Submission in Response to the Review of the *Personal Injuries Proceedings and Other Legislation Amendment Bill 2022*

April 2022

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 34 permanent offices and 30 visiting offices throughout all mainland States and Territories.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Queensland practice has 14 offices spread across both regional and metropolitan parts of the State, with these offices offering legal services across the firm's primary practice areas of personal injuries, medical negligence, abuse law, employment and industrial law, dust diseases, superannuation, negligent financial and other advice, and consumer and commercial class actions.

The Queensland arm of Maurice Blackburn has also contributed to recent parliamentary inquiries into labour hire, the gig economy, workers' compensation, dust diseases, vilification and hate crimes, and child sexual offences. We have appeared at numerous parliamentary hearings to advocate for access to justice for vulnerable Queenslanders.

Our Submission

Maurice Blackburn notes the words of the Attorney General, in her introductory speech to the Bill:

> *The main purpose of the bill is to: stop claim farming for personal injury and workers compensation claims; prevent undesirable costs agreement practices by law practices for personal injury claims; confirm the policy intent for when an entitlement to terminal workers compensation arises under the Workers' Compensation and Rehabilitation Act 2003; and make technical and clarifying amendments to the Electoral Act 1992 relating to fundraising contributions and state campaign accounts and disclosure returns.*

Maurice Blackburn was supportive of amendments to the *Motor Accident Insurance Act 1994* (**MAIA**) which first introduced provisions to stop claims farming. We commend the Palaszczuk Government for now introducing strong provisions to prevent claims farming activities for claims governed by the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) and *Personal Injuries Proceedings Act 2002* (**PIPA**).

We have long argued that the activity of claims farming is repugnant, and lawyers engaging in this process ought rightly to be criticised and face significant penalties and sanctions. As other advocates have long made clear, too often claims farming practices target those who are most vulnerable and such practices have no place within the Queensland legal profession.

In particular we remain concerned about claims farming activity in relation to abuse survivor claims, otherwise known as 'survivor farming'. These practices have been highlighted at length by survivor advocacy organisation Knowmore[1], who have noted behaviours that extend well beyond cold calling in relation to the targeting of abuse survivors specifically, including a rise in 'survivor advocacy' businesses.

[1] https://Knowmore.org.au/

In recent testimony to a federal Parliamentary Committee, Knowmore said:

> *We see particular communities being targeted by entrepreneurial and commercially based law firms and what we call 'survivor farming' or 'survivor advocacy' businesses, which go into particular communities and try and promulgate information and sign people up, again without letting them know about the availability of free services. We hear of law firms where referral fees are paid and where clients are sourced - for example, in prisons - where people are paid 'spotter' fees or referral fees for referring on another survivor.*[2]

Our firm shares these concerns with Knowmore. As Knowmore also notes in their testimony there is a valid and important role for lawyers to play in assisting survivors, particularly in relation to claims for common law damages. However, those efforts do not extend to the behaviours as detailed above – such practices are abhorrent and we believe this Bill will help to put a welcome end to this in Queensland.

In our submission we outline a number of considerations in relation to the structure and content of the Bill. We have highlighted these concerns because we believe that while such considerations may be well-intentioned, they risk leading to harmful outcomes and unintended consequences if adopted.

These include concerns relate to:

- proposed changes in relation to Terminal Workers' Compensation Benefits, especially in relation to the proposed retrospectivity of legislative amendments
- the issuance of Law Practice Certificates
- provisions regarding legal costs recovery
- the impacts of ongoing restrictions on advertising regarding the rights of people who have suffered personal injuries, and
- the provisions describing the enforcement of the regulations.

All Maurice Blackburn contributions to public policy inquiries are based on the lived experience of the clients we serve, and the observations of our staff who assist them.

We would be pleased to accept an invitation to discuss the contents of our submission in more detail with the Committee, if that would be of benefit.

[2] Ref: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen%2Faf1a0263-1f99-4a8d-813d-05410f911cbf%2F0004;query=Id%3A%22committees%2Fcommsen%2Faf1a0263-1f99-4a8d-813d-05410f911cbf%2F0005%22

Response to Key Elements of the Bill

Terminal Workers Compensation Benefits

The policy objectives of the Bill, articulated in the Explanatory Notes[3], includes:

> *3. confirming the policy intent for terminal workers compensation benefits pursuant to the Workers Compensation and Rehabilitation Act 2003* (the **WCRA**).

The Explanatory Notes go on to tell us that:[4]

> *The Bill will also confirm when an entitlement for terminal workers' compensation arises under the WCR Act. This amendment confirms the government's policy intent and protects the financial sustainability of the workers' compensation scheme following the December 2021 decision in Blanch v Workers' Compensation Regulator [2021] QIRC 408 (***Blanch***). This decision expanded access to this type of compensation beyond the policy intent of previous amendments in 2019.*

Maurice Blackburn has a number of significant concerns with changes proposed in the relevant sections of the Bill and their impacts on workers suffering from a terminal illness – particularly Clauses 58 and 66. Our concerns and suggestions for improvement appear below.

In relation to Clause 58:

Section 39A of the WCRA defines 'Terminal Condition' and is the gateway provision for workers to access lump sum benefits pursuant to Part 3, Division 4 of the WCRA (**Terminal Benefits**).

Clause 58 of the Bill makes the following amendment to section 39A of the WCRA (the **Proposed New Terminal Condition Definition**):

> ***39A Meaning of terminal condition***
>
> *(1) A terminal condition, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the worker's life within 3 years after the terminal nature of the condition is diagnosed.*
>
> *(2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition.*[5]

The purpose of this amendment is to reintroduce a strict timeframe threshold for workers to access Terminal Benefits pursuant to Part 3, Division 4 of the WCRA, and thereby to make Terminal Benefits less accessible to workers.

There is an extensive history to section 39A of the WCRA, which has undergone considerable amendment over the last few of years. In the circumstances, we consider that it would be instructive to have this history set out to appropriately consider the proposed amendments and their impacts.

[3] https://documents.parliament.qld.gov.au/tp/2022/5722T477-1BE3.pdf: p.1
[4] Ibid: p.2
[5] Our emphasis

Terminal Benefits were initially introduced to the scheme pursuant to *Workers' Compensation and Rehabilitation Act and Other Act Amendment Act 2005*.

At that time, the Explanatory Notes[6] to the *Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2005*, provided that:

> *"The proposed Bill will achieve its objectives for the workers' compensation scheme primarily by: …*
>
> - *Providing greater certainty on the payment of workers' compensation for latent onset injuries and aligning the calculation of these benefits with the method used by the Courts…"*

The earliest iteration of section 39A of the WCRA (the **Initial Terminal Condition Definition**) provided:

> ***39A Meaning of terminal condition***
>
> *(1) A terminal condition, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the worker's life within 2 years after the terminal nature of the condition is diagnosed.*
>
> *(2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition.*

The Initial Terminal Condition Definition was subsequently amended, pursuant to section 36 and 732 of the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2019*, and the following changes were made to section 39A (the **Current Terminal Condition Definition**) for injuries arising after 31 January 2015:

> ***39A Meaning of terminal condition***
>
> *(1) A terminal condition, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the worker's life ~~within 2 years after the terminal nature of the condition is diagnosed~~.*
>
> *(2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition.*

On 22 August 2019, the Hon. G Grace in the First Reading Speech for the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019*[7], stated that:

> ***With this bill before the House today, we are making the best workers compensation scheme in the country even better**, with a package of sensible and practical improvements that give effect to the recommendations from the most recent five-yearly independent review into the Queensland workers compensation scheme by Professor David Peetz from Griffith University. In March 2018, I commissioned Professor Peetz to conduct the second legislated five-year review of Queensland's workers compensation scheme… **The review found Queensland's workers compensation scheme is performing well, is financially sound, involves low costs for employers and provides fair treatment***

[6] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2005-1192: p.3
[7] https://documents.parliament.qld.gov.au/tableOffice/BillMaterial/190822/Workers.pdf: p.2476 (our emphasis)

> ***for both employers and injured workers whilst providing unlimited common law rights for all injured workers and their families. While the review found no case for changing the core architecture of the current scheme, opportunities for improvement were identified*** *in areas such as rehabilitation and return to work outcomes and the workers compensation process and experience for injured workers, especially those with psychiatric and psychological injuries.*
>
> …
>
> *"The bill also makes some further amendments for regulatory simplification and clarification. I make particular note of the amendment to extend access to the latent onset terminal payment entitlements under the Workers' Compensation and Rehabilitation Act. The act currently provides that a worker who has a terminal condition as a result of their employment, for example dust lung diseases such as asbestosis, silicosis and coal workers' pneumoconiosis, or a work-related cancer such as a specified cancer sustained by a firefighter, has an entitlement to a statutory payment of up to $743,041.*
>
> ***The payment of this lump sum allows the worker to be provided with palliative care and support and ensures that the worker can plan and attend to the financial needs of their family and dependents****. The worker retains their rights to seek common law damages for negligence contributing to the worker's terminal condition, however,* ***for some workers the prompt assessment and payment of this statutory entitlement may alleviate the need of the worker to seek common law damages and allow the worker to spend more time with their family****.*
>
> *Under the act currently, a terminal condition is defined as a condition certified by a doctor as being a condition that is expected to end the worker's life within two years after the terminal nature of the condition is diagnosed.* ***However, some workers are diagnosed with a terminal work-related condition with a life expectancy greater than two years which means they have been excluded from accessing this payment. The amendment addresses this by removing the reference to the time period restriction of two years. This is an important amendment for those who need it most and a great step forward in that area.***
>
> …
>
> ***The changes I have outlined under this bill will continue to ensure that Queensland's workers compensation scheme is the nation's leading scheme by further improving injury management, rehabilitation and return-to-work outcomes for injured workers, while maintaining the lowest average premium rate of any state or territory workers compensation scheme. Once again, the Palaszczuk government is delivering for Queensland workers and their families and employers in all industries****.*

Similarly, the Explanatory Notes to the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019*[8] provided:

[8] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-003: p.9 (our emphasis)

> *A worker with a terminal condition has an entitlement to the latent onset terminal lump sum compensation of up to $743,041 under the WCR Act. The WCR Act currently defines a terminal condition as a condition that is expected to terminate the worker's life within two (2) years after the terminal nature of the condition is diagnosed (section 39A).* ***However, some workers are diagnosed with a terminal work-related condition with a life expectancy greater than 2 years (for example 3 or 5 years) which means they are excluded from accessing this payment. The Bill amends the WCR Act to extend entitlement to the latent onset terminal entitlements by removing the reference to two years and replacing it with an assessment that the insurer is satisfied that the worker has a latent onset condition that is terminal***.

With that history in mind, we provide the following commentary:

The overarching and integral purpose of the scheme in Queensland, pursuant to section 5 of the WCRA, is to maintain a balance between fair and appropriate benefits to injured workers, dependents and other persons, and ensuring reasonable insurance costs for employers.

The First Reading Speech for *the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019*, made plain that the abolition of the time restriction previously imposed by the Initial Terminal Condition Definition, was to extend access to latent onset terminal payment entitlements for workers and to "*continue to ensure that Queensland's workers compensation scheme is the nation's leading scheme*."[9]

Furthermore, the Explanatory Notes to the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019* demonstrate that the introduction of the Current Terminal Condition Definition was to ensure that workers suffering from terminal conditions that will reduce their life expectancies, including those with life expectancies of five (5) years, should receive this benefit.

The First Reading Speech and Explanatory Notes make clear that the Current Terminal Condition Definition was designed specifically to accommodate workers diagnosed with various forms of progressive dust-related injuries, principally from the mining and stonemasonry industries.

On this background, re-introducing a three (3) year strict time limit is a regressive legislative amendment that will produce unfair outcomes for many workers suffering from progressive forms of lung disease including mesothelioma, asbestosis, progressive massive fibrosis, silicosis, coal workers' pneumoconiosis and silica induced auto-immune diseases.

There are four (4) clear reasons supporting our view.

Firstly, except in the very severe cases, workers with Progressive Massive Fibrosis, Progressive Systemic Sclerosis, progressive Coal Workers Pneumoconiosis and asbestosis (to name only a few), have life expectancies generally beyond three (3) years.

Notwithstanding, their conditions are nonetheless terminal in the sense that their diseases will continue to progress and will ultimately cause their death.

In the Queensland context, from approximately 1100 stonemasons screened over the last few years, approximately 270 were diagnosed with silica-related disease. From this amount, approximately 40 were suffering from Progressive Massive Fibrosis. This means that

[9] First Reading Speech by the Hon. Grace Grace dated 22 August 2021.

approximately a quarter of the stonemasons were suffering from the 'simple' form of the disease, but only 3% had developed the advanced progressive form of the diseases at the time of the review.

If the New Proposed Terminal Condition Definition was introduced, this discrete but nonetheless material cohort of workers would be ineligible for Terminal Benefits at or around the time of their diagnosis. For some, this will be the point in time that they will be removed from the workforce indefinitely. For all, this is the time at which point they need compensation the most.

In our view, it is illogical, unfair and inhumane to deny this cohort of worker Terminal Benefits at or about the time of their diagnosis and force them to wait until the inevitable occurs and their conditions worsen.

In our experience, workers use the Terminal Benefits to financially set themselves and their families up to ensure that when the times comes and their disease reach end stage, they are as ready as they can be.

For example, many of our clients use the Terminal Benefits to buy a suitable property or undertake renovations to their current property to accommodate their anticipated increased care needs in future, when they are relatively healthy and the cost of doing remains reasonable.

Secondly, many workers with progressive lung disease are forced to cease employment without warning. Due to the nature of their condition, and the psychological impact, they are rarely able to return to any form of employment in the future.

However, it is very often the case that workers with these diseases remain on minimal workers' compensation benefits for two years or more until their disease has reached a point where it is capable of being assessed for permanent impairment. Very often their permanent impairment is rated at or below 20% DPI. As a result, these workers stay on the scheme for very lengthy periods of time and, further, their psychological health suffers significantly as a result.

Terminal Benefits, under the Current Terminal Condition Definition, ensure that these workers will not have to wait, often for years, before they receive their statutory lump sum compensation. Indeed, they are not forced to receive minimum weekly benefits for lengthy periods of time and they can, as mentioned, set up their homes for when their health eventually deteriorates and invest other portions of the compensation so as to ensure that they can be properly supported when that time inevitably comes and their health is significantly worse.

Thirdly, forming an opinion on life expectancy is fraught and rarely accurate. In this context, a mandatory three (3) year time limit is arbitrary and may not in all cases reflect the period in which workers enter the 'end stage' of their diseases.

For example, on current medical practice, it can be argued that with the advancement of immunotherapy for treatment of mesothelioma, life expectancies of mesothelioma sufferers are being confidently extended beyond two years and, in some cases, beyond three years or more, especially for those who are younger and/or are candidates for surgery. These opinions as to life expectancy are a far cry from the historic literature which suggests that a mesothelioma sufferers' life expectancy is generally 10-12 months from diagnosis.

Fourthly, the vast majority of workers with Progressive Massive Fibrosis, Progressive Systemic Sclerosis and progressive Coal Workers Pneumoconiosis and asbestosis (and

many other conditions), in any event go on to pursue common law damages from their employers and/or product manufacturers and/or occupiers.

Due to their age and loss of earning capacity, their common law claims often exceed the Terminal Benefit permitting the insurers to receive a full recovery of the Terminal Benefit pursuant to section 207 of the WCRA.

Section 207 of the WCRA also entitles insurers to bring a recovery action if a worker elects not to, which permits an insurer to recover contribution from other tortfeasors for the Terminal Benefits paid to a worker.

In the circumstances, we consider that if there is to be an arbitrary life expectancy period re-imposed on the operation of s39A of the WCRA, such a period should be five (5) years and not three (3).

Accordingly, the overall financial stability of the scheme is, on a medium to long term view, unaffected by the present law and the *Blanch* decision.

In relation to Clause 66:

Clause 66 of the 2022 Amendment Bill introduces a new Chapter 37, which provides that the Proposed New Terminal Condition Definition is to apply retrospectively to all injuries sustained on or after 31 January 2015 (the **Proposed Commencement Date**) and apply to a claim even if:

- an insurer allowed an application for Terminal Benefits, but the worker or the worker's dependents had not yet received the Terminal Benefits;
- an insurer accepted a doctor's diagnosis of the terminal nature of the worker's condition, but the worker or the worker's dependents had not yet received the Terminal Benefits;
- a review relating to a claim for Terminal Benefits had been started pursuant to Chapter 13 of the WCRA, but had not been decided.

Pursuant to section 746, which will be housed in the new Chapter 37, the Current Terminal Condition Definition applies only for workers that have received Terminal Benefits or, in respect to a claim for damages only, the worker has given the insurer a notice of claim.

Therefore, the Proposed New Terminal Condition Definition is to relate to injuries sustained on or after 31 January 2015, for any claim in which Terminal Benefits have not already been paid or reviews that have not already been decided.

Maurice Blackburn submits that this represents bad law, noting that retrospective laws are unjust, unfair and unreasonable. As a matter of basic principle, this should not be permitted to stand.

It is also abhorrent that terminally ill Queensland workers should have their rights retrospectively abolished by the Proposed Commencement Date, as those entitlements can and should be determined under the Current Terminal Condition Definition.

The application of the Proposed Commencement Date and section 744 will also mean that workers that have incurred costs (often significant costs) associated with medical expert opinions and related legal advice incurred seeking Terminal Benefits under the WCRA,

including matters currently the subject of review with the Workers Compensation Regulator, will have these costs thrown away.

Indeed, not only will the Proposed Commencement Date abolish their entitlements to Terminal Benefits, but it will also throw away the costs that these workers have incurred in legitimately and reasonably pursuing their entitlements pursuant to the current law, as clarified by the *Blanch* decision.

Thirdly, the retrospectivity of this proposal will also have a significant effect on common claims already commenced in Queensland Courts for workers suffering from Terminal Conditions.

Section 238 of the WCRA carves-out a number of requirements of Chapter 5 of the WCRA (i.e. the "pre-court" procedures) for workers suffering from a Terminal Condition (as defined), who are seeking to access damages. That is, section 238 of the WCRA allows workers with a Terminal Condition to advance a claim for common law damages without serving a Notice of Claim for Damages or attending a Compulsory Conference, to avoid undue delay, due to their prognosis.

Many workers diagnosed with terminal conditions have already utilised this provision to speed up their claims and save costs, for self-evident reasons. Some have even elected to do so without accessing Terminal Benefits under the scheme.

By retrospectively applying the Proposed Commencement Date (as presently defined), common law actions already filed in the Courts pursuant to section 238 of the WCRA, may potentially be retrospectively rendered invalid and liable to be struck out or stayed.

In some cases, this may even mean that workers entitlements would be quashed by limitation periods due to the Proposed Commencement Date, if they are suffering from non-dust related or autoimmune injuries. This would evidently immensely prejudice workers and their families.

To appropriately illustrate these points, we note the following case and hypothetical examples of individuals that will be significantly prejudiced if these retrospective changes were to be made:

Example 1:

A 70-year-old underground miner has been diagnosed with silicosis, progressive massive fibrosis (**PMF**), silica-related chronic obstructive pulmonary disease and silica-related emphysema. His condition is expected to terminate his life in approximately nine (9) years, reducing his overall life expectancy by five (5) years in total. There are no relevant co-morbidities.

This workers' claim was denied by the workers compensation (self) insurer on the basis that his death is not 'imminent'. The worker has incurred expenses and legal costs in appealing the decision, which is presently pending before the Workers Compensation Regulator.

If the retrospective Terminal Condition is applied before the Workers Compensation Regulator determines his review, then his appeal will ultimately fail due to the law moving beneath his feet and he will have significant costs thrown away relating to the Appeal.

Example 2:

A 55-year-old miner has been diagnosed with a progressive autoimmune condition subsequent to silica exposure. His condition is expected to terminate his life in approximately 10 years.

As his condition is not a defined 'dust-related injury', the usual limitation period for personal injury claims applied to his claim.

Pursuant to section 238 of the WCRA, due to his Terminal Condition, the worker bypassed the pre-court procedures set out in the WCRA and filed his action directly in the Supreme Court of Queensland.

If the retrospective Terminal Condition is applied before his proceeding resolves, then the argument may arise that this worker's proceeding is nullified due to non-compliance with the pre-court procedures, due to the retrospective amendment to the definition of Terminal Condition. If this was the case, then the retrospective application may see this worker's cause of action against his employers statute barred as it is not a dust-related injury (as defined).

Example 3:

A 71-year-old underground miner has been diagnosed with silicosis, resected silica-related squamous cell carcinoma of the lung and silica-related emphysema. His condition is expected to terminate his life in approximately five (5) years. There are no relevant co-morbidities.

This worker's claim was denied by the workers compensation (self) insurer on the basis that his death is not 'imminent'. To challenge this rejection in light of *Blanch* the worker has incurred expenses and legal costs in appealing the decision, which is presently pending before the Workers Compensation Regulator.

If the retrospective Terminal Condition is applied, then his appeal will ultimately fail due to the law moving beneath his feet and he will have costs thrown away relating to the Appeal.

Example 4:

An 86-year-old former underground miner has been diagnosed with diffuse dust fibrosis. His condition is expected to terminate his life in 4 years.

This workers' claim was denied by the workers compensation self-insurer on the basis that his death is not 'imminent'. The worker has incurred expenses and legal costs in appealing the decision before the Workers Compensation Regulator and now with proceedings pending before the Queensland Industrial Relations Commission.

If the retrospective Terminal Condition is applied, then his appeal will ultimately fail due to the law moving beneath his feet and he will have significant costs thrown away relating to his appeals with the Regulator and the QIRC.

Example 5:

A 31-year-old former stonemason with three young children has been diagnosed with silicosis (and severe secondary psychological injury). Medical evidence from two independent experts has indicated that although the worker does not yet have PMF (the advanced form of silicosis), he has all the hallmarks that his silicosis is progressive and at some stage in the next 10-15 years will progress to PMF.

Pursuant to section 238 of the WCRA, due to his Terminal Condition, the worker has bypassed the pre-court procedures set out in the WCRA and filed his action directly in the Supreme Court of Queensland.

If the retrospective Terminal Condition is applied, then the argument may arise that this worker's proceeding is nullified due to non-compliance with the pre-court procedures due to the retrospective amendment to the definition of Terminal Condition. If this was the case, then the retrospective application may see this workers' claim be forced back into the pre-court procedure and have his costs thrown away of pursuing his (wholly legitimate) Supreme Court action to date.

Noting all of this and most particularly the impacts of these amendments on terminally ill Queensland workers, we submit that it is only fair, reasonable and appropriate for the Proposed Commencement Date to be amended to a date in the future, such as 1 July 2022.

This will ensure that workers diagnosed with Terminal Conditions before this time who have taken steps to access their benefits under the current iteration of the law, as they are entitled to do, are not unfairly impacted by these proposed retrospective changes in the law.

When considering the basic fairness of retrospective laws, we believe that an apt comparison can be made to changes introduced by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015*, which restored workers' access to common law damages by reversing the changes made to the Queensland Workers Compensation Scheme in 2013, commonly referred to as the Newman Act amendments.

The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015* restored the rights of workers from 31 January 2015 by abolishing the 5% DPI "gateway" for workers to access common law damages. However, for injuries sustained between 15 October 2013 and 31 January 2015, the law in place at that time remained and workers who, unfortunately, sustained an injury during this period, still had to meet the 5% threshold. In that way, even the (beneficial) reversal of the Newman Act changes were not retrospective.

The Issuance of Law Practice Certificates

During the consultation phase, it was our understanding that a version of ss.325H and ss.325I were provided which contained a clear understanding of the circumstances under which a Law Practice Certificate was required to be given.

Unfortunately, the version which has been included in the Bill has not adopted this earlier version, instead it provides an amalgam of three separate provisions stretching four pages which, read jointly, leads to significant confusion and the requirement to provide multiple Law Practice Certificates.

Further, should this Bill pass, there would be a requirement across all three jurisdictions applying to personal injury claims to provide Law Practice Certificates. It is not uncommon for claimants to have claims which involve both the WCRA and PIPA, or WCRA and MAIA (colloquially referred to as hybrid claims). On rare occasions a claimant may have a claim which encompasses all three pieces of legislation.

It is also not uncommon in hybrid claims involving the PIPA to have multiple respondents. For example, a labour hire worker placed to work on a large construction site with Company A as the subcontractor, Company B as the head contractor and Company C supplying certain heavy equipment. If the worker is injured through the negligent operation of the heavy machinery, there is the prospect of a workers' compensation claim against the employer, and then claims against Company A, B and C under the PIPA.

To complicate matters, at the outset perhaps only the details of the employer and Company A are known, and it may be several weeks or months before evidence can be obtained as to the involvement or details of the Company B and C. Under the current Bill, a separate Law Practice Certificate would be required to be given to each respondent (so 4 certificates), and each would be required to be given at different timeframes.

Maurice Blackburn believes that this has the potential to lead to significant disruption and unintended consequences, including:

- Increased legal costs for claimants due to the additional work required to be performed under each legislative regime, some of which will not be recoverable from respondents or insurers;
- Unintentional non-compliance through human or systems errors;
- The prospect of IT solutions to automate such a scheme is limited, because human input will, in all instances be necessary. Any IT solution that could potentially be found is very likely to be costly;
- Not all law practices would have the IT services available, or the resources to fund IT solutions;
- There will be wasted time and resources by respondents, insurers and their lawyers, and the Regulators in dealing with unintentional errors, with no conceivable benefit either to the schemes, to enforcement activity or to preventing claims farming;
- The Bill provides for 300 penalty units for non-compliance. This can equally be applied in respect of unintended errors;
- Confusion and over-burdened regulatory agencies, we fear, may be used to the advantage of claims farmers, who may be emboldened to take a risk in such an atmosphere.

To minimise the likelihood of genuine and unintended errors, we would suggest that:

- One Law Practice Certificate be devised which will be applicable across all the schemes. The current Law Practice Certificate in CTP refers to specific MAIA provisions. We do not think this is necessary, and instead reference could be made to the "claims farming provisions" which are defined in this Bill;

- Each initial notice under the schemes be amended and include the Law Practice Certificate. We note that, in the CTP scheme, the Motor Accident Insurance Commission already amended the Notice of Accident Claim form to include the Law Practice Certificate;

- A copy of an original Law Practice Certificate given under any of the schemes be sufficient to discharge the requirement to provide a Law Practice Certificate under another corresponding scheme provision(s). For example, if a Law Practice Certificate is given to a respondent in a Notice of Claim for a PIPA matter and later a Notice of Claim for Damages is provided under the WCRA also commenced for the same event, the earlier PIPA Law Practice Certificate should be acceptable to be provided under the WCRA;

  This would involve the insertion of a new section in each of the MAIA, WCRA and PIPA to clarify that, where a Law Practice Certificate has already been given in one scheme, a copy of that certificate is effective to discharge the obligation under another scheme for a claim arising from the same circumstances and given by the same law practice; and

- The requirement to give a Law Practice Certificate under the WCRA should be triggered when:

  i. A damages claim is commenced; or
  ii. When a lump sum offer is accepted by a legally represented worker; or
  iii. Within one month of an injured worker retaining a law practice, if a damages claim has already commenced (that is a self-represented worker retaining a lawyer or a worker instructing a new law practice instead to act on their behalf).

The requirements of providing a Law Practice Certificate under ss.325H, I and J in the current proposed version of the WCRA are simply unworkable. Our proposed solution, as noted above, provides a clear and simple set of circumstances in which the Law Practice Certificate is to be provided, will minimise increased costs to injured persons, and balances this with the intent of putting a stop to claims farming.

Claims farmers seek to profit quickly and cheaply from their activity. In respect of a statutory claim, this is only possible if a worker accepts a lump sum offer in their Notice of Assessment issued by the insurer. Claims farmers want this money to be deposited in their trust accounts, as opposed to being paid directly to the worker. Therefore, this is the point in time at which it makes sense to require a Law Practice Certificate.

We also hold concerns about the provision of a Law Practice Certificate under the WCRA where a damages claim has not yet been commenced.

Injured workers already face substantial prejudice in the workplace following an injury or when they lodge a workers' compensation claim. Many workers delay seeking legal advice or request legal advisors not to communicate with the insurer to avoid their employer finding out that they have sought legal advice due to the fear of further straining the employment relationship.

For this reason, we strongly urge that the requirement to give a Law Practice Certificate during the statutory phase of a claim occur if a lump sum offer is accepted by a legally represented worker. This will strike a sensible balance between stopping claims farmers and taking account of workers' real and valid concerns.

The implementation of this proposal is also simple:

- A payment direction (signed by the worker) would generally have been given to the insurer requesting payment of the lump sum to the trust account of a law practice. Therefore, the Law Practice Certificate would need to be given with the acceptance of the lump sum offer;

- The Notice of Assessment should have added to it, the Law Practice Certificate;

- Further, to prevent non-compliance, the Notice of Assessment can be amended to ask workers whether they have retained a lawyer, together with a short note of the obligation to give a Law Practice Certificate;

- Payment of the lump sum therefore being conditional on a Law Practice Certificate being given if the worker has retained a law practice.

Even with amendment, there is always a risk of genuine and unintended errors arising from this complex interplay of different requirements for the giving of a Law Practice Certificate. Non-compliance with the strict timeframes in these circumstances should not lead to sanction of the law practice.

Therefore, it is necessary for the regulators across all schemes to take a practical approach to enforcement when errors occur with the timing within which Law Practice Certificates are given.

Amendments to the Legal Profession Act 2007

Legal Costs Recovery

We support the intent of the amendments to the definition of the maximum amount a law practice can charge and recover, because:

- it will assist in preventing undesirable billing practices used to disguise claim farming activities; and

- the amendments specifically relating to interest on disbursement funding will permit clients to retain a greater portion of their settlement funds.

In relation to amendment of ss.347(8)(a)(i) and (b) – relating to payments to an entity other than a law practice for obtaining instructions or preparing statements - the exemption of barrister's fees is critical.

Barristers play a vital role in the legitimate and strategic progression of a client's claim. However, s.347(8)(b) as drafted only provides an exemption to barristers' costs in relation to the PIPA. The exemption should include also the MAIA and the WCRA.

Without the inclusion of all three schemes, the provision will mean barristers' fees for preparation of certain work relating to a workers' compensation or CTP claim must be borne by a law practice, yet for claims under PIPA they would be considered a legitimate disbursement.

A simple solution to the wording of s.347(8)(b) would be to delete the words "*after a notice of claim is given under the Personal Injuries Proceedings Act 2002, section 9 or 9A*".

In relation to the amendments concerning interest on disbursement funding – we appreciate that disbursement funding is a cost of doing business, and a prohibitive one for many law practices. The use of different disbursement funding models is an appropriate and legitimate way for practices to manage the costs and risks of business.

Despite this, it is our view that the exclusion of interest from disbursements will:

- Support the claims farming amendments by removing practices such as payments to another entity for some alleged service provided, but which in fact is a disguised consideration for a claim referral; and

- Allow clients to retain a greater portion of their settlement funds, hence maximising access to their damages for much needed medical treatment and lost income.

Accordingly, we support the amendments concerning interest on disbursement funding.

Section 347(8)(a)(iv) further allows other disbursements or expenses to be prescribed by regulation. We do not support the use of regulation to make changes to legal costs provisions as such changes are substantive changes to rights and obligations, which must be preceded by adequate consultation with those whose rights and obligations are impacted.

Advertising Regulations

New Chapters 5A and 6A, together with amendments to existing Chapter 5, provide the Legal Services Commission extensive, invasive and special investigatory powers to enforce the claims farming provisions of the PIPA. However, it goes beyond simply tackling the insidious conduct of claims farmers to permitting the use of such extensive, invasive and special investigatory powers in relation to the advertising restrictions contained in the PIPA.

Firstly, in this submission we outline reasons why those advertising restrictions are an anachronism. Secondly, such powers may be justifiable in respect of the serious and insidious conduct of claims farming, but advertising breaches cannot be considered of the same ilk and therefore we believe that such powers in respect of advertising are excessive and unjustifiable.

We further note the Attorney General's words from her Introductory Speech:

> *It is intended that this bill will remove the financial incentive for claim farmers to harass Queenslanders and will amplify the disincentive for legal practitioners to engage with claim farmers given that they will be required to certify, at various stages of the claim process, that the claim was not claim farmed.* ***Lawyers will still be able to inform people of their rights and entitlements at law and to advertise and promote their services.*** *However, what this bill aims to do is stop the harassing calls and intimidating behaviour—all too often targeted at the most vulnerable within our communities—and minimise the potential for unmeritorious claims and fraudulent behaviour in relation to personal injury and workers' compensation claims.* (our emphasis)

Once again, we restate our support for the imposition of disincentives to participate in claims farming activity. However, it is important to note that there is a significant difference between

the appropriate advertising of legal services that helps to inform people of their rights and claims farming.

While the continuation of restrictions on advertising may be a necessary short-term step, it is our hope that the Government will also take this opportunity to consider more fully the appropriateness of ongoing advertising regulations on personal injuries advertising in the long term.

Queensland remains one of only a small number of jurisdictions with such regulations in place. This puts injured Queenslanders at a distinct disadvantage when it comes to being informed of their rights, and the supports available to them in accessing justice.

Maurice Blackburn staff in Queensland are frequently approached by injured consumers who are unaware of their rights, due to their inability to receive appropriate information through sources they generally depend upon.

Such a lack of information has real-world consequences for these injured consumers. For example, we regularly have to inform people with injuries that their application for entitlements has been statute barred due to the effluxion of the three-year time limit applicable to their claim. That time limits even exist in such cases is essential information that many Queenslanders are likely unaware of, made worse by the inability to state this important information in personal injury advertising, as is the case currently in Queensland due to advertising restrictions.

Such restrictions are not something that should be seen as acceptable long-term in Queensland – not only do they deny people important information about their rights, they are out of step with advances in digital and social media and the way many people today consume information.

We would welcome further discussion about these important matters as part of consideration of this Bill, including how best to keep the legal profession informed about their responsibilities under the current regime.

Regulatory and Enforcement Activities

We note from the Attorney General's introductory speech that:

> *To ensure the oversight and enforcement of the claim farming and law practice certificate provisions, the bill extends the role of the Legal Services Commissioner and the Workers' Compensation Regulator by providing the power to investigate and prosecute breaches of the claim farming provisions.*

Maurice Blackburn supports the granting of additional powers to regulators, in order to enforce the new claims farming provisions.

We note, however, that there are very real risks associated with having three separate regulators investigating and prosecuting breaches of analogous provisions. There is a risk of inconsistent methods, processes, duplication, ineffective and inconsistent monitoring, investigation and prosecution.

In particular, we are concerned about the investigation and prosecution of breaches involving hybrid claims. There are circumstances where, for example, both the Workers' Compensation Regulator and the Legal Services Commission would be investigating and prosecuting the same conduct.

Solid collaboration would be critical in such matters to avoid the possibility of an inconsistent approach. Such collaboration should involve also the Motor Accident Insurance Commission. Given the consistent wording of the substantive claims farming provisions across the schemes, judicial interpretation in one scheme would impact each other scheme.

As noted earlier, there is always a risk of genuine and unintended errors arising from the complex interplay of different requirements between schemes, including in the issuance of Law Practice Certificates. Non-compliance with the strict timeframes in these circumstances should not lead to sanction of the law practice. We ask that the regulators across all schemes take a practical approach to enforcement when errors occur, such as with the timing within which Law Practice Certificates are given.

We have found the attitude of MAIC around matters of accidental non-compliance to be pragmatic, preventing valuable regulatory resources being drawn down unnecessarily.

Maurice Blackburn further submits that failure to properly resource each regulator to exercise their new powers could make the claims farming provisions ineffective and hence fail to deter claims farmers.

It is particularly important to ensure that those with newly expanded powers – the Legal Services Commission and the Workers' Compensation Regulator – are granted significant additional funding in order to successfully incorporate the new investigative and enforcement powers.