ASIEQ
Assoc. SELF INSURED EMPLOYERS QLD

14 July 2017

Committee Secretary
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: fac@parliament.qld.gov.au

Dear Committee Secretary

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

I write on behalf of the Association of Self-Insured Employers of Queensland (**ASIEQ**) in relation to the *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill 2017* (**the Bill**).

ASIEQ is representative group acting primarily for the licensed self-insured employers under the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) within the Queensland workers' compensation scheme.

The membership of the association has historically included all Queensland licensed self-insured employers that make up approximately 10% to 12% of the overall Queensland workers' compensation scheme. Our members consist of a diverse range of large organisations and businesses (almost 300 individual employers) that operate across a wide range of industries that contribute significantly to the Queensland community.

These organisations and businesses which include local government authorities, national companies and global/multinational corporations employ more than 200,000 Queensland workers and stimulate significant economic opportunities and growth for the Queensland economy.

We thank you for the invitation to make a written submission in relation to the matters raised in the Bill. ASIEQ makes two submissions, which are **enclosed**. ASIEQ's submissions relate respectively to (1) firstly, Part 3 of the Bill and (2) secondly, Parts 4 and 5 of the Bill. ASIEQ makes no submissions in relation to Parts 1, 2, 6 and 7 of the Bill.

ASIEQ would welcome the opportunity to make oral submissions at the Finance and Administration Committee's public hearing on 31 July 2017.

Regards,

David Gomulka
President ASIEQ

Submission to the Finance and Administration Committee

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

July 2017

Submission Relating to Proposed Amendment of the Industrial Relations Act 2016

Proposed Amendments to Industrial Relations Act 2016

Part 3 of the *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill 2017* (**the Bill**) proposes amendments to the *Industrial Relations Act 1999*.

This document represents the submissions of the Association of Self-Insured Employers of Queensland (**ASIEQ**) in relation to Part 3 of the Bill.

ASIEQ has prepared a separate submission in relation to Parts 4 and 5 of the Bill.

Amendments Proposed by the Bill

Clause 14	**Act amended** This part amends the *Industrial Relations Act 2016*.
Clause 15	**Amendment of s 566 (Stay of decision appealed against)** Section 566— *insert—* (2) This section does not apply to an appeal under the *Workers' Compensation and Rehabilitation Act 2003*, chapter 13, part 3 against a decision to allow an application for compensation under that Act.
Clause 16	**Insertion of new ch 18, pt 3** Chapter 18— *insert—* **Part 3 Transitional provision for Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Act 2017** **1086 Existing appeals under Workers' Compensation and Rehabilitation Act 2003** (1) This section applies to an appeal started under the *Workers' Compensation and Rehabilitation Act 2003*, chapter 13, part 3 but not decided before the commencement, if the appeal is against a decision to allow an application for compensation under that Act. (2) Section 566 applies to the appeal. (3) However, this section does not affect an order that the decision be wholly or partly stayed made before the commencement.

Background to the Proposed Amendments

Current provision in the Industrial Relations Act 2016

Section 566 of the *Industrial Relations Act 2016* (**IRA**), as it currently stands, provides as follows:

> **566 Stay of decision appealed against**
>
> On an appeal, the industrial tribunal may order that the decision being appealed be wholly or partly stayed pending—

(a) the determination of the appeal; or
(b) a further order of the industrial tribunal.

Explanatory Notes

The relevant extracts from the Explanatory Notes to the Bill in relation to this amendment are as follows:

> The Bill also amends the *Workers' Compensation and Rehabilitation Act 2003* to address recent decisions of the Queensland Industrial Relations Commission to grant applications to stay a decision of the workers' compensation regulator following the review of an insurer's decision on a workers' compensation claim. The granting of these stays has resulted in injured workers being denied access to weekly compensation while the appeal is determined. In granting these stays, the Queensland Industrial Relations Commission has relied on matters specific to the employer's status as a self-insured employer, which allows a self-insured employer to gain financial advantage through the appeals process to the detriment of the worker. The Bill amends the *Industrial Relations Act 2016* to make it clear that a stay cannot be granted in an appeal against a decision to accept compensation …
>
> The amendment to clarify that the power to grant a stay under the *Industrial Relations Act 2016* does not apply to an appeal under the *Workers' Compensation and Rehabilitation Act 2003* will ensure workers are not denied access to financial benefits and medical treatment. The amendments do not impose a Regulatory burden on business or the community …
>
> Clause 15 clarifies that section 566 (stay of decision appealed against) does not apply to an appeal under the *Workers' Compensation and Rehabilitation Act 2003*, chapter 13, part 3 against a decision to accept an application for compensation under that Act. This amendment will ensure that workers are not financially disadvantaged during the conduct of an appeal.

Explanatory Speech

The Hon Grace Grace MP (Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs) introduced the Bill into the Queensland Parliament on 14 June 2017. In doing so she said:

> It has also come to the attention of this government that a number of self-insured employers have successfully sought to stay decisions of the Workers' Compensation Regulator to accept a worker's claim for compensation in the Queensland Industrial Relations Commission. This has resulted in these workers being denied access to compensation and medical treatment for lengthy periods of time, undermining any chance of early return to work and rehabilitation and placing these workers at a disadvantage from workers whose employers are insured with WorkCover Queensland. The bill clarifies that the Queensland Industrial Relations Commission cannot grant a stay of decision that is subject to appeal under the *Workers Compensation and Rehabilitation Act 2003* to protect the rights of workers and place all workers and employers on a level playing field.

Submission

Introduction

Under the WCRA, where an insurer rejects an application for compensation by a worker, the worker can apply for a review of the insurer's decision to the Workers' Compensation Regulator. If the Regulator sets aside the insurer's rejection, and substitutes the decision that the application is to be accepted, the employer is able to appeal the decision of the Regulator to the Queensland Industrial Relations Commission (**QIRC**).

In those circumstances, and pending a decision on appeal, compensation under the WCRA is payable by the insurer to the worker.

Further, by virtue of section 566 of the WCRA, the compensation paid is not recoverable by the insurer even if the employer is ultimately successful in an appeal to the QIRC or Industrial Court – where it is ultimately determined that the insurer is not liable to make the payments.

It is due to the creation of an interim entitlement to compensation payments, which cannot be recovered if the employer is successful on appeal, that gives rise to the need for an employer, in appropriate circumstances, to be able to have the Regulator's decision stayed pending the determination of the appeal.

Against that background, ASIEQ submits that the Committee recommend to the Queensland Parliament that clauses 14, 15 and 16 be removed from the Bill.

ASIEQ's submission is made on the following bases:

- scheme wide, cases where a stay is appropriate to be sought by an employer are extremely rare;
- the granting of a stay is currently at the discretion of the QIRC and the QIRC takes a careful approach to ensure the just granting of a stay only in proper circumstances;
- the proposed amendments would render the appeal process largely redundant;
- the proposed amendments do not reflect the objects of the legislation, and reverse the existing position under the legislation which permits the QIRC to grant a stay in respect of appeals pursuant to the WCRA;
- workers are not 'denied access to compensation' under the current legislation; and
- the proposed amendments are financially detrimental to employers.

ASIEQ will address these concerns in turn in this submission.

ASIEQ submits in the alternative that if the Committee will not recommend to the Queensland Parliament that clauses 14, 15 and 16 be removed from the Bill, the Committee should recommend that section 566 of *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) be removed.

ASIEQ also submits that the Committee recommend to the Parliament that review officers of the Workers' Compensation Regulator be required to have their decisions reviewed internally, in the same way that insurers are required to under the legislation.

ASIEQ also makes comment regarding its consultation in relation to the proposed amendments to the IRA and the Office of Industrial Relations' (**OIR**) brief to the Committee.

Cases justifying a stay are rare

The Queensland workers' compensation scheme statistics 2015-2016[1] published by the OIR reports:

- 77,786 decisions made by workers' compensation insurers;
- 5.5% of those decisions were rejections of physical injuries;
- 2,917 applications for review decided by the Regulator;
- 1,652 applications were for rejected claims.

In the history of workers' compensation in Queensland, ASIEQ is aware of only four applications to the QIRC by employers for the granting of stays of the decisions of the Workers' Compensation Regulator (or previously Q-Comp) to set aside the rejection of a claim.

Relative to the numbers of claims in dispute each year, it is not an often utilised avenue for employers.

The four decisions are:

- *Qantas Airways Limited and Q-Comp* (2006) 181 QGIG 227 – VP Linnane determined that there was no power to grant a stay of the review decision by Q-Comp.
- *Toll North Pty Ltd and Q-Comp & Anor* (B2013/32) - O'Connor DP granted a stay of the decision of Q-Comp.
- *Toll Personnel Pty Limited v Workers' Compensation Regulator* [2016] QIRC 140 - Industrial Commissioner Black granted a stay of the decision of the Workers' Compensation Regulator.
- *JBS Australia Pty Limited v Workers' Compensation Regulator* [2016] QIRC 138 - Industrial Commissioner Black granted a stay of the decision of the Workers' Compensation Regulator.

In each instance, the Workers' Compensation Regulator (and formerly Q-Comp) opposed the stay applications. As noted above the instances in which employers have and will seek a stay are rare and will impact a minimal number of claims scheme wide.

1 https://www.worksafe.qld.gov.au/forms-and-resources/statistics/workers-compensation-Regulator-statistics-reports

The QIRC takes a careful approach to ensure granting of a stay only in proper circumstances

The granting of a stay has always been at the discretion of the QIRC. It has based its decisions upon a series of principles as applied in *Toll Personnel* and *JBS Australia*. These principles were as originally enunciated by the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685. These principles are (as summarised in *JBS Australia* at pages 10 to 11 of the decision):

- The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties.
- The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.
- The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties.
- Where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the court may refuse a stay.
- Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay.
- The court will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.
- As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security.

Thus, the scheme is protected against vexatious or frivolous applications by employers for stays. Importantly, the QIRC must consider whether the employer has an arguable case and must also carefully consider the competing rights of the parties. These principles were carefully applied by the QIRC in the recent decisions in which a stay was granted.

Financial detriment to the employer

The reason for an employer seeking a stay of a review decision by the Regulator in limited circumstances is by virtue of section 566 of the WCRA, which provides as follows:

> **566 Decision about payment of compensation**
>
> (1) This section applies if the industrial commission or the industrial court decides that an insurer is not liable to make payments of compensation to a person.
> (2) The person who received compensation is not required to refund payment to the insurer.
> (3) Subsection (2) is subject to section 537.

As noted above, the amendment proposed by the Bill addresses the situation where an insurer rejects an application for compensation by a worker and the worker applies for a review of the insurer's decision by the Regulator. If the Regulator sets aside the

rejection and substitutes the decision that the application is accepted then, absent a stay of the Regulator's decision, compensation under the WCRA is payable by the insurer to the worker.

However, by virtue of section 566 of the WCRA, the compensation paid is not recoverable even if the employer is ultimately successful in an appeal to the QIRC or Industrial Court – where it is ultimately determined that the insurer is not liable to make the payments.

This is in contrast to the provisions of section 170 of the WCRA where an insurer may recover the difference between payments made and entitlement, in the case of an overpayment of compensation.

This means that where an employer is put to the expense of appealing a decision incorrectly made by the Regulator, it also incurs (without ability to recover) the costs of paying compensation to a worker who is ultimately not entitled.

The Explanatory Notes suggest self-insured employers *'gain financial advantage through the appeals process to the detriment of the worker'.*

ASIEQ respectfully submits that no financial advantage is being gained by the self-insured employer. Rather the self-insured employer is at a financial disadvantage. The stay mechanism provides protection to the self-insured employer and is a necessary complement to section 566 of the WCRA. Without it, the self-insured employer is required to pay compensation even if successful in an appeal. This would render an appeal, in many cases, of little or no utility (as discussed further below).

ASIEQ recognises that by seeking a stay of an erroneous decision by the Regulator so as not to pay compensation not entitled and not recoverable could be perceived a 'financial advantage' in the narrow sense that the self-insured employer would retain the compensation payable until the dispute is decided on appeal.

In both the matters of *Toll Personnel* and *JBS Australia*, the subsequent appeals by the employers of the review decisions of the Regulator were allowed, and the stay granted in each case prevented the overpayment of compensation to which the worker was not entitled. Conversely, if the decision of the Regulator is confirmed on appeal then the self-insured employer pays compensation entitlements.

As noted above, the relevant principles for consideration in the exercise of the discretion for granting a stay by the QIRC, include:

> As a condition of a stay the court may require payment of the whole or part of the judgement sum or provision of security.

This measure would remove any potential for financial benefit in the above discussed narrow sense to the self-insured employer.

Workers are not 'denied access to compensation'

As in *Toll Personnel* and *JBS Australia*, the ultimate findings on appeal justified the granting of stays which if otherwise had not been granted would have meant the payment of compensation without the power of recovery due to section 566 of the WCRA.

The statement in the Explanatory Notes that workers are denied access to compensation is incorrect. As the two abovementioned cases demonstrate, the appeal body ultimately decided the worker had no entitlement to the compensation in dispute.

If an appeal by an insurer is unsuccessful, full compensation entitlements will then become payable to the worker.

It is also noted that in *Toll Personnel*, ASIEQ is advised that compensation under the WCRA had already been paid and the determination on appeal was only about entitlement to additional payments of compensation. In *JBS Australia*, the QIRC granted the stay, but ordered $51,023.63 be paid to the worker after the employer offered this interim amount unconditionally.

Appeal mechanism becomes redundant

The payment of compensation by virtue of section 566 on decisions set aside by the Regulator is a reason very few of the thousands of review decisions of the Regulator are appealed by employers every year. There is little benefit to employers in appealing the Regulator's decision when the compensation overpaid is not recoverable.

This amendment will impose a Regulatory burden on business by further limiting the utility in disputing erroneous decisions of the Regulator that impact on the costs to employers. This amendment therefore restricts any access to justice for employers by further limiting their ability to challenge erroneous decisions by the Regulator.

This could lead to a scarcity of appeals. If very few review decisions are appealed to the QIRC or the Industrial Court, clerical officers of the Regulator become the ultimate arbitrators of the scheme, rather than the courts. Statute law is meant to be ultimately interpreted by courts and commissions, whose decisions become authoritative precedents for decision-makers to follow.

The proposed amendments do not properly reflect the objects of the legislation

The objects of the *Workers' Compensation and Rehabilitation Act 2003* ('WCRA') include:

> **5 Workers' compensation scheme**
>
> (4) It is intended that the scheme should—
>
> (a) maintain a balance between—
>
> (i) providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and
>
> (ii) ensuring reasonable cost levels for employers …
>
> (5) Because it is in the State's interests that industry remain locally, nationally and internationally competitive, it is intended that compulsory insurance against injury in employment should not impose too heavy a burden on employers and the community.

ASIEQ submits that given the very small number of occasions in which an employer has or will seek a stay of a review decision, the amendment proposed by the Bill is an

over-reach and a shift in policy not in keeping with the objects of the WCRA of providing fair and appropriate benefits for workers and reasonable cost levels for employers.

ASIEQ submits that stay applications appropriately considered by and decided by the QIRC enhance the objects of the WCRA in maintaining a balance between *'fair and appropriate benefits for injured workers'* and '*reasonable cost levels for employers'.*

ASIEQ notes that the decisions of the QIRC in *Toll Personnel* and *JBS Australia* have prompted the proposed amendment to the IRA that seeks to abolish the powers of the QIRC to grant a stay of a review decision under the WCRA. It is noted that both the Explanatory Notes and the Explanatory Speech refer to the proposed amendments being to '*clarify that the power to grant a stay under the Industrial Relations Act 2016 does not apply to an appeal under the Workers' Compensation and Rehabilitation Act 2003*'. ASIEQ says that the proposed amendments do not clarify the existing position, rather the existing legislative position (which permits a stay to be granted by the QIRC) is in fact being reversed by the proposed amendments.

Self-Insured Employers Are Disadvantaged

Each employer, whether also a self-insurer, or who has a policy of insurance with WorkCover Queensland, has the right to appeal the Regulator's decision to allow a claim for compensation.

Employers, whether self-insurers or insured by WorkCover, are impacted financially by workers' compensation claims made. Each employer faces the prospect that the workers' compensation payments made to a worker as a consequence of the Regulator's decision will be forfeited if the Regulator's decision to allow a claim for compensation is later overturned.

The payments made by an employer which is also a self-insurer are made by the employer (see section 109 of the WCRA).

For an employer insured with WorkCover, the payments made by WorkCover are reflected in the premium paid by the employer and are adjusted using an experience based rating (EBR) which reflects claims experience made up of the past three (3) years of statutory claims costs, followed by the preceding one year of common law costs (going back four years in total).

If a WorkCover claim rejection decision is overturned by the Regulator, WorkCover pays the compensation but there is no immediate financial impact on the employer. WorkCover is not permitted to appeal the decision. If the employer appeals the Regulator's decision and is successful, it is our understanding that WorkCover does not penalise the employer through the EBR premium for the compensation that was paid.

This places employers insured with WorkCover in a better position than self-insured employers. This is another reason that it is wrong to say that self-insured employers are seeking to gain a financial advantage through a stay.

The Explanatory Notes appear to assert that the ability of the QIRC to grant a stay produces an unjust result and favours employers who are self-insurers by reason that:

- self-insured employers could unjustly benefit from their status to gain a stay in appeal proceedings;

- WorkCover generally pays compensation to the workers during appeal proceedings;

- the QIRC would not take into account as a material consideration the burden placed on WorkCover on continuing to pay the worker during the appeal process.

This distinction between employers insured with WorkCover, as opposed to those who are self-insured, is misconceived because:

- employers, insured by WorkCover, do face a potential financial liability but they are protected by WorkCover's practices;

- both employers who are self-insurers and employers who are insured by WorkCover have each been given standing to appeal a Regulator's decision and to take action to seek a stay pursuant to section 274 of the IRA.

Alternative Position

If the Committee is not minded to recommend removal of clauses 14, 15 and 16 from the Bill, then ASIEQ submits that the Committee recommend that section 566 of the WCRA be removed from the WCRA altogether, thus removing the bar to an insurer recovering the compensation paid to a worker with no entitlement, after an employer's successful appeal.

Further Submission

Furthermore, ASIEQ submits that the Committee recommend to the Parliament that the requirement for insurers to have their decisions reviewed internally under section 538 of the WCRA be replicated for the decisions of the review officers of the Regulator in section 540 of the WCRA. The intention of this mechanism would be to improve the decision making of the Regulator.

Lack of Consultation

The Explanatory Notes state that consultation has occurred with ASIEQ regarding to the provisions in the Bill relating to stays. ASIEQ respectfully disagrees.

Two informal discussions were convened by employees of the OIR with the President and/or Vice-President of ASIEQ without prior notice, neither of which represented proper consultation.

Office of Industrial Relations Briefing

ASIEQ has noted the Departmental Brief to the Committee dated 29 June 2017.

In paragraph 34, the OIR purports to describe a situation where an injured worker involved in one of the cases where a stay was granted, was denied compensation and treatment that the worker was entitled to. The OIR fails to mention that the QIRC

decided the appeal in favour of the employer. Therefore, the worker was not entitled to the compensation and the employer was not liable for the treatment.

Submission to the Finance and Administration Committee

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

July 2017

Submission Relating to Proposed Amendment of the Workers' Compensation and Rehabilitation Act 2003 and the Workers' Compensation and Rehabilitation Regulation 2014

Proposed Amendments to Workers' Compensation and Rehabilitation Act 2003 and the Workers' Compensation and Rehabilitation Regulation 2014

Parts 4 and 5 of the *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill 2017* (**the Bill**) propose amendments to the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) and the *Workers' Compensation and Rehabilitation Regulation 2014* (**WCRR**).

This document represents the submissions of the Association of Self-Insured Employers of Queensland (**ASIEQ**) in relation to Parts 4 and 5 of the Bill.

ASIEQ has prepared a separate submission in relation to Part 3 of the Bill.

Submission

Background

ASIEQ was invited to participate in the Coal Worker Pneumoconiosis Workers' Compensation Stakeholder Reference Group (**SRG**) established by the Queensland Government that commenced on 24 January 2017 to advise on any gaps in the WCRA in relation to workers diagnosed with coal workers pneumoconiosis (**CWP**).

The terms of reference for this stakeholder group were related specifically to the coal mining industry and in particular claims for CWP. It was not created to consider the broader implications of dust exposure in the workplace across all industries. However, as a consequence of this review into CWP, the Bill proposes to introduce significant changes in relation to the management and cost of all pneumoconiosis (lung conditions caused by dust exposure) claims across the scheme.

ASIEQ acknowledges that there are difficulties in endeavouring to medically isolate CWP from other dust related lung diseases such as silicosis, or in isolating even non-industrial diseases such as emphysema from smoking.

The introduction of a proposal by the Office of Industrial Relations (**OIR**) to consider a new lump sum, and the use of a pneumoconiosis scoring methodology, saw the previous reference to only CWP claims expand to capture all pneumoconiosis claims.

ASIEQ does not believe that that the SRG was provided with sufficient time and information to consider the implications of the newly proposed changes. As noted, the SRG was created to review CWP claims within the coal industry - information provided indicated that there were less than 25 accepted CWP claims, any additional costs would be minimal based on claim numbers to date and costs would be contained within the coal industry. However, once drafting of the proposed amending legislation commenced, the impact of the proposed amendments broadened to reach across all industries where exposure to dust may have occurred in the past.

ASIEQ is therefore reliant on the OIR's consideration of the cost implications of these significant changes; and also the relevance and merit of using a pneumoconiosis scoring system based on the ILO classification guidelines, rather than the existing impairment assessment process.

As previously noted, whilst the incidence to date of CWP in Queensland has been relatively small (possibly less than 25 confirmed cases), the effect on the scheme in regards to providing new lump sums for all pneumoconiosis cases and the potential 're-opening' of a large portion of previous pneumoconiosis cases (which number in the hundreds) should be appropriately modelled and reported on by WorkCover Queensland in consultation with OIR.

It is important to recognise that the classification method proposed to determine a pneumoconiosis score does not provide a diagnosis, nor does it determine whether any deterioration between readings was the result of further exposure to non-industrial contaminants or the degeneration of the original condition. The communication of any new legislation needs to emphasise that obtaining a category rating in accordance with the schedule does not in itself signify entitlement to lump sum compensation. Any claims still need to consider the workers' entitlement to compensation within the Queensland scheme.

ASIEQ would also caution against the use of the term 're-open' to consider additional benefits as this infers the payment of treatment and other benefits. There is no provision for additional treatment or weekly compensation being proposed. It should be noted that under the proposed amendments, workers can apply to have entitlement to statutory lump sums reassessed if there has been significant degeneration in the lung condition.

Recommendations

Against that background, ASIEQ submits that the Committee should make the following recommendations to the Queensland Parliament:

- there is currently sufficient lump sum compensation within the existing provisions of the WCRA to provide for a worker with a pneumoconiosis condition, and the proposed additional lump sums are not required;
- alternatively, if the new lump sum entitlement is to be introduced, the scale should be adjusted to provide a minimum payment of $3,200, up to a maximum of $120,000;
- there should be a minimum three to five year exclusionary period between applications for reassessment of lump sums;
- the proposed section 193D should be amended to provide that the assessed DPI for degeneration of a pneumoconiosis condition be reduced by the previously assessed DPI for the pneumoconiosis condition;
- the transitional provisions should be amended to limit entitlement to the new lump sums, and further assessment of permanent impairment, to:
    - all new claims after commencement of the amending legislation; and
    - past claims where entitlement to a lump sum under section 179 of the WCRA has not been previously assessed before commencement of the amending legislation;
- the OIR should establish a panel of certified readers to be used by insurers for the appropriate assessment of pneumoconiosis conditions in accordance with ILO classification guidelines;

- section 186 of the WCRA should be amended to omit the ability for the worker to request to have the DPI assessed again by a doctor.

ASIEQ will address these points in turn below.

New lump sum – clause 20 (Chapter 3 Part 3 Division 5 of WCRA)

Clause 20

Insertion of new ch 3, pt 3, div 5
Chapter 3, part 3—
insert—
Division 5 Workers with pneumoconiosis

Note—
Under section 128B, if a worker sustains a latent onset injury that is a terminal condition, the worker is entitled to compensation for the injury only under division 4.

Subdivision 1 Entitlement to lump sum compensation

128F Application of subdivision
This subdivision applies to a worker—
(a) who has sustained an injury that is pneumoconiosis; and
(b) if section 119 applies for the worker's injury—whose entitlement to compensation for the injury has not ended under section 119(2).

128G Lump sum compensation
(1) The worker is entitled to lump sum compensation under this subdivision of up to $120,000 for the injury.
(2) The amount of the lump sum compensation is payable according to a graduated scale prescribed by regulation, calculated on the basis of—
(a) the worker's pneumoconiosis score; and
(b) the worker's lodgement age.
(3) For subsection (2), a regulation may prescribe bands (each a ***pneumoconiosis band***) that comprise particular pneumoconiosis scores.
(4) Subject to section 140, the worker's entitlement to lump sum compensation under this subdivision is in addition to any entitlement to lump sum compensation under part 10.
(5) This section applies despite section 176.

128H When lump sum compensation is payable
(1) The lump sum compensation is payable only after the worker's injury has been assessed under section 179.
(2) However, it does not matter whether the notice of assessment in relation to the injury states that the worker has sustained permanent impairment from the injury.

<u>Recommendation:</u> ASIEQ submits that there is currently sufficient lump sum compensation within the existing provisions of the WCRA to provide for a worker with a pneumoconiosis condition, and the proposed additional lump sums are not required.

The Bill proposes to introduce a new Chapter 3, Part 3, Division 5 into the WCRA.

Subdivision 1 provides for a lump sum payable to worker who has an injury that is pneumoconiosis on a graduated scale prescribed by regulation up to a maximum of $120,000, based on a pneumoconiosis score and the worker's lodgement age.

Importantly, this proposed lump sum would be in addition to the worker's entitlement to lump sum compensation under Part 10 of the WCRA for workers with a pneumoconiosis condition.

The applicable existing entitlements within the WCRA as it currently stands include:

- a lump sum entitlement of up to $320,370 based on the degree of permanent impairment (**DPI**) assessed under section 180 of the WCRA;
- additional lump sum compensation of up to $320,370 for workers with a DPI of 30% or more under section 192 of the WCRA;
- additional lump sum compensation for gratuitous care of up to $362,920 for workers with a DPI of 15% or more under section 193 of the WCRA; and
- maximum weekly compensation payments under section 140 of the WCRA of up $320,370.

As statutory claim entitlements can exceed a worker's potential common law entitlements under the current provisions for pneumoconiosis claims, the addition of a new lump sum is unnecessary. The existing lump sum provisions have considered the implications of impairment arising from pneumoconiosis conditions, and the existing entitlements are significant.

The proposed new lump sum is unusual as it appears to provide financial recognition for the extent of the condition as it is seen on an x-ray. There is little or no relationship to incapacity or impairment. As the WCRA already provides for multiple lump sums for pneumoconiosis conditions based on assessed DPI, there is no justification for the proposed new lump sum compensation.

It follows that ASIEQ sees no justification for the payment of further lump sum compensation as provided for in the proposed Division 5, Subdivision 2.

Minimum period between reassessments – clause 25 (Section 193C of WCRA)

> **193C Further assessment under s 179**
> The insurer may decide, or the worker may ask the insurer, to have the worker's injury further assessed under section 179 to decide—
> (a) if a previous notice of assessment in relation to the injury stated that the worker had sustained permanent impairment from the injury—whether the degree of permanent impairment resulting from the injury has increased; or
> (b) otherwise—whether the injury has resulted in a degree of permanent impairment.

<u>Recommendation</u>: ASIEQ recommends the introduction of a minimum three to five year exclusionary period between applications for reassessment of lump sums.

The proposed amendments provide workers with previously accepted claims the ability to regularly lodge applications to 'reopen' finalised claims and seek an assessment of

whether the lung condition has deteriorated, and if the pneumoconiosis score has moved a band width, to create an additional entitlement to further lump sum compensation.

This process could eventually become a pseudo health screening process as there are no limitations on how often a worker can apply for a reassessment. The scheme needs to be protected from the cumbersome and costly administration of regular applications to reassess whether a worker's condition has progressed sufficiently to warrant an additional increase in the lump sums. A minimum exclusionary period of three to five years will achieve this.

This would be in keeping with time frames for lodging repeat applications for industrial deafness (as per section 126 of the WCRA).

Reduction of compensation payable - clause 25 (Section 193D of WCRA)

193D Entitlement of worker to lump sum compensation under s 180 and div 4

(1) This section applies if the worker is assessed under section 179 as having sustained a DPI or an increased DPI from the injury (the ***current DPI***).

(2) The worker is entitled to lump sum compensation for the injury under the following provisions, calculated on the basis of the worker's current DPI—

(a) section 180;

(b) division 4.

(3) However, the amount of compensation payable under section 180 and division 4 must be reduced by the total of—

(a) the amount of any compensation previously paid under those provisions for the injury; and

(b) the amount of any compensation paid under a law of Queensland (other than this Act), another State or the Commonwealth for the injury; and

(c) if a settlement for damages has been agreed, or judgment for damages has been given, for the injury—an amount equal to the compensation to which the worker would have been entitled under section 180 and division 4, calculated on the basis of the DPI stated in the first notice of assessment given to the worker in relation to the injury.

(4) This section applies—

(a) despite sections 119, 176, 190 and 239; and

(b) whether or not the worker has previously received compensation, or further compensation, under section 180 or division 4 because of this section.

<u>Recommendation:</u> The proposed section 193D be amended, consistent with claims for industrial deafness, to provide that in deciding the lump sum compensation under section 180 for the further impairment related the degeneration of a pneumoconiosis condition, the assessed DPI must be reduced by the previously assessed DPI for the pneumoconiosis condition.

There appears to be an unintended flaw in the drafting of the Bill in regards to the calculation of the amount to be paid upon further assessment of the DPI under section 180 of the WCRA, or any additional lump sums under Division 4.

Under the proposed section 193D(3), the amount of compensation payable under section 180 and Division 4 of the WCRA must be reduced by the total of the amount of any compensation previously paid under those provisions for the injury.

This is not consistent with historical insurance practices and current legislation in regards to entitlement to other additional lump sums. For example, section 182 of the WCRA states that in deciding the lump sum compensation payable under section 180 for further industrial deafness, the assessed percentage loss of hearing must be reduced by the previously assessed percentage loss of hearing.

Therefore, section 193D should not refer to a reduction of the amount of compensation previously paid, but a reduction of the previously assessed percentage. This adjustment will correctly assess the value of the increase in the percentage of impairment. The wording in regards to compensation entitlements under Division 4 should also be amended to reflect the difference between the previously assessed percentage or indicator, and the current percentage or indicator.

Transitional Provisions – clause 32 (Chapter 34 of WCRA)

Clause 32 **Insertion of new ch 34**

After chapter 33—

insert—

Chapter 34 **Transitional provisions for Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Act 2017**

727 Application of ch 3, pt 3, div 5

(1) Chapter 3, part 3, division 5 applies to a worker—

(a) whether the worker's injury was sustained before or after the commencement; and

(b) whether the application for compensation for the injury was lodged before or after the commencement.

(2) However, if the worker's injury was sustained before the commencement, chapter 3, part 3, division 5 applies to the worker only if the worker's injury had not, before the commencement, been assessed under section 179.

728 Application of ch 3, pt 10, div 5

Chapter 3, part 10, division 5 applies to a worker—

(a) whether the worker's injury was sustained before or after the commencement; and

(b) whether the application for compensation for the injury was lodged before or after the commencement.

729 Working out worker's pneumoconiosis score before commencement

(1) This section applies for the purpose of applying chapter 3, part 3, division 5 or part 10, division 5 to a worker whose injury was

> sustained before the commencement.
> (2) To remove any doubt, it is declared that nothing in this Act prevents the worker's pneumoconiosis score being worked out, after the commencement, as at a day before the commencement.

<u>Recommendation</u>: ASIEQ recommends that the transitional provisions be amended to limit entitlement to the new lump sums, and further assessment of permanent impairment, to all new claims after commencement and past claims where entitlement to a lump sum under section 179 of the WCRA has not been previously assessed before commencement.

Clause 32 introduces transitional provisions in relation to the application of the proposed legislation. Section 727 provides that the new pneumoconiosis lump sum will apply to any new claim or current claim where a lump sum under the existing section 179 as not been assessed before commencement. This section appears appropriate.

However, ASIEQ has concerns in regards to the application of the proposed section 728 and 729. Section 728 refers to the further assessment entitlement under the existing section 179, and in particular entitlements under section 180 and Part 10, Division 4 of the WCRA. Section 728 does not limit the application of the provisions relating to further assessment to injuries sustained within any time frame or period. Therefore, it is retrospective legislation creating a potential entitlement to every past pneumoconiosis claim (including asbestosis, silicosis, etc) within the scheme history. Section 729 complements section 728.

Panel of Certified Readers – clause 36 (Schedule 4B Section 2(2) of WCRR)

> In this section—
> …
> ***qualified reader*** means a doctor who is qualified and competent to categorise, in accordance with the ILO classification guidelines, the appearance of opacities in a chest x-ray.
> *Example*— a doctor approved as a B Reader by the National Institute for Occupational Safety and Health

<u>Recommendation</u>: ASIEQ recommends that OIR establishes a Queensland panel of certified doctors to be used by insurers for the appropriate assessment of pneumoconiosis conditions in accordance with ILO classification guidelines.

The ILO rating system being promoted to assess the category used in determining the pneumoconiosis score has not been significantly utilised in Australia. Obtaining timely and accurate assessments is currently limited by the number of Australian medical providers that are certified to provide a reading of a chest x-ray in accordance with the ILO classification guidelines. ASIEQ understands that there may be only one approved reader in Queensland at this time.

It is understood certification of further medical practitioners is currently being planned/facilitated; however it is important that there are sufficiently trained and approved practitioners available at commencement as the proposed Regulations require up to five different readers in certain cases.

Reduction of Minimum Payment – clause 36 (Schedule 4C of WCRR)

<u>Recommendation:</u> Whilst submitting that there is already sufficient lump sum compensation within the legislation to provide for a worker with a pneumoconiosis condition, ASIEQ recommends that if the new lump sum is introduced the scale be adjusted to provide a minimum payment of $3200 to a maximum of $120,000.

As noted above, the amount of lump compensation being proposed is not commensurate with other lump sums within the scheme, and may set a significant precedent in determining entitlements for other conditions.

Based on ASIEQ's understanding of the pneumoconiosis scoring process, a worker with simple CWP may be assessed with a 0% DPI, however be rated a category 1/0, 1/1 or potentially a 1/2 to provide a pneumoconiosis score of 15 to 25. This would entitle the worker to a minimum lump sum of $18,000. This is the equivalent to the lump sum for a 5% to 6% DPI.

At the early stages of development of simple CWP, the new lump sum should be consistent with only recognising the development of the condition and the potential need for monitoring in the future. It is considered that the equivalent amount for 1% DPI ($3,205) would be reasonable.

Section 186 of the WCRA

186 Worker's disagreement with assessment of permanent impairment

(1) This section applies if—
- (a) the worker's degree of permanent impairment has not been assessed by a medical assessment tribunal; and
- (b) the worker does not agree with the degree of permanent impairment stated in the notice of assessment (the ***original notice***).

(2) The worker must advise the insurer within 20 business days after the original notice is given (the ***decision period***) that the worker—
- (a) does not agree with the degree of permanent impairment; and
- (b) requests—
  - (i) that the insurer has the worker's injury assessed again under section 179 by an entity mentioned in section 179(2) and agreed to by the worker and the insurer, (other than the entity that gave the report to the insurer under section 179(3)); or
  - (ii) that the insurer refer the question of degree of permanent impairment to a tribunal for decision.

(3) If the worker makes a request mentioned in subsection (2)(b)(i), the insurer must decide, within 10 business days after receiving the request, whether to have the worker's injury assessed again under section 179 to decide if the worker's injury has resulted in a degree of permanent impairment.

(4) If, under subsection (3), the insurer decides to have the worker's injury assessed again under section 179, the original notice is taken to have never been given.

(5) If the insurer has the worker's injury assessed again under section 179, the worker can not make a further request mentioned in subsection (2)(b)(i).

(6) If—

(a) under subsection (3), the insurer decides not to have the worker's injury assessed again under section 179; or

(b) the worker makes a request mentioned in subsection (2)(b)(ii);

the insurer must refer the question of degree of permanent impairment to a medical assessment tribunal for decision.

(7) The degree of permanent impairment may then be decided only by a medical assessment tribunal.

Recommendation: If legislation is introduced to allow the further assessment of DPI on previously assessed claims for pneumoconiosis, section 186 of the WCRA should be amended to omit the ability for the worker to request to have the DPI assessed again by a doctor.

As a result of the 15 October 2013 amendments to the WCRA which introduced a threshold on seeking common law damages, section 186 of the WCRA was amended as per above to provide workers the option of an additional review of the DPI by a GEPI trained doctor.

This section was amended as a precaution to alleviate anticipated pressure on the Medical Assessment Tribunals to cope with the number of cases where the DPI assessed below the threshold would require a reassessment to test whether the worker could overcome the common law threshold. This actually led to numerous cases where the DPI was assessed on three separate occasions, creating unnecessary and expensive travel and report costs for the scheme.

The common law threshold was removed from the WCRA, effective 31 January 2015, and therefore the primary need for the additional medical review was also removed. However, the legislation was not amended to return the right of review of the assessed DPI to solely a review by the Medical Assessment Tribunal.

This section needs to be amended regardless of the current enquiry into the Bill. However, with the potential introduction of legislation that allows multiple reassessments of DPI for pneumoconiosis conditions, there could be multiple reviews of these multiple assessments. This would in turn create further significant and unnecessary administration costs to the scheme.

Having regard to the medical complexity of diagnosing and apportioning impairment in pneumoconiosis cases, workers and the scheme would be best served with a review process that requires only a referral to the Medical Assessment Tribunal.

This could be achieved by amending section 186 of the WCRA in accordance with the wording which existed prior to the 15 October 2013 amendments, as per below.

186 Worker's disagreement with assessment of permanent impairment

(1) This section applies if—

(a) the worker's degree of permanent impairment has not been assessed by a medical assessment tribunal; and

(b) the worker does not agree with the degree of permanent impairment stated in the notice of assessment.

(2) The worker must advise the insurer within 20 business days after the notice is given (the ***decision period***) that the worker does not agree with the degree of permanent impairment.

(3) The degree of permanent impairment may then be decided only by a medical assessment tribunal.

(4) The insurer must refer the question of degree of permanent impairment to a tribunal for decision.

7 August 2017

Committee Secretary
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: fac@parliament.qld.gov.au

Dear Committee Secretary

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

I write on behalf of the Association of Self-Insured Employers of Queensland (**ASIEQ**) in relation to the *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill 2017* (**the Bill**).

I refer to my previous letter dated 14 July 2017, which provided some background in relation to ASIEQ, and enclosed ASIEQ's submission in relation to the Bill. In particular, ASIEQ provided submissions in relation to Parts 3, 4 and 5 of the Bill.

Since providing the initial submission:

- I have had the opportunity to review the letter from the Office of Industrial Relations to the Finance and Administration Committee (**the Committee**) dated 24 July 2017 which attaches a document entitled Department Response to Submissions. This document responds to the submissions made by the various stakeholders, including ASIEQ; and
- I appeared on behalf of ASIEQ at the Public Hearing – Inquiry into the *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Bill* (**Public Hearing**) on 31 July 2017. Various other stakeholders, including the Office of Industrial Relations, also appeared.

ASIEQ wishes to respond to some points raised by the Office of Industrial Relations in its Department Response to Submissions, and at the Public Hearing.

Pneumoconiosis (Parts 4 and 5 of the Bill)

ASIEQ's position in relation to various clauses within Parts 4 and 5 of the Bill is set out in detail in its submission dated 14 July 2017. I wish to clarify and expand on that submission in relation to two points in turn below: (1) firstly, clause 25 of the Bill and (2) secondly, clauses 20 and 32 of the Bill.

1. Clause 25 of the Bill (Section 193D of WCRA)

At page 6 of its Submission Relating to Proposed Amendment of the *Workers' Compensation and Rehabilitation Act 2003* and the *Workers' Compensation and Rehabilitation Regulation 2014* (**ASIEQ WCRA Submission**), ASIEQ submitted that the Committee should recommend as follows:

> The proposed section 193D be amended, consistent with claims for industrial deafness, to provide that in deciding the lump sum compensation under section 180 for the further impairment related to the

> degeneration of a pneumoconiosis condition, the assessed DPI must be reduced by the previously assessed DPI for the pneumoconiosis condition.

ASIEQ's Submission

ASIEQ reiterates its previous submission.

Method of Calculation of Lump Sum for Increased DPI

The Office of Industrial Relations submitted in its Department Response to Submissions (see page 27) as follows:

> To calculate the top up amount of both lump sum compensation the Bill uses dollar amounts i.e. it requires any previous amounts paid to be deducted.
>
> The ASIEQ recommends a difference (sic) approach for calculating the further entitlement to compensation by using the difference in the assessed DPI rather than the difference in dollar amounts of payments received. The approach of using dollar amounts in the Bill is designed for simplicity reasons so both top-ups are calculated in the same manner.

ASIEQ reiterates its position that any amount paid in regards to an increase in the degree of permanent impairment (**DPI**) should reflect only the value of the percentage increase (which I will refer to as the **Percentage Increase Method**), rather than a deduction of amounts previously paid (which I will refer to as the **Deduction of Amount Previously Paid Method**).

An example of how the separate approaches alter the outcome where DPI increases for an injury is set out below.

> *A worker was assessed with a 50% degree of permanent impairment (DPI) referable to a pneumoconiosis injury in January 2001, and was then assessed with a 60% DPI for the same pneumoconiosis injury in January 2017. The DPI referable to the injury had therefore increased by 10%.*

Percentage Increase Method (recommended by ASIEQ)

Current DPI 60% less previous assessed DPI 50% = 10% DPI

10% DPI = 10% of the current maximum $320,370, which is $32,037

Amount Payable - $32,037

Deduction of Amount Previously Paid Method (as proposed by Clause 25 of the Bill)

50% DPI assessed in January 2001 = $124,715 (amount paid in January 2001)
60% DPI assessed in January 2017 = $192,222

$192,222 (current 60% DPI) less $124,715 (previous amount paid) = $67,507

Amount Payable - $67,507

The Percentage Increase Method has historically underpinned the calculations in regards to permanent impairment lump sums within the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) - as with claims for industrial deafness, discussed at page 7 of ASIEQ's WCRA Submission. The Percentage Increase Method applies to an aggravation of a previously accepted injury – the worker receives payment of a lump sum calculated in accordance with the percentage increase referable to the aggravation.

The Deduction of Amount Previously Paid Method proposed by the Bill leads to a reassessment of the previous lump sum paid to incorporate the difference in present day value of the previous lump sum and the amount previously paid.

Every worker with a 10% increase in DPI should be paid the same amount regardless of the nature of the injury.

ASIEQ's submission remains that the Committee should recommend that clause 25 of the Bill (comprising the proposed section 193D of the WCRA) be amended as originally submitted.

2. Clauses 20 and 32 of the Bill (Chapter 3, Part 3, Division 5 and 727 of WCRA)

At page 8 of the ASIEQ WCRA Submission, ASIEQ stated:

> ASIEQ recommends that the transitional provision be amended to limit entitlement to the new lump sums, and further assessment of permanent impairment, to all new claims after commencement and past claims where an entitlement to a lump sum under section 179 of the WCRA has not been previously assessed before commencement.

The Office of Industrial Relations submitted in its Department Response to Submissions (see page 30 to 31) as follows:

> All new claims for Pneumoconiosis post commencement of the Bill will be entitled to:
> - the new Pneumoconiosis lump sum;
> - statutory lump sum compensation; and
> - where they experience future progression of their disease be entitled to re-open their claim to receive a top of the new lump sum and their statutory lump sum compensation.
>
> For all past accepted Pneumoconiosis claims post commencement of the Bill a worker will be entitled to:
> - the new Pneumoconiosis lump sum payment but only if they have not yet been assessment (sic) under section 179 of the WCR Act (s727 of the Bill). This provision limits the new lump sum for pneumoconiosis to claims that are open (i.e. not yet finalised); and
> - where they experience future progression of their disease be entitled to re-open their claim to receive a top of the new lump sum and their statutory lump sum compensation.
>
> Without these transitional provisions workers with CWP, or pneumoconiosis who have previously made a workers' compensation claim, who experience a significant deterioration of their disease, will be prevented from accessing any further compensation under the workers' compensation scheme. Restricting access to this entitlement as proposed by the ASEIQ would undermine the intention of the re-opening provisions to permit workers with an accepted and finalised claim for pneumoconiosis to receive further compensation for deterioration.
>
> It is important to note to be eligible to re-open a claim (and access a top up of both lump sum compensation) the worker must firstly experience disease deterioration and secondly that deterioration must place them in a higher pneumoconiosis band. Further the Pneumoconiosis bands have been structured in a way that reflect severity of the disease so a worker would require a significant deterioration to be placed in a new band. This will limit on how often an individual may seek to have their Pneumoconiosis claim re-opened.
>
> This was a clear recommendation from the Stakeholder Reference Group including 'ensuring workers with simple CWP who experience disease progression can apply to re-open their claim to access further benefits under the workers' compensation scheme'. The ASEIQ is a member of the Stakeholder Reference Group.

ASIEQ's Submission

ASIEQ has carefully considered the Office of Industrial Relations submission in relation to Clause 32 and now submits that the Committee should recommend that the transitional provisions (the proposed section 727 of the WCRA) and clause 20 (the proposed Chapter 3, Part 3, Division 5 of the WCRA) be amended to expressly remove entitlement to lump sum compensation in the proposed Chapter 3, Part 3, Division 5 of the WCRA, where a claim for common law damages in relation to the pneumoconiosis injury has been finalised before commencement of the amending legislation.

Finalised Common Law Claims

The combined effect of the proposed sections 727 and 128I(3) of the WCRA in the Bill is to allow workers, who had previously received damages by way of settlement or judgment for an injury that is pneumoconiosis, to seek further lump sum compensation unless the previous settlement or judgment expressly states 'that it includes damages to compensate the worker for the future progression of the injury'.

The basic underlying principle of the payment of damages is (and has always been) to put the worker in the position he or she would have been, had the injury not occurred, on a 'once and for all' basis. This means that payments of damages by their very nature must include payments to compensate a worker for the future progression of the injury.

It would be highly unlikely that any release and discharge signed upon settlement of a common law claim for damages in the past for a pneumoconiosis injury (or indeed for any other type of injury) would have expressly stated that it 'includes damages to compensate the worker for the future progression of the injury'. That damages paid provide for future progression was always understood between the parties, because that is the fundamental principle upon which damages are paid.

Where a worker with a pneumoconiosis injury had previously resolved a common law claim, there was an onus upon the workers' legal representative to consider future progression and ensure that a worker was appropriately compensated for this potential. Lawyers representing workers argued for, and obtained, damages for future progression.

Therefore the amendments proposed by the Bill enable a worker to in effect be doubly compensated for future progression of a pneumoconiosis injury.

The amendment submitted by ASIEQ maintains the important principal of damages settlements being a full and final resolution of a claim for injury.

ASIEQ's position is expressly supported by the submission of the Queensland Law Society in its letter to the Committee dated 19 July 2017, where it states:

> 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, under proposed sections 1281(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.

ASIEQ agrees with the aim of 'ensuring workers with simple coal workers' pneumoconiosis (**CWP**) who experience disease progression can apply to re-open their claim to access further benefits under

the workers' compensation scheme'. ASIEQ also acknowledges that the legislation should provide a level of assurance to a worker with simple CWP that if his or her claim is finalised, and deterioration occurs, then there is an entitlement to seek further lump sum compensation.

ASIEQ was a member of the CWP Stakeholder Reference Group, however the proposed amendments which would allow every living worker that has previously had an accepted claim for a pneumoconiosis injury to apply to reopen their previous claim to be considered for additional entitlement was not within the scope of the CWP Stakeholder Reference Group, and was not discussed in any detail.

The amendment of the Bill as proposed by ASIEQ will not disadvantage workers with simple CWP, who were the intended beneficiaries of the proposed recommendation by the CWP Stakeholder Reference Group.

It is understood there are less than 25 claims involving simple CWP which have been lodged within the last 2 years. Those workers are all still within time to lodge a common law claim for damages, and to ASIEQ's knowledge whilst some common law claims have been commenced, no common law claims for simple CWP have been resolved.

The new amendments will allow a worker to potentially settle a claim without asking for damages for future progression. Workers with current common law claims could assess whether to settle with or without an award for disease progression. The release and discharge could clearly state whether disease progression formed part of the agreement, and the ILO Assessment score could be agreed in case of future progression. This would prevent complex medical and legal debate if future progression occurs.

Further, workers who in the past did not seek common law damages and instead accepted a statutory lump sum in good faith could still apply to reopen their claim for an additional lump sum entitlement if the condition has deteriorated.

ASIEQ therefore submits that there would be no disadvantage to amend the transitional provisions to limit the application of the new legislation to past cases where common law damages claims were not resolved or finalised prior to the commencement date.

Stay of Regulator's Decision Pending Appeal (Part 3 of the Bill)

I wish to clarify ASIEQ's position regarding the proposed amendment in Part 3 of the Bill of the *Industrial Relations Act 2016* to remove the powers of the Queensland Industrial Relations Commission (**QIRC**) to grant a stay of a review decision of the Workers' Compensation Regulator, in circumstances where there is an appeal to the QIRC on foot and an arguable case of no entitlement to workers' compensation benefits.

The Office of Industrial Relations submitted in its Department Response to Submissions (see page 5) as follows:

> The impact of the Commission granting a stay in these appeals is significant as it (sic) not only does it impact on a worker accessing compensation and rehabilitation it creates a two tier system where workers of self-insured employers will be treated differently to workers employed by a WorkCover insured employer. This outcome is contrary to the principle that all workers should be treated equally and expect the same outcomes as workers of employers insured with WorkCover Queensland.

Representatives from the Office of Industrial Relations submitted, at the Public Hearing on 31 July 2017, as follows (see Transcript of Proceedings, page 19):

> **Ms Hillhouse:** ... The concern that exists in relation to the use of stays is that, if we look back, stays have only been used within workers compensation appeals by self-insured employers. Employers who are insured through WorkCover do not use the stay process. The reason that self-insured employers use the stay process is that they rely on one of the provisions of the legislation which applies to them

> due to the nature of the fact that they are actually an insurer—that is, they may potentially suffer loss if the worker's appeal or their appeal is not successful and their claim is not accepted.
>
> It creates a two-tier system, where we have workers whose employers are insured with WorkCover Queensland and are not making stays or who do not necessarily have the grounds to make a stay versus employers who have elected to self-insure who are choosing to make those stays. We get inequality with the treatment of workers across the scheme depending on who their insurer is.
>
> ...
>
> **Mr Goldsborough:** ... I think it is important to understand that you have a scenario where general Queensland employers insure with WorkCover Queensland. WorkCover looks after their interests. In that situation they are not in a position to make a stay... What you have with the stays is, as Ms Hillhouse pointed out, a situation that allows them, because of the belief that there has been economic loss as an employer, to go down a separate system.

'Two-Tier System'

In regards to these submissions, ASIEQ wishes to make it clear that it is incorrect to say there presently exists a 'two-tier system' or 'separate system' in relation to stays.

Employers insured with WorkCover Queensland have the same rights as self-insured employers to both:

1. appeal a decision of the Workers' Compensation Regulator to an appeal body under section 549 of the WCRA; and

2. apply for a stay of the review decision of the Regulator in the appeal body.

The reason employers insured with WorkCover do not elect to utilise the stay process is that they do not suffer the financial impact which self-insured employers suffer pursuant to section 566 of the WCRA.

This is because when a worker receives compensation for which they are found to be not ultimately entitled, those claim costs do not impact the premium paid by the employer insured by WorkCover.

The Office of Industrial Relations noted this in its Department Response to Submissions (see page 7):

> An employer who is not a self-insurer is unable to argue any direct financial detriment as the cost of a claim that is not accepted by WorkCover Queensland is not apportioned directly to an employer's policy of insurance. These costs are borne by the (sic) WorkCover Queensland. However payments covered by the workers' compensation fund may indirectly impact on the costs of all accident insurance policies (via the premium calculation method).

Entitlement to Compensation

The Office of Industrial Relations submitted further in its Department Response to Submissions (see page 8):

> It is not appropriate that by way of a stay application as (sic) a self-insured employer is able to transfer this risk to the injured worker who is then denied compensation and rehabilitation to which they are ***at that time entitled***. (our emphasis added)

Ms Hillhouse from the Office of Industrial Relations further submitted at the Public Hearing as follows (see Transcript of Proceedings, page 20):

> I would like to clarify one of the other points in relation to Mr Gomulka's statement in that the payments being made are actually not a debt, so they should not be likened to a debt. As Paul said, they are weekly compensation. They are rehabilitation. They are actually the entitlements that a worker has ***at that point in time*** for workers compensation. (our emphasis added)

The submissions do not point out that in the two most recent decisions of the QIRC where stays were granted (*Toll Personnel Pty Limited v Workers' Compensation Regulator* [2016] QIRC 140; *JBS*

Australia Pty Limited v Workers' Compensation Regulator [2016] QIRC 138), the QIRC ultimately found in both cases that the worker did not have an entitlement to compensation.

So it is trite to say that the worker had an entitlement 'at that point in time', because ultimately the worker was determined not to have any entitlement. A worker has entitlement 'at that point in time' only by virtue of a review decision of the Workers' Compensation Regulator which, in the instances referred to above, was ultimately determined by the QIRC to be incorrect.

If the employers in those cases were unable to obtain a stay:

1. compensation would have been paid to each worker, to which each worker was not ultimately entitled; and

2. because of the operation of section 566 of the WCRA, the worker, who was not entitled to compensation, would not be required to refund the compensation paid to which the worker was not entitled.

From the Queensland workers' compensation scheme statistics 2016-2016, 7.6% of workers' compensation applications for benefits were rejected in 2015-2016 meaning 7.6% of claimant workers were ultimately determined to not have an entitlement to compensation.

That is a significant proportion of claims, and that is why ASIEQ's position is that the QIRC is the body to make the determination, taking into account the various factors identified in ASIEQ's original submission (see page 6).

This position is supported by the submission of Mr Luke Murphy, Deputy Chair of the Accident and Tort Law Committee of the Queensland Law Society, made at the Public Hearing (see Transcript of Proceedings, page 1):

> ... we believe the appropriate entity to consider the rare occasions in which a stay application is brought is rightly the industrial relations commissioners. Allowing them the ability to exercise their discretion after a proper hearing is in fact, in the society's view, the correct and adequate way for that issue to be determined.

ASIEQ's Submission

ASIEQ's submission remains (noting its original submission dated 14 July 2017 and the matters referred to above) that the Committee should recommend that clauses 14, 15 and 16 should be removed from the Bill.

Alternatively, ASIEQ reiterates its previous position that if the Committee is not minded to recommend the removal of clauses 14, 15 and 16 from the Bill, it should recommend that section 566 of the WCRA be removed. Section 170 of the WCRA entitles an Insurer to recover compensation overpaid or the difference between payments and entitlement. Section 566 is in contrast to this provision.

Please do not hesitate to contact me if you have any queries.

Regards,

David Gomulka
President ASIEQ