24 April 2014
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

By Email: Law@parliament.nsw.gov.au

Dear Chair,

Questions on notice from the Parliamentary Inquiry into WorkCover Functions

We thank the Committee for providing Unions NSW with the time to review our extensive files on our interactions with WorkCover.

Please note that this response is prepared by staff other than Mark Lennon at Unions NSW. While Mark Lennon sits on the Safety Return to Work and Support Board we are unable to access the minutes of these meetings unless authorised by the Board. We have not sought to do this. Neither have we sought to access Mark Lennon's knowledge from these meetings.

The following attempts to answer the questions posed by the Committee and have been answered in the order that they were asked. We remain available to answer further questions.

Yours faithfully,

Shay Deguara
Industrial officer
WHS and Workers Compensation

Response to Questions from the Standing Committee on Law and Justice

The Hon David Clarke

Regarding our list of recommendations Unions NSW have been asked:

"What you raised with WorkCover, when you raised it, what response was given, your response to the response?"

We have also been asked by another member of the Committee to divide the recommendations into administrative **(A)** and legislative **(L)** changes required. We have combined these two responses for brevity.

Unions NSW recommendations included:

(A) 1. That WorkCover recommit to implementing premium recovery and fraud investigation targets to enable greater premium recovery and also enable deterrent of fraud regardless of the party involved.

- This was raised a number of times over the years at the OHS and WC Advisory Council, WorkCover CEO meetings (when they still occurred), and in Industry Reference Groups (while they still existed). We can provide minutes of Industry Reference Groups where fraud was discussed.
- This issue was formerly reported in the Annual Report.
- This issue was raised by Unions NSW (other parties raised the need for a return to work inspectorate) in our Submission to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012, p. 35.
- This was raised again with WorkCover on the 6 August 2013 via correspondence.
- On the 20 September WorkCover responded with the following:

  "In relation to premium compliance, WorkCover currently relies on complaints from internal and external stakeholders and data analysis that identifies potential employers that may be at risk of non compliance, based on a defined set of risk behaviours, before it considers a wage audit. WorkCover is moving towards a mix of approaches to ensure premium compliance including education, support, marketing campaigns, self-assessment tools and audits. Audits are only intended to be used in high risk areas of non-compliance. Non insurance and under declaration of wages will also be targeted via data matching comparisons with the Australian Taxation office and the Office of State Revenue data, subject to legal clearance.

  Where an uninsured employer is audited, workers compensation legislation allows for recovery from that employer of double the avoided premium, or a lesser amount agreed by WorkCover, and a cost of the audit. Where an audit of an insured employer reveals under-declared wages, the legislation allows for recovery of the avoided premium, statutory late payment fees and, where under declaration is 25 % or more, the cost of the audit. Unpaid premium debt is subject to compounding late payment fees at the statutory rate.

> *The legislated penalties noted above are applied by WorkCover to uninsured employers by Scheme agents to policy- holding employers who have been found to have underpaid their premium. In 2012/13 4301 audits were completed on Scheme policy holders with 97.73 per cent of gross premiums recovered. A further 161 audits were conducted on uninsured employers with 59.84 per cent of gross premiums recovered.*
>
> *Scheme agents manage the collection process to recover unpaid premium debt from their policy holders. However, the number of employers prosecuted by Scheme agents is not currently reported to WorkCover. In respect of uninsured employers, WorkCover manages the recovery process directly and* ***prosecution is rare."***
>
> (emphasis added)

However in a meeting between WorkCover and the Building Trades Group of Unions on the 11 April 2014 as part of the "6 week safety blitz" on city construction, officers of WorkCover advised that they had a 278% return on policy audits with recovery of under and unpaid premiums.

(A) 2. That WorkCover terminate its moratorium on removal of self-insurers licenses and prosecuting scheme agent insurers who breach the law.

- This has been raised in a number of forums over a number of years including the OHS and Workers Compensation Advisory Council, WorkCover CEO forum and similar meetings.
- WorkCover denies such a policy being in place despite a number of serious deviations from the conformance requirements occurring from time to time and no termination process commenced.
- A number of Unions made submissions to the General Purpose Standing Committee No. 1 on alleged workplace bullying at WorkCover that included problems with self insurers.
- See the Australian Manufacturing Workers Union submission to the General Purpose Standing Committee No 1 on Allegations of bullying in WorkCover for example.

(L) 3. That the period for injured worker protection from termination be extended from 6 months to 12 months.

- This issue was raised in a meeting with WorkCover CEO on the 12 December 2012 as a number of unions reported to WorkCover that rather than providing suitable duties to return to work, a number of employers were opting to wait until after the employment protection period of 6 months and then terminating the worker. The insurance premium is affected differently by performance depending on the size or type of workers compensation policy, offering little incentive to return long term workers to work.
- It was followed up in correspondence on the 13 December 2012 we asked:
  "How does the offence for failure to provide suitable duties interact with the ability to terminate an injured workers after 6 months?"
- The response provided on 21 January 2013 missed the point of the conversations that it is more difficult to return someone to work once they are terminated. The correspondence stated:

> *"The provisions regarding the failure to provide suitable employment under Section 49 of the Workplace Injury Management and Workers Compensation Act 1998 and dismissal of an injured worker within six months of the worker becoming unit under Section 248 of the Workers Compensation Act 1987 are separate offence provisions."*

(L) 4. Require a positive burden of proof that the employer has no ability to provide suitable duties prior to termination.

- This was raised in our Unions NSW Submission to the Joint Parliamentary Select Committee on the NSW Workers Compensation Scheme, May 2012, p. 34-35.
- WorkCover has stated that they have read all the submissions to Parliament in the Joint Standing Committee.

(A) 5. That a tri-partite panel be formed to manage WHS strategic direction and boost compliance and enforcement activity within NSW with regard to health and safety, return to work and injury management.

- This was requested in August 2013 as part of the Unions NSW submission to the General Purpose Standing Committee No.1 into allegations of bullying in WorkCover NSW.
- WorkCover has stated that they have read all the public submissions from this Inquiry.
- The report is being drafted from this Inquiry.
- We have received no formal response from WorkCover.

(A) 6. That the functions of the WHS Division and the Workers Compensation Division be separated under different executive management and advisory councils to avoid conflicts of interest.

- This issue has been raised by the Public Service Association of NSW.
- This was raised in our commissioned independent research by Macquarie University.
- This issue was raised in our submission.
- This is an issue for Board level discussions.

(A) 7. That the Statistical Bulletin be re-established to enable timely and NSW relevant statistics available to the Minister and the general public about the operations of WorkCover Authority.

- Unions NSW met with the WorkCover CEO on 12 December 2012 where the statistical bulletin was raised including a range of statistics regarding the scheme and prosecutions.
- Unions NSW confirmed via correspondence on 13 December 2012 that WorkCover Authority agreed to get back to Unions NSW regarding the statistical bulletin and regarding certain items being published in them.
- The response on 21 January 2013 included:

  > *"With regard to your enquiry about prosecution data, I can advise that this information has never been reported in WorkCover's Annual Statistical Bulletin. However, WorkCover does maintain a list of recent prosecutions on its website. Prosecution results are also provided in WorkCover's Annual Report."*

  There was no reference to the ceasing of the Statistical Bulletin.

- The termination of the Statistical Bulletin was apparent from the Macquarie University Research.

(A) 8. That the WorkCover Authority reconstitute the Work Health and Safety and the Workers Compensation Advisory Council/s as a tripartite consultation mechanism as required by the ILO between employee and employer organisations and the Government.

- This was raised at the time of the establishment of the Safety Return to Work and Support Board.
- We believe the issue was raised at the final meeting of the former WorkCover Board.
- We believe this issue was raised directly with the Minister on termination of the previous Advisory Council, but are yet to identify the content or medium of this correspondence.
- We believe it has been raised with the current Safety Return to Work and Support Board under Section 10 of the Safety Return to Work and Support Board Act 2012.
- There has been no formal attempt by WorkCover to initiate the Advisory Council/s to date.

(A) 9. That the proposed Advisory Council and the Board open their meetings to greater transparency by allowing questions on notice, and staff and other observers to attend. While there will be an option for in camera sessions, there should be a direction that open meetings be given preference over closed sessions.

- This has not been submitted to WorkCover by Unions NSW previously and arose from discussions with WorkCover union members in preparing the submission for this Inquiry due to lack of knowledge of what occurs at the Board..

(A)10. That the actuarial advice and timing regarding a projected return to surplus for the June 2012 amendments be tabled as a public document, including the actuarial advice and assumptions for the previous five years.

- This was submitted to WorkCover as part of the Unions NSW Submission to the Joint Parliamentary Select Committee on the NSW Workers Compensation Scheme, May 2012.

(A)11. That this Parliamentary Committee acquires its own actuary and conduct a review of the above actuarial reports, and identifies mechanisms to restore workers benefits.

- This is not for the WorkCover Authority to establish and is up to this Parliamentary Committee to establish.
- The provision of the PWC advice on the day prior to the Inquiry hearing is not ideal.
- The contents of the PWC report appear to include a number of difficult assumptions or conclusions. These include that the scheme was on the mend prior to the implementation of the drastic cuts to scheme benefits, and that the cause of these improvements could be linked to the cuts that were not even before the Parliament.
- We raised with Minister Pearce in December 2012 a request for the full copy of the Scheme Valuation and believe this should be in the public domain.

(A) 12. That the Parliament establish a review as per clause 27 (4) as the Minister is aware that the scheme has returned to surplus.

- We have written to WorkCover and wrote to the Minister on 14 February 2014. It is up to the Minister to establish under Parliamentary Authority and not up to the WorkCover Authority.
- There has been no response that we are aware of to date.

(A) 13. That no further premium reductions be authorised until the review is conducted and the Parliamentary Committee actuary has assessed how to restore benefits.

- This was included as part of the Unions NSW submission to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012, pp.10-13.

(A)14. That Work Capacity Decisions be stayed for injured workers who are appealing the decision to ensure sustainable return to work.

- This can be done through administrative processes as we are now seeing these matters take over 6 months for WorkCover to review on merit.
- This issue was raised with the CEO in a meeting on 12 September 2012.
- The issue of Work Capacity Assessments was confirmed in writing on 13 September 2012 and included:

  "*The review process applying to disputes about Work Capacity Assessments and Decisions will be highly transparent and insurers will not have lawyers handling disputes that go through this process."*
- This issue of work capacity assessments was discussed on 12 December 2012 in a meeting with the WorkCover CEO.
- This was confirmed in correspondence of 13 December 2012 that stated:

  "9. Guidelines have been issued regarding work capacity assessments, it is expected capability in this area will be built up over the course of 2013 as the new process is implemented."
- Correspondence from the CEO in response on the 21 January 2013 stated:

  "*I can confirm that the summary you provided regarding recent changes to New South Wales workers compensation legislation is correct aside from a few points of clarification."*

  The correspondence does not mention point 9 above.
- WorkCover Authority is now taking over 6 months to process Work Capacity Decision reviews according to at least two unions. This provides the worker without any pay and little prospect to have workplace rehabilitation or return to work as the insurer is attempting to remove liability for continuing the claim.

(L/A) 15. That the 12 month limit on medical expenses after weekly payments cease, be removed and the delay in the pre-approval of medical expenses by insurers be able to be taken to the Workers Compensation Commission.

- We saw prior to Christmas a Regulation with a shelf life of no more than two weeks attempt this intent after media showed interest in several cases. Despite the Regulation the insurers stated that they were not advised by the WorkCover Authority so did not approve medical treatment post 1 January 2014. Therefore this issue needs both Regulation and administrative directive.
- We raised via email directly to the Minister's Office on 31 December 2013.
- The Minister responded on 4 February 2014 with a letter to Emma Maiden, Assistant Secretary Unions NSW. The letter skirts around the actual issue of access to the Regulation and states at the end:

  > *"I encourage people with concerns about access to medical treatment to speak to their doctor or contact Medicare Australia on 132011 and at www.humanservices.gov.au to discuss the available benefits."*

  This process of cost shifting also has a consequence of potentially delaying a worker's return to work or requiring the worker to leave the workforce until they receive the necessary medical treatment. Medicare has a waiting list during which time a worker may need to take sick leave or be medically terminated.

(A) 16. That the WorkCover Authority be directed to enforce penalties for non-compliance with pre-approval time limits.

- The pre-approval issue was raised in a meeting with the CEO on 25 July 2012.
- A letter was sent to the Minister on 9 August 2012 where it was stated regarding pre approval that there is an issue with already determined WCC matters being overturned by the new pre approval process.
- We have requested through GIPA application this information on 5 February 2014.
- The response on 25 March 2014 was:
  "No prosecutions against the Scheme agents have been undertaken for breach of legislation and there are currently 7 investigations underway; however, to date, none of these are confirmed to be breaches of either legislation or guidelines."

(L) 17. That an independent government officer such as a WorkCover Ombudsman be charged with overseeing all administrative decisions of WorkCover including decisions related to health and safety enforcement and that this not be done to the exclusion of existing appeals processes.

- Unions NSW put this submission to Parliament in the General Purpose Standing Committee on Allegations of Bullying at WorkCover in August 2013, p. 33.
- Through multiple submissions and reviews from 2008 to 2010, Unions also vigorously put to WorkCover and Safe Work Australia, and the Expert panel on OHS Harmonisation that there was a need for checks and balances on the enforcement or non enforcement of OHS laws.
- Much of unions interaction with WorkCover is about raising issues of safety with WorkCover and then pressuring them to undertake some form of intervention. We are unaware of what happens in non union workplaces when a worker rings WorkCover.

(A) 18. That the ABS data Work Related Injuries in the ABS Multi-Purpose Household Survey (MPHS) be used to evaluate the relative success of the WorkCover Authority in WHS injury prevention.

- This is a research method issue and surrounds the issue of under-reporting.
- This has been analysed in a number of research and academic journal articles, including with Safe Work Australia, which WorkCover sits on the Board.
- This issue has been discussed at countless meetings, Parliamentary Reviews ever since WorkCover has relied upon compensation statistics for their WHS strategy.
- For example, the use of compensation statistics was raised in February 2014 with Unions NSW at the Senate Committee on Employment and Workplace Relations.
- Safe Work Australia acknowledges the error of relying on workers compensation data.

(A) 19. That a tripartite panel be established to assist WorkCover in undertaking this function of encouraging research in WorkCover's subject matter.

- This has not been put to WorkCover for some time.
- The research grant rounds have not been advertised for some time.
- There has been research directed by HOWSA and HOWCA where WorkCover is the leading Authority but is paid little attention unless pressured in the media, such as with quad bikes.
- Unions including the AWU and Nurses have raised the need for specific research into particular hazards or industry problems.

(A) 20. To reconvene a further round of WorkCover Assist Education grants for employer and employee organisations.

- This was put to the previous WorkCover Board and also the OHS and WC Advisory Council.
- They have been disbanded.
- Discussions with WorkCover officials stated that there was a plan to re-implement the WorkCover Assist program in late 2012. It did not get approved.

(A) 21. That a tripartite panel be developed to assist WorkCover identify areas of high cost in health and safety and workers compensation and identify strategies to reduce the cost to the scheme.

- Unions NSW put this suggestion to the Joint Parliamentary Select Committee on the NSW Workers Compensation Scheme, May 2012, p.34 (without the tripartite component).
- Unions NSW put this submission to Parliament in the General Purpose Standing Committee on Allegations of Bullying at WorkCover in August 2013, p. 33.
- WorkCover stated that they read all the submissions to both inquiries.

(A)22. That the outcomes of the Return to Work Pilot Project be released and acted upon in full where successful.

- Unions NSW and other parties raised the need for a return to work inspectorate on page 35 of our Submission to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012, p. 35.
- WorkCover has stated that they reviewed all these submissions in meetings with Unions NSW.
- It was a recommendation of the Joint Select Committee in their Report.
- Unions NSW met with WorkCover on 12 September 2012 where it was discussed that WorkCover was conducting a Return to Work Pilot in the Inspectorate.
- This was confirmed in writing on 13 September 2012 in correspondence to WorkCover.
- Unions NSW met with the CEO WorkCover on 12 of December 2012 where the Return to Work Pilot was raised after questions.
- On 13 December 2012 we corresponded with the CEO WorkCover regarding the Return to Work Inspectorate, requesting outcomes of the trial.
- Unions NSW again corresponded on 6 August 2013 to WorkCover requesting further details of the return to work pilot.
- WorkCover responded on 20 September 2013 with a general response that there was general return to work training of inspectors in August 2013.
- Towards the middle of 2013 we are advised that specialist inspectors were being hired as part of a further restructure of inspectors despite the statement above that general training was being provided.

(A)23. That the JobCover Placement Program be reintroduced

- The JobCover Placement Program is still in place however, difficulties with the administration of the Program appear to be highly problematic. This Program places workers in a precarious position due to the operation of work capacity assessments. If a worker has sufficiently recovered to return to work, the insurance company deems them as having returned to work under the definition of suitable employment (S32A) and cuts off their weekly payments. This is despite the worker not being in actual work.
- Phone enquiries with CAS 131050 have been made with WorkCover in August & September 2013 and March 2014. All enquiries state that the scheme is still in existence however, the injured worker must go through their rehabilitation provider and insurer.
- Enquiries with rehabilitation providers have indicated that there are fewer people accessing work placements because of the above conflicted scenario as the insurer does not want to pay money for someone who is *"fit for suitable (un)employment".*
- The insurers act as agents for the WorkCover Authority.
- On the 20 September 2013 the CEO of WorkCover wrote to Unions NSW stating a variation of this Program had commenced:

> *"WorkCover's Return to Work Assist program commenced on 1 August 2013. This new vocational rehabilitation program supports eligible micro employers to offer duties to an injured worker through a graded return to work plan. A micro employer in New South Wales is one who has five workers or less and has a basic premium tariff of $30,000 or less. The program allows the employer to maintain the alternate work arrangement put in place to cover the duties of the injured worker, such as employing a casual worker or having other staff work overtime. At the same time,*

the injured worker can continue to receive their weekly payments from the insurer while they participate in a graded return to work plan."

(L/A) 24. That WorkCover review and improve how it assists or incentivises (sic) employers with at work rehabilitation and re-employment of injured workers after long term incapacitation.

- Unions NSW and other parties raised the need for a return to work inspectorate on page 35 of our Submission to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012.
- The administration of ILARS prevents workers from accessing injury management disputes including return to work disputes when combined with work capacity assessments as these were previously conducted by non practicing representatives. This combination works to prevent return to work issue being addressed in the Workers Compensation system via a form 6.
- The issue has been raised on a number of occasions with WorkCover.
- This issue was raised in a meeting with WorkCover CEO on 12 December 2012 as a number of unions reported to WorkCover that rather than providing suitable duties to return to work, a number of employers were opting to wait until after the employment protection period of 6 months and terminating the worker.
- It was followed up in correspondence from Unions NSW on 13 December 2012 we asked:

  "How does the offence for failure to provide suitable duties interact with the ability to terminate an injured worker after 6 months?"
- The response provided on 21 January 2013 missed the point of the conversations that it is more difficult to return someone to work once they are terminated. The correspondence stated:

  "The provisions regarding the failure to provide suitable employment under Section 49 of the Workplace Injury Management and Workers Compensation Act 1998 and dismissal of an injured worker within six months of the worker becoming unit under Section 248 of the Workers Compensation Act 1987 are separate offence provisions."

(A) 25. That the Doctors Certificate of Capacity be modified to include a recommendation for access to workplace rehabilitation services to prompt earlier access to the workplace and rehabilitation.

- The issue of the Doctors Certificate of Capacity was raised on 12 September 2012 in a meeting with WorkCover CEO.
- The issue was raised on 13 September 2012 via correspondence and Unions NSW advised that we were willing to participate in consultation regarding this and other aspects of the workers compensation system.
- The Certificate was issued via Gazette and causes significant problems for workers as Doctors find the Certificate (6 pages) too long, incorrect completion can cause difficulties from the insurer, and can be ignored by the insurer.

(A)26. That WorkCover allow injured workers in remote areas to attend Doctors via telelink.

- This was raised by the Public Service Association's legal representatives with WorkCover after Minister Pearce issued a press release to exemplify doctor shopping when the changes were put through Parliament. The press release contained case studies that resembled the client the PSA's legal representative was handling. The timing of the issue being raised was early 2013.
- The PSA's legal representative was on the workers compensation lawyers advisory group for a number of years and stated that this issue of regional access to doctors certificates has been raised a number of times.
- The delay caused by it being difficult to see a Doctor in remote areas leads to workers not being paid as doctor availability and injured worker mobility are both compromised. If you do not have a current certificate the insurer suspends payments.

(L/A) 27. There is a need for an independent body to review on grounds of merit and process work capacity decisions and assessments.

- This has been limited under the legislation.
- WIRO can review Work Capacity Decisions and Work Capacity Assessments only on process.
- WorkCover and the insurer have a conflict of interest in the assessment of merit.
- This was the subject of a number of discussions in meetings between Unions NSW and WorkCover CEO and WIRO seperately.
- For instance this was discussed in a meeting on 12 September 2012.
- It was confirmed in correspondence on the 13 September 2012:

  > *"The review process applying to disputes about Work Capacity Assessments and Decisions will be highly transparent and insurers will not have lawyers handling disputes that go through this process."*

  This has not been the case with work capacity decisions and reviews being sent to workers on law firm letterhead.

(L) 28. Section 32A be amended to remove part b of the definition of suitable employment.

- This has been raised by representatives of unions with WorkCover including workers in the retail industry, the construction industry, the public service, transport industry.
- It has been raised on a case by case basis by representative legal representatives and unions including the CFMEU.

(L) 29. That the Workplace Injury Management and Workers Compensation Act be modified to include:

An extra dot point to promote the establishment and operation of:

"health and safety representative structures".

- This has not been raised as part of the consultations between unions and the WorkCover Authority. It is a drafting error when they made the WHS Act 2011. They failed to modify the functions of WorkCover in the WIMWC Act 1998 to change the emphasis of the WHS Act as to the consultation mechanism.

- The WHS Act includes additional functions at Section 152 that could broadly be required to foster a consultative relationsship between duty holders and representatives.

(A) 30. For a tripartite panel to develop a technical guide for inspectors on how to apply assistance to facilitate the establishment and operation of WHS committees and HSRs.

- We are unaware of the timeframe of the request except that it was raised a number of times during the harmonisation process by unions between 2008 and 2010.

(L) 31. That Entry Permit Holder be authorised to inspect Return to Work Programs.

- This was formerly the case. Previously the legislation permitted authorised officers (inspectors and union officials) to inspect return to work programs and workers compensation insurance policies. This authority was significantly used in industries such as the construction industry where no Return to Work Policy exists and underpayment of insurance premiums is and was rife. Unfortunately the June 2012 changes actually changed the reference from an "authorised officer" to an "inspector".
- This change creates an issue as unions are still required to negotiate these policies but cannot see if there is one in place to initiate the negotiation.
- This issue was raised with WorkCover on 12 September 2012 via a meeting and 13 September 2012 via correspondence with the WorkCover CEO. Unions NSW were clarifiying who the Act enabled to issue PINs (a new provision) as the equivalent power in the prior unamended legislation enabled "authorised officers" to inspect this material.
- WorkCover confirmed that it was solely an inspector and not a Health and Safety Representative in the workplace. The effect of this change as described above is that inspectors not Authorised Officers (or Entry Permit holders) could inspect Return to Work Programs and Workers Compensation Insurance Policies.

(A) 32. That inspectors actively seek out return to work programs and apply enforcement where they do not exist.

(A) 33. That inspectors be charged with enforcing return to work outcomes.

- As noted above the power of unions to undertake this form of inspection was curtailed by the 2012 amendments.
- Unions NSW and other parties raised the need for a return to work inspectorate on page 35 of our Submission to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012, p. 35.
- This was a recommendation of the Joint Parliamentary Select Committee.
- WorkCover has stated that they reviewed all these submissions in meetings with Unions NSW.
- Unions NSW met with WorkCover on 12 September 2012 where it was discussed that WorkCover was conducting a Return to Work Pilot in the Inspectorate.
- This was confirmed in writing on 13 September 2012 to WorkCover.

- Unions NSW met with the CEO WorkCover on 12 December 2012 where the Return to Work Pilot was raised after questions.
- On 13 December 2012 we corresponded with the CEO WorkCover regarding the Return to Work Inspectorate, requesting outcomes of the trial.
- Unions NSW again corresponded in 6 August 2013 to WorkCover requesting further details of the return to work pilot.
- WorkCover responded on 20 September 2013 with a general response that there was general return to work training of inspectors in August 2013.
- Towards the middle of 2013 we are advised that specialist inspectors were being hired as part of a further restructure of inspectors despite the statement above that general training was being provided.

(L/A) 34. That fines for employers are increased for non-compliance with return to work provisions.

- This was an issue raised through the June 2012 cuts to workers compensation.
- Despite what has been stated above regarding the Return to Work Pilot we are unaware of a single prosecution.
- This could be done by penalty notices or court imposed penalties.

(A) 35. That the WorkCover Authority be charged with reconstituting industry tripartite groups as per the National Safety Strategy and Conventions that enable the provision of up to date information and monitoring by the industry of the progress of safety, workers compensation and injury management.

- This issue was raised at the time of the establishment of the Safety Return to Work and Support Board.
- We believe the issue was raised at the final meeting of former the WorkCover Board.
- We believe it has been raised with the current Safety Return to Work and Support Board under Section 10 of the Safety Return to Work and Support Board Act 2012.
- There has been no formal attempt by WorkCover to initiate the Advisory Council/s.

(L) 36. Reinstate Journey Claims which was a minimal cost to the scheme.

- Requires amendment to Section 10 definition.
- Unions NSW questioned the need to remove journey claims in our Submission to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012, p. 21
- The issue was raised with WorkCover in a meeting on 12 September and correspondence on 13 September 2012.
- This was raised with Minister Pearce on 13 December 2012.

The Hon. Scot Macdonald

With reference to construction and Barangaroo incident mentioned the WorkCover statement that the problem surrounded labour hire.

How do we raise the bar for labour hire companies?

How do we raise the bar for principal contractors?

Labour Hire employment is a mechanism whereby in the construction industry developers (contractors) manage the risk of the cyclical flow of work by shifting the risk onto the workers. That is by using labour hire, not direct employment developers can crank up or wind back hours if work depending on the weather, approvals and other construction issues. It is not uncommon on some large commercial sites for over 90% of the workforce to be employed through a labour hire company. It is a widespread practice employed as the business model of the developers

Labour Hire causes multiple problems for workers and developers. For example a site foreman will have knowledge of how many workers are required to undertake a certain part of construction works. Different workers have different capacity, a capacity that increases when you have been on site for a period. If a labour hire company provides a revolving composition of workers then there is a requirement to induct the workers onto the site, and the processes and jobs that are being done. Safety and productivity becomes more difficult when the mix of experience and knowledge is constantly changing. The safety issues have to be re-learnt each time.

There are laws in place and they have been the same since at least the enactment of the OHS Act 2000. These laws require a principal contractor to have the authority to direct all matters in the workplace. This includes whether a worker, contractor, sub-contractor or other get onto the site/workplace at all or when they can be terminated/suspended from the site. The definition of a principal contractor is contained in the current WHS Regulations 2011 at clause 293. The principal contractor is a “person conducting a business or undertaking “ (PCBU). The PCBU also has a responsibility to ensure under Section 19 of the WHS Act that their Primary Duty of Care is exercised. The prime responsibility of the principal contractor is to direct and supervise what work is required and to ensure safety and workers compensation is appropriate. So utilising labour hire companies doesn’t eliminate WHS responsibility for the developer.

The role of the labour hire company includes that the labour hire company has to ensure that as the employer PCBU:

- that they provide the appropriately competent workers for the role that is required (including relevant tickets etc.);
- maintain a level of supervision;
- that the host workplace is safe and risk assessed by the labour hire company to their satisfaction; and
- the worker has adequate knowledge including training and induction of the workplace systems of the host.

There have been a number of instructive prosecutions in relation to the different roles in this complex contractual employment web and how the different PCBUs can share the responsibility.

For examples of these instructive enforcement approaches please find the following references:

See

Inspector Atkins v Network Productions Personnel Pty Ltd [2004] NSWIRComm71 at 17

> *"The incidence of labour hire is now common and widespread. Any person engaged in hiring out their employees needs to understand that they have the same responsibilities as other employers in respect of occupational health and safety and if they fail in that regard they face very significant financial penalty."*

Drake Personnel Ltd (t/as Drake Industrial) v WorkCover Authority (NSW) (1999) 90 IR 432 at 456

> *"A labour hire company cannot escape liability merely because the client whom an employee is hired out is also under a duty to ensure that person working at their workplace are not exposed to a risk to their health and safety……The labour hirer has a positive obligation ….to directly supervise and monitor the work of the employee to ensure a safe working environment"*

WorkCover previously pursued these matters which saw vast improvements in industries such as manufacturing where supply chains are a factor. Now it appears that the WorkCover Authority engages in the blame shifting exercise rather than simply addressing the area of common fault. WorkCover previously pursued via enforcement campaigns these matters against principals and labour hire which provided a cultural shift. We recommend the same occurs.

The Hon. David Shoebridge

We have been asked to provide areas where there has been alleged frustrations with right of entry powers to Unions NSW.

- WorkCover Authority- July 2013- Public Service Association of NSW – Regarding Bullying
- TAFE- March 2014- Sydney Institute- Ultimo- Regarding Plant safety, risk management and consultation
- Lend Lease- ETU and CFMEU- Regarding Site Safety (fire, plant, electrocution, and Emergency Evacuations)
- NSW Health – North Sydney Area Health District- NSW Nurses and Midwives- Re Violence and Consultation over safety.

There are current legal proceedings regarding several of these matters and no further detail will be provided.

In a meeting on 11 April 2014 between building unions and Workcover, the WorkCover representative stated that it was not the role of WorkCover to assist in WHS right of entry disputes and that this was an industrial issue for the IRC. This appears contrary to the WHS Act, for example Section 141 or 191.

The Hon Shaoquette Moselmane

Can you narrow down the 36 recommendations to 3 or 5 to put in the report?

Unions NSW refer to the identification provided earlier in this submission to the Chair, The Hon. David Clarke, MLC's request to regarding the Recommendations. These are categorised into Administrative and Legislation categories and we press in the short term that those recommendations with an administrative categorisation could be implemented somewhat easier.

Unions NSW also refer to page 5 of our submission:

1. **Restore journey claims**. This ensures that workers who are injured on journeys that are only occurring due to the obligation to attend work are not forced to cease employment while they await elective surgery and rehabilitation under Medicare. This was only a minor cost to the scheme and the cut is being disproportionately felt by regional and outer metropolitan workers.

2**. Remove Work Capacity Decisions**. Or in the alternative make Work Capacity decisions fairer by removing the ability for insurers to make decisions on matters they have no expertise. The decision should be made by appropriate independent officers with the appropriate technical expertise. The decision should be used to identify employment opportunities but should never be used to cut off or reduce benefits in circumstances where the injured worker is not working.

3. **Independent Merit Review-** Allow for merit review of all WorkCover (or Scheme agent) decisions to an independent body.

4. **Remove the cap on medical expenses** which is currently set at one year from the termination of weekly payments. This simply makes workers who are coping with an injury potentially unemployed while they await medical assistance under the Medicare system.

5. **Allow for equal access to scheme paid legal aid fees for all matters** rather than just allowing the insurers to access legal advice under the scheme.

6. **Improve return to work provisions**, incentives and enforcement including by increasing the period of protection from termination from 6 to 12 months and requiring an employer (including related entities) to prove they have no ability to provide suitable duties prior to termination.

The Hon Sarah Mitchell

If there are any specific examples in which you see a disparity between what your members are experiencing in regional areas as opposed to metropolitan areas that would be useful?

- Insurers in regional areas are more likely to utilise the telephone to contact regional workers. Contacting injured workers by telephone leaves no verifiable or objective written evidence the conversation. This has enabled workers to be verbally bullied with comments such as "see this doctor in this timeframe or you will be deemed to not be complying with your obligations". The conveyance of the worker's rights and ability to appeal these decisions is lessened by this practice as a telephone call may not provide these details to a worker and cannot be provided to their representatives. Telephone is used more readily in the regions to avoid real or perceived delays with post. Potentially a

regional communications protocol could be established to enable equality for regional injured workers by extending timeframes.

- Assistance and advice is limited in the regions with many regional workers having to front up to the one solicitor in town. This creates issues of expertise under the personal injury framework and may reduce the long term capacity for regional workers to attain real advice. Solicitors are now required to undertake an ILARS assessment prior to undertaking a matter after being registered with the WIRO. WIRO has established WIRO Assist but it is unclear what advice has been forthcoming or the knowledge of the service in the regions by these practicing solicitors.
- Non availability of local specialists makes it difficult to attend the myriad of further assessments required by a claim. This occurs with both injured worker and insurer initiated appointments. We had an example of a worker in New England who had an injured back who was required to go to Newcastle to attend appointments and surgery. They were not supposed to sit for extended periods, making the journey difficult. They were asked to travel "by most efficient available means" to the appointments in Newcastle and Sydney. A number of these appointments were at short notice from the insurer.
- Doctor shopping was raised as a big issue with the implementation of the cuts to Workers Compensation in June 2012. Unions have identified a number of regional areas that are serviced by periodical "locum" doctors. This is due to there being no doctor in town. This creates a double problem for the scheme and also the injured worker. The injured worker may have to re tell their story again and again to a new person each time. The injured worker also is reliant on being able to see the doctor next time they attend as the worker has weekly payments suspended whenever there is a break in the coverage of a work capacity certificate. This punishes the worker for being injured and where they live.
- Doctor shopping by insurers causes large logistical management and pain management issues for many regional injured workers who may be asked to attend a number of doctors appointments by the insurer.
- The Workers Compensation Commission does work via teleconference for mediation, which assists workers in the regions. However, there is an absence of any other assistance or compensation to regional injured workers. Doctor consultations via videolink or teleconference for example are should be allowed for second or repeat consultations. Alternatively or in addition other paramedical personnel could undertake roles in the consultation, such as nurses. These issues have been raised by unions with the scheme agents and WorkCover over a long period.
- Insurers have no idea of locational distances. They will require someone to travel hundreds of kilometres at short notice as it is just a few centimetres on their google map. There is no assessment of local conditions such as ice on the road, road works or what sort of vehicles or transport are available to the worker. A number of workers who have limited mobility must access friends or the bus that comes maybe once a day if they are lucky.
- In the regions no real public transport for medical or other appointments. This makes it difficult if pain relief makes an injured worker drowsy or physical injury disables driving. Public transport is virtually non existence in some areas and will often require a worker's

partner, family or friend to assist and take time off their work. The system is not flexible and cuts the worker off if they miss appointments.

- Work capacity assessments are an administrative assessment of a range of factors including what is suitable employment. A number of workers in the regions have been advised that it is quite reasonable that they could work in a non existent job in a town that may be six or seven hundred kilometres away.
- Injured workers have stated in meetings with Unions NSW that the NSW Workers Compensation Act stands for Newcastle Sydney Wollongong (NSW).
- Any assistance that the Parliamentary Committee could provide to directing the WorkCover Authority to assist regional workers would be appreciated.

Questions from The Hon Peter Primrose

1. Your submission refers to '… the conflict of interest and difficulties of requiring WorkCover inspectors to provide advice and also enforce occupational health and safety laws.' What steps can be taken to address this issue?

We believe that there are a number of steps that can be taken that are not difficult and have been tried and tested before.

These include re introducing the Business Advisory Group to deal with the advisory side of the WorkCover Authority. A culture for WorkCover inspectorate should be fostered where if they take actions to enforce safety laws that they will be supported by the Authority rather than counselled or disciplined whenever a complaint arises.

2. Can you expand on your comments about the financial viability of the workers compensation scheme, particularly your concern about further reductions in premiums at the expense of workers' benefits?

The financial viability has allegedly been under threat for over three decades. There is an unsupported idea that capital will flee if the workers compensation premiums are not as low as another state. Competitive federalism has seen scheme benefit cuts every seven to ten years as schemes "blow out" with the downturns in the market or change in actuarial assumptions.

Unions NSW made submission on this topic to the Joint Parliamentary Select Committee Submission on the NSW Workers Compensation Scheme, May 2012. We stand by these submissions and believe the recent PWC Report supports some of these conclusions.

There are stark differences between states schemes. Victoria and Queensland both differ significantly from the scheme model in NSW.

Both Queensland and Victoria have employer excesses. Surprisingly Victoria has the highest excess requiring employers to pay two weeks wages and over $600 in medical expenses. Anyone who has shopped around for car insurance would know the difference of price between policies with an excess and those without an excess (ie NSW). Additionally as there is an excess period of 10 working days in Victoria that would cover over 50% of all claims in duration in NSW, it is also easy to see why the claims are lower and the premiums are lower. Yet the issue of an excess which would put a cost

impost on employers not workers when there is an unsafe workplace has never been explored in NSW.

The injury rates in NSW are higher than Victoria. Whether this is due to the excess issue above or the adherence to safety, or industry profile should be the subject of studies or reference to the ABS data through the Multi House Survey. However, if the incidence rate is 30% higher in NSW then the premiums will also be higher.

Furthermore NSW has one of the lowest provision of rehabilitation rates in the country. If the insurers do not allow access to rehabilitation in a timely manner then a return to work in a sustainable manner will not be achievable.

The best way to minimise scheme costs is to prevent injuries in the first place and to achieve a durable return to work.

3. Can you explain your concerns about the current cap on medical expenses and the cessation of payments after one year?

The legislation now removes an injured workers right to access medical expenses one year after the injured worker has their weekly payments terminated (or determined by a Work Capacity Decision to be $0 or negative). This may be because the worker has returned to work and does not require weekly payments, or never had time off work or had their weekly payments ceased under a work capacity decision.

A number of workers rely upon medical expenses to continue their work and sustain a decent living without pain or suffering. A deaf worker with a hearing aid can work safely and converse with people around them. Workers who require multiple operations who have been cut off will be required to access medical procedures though the Medicare system as was suggested by Minister Constance on 4 February 2014. This involves extensive delays which may make continuing work unsafe or simply lead to medical termination of the worker from that job.

A big reason for the cuts to workers compensation in June 2012 was to improve NSW's return to work rates. This was despite the NSW jurisdiction having the best or above average Return to Work rates in the country according to successive Return to Work Monitors from Safe Work Australia. It appears contrary to the rhetoric of returning workers to work if they can't stay at work due to the absence of timely and free medical intervention.

4. What type of statistical information would you like to see the WorkCover Authority release to better enable analysis of its performance?

Formerly the WorkCover Authority released the Statistical Bulletin that provided NSW specific data. The release of this type of information would assist including the following information to assist industry track their progress. These include:

- ABS Multi House Survey data comparisons with claims data;
- Claims per industry/occupations;
- Types of claims per industry/occupations;

- Cause/mechanism of injury per industry;
- Return to actual work rates per industry;
- Details of emerging safety issues;
- Information on the performance of the self-insurers;
- Information of outcomes of self-insurer audits;
- Data on the collated expenditure on medical expenses for liability assessment as compared to expenses for treatment;
- Details of scheme agents KPIs;
- Details of scheme agents service fees including breakdowns of bonuses and potential bonuses including for project fees. Disengagement services, KPI fees, incentive fees, what kinds of KPIS are to be met, and summaries of how the KPIs have been met;
- Details of numbers of claimants who are terminated;
- Details of numbers of claimants who are returned to work in;
  - Their previous job;
  - Their previous employer with a different job;
  - A different employer same job;
  - A different employer, different job; and
- Statistics on return to work rates, under the entire range of return to work statistical variables available nationally.

5. Do you have any comments on the operation of the functions of the Workers' Compensation (Dust Diseases) Board?

- We agree with the Asbestos Diseases Foundation Australia (ADFA) submission re governance and scope of the Board.
- The current mix of appointees to the Board is appropriate for the functions.
- We support the introduction of the provisional payment for malignant cases.
- We support the removal of the cap as it is an administrative burden solely and has not been updated over time.