Maurice Blackburn Lawyers
Since 1919

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11 March 2020

Committee Secretary
Legislation Scrutiny Committee
GPO Box 3721
DARWIN NT 0801

By email: LSC@nt.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Committee's review of the *Return to Work Legislation Amendment Bill 2020* (the Bill).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn has provided legal services to Territorians since 2014. Our staff of 10, including 5 lawyers, provide legal advice primarily for personal injuries including workers' compensation, motor vehicle accidents, public liability claims and institutional sexual abuse. The safety and wellbeing of Territorians is at the centre of our work.

We congratulate the Government on the development of this Bill. We see it as a sensible, positive and worker-friendly response to existing issues in the current Return to Work legislation.

We note in particular that the Bill provides for:

i. Revision of the definition of a 'worker';

Maurice Blackburn congratulates the Government on its recognition that those engaged by Labour Hire firms deserve the same access to employment protections and entitlements as those under direct employment relationships.

In our view more work needs to occur federally in the redefining of 'worker', 'employee' and 'contractor'. However, we acknowledge that the provisions in the Bill have the potential to provide a significant improvement in work circumstances for many Territorian workers.

ii. **Provision that post-traumatic stress disorder for first responder police officers, firefighters and ambulance officers be a deemed disease;**

The importance of this cannot be understated.

Maurice Blackburn has long argued[1] that statutory compensation schemes across the country treat people who have suffered psychosocial injuries in the workplace less fairly and more poorly than those who have suffered physical workplace injuries.

We have also argued that, in our experience, it is not unusual for the administration of statutory compensations schemes to generate or exacerbate mental health issues, rather than assist in resolving them.

Nowhere are these two factors more pronounced than in our response to workplace injuries suffered by our first responders.

Whilst we applaud the Government on ensuring fit-for-purpose provisions relating to PTSD and the responses to physical and psychological workplace illnesses that particularly affect first responders, we note that more work needs to be done nationally to ensure seamless care and service provision.

Maurice Blackburn has seen an increasing number of cases where a first responder with a claim for work-induced psychological injury has 'fallen between the cracks' of compensation schemes.

We provide the following case as an example.

> *A worker who experiences trauma in one line of work, may leave that role to pursue a career in another line of work or with a different employer, which is covered by a different compensation scheme. If the worker lodges a claim for psychological damage, there can be significant 'buck-passing' in determining which scheme should be covering the claim. Even where there is no question of the worthiness of the claim, the claimant can be forced to wait in some cases years for a determination to be made as to the responsible party or jurisdiction.*

A number of influential inquiries[2] have demonstrated the prevalence of this issue in the emergency services and first responder workforce. For example, someone working for a State or Territory police force (covered by one scheme) then goes to work for the Federal Police (covered by another scheme). In such cases, the claimant is generally receiving no income, no compensation, and has to rely on their own resources until such time as attribution can be made.

Maurice Blackburn believes that, with the introduction of the excellent provisions in the Bill, the NT Government would be well placed to advocate nationally for a more seamless compensation regime for first responders.

iii. **Removal of the cap on normal weekly earnings for payments made after 26 weeks of incapacity;**

[1] See for example https://www.pc.gov.au/__data/assets/pdf_file/0009/240678/sub239-mental-health.pdf
[2] See for example: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Mentalhealth; https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2442 (recommendation 10);

Maurice Blackburn applauds this long awaited amendment, and we congratulate the Government on implementing this sensible, worker-centred adjustment to the current scheme.

iv. Provision that the legislation covers injuries incurred on the way to or from work; and

Once again, Maurice Blackburn applauds this adjustment to the current scheme, which will bring it into line with national best practice.

v. No recovery from worker.

We congratulate the Government on mandating that overpayments cannot be recovered from a worker. This is an important step in rebalancing the rights of workers, insurers and employers.

More work to be done

While we are happy to add our voice to the support for this Bill from other worker advocates,[3] Maurice Blackburn is disappointed that the Government, whilst making significant, worker-centred adjustments to the existing return to work scheme, has not chosen to remove the 260 week limit (5 year cap) placed on workers who have been assessed to have suffered an injury below 15% permanent impairment.

It is recognised that the 2015 amendments introducing this cap were based on advice from a government actuary that the cap would help manage costs and premiums in the long-term to provide a sustainable scheme. We urge the Committee to question whether the existence of the cap has had this impact on scheme sustainability and whether it appropriately balances this with the impact on the rights of Territory workers.

We submit that the 15% figure is arbitrary, and can have disproportionate impacts on workers whose injury falls below this threshold but who are precluded from continuing their usual employment (this is often the case for Territorian workers engaged in heavy manual labour, plumbing, construction, mining etc).

In our experience, too often we see workers with limited education or qualifications suffer a relatively minor impairment to their arm, back, hand, or knee, which renders them unfit for physical work for the rest of their lives. While their impairment will almost certainly be assessed below 15%, their working future, and their entire life, has been permanently impacted in a way that is currently not able to be compensated for under the scheme.

Consider the following case studies:

> *A 33 year old construction worker is diagnosed as suffering from bilateral carpal tunnel syndrome as a result of using a nail gun and other power tools for a prolonged period. Carpal Tunnel release surgery was not effective, and the worker is now permanently limited in the hours they can work before pain and symptoms begin. The worker is also precluded from any work requiring repetitive use of the hands. Additionally, the worker left school in year 10 and has no readily transferable skills. As a result, the Worker struggles to redeploy to alternative work given the limitations on hours, tasks and the lack of any training or experience in sedentary work.*

[3] See for example http://ntnews.newspaperdirect.com/epaper/viewer.aspx

A 48 year old scaffolder suffers a disc prolapse in the lower back as a result of lifting a heavy tool bag. Treatment is conservative and involves physiotherapy and hydrotherapy with little improvement. Surgery is not indicated however the worker is advised to avoid any lifting (over 5kg), bending, climbing or overhead work in the future. The worker has been a scaffolder since leaving school and has worked on various gas construction projects across Australia. The worker has been a high income earner historically and has a mortgage and a family to support. The worker is unable to return to scaffolding and in any event cannot get medical clearance to return to construction sites due to the back injury. An expert Occupational therapist considers the worker is likely to be commercially unemployable due to ongoing pain, functional restrictions and lack of transferable skills.

In both of the above examples, the workers would in our experience fall well below the 15% threshold and would not be entitled to any compensation beyond 5 years as a result of the injury they sustained at work regardless of whether they have been successful in returning to work or not.

It is our position that the cap is an unfair tool that effectively sets ongoing real economic loss of an individual who fails to meet the threshold, at zero once they have passed 5 years, wholly to the benefit of the employer and insurer.[4]

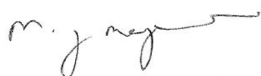
Requiring an impairment assessment of 15% is an enormous hurdle for workers to jump, and we would invite the Committee to bear this in mind when making its recommendations. The vast majority of injured workers that we assist in the Territory do not meet this hurdle.

Maurice Blackburn submits that the Committee should recommend that the Bill be adjusted to incorporate a total repeal of the 5 year cap. Removing the cap is perhaps the simplest way to ensure that workers are able to continue to enjoy access to the statutory rights until they are able to return to work and to receive compensation while they remain incapacitated.

It is also important to recognise that despite the positivity of the proposed changes, workers are still being short changed in the Territory due to this cap in a jurisdiction where there is no entitlement to bring a common law claim against their employers. Maurice Blackburn's position is that in order to balance the rights of workers and employers, that the *Return to Work Act* should be amended to remove the cap.

We would be pleased to discuss the above comments and recommendations in greater detail with the Committee. If we can assist the Committee further in its important work, please do not hesitate to make contact via 08 8914 2300 or MMeyers@mauriceblackburn.com.au.

Yours faithfully,



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[4] For a more detailed discussion of this and other factors, see *'There Must Be a Better Way': Personal Injuries Compensation since the 'Crisis in Insurance',* A Field, Deakin Law Review 1 (2008) 13 at 67 -98