W+K UPDATE

Federal, state and territory ministers unanimously agree to consider banning engineered stone

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Author: **Cassandra Wills** (Partner)

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At a glance

- It's been hard to miss the recent harrowing media coverage about the silicosis tragedy facing many Australian workers. It's not a new story, but one gaining considerable traction in the public interest and in the courts, thanks in part to union activities and threats by the CFMEU to enact its own workplace ban on engineered stone.
- On 28 February, federal, state and territory ministers unanimously agreed to consider banning engineered stone in a meeting led by Workplace Relations Minister Tony Burke.
- The decision brings forward the decision-making process by 17 months.
- Silicosis claims are of significant concern to insurers and can present complicated coverage issues. As the latency period for silicosis can be more than 10 years, some insurers may already have potential historical claims exposure that need examining.

On 28 February, federal, state and territory ministers unanimously agreed to consider banning engineered stone in a meeting led by Workplace Relations Minister Tony Burke. Minister Burke said: "We have now tasked Safe Work Australia to do the work to scope out what regulation is required for all workplaces where you deal with silica dust and to also scope out specifically ... what a ban would look like."[1]

The decision brings forward the decision-making process by 17 months. The previous July 2024 deadline was set by the former national dust diseases taskforce in case improvements to industry safety had not been made in the interim.

Background to the issue

Silicosis and associated medical diagnoses (including psychological injuries and autoimmune conditions) occur following the inhalation of silica particles released from cutting and grinding engineered stone.

There are three categories of the disease:

- **Category 1** – chronic silicosis, which occurs after 10 to 30 years of low levels of exposure
- **Category 2** – accelerated silicosis, which can occur within 10 years of high levels of exposure, and
- **Category 3** – acute silicosis, which can occur after a few weeks of extremely high levels of exposure.

References to silicosis appear in literature as early as the 1700s. Artificial stone was invented in 1963 and introduced to Australia in the early 2000s. The first instances of artificial stone silicosis were identified in Australia in 2011. Regulatory action addressing the issue began in 2017 and, in 2019, the Australian Department of Health established a National Dust Disease Taskforce to undertake an independent review of the systems in place regarding Australian dust diseases. The Taskforce's work remains ongoing.

[1] https://www.theage.com.au/politics/federal/states-and-territories-agree-to-ban-engineered-stone-20230228-p5co5m.html

The Age recently summed up the current situation well: "The courts are filling up with silicosis-stricken workers, with more than 70 in Victoria and Queensland. Many are stonemasons, suing their employers for failing to provide a safe work environment. The manufacturers of the deadly product are also in their sights ..."[2]

The silicosis crisis is an issue the government is focussed on. Earlier this month, the federal government committed $3.9 million to a prevention and awareness strategy in response to a report by the National Dust Disease Taskforce, which included a finding that almost a quarter of people who have worked with engineered stone since before 2018 are suffering from silicosis or other dust diseases. Workplace Relations Minister Tony Burke has also gone on record to say "The Albanese Labor government is deeply concerned about the spread of silicosis among Australian workers … We want a co-ordinated national response to this issue."

Liability issues, quantum and policy impacts across Australia

Silicosis claims require the plaintiff to prove that the defendant is liable. There's no question employers owe their workers a non-delegable duty of care and suppliers and manufacturers owe a duty of care to consumers. However, there are often contested liability issues in silicosis claims involving the question of foreseeability, warnings provided by the suppliers, the apportionment of liability between employers and suppliers, and the concept of product stewardship.

There are also significant quantum questions that remain unanswered due to the low number of silicosis-related judgments to date, the assessment of impairment, life expectancy, and care issues. While asbestosis-based litigation provides some guidance, there remains a lack of clarity around how to assess general damages, calculate economic loss, and future care and assistance allowances, and on whether to delay claims pending the success of lung transplants or lung lavages.

For insurers, silicosis claims, which are commonly covered under Product Liability and Business Pack Policies, also raise some coverage trigger issues. For example, it is important to identify the policy periods where the exposure occurred, the diagnosis of an injury (given liability can arise in subsequent years given the latency period), relevant exclusions (including whether it extends to 'dust diseases' and the definition of dust), and the definitions of 'occurrence' and 'personal injury' in the policy wording. For example, does the definition of 'personal injury' include a latent onset deeming clause, which will provide that the injury will be deemed to have occurred at the time the disease/condition was first medically diagnosed. This will shift the policy trigger from exposure to diagnosis.

Given the latency of the disease and the long-term exposure of stonemasons to the engineered stone products, claims against suppliers often involve multiple insurers because the insurance coverage changed over the period of exposure. These circumstances also introduce questions of apportionment between insurers, gaps in cover and dual insurance.

[2] https://www.theage.com.au/business/workplace/the-shiny-kitchen-benchtops-killing-young-australians-20230215-p5ckpn.html?collection=p5clq0

Additionally, matters can become complex when a physical injury develops in one policy period and a psychological injury develops in a different policy period, or when a claim is made by a dependent or partner.

Another issue to consider is the aggregation of claims. For example, was the exposure an event in a series of events arising from, or attributable to, the one source? Other aggregation issues include whether it is possible to aggregate the claims of all stonemasons or whether aggregation needs to be limited to only those claims arising at a particular employer.

A long road ahead

Silicosis claims are of significant concern to insurers and present complicated coverage issues depending on the policy wording in question. The latency period for silicosis can be more than 10 years, which means some insurers may already have potential claims exposure for policies from the past 10 to 20 years. An audit of historical policies for high-risk insureds would be worthwhile, if not already completed.

While most silicosis claims are made by workers, there are risks for insurers providing public and product liability or professional liability insurance to manufacturers and suppliers of engineered stone products, and also to occupiers that have high levels of silica dust on their premises.

Wotton + Kearney will continue to monitor Safe Work Australia's proposed regulation of the engineered stone industry (and all workplaces dealing with silica dust) and any legislative proposals to ban engineered stone. Each state and territory parliament will have to pass its own laws to enact any such ban of engineered stone, which is a process that may take 12 months.

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Australian offices

Adelaide
Level 1, 25 Grenfell Street
Adelaide, SA 5000
T: +61 8 8473 8000

Brisbane
Level 23, 111 Eagle Street
Brisbane, QLD 4000
T: +61 7 3236 8700

Canberra
Suite 4.01, 17 Moore Street
Canberra, ACT 2601
T: +61 2 5114 2300

Melbourne
Level 15, 600 Bourke Street
Melbourne, VIC 3000
T: +61 3 9604 7900

Melbourne – Health
Level 36, Central Tower
360 Elizabeth Street, Melbourne, VIC 3000
T: +61 3 9604 7900

Perth
Level 49, 108 St Georges Terrace
Perth, WA 6000
T: +61 8 9222 6900

Sydney
Level 26, 85 Castlereagh Street
Sydney, NSW 2000
T: +61 2 8273 9900

www.wottonkearney.com.au

New Zealand offices

Auckland
Level 18, Crombie Lockwood Tower
191 Queen Street, Auckland 1010
T: +64 9 377 1854

Wellington
Level 13, Harbour Tower
2 Hunter Street, Wellington 6011
T: +64 4 499 5589

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Need to know more?

Please contact our **General Liability** team if you'd like to discuss the claims and insurance issues arising out of exposure to silica dust from the fabrication of engineered stone.

Cassandra Wills
Partner, Brisbane
T: +61 7 3236 8717
cassandra.wills
@wottonkearney.com.au

Cheryl Phillips
Partner, Adelaide
T: +61 8 8473 8008
cheryl.phillips
@wottonkearney.com.au

Catherine Power
Partner, Canberra
T: +61 2 5114 2302
catherine.power
@wottonkearney.com.au

Andrew Seiter
Partner, Melbourne
T: +61 3 9604 7906
andrew.seiter
@wottonkearney.com.au

Ken Grunder
Partner, Perth
T: +61 8 9222 6967
ken.grunder
@wottonkearney.com.au

Jacqueline Grace
Special Counsel, Sydney
T: +61 2 8273 9890
jacqueline.grace
@wottonkearney.com.au

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