU proposes the Committee recommend changes to the WHS Act and Regulations to address these shortcomings.

RECOMMENDATION 2: The NSW Parliament must overhaul the Work Health and Safety Act and Regulations to provide protections for all workers involved in high-risk silica work based on the Victorian regulatory model. These changes must define high-risk silica work and require clear and concise standards for the PCBU to meet in order for work to commence and to allow for work to cease if risk assessments and hazard statements are not complied with. The ability for a PCBU to rely upon the current regulatory ‘reasonable grounds’ provisions under clause 50(1)(a) must be removed for silica dust.

3 Ongoing physical and mental health consequences of a silicosis diagnosis

The Victorian Government has taken proactive steps in relation to this epidemic from an OHS regulatory perspective. More work, however, is needed to protect workers once there has been a diagnosis of silicosis with consideration as to the latency of the disease and the capacity for the worker to find future employment. Academic research has found:

*Being a chronic health hazard, the latency between exposure and the development of silicosis is typically 20 to 30 years. However, when quartz is freshly fractured, as is the case with tunnelling and construction, the toxicity of silica increases, which in turn can reduce the latency period down to 10 to 20 years.*⁷

AWU members have reported a lack of confidence in the NSW workers’ compensation provisions for sufferers of silicosis due to fears of inadequate financial and mental health support. The AWU believes that this lack of confidence leads to workers who would otherwise come forward hiding their concerns, real or otherwise, for fear of losing their job and being left with inadequate support.

⁷ Cole, K. Investigating best practice to prevent illness and disease in tunnel construction workers, 2016, p7

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Silicosis is potentially a death sentence. The Dust Diseases Scheme must have greater consideration for the stressful situation that a positive diagnosis puts workers and their families through. AWU members and their families have reported great psychological stress when diagnosed, particularly given the nature of the construction industry. Many family units in the construction industry operate traditionally, that is, the partner working in construction is typically the sole income provider.

Greater support for workers with silicosis should be provided beyond the current statutory limits. It is noted that NSW workers diagnosed with silicosis are paid a pension (wage replacement) by iCare Dust Diseases Care, but that pension is pro-rata to reflect their level of disablement from their silicosis and how much exposure they have had in NSW (as opposed to other states). For example, if a worker with silicosis has 10% disability and 50% of their exposure occurred in NSW, then their pension entitlement will be reduced to reflect this. Further, after the first 6 months or 26 weeks, the worker's pension is dropped back to the minimum statutory rate which would be further pro-rated depending on their level of disablement and percentage of exposure in NSW.

Accordingly, workers with silicosis are faced with a situation of being stranded in the dire situation of being effectively placed on the minimum wage (or less depending on disablement) after the initial statutory 26 week period. Workers then must decide to file a common law claim which may not ultimately provide full replacement income and will certainly not be provided in a timely way. These workers require urgent financial support and assistance. A potential further common law claim may be made under certain circumstances should that worker develop a further type of silica related disease (including a cancer or severe auto-immune disease). However, this process is extremely draining and time consuming.

The AWU submits that the NSW Government must work with industry to provide financial and mental health support for workers with silicosis.

RECOMMENDATION 3: The NSW Government should ensure that continued support and assistance is provided to workers diagnosed with silicosis in the following ways:

- (i) Work with industry to ensure that full financial compensation is provided for more than 26 weeks, until a worker has found alternative employment or successfully receives common law compensation; and

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- (ii) Ensure ongoing health and medical support, including mental health support, is provided to all workers. The mental health assistance must also be extended to a worker's immediate family.

The workers currently at risk may not be identified as victims of silicosis until 2030 onwards and many will be misdiagnosed as having other lung diseases because of monitoring and screening deficiencies.

Lung Function Tests and chest x-rays are now firmly considered insufficient as a monitoring and screening tool. The implementation of High-Resolution Computed Tomography (HRCT) screening for silicosis has been identified as superior in identifying silicosis.⁸

RECOMMENDATION 4: The NSW Government immediately adopt and provide additional funding for HRCT screening for all workers exposed to silica dust.

4 Case Study: A Look at Tunnelling

The Australian Workers' Union represents tunnelling workers.

Silica represents the highest risk of developing an occupational illness and disease for Australian tunnelling workers.⁹

Silicosis has plagued sandstone workers in Australia since the early 1900s. After an initially recorded epidemic in the early 1900s, and then again in the 1920s and 1930s, and yet again in the 1950s and 1960s, waves of disease due to exposure to high levels of silica dust during construction, are part of Australia's dark industrial history.¹⁰

⁸ Austin EK, James C and Tessier J, Early Detection Methods for Silicosis and Internationally: A Review of the Literature, International Journal of Environmental Research and Public Health, 18(15), August 2021, p 8 and 123.

⁹ WHSQ, "Occupational dust and silica conditions in some Queensland construction and related industries," State of Queensland (Department of Justice and Attorney-General), QLD, 2013.

¹⁰ Cole, K. Investigating best practice to prevent illness and disease in tunnel construction workers, 2016, p3

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More recently, there has been a significant boom in tunnelling since 2016, the highest in the last two decades. In 2018, seven major tunnelling projects commenced, with each project requiring approximately 4,000 workers.¹¹ Almost two-thirds of such tunnelling projects will take place in Sydney.

Sydney's shale and sandstone characteristics afford huge benefits when constructing tunnels, however, such benefits are met with dangers for workers as the high quartz-containing rock generates silica dust when it is cut, crushed, hammered, sawed into, or otherwise disturbed. While primarily a danger for tunnelling workers, it also poses a risk for the broader construction industry.

Studies have shown that tunnel workers had the highest measured exposures to silica, with carcinogenic diesel exhaust exposure also presenting a risk to health, these workers are at a high risk of developing diseases associated with those occupational exposures.¹²

In NSW, the NorthConnex tunnel, commissioned by the NSW State Government was required to be shut down on numerous occasions in a 12-month period for failing to provide adequate ventilation. Additionally, the NSW WestConnex Haberfield tunnel site has also demonstrated poor ventilation, exposing workers to high levels of silica dust.

More recently, AWU Organisers, Delegates and HSRs have regularly found poor examples of air quality in tunnels. This is in part due to the quickly changing conditions in tunnels, mixed with a managerial culture of productivity trumping safety. Not one tunnel or section of tunnel in Sydney has avoided being shut down.

There is a significant power imbalance between workers and industry. A way to bring some balance to the relationship is to broaden the powers of HSRs by providing them the same rights as a Safe Work Inspector in addressing silica dust exposure in the workplace. Including the power for workers and their representatives to prosecute employers directly for non-compliance with minimum safety benchmarks. This will also assist State Regulators, who are resource stricken and unable to attend most sites to carry out audits, enforce compliance with current WHS laws/regulations or prosecute

¹¹ Ibid p.122

¹² Ibid p.7

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repeated offenders.

RECOMMENDATION 5: Amend the current WHS Act and Regulations to provide HSRs with rights equal to Safe Work Inspectors for the purpose of addressing silica exposure on site and for representatives of HSRs to prosecute employers directly for non-compliance with minimum safety benchmarks.

Most importantly, even if guidelines, codes, regulations and laws change in order to adequately protect workers going forward, they will have no effect unless they are policed and enforced and there are tough penalties imposed for non-compliance. There must be clear and severe penalties for breaches of the minimum benchmarks.

RECOMMENDATION 6: Penalties for PCBU non-compliance with the WHS Act and Regulations must be increased

If greater focus is not placed on tunnelling, it will leave workers in the industry with an impending silicosis death sentence in the coming years. The tunnels that NSW residents drive through as they go about their lives will metaphorically act as an epitaph to the workers who created them. The NSW Government must also focus its attention on the dangers present in quarrying, cement work, mining and construction.