maurice blackburn lawyers

15 August 2022

Director
Occupational Diseases and Hygiene Policy
Safe Work Australia

By email: occhygiene@swa.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Consultation Regulation Impact Statement - Managing the risks of respirable crystalline silica.

Maurice Blackburn Pty Ltd (**Maurice Blackburn**) is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust and occupational diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn acknowledges the effort of Safe Work Australia (**SWA**) and Ernst and Young on the development of the Consultation Regulatory Impact Statement (**CRIS**).

We note the purpose of the CRIS, as detailed in section 1.6:

> *The purpose of this consultation RIS (CRIS) is to seek stakeholder feedback on non-regulatory and regulatory options for managing the risks of RCS at work.*

However, we also note the limitations to the scope of the coverage of the CRIS, detailed in the same section, including Victorian workplaces, and the quarrying and mining industries in New South Wales, Queensland, Tasmania and Western Australia.

These limitations of the CRIS and therefore any potential model regulations which may flow from it, will severely limit the positive impact that any such future regulation may have to improve the working conditions of thousands of workers across the nation, not the least of which will be mine and quarry workers. Acknowledging the separate legislation which covers these particular workplaces, RCS exposure nonetheless is a very significant problem for every workplace in the country.

In our National Dust Diseases practice, we have and continue to act for hundreds of clients with various forms of silica related disease and these clients have been exposed to RCS in both the stonemasonry and non-stonemasonry industries, including from metalliferous mining and quarrying. Silica disease is a whole of Australia problem, requiring a wholistic solution. Therefore, notwithstanding the non-Federal nature of the regulations covering mining and quarrying, to exclude these workers from the CRIS analysis nonetheless remains short-sighted.

We therefore strongly urge SWA not to take the path of least resistance and to take on all challenging and difficult workplace RCS issues across the board because every worker deserves a safe workplace.

We further note section 8.4 of the CRIS (Next Steps), which tells us that:

> *Stakeholder feedback received from this CRIS will be used to revise information in the problem statement, options for analysis and assumptions in the impact analysis, before determining the proposed preferred option or options and developing an implementation and evaluation plan.*

Apart from our comments above regarding the severe and significant limitation to the CRIS, to this end, we necessarily restrict our input to those consultation questions which refer to:

- The policy options (CRIS Section 4)
- The likely impact of each option (CRIS Section 6), and
- The discussion of policy options (CRIS Section 7).

CRIS Section 4 – Policy Options

Related consultation questions:

4.1 Do these options address the problem? Please provide evidence to support your position.

4.2 Are there any other non-regulatory or regulatory options you think should be considered to address the problem?

Maurice Blackburn believes that the policy options are grossly incomplete.

We note that Section 4.8 details options that were considered, but assessed as infeasible. We strongly suggest that this decision be revisited for two of the options detailed in this section, namely:

- Ban on engineered stone; and

- Replacement of chest X-Ray with low dose High Resolution Computerised Tomography in the minimum regulatory requirements for health monitoring.

In relation to a ban in engineered stone

Maurice Blackburn has long argued that a ban on the importation of engineered stone should be considered, once other means of dealing with the issue have been exhausted. We believe we are at that point.

Maurice Blackburn believes that a ban (either total or partial) of high silica content engineered stone appears to be the only practical step to adequately mitigate the emergence of silicosis in the stonemasonry industry in Australia.

In our submission to the National Dust Diseases Taskforce (**NDDT**), we argued that:

> *If workplace based solutions continue to fail to stem the tide of workplace silicosis cases, then the imposition of a ban may become the only meaningful way of preventing deaths and instances of severe chronic lung diseases.*
>
> *It is worth noting that asbestos was banned in Australia a little over 80 years after it was first produced here.[1] It has caused the deaths of tens of thousands of Australian workers.[2] Even after the ban, it is still claiming hundreds of lives each year due to exposure decades earlier.*
>
> *It is also worth noting that, in the lead up to the ban on asbestos, the asbestos industry argued passionately that a ban was unnecessary, too expensive to implement, and a disproportionate response to the issues at hand.*
>
> *It should be noted that a ban will not provide a panacea for ending workplace silicosis. Even the cutting of a lower silica content product (or a natural stone), in a workplace with poor controls has and will lead to poor health outcomes for its workers.*
>
> *Public attitudes toward a ban vary greatly. Whilst some laud engineered stone as an affordable alternative to real stone or marble, we believe that large numbers of consumers would be horrified with the thought that an essentially decorative product in their kitchen could have led to serious illness and death in its production and installation in their homes.*
>
> *It is not difficult to believe that, should a ban be imposed, market forces would drive innovation and alternative products would be created to replace those silica-based products that are subject to the ban. This would be a very acceptable outcome.*
>
> *Maurice Blackburn would prefer for the Taskforce to invest its energies and influence on:*
>
> - *The immediate complete and total banning of all forms of dry cutting of engineered stone;*
> - *The immediate adoption of mandatory forms of wet cutting; and*
> - *The adoption of an exposure standard for respirable crystalline silica of 0.025 milligrams per cubic metre (per 8 hour shift).*
>
> *The consideration of a ban or partial ban should come after that.*

[1] https://www1.health.gov.au/internet/publications/publishing.nsf/Content/asbestos-toc~asbestos-when-and-where
[2] The Asbestos Council of Victoria estimates that asbestos related disease costs over 4,000 Australian lives every year. https://gards.org/asbestos-related-disease-facts-and-figures-australia-2018/#

We note that the NDDT agreed with our position, as noted in section 4.8.1 of the CRIS. That they didn't recommend it as an *immediate* policy option should not rule it out as a *valid* policy option.

Page 19 of the CRIS provides a reminder of the hierarchy of controls which dominates OHS policy: with elimination of the risk being the highest priority. Surely a ban on harmful imported products would tick that box just as it did with asbestos in 2003 (but altogether far too late for literally thousands of Australians). As a nation, we cannot consign whole new generations of silica exposed workers to the same indolent and frankly, reckless policy inaction as we did when it came to the asbestos manufacturing industry and asbestos based products.

To this end, Maurice Blackburn believes that the policy option of a ban (with appropriate but nonetheless immediate transitional arrangements) should immediately be reinstated into the CRIS, and exposed to the same scrutiny as other policy options to determine its potential impacts and costs. To do otherwise defies common sense.

<u>In relation the replacement of chest X-Ray with low dose High Resolution Computerised Tomography in the minimum regulatory requirements for health monitoring</u>

Maurice Blackburn believes that the NDDT's recommendation of "*strengthening the health monitoring requirements include contemporary methodologies such as low dose [HRCT] scans*"[3] should be sufficient for this to be included as a valid policy option, and thereby included in the CRIS.

We do not accept the argument that it should not be evaluated as a policy option because it would: "….*remove the medical practitioner's ability to determine that chest X-rays may be an appropriate method when carrying out or supervising health monitoring*."[4] On the contrary – we believe that the setting of evidence based minimums related to the detection of dust diseases would be beneficial, both to the workers and to the medical profession.

It has long been accepted by the medical community that the optimal mechanism to detect the nature and extent of a lung dust disease is via a CT scan. A chest x-ray is, by comparison, a primitive and broadly unhelpful tool to quickly and effectively detect lung dust disease. Whilst the availability of CT scanning technology in regional Australia is presently a challenge for some communities, it should nonetheless be included in the CRIS to assess its actual impact.

Maurice Blackburn urges Safe Work Australia to ensure that these two valid policy options are included in the CRIS.

CRIS Section 6 – The Likely Impact of Each Option

Related consultation questions:

6.1 Is the cost modelling methodology appropriate to estimate the costs to industry and governments (Appendix D)?

6.3 Are there other factors that should be considered in the assessment of the effectiveness of each option (Section 6.5)?

[3] CRIS, p.35
[4] CRIS: p.35

Maurice Blackburn understands that an essential function of a CRIS is to describe the potential costs and benefits of the various policy options, in order to inform an assessment of a preferred model. We believe, however, that the lense adopted for the assessment of impact in the CRIS is far too narrow.

We note from section 6.1 of the CRIS that:

> *The RIS process seeks to ensure that proposed regulatory and non-regulatory options are well-targeted, effective and appropriate, and any burden* ***imposed on business and the community*** *is comparatively appropriate to address the identified issue. A key part of this process is to compare the impact of the proposed options.* (emphasis added)

This is the last time 'community' is mentioned, in this context, in the CRIS.

Discussion of the impact on individuals and the community is severely lacking, with the impact analysis skewed in favour of an economic analysis of impacts on business. The lived experience of sufferers of work-related lung diseases, including severe forms of silicosis and silica induced auto-immune diseases, is that their families and communities is comparatively devalued. Indeed, within the parameters of the CRIS, it is treated as being unimportant.

We believe that the CRIS would benefit from a greater analysis of the physical, social and psychological impacts (and benefits) for individuals and their families, as a result of each option. Indeed, to ignore these very significant impacts of favour of what is virtually a strict economic analysis of new regulation means that the CRIS will grossly undervalue the true costs of the impact of the RCS disease in Australia and therefore any potential new regulation will be necessarily sub-optimal.

Section 6.4 (the discussion of costs for each option) would benefit from a discussion of the societal cost of inaction – especially in relation to Option 1 (maintaining the status quo).

CRIS Section 7 – Discussion of Options

Related consultation questions:

7.1 Which option or combination of the options presented is most likely to address the identified problem?

No one option presented by the CRIS will, in our view, appropriately or adequately tackle the RCS problem in Australia. This is particularly so given the significant limitations to the scope of the CRIS at the outset and the inadequacies of the policy options not considered as outlined in our submission above.

On the limited question of which option or combination of options presented in the CRIS is most likely to address the identified problem, Maurice Blackburn urges Safe Work Australia to nominate, as a bare minimum, a combination of Option 4 and 5a.

The fact is that the use of engineered stone must be the subject of a licensing regime for all of the reasons that have been identified in the CRIS and by the Victorian government when introducing its licensing scheme recently. In addition, all workplaces where there is a high level of RCS exposure occurs or is at risk of occurring must be better regulated.

All other options presented in the CRIS will not go anyway in meaningfully addressing the stated RCS problem in Australia.

Given the work already done by the Victorian Government, we believe that an appropriate template already exists for the development and implementation of a national framework, which can and should be adopted by SWA and then flow on to the individual states and territories thereafter.

Finally, and by no means least, the time for SWA to act to introduce vastly improved model regulations is now. It was in 2015 the black lung crisis in Queensland was identified, 2017 that the stonemasonry silicosis epidemic was uncovered and here we are in 2022 and it is only now that SWA is starting the very first steps to improve workplace health and safety. Too much time has been wasted already and we urge SWA to move faster and with better focus to ensure that working men and women across the country do not continue to have prolonged and excessive exposures to RCS.

Please do not hesitate to contact me and my colleagues [redacted] or at [redacted] if we can further assist with Safe Work Australia's important work.

Yours faithfully,

[redacted]

Jonathan Walsh
Principal Lawyer
Maurice Blackburn