

CCIQ SUBMISSION

Education, Tourism, Innovation and Small Business
Committee

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

CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND

14 July 2016

Overview

1. CCIQ is Queensland's peak industry organisation for small and medium businesses. We represent over 25,000 businesses on the local, state, and federal issues that matter to them.
2. Our guiding focus is to develop and advocate policies that are in the interests of Queensland businesses, the Queensland economy, and the Queensland community.
3. CCIQ welcomes the opportunity to provide feedback to the Education, Tourism, Innovation and Small Business Committee (the Committee) on the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016*.
4. CCIQ commends the Government for progressing with reforms to introduce a National Injury Insurance Scheme (NIIS), and notes the amendments contained in the proposed Bill provide the legislative framework for the integration of the NIIS into Queensland's workers' compensation scheme.
5. This Bill will meet the Queensland Government's agreement with the Commonwealth and other States and Territories to implement a lifetime care and support scheme for accidents that meets the national minimum benchmarks.
6. This submission aims to comment principally on the amendments contained in the Bill that overrule the use of contractual indemnities through the reversal of the Byrne decision.¹
7. In order to restore the original policy intention of the Act, select amendments within the proposed legislation are included in order to restrict the contractual transfer of liability for the costs of injury from principal contractors or host employers to employer/s with a workers' compensation insurance policy.²
8. CCIQ supports amendments to the Act to reverse Byrne insofar as they will result in voiding contractual indemnity clauses that protect both WorkCover and smaller tiered operators from having increased costs by way of claims flowing their way.
9. Further, CCIQ notes the reversal of Byrne is predicted to raise an estimated \$40 million in savings for WorkCover, thereby increasing the capacity of WorkCover to maintain competitive workers' compensation insurance premiums.

¹ *Byrne v People Resourcing (Qld) Pty Ltd* [2014] 2 QdR 397.

² Explanatory Notes *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016*.

10. CCIQ pledges its full support for the substance of this Bill and provides its feedback to the impacts of the relevant amendments on small and medium employers regarding contractual indemnities, and the impact of these amendments on premiums payable by employers more broadly.

Reversing the Byrne decision³

11. On 28 October 2014, former Chief Justice Carmody of the Supreme Court of Queensland handed down the decision in *Byrne v People Resourcing (Qld)* whereby WorkCover Queensland was liable to indemnify a labour hire employer in respect of both joint and several liabilities to pay damages to the worker, including any indemnity due to the principal.
12. As a result of the decision in *Byrne*, WorkCover Queensland was thereafter obliged to indemnify employers for contractual liability to third parties.
13. The impact of the decision meant that a principal contractor who may indeed not employ a single person, that has entered into a contractual agreement/s with a subcontractor or series of subcontractors will, in the event that a common law claim against them, be able to hold the subcontractor liable as per the relevant indemnity clause/s.
14. In the first reading speech for the Bill, the Minister for Employment and Industrial Relations said:

*'The Bill prevents the contractual transfer of liability for injury costs from principal contractors or host employers to employers with a workers' compensation insurance policy such as subcontractors or labour hire employers and clarifies that an insurer will not be liable to indemnify an employer for a liability to pay damages incurred by a third party contractor under a contractual arrangement.'*⁴

15. The Bill otherwise proposes to reverse the impact of the decision in *Byrne*⁵ for insurers, including WorkCover Queensland.
16. To achieve this, the Bill firstly amends the section 10 definition of damages to include subsection 4 as follows:

³ *Byrne v People Resourcing (Qld) Pty Ltd* [2014] 2 QdR 397.

⁴ Minister's Explanatory Speech Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016.

⁵ *Byrne v People Resourcing (Qld) Pty Ltd* [2014] 2 QdR 397.

- a. Further, a reference in subsection (1) 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.
17. As a result of this provision, the insurer is not obliged pursuant to section 8 of the WCRA to indemnify employers for contractual indemnities extended to other parties.
18. The Bill also contains at section 236B a provision which relates to contribution claims by WorkCover Queensland. The section provides as follows:
- a. This section applies to an agreement between an employer and another person under which the employer indemnifies the other person for any legal liability of the person to pay damages for injury sustained by a worker.
 - b. The agreement does not prevent the insurer from adding the other person as a contributor under section 278A in relation to the employer's liability or the insurer's liability for the worker's injury.
 - c. The agreement is void to the extent it provides for the employer, or has the effect of requiring the employer, to indemnify the other person for any contribution claim made by the insurer against the other person.
 - d. In this section—damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10.
19. This proposed section preserves the right of WorkCover Queensland to bring a contribution claim against a party that an employer has contractually indemnified.
20. The abovementioned provisions have been specifically designed to re-establish the original policy intent of the Act, thereby actively reversing the Byrne decision by excluding from coverage under an employer's workers' compensation insurance policy any liability to pay damages.⁶
21. Industries with a higher proportion of labour hire and principal contractor arrangements (such as manufacturing and construction) have traditionally relied upon contractual indemnities to mitigate exposure to risk.
22. Since the Byrne decision, the costs of claims against principal contractors has in turn been passed on to small and medium operators and subcontractors, thereby exposing those smaller businesses to significant financial risk to which a principal contractor is ultimately contracting out of.

⁶ Public Briefing – Inquiry into Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016.

23. To the extent that the proposed amendments reverse the Byrne decision through voiding contractual indemnity clauses that protect both WorkCover and smaller tiered operators from having increased costs by way of claims flowing their way, CCIQ is supportive of the amendments.
24. To this end, CCIQ supports provisions in the legislation that seek to protect smaller employers and subcontractors, and any provisions that go to restoring the original policy intent of the Act.

Cost of reversing the Byrne decision

25. The legislative amendment reversing the effect of the Byrne decision, and thereby prohibiting the contractual transfer of liability from principals to subcontractors, produces an estimated saving of around \$40 million for WorkCover Queensland per annum.
26. CCIQ notes that some of the costs will be linked back through to the employer (such as a subcontractor who is insured by WorkCover), with some of the costs being borne by the scheme as a whole.
27. CCIQ encourages the WorkCover Queensland Board to put in place a robust set of arrangements to ensure small and medium employers will not bare any additional cost impost as a result of the proposed amendments.
28. Nevertheless, CCIQ believes the additional savings measures of \$40 million in reversing the Byrne decision will keep the fund healthy and viable, and create better opportunities to maintain Queensland's competitive workers' compensation premiums.

Retrospective application

29. CCIQ notes that according to the Bill, the amendments will be retrospective. They will apply (pursuant to section 725) to any claim for damages started before the enactment of the proposed amendments except for those that have at commencement either been settled; or where a court hearing has actually started.
30. Governments are, on the whole, encouraged to adopt truly prospective legislation as a central principle of good governance. The need for stability and predictability is fundamental to the operation of the law and indeed to the operation of running a small business in Queensland.

31. Nevertheless, CCIQ notes that the current Bill conforms with fundamental legislative principles by having sufficient regard to the rights and liberties of individuals, and that the amendments are proposed in order to re-establish the Act's original policy intent concerning the indemnity provided to employers under workers' compensation policies.

Conclusion

32. Throughout this submission, CCIQ has sought to highlight its support for reversing the decision in Byrne in order to restore the policy intention of the Act and welcome the estimated savings of \$40million for WorkCover Queensland as a result of this legislation coming into place.

33. For the abovementioned reasons, CCIQ supports passage of the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016*.