

By Holly Pinnis and Ross Sottile

The legislative response to the current wave of silicosis

A Victorian perspective

In recent times, lawyers have acted for an increasing number of workers in the manufactured stone, mining and quarrying industries who have developed work-related silica conditions including silicosis and auto-immune illnesses, among others.



As silicosis is an incurable and progressive disease, many affected workers do not know if and how rapidly their condition may deteriorate, or whether it will lead to other serious silica-related illnesses in the future. To date, the workers compensation model in Victoria has run the risk of undercompensating these workers as a result of the ‘once and for all’ nature of impairment benefit and common law claims for damages. However, the recent introduction of the *Workplace Safety Legislation and Other Matters Amendment Act 2022 (Vic)* (*Workplace Safety Amendment Act*) is aimed at addressing some of these issues.

A SNAPSHOT OF THE CURRENT WAVE

Leading respiratory physician Dr Ryan Hoy in conjunction with Professor Dan Chambers outlined the severity of the current wave of silicosis in their article ‘Silica-related diseases in the modern world’.¹

‘Occupational silica dust exposure is one of the oldest known causes of lung disease.² ... In 1995, the World Health Organisation began to campaign to eliminate silicosis from the world by 2030.’³

In 1997 the International Agency for Research on cancer classified respirable crystalline silica as a human carcinogen.⁴ Unfortunately, silicosis remains a major health issue internationally.⁵

Previously mining was the industry with the highest contribution to silicosis.⁶ However, since the early 2000s artificial stone (also known as engineered or reconstituted stone) has rapidly become a popular material for the fabrication of kitchen and bathroom benchtops. Artificial stone is a composite material made of quartz as the major filler, with the addition of coloured glass, shells, metals or mirrors bound together by a polymer resin. The crystalline silica content of the material is over 90 per cent, which is far higher than in traditionally used natural stone such as granite (30 per cent) or marble (3 per cent).⁷

‘There have been recent outbreaks of severe, progressive forms of silicosis in countries including Israel, Spain and Australia due to the introduction of high silica-containing artificial stone.⁸ ... The first reported case of silicosis associated with artificial stone was from Italy in 2010, and more recently the number of cases reported internationally has grown rapidly from countries including Israel, Australia, Spain and the United States. ... These outbreaks have noted a younger age at diagnosis and more rapid disease development than chronic silicosis, a high rate of disease progression, and resultant death or requirement for lung transplantation.’⁹

Currently there is no proven treatment for silicosis other than lung transplantation.¹⁰ Further, the ‘duration of occupational exposure to artificial stone-derived silica (4–10 years) is significantly shorter than with chronic silicosis in other industries.’¹¹

Increasingly, silica dust exposure is being linked with a range of other diseases and complications, both respiratory and non-respiratory, including pulmonary conditions such as pulmonary fibrosis and sarcoidosis along with autoimmune

disorders including rheumatoid arthritis, systemic lupus erythematosus and scleroderma.¹² Further, there is an emerging link to silica-related lung cancer.¹³

In May 2019, the Victorian Government launched a health screening program for stonemasons as part of an action plan to address and prevent unsafe silica exposure.¹⁴ As at October 2021, 202 silica-exposed workers suffering from silicosis had been identified in Victoria, indicating that one in about four screened workers exposed to silica dust have developed silicosis.¹⁵

THE 'ONCE AND FOR ALL' NATURE OF THE VICTORIAN WORKCOVER SCHEME

Prior to the introduction of the *Workplace Safety Amendment Act*, the WorkCover scheme failed to adequately deal with the progressive nature of silicosis and the other silica-related conditions an injured worker might develop in the future. This led to the risk of silicosis sufferers being undercompensated.

For example, it was difficult to establish that a silicosis sufferer's condition had stabilised for the purposes of pursuing an impairment benefit claim when the very nature of silicosis meant that the worker's condition was likely to continue to progress and their level of whole person impairment (WPI) would increase.

Further, there is growing evidence that suggests silicosis sufferers are at a significantly increased risk of lung cancer,¹⁶ and it was previously not possible to adequately compensate for that risk following the resolution of a worker's common law damages claim for silicosis.

WORKPLACE SAFETY AMENDMENT ACT

The *Workplace Safety Amendment Act* amends the *Accident Compensation Act 1985* (Vic) and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) to improve compensation arrangements for workers suffering from silicosis and similar occupational diseases.

Introduction of the eligible progressive disease (EPD) list

The new entitlements will apply to workers diagnosed with an eligible progressive disease (EPD) on or after 1 June 2016.¹⁷ The EPD list includes silicosis, scleroderma with silicosis, and lung cancer with silicosis. As part of this legislative reform, a number of non-silica-related progressive conditions, including asbestosis and occupational cancers, were also included on the list.

The list of EPDs is prescribed under a legislative instrument. This allows for flexibility as understanding and knowledge of these conditions continues to evolve, and provides an avenue for other conditions to potentially be added to the list.

For workers suffering from a listed EPD, the amendments address:

1. Stabilisation

Impairment benefit lump sum payments can be made to injured workers suffering from an EPD regardless of whether their condition is considered stable (or may never stabilise), removing a previous barrier to compensation given the progressive nature of silicosis.¹⁸

2. Impairment benefit claim

Injured workers suffering from an EPD who experience a deterioration of 10 per cent or more WPI will be able

to bring a subsequent impairment benefit claim. This amendment also acknowledges that these conditions progress over time and provides sufferers with the ability to obtain further compensation to reflect the increasing severity of their condition.¹⁹

3. *Subsequent common law claim for serious silica-related diseases*
Injured workers suffering from serious silica-related conditions will now be entitled to make a further common law claim for damages if they develop a subsequent serious silica-related condition. The amendment therefore allows workers to recover 'provisional damages' for silicosis and permits a second claim if they develop a serious silica-related condition such as lung cancer. The court will take any prior settlement into account when the second claim occurs.²⁰ This amendment is similar to s4 of the *Asbestos Diseases Compensation Act 2008* (Vic), which allows those who have a benign asbestos-related disease to bring a claim for compensation but retain their right to bring a subsequent claim for a malignant condition arising from the same exposure to asbestos dust.

4. Lung transplant

Injured workers who undergo a lung transplant will be deemed to have suffered a minimum 30 per cent WPI and therefore have suffered a 'serious injury'. This allows them to pursue a common law claim for damages for both pain and suffering and pecuniary loss.²¹

5. Family counselling entitlement

Family members of workers diagnosed with work-related EPD will now be able to access family counselling services up to \$6,820.²²

STATUTE OF LIMITATIONS CHALLENGE IN VICTORIA

Despite the recent amendments, those in Victoria suffering from silicosis continue to face strict time limits within which they must bring a common law claim for damages. Other Australian states, including Queensland and NSW, recognise these challenges and do not apply time limitations for defined dust diseases (as long as proceedings are issued in a sufferer's lifetime).

Currently, the time limits imposed in Victoria are cumbersome and add a significant hurdle to redress. Silicosis sufferers may be subject to multiple time limits for one condition depending on when they were exposed and when they become aware of their condition. The evolution of the WorkCover scheme in Victoria means that a silicosis sufferer may face a three-year and/or six-year statute of limitations (see the table below). The time limits are complex, confusing and fail to recognise the progressive nature of the condition.

Early diagnosis (for example via the WorkSafe screening program) raises complex considerations regarding when to proceed with a common law claim. To proceed in the early stages of disease progression poses risks that the claimant will fail to satisfy the serious injury gateway test and be barred from pursuing a common law claim for damages. Alternatively, the claimant may be undercompensated should they fail to satisfy the permanent 40 per cent loss of earning capacity test that is required to recover damages for pecuniary loss at common law.

Common law statute of limitations in Victoria for injured workers

Exposure period	Prior to 4:00pm on 31 August 1985	After 4:00pm on 31 August 1985 to 11 November 1997	12 November 1997 to 19 October 1999	20 October 1999 onwards
Statute limitation	Before three years from the date when the person first knew that they have suffered a personal injury and that the personal injury was caused by the act or omission of another. ²³	Before the expiration of three years after the date the incapacity became known. ²⁴ Time runs from the date the worker was aware of the serious injury incapacity of their illness arising from employment pre-November 1997. ²⁵	The 'black hole' – no entitlement to pursue common law damages. ²⁶	Before six years from the date when the person first knew that they had suffered a personal injury and that the personal injury was caused by the act or omission of another. ²⁷ Note: There are relevant 'pauses' for impairment benefit and serious injury application. ²⁸

Case study

Mr R is a 49-year-old stonemason who was diagnosed with silicosis on 20 January 2020. Subsequently, R's respiratory specialist advised him to change jobs in order to avoid further exposure to silica dust.

R has an accepted WorkCover claim for weekly payments and medical and like expenses. He currently has minimal symptoms and his condition has not progressed since he was diagnosed. He is certified fit for suitable duties so long as he avoids dust exposure and he is in the process of retraining in order to find alternative employment.

R's exposure to silica dust occurred over a long period of time with multiple employers, and covers a number of iterations of the WorkCover legislation. R's claim must navigate all of the following:

1. Period one

For his work up until 11 November 1997: s135AC of the *Accident Compensation Act* means R must lodge a serious injury application within three years from the time the serious injury incapacity became known. It is difficult to be certain how this will be interpreted given the enormity of his diagnosis but his current minimal serious injury consequences.

2. Period two

From 12 November 1997 until 19 October 1999: the WorkCover black hole means R will not be able to recover compensation for the 'portion' of his exposure that occurred during this period.

3. Period three

From 20 October 1999 until R ceased work: s328 of the *Workplace Injury Rehabilitation and Compensation Act* has a six-year limitation period.

R will soon reach the three-year anniversary of his diagnosis, and arguably the expiry of the three-year time limit relating to period one, if it can be established that he knew he had a serious injury incapacity from the time he was diagnosed. To proceed with a common law claim now would mean he may fail to satisfy the serious injury test, or alternatively his common law damages may not fairly reflect the severity of his condition should it progress in the future.

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R will also be disadvantaged by the black hole. Applying the black hole to a divisible lung condition has the effect that the portion of exposure that occurred in the black hole period will be applied as a ‘discount’ to the total compensation claim. This leaves R undercompensated for the portion of his silica dust exposure that can be shown to have occurred during the black hole period.

OCCUPATIONAL HEALTH AND SAFETY AMENDMENT (CRYSTALLINE SILICA) REGULATIONS 2021 (VIC)

In addition to the legislative changes to compensation entitlements, the Victorian Government has amended the *Occupational Health and Safety Regulations 2017* (Vic) to provide greater protection to Victorian workers working with respirable silica, and replaced the *Occupational Health and Safety Amendment (Crystalline Silica) Interim Regulations 2021* (Vic) (*Interim Regulations*) with the *Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021* (Vic) (*Regulations*).

The *Regulations* build on the *Interim Regulations* and implement changes including:

- introducing a licensing regime for engineered stone, including increased manufacturer and supplier duties;
- making permanent Victoria’s prohibition on uncontrolled dry-cutting of engineered stone; and
- adding additional regulatory oversight of high-risk crystalline silica work outside of engineered stone across all industries, including the construction and earth resources industries.

CONCLUSION

The wave of silica-related diseases is ongoing and legislators will continue to grapple with the legal issues identified in this article into the future.

Prior to the introduction of the *Workplace Safety Amendment Act*, accessing entitlements under the WorkCover scheme was particularly complex for those suffering from silicosis.

The *Workplace Safety Amendment Act* allows workers suffering from silicosis to make a further common law claim for damages should they develop a subsequent serious silica-related condition; removes the requirement for eligible progressive diseases to be considered stable prior to accessing compensation; and allows workers to access a further impairment benefit should their condition progress or worsen.

Nevertheless, further reform is needed to remove the statute of limitations imposed on those suffering from silicosis in order to ensure access to justice for a vulnerable cohort of workers. ■

Notes: **1** R Hoy and D Chambers, ‘Silica-related diseases in the modern world’, *European Journal of Allergy and Clinical Immunology*, Vol. 75, 2020, 2805–17. **2** *Ibid*, 2805. **3** *Ibid*, 2813. **4** *Ibid*, 2811. **5** *Ibid*, 2812. **6** *Ibid*. **7** RF Hoy, T Baird, G Hammerschlag, et al, ‘Artificial stone-associated silicosis: A rapidly emerging occupational lung disease’, *Occupational & Environmental Medicine*, Vol. 75(1), 2018, 3–5. **8** Hoy and Chambers, above note 1, 2805. **9** *Ibid*, 2813. **10** *Ibid*, 2805. **11** *Ibid*, 2812. **12** Hoy and Chambers, above note 1. **13** T Sato, T Shimosato and DM Klinman, ‘Silicosis and lung cancer: Current perspectives’, *Lung Cancer: Targets and Therapy*, Vol. 9, 2018, 91–101. **14** Premier of Victoria, the Hon Daniel Andrews, ‘Silica health assessments pass halfway target’ (Media release, 29 May 2020) <<https://www.premier.vic.gov.au/silica-health-assessments-pass-halfway-target>>. **15** Monash University, *Final Report of Phase 2: Silica-Associated Lung Disease Health Screening Research Project* (Monash University, 2022) <<https://content.api.worksafe.vic.gov.au/sites/default/files/2021-10/ISBN-Silica-associated%20disease%20project-final-report-%28phase-2%29-2021-10.pdf>>. **16** Sato, Shimosato and Klinman, above note 13. **17** *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), s51A. **18** *Accident Compensation Act 1985* (Vic), s90A; *Workplace Injury Rehabilitation and Compensation Act*, s68A. **19** *Accident Compensation Act*, s90D; *Workplace Injury Rehabilitation and Compensation Act*, s68C. **20** *Accident Compensation Act*, s135BD; *Workplace Injury Rehabilitation and Compensation Act*, s356B. **21** *Accident Compensation Act*, s90C; *Workplace Injury Rehabilitation and Compensation Act*, s68F. **22** *Workplace Injury Rehabilitation and Compensation Act*, s224. **23** *Limitation of Actions Act 1958* (Vic), s5(1A). **24** *Accident Compensation Act*, s135AC. **25** ACN 005 565 926 Pty Ltd v Snibson [2021] VSCA 31. **26** *Accident Compensation Act*, s134A. **27** *Limitations of Actions Act*, s5(1A). **28** *Accident Compensation Act*, s134ABA; *Workplace Injury Rehabilitation and Compensation Act*, s348.

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