



# **Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016**

**Report No. 17, 55th Parliament**

**Education, Tourism, Innovation and Small Business Committee  
August 2016**



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## Education, Tourism, Innovation and Small Business Committee

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## Abbreviations and glossary

the Act	the <i>Workers' Compensation and Rehabilitation Act 2003</i>
ALA	Australian Lawyers Alliance
ASIEQ	Association of Self-Insured Employers Queensland
the Byrne Judgment	<i>Byrne v People Resourcing (Qld) Pty Ltd &amp; Anor</i> [2014] QSC 269
CCIQ	Chamber of Commerce and Industry Queensland
the committee	Education, Tourism, Innovation and Small Business Committee
the department	Office of Industrial Relations, Queensland Treasury
HIA	Housing Industry Association
MBQ	Master Builders Queensland
NDIS	National Disability Insurance Scheme
NIIS	National Injury Insurance Scheme
NIIS (Qld) Agency	National Injury Insurance Scheme Queensland Agency established by the <i>National Injury Insurance Scheme (Queensland) Act 2016</i> to administer the NIIS for motor vehicle accidents
PAYG	Pay As You Go income tax instalments
QCAT	Queensland Civil and Administrative Tribunal
QCU	Queensland Council of Unions
QNU	Queensland Nurses' Union
QOTE	Queensland Ordinary Times Earnings
QTA	Queensland Trucking Association
RECOVER	RECOVER Injury Research Centre
the Regulation	Workers' Compensation and Rehabilitation Regulation 2003
the Regulator	Workers' Compensation Regulator
UFUQ	United Firefighters Union Queensland
WorkCover	WorkCover Queensland



## Chair's foreword

On behalf of the Education, Tourism, Innovation and Small Business Committee of the 55<sup>th</sup> Parliament of Queensland, I present this report on the committee's inquiry into the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016.

The Bill was introduced into the Legislative Assembly by the Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs on 14 June 2016. The committee was required to report to the Legislative Assembly by 19 August 2016.

In considering the Bill, the committee's task was to consider the policy to be given effect by the Bill, and whether the Bill has sufficient regard to the fundamental legislative principles in the *Legislative Standards Act 1992*. The fundamental legislative principles include whether legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

This report summarises the committee's examination of the Bill, including the views expressed in submissions and by witnesses at the committee's public hearings, and information provided by Queensland Treasury.

On behalf of the committee, I thank those who made written submissions about the issues in this inquiry, and those who briefed the committee or participated in its public hearings.

I commend the report to the House.



Scott Stewart MP  
**Chair**



## **Recommendations**

The committee was unable to reach a majority decision as to whether the Bill be passed. The committee did, however, agree unanimously with the recommendations outlined in this report.

### **Recommendation 1** **17**

The committee recommends that Queensland Treasury consult with affected stakeholders, in particular, insurers, employers, unions and disability service providers and representative groups, on the drafting of the regulations to prescribe the assessment criteria for re-entry into the National Injury Insurance Scheme for workplace accidents after an injured person has received common law damages.

### **Recommendation 2** **18**

The committee recommends that a parliamentary portfolio committee be given ongoing oversight responsibility for the National Injury Insurance Scheme for workplace accidents, including to review and report to Parliament on the scheme's operations on an annual basis for the first five years after the scheme is established.

### **Recommendation 3** **21**

The committee recommends that Queensland Treasury and WorkCover Queensland work with representatives of principal contractors and host employers to resolve issues arising from the exclusion of those entities from the WorkCover scheme and extend it to give principal contractors and host employers the option of participating in the scheme, taking out a private insurance policy or both.



## 1 Introduction

### 1.1 Role of the committee

The Education, Tourism, Innovation and Small Business Committee (the committee) was established as a portfolio committee by resolution of the Legislative Assembly on 27 March 2015. The committee consists of three government and three non-government members. The committee's areas of portfolio responsibility are:

- education
- tourism and major events
- innovation
- science, and
- the digital economy and small business.<sup>1</sup>

The committee is responsible for examining each Bill in its portfolio areas to consider:

- the policy to be given effect by the legislation, and
- the application of the fundamental legislative principles (FLPs).<sup>2</sup>

Further information about the work of the committee can be found on its website [here](#).

### 1.2 Referral and committee's process

The Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016 (the Bill) was referred to the committee on 16 June 2016, and the committee was required to report to the Legislative Assembly by 19 August 2016.

During its examination of the Bill, the committee:

- invited submissions from stakeholders and the public. A list of the 17 submissions received by the committee is at **Appendix A**
- held a public briefing on 22 June 2016 attended by officers from the Office of Industrial Relations, Queensland Treasury (the department). A list of the officers who appeared at the briefing is at **Appendix B**, and
- held public hearings on 18 July 2016 and 4 August 2016 to hear from invited witnesses. A list of the witnesses who appeared at the hearings is at **Appendix B**.

Copies of the material published in relation to this inquiry, including transcripts of the public briefing and public hearings and submissions, are available on the committee's website.

### 1.3 Outcome of committee consideration

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed. The committee considered the Bill, information provided by the department and the information and views expressed in submissions.

The committee was unable to reach a majority decision as to whether the Bill be passed. The committee did, however, agree unanimously with the recommendations outlined in this report.

This report summarises the committee's examination of the Bill, including the views expressed in submissions and by witnesses at the public hearings, and the department's response.

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1 *Parliament of Queensland Act 2001*, section 88 and *Standing Rules and Orders of the Legislative Assembly*, effective from 31 August 2004, Standing Order 194 and Schedule 6

2 *Parliament of Queensland Act 2001*, section 93



## 2 Background to the Bill

### 2.1 Workers' compensation scheme in Queensland

Queensland operates a no-fault, short-tailed workers' compensation scheme under the *Workers' Compensation and Rehabilitation Act 2003* (the Act) and the *Workers' Compensation and Rehabilitation Regulation 2003* (the Regulation).

Under the workers' compensation scheme, an employer must insure or self-insure against work related injury sustained by a worker of the employer where work is a significant contributing factor to the injury. The scheme is administered by:

- **Queensland Treasury** – implements the government's policy and legislative agenda
- **Workers' Compensation Regulator** – regulates insurers, provides legal and medical dispute resolution, provides rehabilitation advisory services and promotes education about the scheme
- **WorkCover Queensland (WorkCover)** – a government owned statutory body which operates as a commercial enterprise – sole commercial provider of workers' compensation insurance and claims. WorkCover is fully self-funded by premiums paid by employers and investment returns - the current average premium is \$1.20 per \$100 paid in wages<sup>3</sup>, and
- **Self-insurers** – there are 28 self-insurers which have opted to take on responsibility and liability to insure their own workers for workers' compensation.

The workers' compensation scheme provides that workers who are injured in workplace accidents are entitled to statutory compensation, which includes weekly income replacement benefits, while the worker is unable to work, as well as cover for medical, rehabilitation and other expenses.<sup>4</sup> Under the workers' compensation scheme, entitlements or benefits cease when:

- incapacity due to work-related injury stops, or
- the period for benefits paid to an injured worker reaches the maximum time of five years or weekly benefits reach the maximum amount (\$314,920 as at 1 July 2015).

In addition, if a worker suffers a permanent impairment from the injury and their employer was at-fault, they may be entitled to a lump sum payment under common law. Other benefits and compensation, under the scheme, cease once a lump sum payment is made.<sup>5</sup>

The workers' compensation scheme deals with approximately 80,000 statutory claims and 2,400 common law claims per annum.<sup>6</sup>

### 2.2 National Injury Insurance Scheme

#### 2.2.1 Productivity Commission report

The establishment and implementation of a National Injury Insurance Scheme (NIIS) has its origins in the findings of the Productivity Commission's *Disability Care and Support* report.<sup>7</sup> The Productivity Commission reviewed the costs and benefits of replacing the current system of disability services in Australia with new arrangements which would ensure all Australians with significant and ongoing disabilities were delivered essential care and support.

The Productivity Commission uncovered a poor, inequitable and under-funded disability support system and also highlighted the inability of the current system to adequately support those individuals who were catastrophically injured in accidents. In particular, the Productivity Commission found that

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3 Tony Hawkins, Chief Executive Officer, WorkCover Queensland, *Public Hearing Transcript*, 4 August 2016, p.2

4 Department of Justice and Attorney-General, *The Queensland Workers' Compensation Scheme: Ensuring Sustainability and Fairness – Discussion Paper*, February 2010, p.7

5 Department of Justice and Attorney-General, *The Queensland Workers' Compensation Scheme: Ensuring Sustainability and Fairness – Discussion Paper*, February 2010, p.7

6 Tony Hawkins, Chief Executive Officer, WorkCover Queensland, *Public Hearing Transcript*, 4 August 2016, p.1

7 Productivity Commission, *Productivity Commission Inquiry Report No.54 – Disability Care and Support*, 31 July 2011

existing common law based injury insurance schemes were less effective and efficient than no-fault schemes in delivering care and support, particularly to catastrophically injured people.

Accordingly, the Productivity Commission recommended:

- a **National Disability Insurance Scheme (NDIS)** – similar to Medicare, in that all Australians with a significant and ongoing disability would get long-term care and support, and
- a **National Injury Insurance Scheme** – to cover the lifetime care and support needs of people who sustain a catastrophic injury from an accident, regardless of fault.<sup>8</sup>

The NIIS is intended to establish no-fault lifetime, treatment care and support arrangements for persons who sustain serious personal injuries across four streams: motor vehicle accidents; workplace accidents; medical treatment injury and general accidents. The NIIS for motor vehicle accidents was established in Queensland under the *National Injury Insurance Scheme (Queensland) Act 2016*.<sup>9</sup>

Under the *Heads of Agreement between the Commonwealth and Queensland Governments on the NDIS*, signed in May 2013, Queensland agreed to develop and implement national minimum benchmarks for workplace accidents by 1 July 2016.

The Heads of Agreement stated that if agreed minimum national benchmarks (or in the absence of agreements to benchmarks, equivalent lifetime care and support arrangements to the NSW workcover scheme) are not implemented by 1 July 2016, Queensland will be responsible for 100 per cent of the cost of NDIS participants who are in the NDIS because they are not covered by an injury insurance scheme that meets these requirements.<sup>10</sup>

### 2.2.2 National minimum benchmarks

In March 2015, the Australian Government published the *National Injury Insurance Scheme – Workplace Accidents - Consultation Regulation Impact Statement* which included draft national minimum benchmarks for workplace accidents.

The minimum benchmarks state the scheme's eligibility rules should, at a minimum, include people who suffer the following work-related catastrophic traumatic injuries: spinal cord injury; traumatic brain injury; multiple amputations; burns and permanent blindness.

Each jurisdiction is also required to cover catastrophic injuries which are considered work-related, including work-related travel and onsite recess breaks. However, a scheme does not need to cover injuries sustained during journeys to and from work or on offsite recess breaks. The minimum benchmarks also do not require coverage of people who are catastrophically injured while engaging in serious or wilful misconduct.<sup>11</sup>

The minimum level of entitlements are consistent with those for motor vehicle accidents, namely a person's reasonable and necessary needs for the following treatments and services:

Medical treatment (including pharmaceutical)	Domestic assistance
Dental treatment	Aids and appliances
Rehabilitation	Artificial members, eyes and teeth
Ambulance transportation	Education and vocational training, and
Respite care	Home modification, transport and workplace modification
Attendant care services	

8 Productivity Commission, *Productivity Commission Inquiry Report No.54 – Disability Care and Support* – Plain English version, 31 July 2011, p.2-3

9 Education, Tourism, Innovation and Small Business Committee, *Report No. 13 – National Injury Insurance Scheme (Queensland) Bill 2016*, May 2016

10 Heads of Agreement between the Commonwealth and Queensland Governments on the National Disability Insurance Scheme, 8 May 2013, p.7

11 Australian Government, *National Injury Insurance Scheme – Workplace Accidents, Consultation Regulation Impact Statement*, March 2015, Appendix A

### 3 Examination of the Bill

#### 3.1 Policy objectives of the Bill

The Bill's policy objectives are to amend the *Workers' Compensation and Rehabilitation Act 2003* (the Act) and the *Workers' Compensation and Rehabilitation Regulation 2003* (the Regulation):

- to ensure that workers who suffer serious personal injuries as a result of workplace accidents in Queensland, receive necessary and reasonable treatment, care and support payments, regardless of fault – the National Injury Insurance Scheme (NIIS) for workplace accidents
- to provide self-insurers with greater flexibility and choice
- in light of the Court judgments in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269 (the Byrne Judgment) and *Simon Blackwood v Colin Hinder*, and
- to prevent financial hardship for injured workers by providing for an alternative indexation method for statutory compensation and common law damages entitlements.

#### 3.2 Consultation on the Bill

The Explanatory Notes state that “There was extensive public consultation on the NIIS through the Productivity Commission 2011 inquiry”.

In addition, the Explanatory Notes state that a Stakeholder Reference Group was established which considered options and issues for implementing the NIIS for workplace accidents. The Explanatory Notes state that “the deliberations of the group have informed the amendments implementing the NIIS in the Act”.<sup>12</sup>

The committee notes that the Stakeholder Reference Group included representatives from legal associations, employer groups, unions, insurers and the Motor Accident Insurance Commissioner.

During the committee's inquiry, a number of stakeholders raised concerns about the lack of consultation on the amendments relating to the reversal of the Byrne Judgment – see section 3.16.

At the public hearing, Master Builders Queensland (MBQ) stated that “We have not been consulted on the Bill, on the drafting of the wording or on the Bill itself, until it was posted on the parliamentary website”.<sup>13</sup> The Housing Industry Association (HIA) stated that there had been consultation on the NIIS aspects of the Bill, but concurred with MBQ that there had been “absolutely none on the Byrne issue”.<sup>14</sup>

#### Committee comment

The committee acknowledges the concerns raised by submitters about the lack of consultation undertaken by the Government on the amendments to reverse the Byrne Judgment, particularly given the potentially significant impacts the amendments may have on principal contractors, host employers, subcontractors and workers.

#### 3.3 National Injury Insurance Scheme for workplace accidents

The Bill amends the current workers' compensation scheme to incorporate a NIIS to ensure that workers who sustain serious personal injury resulting from workplace accidents receive necessary and reasonable treatment, care and support.<sup>15</sup>

In her explanatory speech, the Minister stated that:

*No-fault statutory benefits are currently provided to workers who are catastrophically injured for a maximum period of between two and five years. If injured workers can*

<sup>12</sup> Explanatory Notes, p.6

<sup>13</sup> Corlia Roos, Director, Construction Policy, Master Builders Queensland (MBQ), *Public Hearing Transcript*, 18 July 2016, p.17

<sup>14</sup> Warwick Temby, Executive Director, Housing Industry Association (HIA), *Public Hearing Transcript*, 18 July 2016, p.17

<sup>15</sup> Clauses 3 and 30 amend section 5 of, and insert new Chapter 4A into, the *Workers Compensation and Rehabilitation Act 2003* (the Act)

*establish their employer was at fault in causing their injury, they also have access to lump sum common law damages for future care and support, loss of future earnings and pain and suffering. While the workers who have catastrophic work related injuries in Queensland can receive their full statutory and common law workers compensation entitlements under the current scheme structure, current statutory no-fault entitlements are not guaranteed to meet their treatment, care and support needs for their lifetimes.*<sup>16</sup>

The Explanatory Notes state:

*The provisions in this chapter [new Chapter 4A of the Act] are consistent with the arrangements for the National Injury Insurance Scheme, Queensland for motor vehicle accidents under the National Injury Insurance Scheme (Queensland) Act 2016, subject to jurisdictional differences between the workers' compensation and motor accident schemes and the national minimum benchmarks for workplace accidents.*<sup>17</sup>

Submitters indicated broad support for the implementation of a NIIS for workplace accidents in Queensland.<sup>18</sup> The United Firefighters Union Queensland (UFUQ) stated that the NIIS for workplace accidents is in the public interest and would assist those workers who need to rely on the system for long-term support.<sup>19</sup> RECOVER Injury Research Centre (RECOVER) considered that the introduction of a NIIS for workplace accidents "... is a major and important reform which will improve health outcomes for seriously injured people in Queensland".<sup>20</sup>

There were differing views among submitters, however, about which model should be adopted for the NIIS for workplace accidents – see section 3.14. Submitters also expressed views about specific elements of the proposed NIIS which are outlined in this report.

A diagram outlining the proposed model for the NIIS for workplace accidents is at **Appendix C**.

### **3.4 Proposed scope of the scheme**

#### *3.4.1 Injuries to be covered*

The Bill provides that the NIIS would apply to serious personal injuries sustained by workers on or after 1 July 2016.<sup>21</sup> The term *serious personal injury* is defined as:

- a permanent spinal cord injury resulting in a permanent neurological deficit
- a traumatic brain injury resulting in a permanent impairment of cognitive physical or psychosocial function
- a forequarter amputation or shoulder disarticulation amputation
- the amputation of a leg through or above the femur
- the amputation of more than one limb or parts of different limbs
- a permanent injury to the brachial plexus resulting in an impairment equivalent to a shoulder disarticulation amputation
- a full thickness burn to all or part of the body
- an inhalation burn resulting in a permanent respiratory impairment, or
- permanent blindness caused by trauma.<sup>22</sup>

The term *worker* is defined at section 11 of the Act as a person who works under a contract and is an employee for the purpose of assessment for pay as you go (PAYG) income tax instalments.

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16 Hon. Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs (the Minister), *Explanatory Speech*, Hansard, 14 June 2016, pp.2260-2261

17 Explanatory Notes, p.13

18 Submissions 2, 3, 6, 8, 13 and 16

19 United Firefighters Union Queensland (UFUQ), submission 8, p.1

20 RECOVER Injury Research Centre (RECOVER), submission 1, p.1

21 Clause 46 inserts new section 724 into the Act

22 Clause 47 amends schedule 6 of the Act to insert the definition of *serious personal injury*

### 3.4.2 Proposed exclusions

The NIIS would not apply to serious personal injuries sustained while a worker:

- is temporarily absent from the place of employment during an ordinary recess, or
- is on a journey between: their home and place of employment; their home or place of employment and a trade, technical or other training school; their home or place of employment and a place to obtain medical or hospital advice, attention or treatment, for rehabilitation, for an examination or to receive payment of compensation; or their place of employment with one employer and place of employment with another employer.<sup>23</sup>

In addition, the NIIS for workplace accidents would not apply to an injury caused by the worker's serious and wilful misconduct.<sup>24</sup>

### 3.4.3 Submitters' views and department's response

RECOVER, Australian Lawyers Alliance (ALA) and Young People in Nursing Homes National Alliance (YPINH Alliance)<sup>25</sup> opposed the proposed exclusions from the NIIS for the following reasons:

- the proposed exclusions are inconsistent with the NIIS for motor vehicle accidents and would create two classes of injured people within a scheme that will be administered by the NIIS (Qld) Agency<sup>26</sup>
- the NIIS should include as many injured workers as possible, as exclusions undermine the integrity of the no-fault system<sup>27</sup>
- if injured workers are excluded from the NIIS, they enter into the NDIS and any cost would still be recovered from the Queensland Government<sup>28</sup>
- removing the exclusions would only add one or two injured workers to the NIIS every couple of years and would not place a heavy financial burden on the workers' compensation scheme,<sup>29</sup> and
- the definition of worker in the Act would mean that people who routinely undertake activities in workplaces, such as volunteers, people on work experience, work trials or work for the dole programs, and others who have a different corporate status would not receive lifetime treatment, care and support.<sup>30</sup>

Vision Australia recommended that the definition of permanent blindness caused by trauma should be based on a person's functional vision after trauma, rather than being measured solely by the legal definition of permanent blindness.<sup>31</sup>

In response, the department stated:

*The exclusion of journey claims, ordinary recess claims, injuries caused by serious and wilful misconduct, and persons who are not workers is consistent with the national minimum benchmarks for workplace accidents.*<sup>32</sup>

The department advised that "Serious and wilful misconduct provisions are intended to deter workers from intentionally and knowingly engaging in conduct with a serious risk of harm that is outside the scope of the employer's control or direction".<sup>33</sup> In addition, the department stated:

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23 Clause 30 inserts new section 232H into the Act

24 Explanatory Notes, p.13; clause 30 inserts new section 232H into the Act

25 Submissions 1, 6 and 14

26 RECOVER, submission 1, p.5

27 Alan Blackwood, Director, Policy and Innovation, Young People in Nursing Homes National Alliance (YPINH Alliance), *Public Hearing Transcript*, 18 July 2016, p.9

28 Alan Blackwood, Director, Policy and Innovation, YPINH Alliance, *Public Hearing Transcript*, 18 July 2016, p.9

29 Michelle James, Queensland President, Australian Lawyers Alliance (ALA), *Public Hearing Transcript*, 18 July 2016, p.6

30 YPINH Alliance, submission 14, p.4

31 Vision Australia, submission 5, pp.2-3

32 Queensland Treasury (Department), *Response to submissions*, 29 July 2016, p.1

33 Department, *Response to submissions*, 29 July 2016, p.1

*Claimants excluded from entitlement to treatment, care and support payments will still have access to their existing compensation and damages entitlements under the Workers' Compensation and Rehabilitation Act 2003 (the WCR Act). Those seriously injured in a motor vehicle accident may apply to participate in the NIIS Queensland to receive lifetime care and support. Claimants may also have entitlements under the NDIS after their workers' compensation claim ends. Because these injuries are not covered by the minimum benchmarks, the Queensland Government would not be liable under the Heads of Agreement for the NDIS to cover the costs if a claimant enters the NDIS in the future.*<sup>34</sup>

### **3.5 Assessment of eligibility to participate in scheme**

Under the proposed NIIS for workplace accidents, WorkCover or a self-insurer<sup>35</sup> (*the insurer*) must pay for a worker's *treatment, care and support* arising from an injury which meets the *eligibility criteria* during the worker's *eligibility period*.<sup>36</sup>

The Bill provides for the assessment of a worker's injuries to decide whether they are entitled to treatment, care and support payments for their injury. If the worker requests an assessment, the insurer must ensure the assessment is carried out within 20 business days, or a longer period agreed between the insurer and worker.<sup>37</sup>

A worker is entitled to treatment, care and support payments, if their injury is a serious personal injury which meets the *eligibility criteria*, or their injury results from the same event as the serious personal injury. The Bill amends the Regulation to prescribe the eligibility criteria for each serious personal injury.<sup>38</sup> The Bill amends the Act to provide that the insurer may, as part of its assessment, make a referral to a medical assessment tribunal.<sup>39</sup>

After carrying out an assessment, the insurer must decide whether the worker:

- is entitled to treatment, care and support payments for their injury:
  - for an interim period (a period of two years – see section 3.8), or
  - for the rest of the worker's life – if the insurer is satisfied that the worker's serious personal injury is likely to continue to meet the eligibility criteria after the interim period ends, or
- is not entitled to treatment, care and support payments for their injury.

The insurer must give the worker written notice of the decision within 10 business days.<sup>40</sup>

The Bill provides that an *eligible worker* is not entitled to treatment, care and support payments during any period where:

- the worker's compensation under the existing workers' compensation scheme is suspended, or
- the worker's entitlement to treatment, care and support payments is suspended because the insurer considers the worker's absence from Australia will, or is likely to, adversely affect their condition or prospects of improvement or rehabilitation (see section 3.9 of this report).<sup>41</sup>

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34 Department, *Response to submissions*, 29 July 2016, p.2

35 Clauses 9 and 10 amend section 92 and 92A of the Act to provide that a self-insurer has the same powers and functions as WorkCover in relation to the NIIS for workplace accidents

36 Clause 30 inserts new section 232L into the Act to provide that the *eligibility period* is the period from the date the insurer decides the worker is entitled to treatment, care and support payments and ending when the worker dies or stops being entitled to treatment, care and support payments

37 Clause 30 inserts new section 232M into the Act

38 Clause 50 inserts new sections 117A to 117J into the Workers' Compensation and Rehabilitation Regulation 2003 (the Regulation)

39 Clauses 38 to 40 amend Chapter 11 of the Act

40 Clause 30 inserts new section 232M into the Act

41 Clause 30 inserts new section 232L into the Act

### 3.6 Assessment of treatment, care and support needs

The Bill provides that the insurer must assess an eligible worker's necessary and reasonable treatment, care and support needs resulting from their serious personal injury and their other treatment, care and support needs.<sup>42</sup> *Treatment, care and support needs*<sup>43</sup> are defined as:

Medical treatment	Attendant care and support services
Hospitalisation	Aids and appliances, other than ordinary personal or household items
Dental treatment	Prosthesis
Rehabilitation	Education or vocational training
Ambulance transportation	home, transport or workplace modification
Respite care	

In deciding whether an eligible worker's treatment, care and support needs are necessary and reasonable, the insurer must consult with the worker and any other person the insurer deems appropriate. The insurer must also consider:

- whether the treatment, care or support is excluded treatment, care and support – for example, is provided free of charge, falls within the ordinary costs of raising a child or is provided as part of a medical trial<sup>44</sup>, and
- the following matters prescribed in the Regulation: the benefit to the worker, including measurable outcomes; the appropriateness of the service; the appropriateness of the service provider and cost-effectiveness.<sup>45</sup>

The Bill amends the Act to provide that the insurer may, as part of its assessment, make a referral to a medical assessment tribunal.<sup>46</sup>

The Bill amends the Regulation to provide that the insurer must undertake an assessment as soon as practicable after the insurer decides the worker is eligible for treatment, care and support payments and, at least, on an annual basis after the first assessment.<sup>47</sup>

#### 3.6.1 Support plans

After undertaking an assessment of an eligible worker's treatment, care and support needs, the insurer must make a support plan and give a copy to the worker.<sup>48</sup> The support plan must include the matters prescribed by the Regulation including: the outcomes of the assessment; the treatment, care and support needs considered necessary and reasonable; and the intervals at which further assessments will be undertaken.<sup>49</sup> A support plan may be amended to reflect the outcomes of a further assessment of an eligible worker's treatment, care and support needs, a decision about a service request, or after a review of the support plan or approval of a service request.<sup>50</sup>

42 Clause 30 inserts new section 232O into the Act

43 Clause 30 inserts new section 232J into the Act

44 Clause 30 inserts new section 232K into the Act

45 Clause 50 inserts new sections 117J to Q into the Regulation

46 Clauses 38 to 40 amends Chapter 11 of the Act

47 Clause 50 inserts new section 117L into the Regulation

48 Clause 30 inserts new section 232O into the Act

49 Clause 50 inserts new section 117T into the Regulation

50 Clause 30 inserts new section 232O into the Act

### 3.6.2 Service requests

The Bill provides for written requests to be made to the insurer to pay for particular treatment, care or support for an eligible worker.<sup>51</sup> The insurer must assess the request against the criteria in the Regulation, including whether the requested service relates to the worker's treatment, care and support needs resulting from a serious personal injury and is necessary and reasonable.<sup>52</sup>

An insurer must decide whether to approve, with or without conditions, or refuse a service request within 20 business days after the request is received or, if further information is requested, within 20 business days of receipt of the further information. The insurer must give written notice of its decision.

### 3.6.3 Submitter's views and department's response

Vision Australia suggested that the definition of reasonable and necessary should align with the NDIS and should allow for funding of supports for psychological treatment or counselling. Vision Australia also suggested that the definition of measurable outcomes in the Regulation should remain broad enough to encompass intangible aspects of a worker's individual goals.<sup>53</sup>

In response, the department stated:

*The definitions of 'necessary and reasonable treatment, care and support needs' and 'serious personal injury and the injury eligibility criteria in the Bill are consistent with the national minimum benchmarks for workplace accidents and the National Injury Insurance Scheme (Queensland) Act 2016. Medical treatment and rehabilitation services may include counselling services where appropriate.*<sup>54</sup>

The department advised:

*Because entitlement to treatment, care and support payments also includes coverage for non-catastrophic injuries which are caused by the same event, there is scope to include treatment and counselling for psychological injuries that are caused by the same event as the serious personal injury.*<sup>55</sup>

The department stated that when assessing whether treatment, care and support has a measurable outcome, the insurer must also consider whether it relates directly to the worker's individual goals and will improve or maintain the worker's ability to perform daily activities or participate in the community or employment.<sup>56</sup>

## 3.7 Treatment, care and support payments

The Bill provides that the insurer may make treatment, care and support payments:

- under a *funding agreement* for a specified period of time under which the insurer pays an amount to the worker to cover particular expenses for treatment, care and support of the worker, or
- in response to a *payment request* from a person to reimburse them for an expense incurred for treatment, care and support for an eligible worker.<sup>57</sup>

### 3.7.1 Funding agreements

The Bill enables an eligible worker to receive funding to pay for services for their treatment, care and support under a funding arrangement. Requirements for funding agreements may be specified in a regulation. The committee notes that such requirements are yet to be prescribed in regulations.

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51 Clause 30 inserts new section 232P into the Act

52 Clause 50 inserts new section 117V into the Regulation

53 Vision Australia, submission 5, p.2

54 Department, *Response to submissions*, 29 July 2016, p.2

55 Department, *Response to submissions*, 29 July 2016, p.2

56 Department, *Response to submissions*, 29 July 2016, p.3

57 Clause 30 inserts new section 232Q into the Act

The Explanatory Notes state that “During the period for which the insurer pays an amount to the worker, the worker is able to directly choose and pay for the treatment, care and support the worker considers best meet their needs”.<sup>58</sup>

### 3.7.2 *Payment requests*

A person who incurs an expense for the treatment, care or support of an eligible worker may make a written request for reimbursement of those expenses provided that the expense was not incurred during the period of a funding agreement. A payment request must generally be made within six months after the expense is incurred, however, the insurer may accept a later payment request.<sup>59</sup>

The insurer may request information from the person who made the request and the eligible worker, and if the information is not provided by the due date, the payment request lapses.<sup>60</sup>

A payment request must be approved if the expense is incurred during the worker’s eligibility period and the treatment, care and support is an approved service for the eligible worker. An *approved service* means:

- if a support plan has not been made for the eligible worker – treatment, care and support approved by the insurer in response to a service request, or
- if a support plan has been made for the eligible worker – treatment, care and support the insurer has considered necessary and reasonable and stated in the support plan and other treatment, care and support stated in the support plan that the insurer has agreed to wholly, or partly, pay.<sup>61</sup>

The insurer must approve or refuse a payment request within 20 business days. If a payment request is approved, the payment must be made within 20 business days after the approval of the request. If a payment request is refused, the insurer must give written notice of the decision.<sup>62</sup>

The Bill provides, however, that the insurer is not liable to pay a part of the amount requested in a payment request that exceeds an amount prescribed by the Regulation.<sup>63</sup>

### 3.7.3 *Submitter’s views and department’s response*

Vision Australia considered that the requirement to make a written payment request presents an undue burden on workers who are blind or have low vision.<sup>64</sup> In response, the department advised “the legislative framework already enables insurers to receive information required to be provided in writing through alternative methods, including over the telephone or electronically”.<sup>65</sup>

## **3.8 Review of interim eligible workers**

If the insurer has decided that a worker is entitled to treatment, care and support payments during an interim period only (up to two years), the insurer must review the worker’s entitlements at least once before the end of the interim period.<sup>66</sup>

Further details about how such reviews are to be conducted are prescribed in the Regulation.<sup>67</sup> The Bill also amends the Act to provide that the insurer may, as part of its assessment, make a referral to a medical assessment tribunal.<sup>68</sup>

Before the end of the interim period, the insurer must conduct a review, and decide:

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58 Explanatory Notes, p.16

59 Clause 30 inserts new section 232Q into the Act and clause 50 inserts new section 117W into the Regulation

60 Clause 50 inserts new section 117X into the Regulation

61 Clause 30 inserts new section 232I into the Act which includes a definition of *approved service*

62 Clause 30 inserts new section 232R into the Act

63 Clause 30 inserts new section 232R into the Act

64 Vision Australia, submission 5, p.2

65 Department, *Response to submissions*, 29 July 2016, p.3

66 Clause 30 inserts new section 232S into the Act

67 Clause 50 inserts new section 117Z into the Regulation

68 Clauses 38 to 40 amend Chapter 11 of the Act

- the worker's serious personal injury is likely to continue to meet the eligibility criteria after the interim period ends – if so, the worker is entitled to treatment, care and support payments for their injury for the rest of their life, or
- the worker's serious personal injury is not likely to continue to meet the eligibility criteria after the interim period ends – if so, the worker's entitlement to treatment, care and support payments ends when the interim period ends or an earlier day decided by the insurer.<sup>69</sup>

The insurer must give the worker written notice of its decision within 10 business days.<sup>70</sup>

### **3.9 Eligible worker absent from Australia**

The Bill makes provision to address circumstances where an eligible worker who is receiving treatment, care and support payments is absent from Australia.

A worker must give the insurer written notice of their absence, at least one month before leaving Australia, unless the worker has a reasonable excuse. Failure to comply with this provision is an offence attracting a maximum penalty of 10 penalty units (\$1,219).<sup>71</sup>

The insurer may suspend a worker's entitlement to treatment, care and support payments, if they consider that the worker's absence from Australia will, or is likely to, adversely affect either the worker's condition or their prospects of improvement or rehabilitation. The insurer must notify the worker if they decide to suspend their payments.<sup>72</sup>

### **3.10 Common law damages for treatment, care and support**

Under the workers' compensation scheme, an injured worker may pursue a common law claim against their employer's insurer for different heads of damage, for example, future care and support, pain and suffering and economic loss, if their employer is at-fault.

The Bill does not alter these existing common law rights. Under the Bill, seriously injured workers who can establish that their employer was at-fault for their injury may elect to opt out of receiving statutory treatment, care and support payments and accept a lump sum award for treatment, care and support.<sup>73</sup>

The Explanatory Notes state that the proposed approach "... is consistent with the approach taken in the *National Injury Insurance Scheme (Queensland) Act 2016*".<sup>74</sup>

The process for electing to opt-out of the statutory scheme and receive a common law lump sum award for treatment, care and support is at **Appendix C**.<sup>75</sup>

#### *3.10.1 Proposed safeguards to prevent lump sum dissipation*

The Bill includes the following safeguards aimed at ensuring that any dissipation of lump sum damages does not lead to an injured worker being unable to receive treatment, care and support throughout their lifetime:

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69 Clause 30 inserts new section 232S into the Act

70 Clause 30 inserts new section 232S into the Act

71 Clause 30 inserts new section 232ZF into the Act

72 Clause 30 inserts new section 232ZH into the Act

73 Paul Goldsbrough, Executive Director, Workers Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury, *Public Briefing Transcript*, 22 June 2016, p.2

74 Explanatory Notes, p.1

75 See also new section 232V to 232ZD of the Act, as inserted by clause 30

- **Court sanction** - if the insurer considers the worker is a *person under a legal disability* (a child or person with impaired capacity), the insurer must apply to a court for an order sanctioning the notice to elect to receive damages. If the court decides that the worker is under a legal disability, the court: must decide whether or not to sanction the election; may order that the worker, or a person acting for the worker, amend the notice of claim to remove the election, and may make any other order the court considers appropriate. In reaching its decision, the court must consider the worker's likely legal costs relating to the claim for damages and may consider any other matter.<sup>76</sup>
- **Court order** - an insurer may apply to the court for an order preventing a worker from being awarded treatment, care and support damages. In deciding whether to make an order, a court: must consider the worker's ability to manage the award in a way that will not compromise their prospects of improvement or rehabilitation or future health and wellbeing; must consider whether the worker is a person under a legal disability; must consider the worker's likely legal cost relating to the claim for damages, and may consider any other matter.<sup>77</sup>
- **Contributory negligence** - a worker is prevented from electing to seek treatment, care and support damages, if a court decides, or the worker and insurer agree by way of settlement, that the worker is guilty of contributory negligence and the damages to which the worker would be entitled to would be reduced, as a result of the worker's contributory negligence, by 50 per cent or more.<sup>78</sup>
- **Re-entry into the NIIS** - at least five years after accepting an award for damages, a worker may apply to the insurer for additional treatment, care and support payments. The insurer may accept liability to make treatment, care and support payments to the worker, if the insurer is satisfied that the amount of awarded treatment, care and support damages was insufficient to meet the worker's necessary and reasonable treatment, care and support needs.<sup>79</sup> The criteria for re-entry into the NIIS for workplace accidents is to be prescribed in regulations.

The Bill also amends the Act to provide that treatment, care and support damages cannot be reduced for contributory negligence of a worker.<sup>80</sup>

### 3.10.2 Interaction with treatment, care and support payments and current workers' compensation scheme

The Bill makes a number of provisions in relation to a worker's entitlement to treatment, care and support payments where the worker may also elect to be awarded common law damages for their injury, including stipulating that an injured worker's treatment, care and support payments end when they accept an award for damages.<sup>81</sup>

In addition, the Bill amends current provisions in the Act relating to compensation and damages to facilitate the introduction of the NIIS and treatment, care and support payments and damages.<sup>82</sup>

## 3.11 Review of decisions

In its *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, the committee recommended that the government establish a robust and independent review mechanism for decisions under the NIIS.<sup>83</sup>

The Bill amends the Act to provide that existing dispute and review mechanisms, under the workers' compensation scheme, would apply to the NIIS for workplace accidents.<sup>84</sup> The department stated that:

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76 Clause 30 inserts new section 232X into the Act

77 Clause 30 inserts new section 232Y into the Act

78 Clause 30 inserts new section 232W into the Act

79 Clause 30 inserts new section 232ZD into the Act

80 Clause 36 inserts new section 305K into the Act

81 Clause 30 inserts new sections 232Z, 232ZA, 232ZB and 232ZC into the Act

82 Clauses 3 to 4, 6, 12 to 29, 32 to 36 and 38 to 43

83 Education, Tourism, Innovation and Small Business Committee, Report No. 11 - *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, March 2016, p.67

84 Clauses 42 and 43 amend section 538 and 540 of the Act

*Existing dispute mechanisms within the workers compensation scheme will be used to resolve disputes concerning entitlements to treatment, care and support payments, including Medical Assessment Tribunals for medical disputes, internal review by insurers, review rights to the Workers' Compensation Regulator and appeal rights to the Queensland Industrial Relations Commission. In this context, they [workers] are treated no differently from any other worker who sustains a work related injury in Queensland.*<sup>85</sup>

The YPINH Alliance considered that external reviews under the NIIS for workplace accidents should be referred to the Queensland Civil and Administrative Tribunal (QCAT) to ensure consistency with the NIIS for motor vehicle accidents.<sup>86</sup>

In response, the department stated that the proposed approach ensures “consistency of treatment for all workers’ compensation claimants”. The department stated that the workers’ compensation dispute mechanisms “... have well-established legislative and administrative frameworks, are efficient and cost effective and have developed a body of expertise in determining workers’ compensation claims matters”.<sup>87</sup>

### **3.12 Funding and cost of scheme**

The Explanatory Notes state that WorkCover will meet the additional costs associated with funding treatment, care and support through employer premiums.<sup>88</sup>

The department advised that “There will be an additional cost to the scheme, we estimate ... of 11 cases [catastrophic injuries each year] of about \$16.5 million per annum”<sup>89</sup>, which “is the equivalent of adding one cent to the average premium rate”.<sup>90</sup> This would mean that average premiums were approximately \$1.21 per \$100 in wages. The department explained that it would be for the board of WorkCover to decide whether to absorb the increase or to increase the average premium for employers.<sup>91</sup>

The Explanatory Notes state that “There will be some financial impacts for self-insured employers ... They will be exposed to additional costs associated with funding treatment, care and support payments, although the extent of increase will vary across self-insurers”.<sup>92</sup>

The Queensland Council of Unions (QCU) supported the approach that the NIIS for workplace accidents should be funded by employer premiums, not by workers or the wider community.<sup>93</sup> The ALA noted that the “impact on premiums of the introduction of coverage for the most catastrophically injured is next to nothing. It is just one cent on premiums that have already been the lowest in Australia for over a decade”.<sup>94</sup>

The Association of Self-Insured Employers Queensland (ASIEQ) raised concerns that the future of costs of the NIIS for workplace accidents may be substantially higher than those currently estimated due to potential escalation in areas of conflict and related legal reviews and “bracket creep”, if the eligibility criteria are amended in the future.<sup>95</sup>

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85 Paul Goldsbrough, Executive Director, Workers Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury, *Public Briefing Transcript*, 22 June 2016, p.2

86 YPINH Alliance, submission 14, p.7

87 Department, *Response to submissions*, 29 July 2016, p.2

88 Explanatory Notes, p.4

89 Paul Goldsbrough, Executive Director, Workers Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury, *Public Briefing Transcript*, 22 June 2016, p.3

90 Paul Goldsbrough, Executive Director, Workers Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury, *Public Briefing Transcript*, 22 June 2016, p.10

91 Paul Goldsbrough, Executive Director, Workers Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury, *Public Briefing Transcript*, 22 June 2016, p.10

92 Explanatory Notes, p.4

93 Queensland Council of Unions (QCU), submission 13, p.1

94 Michelle James, Queensland President, ALA, *Public Hearing Transcript*, 18 July 2016, p.6

95 Association of Self-Insured Employers Queensland (ASIEQ), submission 12, pp.1-2

The department advised that the estimated costs are based on the national minimum benchmarks, and that any future amendments to the benchmarks would be subject to further negotiation and, if approved, would be actuarially costed and subject to debate in Parliament.<sup>96</sup>

### 3.13 Administration of scheme

In its *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, the committee recommended that in designing the NIIS model in Queensland, the government takes into account the need to build a platform for other proposed no-fault schemes, including workplace accidents, and explores options for sharing resources and information.<sup>97</sup>

The Bill provides that an insurer (WorkCover or a self-insurer) may engage the NIIS (Qld) Agency, the body responsible for administering the NIIS for motor vehicle accidents, to perform its functions or exercise its powers under the NIIS for workplace accidents.<sup>98</sup> The Bill clarifies that if an insurer enters into such an arrangement, the insurer still remains liable to make payments to the worker.

The Bill provides that the Workers' Compensation Regulator (the Regulator) may monitor the performance or exercise of powers by the NIIS (Qld) Agency. The Regulator may also impose a condition on a self-insurer's licence that they engage the NIIS (Qld) Agency for all of the self-insurer's functions and powers under the scheme.<sup>99</sup>

The Minister, in her explanatory speech, stated that this approach "... will leverage the expertise established for managing the larger group of motor accident participants to ensure that the treatment, care and support needs of all seriously injured Queenslanders are met consistently".<sup>100</sup>

The YPINH Alliance supported the option for the NIIS (Qld) Agency to manage catastrophic injury claims for workers' compensation insurers.<sup>101</sup>

### 3.14 Submitters' views on the proposed NIIS model

#### 3.14.1 Adoption of a hybrid model

The ALA, Queensland Nurses Union (QNU), United Voice, and UFUQ supported the proposed model for the implementation of a NIIS for workplace accidents, in particular the ability for injured workers to elect to receive common lump sum damages for treatment, care and support.<sup>102</sup> The ALA noted that the proposed NIIS for workplace accidents mirrors the NIIS for motor vehicle accidents, and stated:

*... the scheme design suggested involves no diminution of rights whatsoever. We commend the opt-out provisions and note that this will lead to a leaner scheme with potentially fewer participants for life and most importantly, will preserve choice, dignity and self-determination for those most seriously injured in work accidents.*<sup>103</sup>

RECOVER, Suncorp and YPINH Alliance raised concerns about the model adopted for the NIIS for workplace accidents.<sup>104</sup> The principle concern of these submitters was that lump sum damages may be insufficient to ensure that an injured worker is able to fund their treatment, care and support needs over their lifetime.

RECOVER stated that its research into Australian Administrative Appeals Tribunal cases, where people sought access to disability support pension because their lump sum compensation for injury has been

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96 Department, *Response to submissions*, 29 July 2016, p.2

97 Education, Tourism, Innovation and Small Business Committee, Report No. 11 - *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, March 2016, p.66

98 Clause 30 inserts new section 232Z1 into the Act

99 Clause 30 inserts new section 232Z1 into the Act

100 Minister, *Explanatory Speech*, Hansard, 14 June 2016, p.2261

101 YPINH Alliance, submission 14, p.3

102 Submissions 2, 3, 6 and 8

103 Michelle James, Queensland President, ALA, *Public Hearing Transcript*, 18 July 2016, p.6

104 Submissions 1, 10 and 14

dissipated, provided "clear evidence" of lump sum dissipation.<sup>105</sup> RECOVER stated that the factors which contribute to lump sum dissipation are beyond an individual's control and cannot be remedied by financial advice or trustee arrangements, including: excessive discount rates; cost of fund management; divorce or relationship breakdown; deterioration of conditions; increase in care costs; large deductions of legal fees and Centrelink exclusion periods.<sup>106</sup>

Suncorp considered that a full no-fault scheme, with no opt-out provision, would provide a simpler scheme that "sought to treat everyone exactly the same" and would avoid some of the friction points between solicitors, insurers and the injured person, leading to better outcomes.<sup>107</sup>

The department highlighted that the election to seek common law damages is subject to a number of safeguards which are consistent with the NIIS for motor vehicle accidents. The department stated the safeguards "are designed to ensure that workers make reasonable and informed decisions, receive adequate lump sum for their future needs, and have capacity to optimally manage their funds".<sup>108</sup>

In addition, the department stated that the approach "preserves eligible workers' common law rights and enables them to choose how they wish to receive and apply the funds required to provide their necessary and reasonable treatment, care and support".<sup>109</sup>

### 3.14.2 Proposed safeguards

Despite their objections to the model, RECOVER welcomed "the protections aimed at the prevention of lump sum dissipation", and suggested that some of the protections, e.g. the consideration of the impact of legal costs on damages, should be included in the NIIS for motor vehicle accidents.<sup>110</sup> RECOVER, however, recommended that the protections be strengthened as follows:

- the *Legal Profession Act 2007* (Qld) should be amended to provide that any lump sums awarded for lifetime treatment, care and support costs are quarantined from reduction by legal fees
- the appointment of a trustee or fund manager for all lump sums for treatment, care and support
- the inclusion of fund management costs for all recipients of lump sums for lifetime treatment, care and support costs, not just recipients who are under a legal disability
- the appointment of, and funding for, a qualified case manager for each recipient of lump sums for lifetime treatment, care and support costs to provide support in the planning, organisation, co-ordination and expenditure of treatment, care and support services, and
- a significant reduction in the current discount rate<sup>111</sup> for lifetime treatment, care and support damages (currently five per cent of the damages).<sup>112</sup>

The ALA considered that new section 305K of the Act, which provides that treatment, care and support damages cannot be reduced for contributory negligence of a worker, should be amended to apply where damages have been agreed between the parties, not only where damages have been awarded by a court.<sup>113</sup> In response, the department advised that:

*The wording of this provision reflects the provisions in the WCR Act which guide the court in making a finding of contributory negligence in relation to a worker's conduct ... . The settlement process prior to starting court proceedings will address the worker's and the insurer's positions in relation to the worker's contributory liability. The settlement process will also be guided by the civil liability provisions in Part 8 of the WCR Act, so that agreed lump sum damages settlements should not vary from the matters a court is able to*

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105 RECOVER, submission 1, p.2

106 RECOVER, submission 1, p.3

107 Daniel Wilkinson, Executive Manager, CTP, Suncorp, *Public Hearing Transcript*, 18 July 2016, p.18

108 Department, *Response to submissions*, 29 July 2016, p.1

109 Department, *Response to submissions*, 29 July 2016, p.1

110 Dr Ros Harrington, RECOVER, *Public Hearing Transcript*, 18 July 2016, p.20

111 *Civil Proceedings Act 2011* (Qld), section 61 provides that an award for damages for economic loss is subject to a discount rate of five per cent

112 RECOVER, submission 1, p.8

113 ALA, submission 6, p.6

*determine. This means that in order to remain consistent with other provisions in Division 4A, new section 305K need not make express reference to an agreed damages settlement. An agreed damages settlement would not be able to include a reduction of the treatment, care and support head of damages for contributory negligence as a court would not be able to make a damages award on this basis.*<sup>114</sup>

At the public hearing, ASIEQ raised concerns about re-entry into the NIIS.<sup>115</sup> The ASIEQ considered that:

*The benefits of a short tail system and a damages settlement is the provision of finality. A reassessment of a damages award based on whether the amount was sufficient would be considered unusual and possibly unprecedented. This area needs potential close scrutiny as to whether it should exist or should only occur if there has been unexpected and substantive change to the worker's condition.*<sup>116</sup>

The ASIEQ also noted that the assessment criteria for considering re-entry into the NIIS is yet to be prescribed in regulations.<sup>117</sup> Submitters stated that the regulations should:

- be clear that re-entry into the NIIS is only permitted in the most exceptional circumstances to prevent “double-dipping” due to the obvious financial impact re-entry may have on the NIIS, and<sup>118</sup>
- provide that the criteria and process for re-entry into the NIIS is the same as the NIIS for motor vehicle accidents.<sup>119</sup>

In response, the department stated that:

*These provisions ensure that the Queensland workers' compensation scheme meets the national minimum benchmarks for workplace accidents, and minimises the risk of workers who prematurely exhaust their damages lump sum seeking to enter the NDIS and transferring costs to the Queensland Government.*<sup>120</sup>

The department advised the regulations for the application of the re-entry provisions will be developed in consultation with the NIIS (Qld) Agency to ensure consistency across the two schemes.<sup>121</sup>

#### **Committee comment**

The committee notes the department's intention to consult with the NIIS (Qld) Agency on the required regulations.

The committee recommends that the department consults widely with affected stakeholders, in particular, insurers, employers, unions and disability service providers and representative groups, on the drafting of the regulations to prescribe the assessment criteria for re-entry into the NIIS after an injured person has received common law damages.

#### **Recommendation 1**

The committee recommends that Queensland Treasury consult with affected stakeholders, in particular, insurers, employers, unions and disability service providers and representative groups, on the drafting of the regulations to prescribe the assessment criteria for re-entry into the National Injury Insurance Scheme for workplace accidents after an injured person has received common law damages.

114 Department, *Response to submissions*, 29 July 2016, p.3

115 Bill Nevin, Chairperson, ASIEQ, *Public Hearing Transcript*, 18 July 2016, p.2

116 ASIEQ, submission 12, p.1

117 ASIEQ, submission 12, p.1

118 Michelle James, Queensland President, ALA, *Public Hearing Transcript*, 18 July 2016, p.8

119 RECOVER, submission 1, p.6

120 Department, *Response to submissions*, 29 July 2016, p.1

121 Department, *Response to submissions*, 29 July 2016, p.1

### 3.14.3 Buy-in provisions

RECOVER and YPINH Alliance suggested that the Bill should be amended to include provisions to enable injured workers not covered by the NIIS to buy-in to the scheme, consistent with the NIIS for motor vehicle accidents.<sup>122</sup> In response, the department stated:

*The NIIS Queensland for motor vehicle accidents introduces no-fault statutory lifetime care and support benefits where previously injured persons were required to prove another person was at fault in order to bring common law damages action under the compulsory third party (CTP) insurance scheme. The buy in provisions for the NIIS Queensland appear to be a way to extend these no-fault statutory benefits to people who would not otherwise be eligible for the scheme. By contrast, the Queensland workers' compensation scheme already provides no-fault statutory compensation. Workers who sustained serious personal injuries before 1 July 2016 will be able to apply for existing compensation entitlements, as well as seek common law damages if they can prove their employer was at fault.*<sup>123</sup>

### 3.14.4 Review of the NIIS

Suncorp suggested that the operation of the NIIS for workplace accidents should be reviewed at regular intervals to ensure there are no unintended consequences.<sup>124</sup> In response, the department advised Suncorp's suggestion can be accommodated within the five-yearly review of the operation of the workers' compensation scheme under section 584A of the Act, which is due to be completed by 2018.<sup>125</sup>

#### **Committee comment**

The committee notes the department's comments that the operation of the NIIS for workplace accidents may be reviewed as part of the statutory five-yearly review of the Act.

However, as recommended in its Report No. 11 - *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, the committee considers that the various National Injury Insurance Schemes should be reviewed on an annual basis for the first five years, to enable any necessary modifications to be made as data and feedback about their operation becomes available.<sup>126</sup>

#### **Recommendation 2**

The committee recommends that a parliamentary portfolio committee be given ongoing oversight responsibility for the National Injury Insurance Scheme for workplace accidents, including to review and report to Parliament on the scheme's operations on an annual basis for the first five years after the scheme is established.

### 3.15 Self-insurer amendments

The Act requires self-insurers to give a cash deposit or unconditional bank guarantee to the Regulator to ensure that the workers' compensation scheme is not financially exposed in the event of a self-insurer's insolvency.<sup>127</sup>

The Bill amends the Act to provide for an alternative form of security in the form of an unconditional financial guarantee issued by general insurers. The Bill also removes the current minimum \$5 million

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122 Submissions 1 and 2

123 Department, *Response to submissions*, 29 July 2016, p.3

124 Suncorp, submission 10, p.4

125 Department, *Response to submissions*, 29 July 2016, p.3

126 Education, Tourism, Innovation and Small Business, *Report No.11 – Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, March 2016, p.68

127 Explanatory Notes, p.2

value for the security required from self-insurers, and instead bases the security on a percentage of the self-insurer's estimated claims liability.<sup>128</sup>

The Bill makes transitional provisions to provide that the amendments would apply to an application to be licensed as a self-insurer made, but not decided before commencement of the relevant provisions.<sup>129</sup> The Explanatory Notes state that the amendments:

*... will free up cash collateral currently tied up in bank guarantees, encouraging self-insurers to invest further in Queensland, and will align Queensland's arrangements more closely with Comcare and schemes in New South Wales and South Australia.*<sup>130</sup>

In addition, the Bill will enable those self-insurers who decide to return to a WorkCover insurance policy to return to self-insurance within five years of that decision under the same minimum employee criteria that applied at the time they originally became self-insurers (a minimum of 500 employees).<sup>131</sup>

The Explanatory Notes state that "This change will provide more flexibility for self-insurers".<sup>132</sup> The Bill makes transitional provisions to provide that the amendments would apply to a self-insurer who stops holding a self-insurer licence after commencement.<sup>133</sup>

The ASIEQ supported the amendments to assist self-insurers to consider a return to WorkCover insurance.<sup>134</sup>

### **3.16 Byrne Judgment amendments**

In October 2014, the Queensland Supreme Court reached its judgment in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269 (the Byrne Judgment).

The Byrne Judgment validated the use of 'hold harmless clauses' in contracts which transfer a third party's (typically a principal contractor or host employer) liability for their negligence in injuring a worker to the worker's employer (e.g. a subcontractor). The Byrne Judgment also provided that WorkCover, as the employer's insurer, was liable for this additional cost.<sup>135</sup>

The Bill reverses the effect of the Byrne Judgment by prohibiting the contractual transfer of liability for injury costs from a third party (e.g. principal contractors or host employers) to employers with a workers' compensation insurance policy (e.g. subcontractors). The Bill also provides that WorkCover is not liable to indemnify an employer for a liability to pay damages incurred by a third party contractor under a contractual arrangement.<sup>136</sup>

The Explanatory Notes state that the amendments:

*... restore the original policy intent and intended interpretation of various provisions that have been or could be called into question by various recent Queensland court decisions, to provide certainty for insurers, employers, workers and the courts.*<sup>137</sup>

And

*... further the objects of the Act by encouraging improved health and safety performance by employers, ensures reasonable cost levels for employers and provides for the protection of employers' interests in relation to claims for damages for workers' injuries.*<sup>138</sup>

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128 Clause 8 amends section 84 of the Act

129 Clause 46 inserts new section 720 into the Act

130 Explanatory Notes, p.2

131 Clause 7 amends section 71 of the Act

132 Explanatory Notes, p.2

133 Clause 46 inserts new section 719 into the Act

134 ASIEQ, submission 12, p.2

135 Department, *Response to submissions*, 29 July 2016, p.4

136 Explanatory Notes, p.3; clauses 5 and 31 amend section 10 of, and insert new section 236B into, the Act

137 Explanatory Notes, p.2

138 Explanatory Notes, p.19

The Bill provides that the amendments apply retrospectively to claims for damages started before commencement where settlement had not been agreed and a court has not started hearing a proceeding of claim, and to claims for damages started after commencement.<sup>139</sup>

### 3.16.1 Submitters' views and department's response

The QNU, United Voice, QCU, ALA and Chamber of Commerce and Industry Queensland (CCIQ) supported the amendments. Submitters considered that the amendments:

- would encourage employers to maintain health and safety standards and a more secure compensation scheme for the workers and restore the policy intention that an insurer is only liable to indemnify an employer for its legal liability to pay damages to the worker<sup>140</sup>
- are a positive step towards clarifying that negligent employers who follow unsafe work practices will be unable to transfer liability to another related party,<sup>141</sup> and
- will raise an estimated \$40 million in savings for WorkCover, thereby increasing the capacity of WorkCover to maintain competitive workers' compensation insurance premiums.<sup>142</sup>

The HIA, Queensland Trucking Association (QTA) and MBQ opposed the amendments.<sup>143</sup> The MBQ disputed the department's statement that the amendments only "restore the original policy intent".

The MBQ considered that the proposed amendments do not resolve the underlying issue of uninsured or underinsured principal contractors and subcontractors, and may exacerbate the problem.<sup>144</sup> Submitters expressed the following views about the amendments:

- the approach of voiding contractual indemnities is neither an appropriate nor reasonable policy response to situations where more than one business entity has a level of responsibility over the occurrence of a workplace injury – a particularly common arrangement in the construction and transport industries<sup>145</sup>
- the amendments discriminate against principal contractors and host employers<sup>146</sup>
- the amendments do not address the underlying issue of principal contractors being excluded from WorkCover for common law damages claims brought by injured employees of another employer<sup>147</sup>
- the amendments may impact on apprentice uptake by increasing the cost to engage an apprentice via a group training scheme<sup>148</sup>
- the amendments will add an extra complicating factor to common law claims processes, prolonging the ability of an injured person to obtain compensation and risking the financial viability of business and ability of an injured person to recover compensation from an uninsured employer<sup>149</sup>, and
- industry has had to respond to the lack of WorkCover coverage by relying on contractual risk transfers and public liability insurance (which is not always available and is very expensive for smaller businesses).<sup>150</sup>

The HIA, MBQ and QTA recommended that the government undertake a thorough review, as recommended by the Finance and Administration Committee in 2013<sup>151</sup>, to secure a fair and workable

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139 Clause 46 inserts new section 725 into the Act

140 Submissions 2 and 13

141 United Voice, submission 3, pp.2-3

142 CCIQ, submission 16, p.5

143 Submissions 4, 7 and 9

144 MBQ, submission 9, p.2

145 Submissions 4 and 9

146 HIA, submission 4

147 MBQ, submission 9

148 MBQ, submission 9

149 Submissions 7 and 9

150 MBQ, submission 9

151 Finance and Administration Committee, 54<sup>th</sup> Parliament, *Report No. 28 – Inquiry into the operation of Queensland's Workers' Compensation Scheme*, May 2013, p.223

solution to the issue.<sup>152</sup> The HIA and MBQ made a number of recommendations for amendments to the Bill, including:

- the proposed voiding of indemnities should only apply, where the businesses partly or wholly responsible for an injury are not covered by a current workers' compensation policy<sup>153</sup>
- a contractor is deemed to be the employer of all workers engaged by their subcontractors, as is the case in Western Australia, Tasmania and the Northern Territory,<sup>154</sup> and
- amending the definition of employee, extending principal contractor's existing WorkCover policy or introducing a new separate WorkCover cover for principal contractors.<sup>155</sup>

In addition, MBQ considered that the retrospective application of the amendments is manifestly unfair as it creates significant exposure for employers to be uninsured for events that have occurred up to three years ago.<sup>156</sup> The CCIQ, in contrast, considered that the amendments conform with the FLPs.<sup>157</sup> The potential FLP issues raised by the amendments are discussed further in section 4 of this report.

In response, the department advised:

*... the Byrne decision has the effect of encouraging the use of hold harmless clauses which allows third party contributors to avoid liability, encouraging further negligence; and makes WorkCover Queensland jointly and severally liable for all damages despite there being fully solvent third parties to join the claim.*

*As WorkCover is unable to recover the cost from the negligent principal contractor or host employer this cost is allocated to the premium of the employer and potentially across all other WorkCover premium paying employers.*<sup>158</sup>

At the public hearing on 4 August 2016, WorkCover advised that it has been considering the option of principal contractors entering the WorkCover scheme for coverage for common law damages claims brought by an injured employee of another employer.<sup>159</sup>

### Committee comment

The committee acknowledged the concerns raised by submitters, in particular about the exclusion of principal contractors and host employers from WorkCover coverage for common law damages claims brought by injured employees of another employer.

The committee recommends that Queensland Treasury and WorkCover work with the representatives of principal contractors and host employers to resolve issues arising from the exclusion of those entities from the WorkCover scheme and extend it to give principal contractors and host employers the option of participating in the scheme, taking out a private insurance policy or both.

### Recommendation 3

The committee recommends that Queensland Treasury and WorkCover Queensland work with representatives of principal contractors and host employers to resolve issues arising from the exclusion of those entities from the WorkCover scheme and extend it to give principal contractors and host employers the option of participating in the scheme, taking out a private insurance policy or both.

152 Submissions 4, 7 and 9

153 HIA, submission 4

154 MBQ, submission 9

155 MBQ, submission 9

156 MBQ, submission 9

157 CCIQ, submission 16

158 Department, *Response to submissions*, 29 July 2016, p.4

159 Tony Hawkins, Chief Executive Officer, WorkCover Queensland, *Public Hearing Transcript*, 4 August 2016, p.3

### **3.17 Simon Blackwood v Colin Hinder judgment amendments**

The Bill amends the Act in response to the Industrial Magistrates Court decision in *Simon Blackwood v Colin Hinder*. The Bill provides that where certain prosecutions for offences against the Act are to be commenced by the Regulator, only the knowledge of the Regulator is relevant to the timeframe for commencing final proceedings.<sup>160</sup>

In addition, the Bill amends the Act to ensure insurers respond promptly to fraud allegations by clarifying that insurers must immediately refer allegations to the Regulator as soon as they have a reasonable belief that fraud has occurred.<sup>161</sup>

### **3.18 Indexation for statutory compensation and common law damages**

The Act currently provides that statutory compensation entitlements and common law damages entitlements are subject to indexation based on the value of the Queensland Ordinary Times Earnings (QOTE). The Bill amends the Act to provide an alternative indexation method for statutory compensation entitlements and common law damages entitlements under the Act.<sup>162</sup>

The department advised that the amendments aim:

*... to prevent financial hardship to those relying on workers compensation payments by providing for an indexation method that will not result in a reduction to any payments or amounts as a consequence of a reduction in the value of the Queensland ordinary time earnings, or QOTE, while ensuring that indexation keeps the alignment with the QOTE.*<sup>163</sup>

Submitters supported the amendments which they considered would provide a further protection to injured workers, as they will ensure that any reduction in the QOTE will not result in a reduction in compensation payments to the worker.<sup>164</sup>

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160 Explanatory Notes, p.3, clauses 44 and 45 amend sections 578 and 579 of the Act

161 Explanatory Notes, p.3

162 Explanatory Notes, p.3; clause 11 amends section 107 of the Act

163 Paul Goldsbrough, Executive Director, Workers Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury, *Public Briefing Transcript*, 22 June 2016, p.3

164 Submissions 2, 6 and 13

## 4 Compliance with Legislative Standards Act

### 4.1 Fundamental legislative principles

#### 4.1.1 Introduction

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the "principles relating to legislation that underlie a parliamentary democracy based on the rule of law".

The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the FLPs to the Bill and brings the following potential FLP issue to the attention of the Legislative Assembly.

#### 4.1.2 Rights and liberties of individuals

##### Clause 46 – retrospectivity

Clause 5 amends section 10 of the Act to provide that a reference to the liability of an employer does not include a liability to pay damages, for injury sustained by a worker, arising from an indemnity granted by the employer to another person for the other person's legal liability to pay damages to the worker for the injury.

Clause 31 inserts new section 236B into the Act to provide that an agreement between an employer and a third party, under which the employer indemnifies a third party for any legal liability to pay damages for injuries sustained by a worker (commonly known as hold harmless clauses), does not prevent the insurer from adding the third party as a contributor to the incident. The amendments also provide that any such agreement is void and that the third party cannot recover the amount of an award or settlement made against them, from the employer.

Clause 46 inserts new section 725 into the Act to provide that the amendments at clauses 5 and 31 (new sections 10 and 236B of the Act) apply to claims for damages started before commencement, where a settlement has not been agreed and a court has not started hearing a proceeding for a claim.

The provisions raise potential FLP issues under section 4(3)(g) of the *Legislative Standards Act 1992*, which provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively. The committee considers that strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The committee notes that the provisions have the potential to adversely impact on third parties (e.g. principal contractors or host employers) who have entered into contracts with employers, where the contract includes clauses under which the employer indemnifies a third party for any legal liability to pay damages for injuries sustained by a worker. Submitters raised the following issues about the provisions:

- as the Act requires a worker to elect to pursue common law damages no more than three years after the injury occurred, the amendments will apply to contract provisions entered into up to three years ago
- commercial contracts, which include hold harmless clauses, are used to apportion risk and liability amongst the parties who collaborate on a project – it would be manifestly unfair to change the risk profile retrospectively and remove a contractual right agreed to and factored into the costings for the project, and
- employers who have, since the Byrne Judgment, provided contractual indemnities to principal contractors on the basis that they are entitled to cover under their WorkCover insurance

policies will be left exposed to damages for events that may have occurred up to three years ago.<sup>165</sup>

The Explanatory Notes acknowledge the issue and provide the following justification:

*The Bill conforms with fundamental legislative principles by having sufficient regard to the rights and liberties of individuals, as the purpose of the amendments is to re-establish the Act's original policy intent and status quo concerning the indemnity provided to employers under workers' compensation insurance policies.*<sup>166</sup>

The committee requested further advice from the department about the provisions. In response, the department stated:

*Clauses 5, 31 and 46 of the Bill commence on assent with no retrospective amendment of the Workers' Compensation and Rehabilitation Act 2003 (the Act).*

*The intention of the transitional provision is to clarify that the change to sections 10 and 236B of the Act apply to all claims which have not been resolved on commencement, or which start after the commencement.*

*Claims which have been finalised before commencement will not be affected by the amendment. As such, the amendments will not have retrospective application to previous claims where issues of liability and contribution have already been determined.*<sup>167</sup>

As to why it was considered necessary to commence the provisions retrospectively, the department stated that:

*For existing contractual agreements entered into before commencement, the transitional provision will apply the amendments to claims where the determination about liability and contribution of the parties occurs after commencement. To this extent, the effect of the amendments on individual's rights and obligations in relation to liability for damages does not change rights and obligations in relation to liability for damages prior to commencement.*

*The amendments may be considered curative or remedial in effect by restoring the previous policy intent. This ensures consistent application for all current claims, where liability and contribution are yet to be resolved, of the principle that a workers' compensation insurer will not be liable to indemnify an employer for a liability to pay damages incurred by a third party contributor. Extending the remedial effect of these amendments will provide certainty for insurers in managing both current and future claims.*<sup>168</sup>

In relation to the potential impact of the provisions, the department stated:

*The amendments will have no adverse impact on the entitlement of workers' compensation claimants to seek damages for negligence. The amendments will benefit workers by providing a financial incentive to improve health and safety outcomes. The amendments will beneficially impact on employers whose workers' compensation insurance policies and premiums will not be affected by indemnifying, under the employer's policy, a third party for their liability to pay damages. The amendments will also have a beneficial impact on WorkCover Queensland and in turn all employers, by not requiring the insurer and scheme to take on the additional costs of providing coverage for a liability to pay damages of a third party that does not hold a workers' compensation insurance policy.*

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165 MBQ, submission 9, p.17

166 Explanatory Notes, p.5

167 Department, *Correspondence*, 9 August 2016, p.1

168 Department, *Correspondence*, 9 August 2016, p.2

*It is acknowledged that the transitional provisions may affect a third party who has entered into a contractual indemnity agreement with an employer. This potential has been assessed against the need to further the objects of the Act that require the scheme to encourage improved health and safety, ensure reasonable cost levels for employers and provide for the protection of employers' interests in relation to claims for damages for workers' injuries.*<sup>169</sup>

In addition, the department stated:

*It is noted that there is a significant public interest and policy imperative in seeking to minimise the workers' compensation scheme's exposure to liability for damages incurred by parties other than employers, who do not have workers' compensation insurance coverage or pay premiums for the coverage provided as a result of contractual indemnity agreements. It is in the best interests of the scheme to restore the original policy intent with consistent application across all current claims that are yet to be resolved, as well as future claims.*<sup>170</sup>

## **4.2 Explanatory Notes**

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 of the *Legislative Standards Act 1992* and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

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<sup>169</sup> Department, *Correspondence*, 9 August 2016, p.2

<sup>170</sup> Department, *Correspondence*, 9 August 2016, p.3



**Appendix A – List of submissions**

<b>Sub No.</b>	<b>Submitter</b>
001	RECOVER Injury Research Centre
002	Queensland Nurses' Union
003	United Voice
004	Housing Industry Association Ltd
005	Vision Australia
006	Australian Lawyers Alliance
007	Queensland Trucking Association Ltd
008	United Firefighters Union Queensland
009	Master Builders Queensland
010	Suncorp
011	Local Government Association Queensland
012	The Association of Self-Insured Employers of Queensland
013	Queensland Council of Unions
014	Young People in Nursing Homes National Alliance
015	Royal Australasian College of Surgeons
016	Chamber of Commerce and Industry Queensland
017	Australian Society of Rehabilitation Counsellors Inc.

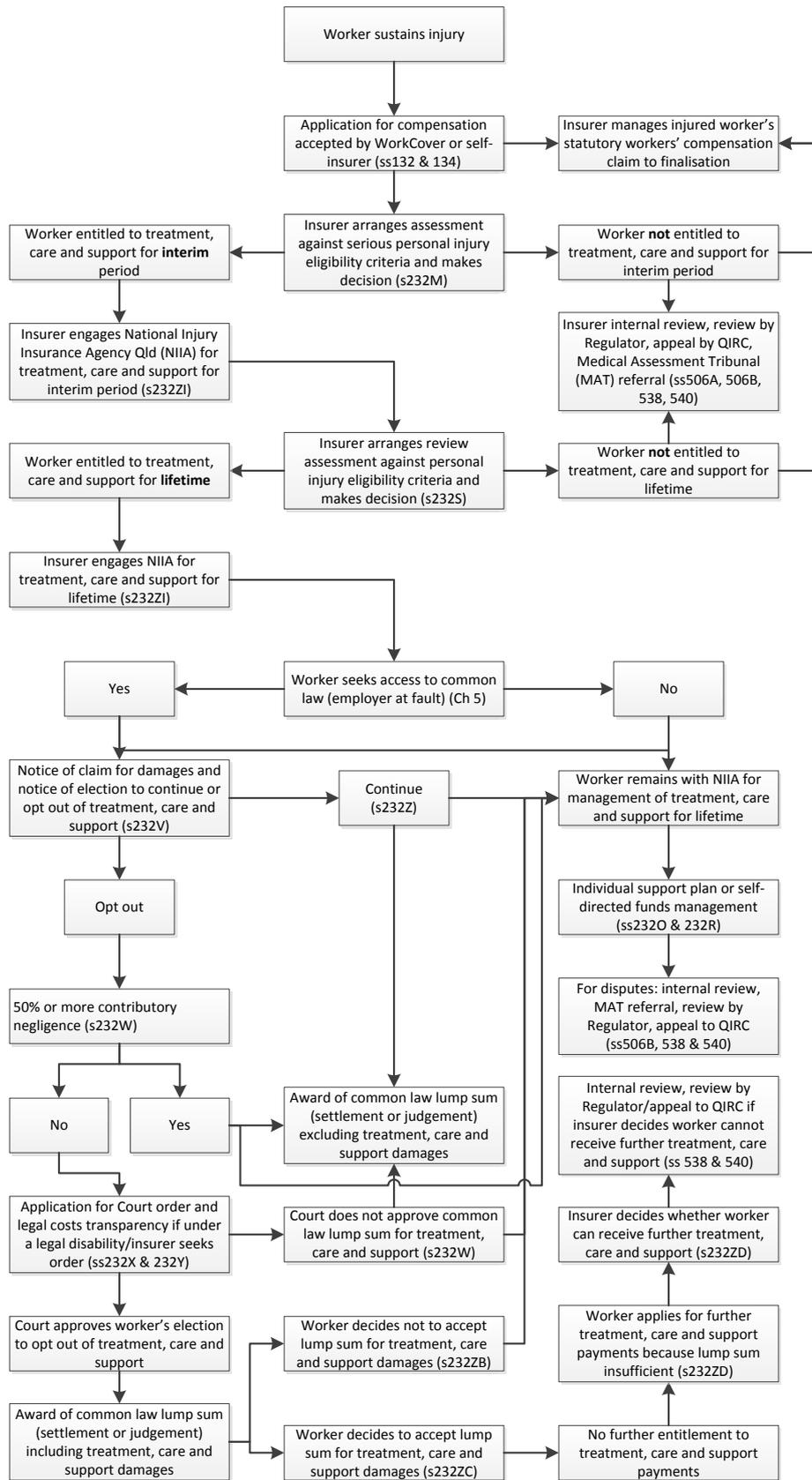
## **Appendix B – Witnesses at public briefing and public hearings**

<b>Public briefing – 22 June 2016</b>
Paul Goldsbrough, Executive Director, Workers' Compensation and Policy Services, Office of Industrial Relations, Queensland Treasury
Janene Hillhouse, Director, Workers' Compensation Policy and Tribunal Services, Office of Industrial Relations, Queensland Treasury
Jonathan Shield, Director, Review and Appeals, Office of Industrial Relations, Queensland Treasury

<b>Public hearing – 18 July 2016</b>
John Martin, Research and Policy Officer, Queensland Council of Unions
Bill Nevin, Chairperson, Association of Self-Insured Employers of Queensland
Michelle James, Queensland President, Australian Lawyers Alliance
Alan Blackwood, Director of Policy and Innovation, Young People in Nursing Homes National Alliance
Corlia Roos, Director, Construction Policy, Master Builders Queensland
Warwick Temby, Executive Director, Housing Industry Association
Daniel Wilkinson, Executive Manager, CTP Queensland, Suncorp Insurance
Dr Ros Harrington, RECOVER Injury Research Centre

<b>Public hearing – 4 August 2016</b>
Tony Hawkins, Chief Executive Officer, WorkCover Queensland
David Heley, General Manager Finance, WorkCover Queensland
Janine Reid, Legal Counsel, WorkCover Queensland

## **Appendix C – Proposed model for the National Injury Insurance Scheme for workplace accidents**



## **Statements of Reservation**

## **Statement of Reservation on behalf of Government Members of the Committee**

I write to lodge a statement of reservation with respect to the Inquiry into the Workers Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016. I will briefly detail some of the Government member's concerns with respect to the report. The areas of concern listed below are not exhaustive and Government members will detail additional concerns during the parliamentary debate on the Bill.

### **Failure to reach agreement to pass the bill**

Government members believe that no one should be left behind and are committed to ensuring that at least the minimum benchmarks of care are provided to Queenslanders catastrophically injured while performing their role in the workplace.

Government members support the bill as it ensures that workers who suffer serious personal injuries as a result of workplace accidents in Queensland, receive necessary and reasonable treatment, care and support payments, regardless of fault under the National Injury Insurance Scheme (NIIS) for workplace accidents. The Bill will also provide self-insurers with greater flexibility and choice in light of the Byrne judgement, and prevent financial hardship for injured workers by providing for an alternative indexation method for statutory compensation and common law damages entitlements.

The Bill amends the current workers' compensation scheme to incorporate a NIIS to ensure that workers who sustain serious personal injury resulting from workplace accidents receive necessary and reasonable treatment, care and support.

The Explanatory Note state:

*The provisions in this chapter [new Chapter 4A of the Act] are consistent with the arrangements for the National Injury Insurance Scheme, Queensland for motor vehicle accidents under the National Injury Insurance Scheme (Queensland) Act 2016, subject to jurisdictional differences between the workers' compensation and motor accident schemes and the national minimum benchmarks for workplace accidents.*

### **The Byrne Judgment**

The Byrne Judgment validated the use of 'hold harmless clauses' in contracts which transfer a third party's (typically a principal contractor or host employer) liability for their negligence in injuring a worker to the worker's employer (e.g. a sub-contractor). The Byrne Judgment also provided that WorkCover, as the employer's insurer, was liable for this additional cost.

The Bill reverses the effect of the Byrne Judgment by prohibiting the contractual transfer of liability for injury costs from a third party (e.g. principal contractors or host employers) to employers with a workers' compensation insurance policy (e.g. subcontractors). The Bill also provides that cases WorkCover is not liable to indemnify an employer for a liability to pay damages incurred by a third party contractor under a contractual arrangement.

The Explanatory Notes state that the amendments:

*... restore the original policy intent and intended interpretation of various provisions that have been or could be called into question by various recent Queensland court decisions, to provide certainty for insurers, employers, workers and the courts.*

And

*... further the objects of the Act by encouraging improved health and safety performance by employers, ensures reasonable cost levels for employers and provides for the protection of employers' interests in relation to claims for damages for workers' injuries.*

Submitters presented a range of views regarding reversing the Byrne Judgment from complete support to concern for the impact this decision will make, however, the Department addressed these concerns as follows:

*... the Byrne decision has the effect of encouraging the use of hold harmless clauses which allows third party contributors to avoid liability, encouraging further negligence; and makes WorkCover Queensland jointly and severally liable for all damages despite there being fully solvent third parties to join the claim.*

*As WorkCover is unable to recover the cost from the negligent principal contractor or host employer this cost is allocated to the premium of the employer and potentially across all other WorkCover premium paying employers.*

Through these very clear explanations, the Government of the committee endorse the Bill with particular attention to reversing the Byrne Judgment in an effort to protect all workers from possible catastrophic injury from negligence by the principal contractor or host employer.

## **Conclusion**

Government members are of the view that the cornerstone of the NDIS and the NISQ is to provide people with choice and control. This should also be a cornerstone of the Workers Compensation and Rehabilitation NIS. As such, Government members support a scheme that allows catastrophically injured people to opt in or out of the scheme with a common law avenue (if eligible). We are also of a view that this scheme should have inbuilt safeguards to minimise, as much as possible, abuse or misuse of the system as determined by the NISQ.

Government members are also of the view that the reversal of the Byrne Judgment will ensure to workers, that principal contractor or host employers are responsible for maintaining safe worksites for every employee or contractor. And, in the unfortunate event that a worker suffers a catastrophic injury at the workplace, their life time injuries and care will be adequately covered to a suitable standard.

As previously mentioned, these areas outlined not exhaustive and Government members will detail additional concerns during the parliamentary debate in the house.

Sincerely



Scott Stewart

Member for Townsville

## **Non-Government Members' Statement of Reservation**

The non-government members of the Education, Tourism, Innovation and Small Business Committee (ETISBC) support the extension of the National Injury Insurance Scheme (NIIS) to those who are catastrophically injured at work; however, we are not able to support the provisions of the bill which seek to reverse the *Byrne* judgment. This statement of reservation will, for the most part, contain itself to commentary on those provisions and the lack of consultation.

### **Model**

With respect to the NIIS model, the non-government members of the ETISBC again draw the House's attention to our concerns around the hybrid model which has been adopted by this government. During the initially inquiry around which model would be the best and the subsequent inquiry into the bill stakeholders and disability support service providers highlighted their very significant concerns about a hybrid model which allowed lump sums as opposed to the lifetime care and support model and the impact this could have on catastrophically injured Queenslanders. Again, stakeholders and disability support service providers raised concerns about the potential for dissipation of lump sums and again this government has ignored those at the coalface who have a greater understanding of the issues.

### **Lack of Consultation**

This asleep at the wheel government claims they are one of consultation. The provisions of this bill which seek to reverse the lawful judgment in the matter of *Byrne*. The Explanatory Notes state a Stakeholder Reference Group (SRG) was established. The Housing Industry Association (HIA) was listed as a member of the SRG. At a public hearing on July 18, when asked about consultation, HIA Executive Director Warwick Temby confirmed that the SRG was not consulted on the *Byrne* issue.

*There was consultation on the NIIS aspects of the bill, but absolutely none on the Byrne issue.*

In their submission and at the same hearing, Corlia Roos, of Master Builders' Queensland (MBQ) indicated the first MBQ had heard about the proposed changes was upon the introduction of the bill.

*We have not been consulted on the bill, on the drafting of the wording or on the bill itself, until it was posted on the Parliamentary website.*

When pushed, in the Departmental Briefing, on the extent of its consultation, representatives from Queensland Treasury indicated they did not give consideration to whether MBQ should be included in the consultation on the draft bill and Departmental officials cited discussions had since pre-2010 which included MBQ. The blatant disregard and snubbing of a major stakeholder demonstrates the continued arrogance of this government. In defence of this snub, Departmental officials indicated they did not want a roomful of people to work through some of these issues; a flippant response which smacks of arrogance if ever there were one. To quote a phrase oft used in the House, '*hypocrisy: they name is Labor.*' Clearly, any assertion of being a consultative government is hyperbole.

### **Byrne Amendment**

The bill's proposed changes will hurt most those this government claims to represent: workers. It has been standard industry practice for a number of years that principal contractors would

include clauses this bill seeks to nullify; the effect of these clauses is to ensure injured workers in Queensland are suitably protected and insured. The consequence of the *Byrne* decision was the cement the soundness of this long-standing practice and the validity of these clauses. In both its written submission and oral testimony before the ETISBC, MBQ expressed very significant concerns about the impact this decision will have on injured workers and the industry. The concern stems from principal contractors being excluded from the Queensland WorkCover Scheme.

*I wish to point out that, at the root of this issue, is the fact that principal contractors and host employers, including group training organisations that employ apprentices specifically, are all excluded from WorkCover coverage. Hence we now have this very complex situation where, if an injured worker of a subcontractor on a site makes a common law damages claim against both his own employer and a principal contractor, that claim, as far as the principal contractor is concerned, sits outside of the principal contractor's, or host employer's, WorkCover policy*

This concern was echoed by HIA.

*The Byrne decision is the correct public policy decision. In our view, that decision does not need to be voided through these legislative changes. As Corlia mentioned, there is a very strong perception in the building industry, and particularly among the smaller end of the home building industry that I represent, who are numerically the largest share of businesses in the building industry, that, if I have a WorkCover policy, I am in the clear if somebody gets hurt. This bill will take away that perception and reality from thousands of businesses in the industry. Most businesses probably did not even realise that they were exposed, prior to the Byrne decision, for potential public liability claims in the circumstances that the bill is trying to overturn. In that position, they were relying on their perception that WorkCover would cover the issues for them.*

A consequence of this exclusion is the need for principal contractors to secure private insurance and potentially a lack of awareness for the need to secure this private insurance. Those most at risk as a result of this gap are injured workers. The irony it is a Labor government and trade unions who would endorse a policy which sees injured workers most at risk is not lost on the non-government members of the government. The reversal of the *Byrne* decision is about cost shifting from WorkCover to private insurers not about protecting injured workers.

At a public hearing on August 4, it was put to representatives of WorkCover Queensland that principal contractors should be brought back into the scheme. In light of the response it is surprising the government are persisting with their endeavours on this issue:

*Mr Hawkins: That is a very valid question and one that WorkCover has been discussing for a few years now with respective industry associations. The chair of WorkCover wrote to the minister to suggest that that is an option that could or should be looked at. The minister has written back and said they are more than happy for us to have a look at that and please make sure we discuss it with all of the respective stakeholders to ensure that all the options are considered.*

The non-government members are of the view the invidious *Byrne* provisions should be withdrawn until such time as Queensland Treasury and WorkCover Queensland have had an opportunity to establish how principal contracts would be able to be brought back into the scheme. Representatives of WorkCover indicated many large principal contractors have public liability insurance; however, this does not address the significant number of small and medium sized principal contractors nor the limited market options available to principal contractors.

The non-government members echo MBQ and HIA's concerns with respect to the retrospectivity of these provisions. It is incomprehensible the Australian Lawyers' Alliance (ALA) would have no objection to the Parliament retrospectively invalidating contractual terms which were entered into by mutual agreement of both parties and in accordance with industry practice and common law decisions. Given the Premier's previous comments, when Leader of the Opposition, objecting to retrospectivity it would appear it is one rule for Labor when in opposition and another in government. To again reiterate an oft used phrase; hypocrisy, thy name is Labor.

The non-government members will further detail their objections in their contributions to the debate in the House.



**Verity Barton**  
**Member for Broadwater**



**Mark Boothman**  
**Member for Albert**



**Steve Dickson**  
**Member for Buderim**

