19 July 2017

Committee Secretary
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000

By post and by email: fac@parliament.qld.gov.au

Dear Committee Secretary

Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill 2017

Thank you for the opportunity to provide comments on the Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill 2017 (the Bill).

The Queensland Law Society (the Society) is the peak professional body for the state's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The Society also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the Accident Compensation and Tort Law Committee who have substantial expertise and practice in this area.

We note the Bill amends several statutes and we make the following comments in respect of each.

Amendment of the Electrical Safety Act 2002

We note the purpose of these amendments is to:

- allow the electrical safety regulator to obtain information about the competency of applicants for an electrical work licence;
- allow the Electrical Licensing Committee to direct an existing electrical work licence holder to undertake a competency reassessment where there are reasonable grounds to believe the licensee may not be competent, and
- allow the Electrical Safety Regulator to immediately suspend an electrical worker's licence in specific and extremely serious circumstances in the interests of protecting the safety of others.
Workers’ Compensation and Rehabilitation (Coal Workers’ Pneumoconiosis) and Other Legislation Amendment Bill 2017

The Society supports effective regulation to ensure work is carried out safely and competently. However, in our view, the proposed amendments contain some concerning provisions which we recommend the Committee address in its report.

- Firstly, proposed 64C(3) provides that the notice given to the holder of an electrical work licence must allow a least one month for this person to undergo an assessment of that person’s competency. There does not appear to be a mechanism to allow further time for someone to undertake this assessment. This is concerning as there may be instances where a person’s location and/or ability to pay for the assessment will prohibit this timeframe from being met. We note that there are consequences to the person’s licence, and thus ability to work, if the assessment is not undertaken. Hence, we submit that there should be an ability to request further time to complete the assessment. We also suggest that it be clarified whether or not the licence holder pays for the cost of the assessment.

- Proposed section 121AA of the Bill allows an electrical work licence to be suspended, or the recognition an external electrical licence to be suspended, if the regulator decides that the work performed by the licensee holder may have caused death or grievous bodily harm. We are concerned that the use of the word “may” means that serious action can be taken against a licensee when the matter has not been finally determined by a court or other appropriate body. Should a licence holder have their licence suspended, and subsequently be found not guilty of causing the death or harm, the detriment suffered by that licence holder will not be able to be adequately redressed. Further, the regulator will be essentially making a judicial determination, and concerningly the effect of that determination will be to remove the licence holder’s ability to earn a living. We suggest that the clause be amended to state that if the electrical work was found to have cause death or grievous bodily harm, then the licence can be suspended.

- Regarding proposed section 121AB(b) of the Bill, we are concerned that if there is delay in receipt of the notice, the licence holder may not be aware of the suspension and may face serious consequences for performing work with a suspended licence. We submit that the suspension take effect from when notice is received and we suggest that the regulator should be able to ask for proof of receipt.

- Regarding proposed section 121AC, in the Society’s view the submission must be provided within a reasonable time before the hearing to allow sufficient time for its consideration.

- We note proposed section 121AD(5) provides that the disciplinary hearing must take place within 10 business days after the licence holder is given notice of the hearing. Again, there is no mechanism to extend time and we are concerned that this may not allow sufficient time for some people to obtain legal advice, especially if they are working in rural or regional area.

- In addition, we reiterate our concern outlined above about the appropriate forum to decide whether work may have caused death or grievous bodily harm. In our view, a disciplinary hearing is not the appropriate arena for this determination especially as we note that the hearing, under section 118(1)(c) of the Electrical Safety Act 2002, is not governed by the rules of evidence.
• Clause 10 of the Bill, which amends section 122C of the Electrical Safety Act 2002. Subsection (5) of that section provides that a person must not, without reasonable excuse, refuse or fail to comply with a requirement under that section. We note the maximum penalty is 100 penalty units. This provision clearly abrogates the right to claim privilege against self-incrimination and should be removed from the current Act.

Amendment of the Workers' Compensation and Rehabilitation Act 2003

The amendments to this act deal only with pneumoconiosis. While we note the seriousness and complexity of pneumoconiosis diseases, other latent onset injuries can have similar rates and types of deterioration. We would welcome consideration being given to additional entitlements for those who suffer from other types of latent onset injuries.

In considering the current Bill, the Society has been participating in the Coal Workers' Pneumoconiosis Stakeholder Reference Group, which contributed to the development of these amendments. The Society was pleased to be involved in that Group and commends efforts of the Office of Industrial Relations in drafting these amendments.

The Society has always been a strong advocate for fair compensation for injured workers. We also believe the pre-claim medical examination established under these amendments may prompt workers who may have a dust lung disease, to seek medical advice without necessarily bringing a claim. Accordingly, we are generally supportive the amendments proposed to the Workers' Compensation and Rehabilitation Act 2003 (the WCRA) however, several provisions of the Bill should be amended to ensure that additional entitlements given to those who suffer from pneumoconiosis are just and fair.

Common law claims

This Bill allows workers who have pneumoconiosis to access an additional lump sum payment and to have a further DPI assessment and receive an offer under those provisions, based on the pneumoconiosis score. Workers remain able to access these entitlements even if they have previously received them and, even if they have brought and finalised a common damages claim.

There is concern amongst our members that the ability to access further compensation once there is a finalised claim disrupts the long-established concept of a “once and for all” outcome. This concept applies currently to all injuries. In our view, if this substantial law is to be changed, such change should be considered for all injuries where there is a deterioration. We note though that if the law was to change in this way, the very concept of a “once and for all” outcome will essentially be eroded. Further, a claim for common law damages will normally include, if the facts necessitate, a claim for future economic loss, future medical and other expenses and the assessment of general damages, though reduced now under the current legislation, does purportedly take into account future pain, suffering and loss of amenities of life (section 9 of schedule 8 of the Workers' Compensation and Rehabilitation Regulation 2014). Hence, there is debate that as to whether entitlements for sufferers of pneumoconiosis are unnecessary.

Further, any benefits received from an insurer in the “statutory stage” of a claim is normally refunded back in the common law claim. We question what will happen when these entitlements are accessed after a common law claim is finalised as compared with those
accessed beforehand. Practically, workers who access these additional entitlements after their claim has resolved will receive a greater benefit than those whose claim resolves after these are paid.

Further, under proposed sections 128I(3) and 193B(3) a judgment or settlement agreement needs to expressly state there has been an amount paid for future deterioration. If not, it will be taken that future deterioration has not been included in the settlement/award. This may be unfair to an insurer and an employer where an insurer has considered future deterioration in a settlement but not expressly stated this in the Release and Discharge. It is currently not usual for a Release and Discharge to refer to such a consideration. In these circumstances, we submit that workers whose common law claims have settled before the commencement of these amendments should be excluded from these new entitlements unless a mechanism can be put in place to demonstrate that now allowance was made in the settlement or award of damages for future deterioration of the condition.

Under proposed section 193D(3)(b), additional compensation needs to be reduced by the “amount of any compensation paid under a law of Queensland, another State or the Commonwealth for this injury.” This is not the case for compensation normally paid under section 180 of the WCRA. If it is not the policy intention for this compensation to be reduced in this way, then the section needs to be amended by narrowing the definition of “compensation”.

Pursuant to proposed section 193C, a worker can undergo a further DPI assessment if they move into a higher pneumoconiosis band. We query whether there is a risk that the assessment will be lower than the previous one and if so, how insurers and other stakeholders will determine the compensation to be paid.

Medical examination

From the wording in proposed section 325B, it is not clear whether a worker is only eligible for the medical examination if the exposure occurred at a single place of employment or whether the work could have worked in multiple workplaces. This needs to be clarified by the drafters.

We note that under proposed section should 325D(1)(c) the insurer must pay for the examination. It should be clarified whether the insurer should also bear the worker's reasonable travel costs. Further, proposed section 325D(1)(c)(iii) be clearer and state that the insurer will pay for the worker's doctor to provide the report and explain its contents.

Transitional provisions

In addition to our comments about accessing further compensation after the finalisation of a common law damages claim we have some concern with proposed section 727. Under this provision, if an injury was sustained before the commencement of these amendments, a worker cannot obtain an additional lump sum under the new Chapter 3, Part 3, Division 5 if he or she has already been assessed under section 179. This exclusion seems at odds with the, purpose of the amendments, the other transitional provisions and the new Chapter 3, Part 3, Division 5 provisions.

The entitlement to this further compensation under proposed section 128I says it can be claimed at any time after the worker receives the lump sum compensation, or further lump sum compensation, if his or her pneumoconiosis score for the injury increases and falls within a
higher pneumoconiosis band. This provision applies even if a settlement has been reached or a judgment has been made and is payable after a worker's injury has been assessed under 179 (per proposed section 128H).

Therefore, there appears to be no substantive or procedural reason to exclude workers on this basis. We recommended removing subsection (2) from this proposed section to avoid what must be an unintended consequence of unfairly disadvantaging one group of people.

As the Committee will recognise, these amendments will require education of the legal profession, other stakeholders and most importantly, workers whose entitlements may be altered. The Society would be pleased to assist in this process.

**Amendment to the Work Health and Safety Act 2011**

We make a few comments in respect of the "affected person committee" established in the proposed amendments to the Work Health and Safety Act 2011.

Firstly, we applaud the steps taken to ensure that membership of the committee is diverse and as such we submit that diversity should not be limited to gender and but should be expanded to other factors, for example, geographical location.

Also, with respect to proposed section 23F(2) and the decisions made under this new Part generally, we believe consideration should be given to how the Judicial Review Act 1991 will apply to any administrative decisions made.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Kate Brodnik on 07 3842 5851 or k.brodnik@qls.com.au.

Yours faithfully

Christina Smyth
President