

# **Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010**

## **Explanatory Notes**

### **Objectives of the Bill**

The objectives of this Bill are to amend the *Workers' Compensation and Rehabilitation Act 2003*, *Workplace Health and Safety Act 1995* and certain subordinate legislation to ensure WorkCover Queensland's ongoing financial viability, while maintaining access to common law remedies for workers.

### **Reasons for the Bill**

On 18 November 2009, the WorkCover Queensland Board presented the Attorney-General and Minister for Industrial Relations with the outcomes of a review of WorkCover Queensland. The review analysed WorkCover's financial position and identified possible solutions to ensure it remains solvent. Phase 1 of the review was completed in early July 2009 and identified the drivers of WorkCover's current financial position as a combination of the following three factors:

1. increasing cost of claims, particularly a disproportionate increase in common law claims payments and the number of claims when compared to statutory claims payments and the number of claims;
2. premium income not keeping pace with net claims growth; and
3. two consecutive years of negative investment returns due to the global financial crisis.

These three factors resulted in a deficit of \$381 million before tax in 2007-08, followed by a deficit of \$894 million in 2008-09, resulting in a total accumulated operating deficit of \$1.3 billion before tax. These losses have been absorbed by WorkCover's investment fluctuation reserves.

Phase 2 of the review commenced in August 2009, and sought to quantify the extent of WorkCover's present and future financial position, and made a

number of recommendations to maintain fund solvency. The review estimated that if all factors are held constant, the recurrent funding gap would be in the order of \$400 million per annum.

Following the receipt of the recommendations of the WorkCover Board, the Attorney-General and Minister for Industrial Relations made a statement to Parliament on 26 November 2009 regarding the WorkCover Board's recommendations. This was followed by another statement on 23 February 2010 to announce the release of a discussion paper for public comment. The discussion paper outlined the WorkCover Board's recommendations and further recommendations identified through informal consultation with stakeholders.

A stakeholder reference group chaired by the Attorney-General and Minister for Industrial Relations consisting of employer associations, unions and the legal profession met on four occasions to provide advice, discuss all identified options and review the submissions to the discussion paper.

### **How the policy objectives are to be achieved**

The policy objectives of the Bill are to be achieved by:

- harmonising common law claims brought under the *Workers' Compensation and Rehabilitation Act 2003* with those brought under the *Civil Liability Act 2003* in terms of liability (standard of care), contributory negligence and caps on general damages and damages for economic loss;
- addressing the increased difficulty faced by employers in resisting claims for damages as a result of the Queensland Court of Appeal decision in *Bourk v Power Serve Pty Ltd & Anor* [2008] QCA 225;
- increasing obligations on third parties to participate meaningfully in pre-court processes;
- allowing a court to award costs against plaintiffs whose claims are dismissed;
- increasing the amount of employer excess to 100 per cent of Queensland Ordinary Time Earnings or one week's compensation, whichever is the lesser;
- removing the option for employers to insure against their excess;

- allowing payments to parents of workers aged under 21, if the worker dies and the parents live interstate; and
- allowing self-insurers to take on a higher statutory reinsurance excess in order to lower reinsurance premium.

### **Estimated Cost for Government Implementation**

The costs associated with the implementation of the Bill are to be met within existing resources.

### **Consistency with Fundamental Legislative Principles**

The Bill makes a range of amendments that may be considered adverse to the rights of individuals taking legal action for damages for work-related injuries. In large part, these amendments seek alignment with the *Civil Liability Act 2003*. Generally, these amendments are to apply prospectively for injuries sustained or diagnosed after the date of commencement.

However, one amendment adversely affects rights retrospectively. The amendment to the *Workplace Health and Safety Act 1995* states that nothing in that Act creates a civil cause of action based on a contravention of a provision under the Act. The purpose of the amendment is to address a perception that strict liability attaches to an employer if a work injury has occurred, regardless of fault. The basis for this perception is the decision of the Queensland Court of Appeal in *Bourk v Power Serve P/L & Anor* [2008] QCA 225. This judgment affirmed that if a worker is injured at work and there is a causal connection between the injury and work, the employer has breached its duty under the *Workplace Health and Safety Act 1995*.

This amendment applies retrospectively to all current proceedings for damages where a notice of claim was lodged after 8 August 2008 (the date of the *Bourk* judgment), unless the trial in the proceeding was started before 1 July 2010. This action is considered necessary to stem an increasing number of claims based on the strict liability perception.

While the amendment removes a worker's right of action under the *Workplace Health and Safety Act 1995*, it does not affect any other cause of action the worker may have in relation to his or her injury, such as a breach of a duty of care in tort (negligence) or in contract. Where a claimant has already commenced proceedings, the amendments do not restrict the ability to make any necessary alterations to pleadings.

Consequently, this amendment is justified on the basis that it will only affect those workers who are unable to establish that their employer was negligent in tort or had breached their duty of care under contract.

In addition, the amendment is consistent with other Australian jurisdictions, the national Model Work Health and Safety Act and the *Electrical Safety Act 2002*.

## **Consultation**

A discussion paper was released for public comment from 23 February 2010 to 24 March 2010. Sixty submissions were received from employer groups, unions, lawyers, individual employers, workers and health professionals. In addition, a stakeholder reference group chaired by the Attorney-General and Minister for Industrial Relations consisting of employer associations, unions and the legal profession met on four occasions to provide advice and discuss all identified options. Submissions were received from:

Aged Care Employers Self-insurance

Anglo Coal Australia

Atlas Insurance Brokers

Australasian Meat Industry Employees Union

Australian Asphalt Pavement Association

Australian Industry Group

Australian Lawyers Alliance

Australian Manufacturing Workers Union

Australian Orthopaedic Association

Australian Services Union (Central & Southern Queensland Clerical & Administrative Branch)

Australian Sugar Milling Council

Bar Association of Queensland

Boral Resources (Qld)

Building Trades Group of Unions

Cementing Australia

CFMEU Mining and Energy Division  
Chamber of Commerce and Industry Queensland  
Chris Trevor and Associates  
Civil Contractors Federation (including Queensland Major Contractors Association and Traffic Management Association of Queensland Inc)  
EastCoast Apprenticeships  
Electrical and Communications Association  
Electrical Trades Union  
Group Training Association of Qld and NT  
Hall Payne Lawyers  
Housing Industry Association  
KM Splatt and Associates  
Local Government Association of Queensland  
Master Builders' Association  
Queensland Asbestos Related Disease Support Society  
Queensland Council of Unions  
Queensland Hotels Association  
Queensland Law Society  
Queensland Nurses' Union  
Queensland Police Union  
Queensland Resources Council  
Queensland Trucking Association  
Recruitment and Consulting Services Association  
Sciacca's Lawyers and Consultants  
Shop Distributive and Allied Employees Association (Qld)  
Skilled Group  
The ABS Partnership  
The Retailers Association

Village Herb Farm

Workers' Rights Coalition

In addition, 16 confidential submissions or submissions from private individuals were received.

WorkCover Queensland and Q-COMP, the Workers' Compensation Regulatory Authority, were consulted throughout the development of the Bill.

## Notes on Provisions

### **Part 1                      Preliminary**

*Clause 1* sets out the short title of the Act to be the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010*.

*Clause 2* states that the Act, other than section 13, commences on 1 July 2010. Section 13 and X commences on assent.

### **Part 2                      Amendment of Workers' Compensation and Rehabilitation Act 2003**

*Clause 3* states that this part and the schedule amend the *Workers' Compensation and Rehabilitation Act 2003* (the Act).

*Clause 4* amends section 54 of the Act to confirm the ability of WorkCover Queensland to impose additional premium on an employer's insurance policy due to sustained poor claims experience. The clause specifies the circumstances under which an additional premium may be imposed. The additional premium may take, for example, the form of a higher premium rate.

*Clause 5* replaces section 67 of the Act to remove the ability of employers to insure against the excess period. The option for employers to insure against (buy out) the excess payable on WorkCover claims was introduced in 1997. There is an increasing trend for employers to take up the buy out option. This increase has eroded the original intent of the excess, which is to give employers an incentive to take an interest in the prevention of injury.

*Clause 6* amends section 86 of the Act regarding reinsurance for self-insured employers. Self-insurers are currently required to take out a policy of reinsurance with an approved insurer to cover the cost of such claims above a chosen level of risk (between \$0.3 million and \$1.0 million of claims costs). This bracket was not made subject to indexation and has remained unchanged since the commencement of the *WorkCover Queensland Act 1996* (repealed). The clause provides the Board of the Workers' Compensation Regulatory Authority (the Authority) with a discretion to approve reinsurance excess limits for amounts greater than \$1 million.

*Clause 7* corrects a drafting error in section 185 of the Act. Under section 185, an insurer must notify a worker of an entitlement to additional compensation if the worker has sustained a work related impairment over a certain threshold. Prior to 2007, the threshold was 50 per cent work related impairment. In 2007, the threshold was reduced to 30 per cent. In practice, insurers now list a worker's entitlement to additional lump sum compensation on the notice of assessment if the worker's work related impairment is 30 per cent or more, rather than 50 per cent. Section 185 however still refers to 50 per cent instead of 30 per cent.

*Clause 8* amends section 202 of the Act that concerns workers aged under 21 who die from a work-related injury and leave a parent but no dependants. Section 202 permits a payment to the worker's parents if they reside in Queensland, but not if the parents reside outside of Queensland. This contrasts with the position of dependants of deceased workers, who receive dependency benefits irrespective of where they live. This clause allows payments to parents of deceased young workers if the parent resides in Australia.

*Clause 9* amends section 220 of the Act to place an obligation on insurers to refer, at the conclusion of a statutory claim, an injured worker who is unable to return to work with his or her former employer, to the Authority for assistance. The insurer must notify the Authority of the work outcome for the worker.

*Clause 10* amends section 221 of the Act to include return to work advisory services for workers, employers and insurers as part of the Authority's role. The Authority must refer a worker referred to it under section 220, to programs that may assist in the worker's return to work, with the worker's consent.

*Clause 11* amends section 231 of the Act to provide that a worker must satisfactorily participate in return to work programs or suitable duties arranged by an insurer or the Authority.

*Clause 12* amends section 233 of the Act to define the terms "contribution claim" and "offer".

*Clause 13* amends section 235A of the Act to ensure that a worker who first consulted a nurse practitioner or dentist in relation to an injury that happened over a period is treated no differently with regard to the time limit on actions than if the worker first consulted a doctor about the injury. This is a consequential amendment resulting from the *Health and Other Legislation Amendment Act 2009*, enabling nurse practitioners to issue a workers' compensation medical certificate for minor injuries at a worker's initial attendance.

*Clause 14* amends section 238 of the Act to provide that a worker with a terminal condition who seeks damages is not subject to the new section 267(3) that concerns participation in return to work programs.

*Clause 15* amends section 267 of the Act to provide that a worker must satisfactorily participate in return to work programs or suitable duties arranged by an insurer or the Authority in addition to the worker's common law duty to mitigate his or her loss because of the injury.

*Clause 16* amends section 290A of the Act to increase the pre-trial obligations on third party contributors to exchange relevant documents and certify readiness for conference. The Act currently requires parties to a common law claim to participate meaningfully in a compulsory settlement conference by exchanging material relevant to the claim and estimates of legal costs before the conference, certifying readiness for the conference and exchanging mandatory final offers at the conference. While contributors joined in the claim are required to attend and actively participate in the compulsory settlement conference, they are not under the same obligations as other parties to a claim to be fully prepared so that they can participate meaningfully. This can and has led to settlement processes being frustrated by an inability to resolve all the issues between the parties, further delaying settlements and increasing legal costs for all parties. This

clause also requires a financial statement given to a party by the party's lawyer to state the costs consequences of a judgment dismissing the claim, or making no award of damages.

*Clause 17* replaces sections 292 and 292A of the Act to impose obligations on parties to a claim for damages where another party or parties is the subject of a contribution claim and the contribution claim is not settled at a compulsory conference. Each party must ensure that it makes a written final offer or offers, or a joint written final offer or offers, at the conference to the other party or parties at the conference that would dispose of the contribution claim if accepted.

*Clause 18* omits chapter 5 part 8 of the Act dealing with structured settlements. Provisions for structured settlements are to be included at the new division 4 in chapter 5 part 9. These provisions are modelled on the provisions in the *Civil Liability Act 2003*.

*Clause 19* omits the heading of chapter 5 part 9 (Particular matters affecting assessments of liability), as this part no longer exists. The contributory negligence provisions contained in the old part 9 have been relocated to the new part 8 that deals with civil liability.

*Clause 20* omits section 306 of the Act. Section 306 states that the Act does not reintroduce the absolute defence of contributory negligence or common employment. Until 1952, an employer was able to use the absolute defence of contributory negligence on the part of a worker to defeat a claim for damages at common law. The *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952* abolished the absolute defence of contributory negligence. However, that Act does not prevent the reduction of damages by up to 100 per cent due to the worker's contributory negligence. The defence of common employment implied that where an employee was injured through the negligence of a fellow employee, the employer could not be held vicariously liable. This defence was abolished in Queensland by the *Law Reform (Abolition of the Rule of Common Employment) Act 1951*. The abolition of these archaic defences is continued in statute by the *Law Reform Act 1995*. As such, there is no need to reproduce them in the Act.

*Clause 21* inserts a new part 8 and part 9 in chapter 5. Part 8 concerns the civil liability of persons or parties against whom a worker is seeking damages for injury. Part 9 regulates the assessment of damages paid to a worker. These provisions closely resemble certain provisions in the *Civil Liability Act 2003*. They have been brought into the Act in order to achieve

the stated policy objectives of the Bill, and to maintain the clear distinction between the two statutes. It is considered inappropriate for the *Civil Liability Act 2003* as a whole to apply to work injuries, as some of the limitations on liability conflict directly with common law principles regarding master and servant claims. For example, provisions regarding voluntary assumption of risk in the *Civil Liability Act 2003* have not been brought over, as they are inappropriate for work situations.

New section 305 defines the terms “duty” and “duty of care”. These are modelled on the definitions used in the *Civil Liability Act 2003*.

New section 305A states that part 8 does not apply to injuries that result from dust-related conditions, smoking, or the use of or exposure to tobacco products, with the exception of the provisions regarding contributory negligence. This includes claims by dependants of a worker who died of such injuries. These exclusions are consistent with the exclusions under the *Civil Liability Act 2003*.

New section 305B sets out the general principles to be taken into account in assessing the appropriate standard of care to be taken by a person or party in precaution against a risk of injury eventuating to a worker. Subsection (2) requires consideration of certain factors, not exclusive to any other circumstance of a particular case, in assessing the precaution(s) that would be taken by a reasonable person in that case. These principles are modelled on similar provisions in the *Civil Liability Act 2003*.

New section 305C specifies that, in actions for negligence, certain principles are to apply. First, the risk of injury is not to be considered in isolation. It must be considered as one of a number of similar risks of injury to which a reasonable response must be made. Second, the mere fact that a different way of responding to the risk exists does not alone create liability or affect any existing liability. It is for the worker to prove that the method used was an unreasonable response in all the circumstances, including the existence of the different method. Finally, an action by a person subsequent to the incident to prevent similar injury occurring does not of itself create liability or affect an existing liability. Similarly, action subsequent to an incident to remove a risk does not constitute an admission of liability. These principles are modelled on similar provisions in the *Civil Liability Act 2003*.

New section 305D sets out the elements and general principles to be taken into account in assessing whether the conduct of a person has caused injury to a worker. Whether a person has caused injury requires consideration of

the facts of the case in two ways. First, whether the injury suffered would not have occurred but for the actions of the person claimed to be at fault, described as “factual causation”, and second, whether in all the circumstances of the particular case, it is appropriate that the liability of the person considered at fault should include the injury that eventuated, described as “scope of liability”.

Further, the new section provides for cases where the facts are so unusual or extraordinary that, while factual causation cannot be found, a breach of duty that was a material contribution to the injury exists. In such circumstances, the section requires the Court to apply the tests developed at common law for such cases to decide whether or not, subjectively, a person should be responsible for the injury suffered. As part of this, the Court is to consider why in all the circumstances the person should be held responsible. The Court is still then required to move to the objective test for the scope of liability.

In addition, in relation to determining factual causation under the provision, the new section provides that in instances where the hypothetical conduct of the worker who suffered injury in the absence of the negligent act is relevant, the conduct is to be developed and assessed subjectively, as opposed to that of a reasonable person. In relation to statements made by the worker after he or she suffered the injury, only a statement adverse to the worker is admissible in the process.

Finally, this section provides that, in assessing the scope of a person's responsibility, the Court is to consider why in all the circumstances the person should be held responsible. These principles are modelled on similar provisions in the *Civil Liability Act 2003*.

New section 305E provides that the onus of proof for negligence is always upon the worker, and each fact relevant to causation must be proven on the balance of probabilities. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 305F provides that the same principles that apply in deciding a matter to which the Act applies, also apply in deciding contributory negligence. The standard of care a worker must take for the care of his or her own safety is the same standard a reasonable person would take if the reasonable person was aware of the same information that the worker who suffered the injury knew or ought to have known. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 305G states that a claim of contributory negligence can defeat a claim for breach of a duty by way of a reduction of damages by 100 per cent. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 305I sets out the meaning of “obvious risk” for this division. An obvious risk does not include risks that manifest themselves because of some action that is not itself an obvious risk. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 305J establishes a presumption that, if an injured worker was intoxicated at the time of the injury, the worker was contributorily negligent. The presumption may be rebutted if the intoxication was not a factor in the occurrence of the injury or the intoxication was not self-induced. If not rebutted, the Court is required to reduce any damages assessed by a minimum of 25 per cent. If the injury is suffered as a result of the injured worker driving a motor vehicle, the minimum reduction of damages is increased to 50 per cent where the worker is found either to have a blood/alcohol level of 150 mg or more of alcohol in 100 ml of blood or to be incapable in the Court’s opinion of exercising actual control of the vehicle. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New part 9 regulates the assessment of damages paid to a worker. New section 306 defines the terms future loss, general damages and loss of earnings. These are modelled on the definitions used in the *Civil Liability Act 2003*.

New section 306A states that part 9 does not apply to injuries that result from dust-related conditions, smoking, or the use of or exposure to tobacco products, with the exception of the provisions regarding exemplary damages and damages for gratuitous services. This includes claims by dependants of a worker who died of such injuries. These exclusions are consistent with the exclusion of such injuries under the *Civil Liability Act 2003*.

New section 306I provides that the limit of the amount to be awarded for loss of earnings is an amount equal to a limit defined by reference to lost earning capacity expressed as a capacity on a per week basis, and is three times Queensland Ordinary Time Earnings (QOTE). The limit is also expressed as the “present value” of that capacity (the value prior to being discounted on the basis a portion of the amount would have been earned at some time in the future). Further, the level of earning capacity retained

does not affect the calculation. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 306J provides that, in circumstances where a court is to award damages by way of a global amount for economic loss, the Court must only award damages if it is satisfied the worker has suffered or will suffer that loss because of the injury. The section details the considerations the Court must make in its assessment. It is irrelevant whether the loss is future or past loss. Secondly, in awarding damages, the Court must detail its reasons for awarding the damages, outlining any assumptions it has made in arriving at the value of the damages. Finally, any amount of damages awarded globally cannot exceed the limit set in section 306I. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 306K provides that damages for loss of superannuation entitlements, if awarded, are to be limited to the amount of the employer contribution. The maximum payable is the minimum percentage employer contribution required by law for that specific person applied to the damages awarded for loss of earnings in accordance with this part. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 306L requires damages for future loss to be discounted at a rate of 5 per cent. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 306M establishes a threshold for eligibility for damages in respect of loss of consortium (between husband and wife, the entitlement to companionship, love, affection, comfort, and support of the other) and loss of servitium (loss or impairment of the services, duty, or labour to be rendered by one person to another). The threshold for entitlement to such damages is to be prescribed by regulation, to facilitate the future indexation of the amount. The section also limits compensation to a weekly amount not exceeding three times QOTE. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

The inclusion of this section does not authorise WorkCover Queensland to indemnify an employer for a liability of the employer to pay damages for loss of consortium resulting from injury sustained by a worker.

New section 306N aligns the calculation of interest payment for past losses to the Treasury Bond rate for 10 year investments. This ensures the interest is appropriate for the economic conditions at the time of settlement. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 306O provides a new method for the assessment of general damages. The method involves a 100-point scale upon which the Court must assess the degree of injury. The Court is to assess an injury scale value (ISV) in accordance with the rules provided by way of regulation, as well as the ISVs attributed to similar injuries in prior proceedings. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New section 306P provides the formula for the calculation of general damages subsequent to assessment of the ISV by the Court. The amounts used for the calculation of general damages are to be prescribed by regulation to facilitate the future indexation of the amounts. This section is modelled on a similar provision in the *Civil Liability Act 2003*.

New chapter 5 part 9 division 4 facilitates the making of consent orders for structured settlements. It replaces part 8 in chapter 5 of the Act, which also dealt with structured settlements, and has been drafted to be consistent with similar provisions in the *Civil Liability Act 2003*.

New section 306V provides the method by which annual indexation should occur for amounts used for the purposes of general damages calculation provisions, damages for loss of consortium and structured settlements. Monetary amounts are to be adjusted on 1 July each year by the percentage change in QOTE over the preceding four quarters.

*Clause 22* amends and renumbers section 307 of the Act regarding contributory negligence. It provides that a court may make a finding of contributory negligence if the worker undertook an activity involving obvious risk or failed to take account of obvious risk. However, the clause does not limit the discretion of a court to make a finding of contributory negligence if the worker undertook an activity involving less than obvious risk or failed to take account of risk that was less than obvious.

*Clause 23* relocates part 10 in chapter 5 regarding awards of damages for gratuitous services. This amendment aligns the order of certain provisions in the Act with those in the *Civil Liability Act 2003*.

*Clause 24* relocates part 11 in chapter 5 of the Act (Exemplary damages) to the new part 9 (Assessment of damages).

*Clause 25* amends section 311 of the Act to expand the range of instances under which a court must make orders as to costs. These are to include situations in which a court has dismissed a worker's claim, or makes no award of damages.

The Queensland Court of Appeal in *Sheridan v Warrina Community Co-operative Ltd & Anor* [2004] QCA 308 held that no costs can be awarded against a plaintiff whose claim is dismissed. It is considered anomalous that a plaintiff who receives damages that are less than an insurer's or contributor's mandatory final offer suffers costs consequences for taking the matter to trial, yet a plaintiff who receives no damages because of a finding of no liability is not required to pay the insurer's or contributor's costs. The lack of a costs deterrent is considered to provide further incentive for some plaintiffs to continue with speculative or unmeritorious claims.

*Clause 26* amends section 312 of the Act to replace a reference to judgments that are "no less favourable" to claimants with a more precise reference to the actual amount of damages awarded.

*Clause 27* amends section 313 of the Act to expand the range of instances under which a court must make orders as to costs. These are to include situations in which a court has dismissed a worker's claim, or makes no award of damages.

*Clause 28* amends section 316 of the Act to expand the range of instances under which a court must make orders as to costs. These are to include situations in which a court has dismissed a worker's claim, or makes no award of damages.

*Clause 29* inserts a new division 2A in chapter 5 part 12 to introduce costs consequences for contributors if the contributor is required to make a mandatory final offer under section 292A.

*Clause 30* omits section 317 of the Act that states section 318 applies to all claimants. Section 318 is instead being amended to include this condition.

*Clause 31* amends section 318 of the Act to state that the section applies to all claimants.

*Clause 32* inserts new sections 318A to 318E regarding the awarding of costs in particular circumstances. A court may make an order for costs other than the prescribed order if the party ordered to pay costs shows the other order is appropriate in the circumstances, or if an award of damages is affected by factors that were not reasonably foreseeable by a party at the time of making or failing to accept a written final offer. A failure to accept a written final offer or later offer includes a refusal to accept the offer. The clause also prescribes conditions for costs orders for interlocutory

applications and orders where an entity was not a party at the compulsory conference. These provisions were previously located in section 316.

*Clause 33* inserts a new chapter 26 containing transitional provisions for the amendments made by the Bill.

New section 663 defines terms used in the chapter.

New section 664 states that an employer who has insured against the excess under the old section 67 remains insured for the duration of that period of insurance.

New section 665 states that the new arrangements for reinsurance apply to any reinsurance entered into on or after 1 July 2010.

New section 666 states that the expanded benefit for parents of workers aged under 21 applies if the death results from an injury sustained on or after 1 July 2010.

New section 667 states that an insurer's obligation to refer injured workers to the Authority for return to work assistance under the amended sections 220 and 221 applies to any injured worker on or after commencement, regardless of when the injury was sustained. This provision is intended to mean any worker currently receiving weekly payments of compensation, but does not prevent an insurer referring other workers whose entitlement to weekly payments of compensation ceased before commencement of the amended section 220.

New section 668 provides that the stated sections regarding compulsory conferences, contributors and costs are to apply upon commencement to all damages claims that are on foot but have not yet gone to a compulsory conference or trial.

New section 669 states that the civil liability and assessment of damages provisions apply to injuries that arise after 1 July 2010. In the case of a latent onset injury, the new provisions apply if the date of diagnosis of the latent onset injury is on or after 1 July 2010. This is considered reasonable given that dust-related conditions such as mesothelioma are excluded from the application of these new provisions. In the case of an injury that happens over a period, the new provisions apply if the worker first consulted a relevant health practitioner on or after 1 July 2010.

New section 670 states that the amendment of the *Workers' Compensation and Rehabilitation Regulation 2003* (the Regulation) under the amending Act does not affect the power of the Governor in Council to amend the Regulation further or to repeal it. The Regulation is being amended by Act

of Parliament in order to ensure the new arrangements are in place by 1 July 2010.

*Clause 34* amends the dictionary in schedule 6 to define the new terms to be used in the Act.

### **Part 3                      Amendment of Workers' Compensation and Rehabilitation Regulation 2003**

*Clause 35* states that this part and the schedule amend the *Workers' Compensation and Rehabilitation Regulation 2003*.

*Clause 36* amends and relocates current definitions to the dictionary in schedule 13.

*Clause 37* amends section 16 of the Regulation to specify that the employer excess amount is equal to 100 per cent of QOTE, or one week of compensation, whichever is the lesser amount. The clause also removes a provision whereby if a worker's weekly earnings are less than the statutory amount of excess, the excess payable by an employer is the amount of the worker's weekly earnings less \$1. This provision was introduced in 2004 to assist employers of lower paid workers so that the excess amount would never be more than a worker's weekly earnings. Although this arrangement was introduced to assist employers, its benefit has been negligible while the administrative cost to WorkCover Queensland in processing the \$1 payment is more than the payment itself. In any case, this section is rendered inoperable by the changes to the excess amount in section 16 of the Act.

*Clause 38* omits sections 17 and 18 of the Regulation, which deal with the excess buy out option. The option to insure against the employer excess is removed by the amendment to section 67 of the Act.

*Clause 39* amends section 77 of the Regulation to change the reference to the Queensland Workers' Compensation Self-Insurers' Association. In 2008, this body changed its name to the Association of Self Insured Employers of Queensland.

*Clause 40* inserts a new part 7A regarding the assessment of damages paid to a worker. The new part is based on provisions of the *Civil Liability Regulation 2003* regarding the prescribed amount of damages for loss of consortium or loss of servitium, rules for assessing ISV, general damages calculation provisions, and the prescribed amount of award for future loss.

*Clause 41* inserts a transitional provision stating that the excess provisions in force prior to 1 July 2010 remain in force for an injury that occurred before that date.

*Clause 42* inserts new schedules 8 to 12 regarding the assessment of general damages. It reproduces provisions of the *Civil Liability Regulation 2003* regarding ranges of ISVs, as well as the matters to which a court is to have regard in the application of the ranges of ISVs. It also reproduces the psychiatric impairment rating scale (PIRS) and provisions regarding the matters relevant to PIRS assessments by medical experts. The clause also inserts a dictionary in schedule 13 to consolidate definitions of current and new terms used in the Regulation.

## **Part 4                      Amendment of Workplace Health and Safety Act 1995**

*Clause 43* states that this part amends the *Workplace Health and Safety Act 1995*.

*Clause 44* inserts a new division 5 in part 3 of the Act stating that no provision of the Act creates a civil cause of action based on a contravention of the provision. The purpose of the amendment is to address a perception that strict liability attaches to an employer if a work injury has occurred, regardless of fault. The basis for this perception is the decision of the Queensland Court of Appeal in *Bourk v Power Serve P/L & Anor* [2008] QCA 225. This judgment affirmed that if a worker is injured at work and there is a causal connection between the injury and work, the employer has breached its duty under the *Workplace Health and Safety Act 1995*.

While the amendment removes a worker's right of action under the *Workplace Health and Safety Act 1995*, it does not affect any other cause of action the worker may have in relation to his or her injury, such as a breach of a duty of care in tort (negligence) or in contract.

*Clause 45* inserts a new division 7 in part 17 of the Act stating that the amendment to the Act applies to current claims and proceedings for damages to which the *Workers' Compensation and Rehabilitation Act 2003* applies, if the proceeding commenced after 8 August 2008, the date of the judgment in *Bourk v Power Serve*. However, the *Workplace Health and Safety Act 1995*, as in force immediately before the commencement of the amendment, will continue to apply to a proceeding for damages if the trial in the proceeding started before 1 July 2010. Where a claimant has already commenced proceedings but has not yet gone to trial, the amendments do not restrict the ability to make any necessary alterations to pleadings.

## **Part 5**                      **Other amendments**

*Clause 46* and the schedules make minor technical amendments and drafting corrections to the *Workers' Compensation and Rehabilitation Act 2003*, *Workers' Compensation and Rehabilitation Regulation 2003* and *Civil Liability Regulation 2003*.