SENATE INQUIRY INTO WORKPLACE EXPOSURE TO TOXIC DUST

AUSTRALIAN LAWYERS ALLIANCE

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CONTACT:

Rezana Karim

Legal and Policy Officer

Phone: 02 9258 7700
Fax: 02 9258 7777
Email: rezana@lawyersalliance.com.au

SUBMISSION TO SENATE INQUIRY INTO WORKPLACE EXPOSURE TO TOXIC DUST

Introduction

Australia is experiencing an epidemic of illness caused by workplace exposure to toxic dust. Principal among these illnesses are asbestos-related diseases (which are estimated as likely to cause up to 30,000 workplace deaths) and silicosis.

In 1947 Australia's Dr W.E George told an international mining conference that the technology existed to ensure that no worker in the mines should ever suffer silicosis again.[1]

In the 1970s predictions were published in the media that the construction of tunnels in NSW would lead to an epidemic of silicosis.

It is now clear that exposure to silica dust, like asbestos, increases the risk of lung cancer.[2]

Australian Lawyers Alliance members are representing silicosis and lung cancer sufferers whose first exposure to silica occurred in the 1980s.

It is a scandal of the worst proportions that Australian workers were permitted to be exposed to toxic substances so long after the dangers were well known.

[1] Australia Parliament House of Representatives Standing Committee on Aboriginal Affairs and Hand, G. L. (1984). *The effects of asbestos mining on the Baryulgil community: report of the House of Representatives Standing Committee on Aboriginal Affairs*, AGPS, Canberra.

[2] IARC (1997); Checkoway et al (1999); NOHSC (2003); Hughes & Weill (2001); de Klerk & Musk (1998).

(a) The health impacts of workplace exposure to toxic dust including exposure to silica in sandblasting and other occupations.

This is principally a medical question and therefore, the Australian Lawyers Alliance will leave submissions to those with this expertise.

However, Lawyers Alliance members are concerned, that there are many in the medical profession who are poorly trained in recognition and diagnosis of the variety of health effects consequent of workplace exposure to toxic dust.

Often a disease or illness will be diagnosed, but with little thought and information given to the worker as to the cause or source of the illness. Therefore, the problem is not addressed and the worker does not know that he or she may access compensation benefits. Exposure will often continue in these circumstances, giving rise to a worsening of the condition.

Many Limitation statutes have not been drafted or amended to take into account toxic dust exposure-related conditions. Many workers, unaware that their injury is work-related, or continuing to be exposed after the injury has passed a stage that is more than minimal (and thus setting statute of limitation time running against them), find that they are statute-barred for the purpose of pursuing a common law damages claim, which would otherwise be open to them. We deal with this matter further in *term (f)*.

Recommendation

Greater emphasis on workplace diseases in medical courses and post-graduate continuing medical education, so that there is timely recognition of workers suffering such diseases so that the cause can be addressed and workers can seek redress in a timely manner.

(b) The adequacy and timeliness of regulation governing workplace exposure, safety precautions and the effectiveness of techniques used to assess airborne dust concentrations and toxicity.

The problem most often encountered by Lawyers Alliance members in the context of the enforcement of regulations (insofar as they exist) is that officers practicing in corporate Industrial Hygiene and Health (and sometimes those in private practice in such disciplines), often identify too readily with their employer, and fail to take sufficiently stringent or timely action to enforce compliance with such regulations. This results in the exposure of many workers to toxic hazards and greater quantities thereof.

Recommendation

There needs to be greater education and enforcement of regulations relating to workplace toxic dust hazards. Ensure, perhaps by prosecution, the accountability of all in the chain of responsibility from Directors to Industrial Hygiene and Health Officers.

(c) The extent to which employers and employees are informed of the risk of workplace dust inhalation

Employers have a common law duty to stay abreast of hazards to which their workers are to be exposed in the workplace.

Occupational Health and Safety statutes mandate a similar, sometimes a greater awareness of such hazards.

Accordingly there is no excuse for any employer to be ignorant of the hazards to which workers are exposed. The apparent lack of knowledge in many cases suggest the failure of regulatory and enforcement regimes.

In such circumstances it is submitted that the only effective remedy is personal liability of Directors for workplace injuries. It is remarkable how quickly the attention of a Board can become focussed on the nature and extent of workplace hazards in the event of such potential repercussions. The penalties must be sufficiently commensurate with the seriousness of the consequence of failure to protect from the hazard. Fines (even of significant amounts) often become just another cost or provisional cost of business (or insurance).

Recommendation

Ensure a nationwide system of personal liability of Directors for workplace hazards in breach of common law or statutory duty, and in particular where resulting in injury or death. Ensure penalties are significant.

(d) The availability of accurate diagnoses and medical services for those affected and the financial and social burden of such conditions.

This is principally a medical question and therefore the Australian Lawyers Alliance will leave submissions to those with this expertise.

(e) The availability of accurate records on the nature and extent of illness, disability and death, diagnosis, morbidity and treatment.

This is principally a medical question and therefore the Australian Lawyers Alliance will leave submissions to those with this expertise.

(f) Access to compensation, limitations in seeking legal redress and alternative models of financial support for affected individuals and their families.

The principal barriers to legal redress for workers injured as a consequence of workplace exposure to toxic dust relate to;

1. 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);

2. the statutes of Limitation;

3. 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);

4. that damages available to an injured worker in lifetime do not enure for the benefit of their estate or dependants after death;

5. the abolition of claims for exemplary damages.

Statutes of Limitation

The diseases caused by toxic dust in the workplace are often latent, arising many years after exposure, and insidious. They are notoriously afflicted by misdiagnosis or a failure to relate, or to inform the worker of the relationship, to a workplace hazard.

All of these factors combine to ensure that statutes of limitation that prescribe the time for commencement of workplace injury claims in most circumstances are inadequate and harsh in relation to claims that relate to exposure to toxic dusts.

For example, some schemes have long-stop provisions that cut in at 12 years after exposure. With some latent illness, such a period is manifestly too short to enable many such diseases to become apparent, to be investigated and related to workplace exposure and to be the subject of appropriate court proceedings.

Another limitation problem is that some conditions (eg silicosis) are caused immediately upon exposure to the hazard and thus a cause of action is complete long before the symptoms, let alone the full disabling effects, become apparent. This was the situation addressed in amendments to limitation statutes in England after the failure of the worker's silicosis claim in *Cartledge v Jopling* [1963] AC 758. The Law Lords criticised the unfairness of such an approach in that case. Since then, legislatures have been amending statutes to avoid this unfairness by substituting discoverability and awareness of symptoms as the requirement eg s 38A *Limitation Act* 1935 (WA); s 5 (1A) *Limitation of Actions Act* 1958 (Vic). Unfortunately some state statutes still commence time running from the suffering of first damage (even if undetectable) and this is a situation that must be remedied. The anomalous situation that exists in WA where the *Limitation Act* was amended to overcome this problem, with persons suffering asbestos related diseases but not any other latent disease from toxic hazards is a particular problem.[3]

Some state limitation statutes provide for Courts to extend time to commence actions, but the application of concepts such as "presumptive prejudice" caused by the overflow of time, which operate against the exercise of the discretion to extend, must be ameliorated in the circumstances of latent diseases caused by toxic dusts. This also applies where workers, who will have had no idea at the time of exposure of the hazardous nature of the dust (as a result of the absence of warning, training or protection), will be prevented from pursuing a claim through the very ignorance that vests them with a cause of action in negligence.

Recommendation

Ensure all state longstop provisions are sufficiently long to cover the latency periods of diseases caused by exposure to toxic dusts, or have the provisions commence upon reasonable discoverability of the condition and the right of action.

Recommendation

All Limitation statutes should be extended, in the case of latent diseases caused by inhalation of toxic dusts. The cause of action should accrue when the person first becomes aware of the symptom and that was caused by the negligence of some person.

Recommendation

Abolish by statute the presumptive prejudice and prejudice formed as a result of the period of latency, in claims where an extension of time is sought to commence proceedings for latent injuries caused by inhalation of toxic workplace dusts.

[3] see J Gordon 'Latent Diseases and the Limitation Act (WA) (1935-1978),' (1987) *Kalgoorlie Juridical Quarterly*, Vol 1, no. 4, August 1987.

Thresholds

In its early stages many latent, progressive diseases such as silicosis and asbestosis are mild in effect, perhaps not even resulting in a work-related disability. However, limitation statutes (even where they are based upon knowledge of the condition) require proceedings to be commenced within a short period of time; sometimes 1 year, usually 3 years.

However, often a worker is precluded from commencing proceedings for damages at common law, however egregious might have been the conduct that has caused the condition, because of the existence of a threshold which requires an injury to be "serious" defined by reference to a percentage disability impairment or otherwise. These are summarised in the attached table (HWCA Table bottom p 28 to end p 31).

Accordingly, at an early stage of the disease, when a worker is able to bring a claim without difficulty and when the need for medical intervention and treatment may be critical, a worker is often precluded from bringing a claim for damages due to these thresholds.

Later, when a worker's disability has progressed to the point where they can satisfy the threshold, they may well be out of time under the statute of Limitations or so seriously ill that their ability to pursue their claim is compromised.

Recommendation

Abolish or ameliorate thresholds that prevent latent and progressive disease common law damage claims being commenced upon the worker first becoming aware that they are suffering from such condition.

Survival of Claims

Many diseases caused by toxic workplace dusts are fatal and often within a very short period of time after diagnosis.

In Victoria and New South Wales all heads of common law damages available during lifetime to persons suffering such illnesses, including damages for pain and suffering, loss of enjoyment of life and lost expectation of life, have been preserved by statute for claims brought on behalf of the estate of such persons after their death (Vic; s 29, Administration and Probate Act 1958; NSW; s 12B *Dust Diseases Tribunal Act* 1989). In Western Australia and South Australia such damages are preserved for asbestos claims.

Recommendation

Given the nature of these conditions damages for pain and suffering, loss of enjoyment of life and lost expectation of life, should be preserved beyond the life of the sufferer in all jurisdictions. Moreover as knowledge develops, for example, the confirmation that exposure to silica is a risk for occupational lung cancer, the schedules of diseases for which such awards are preserved should be amended to ensure they are consistent with such developments.

Exemplary damages

One of the consequences of the widespread tort reform that spread through Australia in recent years was the abolition of claims for exemplary damages.

Exemplary damages are only available in claims where the conduct causing injury (but not death) is so egregious and contumelious that the Court considers that societal disapproval of such conduct should be imposed in the form of exemplary or punitive damages.

In *Gray v Motor Accident Commission* (1998) 196 CLR 1, in a joint judgment, Gleeson CJ, McHugh, Gummow and Hayne JJ, made these observations (at 6 –9);

"Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. ….[A]lthough awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it. … [I]t arises (chiefly, if not exclusively) in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights."

In *Midalco Pty Ltd v Rabenalt* [1989] VR 461, the worker brought a claim for damages for a mesothelioma suffered by reason of the exposure to asbestos of a worker at CSR's notorious Wittenoom mine in 1960-61. In the leading judgment, Kaye J reviewed the evidence of the knowledge of disease risks, the extensive library of materials held by CSR, and evidence of the warnings of the dangers given by health and mines department officials to the mine management (at 464-466). To the contention that reckless misconduct warranting an award of exemplary damages had not been established on the evidence, Kaye J. concluded (at 473);

"Finally, having regard to the weight of uncontradicted evidence of information concerning the risks to which its employees were exposed in the mill and mine, and the continued poor conditions prevailing in the mill and mine, I consider that a strong case supporting a finding of recklessness – indeed of continuing, conscious and contumelious disregard by the defendant for the plaintiff's right to be free from risk[ing] of injury or disease- was made out. A finding to the contrary might have been arguably against the evidence and the weight of evidence."

In *Trend Management Ltd v Borg* [1996] 40 NSWLR 500, the New South Wales Court of Appeal held, in a claim where a worker had suffered industrial asthma after negligently being exposed to wood dust in the 1970s to 1982, that such an award was available in a claim by an employee against an employer, based on negligence (at 504), and that such an award could be made where it could be shown that during the employment, the employer showed a conscious and contumelious disregard for the employee's health in circumstances in which the employer knew what should have been done, and could have done it (at 507). In finding the award not justified in the particular circumstances of that case, Mahoney P., (with whom Meagher and Powell JJA agreed), observed, in dicta (at 504);

"In my opinion the Court should not exclude the possibility that conduct which is of this kind and is of an appropriate degree of contumeliousness can warrant an award of exemplary damages. Issues of this kind nay arguably arise in (as I shall describe them for brevity) the tobacco, the asbestos and similar contexts."

The abolition by statute of the ability to award exemplary damages in many jurisdictions means that those responsible for the worst types of misconduct causing harm are relieved of the potential liability to pay such damages. Where is the social utility or justification for that? The abolition of such damages has no impact on the price of insurance premiums because all policies exclude such conduct and damages from indemnity. The requirement to pay would fall where it should – on the wrongdoer who is responsible for such despicable conduct which has caused injury.

Oddly enough, such damages have never been available where the conduct has been so harmful that it causes the death of an individual.

Both the re-establishment of the ability to award exemplary damages (where it has been abolished), preservation of such a claim to an estate of a deceased person, and the establishment of an entitlement for dependents to bring such a claim where an income-

earner is killed by contumelious conduct, would act as a significant incentive to improve workplace health and safety in the area of potential exposure to toxic dusts.

Recommendation

Amend statutes to reintroduce exemplary damages in common law claims. Permit such claims in dependency actions. Preserve such claims to the estate of deceased persons who have commenced such claims in their lifetime.

(g) The potential of emerging technologies, including nanoparticles, to result in workplace related harm.

The Australian Lawyers Alliance will leave submissions on this term of reference to those with this expertise.

CONCLUSION

The Australian Lawyers Alliance recommends the enactment of sufficient long-stop provisions to cover the latency periods of diseases caused by exposure to toxic dust, or provisions to allow commencement upon the reasonable discoverability of conditions. Causes of action should accrue when the person becomes aware of the symptoms and discovers that it was caused by the negligence of some other person. While there are state statutes that allow for an extension of time to commence actions, it is imperative that workers' rights of actions are not ameliorated due to lapses in limitation periods. Therefore, the Lawyers Alliance supports the abolition by statute of presumptive prejudice and prejudice for latent injuries caused by toxic workplace dusts.

The Australian Lawyers Alliance also supports the abolition of thresholds that prevent claims for common law damages of latent and progressive diseases when a worker is first aware of suffering from conditions resulting from toxic dust exposure.

The Australian Lawyers Alliance submits that damages for pain and suffering, loss of enjoyment and lost expectation of life should be preserved beyond the life of the sufferer of toxic dust exposure in all jurisdictions.

Workers also need to have a right of action to hold directors for workplace hazards liable if they breach their common law or statutory duty to provide a safe working environment.

The Australian Lawyers Alliance supports reintroducing exemplary damages in common law claims in states where is has been abolished. This will help prevent greater exposure of toxic dust to workers as it acts as an incentive to provide an improved workplace health and safety environment.

The Australian Lawyers Alliance believes that greater education and enforcement of regulations is also needed to prevent exposure to workplace toxic dust hazards, as well as improved workplace disease education in medical training.