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Dear Sir/Madam

### **Workers Compensation and Injury Management Act 2023 - Proposed Act Amendments**

We refer to the *Workers Compensation and Injury Management Act 2023* ('the Act') – Proposed Act Amendments Consultation Paper dated February 2026.

Slater and Gordon's submission has been informed by issues arising in claims brought by its clients suffering from asbestos and silica dust diseases ('dust diseases').

This submission focuses on practical reforms to better accommodate workers with asbestos and silica dust diseases, particularly retired workers, by removing unnecessary First Certificate requirements, clarifying survival of claims, and improving processes where employers are uninsured. We do not support limiting the Default Insurance Fund's coverage of historical common law liabilities of uninsured employers, arguing that dust disease sufferers must retain equal access to the common law safety net. We also recommend several technical fixes to WorkCover WA's forms and systems (including use of ACN/ABN flexibility and automatic claim numbering).

#### **First Certificate of Capacity ('First Certificate')**

Due to the latent nature of dust diseases, the majority of Slater and Gordon's clients are retired at the time of their diagnosis. The claim to be advanced on behalf of a retired worker suffering from a dust disease is for dust disease impairment compensation and medical and health expenses.

WorkCover WA's *Explanatory notes for medical practitioners – First Certificate of Capacity* states its reasoning behind the importance of certificates of capacity:

Certificates of capacity are vital for communication. Communication with all parties greatly assists the worker's recovery, return to work and their claim. To be effective, it is important certificates are completed thoroughly, clearly and legibly. If employers or insurers cannot read them the worker's recovery or return to work may be put at risk. Thoroughly completed certificates will likely minimise requests for further information.

In a case where the worker is retired, their capacity for work and ability to return to work are irrelevant to both the employer assessing liability for the claim and the Dust Disease Medical Panel (DDMP) in its assessment and determination of whole person impairment ('WPI').

The irrelevant nature of some of the information required to be provided (e.g. '*the worker's usual duties*', whether workplace modifications are required, how many kilos the worker can lift, how long the worker can sit and stand, how far the worker can walk and if they can '*work below shoulder height*') and the requirement to prescribe an '*injury management plan*' have caused confusion

amongst medical practitioners. One such medical practitioner initially declined to complete the First Certificate, on the basis it was irrelevant to his 84 year old patient, who was suffering from asbestosis and had been retired from the workforce for 10 years.

Other medical practitioners have completed the First Certificate, but only after seeking clarification or confirmation that it was a necessary part of the claim process.

Slater and Gordon submits that completion of the required *CF3 Dust Disease Compensation Claim Form and Request for WPI Determination – Common Law*, together with the required supporting medical evidence (as set out in WorkCover WA's *Dust Disease Claims Fact Sheet* ('DDMP Fact Sheet')) are all that is necessary for the DDMP to be listed and for the DDMP to make its determination.

The DDMP does not appear to place any, or any significant weight on the First Certificate, at least in determinations received by Slater and Gordon on behalf of its clients. This is not surprising, given that the First Certificate does not set out the worker's lung function test results, radiology results or pathology results etc. As noted above, this medical evidence is required to be provided separately to the DDMP, on the worker's behalf.

According to the DDMP Fact Sheet, the '*DDMP may request additional medical tests, information or documents before it makes a determination*'. In Slater and Gordon's experience, it is not uncommon for the DDMP to request such additional material, and for it to be provided in response. It is submitted that the DDMP would not be prevented from the proper exercise of its function, should the retired worker not be required to provide a First Certificate.

Claims are required to be lodged and determined on an urgent basis, in circumstances where the retired worker is suffering from malignant mesothelioma, lung cancer or an advanced non-malignant dust disease. Removing the requirement for a retired worker to obtain a First Certificate will eliminate unnecessary confusion, delay and expense.

Slater and Gordon accepts that a First Certificate must be obtained by a worker who was still working at the time of the diagnosis of their dust disease, or onset of symptoms. This is because the date of incapacity is relevant to the calculation of income compensation.

In the case of a retired worker, pursuant to section 117 of the Act, the day on which the dust disease injury is suffered is '*the day that a DDMP makes a determination under section 123 that the worker is or was suffering from a dust disease.*'<sup>1</sup> A First Certificate is not required to determine the day on which a dust disease injury is suffered.

Slater and Gordon makes the observation that under the State workers compensation schemes of New South Wales, Victoria and South Australia, a retired worker suffering from a dust disease is not required to obtain a work capacity certificate if there is no claim for income compensation.

Likewise, a retired worker suffering from a dust disease is not required to obtain a medical certificate when claiming permanent impairment compensation pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

### **Survival of Claims**

Slater and Gordon seeks clarification on survival of claims in circumstances where a worker suffering from a dust disease resulting in WPI dies, either before or after a claim is made.

Slater and Gordon submits that consideration should be given to providing for claim survival, allowing the personal legal representative of the deceased worker to make a compensation claim after the deceased's death (or continue to progress any claim made in the deceased's lifetime, as the case may be).

### **Claims on Uninsured Employers**

#### Responding to uninsured employer claims (proposal 9)

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<sup>1</sup> The date the dust injury is suffered is relevant for the purpose of completing *SF1 Settlement Agreement*.

Given the long latency period of dust diseases, employers are often deceased or unable to be located (in the case of a sole trader or partnership) or deregistered.

Slater and Gordon supports the proposed amendment to section 31 but only if there is a further provision, allowing a worker suffering from a dust disease to provide the claim directly to WorkCover WA in circumstances where, after reasonable inquiry, the uninsured employer cannot be located or has ceased to exist.

#### Common law damages where employer is uninsured (proposal 10)

Slater and Gordon does not support proposal 10 and submits that section 267 of the Act (and any related provisions) should be amended to clarify that damages are payable from the Default Insurance Fund ('DIF') with respect to a liability of an uninsured employer to pay damages for any period that employer was uninsured for common law damages (including before 1 October 2011).

To specifically and deliberately exclude a liability of an uninsured employer to pay damages for any period that employer was uninsured for common law damages (including before 1 October 2011) by amendment to the Act would be unjust to dust disease sufferers who should have equal access to the common law safety net. The DIF should continue to respond to historical common law claims where the employer was uninsured and the liability to pay damages is for a period predating 1 October 2011.

The purpose of the DIF is to '*provide a safety net for scheme and system risks*' and the intended purpose of the Act was to '*streamline and consolidate into the default insurance fund the administrative and funding arrangements for liabilities associated with uninsured employers, insolvent insurers and self-insurers, and acts of terrorism*'.<sup>2</sup> To the knowledge of the authors, there was never any legislative intent for the Act to limit or prevent dust disease sufferers' access to the common law safety net through the creation of the DIF.

#### **Feedback on other Technical Matters**

Slater and Gordon has experienced technical difficulties when attempting to lodge forms with WorkCover WA.

#### Option to provide either the ACN or ABN (if known) for the employer in settlement agreements and common law elections

The current *SF1 Settlement Agreement* and *CL1 Common Law Election* require the parties to provide the employer's ABN. WorkCover WA's online portal will only accept a settlement agreement and common law election for lodgement if the employer's ABN is provided.

Given the historical nature of dust disease claims, the ABN is often not known or does not exist. Slater and Gordon submits that the *SF1 Settlement Agreement* and *CL1 Common Law Election* be amended to permit the parties to provide either the employer's ABN or ACN (if known) and for the online portal to accept lodgement of these forms accordingly, as well as in the event the parties are unable to provide either an ABN or ACN.

#### Rejection of *SF1 Settlement Agreement* absent a WorkCover WA claim number

Slater and Gordon has encountered instances in which WorkCover WA has initially refused to register a settlement agreement because the parties did not provide a WorkCover claim number.

The DDMP operates independently of WorkCover WA. In the instances referred to above, the workers provided the employer and DDMP with a First Certificate and completed *Dust Disease Compensation Claim Form and Request for WPI Determination – Common Law*. A Workcover claim number was not allocated to the workers' claims at that stage (or at any time after).

Slater and Gordon recommends that upon the DDMP being listed, the DDMP should also notify WorkCover WA of the listing, for the purpose of the claim being allocated a WorkCover WA claim number.

<sup>2</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 February 2023 597 (Mr W J Johnson (Cannington — Minister for Industrial Relations)).

Thank you for the opportunity to provide a submission to the proposals contained in the consultation paper. If you have any questions, please contact the authors.

Yours faithfully



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**SLATER AND GORDON**

Yours faithfully



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