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Finance and Administration Committee of the Queensland Parliament

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015

Submission by the Local Government Association of Queensland Ltd.

LGAQ
LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

Introduction

The Local Government Association of Queensland Ltd (LGAQ) is the representative body for Queensland local governments.

Almost all local governments are involved in workers' compensation self-insurance arrangements. The only exceptions are some of Queensland's indigenous local governments. 71 local governments and local government controlled entities employing over 23,000 workers participate in the Queensland Local Government Workers' Compensation Self Insurance Scheme (LGW). LGW holds a classification group self-insurance licence. The LGAQ is the appointed representative of LGW scheme members. Four other councils hold individual self-insurance licences.

This submission is made on behalf of local governments and local government entities participating in the Queensland Local Government Workers' Compensation Self Insurance Scheme.

Throughout the submission the *Workers' Compensation and Rehabilitation Act 2003* is referred to as the "Act". The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015* is referred to as the "Bill".

The LGAQ welcomes the opportunity to provide this submission to assist the Finance and Administration Committee's consideration of the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015*. The submission focuses on removal of the impairment threshold for seeking common law damages, the proposed insertion of Section 193A in the Act and issues related to the proposed retrospective application of provisions in the Bill.

Retrospective Provisions Related to Removal of the Threshold

It is clear from the Bill and Explanatory Notes that provisions removing the common law impairment threshold are intended to have retrospective application.

Whilst insertion of Section 193A in the Act providing for additional lump sum compensation is to occur on a day fixed by proclamation, the section will effectively also have retrospective application by changing amounts and conditions for lump sum entitlements relating to past injuries that had applied and been acted on by workers, employers and insurers. Section 193A will result in rights and obligations being changed with effect prior to passing of the Bill.

It is stated on page 3 of the Explanatory Notes for the Bill that:

> "*Providing only a limited retrospective operation ensures the amendments will not apply to a time prior to the Government being elected into office.*"

The LGAQ submits that this reference does not accurately reflect the extent of the effective retrospective application of the Bill.

As detailed below, the LGAQ opposes the provisions related to removal of the threshold and therefore any retrospective application of those provisions. The LGAQ also opposes the insertion of Section 193A in the Act.

Removal of the Threshold

In the absence of other significant reforms dealing with speculative common law claims the LGAQ opposes removal of the impairment threshold. It is not accepted that the 2010 Act amendments resulted in common law costs returning to a sustainable level. In the LGAQ's submission to the Finance and Administration Committee's 2013 Inquiry Into the Operation of Queensland's Workers' Compensation Scheme, it was pointed out that if the 2010 amendments were leading to a stabilization of common law claims then they were stabilizing at an unacceptably high level. It is completely misleading for assessments to be sought to be made in relation to lodgement of common law claims using 2009/10 as a reference point. That was the year when the impact of common law claims on the workers' compensation scheme literally reached crisis point. The signs of that coming impact were clearly apparent during 2008/9 resulting in processes that ultimately led to the 2010 Act amendments.

It would of course be expected that action taken by the Government in 2010 such as dealing with the *Bourk v Powerserve* decision would have an impact. But any comparisons or assessments relating to the impact of common law claims must examine pre and post 2008/9 claims data. That will show that by the end of 2013/14, common law claims remained at historically high levels. An important reason for that was the failure to adequately address the trend towards speculative claims based on minor levels of impairment. That only occurred through introduction of the impairment threshold in 2013.

The LGAQ's position put to the Committee's 2013 inquiry was that urgent action on common law claims should be taken and the need for a common law threshold was not ruled out. However as a first option, the LGAQ stated that it would be preferable to address factors that unreasonably encourage the lodgement of large numbers of speculative claims. Such factors were identified as including profit driven business models being pursued by plaintiff lawyers and weaknesses in the common law process that facilitate such models.

It is noted that the Committee's 2013 report on the Inquiry Into the Operation of Queensland's Workers' Compensation Scheme recommended 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. The LGAQ is not aware of any action taken in response to the Committee's recommendation. The impact of restoring the flow of common law claims based on low levels of impairment will be fuelled by relentless law firm advertising that very clearly seeks to push the boundaries of personal injury advertising restrictions. Removal of the threshold would therefore be a significant risk for the workers' compensation scheme.

If action is taken to remove the threshold the LGAQ opposes that being achieved through legislation with retrospective application. Based on the following comments, the LGAQ considers that use of retrospective legislation would offend fundamental legislative principles.

Removal of the threshold would not exclusively provide benefits to persons in the community. Employers, and particularly self-insured employers, would face additional costs flowing from increased numbers of common law claims and would also see the ground pulled from underneath a critical factor in cost projections and provisioning. As an example, self-insurers will have structured reinsurance, claim management, and cost financing arrangements for 2014/15 on the basis of the current legislation. In that regard it is important to take account of the reality that a Labour Party victory in the last Queensland election was not seen within the community as a strong likelihood. It was reasonable for self-insurers to proceed on the basis of the existing legislation. Self-insurers account for at least 10% of Queensland's workers' compensation scheme and in the context of considering retrospective legislation the fact that removing the threshold will disadvantage those employers should not be brushed aside.

It is further submitted that any suggestion that all parties should have anticipated removal of the threshold following the outcome of the last Sate election ignores the fact that the Labour Party does not hold a majority of seats in Parliament. It would be presumptuous to suggest that Parliament would support every part of every Bill presented by the Government.

Section 186(2)(b)(i)

The proposal to remove the common law threshold is not accompanied in the Bill by a proposed removal of Section186 (2)(b)(i) of the Act. The section was introduced in conjunction with the common law threshold to allow workers the option of requesting a second impairment assessment by another doctor. If the threshold was removed there would appear to be no need for that provision to remain and the Act should return to the former position where any disagreement of the assessed impairment was referred to a Medical Assessment Tribunal for determination. To retain Section186 (2)(b)(i) in the absence of a common law threshold is unnecessary and only adds delay and additional cost to the assessment process.

Additional Lump Sum Compensation

The LGAQ opposes insertion of Section 193A in the Act. It follows that the LGAQ opposes an entitlement to additional lump sum payment being retrospectively made available to certain workers. It is submitted that the retrospectivity involved in the proposed Section 193A by the Bill offends fundamental legislative principles.

Lack of Detail

The initial point of objection to Section 193A must be the complete lack of detail in the Bill relating to the additional lump sum entitlements. The Bill does not specify the additional lump sum entitlements and does not specify further conditions that may need to be satisfied or may be attached to the entitlement. The proposed Section 193A also provides for establishment of a panel to review decisions of insurers on entitlement to additional lump sum compensation. Again, there are no provisions detailing composition of the panel or processes that will apply to the panel reviewing insurer decisions.

The Stakeholder Reference Group established by the Government has discussed various proposals related to provision of additional lump sum entitlements. There is no consensus amongst the reference group participants that a scheme to provide for additional lump sum entitlements associated with removal of the common law threshold should be established. The LGAQ is a member of the Association of Self-Insured Employers of Queensland (ASIEQ) which has participated in reference group discussions. Both the ASIEQ and the LGAQ have formally advised their opposition to the proposal to provide additional lump sum compensation.

The LGAQ considers that Section 193A would involve an unprecedented arrangement both in terms of how it would apply and who it would apply to. Parliament is being asked to endorse such an arrangement on the basis of a Bill that provides no information on the actual entitlements that will be made available and the processes that will be used to determine entitlements in individual cases.

Justification for Additional Compensation

It is submitted that there is no justification for provision of the additional lump sum compensation referred to in the proposed Section 193A, and certainly no justification for it being provided to a certain group of workers. During the period 15 October 2013 to 31 January 2015, the Act provided for entitlements as determined by the Queensland Parliament. Workers, employers and insurers, as they reasonably should have, acted on the basis of the legislated entitlements.

In order to argue that some workers have been disadvantaged, parties may seek to make a comparison with provisions they would have preferred to see in place during a particular period. But the fact is, those provisions were not in place during that period because the elected Parliament determined otherwise. In terms of the application of the legislation there has been no disadvantage and there is no basis for seeking to compensate certain workers for any disadvantage.

The LGAQ believes that disadvantage would indeed arise if a limited group of workers were to receive additional lump sums on the basis of conditions that were not known by any party at the relevant time, and which are comparatively unfavourable to many persons who acted on the basis of the existing legislation.

Unfair Outcomes

From the LGAQ's knowledge of discussions at the Stakeholder Reference Group it would appear that an approach that may be favoured by the Government would involve workers with a DPI of 1% to 5% receiving three times the statutory lump sum payment.

The LGAQ in making comment is hampered by the lack of detail in the Bill, however such an arrangement would see certain workers being in a position to receive greater entitlements than other workers injured on the same day and having the same level of impairment. There would also be the possibility of workers receiving more than they could have had the common law threshold not been in place, and workers who may never have intended to pursue a common law claim seeking to access the additional lump sum entitlement.

One piece of information the Bill does provide is that the Section 193A arrangement would not be available to workers that had accepted an offer of lump sum compensation. It is clear that workers in exactly the same injury circumstances would ultimately have different entitlements based on the decision they made in relation to a lump sum offer. The workers that made those decisions were not aware of the potential comparative disadvantage that may be attached to a decision by subsequent legislation with retrospective application.

In addition, workers who have not made a claim in relation to an injury in the relevant period may seek to do so to gain access to the additional lump sums. Also, workers with a 0% DPI may not be considered to have rejected a lump sum offer and therefore may fall within the scope of the proposed Section 193A arrangement. If so, it is understood to be proposed that such workers would potentially be entitled to three times the 1% lump sum amount. It will no doubt be suggested that these outcomes could only apply to limited numbers of workers. But that suggestion would ignore recent history. The dramatic increase in common law claim lodgements involving very low or zero impairment levels in the 2008/9 and 2009/10 years clearly demonstrated how accommodating legal circumstances combined with intensive plaintiff lawyer activity can rapidly generate increased claim numbers.

The LGAQ is also concerned at the likely encouragement, and potential impact, of combining physical and psychological injuries. Any worker with the ability to access the Section 193A arrangement will have a very clear incentive to add a secondary injury and in so doing secure an additional lump sum multiple. In terms of the reasonableness of the potential additional lump sums, if a worker was assessed with a 5% degree of impairment for both a physical and psychological injury they could be entitled to a lump sum of approximately $94,000 under what appear to be the favoured Section 193A arrangements. This is in excess of the Local Government self-insurance scheme's average damages settlement of $82,500.

The solution to the unfairness as between workers involved in the arrangement proposed by Section 193A is not to simply extend its application to additional workers. Apart from that not being realistically achievable, the LGAQ, as stated above, does not accept there is any justification at all for the provision of any additional lump sum entitlements. The LGAQ absolutely opposes the proposed Section193A and any further proposal that may be made to extend the scope of eligibility to additional lump sums beyond that set out in the Bill.

A central element of Section 193A will be establishment of a panel to review insurer decisions on entitlement to an additional lump sum. The fact that an injury results in a degree of impairment does not automatically provide an entitlement to receipt of common law damages. The Bill proposes establishment of a panel to review decisions of insurers on the entitlement to additional lump sums. Given that the proposed Section 193A entitlements are intended as compensation for the inability to obtain common law damages, it follows that the entitlements would only be available to those where a court would have found negligence on the part of the employer and then awarded damages.

Section 193A does not provide for a court to be involved in determination of an additional lump sum entitlement. Instead it would appear that an appointed panel would be making some form of determination of common law negligence. The Bill provides no detail on the process involved in determinations being made by the panel. It is understood from discussions of the Stakeholder Reference Group that the proposed process would not involve the employer having any right of appearance or opportunity to test the evidence of witnesses.

Such a process is not analogous to the Act's statutory review process. In most cases the panel would not just be reviewing the application of legislative provisions to factual circumstances to determine whether an entitlement was payable. Most directly in the case of self-insurers, an outcome of the panel process may be an employer being liable for payments to workers as a direct result of a determination of common law negligence that was not made by a court. This could not possibly be seen as consistent with a position that supports common law rights and arises from the flawed view that removal of the threshold should have retrospective application, or, that a form of compensation be payable in lieu.

Legal Costs

As detailed above, in 2013 the LGAQ drew the Committee's attention to the impact of plaintiff lawyer driven speculative common law claims. As part of that discussion the LGAQ drew particular attention to the negative outcomes flowing from Section 347 of the *Legal Profession Act 2007* that enables a legal firm conducting a speculative personal injury claim to charge the client up to 50% of the net damages award or settlement.

It is understood that concerns were raised at the Stakeholder Reference Group over the potential cost impact on the Queensland workers' compensation scheme, and on individual workers, of legal costs involved in any arrangements for additional lump sums.

It is also understood that the view of legal groups put to the Stakeholder Reference Group has been to rely on current arrangements for ensuring the reasonableness of legal costs, including the application of Section 347 of the *Legal Profession Act 2007.*

The LGAQ can only once again state that Section 347 of the *Legal Profession Act 2007* has become a significant part of the problem rather than being any form of solution. In 2013 the Finance and Administration Committee accepted that there were issues relating to speculative common law claims, including the 50/50 rule, which required further action to be undertaken by the Government. But nothing has been done.

It is simply not realistic for any party to now believe that legal costs will not have a significant impact on the cost of any additional lump sum arrangement. Administrative and legal costs will inevitably result in the proposed additional lump sum arrangement being a financially inefficient means of providing additional compensation to some workers. This is a further argument for not proceeding with an unjustifiable additional lump sum arrangement.

Retrospective Application

As detailed above, the LGAQ does not accept retrospective removal of the common law threshold. However, in the case of the threshold there is at least some scope to make an argument that following election of the current Queensland Government all parties were effectively on notice that action could be taken seeking to implement pre-election commitments. Further, any announcements made by the new Government in relation to the threshold could (again, arguably), be seen as having the weight of having been made by the current Government. It is again noted that the LGAQ considers such arguments to be at best presumptuous given the final numbers in Parliament.

In contrast, in the case of injuries between 15 October 2013 and 31 January 2015, decisions were taken by workers, employers and insurers in good faith based on the current Act. It cannot be realistically argued that during that period all those parties were aware that the ultimate efficacy of a decision would be determined by subsequent legislative changes that they could not have been aware of. It is also noted that at whatever point the Labour Party formally announced removal of the threshold as an election commitment, the likelihood that it would be in a position to achieve that outcome following the next election would not have been seen as particularly high.

It also cannot be argued that the conflict with legislative principles is overcome by claiming the additional lump sum entitlements are beneficial to persons other than the State. They are not exclusively beneficial. There will be many cases where a worker who was injured between 15 October 2013 and 31 January 2015 and accepted a lump sum payment will receive a lower lump sum payment than other workers injured around the same time and in the same circumstances. The benefits of the retrospectivity will be selectively applied and importantly, applied on the basis of circumstances that workers could not reasonably be expected to have been aware of at the time. Employers, and particularly self-insured employers, will be disadvantaged by a retrospective obligation to pay significant amounts that were not a legislative obligation, and therefore not assessed and provided for, between 15 October 2013 and 31 January 2015.

Time for Making Decisions

Clause 7 of the Bill proposes insertion of Section 239A in the Act. The LGAQ opposes inclusion of 40 days as the time for making a decision in subsection (5) of the proposed Section 239A.

The previous provisions relating to workers with more than one injury provided an insurer with 3 months from the date of receiving a complying notice to make a decision on whether the person was a worker and whether an injury was sustained. The Bill proposes a decision period of 40 business days.

The majority of secondary injury claims relate to psychological injury and in most cases (unlike standard statutory claims) little or no supporting evidence is lodged. The insurer is left with the task of properly investigating the matter which would typically include obtaining treating doctors' records before arranging an examination by a psychiatrist. It is most unlikely that this could be achieved within the proposed 40 business day timeframe.

Time for Applying for Review

The LGAQ opposes the amendment to Section 542 of the Act. It is considered that the decision of the Industrial Court in *Blackwood v Pearce* properly applied Section 542 of the Act and was entirely consistent with the object set out in Section 539 of providing a non-adversarial system for the prompt resolution of disputes. In *Blackwood,* the Industrial Court did not remove the power of the Regulator to grant extensions of time for lodging review applications based on the existence of special circumstances. It found that a request to the Regulator for further time to lodge a review application needed to be made in accordance with the provisions of Section 542.

The decision corrected a continuing, incremental erosion of the ability of Section 542 to achieve the objective of maintaining a prompt process. The proposed amendment would effectively provide an unlimited period of time for a request based on special circumstances to be made. That would be completely inconsistent with the object set out in Section 539. An unlimited period to seek an extension based on special circumstances and the fact that special circumstances are not defined will create significant uncertainty in the review process.