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6 Aug 2015
Finance and
Administration Committee

CIVIL CONTRACTORS FEDERATION

SUBMISSION ON CHANGES TO QUEENSLAND WORKERS COMPENSATION LEGISLATION

The current Government is proposing to amend the Worker's Compensation and Rehabilitation and Other Legislation Amendment Act 2013 (the 2013 Amendment Act) with the introduction of the Worker's Compensation and Rehabilitation and Other Legislation Amendment Bill 2015. The Bill proposes to:

1. Reinstate common law right for injured workers that were affected by changes affected by changes made by the 2013 Amendment Act and establish the ability to provide additional compensation to particular workers impacted by the operation of the common law threshold;
2. Provide entitlement to compensation for firefighters by introducing deemed disease provisions for firefighters with prescribed diseases; and
3. Prohibit prospective employers from continuing to access an individual's claim history following the changes to the 2013 Amendment Act.
4. Potential retrospective operation of the application of the changes to when the current government was elected.

CCF QLD, the peak industry association for the civil construction industry wishes to make the following submission on behalf of its members, specifically regarding proposed amendments 1 and 3 outlined above.

Reinstate common law right

The law as it currently exists came about as extensive consultation in 2012 and 2013 by the then Newman Government. The 2013 Amendment Act introduced the requirement for a worker to be eligible to make a common law claim, the worker must have a 5 per cent Degree of Permanent Impairment (**DPI**) arising from the injury or a terminal condition. This amendment replaced the previous concept of whole person impairment. Dependents retained and continue to retain their ability to seek damages if the work related injury resulted in the worker's death.

The reforms were advanced in 2009-10, Mr Ian Brusasco, the former chairman of the Board of WorkCover Queensland. Mr Brusasco recommended that the than Labor government introduce a 10 to 15 per cent threshold on common law claims.

Statutory no fault claim

It should be noted that every injured worker who has their claim for compensation accepted by WorkCover Queensland (a statutory no fault workers compensation system) is entitled to the following:

- access to weekly compensation for lost earnings until the worker's injury is stable and stationary;

- payment of approved medical treatment;
- access to rehabilitation and return-to-work services and lump sum compensation for permanent impairment.

As such, the current legislative WorkCover arrangement covers workers who are injured in the course of their employment and allows the worker to rehabilitate and return to work as quickly as possible.

Cost to the insurer and employer

When the 2013 Amendment Act was tabled in parliament it was argued that the increase in the threshold would result in a substantial reduction in the number of damages claims currently brought by injured workers against their employers, resulting in a decrease in the premiums an employer is required to pay. At the time of writing, the 2013 Amendment Act has only been operation for approximately 18 months and it is difficult without a complex examination to determine the extent of any savings to employers, or in fact reduced the number of claims made. Noting that it is unclear as to whether or not the changes have resulted in reducing the number of claims and reduced the costs of premiums to employers.

CCF QLD believes these claims are more appropriately dealt with through the statutory no fault system instead of through the courts. This will ensure the focus of injured workers and their employers is on rehabilitation and getting injured workers back to work as soon as it is safe for them to do so, rather than as to how much they can get for their injury.

2002 Tort reforms

The changes proposed in the bill may be inconsistent with the 2002 tort reforms introduced in a number of jurisdictions including QLD[1]; limiting access to applications with injuries that are relatively minor in nature, and ensuring workers with genuine injuries that require time to recover as well as rehabilitate, are given that time to recover, are not out of pocket and receive sufficient compensation.

Accessing a prospective employee WorkCover claim history

The draft Bill proposes to prohibit prospective employers from continuing to access an individual's WorkCover claim history following the changes to the 2013 Amendment Act.

In certain circumstances workers may not be entitled to compensation or damages if they aggravate a pre-existing condition at work. To address this issue, the Act was amended to allow an employer to request that a prospective worker must, where requested, in writing by the prospective employer, disclose all pre-existing injuries or medical conditions of which they are aware, that could reasonably be expected to be aggravated by performing the employment related duties. If the prospective worker is engaged before making the disclosure (or being requested to make the disclosure), his or her entitlement to compensation is unaffected.

A worker may not be entitled to compensation or damages if they have knowingly made a false or misleading disclosure about an injury or condition and they suffer an aggravation of that injury or condition.

[1] Personal Injuries Proceedings Act 2002

To remove this provision will leave an employer once again subject to workers moving from employer to employer and making claims for injuries that may have resulted from pre-existing injuries rather than new injuries. Noting that if the employer was aware the employee had a pre-existing injury the employer could ensure appropriate safeguards in place to ensure the worker can undertake the tasks safely without fear of injury.

Additionally to have a worker undertaking tasks that they are unfit to undertake, may be a breach of the employer's duties under both state and federal WHS laws.

The WHS laws require a person conducting a business or undertaking (PCBU) to ensure, so far as is reasonably practicable, the health and safety of their workers while at work in the business or undertaking.

This includes:

- provision and maintenance of a work environment without risks to health and safety
- provision and maintenance of safe plant and structures
- provision and maintenance of safe systems of work
- the safe use, handling, storage and transport of plant, structures and substances
- provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities
- provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking
- health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

CCF QLD submits that the existing arrangements are effective and allow employers in the civil construction industry to employ workers who have the appropriate skills and capability to undertake their jobs.

Potential retrospective operation of the application of the changes to when the current government was elected

There is a fundamental legislative principle that reflects the common law presumption that Parliament intends legislation to operate prospectively rather than retrospectively. This common law presumption can be displaced if the legislation expressly states that it is intended to apply retrospectively or if that intention is clearly implied in the words of the statute[2].

The presumption is also displaced, or at least weakened if the legislation can be characterised as declaratory, validating or procedural[3].

The authors of Statutory Interpretation in Australia have put it succinctly as follows:

[2] Principles of Good Legislation: OQPC Guide to FLPs; Retrospectivity: Version 1, 19 June 2013.
[3] Ibid at p4

All legislation impinges on existing rights and obligations. Conduct that could formerly be engaged in will have to be modified to fit in with the new law. [...] It cannot therefore be said that in this sense legislation is retrospective because this is true of all legislation. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation. The statement of the law advanced by Dixon J in Maxwell v Murphy in referring to 'rights or liabilities which the law had defined by reference to the past events' confirms this view.[4]

[4] Ibid at p 8

As Lord Diplock in *Black-Clawson International Ltd v Papierverke Waldof-Aschaffenburg [1975] AC 591* stated retrospective laws make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints 'justified expectations'.

An example of this could be a worker who was injured at work on 2 February 2015 makes a claim, and that claim is rejected. The worker is informed 10 days later of the rejected application based on the fact the injury is less than 5 per cent and the worker seeks to have the decision reviewed and the review is rejected. Under the proposed retrospective changes the employee would have a claim that is now effectively out of time. Additionally the employer would become liable for an injury that was previously uncovered.

As such, a retrospective change to 31 January 2015 may make actions that the employer has undertaken prior to the election of the current government a breach of the Act and leave the employer subject to litigation for breaching an Act that they had lawfully applied.

Direct member feedback relating to the Workers Compensation System

The following is feedback that has been provided by members and is not necessarily related to the proposed Bill. The feedback is also not necessarily the view of CCF QLD, however, it does provide the Committee with an understanding of the views and perceptions of business, as well as some of the difficulties they face on a daily basis.

- *Employees have often contacted a personal injury solicitor before they have completely recovered and make no effort to participate in rehabilitation or return to work.*
- *The system incentivises workers to exaggerate symptoms.*
- *The system incentivises doctors to over-service.*
- *Doctors will rarely contradict one another – this seems to be a professional courtesy.*
- *WorkCover will always settle for around $150,000 (the cost of going to court) regardless of how weak the claimant's case is.*
- *Personal injury lawyers are incentivised to represent frivolous cases because they know that they can't lose.*
- *The building and construction industry is extremely vulnerable to joint and back claims due to the type of manual labour performed. Regardless of a 0 LTI goal, it is impossible to remove all bending, twisting, lifting or pulling activities and this immediately places liability on the employer.*
- *Many alleged injuries aren't witnessed and it is impossible to dispute a claim unless there is evidence that the injury occurred outside of work.*
- *Pre-existing and degenerative conditions (primarily in older workers) become the employers' problem.*
- *Too much time and productivity is sacrificed trying to protect businesses against frivolous claims.*
- *The system dis-incentivises business from employing workers.*

- *There needs to be some way of protecting employers from manipulation of the Common Law system for minor impairments. Some suggestions include:*
    - *Extend the 20 per cent cap on premiums to all policies.*
    - *Increase lump sum payments offered for minor impairment so that workers are less likely to pursue common law.*
    - *Implement a less expensive way (other than court) of determining claims for impairments less than 5 per cent.*
    - *Penalise workers who won't participate in return to work activities or maintain contact with employers.*
    - *Establish an accreditation scheme for medical professionals who treat injured workers and monitor their rehabilitation outcomes.*
    - *Penalties for workers (and their lawyers) who exaggerate or falsify claims.*
    - *Incentives for workers to return to work as soon as possible rather than to make claims.*
    - *Review the personal injury law firm regulations and ensure that personal injury lawyers aren't encouraging claimants by suggesting large payouts and then settling for significantly less.*
- *… claims for minor injuries, such as stiffness in one finger, have led to large payouts, even after the worker had returned to work on full pay.*
- *… one claim in progress where it is the workers third claim for a back injury – he received a substantial payout for a back injury as a mine worker, he then received compensation for a back injury claimed from a motor vehicle accident. He is now claiming a further back injury on our site in very suspicious circumstances and WorkCover is negotiating a settlement even though he has made numerous false statements and completely misrepresented the alleged incident. The claims process is demoralising and frustrating for employers.*
- *Ultimately I don't believe that the system is good for workers… They often change their lifestyle and withdraw from work in order to maximise the value of their claim. This affects their long term employment prospects and can also impact on their mental health.*
- *The number of claims have increased to a point where it is common knowledge that a work injury is like hitting the jackpot and personal injury lawyers make it so easy to claim. There is a huge industry built around WorkCover and Common Law in the medical and legal professions who seem to have a significant influence on decision makers.*

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