Submission to the

Legal Affairs and Safety Parliamentary Committee Inquiry

Personal Injuries Proceedings and Other Legislation Amendment Bill 2022

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Introduction

The Queensland Council of Unions (the 'QCU') is the peak union body in Queensland representing twenty-six affiliated unions and around 360,000 Queensland union members. We welcome the opportunity to make a submission to the Committee on the *Personal Injuries Proceedings and Other Legislation Amendment Bill 2022* (the **Bill**).

The QCU has consulted with its affiliates who have members who are affected and potentially affected by the proposed changes outlined in the Bill.

The QCU was consulted over the claims farming proposed amendments in late 2021 and is supportive of the proposed changes. However, the proposed amendments relating to the terminal illness lump sum payment were first mooted in mid February 2022 shortly before the introduction of the Bill. Specific advice provided to the QCU was that the changes were required in order to prevent a 'blow out' to the fund and to insurers.

On that basis, the QCU sought but has not received information, including the actuarial advice on the impact of the *Blanch* decision[1] of the Queensland Industrial Relations Commission in relation to the terminal illness lump sum payment. We believe that this information should be provided to the Committee to assist in its deliberations.

Our view is that the amendments that were only legislated three years ago in 2019 for workers who have received a diagnosis of a terminal condition put the scheme on the correct settings and that without proper public justification and analysis about the impact of the *Blanch* decision, the changes outlined in the Bill are not warranted.

Our commentary on specific elements of the Bill appear below.

Claims Farming:

We note that the policy objectives of the Bill include preventing claims farming in personal injury and workers' compensation claims.

The QCU is fully supportive of this section of the Bill. We believe it strikes the right balance between removing the capacity for claims farming businesses to prey on vulnerable workers,

[1] *Blanch v Workers' Compensation Regulator* [2021] QIRC 408 ('*Blanch*').

while protecting legitimate referral arrangements that our affiliate unions have in place with ethical service providers.

We are aware of the amendments that were made to the *Motor Accident Insurance Act 1994* some time ago and believe that replicating those measures in the context of the *Workers' Compensation and Rehabilitation Act 2003* (WRCA) are an appropriate step forward.

Terminal Workers' Compensation Benefits

Clause 58 of the Bill seeks to define a terminal condition as:

> "*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*". (emphasis added)

A number of our affiliate unions represent workers who live with the ever-present threat of contracting a terminal illness due to inadequate workplace safety. These illnesses include:

- Mesothelioma
- Asbestosis
- Progressive Massive Fibrosis
- Silicosis
- Silica induced Auto-immune Diseases
- Coal Workers' Pneumoconiosis
- Progressive Systemic Sclerosis

However, we note that the above list is not exhaustive.

All of the above can be a terminal condition and in many cases, life expectancy can exceed three years from diagnosis.

In our experience, when a worker receives a diagnosis for any of these conditions, a number of important life events start to occur:

- Their mindset has to start adjusting to the fact that they have a terminal illness

- Often their condition precludes a return to work – in many cases a return to the workplace/industry in which the illness was contracted is not tenable
- The psychological impacts on family and friends become evident
- The worker must start to consider how those who will be left behind will cope in his/her absence.

At this time, financial stresses for the person and their family are likely to come to the fore.

The effect of the Bill, through its proposed change to the definition of a terminal condition is that those workers who receive a diagnosis that their condition is expected to terminate their life within three years will be able to access a lump sum Terminal Benefits payment. Conversely, those who receive a diagnosis of a terminal condition that will not end their life within three years will not be able to access the lump sum payment at the time that they are diagnosed.

It is important to note that the terminal nature of the illness is the same.

As noted above, it is on diagnosis that major life changes start to occur, regardless of the projected time-frame of the condition. This is the time when workers most need financial support. They might use the support to buy a suitable property, or pay down their mortgage, or undertake renovations to their current property to accommodate anticipated increased care needs – while they are still in a physical and psychological condition to do so.

The WCRA, as it stands, does not impose the three year threshold. We believe that is the right setting.

As the Committee is aware, the WCRA was amended in 2019 to remove the previous two year threshold under section 36 of the Workers' Compensation & Rehabilitation and Other Legislation Amendment Act 2019.

The Explanatory Notes to that Bill explained that 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 had meant they were excluded from accessing this payment under the previous legislation. The amendment was introduced to replace the former 2 year limitation with an assessment that the insurer was to be satisfied that the worker has a latent onset condition that is terminal.

The Minister in her first reading speech also noted that the 2 year limitation was being removed because some workers are diagnosed with a terminal work related condition with a life expectancy of greater than two years were being excluded from accessing the payment. This was confirmed in the recent *Blanch* decision of the Queensland Industrial Relations Commission which rejected an arbitrary time limit imposed by an insurer.[2]

On this basis, the current provisions in the Act reflect that in many cases a person with a terminal illness can often have a life expectancy that exceeds three years, but the need to remove financial stress at the time of diagnosis is the most important thing.

Imposing an arbitrary time threshold on eligibility merely creates two classes of terminally injured workers – ones who can access the lump sum benefit on diagnosis and those who can't.

Denying workers access to a lump sum payment at diagnosis means they will be reliant on the workers' compensation system, unnecessarily, for years. This would have a serious impact on the worker's financial and psychological well-being.

The QCU believes that the Committee should recommend that the re-introduction of an arbitrary life expectancy threshold is a backward step in how Queensland supports workers with a terminal illness.

The QCU as noted above, has asked for and not received information, including actuarial advice, on the impact of the *Blanch* decision on the scheme and insurers and that such information should be provided to the Committee to help properly inform its deliberations.

Retrospectivity

Clause 66 of the Bill suggests that the proposed new definition of a terminal condition is to apply to all injuries sustained on or after 31 January 2015, and that this rule would apply even where:

- A worker has lodged a claim for terminal illness benefits (with supporting medical evidence) and the insurer has yet to determine the claim;

[2] *Blanch v Workers' Compensation Regulator* [2021] QIRC 408, [71], [72].

- A worker has lodged and pursued an appeal with the Workers Compensation Regulator (due to a rejection of their claim by the insurer) and the Regulator has yet to determine the claim; and
- A worker has lodged and pursued an appeal with the Queensland Industrial Relations Commission (due to the Regulator affirming a rejection of a worker's claim) and the Court has yet to determine the claim.

The QCU is gravely concerned at the use of retrospectivity in the enactment of the proposed new definition of a terminal condition. Indeed, a fundamental legislative principle is that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.[3] Yet the Bill is clear that some injured workers who are in the process of having their claim for a terminal benefit settled under existing law would suddenly become subject to the new definition.

It is clearly unacceptable that terminally ill workers should have their rights retrospectively abolished. Current claims for entitlements should be determined under the laws that were in place at the time.

The process for claiming a terminal benefits lump sum involves a good deal of effort and expense on behalf of the injured worker. That the new definition could apply in circumstances where a claim "…had been started but not decided" would mean that the effort and financial outlay already invested in that claim become useless. Changing eligibility mid-claim is not only unfair, but in our view is unconscionable. Any legislative changes in our view should only apply to future claims.

As noted previously, workers who receive a diagnosis of a terminal illness contracted in their workplace, already have to deal with the psychological and financial trauma associated with their (and their family's) changed circumstances and their probable withdrawal from the workforce. Changing the eligibility criteria will only add to that stress and compound the hurt. The QCU urges the Committee to find that retrospective legislation is inappropriate, and that this section of the Bill should be abandoned.

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[3] *Legislative Standards Act 1992* (Qld) s 4(3)(g).