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Significant Changes To Workers' Compensation And Workplace Health And Safety Legislation In Queensland – What Is The Impact On General Insurers?

Introduction

The Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010 was passed on 9 June 2010 and will commence on 1 July 2010.

The Bill was introduced in response to a review of WorkCover Queensland and enacts several significant changes to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("WCRA"), the *Workers' Compensation and Rehabilitation Regulation 2003* (Qld) and the *Workplace Heath and Safety Act 1995* (Qld) ("WHSA") with the aim of maintaining the viability of the Queensland Workers Compensation Scheme ("the Scheme").

This article outlines the key amendments of the Bill and the effect that these will have not only on the Scheme but also related parties. The key changes discussed in this article are broken up into three main categories, being the harmonisation of liability and damages provisions with the *Civil Liability Act 2003* (Qld) ("CLA"), increased involvement / co-operation between WorkCover and third party contributors, and claims for breach of statutory duty.

Liability and Damages – Harmonisation with Civil Liability Act 2003 (Qld)

Clause 20 of the bill inserts a new Part 8 and 9 into Chapter 5 of the WCRA. These provisions mirror those contained in the CLA which relate to the general standard of care, causation and contributory negligence in terms modelled on the CLA.

As has been seen with the application of the CLA, these provisions have the potential to make it more difficult for injured workers to establish negligence against their employers. Moreover, there may be greater scope for findings of contributory negligence.

The new Part 9 addresses the assessment of damages and largely brings the assessment process in line with that contained within the CLA and the regulations. The most notable difference may be in relation to the assessment of general damages. Prior to these amendments, damages for claims following industrial accidents were assessed at common law, which often led to higher awards for general damages.

Lower assessments of general damages will be of benefit to co-tortfeasors such as principal contractors and host employers who will not be penalised in claims between master and servant.

Co-Tortfeasors – Increased Involvement / Co-operation

The review of the WorkCover Scheme concluded that the management of common law claims would benefit from the streamlining of procedures upon the joinder of co-tortfeasors as contributors to claims.

The changes to the WCRA now specify that at least 5 business days prior to the compulsory conference, the contributor must give each party to the claim:

- Copies of all documents not yet given to the party that are relevant and required to be given for the claim;
- A statement verifying that all relevant documents in the possession of the party or the party's lawyer have been given as required;
- Details of the party's legal representation; and
- If the party has legal representation – a certificate of readiness signed by the party's lawyer to the effect that the party is ready for conference.

In addition, the current sections 292 and 292A of the WCRA (which deal with the procedure for exchanging final written offers following an unsuccessful conference) have been replaced with a new section 292. This section imposes an obligation upon all parties at the conference (including a contributor) to exchange final written offers should the claim not resolve. The section also allows for:

- Any two or more parties to make a joint final offer (although sufficient notice of the intent to give a joint final offer to allow a proper response must be given to the party to whom the offer is made);
- The final offer for a contribution claim must be made in a way which would dispose of the contribution claim if accepted;
- If the compulsory conference is the subject of more than one claim, the final offer may be a consolidated final offer for all claims made by the claimant;
- A consolidated final offer must cover all contribution claims relating to all claims made by the claimant to the extent the party making the offer has legal capacity to settle the contribution claims;
- A consolidated final offer must detail the portion of the offer applicable to each claim;
- A consolidated final offer can only be accepted or rejected in full;
- The final offer must remain open for 10 business days and proceedings cannot be started whilst the offer remains open;

Further, the Bill inserts a new section 316A into the WCRA which outlines the principles to be followed in relation to costs to the extent that they relate to a contribution claim. The section provides for the following:

- If the Court awards an amount for contribution equal to or greater than the offer made by the party claiming contribution (in most cases WorkCover), the Court must order the contributor to pay the costs of the party claiming contribution on the indemnity basis from the date of the final offer;
- If the Court either dismisses the claim for contribution, makes no award for the contribution or makes an award of contribution of an amount that is equal to or less than the contributor's final offer, then the Court must order the party claiming contribution to pay the contributor's costs on the standard basis from the date of the written final offer; and
- If an award of contribution is less than the offer made by the party seeking contribution but more than the offer made by the contributor, then each party bears its own costs.

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Claims for Breach of Statutory Duty – Retrospective amendment

Part 4 of the Bill amends the WHSA to address the perception that the duty of care owed by an employer to an employee is almost absolute and gives rise to strict liability.

That perception has arisen following the Queensland Court of Appeal decision in *Bourk v Power Serve Pty Ltd & Anor* [2008] QCA 225 which found, that if an injury occurred at work, and there is a causal connection between the employment and the injury, the employer will have breached the duty owed under the WHSA (given the duty is absolute) and the onus will then shift to the employer to establish a defence under the WHSA.

The bill introduces a new section 37A to the WHSA which states:

'No provision of this Act creates a civil cause of action based on a contravention of the provision'.

Essentially, the Bill removes a cause of action for breach of the statutory duties imposed by the WHSA. This not only removes the private cause of action an employee can bring against his employer for breach of the WHSA, but also removes the possibility that a private cause of action for breach of the WHSA could be expanded to other possible respondents.

Section 37A applies retrospectively to all current proceedings where the Notice of Claim for Damages was issued after 8 August 2008 (the date of the *Bourk* decision). The exception is where the trial of the matter begins before the date of commencement (1 July 2010).

The retrospective nature of the section has the capacity to cause some workers to re-evaluate the strength of their claims. WorkCover has recognised this unique situation, and has distributed a statement outlining their approach to the amendment.

Under this policy, workers have the option to maintain their claim (in which case a reasonable period will be allowed to comply with any legislative timeframes) or to withdraw them. Understanding that some claims will have been pursued to date on the basis of a legal landscape which will be altered by section 37A, if workers elect to withdraw their claim, WorkCover has advised that to take into account incurred legal fees and outlays, it will pay up to:

- § $10,000.00 ex gratia for pre-proceedings claims;
- § $20,000.00 ex gratia for litigated claims.

The worker election is required to be made by 31 August 2010.

Whilst WorkCover's approach will largely only impact upon workers and WorkCover, we see the potential for some collateral benefits for co-tortfeasors where, for example:

- § A worker elects to withdraw a claim against WorkCover where the co-tortfeasor has only been only joined by WorkCover by way of contribution notice; and
- § A worker who has a claim against both WorkCover and a PIPA respondent, may elect to withdraw the claim against both if he or she has limited prospects of establishing negligence.

Conclusion

Whilst the predominant objective of the Bill is to improve the financial viability of the Queensland WorkCover Scheme, the changes may potentially provide collateral benefits to public liability insurers, self-insured corporations or corporations with significant policy deductibles in that:

- § The changes create scope for a reduction in damages for workplace accidents (most notably for general damages);
- § The process for the management of contribution claims by employers against co-tortfeasors is streamlined;
- § There is greater scope for applying pressure on claimants to settle claims by legislating for joint final offers by employers and co-tortfeasors;
- § There is an incentive for workers pursuing claims where there are marginal prospects of success to withdraw their claims with a reduced or minimal costs penalty; and
- § The possibility that a private cause of action for breach of statutory duty could be extended to classes other than a worker's employer has been removed.

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