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

BY EMAIL: fac@parliament.qld.gov.au

Dear Committee Members,

Submission in relation to the operation of Queensland's Workers' Compensation Scheme (the Scheme)

CSR Limited (CSR) appreciates the opportunity to make a submission in relation to the performance of the Scheme in meeting the objectives under section 5 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act)).

CSR's submission relates specifically to the intended objective of the Act to maintain a balance between providing fair and appropriate benefits for injured workers and ensuring reasonable cost levels for employers.

CSR

CSR is an Australian company based in New South Wales. CSR's core business is the manufacture and supply of building products in Australia and New Zealand.

CSR is a long-term investor in Queensland - its most recent large project being the Bradford glasswool insulation plant at Brendale. Around 500 of CSR's employees are based in Queensland.

In 1969, CSR became the parent company of Seltsam Pty Limited (formerly Wunderlich Limited) (Seltsam). Seltsam manufactured and supplied asbestos cement building products until July 1977. It operated a factory at Gaythorne in Brisbane which serviced the Queensland market. Seltsam's asbestos cement building products business (including the Gaythorne factory) was acquired by Amaca Pty Limited (formerly James Hardie and Coy Pty Limited) (Amaca) in July 1977.

Seltsam continues to meet its liabilities for injury caused by exposure to asbestos dust and fibre.

CSR

WORKCOVER'S ASBESTOS LIABILITY IN QUEENSLAND

Workers who develop a dust disease caused by exposure to asbestos dust and fibre in the course of their employment in Queensland are eligible to claim statutory compensation pursuant to the Act.

WorkCover's asbestos liability is significant.

In 2010/2011, WorkCover received 420 claims for statutory compensation in respect of mesothelioma and asbestosis in 2011/12, up from 297 in[1]. In 2011/2012, total statutory claim payments, in respect of mesothelioma and asbestosis were $46.8m, up from $39.6m in 2010/11[2]. It is not known how many claims for compensation in respect of mesothelioma and asbestosis were received by self-insurers.

The Act provides for substantial statutory compensation in relation to a latent onset injury which is terminal (i.e. such as mesothelioma). By way of example, a worker who in under 70 years of age and is diagnosed as suffering mesothelioma after 1 January 2008, is entitled to statutory compensation of approximately $573,425.00. If the worker has a dependant spouse, the spouse would be entitled to additional statutory compensation of approximately $86,950.00 at the date of the worker's death. The total value of a claim such as this would be $660,375.00.

Many workers elect to claim statutory compensation from WorkCover rather than to sue their employer and/or the manufacturer and/ or supplier of products containing asbestos as the statutory compensation benefits payable are often greater than common law damages, the threshold for entitlement is relatively low (i.e. compared with the burden of proof in common law proceedings), the process is relatively simple, the process is relatively inexpensive, the process is quick (i.e. claims are decided in about 16.2 days) and the process is risk free (i.e. there is no risk of an adverse costs order if the application for compensation is unsuccessful).

INDEMNITY IN WORKCOVER'S FAVOUR

The Act provides a statutory indemnity in WorkCover's favour. Section 207B(7) of the Act allows WorkCover to recover some or all of the statutory compensation it has paid from any tortfeasor liable for the worker's injury at common law.

WorkCover has commenced a number of proceedings seeking indemnity, pursuant to section 207B(7) of the Act, for statutory compensation it has paid in respect of mesothelioma and asbestosis claims. Amaca is the most commonly named defendant in these proceedings. Seltsam is named as a co-defendant in some matters as are other manufacturers/suppliers of products containing asbestos.

THE ISSUE

The Act has resulted in anomalies and unfairness to companies - such as Seltsam - who continue to meet their asbestos related liabilities. In particular it appears that recovery by WorkCover from some tortfeasors is not available - either through effluxion of time and deregistration or liquidation of relevant companies, or the legislative response to issues associated with the restructure of the James Hardie group - the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (**JHFSA**)[3].

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[1] Q-Comp Statistics Report 2011/12

[2] Ibid

[3] The JHFSA was enacted as a scheme for the winding up of certain companies that were formerly within the James Hardie corporate group and to ensure the asbestos liabilities of those companies were met in accordance with the Final Funding Agreement that was entered by the State of New South Wales and James Hardie Industries NV and LGTDD Pty Limited on 1 December 2005.The JHFSA sets out the types of claims that are payable by Amaca

A worker who elects to sue at common law in respect of a dust disease caused by exposure to asbestos dust and fibre in the course of their employment will often sue not only the manufacturer(s) and/or supplier(s) of products containing asbestos (eg Amaca and Seltsam) but also their employer. In these cases, liability is apportioned by the courts having regard to the relative culpability of each defendant.

The indemnity contained in section 207B of the Act makes no allowance for the culpability of the worker's employer who ultimately controlled how much, how often and in what manner an asbestos containing product was used by the worker. Given Queensland enacted the *Asbestos Rule* in 1971, all employers knew or ought to have known it was necessary to take some precautions when using products containing asbestos from that date.

Further, if WorkCover fails to sue all possible tortfeasors there is no capacity for a named defendant to join other tortfeasors to WorkCover's claim for indemnity.

As a consequence Seltsam and other companies may bear a disproportionate share of any liability to WorkCover under the recovery provisions of the Act. This creates an obvious unfairness which should be addressed.

THE SOLUTION

The issues identified above can be rectified by simple legislative amendment.

If section 207B was amended so as to provide WorkCover with a right of subrogation then issues associated with the JHFSA may be avoided.

Section 207B(7) of the Act ought to be amended so that each tortfeasor's liability for the indemnity in WorkCover's favour is proportionate rather than joint and several (i.e. so as to avoid situations where only one tortfeasor is named in proceedings and there is more than one tortfeasor responsible for the worker's injury).

CONCLUSION

The issues we have identified are increasing cost levels for employers and undermine the sustainability of the Scheme prevent the indemnity contained in section 207B(7) of the Act from operating to ensure those responsible at common law for a worker's injury are held responsible in a just and equitable fashion.

The legislative amendments we have suggested seek to address these issues in a simple way.

We take this opportunity to thank you for consideration of the issue we have raised. Please contact me by telephone should you wish to discuss the issues we have identified further.

Yours faithfully,

Debbie Schroeder

Debbie Schroeder
Legal Counsel and Company Secretary
CSR Limited

CSR