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Finance and
Administration Committee

Queensland Council of Unions

QCU Submission regarding the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015 (the Bill)

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The explanatory note for the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015* (the Bill) identifies five objectives:

- remove the current limitation on the entitlement to seek damages that requires a worker to have a degree of permanent impairment as a result of the injury greater than 5% to access common law since the date of the Queensland State election;
- establish the ability to provide additional compensation to particular workers impacted by the operation of the common law threshold, between 15 October 2013 and 31 January 2015;
- introduce provisions for firefighters diagnosed with one of 12 specified diseases that will deem their injury to be work related if they meet the required qualifying period of active firefighting service;
- remove the entitlement prospective employers have to obtain a copy of a prospective worker's compensation claims history from the Workers' Compensation Regulator; and
- clarify certain procedural aspects of the claims process and reduce regulatory burden through a number of minor miscellaneous amendments.

In the QCU submission there are two other sections of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) that were introduced by the Newman Government that should also be removed. Sections 571B and 571C of the Act should be removed in addition to section 571D as is proposed by clause 30 of the Bill. Those sections place unnecessary and potentially catastrophic obligations on prospective employees who may be injured at a later stage. The entire division, including sections 571B, 571C and 571D that were introduced in 2013 requires removal in our submission. Other aspects of the Bill, in particular provisions pertaining to firefighters diagnosed with one of 12 specified diseases, are supported by the Queensland Council of Unions.

Damages

The report of the Finance and Administration Committee dated 23 May 2013 outlines the history of workers compensation in Queensland in considerable detail. Included in that recent history was the work done by the previous Queensland Governments to ensure that common law claims did not cause a financial blow out to the scheme. There is little doubt that this action by the then Queensland Government was instrumental in maintaining the Queensland workers compensation system as the fairest and most financially viable scheme in Australia.

The Newman Government undertook a review of the workers compensation system in Queensland. Whilst this process was commenced under the previous government, the review being undertaken by the Newman Government was viewed with suspicion by the union movement. A number of fears were held by the Queensland Council of Union, affiliated unions and other community and professional groups in relation to the underlying objective of the review. Those concerns included the possibility of placing restrictions on the ability of employees to take common law claims for damages against negligent employers, despite there being no justification, either financially or for any other reason.

The fact that such concerns were held by the union movement was referenced by the parliamentary committee that oversaw the review. Michael Crandon MP, the then Chair of the Finance and Administration Committee made the following comments in the forward to the Report released 23 May 2013:

> Throughout the inquiry, the Committee heard allegations that 'the government was going to do this' or 'the government was going to do that' with regard to the Workers' Compensation Scheme. I can assure everyone that it was a completely open and transparent process that the Committee went through in order to come to what we consider to be the right conclusions and recommendations for the Parliament to consider.

It was indeed refreshing that the committee, which was dominated by LNP members, had no predetermined position in relation to this matter. That committee in fact made the following comments based on the evidence that was before it:

> The Committee believes that the extent of the 2010 amendments in addressing the increase in common law claims is yet to be fully realised as common law claims can be lodged up to three years from date of injury. As such, the Committee believes that **there should be no changes to the current system**. The Committee recognises that imposing thresholds on accessing common law rights would improperly remove rights from one group of citizens that are available to other citizens. Imposing thresholds on WPI would break the nexus between workers' compensation and the ability of injured workers to perform their pre-injury employment. The Committee recommends **retention of the existing provisions relating to access to common law**. (emphasis added)

No matter how refreshing the attitude adopted by the Finance and Administration Committee was in 2013, it would appear that the assessment made by the union movement and others concerned about the restriction of common law rights, was more accurate than that of the Committee. The reality was that the Newman Government was hell-bent on the restriction of common law rights notwithstanding the evidence provided against such a restriction. The eventual decision to restrict common law rights defied logic and the weight of evidence before the Committee that was charged with the review. The decision to restrict common law claims was injurious to the largest sector of the community, the workforce, without any appreciable benefit to anyone else.

The arguments of those opposed to the restriction on common law right for workers are articulated clearly in the quote from the committee in 2013. In essence those arguments can be summarised as follows:

- the Queensland scheme was under no financial threat from common law damages or anything else;
- premiums in Queensland were comparatively low (if not the lowest in Australia) despite having access to common law damages;
- It removes a basic right to employees that is available to rest of the community;
- It is counter-productive to promoting safe workplaces;
- Any threshold would, regardless of how small it sounded in percentage terms, remove large number of claims; and
- Many workers who sustain injuries under such a threshold will never work in their chosen occupation again.

Furthermore, the Palaszczuk Government has a mandate to restore these important rights to the Queensland workforce. Unlike the Newman Government, where no such announcement was made prior to the 2012 state election, as Opposition Leader Ms Palaszczuk made the unequivocal commitment to restore this right.

Pre-employment

The opposition to the ability of employers to access claims histories is that it encourages discrimination on the basis of impairment, or even perceived impairment. Workers who have been injured at work have suffered considerable pain, emotional distress, financial hardship or a combination of all of these misfortunes. The capacity of employers to exclude potential employees because of their having a previous workers compensation claim compounds an already unfortunate situation. This is particularly the case where the injury was caused by the negligence of another employer.

Part 2 of Chapter 12 of the Act concerns itself with fraud and false and misleading statements. These provisions were sufficient to deal with the type of conduct that is now also sought to be addressed by sections 571B and 571C. The introduction of these provisions in 2013 was unnecessary and ill conceived. These provisions add a further level of complexity to an already complex set of obligations in the pre-employment area. The division containing sections 571B and 571C are particularly concerning in that it:

1. it conflates obligations that should be dealt with in terms of workplace health and safety legislation with that of workers compensation legislation; and
2. potentially encourages employers to contravene anti-discrimination legislation.

The interaction between workers compensation, workplace health and safety and anti-discrimination legislation is complex and not assisted by the introduction of amendments made in 2013 by the Newman Government.

The purpose of a prospective employee disclosing information concerning illness or injury to a prospective employer can only be for that employer to provide a safe system of work for the employee in question. These obligations are rightly addressed in terms of the *Workplace Health and Safety Act 2011*. As members of the Finance and Administration Committee would recall, this Act reflects nationally harmonised legislation that provides for consistent outcomes for employers and employees throughout almost all jurisdictions in Australia. For this reason additional workplace health and safety obligations should not be included in any Act that provides the basis for a workers compensation scheme.

For an employer to use information for any other purpose would be to discriminate on the basis of an impairment contrary to section 7 (h) of the *Anti-Discrimination Act 1991* (ADA). In terms of the ADA, a prospective employer is obliged, amongst other things, to consider whether there is a reasonable adjustment that could be made for an employee or whether the impairment would prevent the potential employee performing the genuine occupational requirement of the position for which they apply. Section 571D encourages an employer to seek information concerning an employee that would most likely be used for a discriminatory reason. Sections 571B and 571C place additional and unnecessary obligations on employees as well as adding a level of complexity to this area of the law.

As far as we are aware, there has been no use of the provisions and no case law can be found from searches on these sections of the Act. This is perhaps of little surprise, given that advice provided to employers was to use caution with respect to these provisions for the reasons outlined above. In addition to the confusion caused by these provisions, the absence of any case law surrounding them tends to indicate that they are also superfluous or unnecessary.

There is little doubt that the provisions of the division containing sections 571B, 571C and 571D are intended to restrict the ability of injured workers to make claims and access rights at common law. In light of the fact that the benefits to employers are dubious in terms of the confusion they cause, it is our submission that there is no justification for these provision remaining in the Act.

Presumptive legislation

The Queensland Council of Unions is fully supportive of presumptive legislation for compensation of occupational cancers in firefighters. The Tasmanian, Western Australian, South Australian and the Australian Governments have all introduced legislation which creates a legal presumption that if a firefighter is diagnosed with certain types of cancers, then that cancer resulted from their employment as a firefighter.

Firefighters' exposure to carcinogens at fire scenes has been the subject of ongoing, worldwide research and the link between certain cancers and firefighting is clear. The legislation is essential since cancer is a disease which normally has very long latency and commonly results from small, cumulative exposures. Currently, a firefighter who is seeking workers' compensation for cancer need to provide evidence of their exposure going back a decade or more. This is not only extremely onerous, but causes additional stress for a person who is dealing with a cancer diagnosis.