



Submission of the Australian Lawyers Alliance

to the

**Education, Tourism, Innovation and Small Business
Committee of the Queensland Parliament**

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

July 2016

CONTENTS

WHO WE ARE	3
INTRODUCTION	3
A FAIR AND BALANCED MODEL THAT SUPPORTS CHOICE	5
CONTRIBUTORY NEGLIGENCE.....	6
CONTRACTUAL INDEMNITIES.....	6
PLACING A FLOOR UNDER THE COMPENSATION RATE.....	7
EXCLUSIONS FROM COVERAGE	7
CONCLUSION	9



WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.

INTRODUCTION

The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide a submission to the Education, Tourism, Innovation and Small Business Committee of the Queensland Parliament on the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016* (the Bill).

The ALA are strong advocates for Queenslanders injured in workplace accidents and welcome the Queensland Government honouring its commitment under the National Injury Insurance Scheme (NIIS) to expand care and support offered to people catastrophically injured, whilst crucially also protecting existing rights.

The establishment of the NIIS and the National Disability Insurance Scheme (NDIS) are significant and long overdue social reforms that go to the very core of why Queenslanders pay taxes and elect representatives to govern on their behalf.

The ALA played an active role in advocating for the rights of injured Queensland motorists with respect to the earlier motor vehicle component of the NIIS, which recently passed the State Parliament. A similar scheme has also recently been implemented in Western Australia.

As part of this process, the ALA advocated strongly for a dual pillar model that extended coverage to those people currently not covered for catastrophic injuries where fault is unable to be determined, whilst at the same time protecting the legal rights of those able to prove fault.

It is a model that strikes the right balance on both the fairness and affordability test for all Queenslanders, delivering a hybrid common law and no-fault care and support arrangement.

In light of this, the ALA strongly supports the Queensland Government's decision to introduce a NIIS model for catastrophic work injuries that is consistent in design, structure and intent as was recently passed with respect to motor vehicle accidents. In particular, we commend and support the legislative intent to retain all existing rights.

The model for catastrophic work accidents as proposed gets the balance right by ensuring it is both the fairest and most affordable option that will have a minimal impact on premiums – with an estimated increase to average premiums of just one cent (\$1.20 to \$1.21). Queensland has extremely competitive premium rates for employers, testament to sound scheme design, and proficient scheme administration.

It is also worth noting that it is estimated that around 11 catastrophic injuries in a work injury context will occur per year, although the ALA notes that this does not include journey claims, many of which will be covered under the motor vehicle accident component of the NIIS.

As the Committee considers the issues during this inquiry process, it is critical that decisions made regarding the implementation of the NIIS with respect to injured workers is based on real world experience of those who assist injured Queenslanders on a daily basis, just as this applied with respect to the introduction of a NIIS model for motor vehicle accidents.

Noting this, the ALA hopes to provide a considered voice to this discussion, recognising that our members know firsthand what those injured in a workplace accident go through, and the hurdles they face. Our members regularly see injured workers in the immediate aftermath of their accident, work with them to get their own affairs in order, and help them readjust their lives as they recover.

A FAIR AND BALANCED MODEL THAT SUPPORTS CHOICE

As earlier reiterated, the ALA firmly supports both the model and intent of this legislation on the basis of fairness and affordability, and for its consistency with the model recently passed with respect to motor vehicle accidents.

Critically under this proposed model, injured workers who can demonstrate that their employer was at fault in relation to their injury are able to elect to opt out of the lifetime care model and accept an award of damages for treatment, care and support at common law, as they do now, subject to existing and enhanced safeguards. Accordingly and most critically, common law rights are maintained through this process.

It is for this reason that the ALA commends the further application of the legislated motor vehicle NIIS model to the stream of catastrophic work injuries.

With this scheme design, Queensland will avoid the profound economic and fairness deficiencies of the schemes in New Zealand and other Australian jurisdictions where common law rights have been removed.

The opt-out provisions of the legislation before this Committee are of particular significance.

The Bill amends Chapter 3, Part 2 of the WCRA to provide that an injured worker receiving payments under the NIIS is not precluded from receiving compensation under the WCRA. As the ALA strongly argued in our submissions on the motor vehicle iteration of the NIIS, it is critical that injured people retain their rights to seek damages in at-fault cases.

This is based on the knowledge that the best decisions for Queenslanders suffering catastrophic injuries will almost always be made by them, their families and those who live in their communities. Choice is critical to self-determination and dignity.

As experience has also shown, and as is reiterated by the experience of the ALA's membership who represent injured people on a daily basis, the best schemes to support this personal decision-making are those that provide choice and self-determination.

Moreover, Australian and international experience make it clear that governments need to exercise great caution in designing what actuaries describe as "long-tail"

schemes: schemes which don't reach actuarial maturity for at least 50 years in this case. Such schemes regularly spawn large, costly and inefficient bureaucracies; and become unsustainable over time. This commonly leads to diminution of benefits for other participants in the broader scheme. Opt-out mechanisms, whilst supporting self-determination and dignity, also play an important part in minimising the number of people in such schemes, and the attendant administrative and cost burdens.

The provisions of this Bill will allow injured workers to elect to opt out of treatment, care and support payments and accept an award of treatment, care and support common law damages. The ALA commends this important and necessary retention of common law rights.

CONTRIBUTORY NEGLIGENCE

The ALA commends the Bill's proposed approach to contributory negligence.

For the purposes of clarity however, the ALA further submits that s 305K should be amended to apply where damages have been agreed between the parties, not only where damages have been awarded by a court.

s 305K provides that:

"treatment, care and support damages awarded to a worker who is entitled to compensation under chapter 4A for the injury cannot be reduced for the worker's contributory negligence"

The ALA recommends that the wording of this clause be changed to reflect that damages may be awarded or agreed.

CONTRACTUAL INDEMNITIES

The ALA supports the proposed amendments to relieve WorkCover of the obligation to pay contractual indemnities in accordance with the decision of *Byrne v. People Resourcing (Qld) Pty Ltd & Anor.* [2014] QSC 269.

The ALA strongly supports the integrity of WorkCover's financial position and the primary purpose of the legislation to provide benefits for workers who sustain injury

in their employment and benefits for the dependents of workers if the worker's injury results in the worker's death while, at the same time, encouraging improved health and safety performance by employers: Section 5 *Workers' Compensation and Rehabilitation Act, 2003* ("WCRA").

The practical effect of the *Byrne* decision is to extend the indemnity offered by the WorkCover legislation and funded by employers' premiums to a third party through a contractual arrangement between an employer and that third party. The ALA submits that this outcome is inappropriate and not in the best interests of workers, employers or the scheme as a whole.

A possible amendment to section 236B (Clause 31) as it currently appears in the Bill is by adding the words "and the insurer" after the word "employer" where it appears in the third line, so that section 236B(3) would read:

"The agreement is void to the extent it provides for the employer, or has the effect of requiring the employer and the insurer, to indemnify the other person for any contribution claim made by the insurer against the other person."

PLACING A FLOOR UNDER THE COMPENSATION RATE

The ALA supports the Bill's proposed objective of placing a floor under the compensation rate.

This is in recognition that Queensland Ordinary Time Earnings (QOTE) have reduced, and that amendment will prevent financial hardship for those workers relying on workers' compensation payments by ensuring that if QOTE reduces in a particular financial year workers' compensation payments will not automatically reduce.

EXCLUSIONS FROM COVERAGE

The ALA notes that Clause 30 of the Bill (insertion of new chapter 4A) proposes to exclude three types of claims from coverage, despite that these claims are currently covered by the *Workers' Compensation and Rehabilitation Act 2003*.

The ALA is concerned by these exclusions, and further detail with respect to each of these is outlined below.

Absence from place of employment

Clause 30, s232H (2) (a) specifically excludes temporary absence from work injuries under s34 (1) (c) of the WCRA. The issue of a worker being injured whilst absent from their place of employment, under s 34(1)(c) is set out as follows:

‘while the worker is temporarily absent from the place of employment during an ordinary recess if the event is not due to the worker voluntarily subjecting themselves to an abnormal risk of injury during the recess.’

The ALA contends that the proposed removal of NIIS coverage for people injured away from the place of their employment is undesirable, there are some discreet circumstances that can arise when a worker in this situation will have common law rights against their employer.

It is the view of the ALA that this amendment runs counter to the objectives of the NIIS, recognising also that it is a small cohort of injured workers who will be eligible to be assisted by the scheme, and that irrespective of where the injury occurred any injuries that are eligible will be catastrophic in nature. We acknowledge the reality that people injured in such circumstances may be eligible to enter the NDIS.

Journey claims

The ALA notes that Clause 30, s 232H(2)(a) of the Bill also excludes coverage for workers who sustain a catastrophic injury whilst travelling for work purposes by amending s35 of the WCRA.

While it is expected that many or most journey claims will be covered under the motor vehicle accident component of the NIIS; in circumstances where this will not apply eg single vehicle accidents resulting from fatigue caused by excessive work, the ALA supports the retention of journey claims as part of the proposed NIIS work injury scheme.

The ALA further submits that this is particularly important in instances where an employer may be responsible for the maintenance of a vehicle that caused or contributed to the work accident.

The ALA recommends that this coverage is not removed. It makes the same NDIS acknowledgement as above.

Injuries caused by misconduct

Clause 16 of the Bill omits s 130(4) of WCRA, s 130(4) of the WCRA provides that compensation is payable for an injury sustained by a worker that is caused by the worker's serious and wilful misconduct only if: the injury results in death or the insurer considers that the injury could result in a DPI of 50 percent or more.

Most who are catastrophically injured are likely to reach the 50 percent threshold. However, the WCRA is designed to protect all workers and the ALA has a significant concern that the proposed amendment unfairly removes that protection for workers who are injured (not just catastrophically) whilst carrying out work at the direction of their employer.

The ALA recommends that this exception should not be included in the Bill.

CONCLUSION

The ALA commends the Queensland Government for its proposed introduction of a work injury NIIS scheme that will complement the State's current nation-leading workers' compensation scheme design, whilst also extending this coverage to those catastrophically injured at work where fault cannot be proven.

The legislative and administrative alignment with the CTP NIIS is likewise supported.

The Bill as it is proposed presents a fair and affordable model for Queenslanders who are catastrophically injured through a work accident – extending coverage and protecting rights, with a minimal impact on premiums of just one cent.

The scheme design as proposed is consistent with ensuring Queensland continues to have the best and fairest NIIS in the country. The legal profession is appreciative of the constructive stakeholder engagement process for this proposed iteration of the NIIS, as well as the CTP iteration. The ALA supports the passage of this Bill, subject to the observations in this submission, and strongly urges bi-partisan support to achieve this outcome in the interests of fairness for injured workers.