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Finance and Administration Committee

BAR ASSOCIATION OF QUEENSLAND

5 August 2015

Ms Di Farmer MP
Chair
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000

By email: fac@parliament.qld.gov.au

Dear Ms Farmer

Re: Inquiries into the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015 and Workers' Compensation and Rehabilitation (Protecting Firefighters) Amendment Bill 2015

Thank you for your letter of 22 July 2015 advising of the Committee's call for submissions on the above Bills. The Bar Association of Queensland (BAQ) comments as follows:

Clause 2 retrospectivity. BAQ notes the legislation with respect to restoration of common law rights would be retrospective in operation from 31 January 2015. In general, BAQ does not support retrospective legislation.

That stated, the explanatory memorandum accompanying the Bill explains a political promise founds the retroactive operation, and that the financial impact of same has been considered. The amendment is to restore common law rights rather than to remove or restrict such rights and the extent of retrospectivity does not exceed what might have been expected as a result of an election promise and a change of government which followed the election. In these particular circumstances BAQ supports the retrospectivity.

Clause 4 (section 132A(9)) and clause 5 (section 132B(3)(c)(ii)). Each refer to information or particulars prescribed by regulation. This mirrors the current section 134(4) of the WCRA. The WCRA regulations do not prescribe any information or particulars.[1] That needs to be remedied forthwith.

[1] cf section 81 of the *WorkCover Queensland Regulations 1997* (Qld); *Emmerson v. Coles Myer* [2004] QSC 161.

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Clause 7 (section 239A(7)(a)). There is no prescribed consequence in the event of default by WorkCover, although an aggrieved worker can activate the rights of review and appeal for a failure to make a decision.

Clause 11 (sections 708, 709). The definition of "pre-amended Act" in proposed section 708, when read with proposed sections 709(1) and (2), could lead to the application of the version of the WCRA as in force at 30 January 2015, regardless of when the injury was suffered prior to Act no. 52 of 2003 being enacted on 15 October 2013.

There are many incarnations of the WCRA since its inception. If the intention is to afford a worker the statutory rights which existed when the worker's injury was sustained, the definition of "pre-amended Act" in section 708 should reflect this by providing to the effect that the "pre-amended Act" means "this act as in force at the time when the worker sustained an injury before 31 January 2013" or like expression.

The terms "sustain" and "sustained". These are used throughout the WCRA in relation to "injury". They are important with respect to the transitional provisions of the various versions of the Act including the proposed section 709[2]. Also, the meaning of "sustained" is pivotal as to latent onset and over period of time injuries. Ascertaining its meaning has proved difficult[3]. The essence appears to be when harm, rather than change, occurs. Consideration might be given to a statutory definition or clarification.

Other issues. First, BAQ observes that the Bill does not address the impact on the WCRA fund of *Byrne v. People Resourcing (Qld) Pty Ltd*[4]. The effect of that decision is that if a non-employer has the benefit of an effective contractual indemnity against an employer, WorkCover Queensland (in the name of the employer) cannot recover contribution from a non-employer who was also a wrongdoer which has contributed to the same damage suffered by the worker. In other words, the WorkCover fund bears 100% of the loss, even if the employer's contribution for the loss is minimal and is far exceeded by that of the non-employer.

Given the superior bargaining power of many non-employers who can insist on such indemnities, the proportionality of loss distribution by subsection 6(c) of the *Law Reform Act 1995* (Qld) ("LRA") is ousted. BAQ expects this is a matter which will substantially affect premium levels if left unaddressed.

Second, Part 4 of the *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Others Amendment Act 2013* (Act no. 29 of 2013), which took effect from 1 July 2013, substantially changed those who qualified as a "worker" for the purposes of the WCRA.

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[2] e.g. section 603 of the WCRA.

[3] cf:- *Q-Comp v. Green* (2008) 189 QGIG (No. 13) 747; *Q-Comp v. Robinson* (2007) 186 QGIG (No. 19) 695.

[4] [2014] QSC 269.

In short, a "worker", essentially, is restricted to a PAYG employee. Further, those persons who worked for labour, or substantially for labour, only were removed from the definition of "worker" in schedule 2.

The consequence is a large number of working men and women now fall outside the ambit of the WCRA, especially those who work under an "ABN" arrangement, often with little or no choice. The Bill does not alter the definition of "worker" introduced with effect from 1 July 2013.

The expression "worker" has no special definition in any of the transitional provisions, such as section 603 and also the proposed section 709. The general definition will apply. Given that there is a more restricted definition of "worker" from 1 July 2013, this may lead to difficulties in the application of the transitional provisions.

Thank you for your consideration of this submission.

Yours faithfully

[redacted]

Geoffrey Diehm QC
Vice President