Senate Standing Committee on Education, Employment and Workplace Relations Committee:

Inquiry into the Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011.

Submission: Slater & Gordon Lawyers

Executive Summary:

- This Bill is of significant symbolic importance, and is a measure of the gratitude the community holds for those who serve to protect the public interest.

- The Bill does not create a right for workers that does not already exist, nor does it create a liability for the scheme that does not already exist.

- Law firms have a commitment to providing access to justice, but questions as to the aetiology of cancers require expert medical opinion before legal advice can be given. This is prohibitively expensive for a worker and their family, and is an event that often occurs at a time of significant family crisis.

- The collection of expert evidence in any litigation is a grossly expensive exercise. This cost is merely exacerbated where the exercise of claims management becomes an evidentiary contest. It inflates the transactional costs to the scheme, and delays the delivery of compensation benefits to injured workers and their families. This can only compound the trauma of a worker and their family at the very time they are most stricken.

- The Bill proposes a sensible and sensitive shifting of the balance of an evidentiary burden away from workers and their families, likely at a time of great stress, to an administrator who has the resources and expertise that places them in the best position to assess the preliminary merits of any particular claim.

- The Bill does not deny or limit any defence to a claim that may otherwise be considered appropriate to be taken on behalf of the scheme.

Introduction and Legislative Context of the Bill:

This is a Bill of enormous symbolic importance to its proponents, and of significant public interest more broadly. The terms and conditions of employment the community sets for those who provide for its safety and protection are perhaps the most direct expression of gratitude the public can give for having the benefit of those services.

Firefighters are among those workers who deserve our gratitude. It is not the point of this submission to elucidate the extraordinary employment risks they take for the benefit of this community. It is the point of this submission to characterise the true nature of this Bill, sitting as it does in a context of a quality of service and commitment that will no doubt be better explained by firefighters themselves.

It is important to be very clear on both what this Bill does, and equally, what it does not do. It does not create a right for workers that does not already exist. It does not create a liability for the scheme that does not already exist.

This Bill is not a radical departure from the established operation of compensation systems.[1] Presumptive provisions are an efficient and accepted means of regulating entitlement. The *Safety, Rehabilitation and Compensation Act* ('the Act') presently makes

[1] For example, Section 87 of the Victorian *Accident Compensation Act* ('the Victorian Act') provides a specific power to proclaim diseases. There are 25 diseases, relevant to specific occupations or employment processes, that have been proclaimed under the Victorian workers compensation scheme.

specific provision for what is intended by this Bill pursuant to the existing requirements of Section 7. Under that power it would be sufficient to identify, by legislative instrument, the types of disease listed in the table in the Bill, to designate 'firefighting' as relevant employment, and then do no more.

This Bill therefore represents an outcome of a type not only already specifically contemplated by the drafters of the current Section 7, but is also narrower in application than that envisaged. It would be errant logic to conceive of this Bill as some new tipping point that will promote a flood of claims.

The effect of the Bill is only to shift the balance of an evidentiary burden away from a severely injured worker and their family at a time where that family is likely experiencing significant stress. It shifts this burden to a professional administrator who has ready access to the resources and expertise necessary to assess the merits of the situation. Indeed, it is in many ways the core business of this administrator to make such assessments. It does not deny the administrator any legal defence that it may otherwise consider appropriate to rely upon in the given circumstances.

Further, with this Bill the burden only shifts once specifically tailored threshold criteria have already been satisfied. Presumptive legislation by its very nature provides a vehicle for improving transactional efficiencies in the administration of a compensation scheme. It also has great potential to improve a worker's experience of participating in such a scheme. Transactional efficiency and client satisfaction are both key objectives of modern compensation schemes.

It is pertinent to make the conceptual distinction that this Bill is about setting the threshold standard for *presumptive* entitlement. It ought not be viewed as having any bearing on the question of entitlement at large. There may well be occasions where entitlement is sought to be established where the presumptive threshold tests have not been met. It means no more than that such a claim must proceed on the standard evidentiary basis, and cannot take advantage of presumptive access.

Analysis of Construction:

The Bill seeks to amend and augment the existing Section 7 of the Act, in accordance with the requirements of Section 7(1)(b), by nominating types of disease and relevant employment that are deserving of an element of preferential consideration in accessing compensation benefits under the Act.

The Bill does so in a modified fashion by establishing threshold tests. In order to obtain the benefit of a presumption, an employee must

1. Suffer a disease of a prescribed type; and
2. Have been employed as a firefighter for the relevant qualifying period for their particular disease; and
3. Have been exposed to the hazards of a fire scene during that qualifying period.

Where these 3 pre-conditions are met, there will exist a rebuttable presumption that employment has been the dominant cause of the employee's disease. The practical effect of this rebuttable presumption will be to entitle the employee to compensation coverage under the Act, subject to any legal defences otherwise available.

In order to understand the likely operation of the proposed amendments, it is perhaps instructive to reduce the Bill to its component parts, as follows:

(a) Identification of Prescribed Disease Pursuant to Section 7(8)(a):

By design, any potential presumption is confined to those diseases identified in the table proposed for insertion in Section 7. This is deliberately intended to ensure only the clearest examples of occupational disease can seek to access the presumptive gateway.

Any attempted codification of 'disease' for compensation purposes creates, probably unavoidably, the possibility of definitional issues concerning the medical evidence as it applies to a given worker. Subject to any definitional issues[2], this first limb of entitlement ought not be expected to create significant difficulties in providing access to compensation for the workers the Bill is intended to assist. Nor would it be expected to create any administrative burden for the scheme administrator.

Item 8 in the table is intended to provide that any further cancers prescribed in the future, perhaps under the existing power given by Section 7(1), are also governed by the provisions introduced by this Bill.

(b) Employment as Firefighter for Qualifying Period Pursuant to Section 7(8)(b):

The introduction of a qualifying period is reflective of the fact that, broadly considered, the evidence of work relatedness of disease strengthens as the duration of potential occupational exposure increases.

As an alternative, the medical evidence as to the latency periods for the prescribed diseases from occupational exposure could equally have operated as part of the rebuttal process. That is, claims could have been contested on the basis of insufficient latency to support a work contribution. The approach adopted ought properly be viewed as a concession to finding an approach to the operation of presumptive legislation that takes into account the natural fears that scheme administrators might hold from time to time.

The Bill would perhaps be assisted by some explanation of what 'employed as a firefighter' is intended to mean. Whether a particular employment position or status gives rise to coverage under a compensation regime can sometimes provoke disputation. Equally though, it may be completely well understood between the parties what does, and what does not, constitute employment as a 'firefighter'.

Furthermore, there is a point to be made about the use of the term 'diagnosis' as being of relevance in determining whether the qualifying period for presumption has been satisfied. It would be against good public policy if the system created a perverse incentive for a worker to delay taking steps in the interests of their own health, merely to ensure they have satisfied the requisite qualifying period if they are found to have a prescribed disease.

While it is useful to be aware of this possibility, there is perhaps not a great deal more to say about it. If the Bill were to reference the experience of 'symptoms' (as in the existing Section 7(1)(c)) in the context of the introduction of a qualifying period (as in the proposed

[2] For example, the Victorian Act contains, at Section 87(3), provision for inclusion of diseases that are '*substantially the same disease as the disease specified in the proclamation*' which does assist in introducing a degree of flexibility around definitional issues of disease identification.

Section 7(8)) then it would in fact disadvantage workers further. As symptoms will likely inevitably occur prior to diagnosis, the more beneficial construction is to link questions of timing to diagnosis rather than symptoms. In addition, the theoretical incentive to delay diagnosis is likely not a powerful one as the potential disentitlement will apply to the presumption only. As discussed, it will always be open to a worker to claim an entitlement even if their circumstances do not fit the requirements of the operation of the presumption.

(c) Exposure to the Hazards of a Fire Scene Pursuant to Section 7(8)(c):

It is understood that the 'hazards of a fire scene' is a reference applying to more than just the attendance of firefighters at an active fire scene. These are hazards that exist in firefighting training, and they exist for fire scene investigators. They are hazards that migrate; that travel away from the fire scene on the equipment used by firefighters.

On one view then, a worker who meets the requirement that they were *employed as a firefighter* in satisfaction of the proposed Section 7(8)(b), might be expected to automatically satisfy the *exposed to the hazards of a fire scene* required by the proposed Section 7(8)(c).

To that extent, the proposed Section 7(8)(c) perhaps does not represent a further element that will be operative in consideration of the application of Section 7. However, it no doubt deserves its place as an important statement of principle going to the heart of the subject matter of the Bill – that the hazards of a fire scene are both pervasive and insidious.

(d) The Rebuttable Presumption of Dominant Cause on Satisfaction of Section 7(8):

The effect of triggering the rebuttal presumption is to deem employment to be the *dominant* cause of the contraction of the disease. It is not clear why the term *dominant* has been selected. The threshold test for entitlement to compensation for disease under the Act is that employment has contributed to a *significant* degree. The threshold test for *significance* is less than for *dominance*, so the use of the higher test will not disadvantage workers who otherwise qualify. There may be some valid collateral reason for the adoption of a separate test. In the absence of some other factor, there may similarly be merit in preserving the test of significance for the purposes of maintaining consistency.

Where the elements of presumption are established, the effect is no more than to shift the balance of the onus to the administrator defendant. It does not deny the defendant the ability to rely upon any defence to the claim they may otherwise consider appropriate to the circumstances.

(e) Deemed Firefighters and Aggregate Periods of Employment Pursuant to Section 7(9)(a) and (b):

The proposed Section 7(9)(a) deems a worker to be a firefighter if *firefighting duties made up a substantial portion* of their duties. The proposed Section 7(8)(b) is a lower bar to entitlement than Section 7(9)(a). The practical application of Section 7(9)(a) will therefore likely be to extend the protection of presumptive entitlement to workers not designated as firefighters, who nonetheless perform substantial firefighting duties in the course of their employment.

The effect of Section (9)(b) would seem to be that a worker who has engaged in three or more periods of employment that cumulatively satisfy the relevant qualifying period, but individually do not, will be deemed to have satisfied the applicable qualifying period.

By the use of the term '*several*', Section (9)(b) risks being interpreted as not operating to the benefit of workers who have only 2 periods of employment that cumulatively satisfy the requisite qualifying period. If this is correct, it seems likely this is an unintended consequence of the drafting that perhaps requires amendment. It would be appropriate to substitute '*several periods'* with '*more than one period*'.

Policy Rationale and Transactional Efficiency:

An inherent fundamental tension in compensation systems exists between preserving the financial integrity of the scheme and delivering fair compensation to injured workers and their families.

In striking this balance, the scheme rules will set eligibility criteria. What we are doing when we talk about varying these eligibility criteria is saying that a special case has been made to depart from the norm.

There are certainly several elements to this being a special case. Firefighters adopt an extraordinary level of personal risk in their employment. They do so in the service of the community. The community has an essential need for the services firefighters provide. One of the mechanisms for ensuring this need is met is to ensure that disincentives for the performance of firefighting duties are minimised. A legislative statement that firefighters will not be unreasonably obstructed from accessing compensation in circumstances where they have the great tragedy of contracting prescribed occupational diseases contributes to this end.

While the justification for this Bill can be established on emotive grounds, it is perhaps equally to the point that it is supportable on the basis of transactional efficiency. Law firms such as Slater & Gordon have a commitment to providing access to justice that means injured workers can typically gain access to legal advice at no initial cost. However, questions relating to the aetiology of cancers, for instance, are not often ones that lawyers can usefully answer. They are questions for medical experts. Without the benefit of relevant expert subject matter opinion, it can be difficult for injured workers to obtain effective legal advice.

The collection of expert evidence in any litigation is a grossly expensive exercise. This cost is merely exacerbated where the exercise of claims management becomes an evidentiary contest. It inflates the transactional costs to the scheme, and delays the delivery of compensation benefits to injured workers and their families. To the extent that such processes increase the relative dollar cost for the provision of compensation benefits, it represents an objectionable frictional cost within the workings of the scheme.

The benefit of presumptive access such as proposed by this Bill, is that it lubricates this friction within the scheme. It reduces the prospect of evidentiary contest. It creates the potential for more efficient delivery of benefits, which ultimately serves the best interests of all of injured workers, their families, and the scheme. Where implemented, presumptive compensation legislation is the quintessential win-win.