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Mr Scott Stewart MP
Chair
Education, Tourism, Innovation and
Small Business Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Stewart

Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016

Thank you for your letter dated 19 July 2016 regarding the Education, Tourism, Innovation and Small Business Committee's inquiry into the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016 (the Bill).

As requested, the Office of Industrial Relations has reviewed the 16 submissions provided to the Committee and our response to issues raised in the submissions is attached for your consideration.

I confirm the Office of Industrial Relations' commitment to continue to assist the Committee in its inquiry.

If you have any queries, please contact Paul Goldsbrough, Executive Director, Workers' Compensation and Policy Services, on [redacted]

Yours sincerely

Jim Murphy
Under Treasurer

Encl. 29/7/16

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Inquiry into the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016
Office of Industrial Relations Comments of Submissions

1. ***Support for full no-fault lifetime care and support model over common law opt-out model (refer to submissions no. 1, 10 and 14)***

Recover Injury Research Centre, Suncorp, Young People in Nursing Homes National Alliance (the Alliance) support a full no-fault lifetime care and support model for the National Injury Insurance Scheme (NIIS) for workplace accidents.

The Bill implements a no-fault model which enables workers with serious personal injuries to receive statutory treatment, care and support payments for their lifetimes. However, consistent with the *National Injury Insurance Scheme (Queensland) Act 2016*, an eligible worker may elect to opt out of receiving these payments in favour of accepting a lump sum for treatment, care and support damages. This election is subject to safeguards consistent with the NIIS Queensland legislation, which are designed to ensure that workers make reasonable and informed decisions, receive an adequate lump sum for their future needs, and have capacity to optimally manage their funds. This preserves eligible workers' common law rights and enables them to choose how they wish to receive and apply the funds required to provide their necessary and reasonable treatment, care and support.

2. ***Re-entry after accepting a treatment, care and support damages lump sum (refer to submissions no. 1, 10, 12 and 14)***

The Bill includes 're-entry' provisions similar to the *National Injury Insurance Scheme (Queensland) Act 2016*. Workers who have received a treatment, care and support damages lump sum which is found to be insufficient to meet their lifetime needs may, after a set period of time, apply to their insurer to receive additional statutory treatment, care and support payments. These provisions ensure that the Queensland workers' compensation scheme meets the national minimum benchmarks for workplace accidents, and minimises the risk of workers who prematurely exhaust their damages lump sum seeking to enter the NDIS and transferring costs to the Queensland Government. Regulations for the application of the re-entry provisions will be developed in consultation with the NIIS Queensland to ensure consistency across the two schemes.

3. ***Exclusions (refer to submissions no. 1, 6 and 14)***

The Australian Lawyers Alliance (ALA), Recover Injury Research Centre and the Alliance do not support the exclusion of certain claimants from entitlement to treatment, care and support payments. The exclusion of journey claims, ordinary recess claims, injuries caused by serious and wilful misconduct, and persons who are not workers is consistent with the national minimum benchmarks for workplace accidents. This also reflects arrangements across various Australian workers' compensation jurisdictions which may restrict access to compensation entitlements depending on the status of the claimant and the circumstances in which the injury occurred. Where jurisdictions provide coverage, it is deemed coverage in circumstances which would not ordinarily meet the definition of a work-related injury. Serious and wilful misconduct provisions are intended to deter workers from intentionally and knowingly engaging in conduct with a serious risk of harm that is outside the scope of the employer's control or direction.

Claimants excluded from entitlement to treatment, care and support payments will still have access to their existing compensation and damages entitlements under the *Workers' Compensation and Rehabilitation Act 2003 (the WCR Act)*. Those seriously injured in a motor vehicle accident may apply to participate in the NIIS Queensland to receive lifetime care and support. Claimants may also have entitlements under the NDIS after their workers' compensation claim ends. Because these injuries are not covered by the minimum benchmarks, the Queensland Government would not be liable under the Heads of Agreement for the NDIS to cover the costs if a claimant enters the NDIS in the future.

4. Dispute resolution (refer to submission no. 14)

The Alliance submits that, consistent with the NIIS Queensland, dispute resolution should be referred to the Queensland Civil and Administrative Tribunal (QCAT). The Bill proposes to use existing dispute resolution mechanisms within the workers' compensation scheme to ensure consistency of treatment for all workers' compensation claimants. These mechanisms have well-established legislative and administrative frameworks, are efficient and cost-effective and have developed a body of expertise in determining workers' compensation claims matters. The scheme is well placed to expand its dispute resolution functions to include an expected small number of NIIS-related disputes.

5. NIIS costs (refer to submission no. 12)

The Association of Self-Insured Employers of Queensland (ASIEQ) submits that the future costs of the NIIS for workplace accidents may be substantially higher than estimated. The estimated impact is $16.4M per annum based on the 2013-14 injury year and an estimate of 11 serious personal injury claimants per annum. This cost will be met through employer premiums and equates to a nominal $0.01 increase on the average premium rate of $1.20 per $100 in wages. The estimate is based on provision of treatment, care and support entitlements that are consistent with the minimum benchmarks. In the event that future amendments to the minimum benchmarks are proposed, this will be subject to state and territory jurisdictions further negotiating and agreeing with the Commonwealth Government to implement any changes legislatively within their respective schemes. Any future changes would be actuarially costed and subject to debate in Parliament.

6. Extending definitions (refer to submission no. 5)

Vision Australia submits that the definition of 'reasonable and necessary' should align with the NDIS and maintain the same criteria for available supports to allow for funding of supports for psychological treatment or counselling, and the definition of 'measurable outcomes' should remain broad enough to encompass intangible aspects of a worker's individual goals. Vision Australia also submits that the definition of blindness within the 'serious personal injury' definition should be based on a person's functional vision after trauma rather than the legal definition of blindness.

The definitions of 'necessary and reasonable treatment, care and support needs' and 'serious personal injury' and the injury eligibility criteria in the Bill are consistent with the national minimum benchmarks for workplace accidents and the *National Injury Insurance Scheme (Queensland) Act 2016*. Medical treatment and rehabilitation services may include counselling services where appropriate. Because entitlement to treatment, care and support payments also includes coverage for non-catastrophic injuries which are caused by the same event, there is scope to include treatment and counselling for psychological injuries that are caused by the same event as the serious personal injury.

In addition to considering whether treatment, care and support has a measurable outcome, the insurer must also consider whether it relates directly to the worker's individual goals and will improve or maintain the worker's ability to perform daily activities or participate in the community or employment.

7. Written payment requests (refer to submission no. 5)

Vision Australia submits that the requirement for a written payment request presents an undue burden on people who are blind or have low vision. The Bill's provisions are consistent with other provisions in the legislation requiring applications for compensation in writing. It is considered that the legislative framework already enable insurers to receive information required to be provided in writing through alternative methods, including over the telephone or electronically.

8. Section 305K (refer to submission no. 6)

The Australian Lawyers Alliance submits that new section 305K concerning not reducing treatment, care and support damages for contributory negligence should be amended to also apply where damages have been agreed between the parties, not only where damages have been awarded by a court.

The wording of this provision reflects the provisions in the WCR Act which guide the court in making a finding of contributory negligence in relation to a worker's conduct (see Chapter 5, Part 8, Division 4A). The settlement process prior to starting court proceedings will address the worker's and the insurer's positions in relation to the worker's contributory liability. The settlement process will also be guided by the civil liability provisions in Part 8 of the WCR Act, so that agreed lump sum damages settlements should not vary from the matters a court is able to determine. This means that in order to remain consistent with the other provisions in Division 4A, new section 305K need not make express reference to an agreed damages settlement. An agreed damages settlement would not be able to include a reduction of the treatment, care and support head of damages for contributory negligence as a court would not be able to make a damages award on this basis.

9. Buy-in provisions (refer to submissions no. 1 and 14)

The Recover Injury Research Centre and YPINH submit that the Bill should include buy-in provisions consistent with the *National Injury Insurance Scheme (Queensland) Act 2016*. The NIIS Queensland for motor vehicle accidents introduces no-fault statutory lifetime care and support benefits where previously injured persons were required to prove another person was at fault in order to bring a common law damages action under the compulsory third party (CTP) insurance scheme. The buy in provisions for the NIIS Queensland appear to be a way to extend these no-fault statutory benefits to people who would not otherwise be eligible for the scheme. By contrast, the Queensland workers' compensation scheme already provides no-fault statutory compensation. Workers who sustained serious personal injuries before 1 July 2016 will be able to apply for existing compensation entitlements, as well as seek common law damages if they can prove their employer was at fault.

10. Review of NIIS (refer to submission no. 10)

Suncorp's submission about reviewing the operation of the NIIS can be accommodated within the five-yearly review of the operation of the Queensland workers' compensation scheme mandated by section 584A of the *Workers' Compensation and Rehabilitation Act 2003*. The next scheme review is due to be completed by 2018.

11. Additional detail about operation and implementation of the NIIS (refer to submission no. 12)

In response to ASIEQ's submission about the significant detail required about operation and implementation of the NIIS, clause 50 of the Bill inserts new provisions into the *Workers' Compensation and Rehabilitation Regulation 2014* which provide further detail about assessing and providing an eligible worker's entitlement to necessary and reasonable treatment, care and support. The Office of Industrial Relations is continuing to consult with NIIS Queensland and workers' compensation scheme stakeholders to ensure that arrangements for establishing the NIIS for workplace accidents are consistent with the NIIS Queensland as far as possible.

12. Number of fulltime workers criterion for self-insurance licences (refer to submission no. 12)

ASIEQ's submission about reducing the 2,000 fulltime workers criterion to 500 fulltime workers is not relevant to the policy objectives of the Bill and does not directly address any provisions in the Bill.

13. Reversal of the decision in Byrne v People Resourcing (Qld) Pty Ltd [2014] QSC 269 (*Byrne*) *(refer to submission no. 2, 3, 4, 6, 7, 9, 13, 16)*

The Queensland Nurses' Union; United Voice; Australian Lawyers Alliance; Queensland Council of Unions; and the Chamber of Commerce and Industry Queensland submissions support the *Byrne* amendments.

The Housing Industry Association (HIA); Queensland Trucking Association (QTA); and Master Builders Queensland (MBQ) raise a number of issues. The submission of MBQ is supported by, or cover the same issues, as the HIA and QTA submissions.

The decision in *Byrne* validated the use of hold harmless clauses in contracts which transfers a third party's (typically a principal contractor or host employer) costs for their negligence in injuring a worker to the worker's employer. Further, it provided that WorkCover, as the employer's insurer, was then made liable for this additional cost. Traditionally, WorkCover was not liable for the cost of a third party's negligence under the Act or any other act. The negligent principal contractor or host employer effectively receives public liability insurance for these injuries at no cost.

As a result the Byrne decision has the effect of encouraging the use of hold harmless clauses which allows third party contributors to avoid liability, encouraging further negligence; and makes WorkCover Queensland jointly and severally liable for all damages despite there being fully solvent third parties joined to a claim.

As WorkCover is unable to recover the cost from the negligent principal contractor or host employer this cost is allocated to the premium of the employer and potentially across all other WorkCover premium paying employers.

Under WorkCover's premium model, workers' compensation premium paid by small and medium sized businesses (up to $1.5million in wages per annum) are more influenced by the industry average premium rate and as a consequence if the average industry rate increases their WorkCover premium will increase. Large employer's premium is more closely linked to their actual claims history and their premium rates are less impacted by the redistribution of Byrne related costs.

The proposed amendments ensure that the party who contributes, by their negligence, to a worker's injury will be held responsible for the costs associated with that injury, and that this cost is not shifted to another party or other small to medium sized business.

a. Statutory duty of care for principal contractors and host employers (page 5 of the MBQ submission)

The MBQ submits that due to the operation of the *Work Health and Safety Act 2011* (WHS Act), principal contractors are assigned a statutory liability and a duty of care to all workers on a construction site, irrespective of whether the Principal Contractor is that worker's direct employer or not. The submission states that this means that when an injured worker sues for common law damages, in most cases the Principal Contractor as well as the worker's employer will be sued.

This position is not correct. The issue was addressed by amendments to the *Workplace Health and Safety Act 1995* in 2010 which provide that no provision of that Act creates a civil cause of action based on a contravention of the provision. This exclusion has continued as part of the *Work Health and Safety Act 2011*. As a result a Principal Contractor can only be found liable where negligence has been proven.

b. Principal Contractors are excluded from WorkCover coverage for common law claims (page 6 of the MBQ submission)

The MBQ submit that principal contractors and host employers are excluded from workers' compensation coverage for common law claims.

All employers with a WorkCover accident insurance policy, including principal contractors and host employers, are covered under the WCR Act for any injury sustained by their own workers, this includes common law damages claims. Claims for statutory benefits are assessed on a 'no fault' basis, and benefits will be paid regardless of whether the worker, employer or a third party is at fault for the injury. Access to common law under the WCR Act is available to all workers who can prove negligence against their employer, this includes an employer that is a principal contractor or a host employer.

As a worker cannot commence a common law damages claim under the WCR Act against a party other than their employer. A damages claim that relates to the negligence of a third party will need to be commenced under the *Personal Injuries Proceedings Act 2002* (PIPA).

Traditionally a workers' compensation insurer has only been liable for damages claims brought under the WCR Act against the employer for the employers negligence. If the only damages claim is against a third party under PIPA, then the workers' compensation insurer has not been liable.

The proposed change to section 10 of the WCR Act re-instates this policy intention.

c. Contractual arrangements and risk to small to medium sized employers (page 8 of MBQ submission)

The MBQ submit that larger companies can make hold harmless clauses a condition of a contract and as a result the contractor is often not in a position to negotiate or refuse, for fear of losing the opportunity of engagement. This can impact negatively on small to medium sized employers, as they can find it difficult to obtain insurance for the contractual indemnity.

The proposed amendment to section 236B of the WCR Act voids a hold harmless clause between the employer and the third party if the employer or insurer adds the third party as a contributor, ensuring that the third party will be responsible for its own costs associated with its negligence and cannot seek to recover those costs from the employer.

d. The Byrne decision negates a subcontractor's exposure to pay damages out of its own pocket(page 8 of the MBQ submission)

The decision in *Byrne* validated the use of hold harmless clauses in contracts which transfers a third party's (typically a principal contractor) costs for their negligence in injuring a worker to the worker's employer (the subcontractor). Further, it provided that WorkCover, as the employer's insurer, was then made liable for this additional cost rather than the negligent principal contractor.

As WorkCover is unable to recover the cost from the negligent principal contractor or host employer this cost will impact the premium of the subcontracting employer. The damages amount is recorded against the employer's claims history and is used to determine their premium rate. This amount is capped at $175,000. The remaining cost of the damages, including the principal contractor's damages component is distributed across all employers in the premium classification relevant to the industry of the employer. This results in an increased average premium rate for all employers in that industry.

Under WorkCover's premium model, workers' compensation premiums for small and medium sized businesses (up to $1.5 million in payroll) are more influenced by the industry average premium rate or WIC rate. Large employer's premiums is more closely linked to their actual claims history and their premiums will be less impacted by the re-distribution of costs.

e. Apprenticeships will be impacted (page 11 of MBQ submission)

The MBQ submit that the proposed amendments will impact on apprentice uptake by increasing the cost to engage an apprentice via a group training scheme.

As a result of the Byrne decision third party contributors can avoid liability for their negligence. As a result the third party may not seek to engage with other parties to improve work health and safety outcomes as there are no financial consequences that can be apportioned to them. The proposed amendments ensure that the party who contributes, by their negligence, to a worker's injury will be held responsible for the costs associated with that injury. As a consequence it is expected that the group training employer and the host employer will collectively seek to minimise work health and safety risks to the apprentice. Safer workplaces result in lower injury rates which lead to lower workers' compensation costs. The cost savings from safer workplaces can be used to invest in apprenticeships.

In addition, the cost impacts of the Byrne decision result in increases to the WorkCover industry average premium rate. As small and medium sized business premiums are more influenced by the industry average premium rate, this results in increased costs to all small and medium sized businesses. The proposed amendments will ensure that third party negligence costs are not shifted to small and medium sized business. This will result in lower costs for small to medium sized business that can be used to invest in apprenticeships.

f. MBQ's 2013 proposed amendment (page 12 of the MBQ submission)

The MBQ submit that during 1990 to 1997 the workers' compensation scheme extended indemnity to host employers and principal contractors. Sections 46-48 of the repealed *Workers' Compensation Act 1990* (the 1990 Act) were provisions that deemed workers of contractors to also be workers of principal contractors and host employers. The provisions of the 1990 Act operated in a scheme where there was no self-insurance or taxation-based "worker" definitions, and where the vast majority of workers were engaged in standard employment arrangements. Sections 46-48 were not retained when the 1990 Act was repealed and replaced with the *WorkCover Queensland Act 1996* (1996 Act).

Workers' Compensation legislation in other States and Territories provided for similar arrangements in the late 1980 and early 1990. Legislation in those jurisdictions no longer provide general indemnity for policy holders who are principals, host employers or other contractors where they are joined in a work-related damages action. But all other jurisdictions have introduced provisions that provide a compliance mechanism. These mechanisms require the contractor to ensure sub-contractors hold a policy of insurance for their workers, and if they do not then the principal contractor or host employer is deemed to be the employer. These mechanisms are required due to there being multiple insurers or claims managers, and if the contractor does not have an insurance policy then there is a risk that the injured worker will not receive their benefits. This is not required in Queensland as WorkCover is the sole provider of commercial workers' compensation insurance and is also the nominal defendant.

g. Limiting WorkCover's liability for common law damages (page 17 of the MBQ submission)

MBQ submit that the amendment to section 10 of the WCR Act, that WorkCover is only liable to indemnify the employer for its legal liability to pay damages, will expose employers to uninsured risks where they have signed a hold harmless clause in the favour of a principal contractor or host employer. The operation of proposed section 236B addresses this concern by ensuring that the hold harmless clause is void, which protects the employer by ensuring that the principal contractor or host employer cannot seek to recover their costs for their negligence from the employer.

h. Cost to WorkCover as a consequence of the Byrne decision (page 17 of the MBQ submission)

The MBQ questions the potential scheme saving of up to $40 million per year if the Byrne amendment proceeds. The MBQ submit that the Finance and Administration Committee 2013 report estimated a cost of $10 to $15 million per year.

In the 2010 *Ensuring Sustainability and Fairness* report, previously provided to the Committee, Deloitte estimated the cost of providing third party indemnity in a WorkCover policy would be $20 million in the first year of operation, increasing to $32 per annum by 2017-18. The cost of $10 to $15 million per year mentioned in the Finance and Administration Committee 2013 report was the estimated cost in the first year commencing 2013 only.

It is noted that the estimate provided to the Finance and Administration Committee 2013 report was based on a different indemnity model where costs could be recovered in WorkCover premium from the negligent third party. The Byrne decision does not allow for this recovery and extends indemnity costs to businesses that do not have a WorkCover insurance policy. As a consequence the estimated cost of the Byrne decision are more significant.

There is also difficulty in estimating the impact of the Byrne decision due to the time required for the impact of the decision to flow through into common law lodgements as it can take up to three years after an injury for a common law claim to be lodged. In addition there is a significant risk of behaviour change in the contracting arrangements entered into by principal contractors and host employers that will take time to develop. As such trends in these claims are not expected to start to emerge until October 2017.

i. Alternative WorkCover Insurance Product (page 14 of the MBQ submission)

While the MBA submits that WorkCover should offer a voluntary third party indemnity insurance product, the Department notes that this is a policy proposal that has not been considered by Government.

j. Possible amendment to section 236B (page 7 of the ALA submission)

The ALA submit that section 236B (3) be amended to add the words "and the insurer" after the word "employer". The current wording is sufficient as the intent is to void a part of an agreement between the employer and the third party that would have the effect of transferring liability for the third party's negligence to the employer. The proposed amendment to section 10 of the WCR Act ensures that this liability cannot transfer to the insurer.