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10 Aug 2015
Finance and Administration Committee

ABN 91 158 806 819

10 August 2015

The Hon. Di Farmer MP
Chair
Finance and Administration Committee
Parliament House
BRISBANE QLD 4000

by email only: 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*

We write on behalf of the Association of Self-Insured Employers of Queensland ("ASIEQ") in relation to the Queensland workers' compensation scheme and proposed amendments by the Queensland Government in the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015.*

By way of background, we advise that ASIEQ is a representative group acting primarily for the licensed self-insured employers under the *Workers' Compensation and Rehabilitation Act 2003* ("WCRA") within the Queensland workers' compensation scheme.

Our members comprise a diverse range of large organisations that operate across many industries in Queensland; employ a large number of Queenslanders; and contribute significantly to the Queensland community and economy.

Success in our members businesses is based on an integrated approach to injury prevention, management and wellness to achieve better outcomes for employees and employers, not just the provision of financial protection from workplace injury and illness.

Self-insurance represents a transfer of risk from the Queensland Government to our members and presents no financial risk to the Queensland Government with appropriate protections built into the WCRA.

The regulation of self-insurance is fully funded via an annual levy on self-insurers with no recourse to consolidated revenue. A significant portion of the self-insurer and WorkCover Queensland's levy goes towards prevention activities of Workplace Health & Safety for the benefit of all Queenslanders.

ASIEQ is committed to improving the Queensland Workers' Compensation Scheme by developing and promoting initiatives that will continue to reduce the social and financial cost of workplace injury and illness.

We thank you for the invitation to make a written submission on the matters raised in the Bills. Please find enclose d the ASIEQ submission.

ASIEQ would welcome the opportunity to discuss the submissions at the Public Hearing on Thursday 13 August 2015.

Yours faithfully,

[redacted]

Justin Crowley
Chair

Submission to the Queensland Legislative Assembly –

Finance and Administration Committee

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

August 2015

Part 1 Preliminary

Clause 2 states that Part 2, divisions 1 and 2 of the Bill are taken to have commenced on 31 January 2015, Part 2, division 3 is taken to have commenced on the date the Bill was introduced into the Legislative Assembly, and Part 2, division 5 commences on a day to be fixed by proclamation.

Submission:
ASIEQ was invited by the Minister to participate in a Stakeholder Reference Group ("SRG") to advise the Government on appropriate arrangements to reinstate common law rights for injured workers.

The SRG investigated retrospective legislation in relation to the reversal of the common law threshold.

The SRG considered options for dates when the amendments will apply from:

1. inception of the previous amendments – 15 October 2013
2. the date of the Election – 31 January 2015
3. the 1 July 2015
4. the date of Assent of the Bill

The Department's advice against retrospectivity to 15 October 2013 was outlined in a paper to the SRG including:

> The paper outlines the fundamental legislative principle concerning retrospectivity in the *Legislative Standards Act 1992*, the common law presumption against interpreting legislation to have retrospective effect, the approach of portfolio committees of the Legislative Assembly of Queensland in considering draft legislation with potential retrospective effect, and relevant policy considerations for legislation intended to commence on a date prior to it being passed by Parliament and receiving assent.
>
> …
>
> A potential consequence of legislating with retrospective effect is that it may set a precedent for future governments to take similar actions. In particular, there would traditionally be arguments against a government enacting provisions which apply to a period of time prior to it being elected into office, when the previous government had exercised legitimate authority to enact provisions which are later subject to retrospective amendment. This would likely be seen as the legislature attempting to exert power prior to acquiring a mandate to make laws. A distinction is drawn between repealing existing laws and seeking to remove them retrospectively .
>
> …
>
> Since the introduction of the common law threshold applying to injuries sustained on or after 15 October 2013, WorkCover, self-insurers, employers and injured workers have made claims management arrangements, made provisions for outstanding claims liability and premium setting, and made decisions about workers' compensation entitlements. This conduct was based on legitimate expectations about the provisions concerning access to common law damages during this period.

ASIEQ recognises that the removal of the common law threshold was a Labor party pre-election policy and the Bill proposes commencement from the date of the election of 31 January 2015.

ASIEQ submits that in keeping with prior amendments to the WCRA and in accordance with the obligation of section 4(3)(g) of the *Legislative Standards Act 1992,*

> Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
>
> …
>
> (g) does not adversely affect rights and liberties, or impose obligations, retrospectively;

the common law threshold should be removed from date of assent of the Bill.

ASIEQ submits that the reversal of the common law threshold will see a return to the unsustainable level of common law costs in the Queensland Workers' Compensation Scheme over time and a resultant increase in premiums. (see Submission under Clause 6)

Part 2 Amendment of Workers' Compensation and Rehabilitation Act 2003

Clause 6 amends section 237 of the Act to remove the requirement that a worker must have an assessed degree of permanent impairment of more than 5% arising from their injury in order for that worker to be entitled to seek damages for the injury under the Act. The amendment reinstates an injured worker's entitlement to seek damages that was removed by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (the 2013 Amendment Act).

Submission:

A review of the WorkCover Queensland Annual Reports[1] reveal that net claims cost incurred exceeded net premium income from 2005 to 2011 returning to an underwriting surplus in 2012 when average premium rates increased to $1.42.

The Board of WorkCover Queensland was so concerned with the deteriorating solvency of the Queensland Scheme that it commissioned Deloitte to investigate and make recommendations on the long term viability of the WorkCover fund. Deloitte's final report was delivered on 13 November 2009.

The Deloitte report and a subsequent Discussion Paper issued by the Department of Justice and Attorney-General in February 2010[2] realised that despite the global financial crisis, it was an accelerating growth in common law claims that was threatening the ongoing solvency of the Scheme,

> This growth in common law claims and associated claim payments cannot be covered only by increasing premiums and relying on increased investment returns.

Deloitte's advised that by taking no action, liabilities would exceed total assets (funding ratio) in financial year 2011 for the first time and a capital or debt injection would be required by financial year 2017 to allow the fund to operate.

The WorkCover Queensland Board made a number of recommendations to the Government including:

- the common law access threshold be introduced at 10% or 15% whole person impairment.
- The average premium rate of $1.15 be progressively increased in conjunction with the agreed common law threshold to maintain the required solvency.
- Common law coverage should be extended for host employers and principal contractors who hold a WorkCover policy.
- The statutory claims benefits then be modified in response to a common law threshold introduction. Options such as increasing the lump sum payments, as well as increasing return to work services and incentives should be considered.
- Further consideration to be given to the smaller statutory changes that were excluded from the Deloitte package due to their low financial impact.

The then Minister introduced the *Workers' Compensation and Rehabilitation and Other Legislation Amendments Bill 2010*[3] on 18 May 2010 with the following policy objectives:

- Harmonise common law claims with those brought under the *Civil Liability Act 2003* in terms of liability, contributory negligence and caps on general damages and damages for economic loss;
- addressing the increased difficulty faced by employers in resisting claims for damages as a result of the Queensland Court of Appeal decision in *Bourk v Power Serve Pty Ltd & Anor* [2008] QCA 225[4];
- increasing obligations on third parties to participate meaningfully in pre-court processes;
- allowing a court to award costs against plaintiffs whose claims are dismissed;
- increasing the amount of employer excess to 100 per cent of Queensland Ordinary Time Earnings or one week's compensation, whichever is the lesser;
- removing the option for employers to insure against their excess.
- allowing payments to parents of workers aged under 21, if the worker dies and the parents live interstate; and
- allowing self-insurers to take on a higher statutory reinsurance excess in order to lower reinsurance premium.

Much has been made of the 2010 legislative amendments to correct the Queensland Court of Appeal's decision in in *Bourk v Power Serve Pty Ltd & Anor [2008] QCA 225 ("Bourk")* as having ameliorated the growth in common law claims.

1 https://www.worksafe.qld.gov.au/forms-and-resources/publications/annual-reports

2 http://pdf.aigroup.asn.au/ohs/WC_2010_reforms_Dis_paper_Final_v2.pdf

3 https://www.legislation.qld.gov.au/Bills/53PDF/2010/WorkCompOLAB10Exp.pdf

4 http://archive.sclqld.org.au/qjudgment/2008/QCA08-225.pdf

The amendment only sought to clarify the legal anomaly that a civil cause of action is not conferred by breach of the *Workplace Health & Safety Act 1995.* Strict liability had been introduced into negligence claims by virtue of the *Bourk* decision in August 2008 meaning a virtual green light for liability in every personal injury claim where a work injury had occurred, regardless of fault.

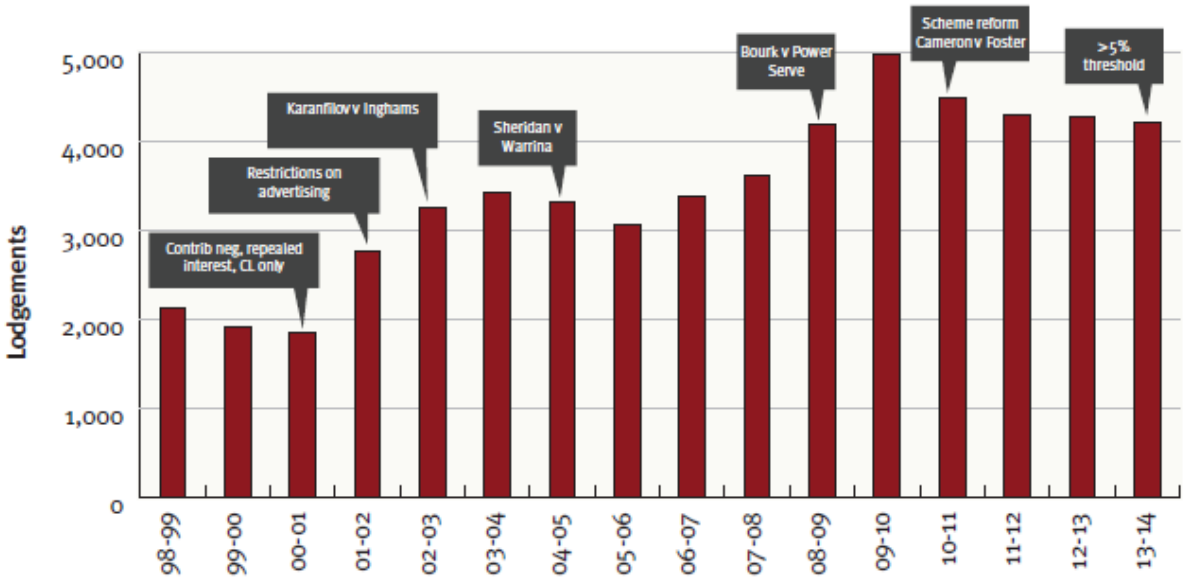
The growth in common laws claims in the Queensland Scheme was increasing year on year up until the decision in *Bourk* and accelerated after the *Bourk* decision in August 2008 peaking at an all-time high in 2010.

Highlighting the growing divide between statutory compensation benefits and common law benefits, the proportion of claims with a lower level of permanent impairment has been increasing such that as at 2013-2014,

> Just under two thirds (66.1%) of common law lodgements have a work related impairment of less than 5%.[5]

Despite the *Bourk* amendments, common law claim numbers in 2011, 2012 and 2013 exceed the pre-2010 levels and have only seen a reduction as a result of the October 2013 amendments.

39 Common law lodgements history 98-99 to 13-14



Source: Deparment of Justice and Attorney-General Workplace Health and Safety Queensland Workers' Compensation Regulator 2013-2014 Statistics Report. [5]

The WorkCover Queensland Chair and CEO commented in their 2013-14 Annual Report[6],

> The changes to the definition of a *'worker'* as of 1 July 2013 and the legislative reforms undertaken in October 2013 havec ontributed to the improvement in our fund's financial performance – the benefits of which have been passed onto our customers in reduced premiums.

Despite representing only approximately 3-4% of claims in the Queensland Workers' Compensation scheme, common law claims costs represent some 40-50% of total schemes costs.

The Finance and Administration Committee's ("FAC") report on the Inquiry into the Operation of the Queensland Workers' Compensation Scheme[7] of May 2013 made a number of recommendations that ASIEQ would support the further investigation of. In particular,

> **Recommendation 28**
> The Committee recommends that the Attorney-General and Minister for Justice investigate the issues of 'no-win-no-fee' arrangements and the '50/50 rule' with a view to curtailing the speculative nature of some claims.

We are not aware of any action taken in this regard and the legal costs of Queensland workers remains the only hidden cost in the Queensland Workers' Compensation Scheme.

5 https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0007/91825/regulator-statistics-report-2013-14.pdf (page 39)

6 https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0011/59492/WorkCover-Annual-Report-2013-2014.pdf (page 15)

7 http://www.parliament.qld.gov.au/documents/committees/FAC/2012/OpQldWorkersComp/rpt-028-23May2013.pdf

The WorkCover Queensland average outlay on legal costs on common law claims is approximately $20,000. If even conservatively, that figure is incurred by each Claimant in a common law claim then there is in the order of $140,000,000 in legal costs incurred on 3,500 common law claims per year in the Scheme. This is not allowing for the costs chargeable under Chapter 3, Part 3.4, Division 8 for Speculative personal injury claims of the *Legal Profession Act 2007*.

ASIEQ submits that the reversal of the common law threshold will see a return to the unsustainable level of common law costs in the Queensland Workers' Compensation Scheme over time and a resultant increase in premiums and recommends the FAC again recommend the Minister investigate the issues of 'no-win-no-fee' arrangements and the '50/50 rule' with a view to curtailing the speculative nature of claims.

Clause 7 inserts a new section 239A to the Act to provide the provisions required to be satisfied for a worker to add injuries to a claim for damages that have not been assessed for a degree of permanent impairment under chapter 3, part 10. This supports amendments made by clause 6 to reinstate an injured worker's entitlement to seek damages.

Submission:
ASIEQ submits that the time within which an Insurer must make a decision has shortened from 3 months under section 245(4) of the WCRA pre 15 October 2013 to 40 business days in the new section 239A.

ASIEQ does not support a reduction in the decision time of the Insurer as prior to the lodgement of a notice of claim for damages there are substantial opportunities and time for a worker or their representative to submit applications for consideration of additional injuries. The early notification of these injuries will expedite the claim process rather than delaying until a notice of claim for damages is lodged.

Clause 11 inserts a new Chapter 32 into the Act. The clause provides transitional arrangements for claims where a worker's injury was sustained before the 31 January 2015.

Submission:
ASIEQ is opposed to the introduction of section 192A. (see submissions under Clause 33).

Clause 12 inserts a new Schedule 5 into the Act. This supports amendments made to section 302 of the Act (see clause 9) by providing for the extension of the period of limitation in specified circumstances.

Submission:
ASIEQ submits that Schedule 5, 2(2)(b)(ii) does not apply to a worker that has elected under section 186 to have their injury assessed again under section 179 and therefore the time for within which to bring a proceeding for damages does not start.

ASIEQ submits that that Schedule 5, 2(2)(b)(ii) ought include re-assessments under section 186.

Clause 28 amends section 542 of the Act to clarify that the Workers' Compensation Regulator has discretion to grant extensions of time to lodge review applications if the applicant can satisfy the Workers' Compensation Regulator that special circumstances exist. This amendment is a consequence of the decision of the Industrial Court in the matter of *Blackwood v Pearce*. It also provides that the applicant can only ask the Workers' Compensation Regulator once to allow further time to apply for review.

Submission:
The Bill seeks to *"improve the day to day operation of the Queensland worker's compensation scheme"* by giving the Regulator discretion to consider special circumstance reasons for the late lodgement of applications for review. This followed a decision by the Industrial Court in *Blackwood v Pearce* whereby the worker was unsuccessful because they did not lodge a review application within the 3 month appeal period.

Despite this case being cited as the reason behind the legislative amendment, President Martin who heard the case did consider the circumstances advanced by the worker and found no special circumstances existed to explain the late lodgement of the appeal.

The proposed amendment would allow a worker to submit "*at any time but not more than once*" an application to the Regulator to lodge a review. To adopt such a concession would give no certainty to the review process which currently allows a worker 3 months to lodge a review and the ability to extend the date to lodge a review with prior approval from the Regulator.

The amendment gives no guidelines as to what "*special circumstance*" would allow the Regulator to consider a review lodged beyond the 3 months review period. Such an approach is contrary to the objects of the review process set out in section 539 which aims to provide a *"non-adversarial system for **prompt** resolution of disputes".* [our emphasis]

Clause 30 removes the entitlement given to prospective employers under section 571D of the Act to apply to the Workers' Compensation Regulator for a copy of a prospective worker's claims history summary.

Submission:
ASIEQ recognises that access to workers' compensation claims histories by prospective employers was a Labor party pre-election policy commitment.

ASIEQ understands that these provisions were rarely utilised by employers, though anecdotally we understand a take up amongst labour hire employers, and were not a substitute for objective pre-placement testing by employers, and as such, their removal will pose no significant risk to the Queensland workers' compensation scheme.

Clause 33 inserts a new section 193A to provide for the payment of additional lump sum compensation amounts to particular workers.

Submission:
The SRG was asked to consider a proposal to establish a scheme to provide ex-gratia payments for eligible injured workers impacted by the common law threshold.

We understand that Section 193A will seek to enact such a scheme through the yet unseen amendments to the *Workers' Compensation and Rehabilitation Regulation 2014*.

ASIEQ has expressed concerns to the Department and Minister that this proposed scheme is without precedent in the Queensland workers' compensation scheme and an attempt at retrospective legislation by another name.

Amendments to the Queensland workers' compensation legislation have been made by successive Governments to adjust benefits and entitlements without such retrospectivity.

The proposed scheme was initially described as a "Reparation Scheme" and subsequently a "Statutory Adjustment Scheme" whereby workers that had a degree of permanent impairment of 5% or lower had no common law rights by virtue of the threshold would be entitled to lump sum payments and the payment of legal costs via a quasi-judicial process.

We are led to believe that features of the proposed scheme may include:

- Restrict eligibility only to those:
  - with a date of injury between 15 October 2013 and 31 January 2015
  - who have not accepted or rejected their offer of lump sum compensation for permanent impairment between 0% and 5%
  - assessed as having nil permanent impairment and have been unable to return to work
- Payment of a multiple of lump sum compensation for permanent impairment
- A 'plus costs' legal fees regime payable by Insurers
- Retention of '50/50' rule under section 347 of the *Legal Profession Act 2007* for 'no win/no fee' personal injury actions
- Involve a complex administrative regime including panels of legal experts with no dispute or appeal rights

ASIEQ submits the following issues if such a scheme is enacted by Regulation:

Additional administration

The promotion of such a scheme will see an increase in workers seeking DPI assessments to bring them into entitlement to additional lump sum compensation.

This will see an unnecessary increase in cost to the Scheme for re-assessments and use of the Medical Assessments Tribunals as DPI assessments are sought to be maximised.

The scheme will encourage workers to seek review of their DPI assessment under Section 186 and referral to a Medical Assessment Tribunal (MAT) to achieve an increased assessment and entitlement under section 193A.

ASIEQ submits that with the removal of the common law threshold, the 2013 amendment to introduce a second DPI assessment under section 179 be repealed.

Inequity

An unintended consequence of seeking to recompense workers impacted by the common law threshold is the exclusion of workers that have accepted or rejected their entitlement to lump sum compensation for a DPI.

There will be numerous cases where workers with post 15 October 2013 injuries have made elected to accept or reject their entitlement to lump sum compensation in accordance with the prevailing legislation.

Those workers will now be excluded from the additional benefits payable to workers injured in the same period.

Paradoxically, there will be cases where a worker that receives a > 6% DPI and accepts their statutory lump sum will receive less than a worker with a lower DPI entitled to the additional lump sum compensation and could seek a re-assessment under Section 186 to bring them into entitlement under section 193A.

Legal Fees

ASIEQ is opposed to a scheme that proposes a 'plus costs' regime not currently provided for in the WCRA for common law claims.

ASIEQ submits that the payment of lump sum compensation for a DPI is "compensation" as defined by section 9 of the WCRA and not "damages" under section 10; and therefore not attracting legal costs chargeable under the *Legal Profession Act 2007*.

ASIEQ would submit that section 110 also prohibits Insurers paying compensation for legal costs.

As currently exists, parties can resolve common law claims in the pre-proceedings stages with no decision on, or admission of liability. It would be commercially prudent for Insurers to resolve entitlements to additional lump sum compensation without the necessity of incurring legal costs for either party.

Financial Implications

As the details of the actual scheme have not been provided for scrutiny with this Bill it is impossible for any party to comment on the financial impacts of this proposed scheme. On our limited understanding of what the scheme may include it seems that undoubtedly there will be a substantial cost impact to the Queensland Scheme with a resultant increase in premiums from the unsustainable average premium of $1.15.

The potential financial implications of such are scheme would very broad and difficult to comment on as there are so many unresolved issues to consider. The SRG was advised that maintenance of current premium will be affected by the removal of the threshold.

ASIEQ's Members have already conducted Actuarial assessments on their outstanding liabilities, submitted Bank Guarantees, made levy payments and charged premiums based on the legislation as enacted. In addition, Member Insurers have applied for self-insurance licences and made amendments to member organisations with actuarially assessed and agreed payments between WorkCover and Insurers. All of these may require review and amendment with the introduction of the additional lump sum compensation.

Specialist Rehabilitation Support

The SRG entertained the idea that specialised rehabilitation support would be made available to the workers impacted by the common law threshold.

ASIEQ submits that workers with a DPI of less than 6% were and continue to be entitled to a referral to accredited return to work programs of Insurers.

ASIEQ submits that the provision of specialist rehabilitation support at the end of a statutory claim or beginning of a common law claim already exists within the WCRA.

ASIEQ has previously pointed out the unfortunate drafting of section 220 of the WCRA; however, ASIEQ's Members were advised from the onset of the legislation that the section applies to workers at the end of the statutory claim and at the lodgement of the Notice of Claim. All self-insured employers had to make submission to the Regulator to achieve 'accredited return to work program' status. Therefore Self Insured employers would submit that appropriate rehabilitation ought be provided to all workers regardless of their DPI.

Our members would suggest that the biggest disincentive to a worker participating in vocational assistance program is the financial consequence of a pending common law claim.

ASIEQ is supportive of the policy commitment to "Ensuring rehabilitation and return to work are a priority for workers" but note no amendments proposed to support this policy objective.

Independent Specialist Panel

ASIEQ does not support the creation of independent specialist legal panels to assess cases and submits that there creation may result in numerous complex, costly and drawn out judicial reviews.

Clause 34 amends section 548 of the Act to provide that a decision by an insurer regarding additional lump sum compensation under section 193A (see clause 33) is not an appealable decision. Review rights are provided for in the new section 193A (clause 33).

Submission:
ASIEQ does not support the introduction of section 193A and therefore cannot support this amendment.

Clause 35 inserts a new Part 5 in the new Chapter 32 into the Act. The clause provides transitional arrangements for injuries sustained on or after 15 October 20013 and before the 31 January 2015.

Submission:
As in clause 34.

MISCELLANEOUS

Section 549 Who may appeal

In a recent decision of the Queensland Industrial Relations Commission in *Brisbane City Council v Gillow and Simon Blackwood (Workers' Compensation Regulator)* [2015] QIRC 124[8], Vice President Linnane made the following observation at Paragraph 56:

[56] If the legislature intends for employers and/or self-insurers to be given a right to be heard in appeals by workers against review decisions of the Regulator pursuant to the *Workers' Compensation and Rehabilitation Act 2003*, then a provision in that Act dealing with the matter may resolve the issue...

Currently section 549 entitles an employer to be a party to an appeal by WorkCover against a decision of the Workers' Compensation Regulator; and a Claimant or Insurer to be a party to an appeal by an employer against a decision of the Workers' Compensation Regulator; but does not confer the same right to an employer/insurer to be a party to an appeal by a worker against a decision of the Workers' Compensation Regulator.

The Queensland Industrial Relations Commission has the discretion to grant leave to a party to appear and be heard yet that discretion is applied inconsistently in the experience of ASIEQ's members.

An employer/insurer aggrieved by a decision of the industrial commission or industrial magistrate cannot appeal to the industrial court under section 561 of the WCRA as they are not a party.

ASIEQ submits that the discretion to grant leave to appear and be heard and the lack of rights of an employer/insurer to be a party to an appeal is not in keeping with the principle of "Natural Justice".

ASIEQ submits the following amendment to section 549,

Insert-

(5) If the appellant is a claimant or worker, an employer or insurer may, if the employer or insurer wishes, be a party to the appeal.

Such amendment will have no adverse impact on the rights of workers or cost to the scheme and in our submission will assist with the prompt resolution of disputes.

***Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269**

In light of the decision of the Supreme Court in *Byrne v People Resourcing (Qld) Pty Ltd & Ors* [2014] QSC 269[9] ASIEQ submits that the Government explore and clarify the extent of indemnity intended by Workers' Compensation Insurance in Queensland.

Section *46 Policy cover on worker on loan* and section *47 Extent of indemnity for principals and contractors* of the repealed *Workers' Compensation Act 1990* provided guidance for labour hire and principal-contractor arrangements.

Similarly, the *Schedule Policy of insurance* in the *Motor Accident Insurance Act 1994* provides some certainty for policy coverage and exclusion in the Motor Accidents Scheme.