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RIGHT WRONG.

Submission to the Education, Employment and Small Business Committee regarding the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019

9 September 2019

Introduction

1. Shine Lawyers is a Queensland based national law firm who represent everyday people who have been injured or wronged. We represent many people across the State of Queensland having offices in over 20 locations. As a legal practice that operates in the area the subject of the Bill and that has a substantial market share in relation to the work of assisting injured workers' we considered it important to provide our submission relating to the proposed Bill.

2. Shine Lawyers supports the objectives of the Bill. We commend the government on consistently reviewing the scheme in order to ensure the scheme gives injured workers' adequate support whilst maintaining the balance of having a financially sound scheme.

3. We consider that the proposed changes will be beneficial to workers', employers and to the operation of the scheme as a whole.

4. However, we consider that given the financial performance of the scheme and the low rate of premiums, further measures should be taken in order to achieve the necessary balance of workers' rights against an affordable, efficient scheme.

5. The areas where we consider further reform can be undertaken to achieve this balance is in common law claims, in particular damages for care and assistance and legal costs, to bring the workers' compensation scheme into alignment with the compulsory third party and public liability schemes.

'The Major' significant contributing factor

6. We support the changes to the meaning of injury for psychiatric or psychological disorder to remove 'the major' as a qualifier for employment's 'significant contribution' to the injury.

7. The consequence of having 'the major' as a qualifier has meant that those suffering from psychiatric or psychological injuries caused by their work have sometimes not received the assistance that they need to get better and once again become a productive member of society.

8. We have seen this in practice for a number of reasons. Firstly, the interpretation of 'the major' by various stakeholders whether that be medical practitioners, insurers or lawyers can be wide. This

qualifier adds further complexity to determining whether an injured worker can receive benefits in the scheme.

9. Because of differing interpretations and the additional complexity this caused application's for compensation to be rejected when under the previous legislation they would not.

10. We have seen enquiries into our firm from these individuals. For those individuals who would not have a common law claim (because the injury was not caused by negligence or breach of contract) or the decision was accurate on account of the qualifier we were not able to provide them with assistance to review that decision to the Workers' Compensation Regulator. This is because the scheme makes no provision to provide an injured worker with legal costs assistance to review these decisions.

11. In these circumstances it is likely that after receiving our advice the matter is either pursued (most likely unsuccessfully) by the injured worker themselves, or it isn't contested at all. The final consequence is that they did not receive the rehabilitation, treatment and support they deserved meaning they will likely become a less productive member of society.

12. The next situation is that the injured worker does have a potential common law claim and the decision is incorrect (most likely due to the interpretation and complexity) and the injured worker engages us to dispute the decision. This has led to an increase in disputes in this area resulting in many more reviews going to the Workers' Compensation Regulator and what we now see is the Workers' Compensation Regulator is rarely able to deal with a dispute within the timeframes stipulated by the *Workers' Compensation and Rehabilitation Act 2003* ("the WRCA"). It is shown that the average time to decide psychological and psychiatric injuries has increased to 34 from 31.1 from the 2017 financial year to the 2018 financial year[1].

13. The increase in disputes costs all parties (worker, insurer and regulator) and creates inefficiency in the scheme. For the worker, it means when (and if) they achieve an outcome at common law, ultimately there in hand amount is less because of the increased legal costs they have to pay out of their damages due to this inefficiency (which there is no right to have the insurer contribute to).

14. It is critical to make this change to improve efficiency in the scheme, help injured workers to be more productive in society and ensure the worker receives as much of the compensation in their hand that they are entitled to.

Discretion to extend time for lodging a statutory application for compensation

15. We support the changes to allow an injured worker to lodge an application for compensation outside of six months if an incapacity has first been assessed outside that period.

[1] Office of Industrial Relations, Queensland workers' compensation scheme statistics, 2017-18 at page 17.

16. It is our experience that often injured workers' will persist with their work albeit in pain and discomfort rather than seek to lodge a compensation claim. It is our opinion that there is a stigma in Queensland attached to lodging a workers' compensation claim and many injured workers' try to avoid it for as long as possible, either because of this stigma, a fear of repercussions from their employer or a fear of it "being on their record" forever making it difficult to secure future employment. Further, often workers' are capable of working albeit with symptoms and the medical advice is to manage a condition conservatively and if there is no improvement then more significant and invasive treatment could be considered. This treatment could be after 6 months and might be the cause of the first incapacity to work.

17. For these reasons and others, injured workers' often contact us outside of the 6 month time frame to lodge an application after having finally succumb to the symptoms and require time off work. Of further note, often injured workers' aren't aware of the 6 months' time frame to lodge their application for compensation.

18. When the injured worker does contact us, if the injured worker has a potential common law claim, we are able to assist the injured worker with an application under section 132A of the WCRA in order to get a Notice of Assessment so that they can pursue a common law claim and achieve a lump sum. The problem with the timeframe in these circumstances is that reasonable treatment and support isn't provided, which can delay recovery or even cause further deterioration due to the lack of early intervention. The injured worker is then forced into the common law process to get the lump sum in order to get the support they need.

19. For those injured workers' who do not have a potential common law claim because there is no negligence or breach of contract, they will not be able to get the support they need. Instead they will become reliant on personal insurances (if they have any), the public health system and Centrelink even though their injury has been caused by work.

20. It is for these reasons it is critical to make this amendment to allow early intervention and support to get the best outcomes for injured workers.

21. However, it is our submission that the timeframe to lodge the application, being 20 days, can be a challenging one. For reasons such as the stigma and reluctance to lodge a claim, injured workers' may not meet that deadline. It is our submission that the time frame for lodging the application should be extended to 3 months of having the initial incapacity for work from their injury.

Support for workers with psychiatric or psychological injuries during claim determination

22. We support the provisions which allow the injured worker to access reasonable rehabilitation to support them whilst the claim is being determined. These amendments are important for 2 reasons.

23. Firstly, due to the often complex nature of a psychiatric or psychological injuries the amount of evidence needed to determine whether an application should be accepted or rejected can often be

substantial. This means the time to make a decision can be extended. The reason for this is because often detailed versions of events will be required from not only the injured worker and the employer but other employees in the workplace. Further often an analysis of medical records is required because there can be factors outside of the workplace that must be considered. Finally there may be a need after the evidence is gathered to obtain an opinion from an expert to determine whether the work has been a significant contributing factor.

24. This leads to the second point which is that the delay often prevents early intervention by practitioners to assist an individual to rehabilitate. Early intervention is key to ensuring the best outcome for injured workers. It is noted that in the 2018 financial year it took on average 34 days to make a decision in applications for compensation related to psychiatric or psychological injuries but 41.1 days on average if it was rejected[2].

25. As it stands the Bill excludes providing the cost of hospitalisations and incidental services. It is our submission, that in order to fulfil the objectives of the provision to ensure early intervention and achieve the best outcomes for workers' that these services ought not be excluded.

26. A further concern is the prescribed period only includes the initial application and no further challenges to a decision. The concern is that once a decision is made the injured worker will no longer be able to obtain the reasonable support even if that decision to reject is being challenged.

27. Due to the definition of prescribed period, this could encourage the insurer to make a quick decision without properly considering the complexities of an application so that the requirement to pay for the reasonable services ends. This is no doubt an issue that WorkCover Queensland can deal with at a policy level within its organisation but a risk remains that individuals making decisions on claims, who have KPIs around claims management and costs may act hastily and it is our submission that it becomes a greater risk with self-insurers.

28. To mitigate against this risk and to encourage a proper investigation of these complex applications, it is our submission that if a decision is rejected and an injured worker notifies the insurer of their intention to make an application for review to the Workers' Compensation Regulator, then the provision of reasonable services should remain until that process is concluded.

29. Our submission is that it needs to be the injured workers' intention to review a decision as the trigger to keep the services continuing because given the complex nature of these applications, an injured worker may need some time to seek advice and collect other evidence prior to lodging the Application for review, which they have 3 months to do.

30. This will allow the injured worker to continue to receive the services whilst the dispute is being determined having the consequence of a better outcome for the injured worker.

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[2] Office of Industrial Relations, Queensland workers' compensation scheme statistics, 2017-18 at page 18.

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Expressions of regret and apologies

31. We support the purpose of exempting expressions of regret and apologies provided by employers following a workplace injury being considered in any assessment of liability for damages under the WCRA and in particular support the provision to bring further consistency with the *Civil Liability Act 2003* ("the CLA").

32. It is our experience that where an injured worker has a more positive relationship with the employer, or that the employer informs the injured worker that they regret what happened or apologises for what happened, that the injured worker will have a more positive claims experience and can have a better outcome in terms of any psychiatric or psychological injury. Our view is that this not only has benefits for the injured worker but allows an employer to do the right thing and treat their injured worker with dignity and respect. This no doubt will have other positive impacts for other workers in the workplace.

33. In our view it is important to ensure that the provision distinguishes between the expression of regret or apology and anything that may be communicated that is attached to that expression of regret or apology. For example, if an employer were to apologise and state something like "*we are very sorry you have been injured, we should have told you that that piece of equipment was broken"*. Just because the second part of the statement is attached to the apology should not mean it is inadmissible.

34. The CLA has attempted to deal with this issue by inserting an example under the relevant section. Our submission is that the sections could be amended to include a clarifying provision stating:
"this section does not extend to any statement surrounding the circumstances of, or reasons for the incident that is attached to the <expression of regret/apology>"
or alternatively an example could be used as has been included in the CLA but the latter example won't be as clear.

35. It is our submission that the expressions of regret or apologies are likely to be more broadly utilised in workers' compensation claims compared to public liability or motor accident claims on account of the fact that there is likely to be a longer and stronger relationship between employer and employee and as such this issue should be clarified in this legislation.

Further balance for the scheme

36. The current Bill provides important amendments to create further efficiencies in the scheme and to start rebalancing the workers' rights compared with the affordability and viability of the scheme, however it is our submission that the balance is currently too conservative and there are opportunities to undertake further reform to get the balance right and make the WCRA more

consistent with the CLA, the *Motor Accident Insurance Act 1994* ("MAIA") and the *Personal Injuries Proceedings Act 2002* ("PIPA").

37. Estimates to the cost to implement the proposed amendments to the workers' compensation scheme totals $18.6 million per annum[3].

38. The workers' compensation scheme is performing strongly with WorkCover Queensland's operating profit for 2017-2018 financial year being $324 million after tax[4].

39. From the 2017 financial year to the 2018 financial year common law lodgements decreased from 2,789 to 2,753[5].

40. The Queensland scheme is maintaining Australia's lowest average premium rate at $1.20 per $100 of wages for the 2017-2018 financial year[6].

41. As can be seen from the metrics above, the scheme is very healthy and there is an opportunity to provide a greater level of assistance to the injured worker.

42. There are currently 2 key differences regarding common law entitlements when comparing the WCRA with MAIA, PIPA and the CLA.

43. The first is the provisions found in sections 59-59D of the CLA for damages for gratuitous services. In summary these provisions allow a person injured where the MAIA and PIPA apply to recover compensation for the amount of gratuitous care and assistance that is provided to them as a consequence of their injuries as long as a threshold of 6 hours per week for 6 months is met.

44. The WCRA does not allow an injured worker to recover damages for gratuitous services.

45. The second difference is the provisions around legal costs which can be found at section 56 of PIPA and section 55F of MAIA. In summary they allow an injured person to recover their legal costs from the defendant (usually an insurer) if the damages in a case exceed a threshold which is currently somewhere between $60,000 and $80,000 depending on the date of the incident. The costs recovered are based on the relevant court scale.

46. The WCRA does not allow for costs recovery from an insurer unless the impairment is 20% or greater but these costs are limited until after an unsuccessful conference takes place.

47. Previously the disparity between the common law schemes was not as stark but due to the 2013 amendments to the WCRA the disparity became more significant in particular due to the adoption by the WCRA of the general damages regulations that were already in the CLA. It should be noted that

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[3] Explanatory Notes to the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 at page 10.
[4] WorkCover Queensland annual report 2017-2018 at page 18.
[5] Office of Industrial Relations, Queensland workers' compensation scheme statistics, 2017-18 at page 5.
[6] WorkCover Queensland annual report 2017-2018 at page 16.

whilst there is this disparity at common law, the statutory claim benefits for workers are greater than the other 2 schemes.

48. There is an opportunity to bring greater consistency to the 3 common law schemes by adopting both or either of the provisions relating to gratuitous care or legal costs.

49. In relation to care and assistance, injured workers' need no less care and assistance for their injuries compared with those injured in other schemes. The consequence of not having access to common law damages means that there is a burden placed on family and friends for the remainder of the injured workers' life so that the injured worker is adequately cared for, or alternatively the care and assistance isn't provided.

50. In relation to legal costs, the work we perform for injured workers in order to secure them adequate compensation is done on a no win no fee basis and is paid from the settlement sum. If firms like ours did not offer the no win no fee service, a lot of people would not have the ability to make a claim to seek compensation. Unfortunately the usual costs principles have been removed by the WCRA in workers' compensation claims and as such injured workers' have to meet the costs of bringing a claim out of their own pocket. In a practical sense, what it means is that even if a fair outcome for damages is agreed to by the insurer, the injured worker isn't getting the full benefit of the amount due to having to fund their own legal costs. This is an unfair system for an injured worker who has suffered an injury due to the negligence of their employer.

51. Not only does the injured worker have this disadvantage, the fact that legal costs are not required to be paid by an insurer puts the injured worker at a significant disadvantage when it comes to negotiating a settlement. This is because the insurer is in a position whereby the insurer can choose to offer a lesser amount but because of the costs of proceeding the injured worker would have no choice but to accept the offer rather than proceed with the matter, because even if a greater offer was obtained from the insurer at a future point, it is likely that the costs involved in getting to that offer would mean very little difference to the amount the client receives in the hand.

52. Further, there is no deterrent to make an insurer offer the right amount at an early stage, if the injured workers' legal costs were required to be paid that would be a deterrent to allowing a matter to become drawn out. Currently the opposite is true. Matters can be drawn out to wear down an injured worker in order to have them accept a lesser sum but even worse is because it is drawn out, the costs the worker needs to pay to prosecute their claim will have increased substantially.

53. Not providing a mechanism for the injured worker to recover legal costs against an insurer not only is an imbalance in the scheme but also creates the inefficiencies alluded to above.

54. The workers' compensation scheme is healthy and profitable but this profit comes at the detriment of injured workers. Reform ought to be undertaken to include both care and assistance and legal costs provisions to be consistent with the provisions in the CLA, MAIA and PIPA.

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Conclusion

55. Shine Lawyers supports the Bill as it stands as we consider it will be beneficial to workers', employers and those operating within the scheme but we have suggested some minor changes to the current provisions.

56. However, we do consider that the government has an opportunity to more fairly balance the rights of injured workers' while maintaining an affordable and profitable scheme and would ask the committee to adopt similar provisions to those found in the other injuries legislation in Queensland.

57. Should the committee require any further clarification or information we are available to provide that.

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