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Finance and
Administration Committee

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Finance & Administration Committee
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Dear Ms Jeffrey,

We thank the Finance and Administration Committee for the opportunity to contribute to its Inquiry into the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015.*

JBS Australia Pty Limited (JBS) has held a self-insurer licence in accordance with the *Workers' Compensation and Rehabilitation Act 2003* ("the Act") since 1999.

JBS is Australia's largest meat processor and exporter, supplying the finest grain fed and pasture fed meats to export and domestic customers for over 25 years. In addition, JBS recently acquired the Primo Smallgoods Group. Primo is Australia's largest producer of ham, bacon and deli meats and is now a household brand catering to both the domestic and export markets.

With approximately 12,000 employees spread across our processing plants, feedlots and offices in Australia, JBS exports to more than 50 countries around the world, all the while maintaining the strongest commitment to people and food safety.

The JBS group employs over 5,000 Queenslanders. Although we operate extensively across Australia's eastern seaboard, our company has its origins in Queensland and our corporate head office is in the state. In Queensland, we operate four meat processing plants, a smallgoods manufacturing plant, and two feedlots, as well as other value-adding and ancillary business divisions.

JBS is pleased to make this submission to the Inquiry, in relation certain clauses of the Bill. We realise that some Clauses have consequential relationships to other clauses and therefore our comments should be read broadly in relation to the principles involved.

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015

Clause 2 Commencement

JBS objects to the retrospective nature of the Bill, particularly in relation to the removal of the requirement that a worker must have an assessed degree of impairment of more than 5%.

JBS and other insurers have already assessed their outstanding claims liability, based on actuarial assessment, and this has been factored into provisions. Furthermore, we have set budgets around expected claims costs. These assessments and forecasts are based on the legislation that is in place.

Businesses make decisions based on known factors, including the laws of the day. Businesses should not be expected to operate in an environment of uncertainty where financial obligations can be imposed retrospectively. The fact that this can occur could lead to Queensland being a less attractive state to do business.

The obligation to pay compensation is imposed through Chapter 2 of the Act (Employer's Obligations) and more specifically through section 46, which states:

> *An employer is legally liable for compensation for injury sustained by a worker employed by the employer.*

We note that one of the responsibilities of the Finance and Administration Committee is to consider the application of *fundamental legislative principles* contained in Part 2 of the *Legislative Standards Act 1992* to the Bill. We further note that those *fundamental legislative principles* include the requirement that legislation:

> *... does not adversely affect rights and liberties, or impose obligations, retrospectively*

The Bill seeks to impose retrospective obligations on employers through their legal liabilities.

The *Queensland Legislation Handbook* was published by the Beattie government in 2004 and to our knowledge, has not been superseded. At 7.2.7, it states:

> *Strong argument is required to justify an adverse effect on rights and liberties, or the imposition of obligations, retrospectively.*

We submit that there has not been a strong argument for the retrospective removal of the impairment threshold for accessing common law.

To the writer's knowledge and vast experience in the Qld scheme, such a level of retrospectivity is unprecedented. This will also set a precedent for future governments. For example, when reducing the rights or entitlements of injured workers, a government could stipulate the changes apply to any worker who has not yet made a claim, regardless of the date of injury.

Thus, we submit that the committee make a recommendation that Part 2, division 1 and 2 of the Bill commence from the date of assent of the Bill and not from 31 January 2015.

Clause 6 Amendment of s 237

As stated in the first reading speech by the Honourable Minister on 15 July 2015:

> *Queensland's workers compensation scheme is an important economic driver for our state and jobs and should not be amended without careful consideration.*

It is evident through many public submissions in the past six years that the concerns of employers have not been alleviated with many worrying trends developing or continuing in the Queensland workers' compensation scheme. It is widely accepted amongst employers and insurers that many plaintiff lawyers and claimants have exploited the common law damages scheme beyond its aims.

We submit that the impact of the reforms implemented in 2010 have been minimal, especially in the area of common law claims. Whilst there has been a slow drop in the number of common law claims in the scheme over a couple years, the claim numbers have not returned to the levels prior to 2007/2008.

The following table shows the number of common law claims lodged in the Queensland scheme over the past nine years as shown by the last two years of statistics reports published by the Regulator.

2005/06	3,072
2006/07	3,386
2007/08	3,621
2008/09	4,196
2009/10	4,988
2010/11	4,508
2011/12	4,313
2012/13	4,299
2013/14	4,215

Sources:

1. *2012-13 statistical report published by Q-COMP*
2. *2013-14 statistical report published by the Workers' Compensation Regulator*

The 2010 amendments would have had their full effect by 2013. (Common Law claims are almost always lodged within three years of the date of injury.) The impact of the 2013 amendments will not yet have made a significant impact in 2013-14. The full impact of those amendments would not take effect until 2016-17.

The above data shows that the 2010 amendments have done little to arrest the 62% increase in common law claims lodgements that occurred in the five years to 2009/10.

The number of common law claims lodged per year has remained at historically high levels despite the 2010 amendments.

The intention behind removing the impairment threshold is to restore workers' rights. However, we respectfully submit that the Bill will not assist injured workers to the extent that is intended.

In its 2013 report, the Finance and Administration Committee considered at length the practices of plaintiff lawyers, through 'no-win-no-fee' arrangements and the '50/50 rule'. After considering a large of volume of submissions and evidence, the committee reported:

> *Of further concern to the Committee is the rule arrangements commonly known as '50/50 rule' that are meant to limit the amount that is able to be charged for litigation. Whilst this is meant to be the upper limit of professional fees (including GST) that a law firm may charge, the Committee is concerned that the '50/50 rule' has become a target for some lawyers who may be earning super profits from these types of claims.*

The Legal Services Commission (LSC) provides an example in a fact sheet on its website where an injured worker could receive as little as $17,000 out of a common law settlement of $50,000. (In our experience, injured workers with a degree of impairment up to 5% would not receive large damages settlements or court awards and therefore the LSC example could be considered indicative of the workers affected by the threshold.)

Self-insurers and WorkCover will experience substantial increases in costs as a result of this amendment, which will have negative impacts on the Queensland economy. Yet, the bulk of this additional cost will not reach the intended target - the injured worker. The main beneficiaries of this amendment will be plaintiff lawyers. Hence, our conclusion that the Bill will not assist injured workers to the extent that is intended.

If this amendment is passed, it is likely that the WorkCover fund could again be placed under the financial pressures that led to WorkCover commissioning Deloitte in 2009 to investigate the deteriorating solvency of the Queensland Scheme.

It is difficult to understand how WorkCover will be able to maintain its current premium levels following this amendment. As discussed above, the 2010 amendments did little to arrest the high levels of common law lodgements. We believe that this amendment will lead to an increase in WorkCover's premium rates from 2016-17.

As stated above, self-insurers will inevitably experience an increase in common law claims and cost.

We ask the committee to also consider that many injured workers have underlying or pre-existing conditions that are not work-related and have only been aggravated by employment. At the Public Departmental Briefing on 6 August 2015, a departmental representative, Mr Paul Goldsbrough was asked to give information about the Bill and explained:

> *"The difficulty is that, as people are ageing and so on, they may have other chronic problems as well. While they might have a two per cent or three per cent degree of permanent impairment, in fact they are really quite significantly disabled when that is added on to it. So not having access to common law meant there was no recognition of that."*

This demonstrates that the Bill is based on an expectation that employers should compensate injured workers not only for their work-related injuries but also their pre-existing conditions. We believe that employers should not be liable for the pre-existing "chronic" conditions of their employees and should not be obliged to pay compensation or damages for those conditions.

We therefore submit that the committee consider our views and facts set out above and make a recommendation that the 'greater than 5%' impairment threshold for common law claims not be removed from the Act.

Clause 4, Clause 5 and Clause 7

These clauses provide that the insurer must make a decision within 40 business days in cases where an application for compensation has not yet been made.

In these cases, the application could be made up to 3 years after the alleged injury occurred. Considerable factual and medical investigation could be required in order to decide whether the event occurred and whether the alleged injuries arose from that event.

Under previous legislative provisions, insurers were given up to 3 months to make such decisions. We submit that the Bill be amended so that this timeframe is 3 months and not 40 business days.

Clause 28 Amendment of s 542

It is our view the Workers Compensation Regulator should only have the power to grant extensions of time to lodge review applications within the 3 month period currently stipulated by s 542(1) and s 542(2).

A timeframe of 3 months to lodge an application for review is manifestly adequate for a person to decide whether to apply and to prepare their application.

We therefore submit that the committee make a recommendation to remove clause 28 from the Bill.

Clause 33 Insertion of new s 193A

This new provision seeks to compensate injured workers who were disentitled from seeking common law damages as a result of the 2013 amendments.

The 2013 amendments were made by the previous government, and it was within its parliamentary rights to do so.

The current government was elected with a policy to remove the threshold and we respect that fact. We hope that the committee and government take note of our submissions above in relation to Clause 6 and re-consider the policy in light of the true impact of that clause.

However, we respectfully question whether the government has a mandate to retrospectively compensate persons for the consequences of legislative amendments enacted by a previous government.

The common law threshold has been referred to as "unfair" by the current government. However, we submit that is a subjective judgment based on the policies of the current government. In almost every workers compensation jurisdiction in Australia, a common law threshold exists. Therefore, it is apparent that other state governments do not see it as "unfair".

The detail regarding this proposed s.193A is not yet clear and will apparently be covered by Regulation. However, we have some serious concerns regarding the operation of this proposed section.

All injured workers with a degree of permanent impairment up to 5% have still been entitled to a lump sum under the Act.

It should not be assumed that workers with a degree of permanent impairment up to 5% would have been able to successfully bring a successful common law claim. Only a court of law can decide whether an employer is negligent for causing a worker's injury, and therefore liable to pay damages. Any process that seeks to make this decision outside of the courts, would be upending a century-old common law system.

Sub-section (3) suggests the establishment of a panel. It is our understanding that discussions in the Stakeholder Reference Group (SRG) suggested this panel would consist of lawyers, who would decide whether an employer is negligent for causing a worker's injury, and therefore liable to pay the additional lump sum. This places lawyers in the same position as the courts in deciding common law liability. We would be strongly opposed to such a process. These decisions in the courts are made by experienced judges who, in the main, are settling disagreements between lawyers.

Insurers often negotiate settlements on common law claims on behalf of employers but without an admission of liability. We are concerned that the payment of this proposed additional lump sum could be seen as an admission of liability.

Furthermore, injured workers with an assessed degree of impairment under 20% must make an irrevocable choice as to whether to accept the lump sum or to seek damages through a common law claim. It appears that the Bill will allow injured workers to accept the lump sum as well as the additional lump sum. This contradicts the principle behind the irrevocable choice.

This clause will retrospectively impose financial obligations on employers. Self-insured employers will be burdened by a cost that has not been provided for through budgeting and provisions. The WorkCover fund will be called upon for this unbudgeted cost and this will further deplete the reserves.

Our submissions about the retrospective effect of legislation regarding Clause 2 also apply in relation to Clause 33.

The writer has seen numerous changes to Queensland's workers compensation legislation over 35 years working within the scheme. Some of those changes have granted workers greater access or entitlements to workers compensation and damages, and some of the changes have taken away some of that access and entitlement. However, it has always been the case that the impact of the amendments on workers would depend on whether they were injured before or after the date of enactment of the amendment. It has never been the case that one set of legislative amendments would seek to compensate workers for the effects of a previous set of amendments.

It is also our understanding that the SRG discussed the possibility of claimants' legal costs being charged to the insurer. We question the need for lawyers in this proposed process, unless a dispute regarding negligence arises, in which case, it should be decided by a court. We would be opposed to any requirement for legal fees by insurers to be paid as a result of this amendment.

Furthermore, another long held principle is that the "winner" of a common law court action is generally entitled to have their costs paid by the other party. Therefore, it would be unfair if the insurer was to be automatically required to bear the cost of the "panel".

In view of the above concerns and flaws, we therefore submit that the committee make a recommendation to remove clause 33 from the Bill.

However, if the parliament passes this provision, we ask that an Inquiry be held into the Regulation that will contain the crucial details.

Other Matters

1. Section 549 Who may appeal

If an employer appeals a decision regarding a statutory workers compensation claim, the worker or claimant has the right to be a party to the appeal. (Generally, the respondent to the appeal would be the Workers' Compensation Regulator.)

However, if the appellant is the worker, the employer or insurer do not have a similar right to be a party to the appeal.

This anomaly has caused some confusion amongst the commissioners of the *Queensland Industrial Relations Commission (Q.I.R.C.)*. When employers or self-insurers have sought to be heard in appeals by workers, varying interpretations of their rights have been given.

The most recent demonstration of this confusion was the Q.I.R.C.'s decision of 1 July 2015 in the matter of *Brisbane City Council v Gillow and Simon Blackwood (Workers' Compensation Regulator)* [2015] QIRC 124, which included the following comment:

> *[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.*

We therefore submit that the committee take this opportunity to include in the Bill 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.

2. Behaviour and Practices of Plaintiff Lawyers

The finance and Administration Committee conducted an *Inquiry into Qld's Workers' Compensation Scheme* and reported on its findings in May 2013.

As stated above, the committee expressed serious concerns about the behaviour and practices of lawyers.

The report included the following recommendation:

> ***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 urge the committee to take this opportunity to recommend to the government that an Inquiry be held into various practices of the legal profession, including 'no-win-no-fee' arrangements, the '50/50 rule' and the speculative nature of many claims.

JBS would welcome any opportunity to provide further information in support of this submission. We also wish to participate in the public hearing to elaborate on our submission and answer any questions of the committee.

Yours Sincerely,

[redacted]

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