

**Inquiry into the NSW Workers Compensation Scheme**  
**Additional supplementary questions for Unions NSW**

1. What is your response to the material under the heading "Causation" on pages 4-5 of the submission by the Australian Medical Association (#40)?

**Unions NSW position:**

It is important to recognise that the nature and condition of work can have long term adverse health effects and this is highlighted in workers who do manual labour in later years developing arthritic conditions.

The example provided by the AMA appears contrary to current practice. If there are contradictory reports from doctors an Approved Medical Specialist can be appointed. A Medical Assessment Panel can review these reports and make a final medical report.

As a further safeguard, the results of arbitration can be appealed if an Arbitrator errs in their decision. Insurance agents have appealed numerous decisions under the current system.

The system, as it stands, works and much of what the AMA seeks to achieve is already in place.

In regard to the example provided by the AMA, WorkCover's website illustrates that the example provided does not fit the purpose or process of an AMS.

An AMS helps resolve disputes, including those regarding causation, and their medical assessment certificate *"is the final, binding opinion in disputes"*.

"There are two types of approved medical specialists:

- those who help to resolve disputes about general medical issues regarding the worker's condition – cause, treatment options or fitness for employment
- those who help resolve disputes about the evaluation of permanent impairment.

An approved medical specialists may decide to:

- consult with the medical practitioner or health care professional who is/has treated the worker
- call for medical records, including X-rays and results of other tests, and any other information that is considered necessary or desirable to assess the dispute
- request that the worker be medically examined by the approved medical specialist.

After investigating the medical dispute, the approved medical specialists will issue a medical assessment certificate. This is the final, binding opinion in disputes..."

WorkCover Website - Approved Medical Specialists

2. *What is your response to the material under the heading "Other Uses of Medical Assessment Panels" on page 5 of the submission by the Australian Medical Association (#40)?*

**Unions NSW position:**

Generally, Unions NSW position is that we do not oppose a medical panel nor peer groups being established to guide practitioners in their treatment of patients to maximise the return to work and health outcomes for working people. A system already exists for several medical disciplines and that of counsellors & psychologists and physiotherapists. The industry panel should be established in a manner similar to the Medical Authority of the Dust Diseases Board.

Unions NSW welcomes measures that ensure the health of injured workers recovers to the maximum extent possible and, if possible, allows a return to productive working life thus exiting the scheme. Ensuring the most effective treatment ensures the highest chance of an effective return to work.

Unions NSW's is concerned that this review process may be used to terminate treatment when the worker has not recovered, or to terminate treatment based on costs. Further, Unions NSW believes that the scope of medical services provided should not be limited by professional college demarcations but instead on evidence based assessments.

3. *What are your responses to sections 8-11 (pages 20-23) of the submission by the Civil Contractors Federation (#170)?*

**Unions NSW position:**

It should be noted that a proportion of those that the Civil Contractors Federation represents are not employers who contribute to the scheme.

Unions NSW opposes all of the aspects of the Civil Contractors Federation submission that seek to remove injured workers rights in respect to doctor/patient confidentiality and treatment regimes.

We the AMA position stated above in question 2 to have a panel to review and recommend treatments and servicing levels, and are open to the idea of hastening the existing system for workplace assessments.

We oppose work capacity assessments and oppose step downs when there are clearly enough checks and balances on injured workers to maintain payments.

The Insurance Agent can already also ask for further information or challenge a treatment plan diagnosis or capacity to work. We are unaware of any research supporting the notion that the process proposed by the Civil Contractors Federation would hasten a return to health and sustainable return to work for injured workers.

The Independent Medical Examiners do not have the same medical history as the NTD. Dr Sammuell, who is referenced in an article Australian and New Zealand Institute of Insurance and Finance, describes the weight of the patient files that are received and then describes a number of faults with IMEs including their inability to detach themselves from the patient and, one would assume, their history.

South Australia's parliament is currently reviewing IMEs as is the AMA.

"These Doctors were described by Dr Andrew Lavender, President of the South Australian Branch of the Australian Medical Association, as "hired guns", adding that "(claims managers) are trying to seek someone who, instead of giving an independent opinion, is giving the opinion they want"

*Ann Bresington MLC SA <http://www.bresington.net/>*

IMEs may lead to increased disputation and increased legal costs to the scheme.

4. What is your response to section 21 (pages 28-29) of the submission by the Civil Contractors Federation (#170), including the specifics of any appropriate change in legislation, regulation or guideline?

**Unions NSW position:**

Unions NSW supports all measures to reduce fraud.

Unions NSW believes that there is not enough effort invested in the investigation of fraudulent activities by employers. These include:

- the provision of false information on claims to insurance agents for the purpose of having claims declined;
- attempts to discourage workers from making legitimate claims; and
- the under insurance of their workforce (including those that have no insurance policy)

We believe that this is a courageous of the CCF to put forward this recommendation.

We refer to the submission of the Public Service Association (PSA), an affiliate of Unions NSW, that includes reports by WorkCover Inspectors (who are members of the PSA) that the current inspection regime does not go far enough to identify fraud for people under insuring thus creating a drain on the premium pool.

**15. Issues with Inspectors' Directed Work Methods**

*As PSA members working as Inspectors have submitted, the current modus operandi of workplace inspection for workplace premiums is to establish the existence of a valid insurance policy and no more. WorkCover could benefit from time devoted to collection of avoided payment of premiums. There has been too much emphasis on examination of wage-books by WorkCover's specialist compliance unit.*

*There is a cash and sham-contracting economy, acknowledged in the Henry Tax Review, that desk-top auditing of wage-books does not detect. WorkCover's compliance activities need to involve field officers in the identification of the numbers of paid workers hired by PCBUs and putting them in the correct premium category.*

*Work methods need to change to include examination of order books to identify current and future work sites where the total number of workers can be ascertained. This may require enhanced powers and training by WorkCover personnel. At present most time is devoted to checking whether a business has a policy. WorkCover already knows that non-insurance is an insignificant problem. WorkCover has reinforced its longstanding paper policy that inspectors should also check the correctness of the industry classification and the total wage bill. This policy statement will not on its own encourage inspectors to investigate this, when they are under tight time-frames to dispose of files that generally originate as a complaint or notification of an incident.*

*This might normally take up to ten days by the time the business has its 5 working days (effectively 7 working days when legally a day begins and ends at midnight) after a request for a certificate of currency. The inspector could be far more effective if the certificate of currency was required to have attached to it a statement of the total declared wages.*

*Currently the inspector would have to follow up receipt of the certificate of currency by enquiries to the insurer. The Inspector might also face a delay because the insurer may need the business to produce wage records prior to issuing the certificate of currency.*

*There will always be more complex cases that require more time to investigate. These include where a business operates in multiple work-sites. Inspectors will be unlikely to spend this time unless the matter is dealt with as a new file with its own time allocation. Inspectors investigating complex cases may also need specialist research and forensic support. It may also assist if individual Inspectors are given recognition for the amount of hitherto unpaid premium that is collected.*

*The 20 day inspector turnaround on complaints also fosters a focus on WHS Hazards, and not more complex premium-calculation issues. Although a recent internal memo has called for proper auditing, without reform of the 20-day rule more complex premium work will be more difficult to achieve than it should be. The regrettably small sums involved in both premium and WHS prosecutions still belie the broader specific and general deterrence value of rigorous enforcement of Workers Health and Safety law."*

*Submission of the Public Service Association to the Workers Compensation Inquiry*

In our experience the scheme Agents and WorkCover have actively pursued claims of fraud, and causation against workers. The Agent has the capacity to undertake enquiries under the provisional liability period without committing to an ongoing claim. We have seen a large amount of resources spent undertaking surveillance of workers by insurance agents.

We have not seen the same effort in ensuring insurance policies are adequate for the number of employees employed by an employer or that an employer's false statements in a claims assessment process are pursued when these are proven to be wrong. The submission by the PSA above would indicate why.

The WorkCover prosecutions website lists WHS and Workers Compensation fraud cases with one listed in April 2012.

<http://www.workcover.nsw.gov.au/lawpolicy/prosecutions/Pages/allprosecutions.aspx>

5. What is your response to each of the reforms proposed by the Shoalhaven City Council under the heading “additional reforms required” starting on page 5 of its submission (#148)?

**Unions NSW position:**

**1. Section 9 A**

This is opposed by Unions NSW.

At it stands this is not a small test or barrier for liability.

*“As a result of the enactment of section 9A a worker must independently establish that he/she sustained an injury arising out of or in the course of employment and that the employment was a substantial contributing factor to the injury.”*

*College of Law website*

The worker would not have established the injury without the exposure to work and already there is a high enough hurdle without establishing a hurdle that is unachievable.

The insurance agent typically will ask the employer about these elements of the liability and then accept or dispute liability accordingly. If the injury was not in the course of work then it is disputed and it is up to the worker to establish liability.

**2. Section 4B (i) and (ii)**

This is opposed by Unions NSW

This is already a difficult barrier to overcome and the worker must provide evidence as to how employment was a contributing factor. For instance the Insurer Agent under the *WorkCover Guidelines for Claiming Compensation Benefits* must satisfy themselves adherence with Section 4 prior to paying the provisional liability.

It would appear that this council wants to shirk its responsibilities to its workers at the council under WHS laws and allow workers to work in conditions that aggravate or reinjure injured workers.

**3. Section 11A**

This is opposed by Unions NSW.

It is of concern to Unions NSW that this employer is seemingly attempting to allow hazards such as bullying and harassment to become a legitimate management or operational action.

Affiliates of Unions NSW have provided examples of cases where employers have stated that people have these forms of reasonable actions occurring when they are instigated after the claim has occurred or the inappropriateness of the use of the reasonable action has been the basis for the claim, e.g. threats of dismissal being used in conjunction with bullying.

As the system stands, claims agents promptly ring employers to ensure if there are any “reasonable actions” that caused a particular psychological injury. These changes would lead to more disputation and increased legal costs for the scheme. Under the Guidelines (Section 11A), Insurers do not have to pay a worker if “reasonable actions of employer” are a wholly or predominantly contributing factor.

Note that many of these claims are disputed by workers compensation insurers and are simply not followed up by workers, resulting in no payment.

#### **4. Section 74 Dispute Notice Amendments**

This is opposed by Unions NSW

This proposal is simply aimed at reducing accountability of insurers or claims assessors and will lead to increased court expense by the scheme. Unfortunately many injured workers who would be legitimately covered but for claims assessment policies, become disappointed with a rejection letter and will not pursue the claim, especially if not advised as per the requirements of S74 that they have appeal rights. Most of the elements of Section 74 (Workplace Injury Management and Workers Compensation Act 1998) are matters for a form letter. Ordinarily, natural justice and procedural fairness requires a party (the insurer) to advise why they are disputing a claim.

This will simply inflate the cost to the scheme by inflating costs to lawyers if a worker is unaware of why they are having their claim disputed. This risks employees attending court to identify the reason, thus increasing costs.

#### **5. Injury Management and Return to Work Plans**

This is opposed by Unions NSW

The Injury Management Plan is vital in the proper management of the injury. Any attempt to remove this requirement will remove the requirement to manage an injury and cause potential blow outs in recovery time and potential exacerbation of injuries. Injury management plans for less serious injuries are not required to be as comprehensive. An injury management plan ensures that the worker can access the right treatment and is more binding on a worker than an employer. If a worker does not participate the insurer is likely to cut off benefits.

The agreement of the Doctor allows for a return to work plan to pass medical scrutiny and thus ensure that the treatment plan is not going to interfere with the recovery by the industrial parties intentions to return a person to work in an unsafe or unsustainable manner. The sign off by Doctor prevents exacerbations of injuries and further injuries and therefore reduces costs. We do however, endorse actions to speed up any process when a worker is ready to return to work.

This will inflate costs to the system, and such a recommendation would run counter to some of the important research around timely return to work and it would raise a question whether this council

has a return to work program that complies with section 52 of the 1998 Act, and if this is not the case we would ask the regulator why it has not increased its audit and inspection regime on this self insurer?

## **6. Requirements by WorkCover-re Audits**

This proposal is opposed by Unions NSW

The self insurer receives a massive financial benefit already from being a self insurer keeping a lion share of the premium they would otherwise have to pay if they improve their safety. The self audits undertaken by self insurers are a check and balance on the self insurer due to their privileged role as manager of safety, claims assessor, and return to work coordinator.

At Unions NSW we are provided with a number of examples where the self insurer employer being responsible for health and safety expense, for claims assessment and for return to work has provided a conflict of interest and a detrimental treatment of injured workers. Some self insurers manage the safety, decline the claim, and then if the claim is accepted decline liability whenever the worker stands up for their rights on dubious grounds. They use self audits to justify their activities and record.

OHS officers at self insurers have informed officers of Unions NSW how WorkCover Audits act to improve workplace safety and accountability at least for the period of the audit. If safety is improved then this will lead to greater reduction in claims and expense.

As far as the financial guarantee requirement, this is required as the WorkCover Scheme is an underwriter of last resort. By providing a significant guarantee the WorkCover Scheme reduces its risk for exposure to the self insurers liabilities. Actuaries would be required to increase the liability to the system if the certainty of the self insured was diminished. This suggestion would increase the scheme liability.

## **7. Retrospectivity**

This proposal is opposed by Unions NSW

Unions NSW does not agree with making the reforms retrospective, as this will simply make a greater number of workers financially disadvantaged. Shoalhaven City Council and other self insurers would simply make a win fall gain at the expense of workers who were injured in their service, for which they had control over the safety, workers who made a legitimate claim and are suffering from ongoing injuries.

We note that as a self insurer Shoalhaven City Council would be unlikely to be faced with the effects of retrospective premium adjustments if this accompanied entitlement reductions.

This council may find this desirable based on the number of workers they may have injured in the past, but are a self insurer, are exposed to minimal competition from interstate, and simply seek a win fall gain at the expense of injured workers.

## **8. Access to medical and previous claims records**



Employers like all other parties in society are obliged to follow the HRIPA Act and cannot simply obtain information on a worker's private medical information. The suggested model was until very recently utilised by the WA WorkCover Authority. WA WorkCover Authority stopped the practice following legal advice.

It should be noted that on the existing WorkCover Certificate workers are required to provide a waiver to allow the Agent to contact the Nominated treating Doctor and other service providers to access information and if this is not signed, provides a reasonable excuse for not making payments under the *WorkCover Guidelines for Claiming Compensation Benefits*.

## **9. Injury and disease**

This process is already in place.

## **10. Section 38**

The Shoalhaven City Council provides an example of why S.38 may not work. Shoalhaven City Council like many employers may focus on job searching rather than placement in the same job, or same workplace. It places the entire responsibility on the worker to find jobs. The hierarchy of return to work options are:

- a) Same Workplace, Same Job
- b) Same Workplace, Different Job
- c) Different Workplace, Similar Job
- d) Different Workplace, Different Job

*(WorkCover, Guidelines for workplace return to work programs, p.19)*

The reasons for this hierarchy are that this hierarchy provides the least impediment for getting injured workers back to meaningful work.

Most rehabilitation services will now offer career transition or job placement service that assists workers find alternative job placements in industry. The rehabilitation providers and Agents are required to report back to WorkCover as to the success of their job search provisions, which leads to ongoing accreditation and contract renewal.

If a worker does not comply the insurance Agent (or employer self insurer) usually ceases payments providing the ultimate control over compliance with the job seeking.