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05 August 2015

## SUBMISSION

### ***Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015.***

This submission is made by the AWXGroup on behalf of its business we have a concern regarding the impact of the proposed amendments on their businesses and its functionality.

## **ABOUT AWXGroup**

AWXGroup is a national portfolio of businesses engaged in the construction, mining, civil, health, meat, manufacturing, agribusiness and hospitality industries that draw on the core competency of workforce procurement, creation, development, management and administration. The individual businesses draw on one; a combination of; or, all of the competencies to deliver a service offering that challenges the way human capital is engaged to improve productivity and labour efficiency. The combination of core competencies also delivers a uniqueness and competitive advantage. The group has a broader strategy of diversification with absolute focus and history of being first movers in chosen fields

## **PROPOSED WORKERS COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT BILL**

### **Proposed Policy objectives Summary of Response:**

The Bill implements a number of policy proposals made by the current Queensland Government in its pre-election policy document

- 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;
  - **Do not support this intended change**
- 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; Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015



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- **Support intended change**
- 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; and
- **Support intended change**

## **Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015**

### **5% Common Law Claims**

- 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;
  - **Do not support this intended change**
- To substantiate;
  - The removal of the 5% threshold for access to common law is likely to result in a substantial increase in the number of damages claims brought in Queensland by injured workers against their employers.
  - This will disadvantage business and will drive costs to increase and will support the new "Industry – Common Law".
  - Changes made in 2013 were beneficial to business and must remain at status quo.
  - If any change is to be made it should be to close the loop pole in PIPA Claims
- 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; Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015
  - **Support intended change**



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- Businesses need this uninsured element covered for business continuity

#### 5% Common Law Claims – Current Status

Upon the 15<sup>th</sup> October 2013 any worker whom received a permanent impairment as a result of an incident occurred in the workplace that was assessed as 0-5% permanent impairment – this **Employee** can not enact a common law claim against their **Direct Employer**.

**Section 237 of the Workers' Compensation and Rehabilitation Act 2003** was amended to establish a 5% threshold for common law claims.

This was a move that made Queensland business very pleased with changes made due to the impact of "eliminating" around 49% of common law claimable action against the **Direct Employer**.

The legal issue arises that there is a loop-pole for action for **Employees** under the Law Reform Act or PIPA Claim.

The Employee will serve **Controller of the Workplace (Other than their Employer) any business who operates in Queensland whom engages/interacts with any third parties** with a **The Law Reform Act (PIPA Claims)** s.6C.

The **Controller of the Workplace (Other than their Employer)** traditionally had the right to seek contribution or indemnity back from the direct employer as follows:

- pursuant to the *Law Reform Act*; and/or
- pursuant to an obligation to insure clause; and/or
- implied term in a contract.

Prior to 15 October 2013 this **Contributor Notice** issued to the **Direct Employer** would be sent to **Workcover Queensland** to commence actions to defend the claim and take part as the **Direct Employer** insurance on this matter.

Effective result of the changes to the **Workers' Compensation and Rehabilitation Act 2003** is the **creation of Uninsured Risk/Losses** for **any business who operates in Queensland whom engages/interacts with any third parties**;

- Contractors whom use Subcontractors for any type of works



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- Group Training Organisations
- Labour Hire Organisations
- Apprentice Organisations

The modern organisation of labour in this country means that there is a large proportion of work that is carried out under these arrangements.

The traditional case is therefore compounded in that the **Direct Employer** will not be able to be sued as the claimant will have no entitlement to sue, not establishing the threshold, and will institute an action solely against the **Controller of the Workplace (Other than their Employer)**.

By virtue of the amendment therefore as a result of the threshold, there will be no right of contribution back for an injury that a **Controller of the Workplace (Other than their Employer)** is sued for against the employer for an injury of 5% or less by **Workcover Queensland Insurance Policy**.

The implication is that the **any business who operates in Queensland whom engages/interacts with any third parties does not have workers' compensation insurance for injuries assessed at 5% and less (Uninsured Risk and Losses)**.

The **Public and Products Liability Policy** contains exclusions for employment liability and contractual liability.

The usual way that any **business who operates in Queensland whom engages/interacts with any third parties** are brought back in when a **Controller of the Workplace (Other than their Employer)** sues, is via an indemnity clause and/or an obligation to insure clause, if such clauses and obligations stand up to rigorous judicial scrutiny.

It would appear that the **broad form policy of insurance will not cover the company (Uninsured Risk/Losses)**.

### **Conclusions**

**Any business that operates in Queensland whom engages/interacts with any third parties** is therefore left in the invidious position that its labour force has not been covered since October of last year for any **Third Party Claims** alleging a contribution or indemnity from the **Direct Employer** for injuries under the threshold.

That of course is an **unacceptable position** and the purpose of this correspondence is to identify that and to suggest some avenues that need to be looked at to resolve this complex issue.



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**Options to Resolve this Uninsured Risk/Losses to Queensland Businesses:**

- Passing an Amendment Act to the **Workers' Compensation and Rehabilitation Act 2003** to **retrospectively alter the Section 237 back to its original status as posed to cover the current uninsured business but then cease order – which would mean uninsured losses would be Insured by Workcover Queensland**
- **Working through the current Law Reform Act and aligning the 5% Threshold**
- Then **sequentially pass both Acts to include a 5% Threshold** (not dissimilar to NSW and Victoria experiences and actions as a result of similar Workers Compensation Act changes).

**Current Business Options:**

- going to market to have Insurers create a new type of insurance policy to cover the implications of the 5% thresholds and uninsured risk.
- alteration of the corporate structure such that if:
  - the insurance is not available; and/or
  - the insurance is prohibitively expensive; and/or
  - the insurance is not obtained; and/or
  - the clauses stand up to judicial scrutiny,

the company's assets or cash reserves are to be protected if sued and there is no insurance in place (this, of course, would not create ongoing strong commercial relationships) and raises concerns as to the directors' personal responsibility.

- negotiate or raise with the **Controller of the Workplace (Other than their Employer)** to have removed the indemnity clause and/or obligation to insure clause (unlikely in the current commercial environment, as most of those clauses required it).

**Access to workers compensation histories**



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- Remove the entitlement prospective employers have to obtain a copy of a prospective worker's compensation claims history from the Workers' Compensation Regulator; and
  - **Do not support this intended change**
- Access to workers compensation histories
  - From 29 October 2013, prospective workers, upon receiving a written request by a prospective employer, are required to disclose all pre-existing injuries of which they are aware could reasonably be aggravated by performing the duties of the position they applied for.
    - This law is to improve the safety of a worker by ensuring they are not placed at risk by previous injuries – by revoking this you will be placing workers at risk.

#### **Workers' Compensation and Rehabilitation (Protecting Firefighters) Amendment Bill 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; and
  - Support intended change

#### **SUMMARY**

AWXGroup is of the firm belief that the existing legislation had good intention for simplicity and costs reductions for business.

We are concerned that the new legislation is not of this mode and will return our state to increased Common Law activity and fuel the new Industry in Queensland – "Common Law".

This is of course a negative at any time, but made all the more so as many of our members have gone through or are going through significant restructures and redundancies to deal with the current industry downturn.

Workplace Health and Safety and Return to Work is absolute paramount to AWXGroup.

In summary our response is as follows:



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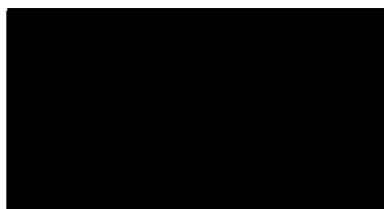
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  - **Support intended change**
- introduce provisions for firefighters diagnosed with one of 12 specified diseases that will deem their injury to be work related if they meet the required qualifying period of active firefighting service; and
  - **Support intended change**

Regards,



**TOM STRACHAN**

CEO

AWXGroup



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