

Your Ref: Scrutiny of Legislation Committee

Quote in reply: Accident Compensation / Tort Law Section:

31 May 2010

Ms Julie Copley  
The Research Director  
Scrutiny of Legislation Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

Dear Ms Copley

## **WORKERS' COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT BILL 2010**

The Queensland Law Society expresses its concern about an aspect of the proposed *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010* (the Bill) not having sufficient regard to the rights and liberties of individuals.

The Society's concern relates to retrospective aspects of the transitional provision proposed to be added to the *Workplace Health and Safety Act 1995* (the WHSA) in clause 45 of the Bill.

### **Retrospective aspects of proposed section 197 of the WHSA**

The Society expresses concern that aspects of the retrospective application of transitional provisions for amendments to the WHSA in the Bill do not have sufficient regard to the rights and liberties of individuals on the basis of:

- inconsistency with principles of natural justice; and
- adversely affecting rights and liberties retrospectively.

Proposed section 197 of the WHSA provides:

#### **'197 Retrospective extinguishing of statutory cause of action**

'Section 37A has effect to extinguish without compensation any right to take action based on a civil cause of action arising from—

- (a) a contravention of a provision of this Act that happens after the commencement of section 37A; and

- (b) a contravention of a provision of this Act, whether as originally enacted or as amended since its original enactment, that happened before the commencement of section 37A, if—
- (i) proceedings for the action have not started before the commencement of section 37A; or
  - (ii) proceedings for the action started after 8 August 2008 but the trial in the proceedings has not started before the commencement of section 37A.<sup>1</sup>

In the circumstances of the Bill the QLS appreciates that the proposals are intended to address the issue of the difference in time between when a civil right accrues and the time when a proceedings relying on that right is initiated. In this context certain retrospective application of the legislation may be necessary, however selecting the correct trigger point in the process where this has sufficient regard to the rights and liberties of individuals is crucial.

*Proposed section 197(b)(i)*

In workers' compensation and workplace injury matters a number of steps must be undertaken, under either the *Workers' Compensation and Rehabilitation Act 2003* or the *Personal Injuries Proceedings Act 2002*, before a common law claim for damages may be initiated. A number of pre-proceedings steps will have had to be taken and decisions may have been made in reliance on the current state of the law before proceedings may be initiated. As an example, the decision to either accept or reject a statutory offer of lump sum compensation in the workers' compensation system will often be based upon advice about an injured workers' rights at common law.

In the context of proposed section 197(b)(i) the retrospective application of the Bill will adversely affect rights and liberties of individuals and bring prejudicial results as the trigger for retrospectivity is set after a number of irrevocable decisions have been made and costs incurred by a claimant.

It is in our view a denial of procedural fairness for a cause of action which has been relied upon by an injured workers in a number of necessary pre-proceeding steps to be later denied to them.

On this basis the QLS contends that the proposed section 197(b)(i) does not have sufficient regard to the rights and liberties of individuals and breaches fundamental legislative principles.

*Proposed section 197(b)(ii)*

This provision denies a litigant a cause of action which existed at the time they commenced proceedings.

It is highly irregular for the law to be retrospectively amended for proceedings on foot and doing so brings with it the real danger for both parties that costs incurred up to this point will be wasted. This is heightened in the context of work that must be conducted in pre-trial disclosure and obtaining expert and medical evidence.

It is contrary to principles of natural justice for a proceeding to be determined on principles of law that differ from those which applied to a matter when an action was commenced. Retrospectively removing a valid cause of action from current proceedings is a denial of procedural fairness. This unfairness is heightened should litigants who initiated a valid action that becomes invalidated by operation of the legislation have adverse costs orders made against them.

It is the submission of the Society that litigants to existing proceedings will be adversely affected in both a financial and procedural sense by the retrospective application of the legislation. The proposed section 197(b)(ii) of the Bill is needlessly contrary to fundamental legislative principles and unnecessarily interferes with the rights of parties to existing proceedings.

Thank you for providing the Queensland Law Society with the opportunity to comment on these issues.

Yours faithfully

Peter Eardley  
**President**