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10 Aug 2015

Finance and
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CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND SUBMISSION

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015

Finance and Administration Committee
Queensland Parliament

CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND

10 August 2015

1.Overview

1. The Chamber of Commerce and Industry Queensland (CCIQ) welcomes the opportunity to provide a submission to the Finance and Administration Committee (the Committee) as part of the review of the *Workers' Compensation and Other Legislation Amendment Bill 2015* (the Bill), and provide comment on the operation of the Queensland workers' compensation scheme more broadly.
2. Specifically, CCIQ wishes to respond to the following proposed policy objectives of the Bill namely:
 - Re-instate common law rights for injured workers that were affected by changes made by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (the 2013 Amendment Act) and establish the ability to provide additional compensation to particular workers impacted by the operation of the common law threshold; and
 - Prohibit prospective employers from continuing to access an individual's claims history as they have been able to following other changes made by the 2013 Amendment Act.
3. CCIQ is committed to achieving the best practice workers' compensation arrangements for the protection of employers and workers. This includes maintaining a financially sound insurer in WorkCover Queensland that adequately protects employers and workers against genuine work-related injuries at affordable and competitive premiums.
4. Through the hard work of progressive governments, Queensland's workers' compensation scheme is regarded as the best performing in Australia not only in terms of solvency but in delivering the lowest or second lowest average premium for businesses across the last 10 years. At the same time the benefits delivered to injured workers and their families across this period have also been regarded as both fair and reasonable.
5. Further, stakeholders across the political spectrum in Queensland have worked hard to ensure that all employers irrespective of size and their employees have access to an efficient, fair, stable, and cost effective workers' compensation scheme, a system that Queenslanders can rightly be proud of.
6. CCIQ is of the view that the 2010 reforms, which limited the size of common law payouts, coupled with the reforms of 2013, which introduced a threshold for common law claims, have brought greater balance to the workers' compensation scheme, providing affordable compensation for those genuinely injured at work and offering employers adequate insurance in the event of a workplace accident.

7. Further, both sets of reforms have undoubtedly had a positive impact on average premiums payable by employers through the scheme, which ultimately encourages small business in Queensland to invest in their businesses and employ more staff.
8. With respect to the proposed amendments in the Bill currently before the Committee, CCIQ is primarily concerned with the discontinuation of the 5 per cent common law threshold. CCIQ is of the view that a reversion back to former arrangements will encourage unfettered access to common law claims, increasing claims, driving up premiums and in turn imposing further costs on employers.
9. CCIQ wishes to additionally raise strong objections to the proposal to introduce a statutory adjustment scheme dating back to October 2013, and the winding back of reforms that grant employer's access to an individual's claims history.
10. It is critical that Queensland retains the lowest workers compensation premiums in Australia, thereby promoting the State as a competitive and prosperous business operating environment. Queensland's workers' compensation premiums are a central element in our State's efforts to keep Queensland the best place to do business in the nation.
11. To this end, this submission will articulate in detail CCIQ's strong opposition to the Government's moves to depart from the existing arrangements of Queensland's well-functioning workers' compensation scheme.

2. Discontinuation of the 5% threshold and impact on premiums

12. CCIQ strongly urges the State Government to retain current limitations to accessing common law damages, more specifically requiring a worker to have a degree of permanent impairment as a result of their injury greater than 5 per cent, in order for Queensland to continue to deliver the lowest workers compensation premiums in Australia.
13. When surveyed in 2012, 81 per cent of Queensland businesses supported the introduction of a threshold to reduce access to common law, with the statutory process considered the most appropriate method among Queensland businesses for achieving compensation for genuine work-related injuries within the range of 0 to 5 per cent degree of permanent impairment (DPI).¹
14. This Bill takes Queensland out of alignment with other states, with Queensland and ACT to be the only jurisdictions that provide unrestricted access to common law if the Bill is allowed to pass.

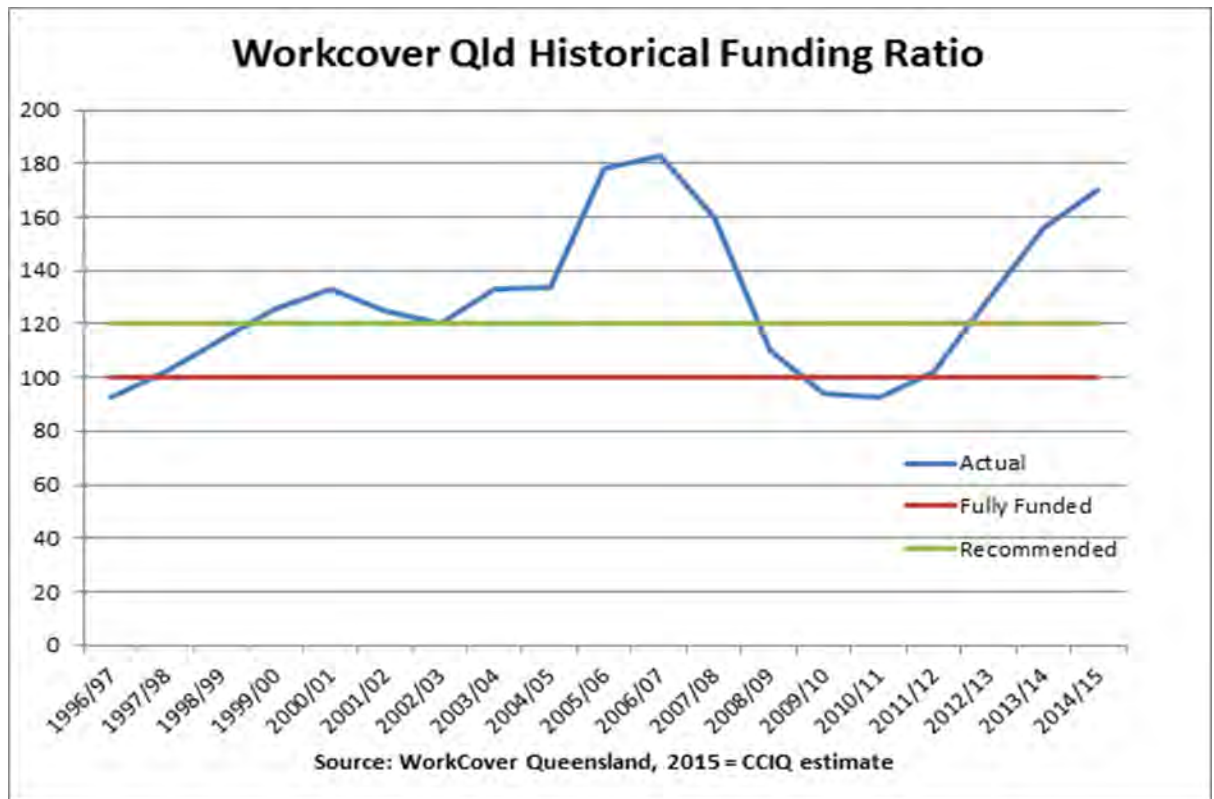
¹ CCIQ Workers Compensation Survey, July 2012

Jurisdiction	Threshold to Access Common Law
New South Wales	15% Whole Person Impairment (WPI)
Tasmania	20% WPI
C/W (Comcare)	10% WPI
ACT	no threshold
South Australia	30% WPI
Northern Territory	no common law
Victoria	30% WPI (can combine physical and psych) or narrative test

Source: *WorkCover Queensland*

15. Reverting back to previous arrangements (as is proposed by the current set of amendments before the Committee) would result in the only reasonable policy measure to counter the spiralling common law claims that were being experienced at the time, thereby directly compromising the scheme's ability to deliver competitive premiums to Queensland employers (see sections 23 – 26).
16. Prior to the 2013 reforms, the Queensland workers' compensation framework was viewed by businesses as heavily skewed towards claimants. When surveyed, only 27 per cent of businesses believed the previous Scheme provided for the protection of employer interests. Businesses did not believe the scheme had the balance between employees and employers right with the scheme overwhelmingly viewed as being skewed towards the employee.²
17. Following the introduction of a 5 per cent threshold, workers' compensation premiums in Queensland reduced on average by 17 per cent, with the average premium rate for businesses dropping from \$1.45 per \$100 of wages to \$1.20 for 2014-15 – and again at this rate at 2015-2016.
18. As a direct result of the introduction of a threshold for common law claims, premiums have been reduced and remained steady, providing significant stimulus to the economy and boosting jobs growth, with an estimated \$250 million benefit to the state's business community each year. It is our view that the 2013 changes restored balance in the system, and improved the overall operation on the scheme. Not only has this positive benefit accrued but WorkCover Queensland solvency has also improved dramatically.

² Ibid.



19. As a direct consequence of the 2013 reforms, Queensland returned to the coveted position of having the lowest workers compensation premiums in Australia. CCIQ draws the Committee's attention to the rapidly improving performance and lower premiums of both NSW and Victoria who will either overtake or threaten Queensland with lower premiums if this Bill is implemented.

	QLD	SA	NSW	VIC	WA	Comcare	TAS	NZ
2004/05	1.55	3.00	2.65	1.98	2.25	1.16	2.46	
2005/06	1.43	3.00	2.57	1.80	2.32	1.22	2.45	
2006/07	1.20	3.00	2.17	1.62	2.12	1.77	2.45	
2007/08	1.15	3.00	1.86	1.46	1.85	1.55	1.94	0.89
2008/09	1.15	3.00	1.72	1.39	1.58	1.36	1.50	0.72
2009/10	1.15	3.00	1.69	1.39	1.74	1.36	1.97	1.31
2010/11	1.30	2.75	1.66	1.34	1.50	1.25	2.13	1.89
2011/12	1.42	2.75	1.68	1.34	1.57	1.40	2.19	1.47
2012/13	1.45	2.75	1.68	1.30	1.69	1.77	2.28	1.15
2013/14	1.45	2.75	1.55	1.30	1.67	1.82	2.36	1.15
2014/15	1.20	2.75	1.40	1.27	1.56	2.12	2.30	0.95
2015/16	1.20	1.95	1.40	1.27	1.48	2.04	2.30	na

Source: State-based Workers' Compensation Scheme Annual Reports

20. Based on CCIQ's close engagement with this process through the State Government's Stakeholder reference group on workers' compensation matters, CCIQ understands Queensland's premium will ultimately have to increase to \$1.36 to cover the absence of a common law threshold and in order to protect the solvency of the WorkCover scheme.

21. CCIQ notes the commitment made by the State Government in the Explanatory Notes for this Bill, namely:

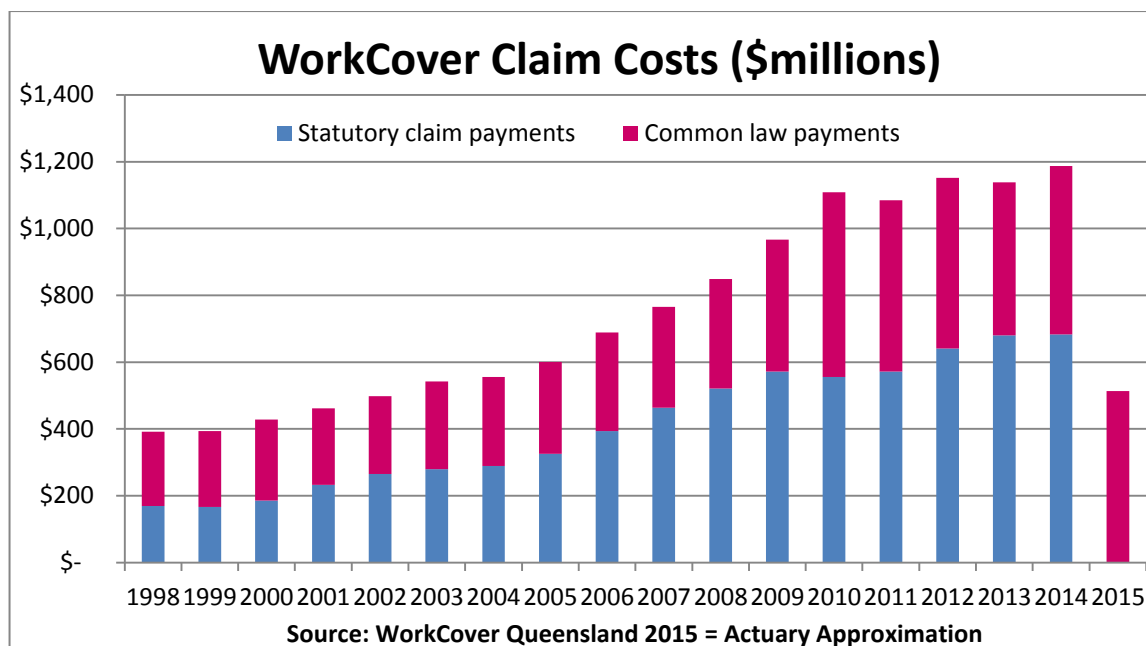
*"While the WorkCover Queensland Board sets premiums annually, it has been estimated the impact of removing the threshold for all injuries on or after the date of the State election and providing additional compensation to particular workers impacted by the operation of the common law threshold prior to the Queensland State election, can be achieved without an increase in the average premium rate of \$1.20 per \$100 wages paid. WorkCover will remain fully solvent as, while its substantial reserves will reduce, the solvency target of 120% will be maintained. The 120% target is above the level of solvency required in any other centrally funded workers' compensation scheme in Australia."*³

22. The above statement in CCIQ's view can only hold weight and is accurate for 2015-16. However, as the notional breakeven premium is \$1.36 per \$100 wages, CCIQ holds grave concerns for what will happen following 2015/16. Accordingly, CCIQ encourages the State Government to give a longer term commitment to competitive premiums in the medium term. Without it, the increase in premiums as a result of this Bill will inevitably compromise employment, investment, and the overall level of economic activity across Queensland.

23. In the period previous to the 2013 reforms, common law claims were a cause of great concern and stress for small businesses in Queensland. Common law claims were above the historical average and accounted for a disproportionate amount of the overall costs of the scheme. The lack of restraint and easy access to litigation were an area that required reform, and clear and identifiable benefits have stemmed from such reforms.

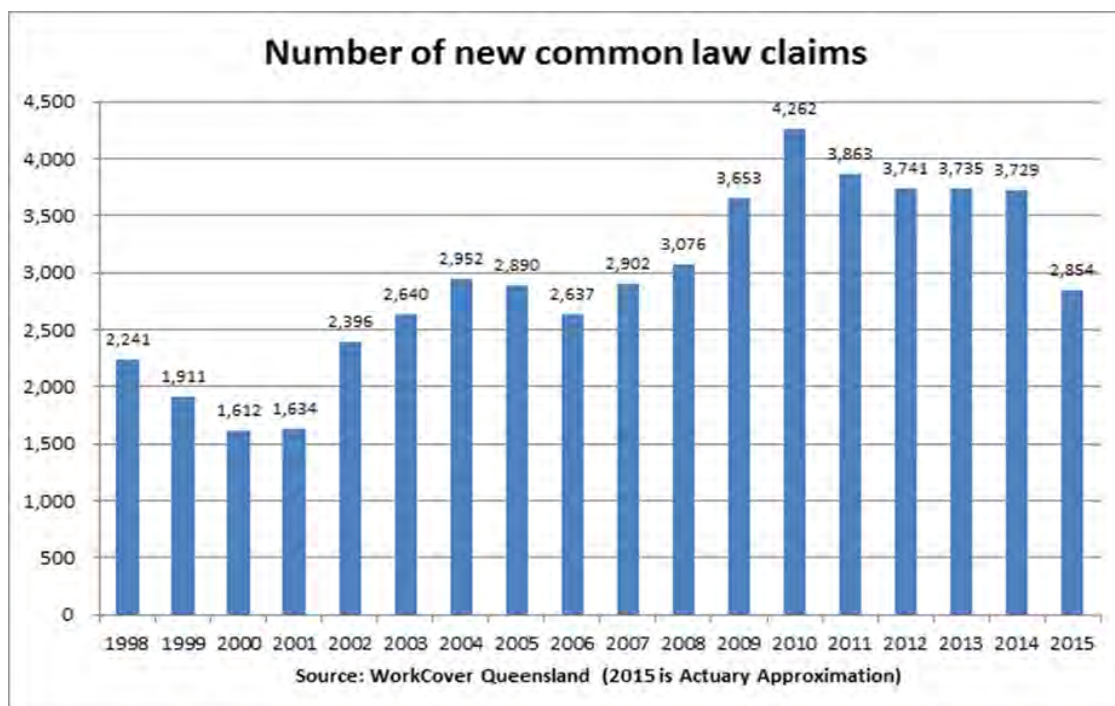
24. Prior to the introduction of the 5 per cent threshold, common law claims represented a significant and unjustifiable portion of scheme costs. More specifically only 4.0 per cent of statutory claims progressed to common law, yet in 2012-13, common law claims made up 40.2 per cent of claim costs, with the average common law claim settlement (\$123,560) costing approximately 15 times more than the average cost of a statutory claim (\$8,310). These figures demonstrate the disproportionate cost impact that common law claims at the lower end had on the financial health of the overall scheme.

³ *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015*, Explanatory Notes, p.2.



25. In short Common law represents an expensive means of awarding compensation to workers compared to the statutory process, particularly for injuries assessed as low DPI per cent.

26. In addition, it must be pointed out that the 2013 amendments are now in their second year of operation and *'as at 31 December 2014, WorkCover noted 20% fewer new common law claims lodged than estimated (1,440 compared to an anticipated 1,804). This downward trend is anticipated to continue.'*⁴ The *'scheme's common law claim experience is not expected to fully reflect the impact of these amendments until the 2016-17 premium year'*.⁵



⁴ Information Paper for the Stakeholder Reference Group on Workers' Compensation Matters, p.10.

⁵ Ibid.

27. CCIQ understands that sometimes a worker must seek recourse through common law. In this respect, our policy position does not seek to deny access to compensation for workers who have significant ongoing impairment. Rather, we believe this issue must be considered against achieving the most efficient means of delivering fair outcomes for all stakeholders and claims resolution.
28. Queensland employers consider the statutory process provides appropriate compensation outcomes for work related injuries at the lower end of severity. A threshold of 5 per cent DPI provides due relief for employers as well as allowing injured workers with higher DPI to still have appropriate recourse to common law.
29. Our objection primarily relates to accessing common law relief where the injured worker has not received a permanent or serious injury. Throughout previous arrangements, employees were trying their luck to see what settlement they could receive from WorkCover. This created 'common law churn', whereby the sheer volume of these claims meant that Workcover had no other option but to settle the large majority of common law claims at compulsory conferences or mediations, rather than pursue the issue in formal proceedings due to time and cost considerations of claims management.

"I have sat in a WorkCover conference where evidence was presented to discredit the injured worker, and prove that he had acted with negligence, and he still walked away with a substantial sum. It was like playing poker with someone else's money. Everyone in that room knew he would walk away with money, and they had all pretty much agreed where the final figure would stand even before the meeting. The employer seems to have little say or rights in the proceedings." – Queensland small business owner, 2012.

"Common law is much too easy to access in this state. With law firms freely advertising that they can obtain a slightly injured worker a lot of money, employers are on the back foot." – Queensland small business owner, 2012.

30. CCIQ believes this 'common law churn' can be attributed to the following influences:
- The growing culture in Australia of "suing" people;
 - The perception that common law claims are "easy money", with easy access and little proof required in order to succeed;
 - WorkCover's reputation of settling quickly out of court, undertaking limited investigations and dismissing few cases;
 - The experience of others and word of mouth is encouraging more claims;
 - Increased awareness of the option to claim;
 - Plaintiff lawyer advertising;

- The perception that it is easy to fake or exaggerate injuries, which will not be thoroughly investigated or identified by WorkCover due to settlement; and
- Claims being accepted for injuries that occur outside of the workplace.

31. This 'churn' promoted an uneasy relationship between employers, injured workers and WorkCover. Where common law claims were instigated, the willingness of the injured worker to complete a full return to work was negatively affected, as doing so was perceived to affect the veracity of their common law claim. This was frustrating for employers who paid their WorkCover premiums and acted in good faith when endeavouring to facilitate the return of a worker to a safe and healthy workplace.

"Change the laws which are so biased against employers. Reputable employers have an impossible task of abiding by the laws as they are written. WorkCover accepts every claim." – Queensland small business owner, 2012.

"After lengthy exposure to Common Law claims and witnessing the behaviour of claimant solicitors (particularly no-win, no-fee) who appear to give their clients a false/unrealistic sense of what their settlement quantum will be, something needs to be done to reign them in. It is unfortunately rare that at the end of the common law process that either party is satisfied with the outcome. Would definitely support increase in enforcing that workers take more responsibility for their own actions." – Queensland small business owner, 2012.

32. One of the biggest concerns with common law claims for injuries below five per cent DPI was the strain they placed on the relationship between worker and employer. The Queensland scheme is based on the principle of supporting the worker back into the workforce but this is fractured when an employee sues their employer and returns to the same role and does the same job. A common law action in reality all but precludes an injured worker returning to the same workplace where the injury occurred. It has the capacity to sever the relationship between the employer and employee.

33. It is important to note that whilst CCIQ out-rightly opposes any changes to the workers' compensation scheme, if the proposed legislative changes do achieve passage, CCIQ calls for the date of effect to coincide with the date of Royal Assent of this Bill, not backdated to the 2015 State Election (see sections 39-46 discussing retrospectivity).

34. In sum, businesses believe the 2013 Amendment Act restored the appropriate balance between employees and employers. The reforms enhanced the ability of Queensland businesses to compete and continue to offer a significant reprieve for businesses in a difficult trading environment. Ultimately, any departure from the current arrangements

would reinstate unfairness in the system that works to the detriment of the employer, employee, and the overall operation of the scheme, in turn impacting the overall health of Queensland's economy.

3. Statutory adjustment scheme

35. CCIQ is opposed to the proposal to 'establish the ability to provide additional compensation to particular workers impacted by the operation of the common law threshold' or in other words, the introduction of a statutory adjustment scheme.

36. In our view, the amendment contained in the Bill proposes to introduce retrospective application of the relevant legislation for injured workers who could have claimed damages against their employer but for the common law threshold.

37. CCIQ's objections to the government's legislative intention with respect to a backdated scheme are across a number of areas:

- As a matter of principle, the legislation at the time as determined by the Government of the day as determined by the people of Queensland precluded individuals with a DPI of 0- 5 per cent accessing common law;
- Retrospectivity sets a very dangerous precedent for the future;
- From the perspective of administration of a statutory adjustment scheme, it will be inefficient, complex and costly, giving rise to both distortion and high administration costs; and
- The impact of a statutory adjustment scheme on premiums has been significantly underestimated in the explanatory notes of this Bill. CCIQ believes the backdated application of legislation will give rise to higher premiums for the Queensland small business community, eroding profitability, investment, employment, and competitiveness.

38. CCIQ will outline the core aspects of the abovementioned arguments in the forthcoming sections to make the case to the Committee that this policy proposal be re-considered for the reasons detailed below.

The absence of precedent: Retrospectivity

39. Since the introduction of WorkCover, Queensland's workers' compensation scheme has been subject to a number of legislative changes that have broadened the benefits of the scheme for Queensland workers. Such changes have included multiple expansions of the definition of 'worker', increases in statutory maximums for lump sums, and the introduction of new benefits for latent onset conditions.

40. Such changes to the scheme have only occurred on or after the date legislation was introduced, and has not included ex gratia payments or extra compensation to workers prior to the commencement date of changes made to the relevant legislation.
41. As such, the proposed series of amendments contained in this Bill, if passed, would be the first time in Queensland's history to retrospectively benefit workers who have been injured.
42. CCIQ strongly urges the Committee to consider the consequences of including provisions that enact the retrospective application of legislation as it increases the likelihood of influencing the establishment of a precedent for similar schemes in the future.
43. Further to this point, if passed, such changes will create a risk for premium assessment in the future as there is potential for ambiguity and instability about the level of benefits payable due to retrospective changes.
44. CCIQ is of the view that laws that retrospectively change legal obligations are wrought with uncertainty and unreliability; two principles small businesses rely heavily upon for business investment decisions and confidence in the business operating environment more broadly.
45. Governments are, on the whole, encouraged to adopt truly prospective legislation as a central principle of good governance. The need for stability and predictability is fundamental to the operation of the law and indeed to the operation of running a small business in Queensland.
46. Indeed, CCIQ's position with respect to these matters can be summarised by the following quote:

*'...legislating retrospectively 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.'*⁶

Cost impacts

47. Secondly, CCIQ believes the actuarial costs of a proposed adjustment scheme have not been fully considered. CCIQ implores the Committee to make recommendations to the State

⁶ Sampford, C, Louise, J, Blencowe, S & Round, T 2006, Retrospectivity and the rule of law, Oxford University Press as quoted in *Information Paper on Issues with Retrospective Legislation, Stakeholder reference group on workers' compensation matters*, p.7.

Government requiring an actuarial costing be conducted that includes careful considerations of the potential *behavioural changes* the retrospective application of legislation will have upon scheme stakeholders.

48. For example, workers who have been injured may feel encouraged to seek permanent impairment assessment so that they meet the relevant eligibility criteria. Additionally, there may be *assessment creep* as doctors respond to pressure to find greater impairment to increase the amount of compensation payable. Both costs will inevitably increase the costs of reparation, impacting WorkCover's bottom line.
49. Furthermore, the costs to the insurer of administering such a scheme must also be considered by the Committee, as the greater attention afforded to the implementation of an adjustment scheme, the less attention afforded to core claims management moving forward.
50. It is our view that the commitment by the current government to retain the average premium rate at \$1.20 for 2015/16 will be compromised if the adjustment scheme were to go ahead. In this light, CCIQ urges the Committee to ensure proper costings are conducted prior to major policy changes in this area like the one proposed within this Bill.
51. It is for the above reasons that CCIQ opposes the proposed introduction of a statutory adjustment scheme, and strongly urge the Committee to make recommendations to this effect.

4. Access to workers' work history

52. Lastly, CCIQ expresses serious reservations with respect to the proposal to prohibit prospective employers from continuing to access an individual's claims history.
53. The 2013 amendments ensured employers were granted the right to request a prospective worker disclose any pre-existing injury or medical condition that they believe would be aggravated by the duties in the position applied for, or alternatively, employers were conferred the right to request access to a prospective worker's claims history from the Workers' Compensation Regulator.
54. Together, these amendments were of significant benefit to employers as they allowed small businesses to manage risks when employing prospective staff and ensure appropriate safeguards were in place to prevent incidents in the workplace.
55. Other benefits of the policy changes include the capacity for the employer to mitigate potential workplace health and safety issues in the workplace, afford a potential employee procedural fairness by opening up a discussion as to a worker's injury history, deter

vexatious claimants, and increase an employer's duty of care for a worker in agreed instances.

56. While these changes provided prospective employers with more information about a worker, businesses remain subject to a number of stringent requirements that provide adequate protections for a workers' ability to find work, including the *Anti-Discrimination Act 1991*.
57. It is the strong recommendation from CCIQ that this provision remain in the legislation in the interests of consistency and predictability, and their obvious benefits to employers and employee safety.

5. Conclusion

58. As articulated above, prior to the 2013 reforms the Queensland workers' compensation framework was viewed by businesses as heavily skewed towards claimants. As a result of action taken by the previous and former State Governments, Queensland retains a reputation for the lowest workers compensation premiums in Australia.
59. The current workers' compensation system is more balanced and has greatly enhanced Queensland's competitiveness than the one in operation three years ago. It has benefited both employers with improved viability and provided employees with secure employment and inevitably greater opportunities.
60. The Queensland small business community urges the State Government to maintain the real and current fairness in the system to ensure the interests of both the employee and employer are met.
61. Based on feedback from our members, and the arguments contained herein, CCIQ expresses serious reservations regarding the proposed amendments to the Bill currently before the Committee. Overall, these amendments will impact on Queensland's reputation as the best place to do business in Australia, and make it harder for employers to employ.
62. For the above reasons, CCIQ strongly opposes the Bill and urges the Queensland Legislative Assembly to block the *Workers' Compensation and Rehabilitation Amendment Bill 2015*.

RECOMMENDATIONS

Retain threshold: CCIQ strongly urges the State Government to retain current limitations to accessing common law damages more specifically; requiring a worker to have a degree of permanent impairment as a result of their injury greater than 5 per cent, in order for Queensland to continue to deliver the lowest workers compensation premiums in Australia.

Date of effect: CCIQ out-rightly opposes any changes to the workers' compensation scheme, however if the proposed legislative changes do achieve passage, CCIQ calls for the date of effect to coincide with the date of Royal Assent of the Amendment Bill, not backdated to the 2015 State Election.

No statutory adjustment scheme: CCIQ is opposed to the proposal to introduce a statutory adjustment scheme. Any moves to implement an adjustment scheme will create a confusing precedent, impact on premiums, impact on the resources of WorkCover Queensland, and incite behavioural and cultural changes when making a claim for the proposed period.

Retain access to an individual worker's history: CCIQ recommends that this provision remain in the legislation in the interests of the benefits to employers and employee wellbeing and safety. +