ELECTRICAL CONTRACTORS ASSOCIATION

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31 August 2012

The Research Director
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

Sent via email to: fac@parliament.qld.gov.au

Dear Sir/Madam,

The Electrical Contractors Association is grateful for the opportunity to contribute to the inquiry into the operation of Queensland's workers' compensation scheme.

The **Electrical Contractors Association** (ECA) is the leading voice of the electrical industry and is committed to improving and advancing this sector. ECA is registered as an industrial organisation under Queensland legislation with its operation in Queensland. The association's website is: http://www.masterelectricians.com.au/page/ECA/

Master Electricians Australia Ltd (MEA) is a not-for-profit organisation that provides a national accreditation program to electrical contractors seeking to differentiate themselves from other contractors - similar to that process adopted by Master Builders within the construction industry. MEA is part of the ECA Group of Companies and operates nationally. The organisation's website is: http://www.masterelectricians.com.au.

References to ECA and opinions expressed by the ECA, within this submission, should be read as both the Electrical Contractors Association and Master Electricians Australia.

Our comments on the operation of Queensland's workers' compensation scheme will focus on the performance of the scheme in meeting its objectives under section 5 of the *Workers Compensation and Rehabilitation Act 2003* (the Act).

Pre-existing injuries

Section 5(4) of the Act indicates that the workers compensation scheme should strike a balance between providing fair and appropriate benefits for injured workers and ensuring reasonable cost levels for employers. *The Act* also states that the scheme should provide for the protection of employers' interests in relation to claims for damages for workers' injuries. In light of these objectives, we believe it is imperative that in order to claim for an injury under the Act, work must be proven to be the *major contributing factor* causing the worker's injury. The current definition of "injury" under the Act only requires that employment be a *significant contributing factor* to the disease or condition.

A firmer eligibility threshold would ensure that workers are compensated for the injuries they sustain as a result of workplace incidents but also prevents employers being held liable for an employee's unknown pre-existing injury or naturally occurring degenerative condition. This requirement would be particularly pertinent for stress related claims. As an example, According to a 2007 ABS Survey of Mental Health and Wellbeing, of the 16 million Australians assessed aged 16–85 years, 45% were determined to have had a mental

disorder at some time in their life and one in five were assessed as having a current mental health disorder[1].

This indicates that in some instances a worker suffering from a mental condition that manifests in a work environment could have many other factors, unrelated to their employment, that have contributed to their illness. We are certainly not suggesting that work related mental health conditions should not be duly compensated through the Act, only that stress at work be the *major contributing factor* to the manifestation or aggravation of that mental illness.

Solar related diseases

Claims related to latent onset diseases such as those attributed to excessive sun exposure also demonstrate the need for work to be identified as the *major contributing factor* to an injury in order to warrant a claim under the Act. Given that most sun damage occurs before the age of 19, there needs to be careful consideration given to the claim before such an injury can be attributed to work[2]. The damage caused by excessive sun exposure has also been common knowledge for many years, with the "Slip, Slop, Slap" public education campaign having been ongoing since 1981. Workers must also accept some personal responsibility for their sun exposure outside of the workplace that could contribute to a solar related medical condition. For these reasons, it must be established that the workplace is the *major contributing factor* causing the injury so that an appropriate balance is maintained between compensating injured workers and protecting employers' interests in relation to claims for damages[3].

Expert medical opinions

The objectives of the Act would also be better served if expert medical opinions were sought in order to establish that employment is the major contributing factor to an injury. Particularly when a claim for stress psychological or other mental illness is lodged, an expert opinion from a psychologist and / or psychiatrist should be made mandatory in order to determine whether work is the major contributing factor or whether other issues in the worker's personal life are playing a more dominant role in the manifestation or aggravation of a worker's mental illness. While a General Practitioner would certainly have a level of skill in the diagnosis of mental health conditions, a specialist in the field needs to be involved in order for an accurate medical assessment to be made. The same applies to other medical conditions that may require more specialist knowledge than that possessed by a GP.

Employee accountability

In the interests of supporting new Workplace Health and Safety laws and the responsibility placed on all parties compared to previous regulation, we would also urge government to acknowledge that workers themselves have a degree of responsibility in the context of workers compensation. Currently, the only official obligation on workers is detailed in section 130(2) of the Act which prevents the payment of compensation in certain circumstances when a worker's serious and wilful misconduct causes the injury. While this provision does provide some protection to employers against claims resulting from an employee's contributory negligence, there is little else in the Act that requires employees to take a degree of responsibility for minimising their risk of injury in the workplace in a statutory claim.

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1 http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Health%20status~229

2 *WorkCover Queensland Building Industry Forum, Dr Graeme Edwards, Independent Medical Examiner, 22 May 2012*

3 http://www.news.qut.edu.au/cgi-bin/WebObjects/News.woa/wa/goNewsPage?newsEventID=44217

To our knowledge the use of this section of the Act has never been utilised by WorkCover in a statutory claim. While employers will always hold the primary duty of care, if workplace safety is the overarching aim, employee obligations must be incorporated into legislation. In addition to stronger enforcement of section 130, we also recommend that the following worker responsibilities be incorporated into the Act:

- Obligation to report workplace incidents and lodge a claim within a reasonable timeframe, with the current timeframe of six months reduced to one month. Latent onset or terminal injuries such as asbestos related disease would be the exception to this timeframe;
- Obligation to advise management of pre-existing medical conditions that could be affected by activities in the workplace; and
- Obligation to cooperate with the claims process and return to work initiatives at the direction of WorkCover Queensland.

Employer incentives

Section 5 of the Act states that one of the objectives of the workers compensation scheme is to encourage improved health and safety performance by employers. In order to further this goal, incentives could be offered to employers who undertake targeted initiatives to reduce the occurrence of workplace accidents. MEA proposes that employers who invest in work health and safety training, improved work, health and safety (WHS) processes and up-to-date equipment receive a return on their investment in the form of lower premium rates. The importance of employer initiatives in reducing the incidence of workplace accidents cannot be underestimated and lower premium rates would be a justifiable compensation for an employer's investment in preventing these incidents occurring in the first place. Lower premiums would also be a valuable incentive for employers to remain diligent in striving to provide a safe working environment.

Other Issues

<u>Reducing the incidence of common law claims</u>

The growth in common law claims could be further addressed by the implementation of a permanent incapacity threshold for common law damages claims. Establishing a threshold could address employer and industry concerns over workers accessing common law relief in the absence of any permanent injury and in situations where an employee has been able to return to work and resume their duties. Granted, it may be a challenge to identify the precise degree of permanent incapacity that must be evident in order to establish a common law claim as each occupation has varied skill requirements. For example, in some roles losing the top of a finger would render a worker unable to perform their existing duties, whereas for another it would make little difference to their ability to return to work. To overcome this challenge, MEA recommends that a working group of industry representatives and medical experts be formed in order to determine the level of permanent incapacity that a worker must have incurred in order to pursue a common law claim. We strongly believe that instituting this threshold will see a further drop in common law claims whilst also protecting the rights of injured workers to be appropriately compensated for a permanent disability they sustain. This change would only further serve the objectives of the Act and would preserve the integrity of the Workers Compensation Scheme in Queensland. The ECA would be a willing participant in any such working group.

<u>Definition of "worker"</u>

In order to meet the stated objectives in the Act, it is imperative that the definition of "worker" in the Act be clear and consistent so that small to medium businesses are able to comply with the legislation. The current results test located in schedule 2 of the Act is not well

understood and causes confusion for employers. In the building and construction industry genuine subcontracting arrangements are widely utilised as a legitimate way of conducting business. Those working under these arrangements continue to regard themselves, in the vast majority of cases, as small businesses owners and not employees.

Whilst we recognise that there is a very small element within the industry where sham contracting arrangements are in place, this should not affect the broader interpretation or actions of genuine subcontractors who, of their own free will, enter into and undertake work of a specific nature which is results orientated. The current narrow legal definition that, in order to be a genuine contractor there must be a written contract in place with a set outcome and set error correction clauses, is difficult to satisfy for many tradespeople operating as contractors, especially in the smaller housing industry sector. In fact, there is now a growing trend of larger principal contractors refusing to work with sole traders and partnerships in order to avoid the risk that they will be deemed as employees. These principal contractors are opting instead to only utilise formally recognised companies. The benefit of this arrangement being that anyone from that company could be a director and not a worker, removing the risk of this company being deemed to be an employee and preventing sham contracting allegations being laid against the principal contractor. This has an obvious impact on sole traders and partnerships who would be losing valuable business opportunities.

Schedule 2, Part 1, Section 2(a)(ii) also states that in a genuine contracting arrangement the person performing the work *has to* supply the plant and equipment or tools of the trade needed to perform the work. However, when considering relevant legal precedent in various jurisdictions this requirement can vary and is not necessarily an indication of a contractor arrangement. While the equipment or tools may be supplied by a principal contractor, if they are not supplied then the contractor would provide it themselves. Therefore, it is not always the case that a genuine contractor *has* to supply their own tools as a particular situation or simple convenience may see the contractor utilising the principal's tools and/or equipment. In light of this, the word "*has*" is not necessarily the determining point in the legislation that turns a contractor into an employee.

Schedule 2, Part 1, Section 2(b) is also a restrictive clause whereby a personal services business determination is in effect. These determinations are expensive to receive and most accounting firms will not lodge a formal application and instead just use professional judgement as to whether the company qualifies. As such, we would suggest that this wording better reflect the accepted business practice of an assessment by a taxation professional who, in accordance with the criteria from the Australian Taxation Office, evaluates the company as qualifying for a personal services business determination.

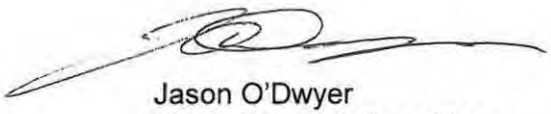
<u>Jurisdictional uniformity</u>

Given the relative strength of Queensland's workers compensation scheme, we would be opposed to any Australia wide harmonisation of Workers Compensation laws. Any potential harmonisation would inevitably result in increased premiums for Queensland employers and our current competitive advantage being diminished. Queensland's existing "short tail" scheme for workers compensation is in the main working well for all parties involved and is achieving the objectives of the Act. Harmonisation with other jurisdictions could compromise this success.

The success of Queensland's scheme is due in no small part to the proficiency of WorkCover and before that the Workers Compensation Board (WCB) and State Government Insurance Office (SGIO). While we would like to see WorkCover engage more regularly with employers and provide more detailed and up-to-date information throughout the course of an investigation, we would support WorkCover (in conjunction with self-insurance) remaining the sole insurer of workers compensation claims in Queensland.

We thank you again for the opportunity to contribute to the continued improvement of Queensland's workers' compensation scheme. MEA is optimistic that this inquiry will result in a scheme that strikes a more equitable balance between the interests of injured workers and preventing undue financial strain for employers who continue to meet their work, health and safety obligations and provide a safe and fair workplace.

Yours sincerely,



Jason O'Dwyer
Workplace Relations Manager