Submission No 31

REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

Organisation: Unions NSW

Date received: 31/01/2014

Inquiry into the exercise of functions by the WorkCover Authority NSW

The Legislative Council Standing Committee on Law and Justice

Submission of Unions NSW

31 January 2014

Submission by: Unions NSW

Trades Hall Building

Level 3, 4 Goulburn Street

Sydney NSW 2000

Contact: Rose Docwra

T: 02 9881 5999

F: 02 9261 3505

E: whs@unionsnsw.org.au

Table of Contents

Introduction

1. Unions NSW welcomes the opportunity to make a submission to this Inquiry and hopes that the Parliament will be able to make some insightful recommendations that enables greater safety for NSW workers and greater support for injured workers: the two main functions of WorkCover NSW.

2. Unions NSW is the peak union council in New South Wales with over 600,000 members in affiliates and 60 affiliated unions. Through our activities we also have significant capacity and reach to assist non-member workers through a range of representative activities such as assisting in the negotiation of workplace WHS, Injury Management and Return to Work policies and our extensive network of workplace representatives that assist workers prevent injuries and facilitate return to work.

3. The WorkCover Authority, like government labour inspection and workers compensation regimes around the world, was established after tireless efforts by organised workers in unions to create an independent body to ensure occupational health and safety and support for injured workers when injury prevention fails.

4. Due to the constitutional history of Australia and the development of the State of New South Wales a majority of workers in NSW are under the umbrella of the WorkCover Authority for injury prevention and support when they are injured.

5. Therefore the WorkCover Authority is enshrined with ensuring the human rights contained in International Labour Organisation Conventions for workers including those conventions that Australia has ratified. The key generic conventions pertaining to Occupational Health and Safety governance are:

   C081 - Labour Inspection Convention, 1947 (No. 81);
   C155 - Occupational Safety and Health Convention, 1981 (No. 155); and
   C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

6. The crucial position that WorkCover has to influence whether workers go to work and come home again or suffer life and family destroying injuries and incidents makes the operation of WorkCover vitally important for all workers in NSW.

7. Throughout this submission there are references to independent research into the effects of the changes to workers compensation made in June 2012. Unions NSW believes this is the only independent research undertaken to date on the 2012 workers compensation changes. The research is contained in the document *"The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1"*[1] (the Macquarie University Report) which is currently press embargoed. Unions NSW has

[1] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures

therefore made a formal request that this document be withheld from public display or made public in any way until after the embargo is lifted.

8. As Unions NSW is a peak body, we are often advised of stories of workers and their interactions with WorkCover, sometimes anonymously. Whilst every effort has been made to verify the claims made in this submission, a number of the examples will be hearsay where we are told by affiliates of examples of real cases. With notice and adequate protections, including confidentiality, we believe that we can provide individual examples of all claims made in this submission.

9. Unions NSW notes the current review into Alleged Bullying at WorkCover by the General Purpose Standing Committee No 1 and stand by our submissions made orally and in written form to that Committee.

10. Unions NSW also notes that there is a requirement to have a review into the Workers Compensation Amendments of 2012 which is yet to occur or be scheduled and we will provide a more thorough account of the workers compensation changes and their effects at this stage.

11. Unions NSW also notes that individual workers have made submissions to this Inquiry and we acknowledge the workers submissions and the difficulties they face.

12. We also acknowledge and support the submissions made by affiliate unions to Unions NSW.

Executive Summary

Unions NSW submits that the administration of the WorkCover Authority is fundamentally and perversely conflicted. There is a need for greater independent oversight of the WorkCover Authority to improve the operation of the Authority including its two major functions of regulating work health and safety and workers compensation.

Unions NSW submits that WorkCover, rather than assisting and protecting injured workers, has become a tormenter of injured workers and a protector of unsafe work practices. WorkCover has failed to enforce the law and has failed to manage scheme agents

Unions NSW submits that there has been a plateauing of the reduction of claims under the scheme rather than the trended reduction that occurred for a number of years and which aligns with trends in other states.

The WorkCover Authority and the workers compensation scheme needs a wholesale restoration of balance to ensure that workers are the focus. Further there should be no more premium reductions to the scheme until it returns cut benefits to injured workers. Unions NSW submits that the following six points should be the first step of this Parliament in restoring the balance:

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.
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 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. Allow for merit review of all 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.

Recommendations

1. That the 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.

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

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

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

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.

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.

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.

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.

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.

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.

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.

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

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

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

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

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

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.

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.

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

20. To reconvene a further round of WorkCover Assist Education grants for employer an employee organisations.

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.

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

23. That the JobCover Placement Program be reintroduced

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.

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.

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

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

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

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".

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.

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

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

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

34. That fines for employers are increased for non-compliance with return to work provisions.

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.

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

Term of Reference

(a) to monitor and review the exercise by the authority of their functions,

13. The functions of the WorkCover Authority are broad and varied with two main divisions: the Work Health and Safety Division (injury prevention), and the Workers Compensation Division (support for injured workers). There are a number of functions that the Authority undertakes within the scope of these two main areas, which are listed below. To understand the legislated functions we must refer to the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act) ss 22, 23 and 23 A, which prescribe the functions of the WorkCover Authority.

General Functions of WorkCover Authority

The Workplace Injury Management and Workers Compensation Act 1998 - SECT 22 states the general functions of Authority

Section 22 (1) a- Compliance

This section requires WorkCover to be responsible for ensuring compliance with the workers compensation legislation and the work health and safety legislation.

Enforcement

14. As the predominant Regulator of Work Health and Safety and the exclusive Regulator of Workers Compensation in NSW (with the exception of Comcare, Sea Care and coal mine workers), the WorkCover Authority is the Regulator in relation to injury prevention, workers compensation and support for the injured worker. Unfortunately in recent years the NSW Regulator has reduced its role as a Regulator significantly for all its areas of responsibility.

15. WorkCover authority NSW seems to have failed to appreciate that by improving enforcement and education of work health and safety laws, workplace injuries will reduce and the workers compensation scheme will improve.

16. The relaxed attitude in enforcement can be summed up by the comment of one long term experienced Health and Safety Representative:

"It used to be the threat of calling WorkCover to resolve health and safety issues would get the employer to fix safety issues, and they could be relied upon to support us when we stick our neck out for others safety. Now WorkCover is called in by the employer to endorse poor safety decisions. The boss actually calls them. We simply can't risk their involvement as

apart from being a rubber stamp for the company they often don't know all the risks or where our industry has moved as far as the hazard."

17. Another Affiliate reported:

"A trained Health and Safety Representative had attempted consultation with the employer over a safety hazard. The HSR issued a Provisions Improvement Notice (PIN) for the employer to fix the safety hazard. The employer still did nothing after the required time for improvement, and the HSR called in WorkCover to enforce the PIN. Instead of enforcing the PIN or commencing penalties against the employer the inspector removed the PIN despite no jurisdiction to do so as the time had lapsed. The Union was forced to seek a review of the decision of the inspector to get the PIN re-instated and enforced. Meanwhile the safety hazard remained un-amended and exposing workers for a longer period."

18. Table 1 below shows NSW OHS and workers compensation prosecutions and how they have declined over time.

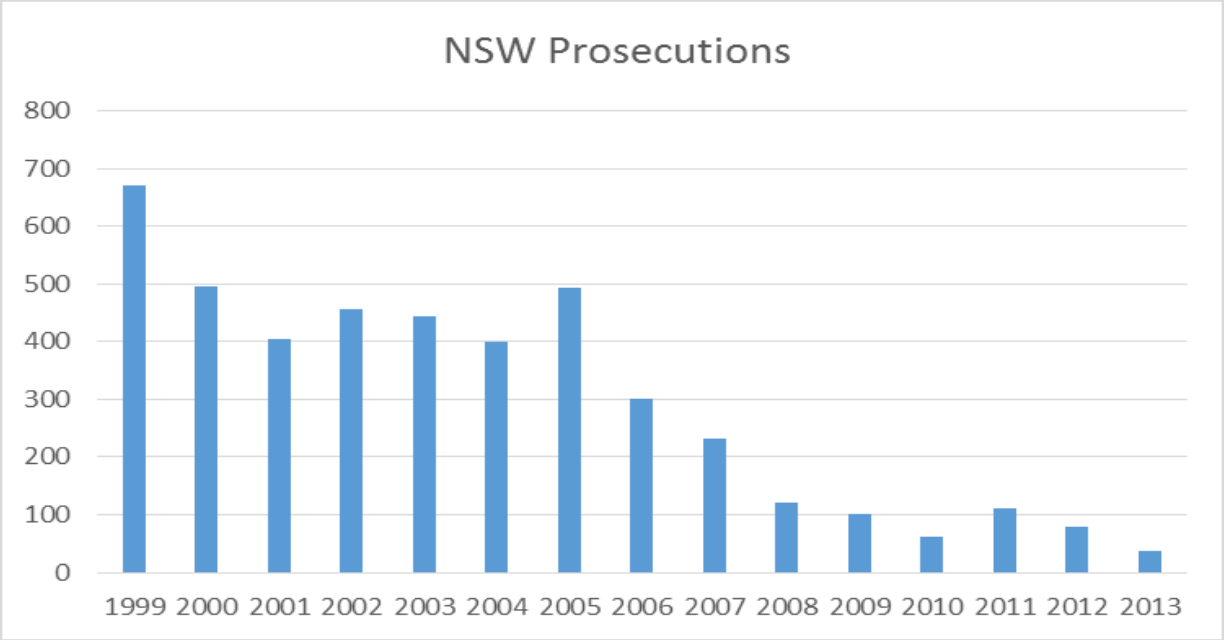

Table1: Graph indicating trend in OHS prosecutions over time

Source 2008-Aug 2013 are calendar years- Source WorkCover Website **Notes** Note1: 1999-2007 are financial years- Source: WorkCover Annual Reports - Completed prosecutions Note2: In 2013 there are approximately 80 prosecutions pending due to transitional court jurisdiction and WHS Act Amendments required. The number for 2013 was until August and was not inclusive of prosecutions completed in months since but not published.

Note 3: Data reported includes statistics for matters, charges, defendants and completed prosecutions with inconsistent reporting of all variables in annual reports.

19. There can be no denying that the peak tool for work health and safety enforcement is the WHS prosecution. Prosecutions are thought to put the employer on notice and also educate the industry on "reasonably practicably" means to make their workplace safe. They also have a deterrent effect.

20. There has also been a delay in prosecutions. This lag effect needs to be considered in light of the intended consequence of the prosecution to encourage better health and safety practice by providing examples and deterrence to the industry. How can such a goal be met when prosecutions are not timely.

21. The evidence also shows that WorkCover has not increased its utilisation of other enforcement tools to compensate for the reduced emphasis on prosecutions.

22. From 2006 to 2012, the following marked reductions occurred in the area of health and safety enforcement as reported in WorkCover Annual Reports:

    - **Prohibitions Notices** reported dropped from 1212 to 601 notices issued in the financial year which is over a 50% drop over these 6 years.
    - **Improvement Notices** were reported as dropping from 14831 to 8858 which equates to a drop of over 40% in just 6 years.
    - **Penalty Notices (Infringement Notices)** were reported as dropping from 1195 to 357 or a drop of over 70%.

Prevention

Year	CARS-	Penalty Notices	Prohibition Notices	Improvement Notices	Prosecution Defendants	Prosecution Matters	Prosecutions completed
2006-2007	1217	726	1127	13243	300	**	**
2007-2008	3919	619	994	13109	182	110	**
2008-2009	2460	690	769	10863	96	59	108
2009-2010	2476	688	856	12161	76	44	103
2010-2011	2272	587	832	11318	89	47	109
2011-2012	4220*	357	601	8858	84	49	98
2012-2013	6686	124	550	6111	83	54	98

Table 2: Enforcement Activities

Source: WorkCover Authority of NSW Annual Reports

Notes

* :The CAR (Confirmation of Advice Received) changed to an inspection report as part of the harmonisation of regulators.

** : These variables were not reported in the annual reports

Source WorkCover Authority Annual Reports

From 2003 to 2012 there were also:

- A number of reported preventable fatalities without investigation or prosecution.
- A number of reported major incidents without even a notice being issued.

Year	Fatalities	Perm Disabilities	LTT Incapacity > 6mths	Total Major injury or disease	Incidence Rate (Claims per 1000 employees)	% Change
2003	136	13263	4127	51000	18.5	-8.9%
2004	132	14251	3475	51551	18.5	-1.1%
2005	125	13877	3313	49749	17.56	-3.8%
2006	146	10986	3550	44013	15.3	-13.1%
2007	137	9062	3643	41231	13.9	-9.2%
2008	124	8760	3862	42277	14.0	.7%
2009	139	8789	3986	42858	14.2	1.4%
2010	113	a	a	a	13.4	-5.6%
2011	117	a	a	a	12.9	-3.7%
2012	122	a	a	a	13.2	2.3%

Table 3: Major Injuries

Source: WorkCover NSW Statistical Bulletins 1998-2010, WorkCover Annual Reports 2010-2013 quoted in Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University - Centre for Workforce Futures, p. 9

Notes

a- not reported due to cessation of statistical bulletin

23. Since the changes in June 2012, enforcement of workers compensation has become the sole responsibility of WorkCover with union entry permit holder's capacity to inspect workers compensation documentation being limited.

24. The WorkCover Authority has also stopped reporting on the number of workers compensation fraud matters they are investigating. In the annual reports in the early 2000s there were targets for the number of fraud matters investigated. Fraud no longer gets reported in the Annual Reports.

25. The benefits of effective regulation of fraud can be understood from the last two annual reports to report on significant fraud enforcement.

2007-2008 WorkCover Annual Report

- *WorkCover completed 5840 wage audits identifying $25.1 million in additional premiums and also returned $9.5 million to employers for over-declaration of wages*
- *WorkCover received 309 referrals of alleged fraudulent activity, all of which were investigated*

- *Nineteen fraud prosecutions were completed, with 17 resulting in a conviction or a finding of guilt not leading to a conviction*

2009-2010 WorkCover Annual Report

As a result of fraud activities undertaken in 2009/10:

- *WorkCover received 354 referrals of alleged fraudulent activity, all of which have been or are being actioned*
- *10 prosecutions resulted in convictions*
- *18 matters resulted in cautions in lieu of prosecution and 18 warnings were issued.*

26. A number of community stakeholders submitted to the Parliamentary Select Committee that reviewed the WorkCover scheme in 2012 that underpayment or non-payment of premiums is excessive in some industries leading to great risk exposure for the nominal insurer WorkCover.

27. The Australian Taxation Office regularly sets yearly targets of unpaid tax recovery and targets particular industries. ATO Deputy Commissioner Michael Cranston said the agency typically recovered $10 for every $1 spent - a return that has led to the program's expansion through regular funding increases.[2]

28. Unions NSW believes WorkCover previously took a similar approach to the ATO but no longer pursues fraud with the same vigour. This is estimated to lead to large leakages in the premium pool affecting the viability of the scheme.

29. The Macquarie University Report discusses the numerous conflicts of interest that WorkCover has. In particular, the management of the scheme agents or the insurers. Of the matters decided by WIRO, there have been several that have identified activities that the insurers have undertaken that warrant investigation for prosecution by WorkCover [3]. The Macquarie University Report quotes the WIRO and Ivan Simic from Taylor and Scott lawyers "there is no evidence of WorkCover following through on these binding recommendations from the WIRO" [4]

30. The Macquarie University Report states that the conflict of interest is that if a worker is disadvantaged by the insurer reducing costs to the scheme by improperly removing payments or medical expenses, or denying rehabilitation, the WorkCover Authority profits from this action, and they are hardly likely to penalise the insurer, which who will in fact get a bonus for undertaking this action[5].

[2] http://www.smh.com.au/national/australian-tax-office-nets-430m-from-the-rich-20140125-31fra.html

[3] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 69

[4] Ibid, p. 69

[5] Ibid. p. 65

Recommendations

1. **That WorkCover recommit to implementing premium recovery and fraud investigation targets to enable accurate premium collection and deterrence of fraud.**
2. **That WorkCover terminate its moratorium on removal of self-insurers' licenses and prosecuting scheme agents who breach the law.**

Education

31. There has been significant changes to the operation of WorkCover in recent years in relation to its educative role.

32. In the mid to late 2000s, WorkCover acknowledged the conflict of interest and difficulties of requiring inspectors to provide advice and also enforce occupational health and safety laws. WorkCover established a Business Advisory Group that included officers who were often not inspectors and unable to issue notices or undertake investigations in order to assist small business and educate them about work health and safety. This unit has now been disbanded thus requiring inspectors to be the enforcer and the educator again.

33. Table 4 shows a number of WorkCover Authority's proactive education activities as reported. Whilst the data appears patchy the high water mark for these activities appears to be 2010-2011.

Year	WorkCover Assist Presentations*	Webinars*	Visits *	Presentations *	workshops/ presentation / seminars/ forums proactive **	proactive workplace visits
2009-2010	A	A	a	290	631	8915
2010-2011	A	3	24752	705	3015	9735
2011-2012	>10000	20	19545	437	1065	6577
2012-2013	0 not offered	1	19633	b	b	B

Table 4: Proactive Education Activities

Source: *WorkCover Annual Reports ** Safe Work Australia, Comparative Performance Monitoring Report, 15, (2013), p.18

Notes:

a Not reported

b Not yet issued

Return to Work

34. An additional compliance problem relates to return to work. Frequently workers are terminated even if they attempt to return to work when they are injured. Once an injured worker is terminated from their existing employment their likelihood of returning to work is greatly diminished.

35. The Macquarie University Report discusses how workers are being terminated since the change in laws[6], and how the changes provide only minimal incentives for employers to keep on, or take on, injured workers[7].

36. Many unions often report that their members experience significant difficulty getting assistance from their employer in returning to work and this protracts return to work, which often leads to the worker being medically terminated after the 6 month protection expires. The employer often falsely states that there is no suitable work available.

37. After the workers compensation law was changed WorkCover conducted a Return to Work pilot in the Inspectorate. No report has been publicly released. Unions NSW have seen an early version of the return to work pilot report called *"Early Return to Work Engagement*

[6] Ibid p. 61
[7] Ibid p. 60

with Workplaces Pilot"[8] that identified varied results if an intervention occurred by a WorkCover Inspector.

38. Of great importance is the following finding:

> *"Of note also, there were significantly less injured workers terminated as a result of a workplace visit (7%) compared with 27% where no WorkCover intervention was undertaken and 32% where intervention occurred but no visit."* [9]

39. This clearly demonstrates the capacity for WorkCover to make a difference by enforcing the requirement to provide suitable work in the workplace and intervening to resolve workplace return to work issues.

40. The Macquarie University Report alludes to the ease with which employers, who often contributed to the injury through unsafe work systems, can simply dispose of the injured worker via termination without any requirement to provide rehabilitation or suitable duties. These actions also minimise costs to the scheme by reducing rehabilitation costs and combined with work capacity assessments, minimise weekly payments.

41. The requirement to keep an injured worker on for 12 months has been stated to provide a greater incentive to prevent injuries than premium variations[10].

Recommendations:

3. **That the period for protection from termination be extended from 6 months to 12 months**
4. **Require a positive burden of proof that the employer (and its related entities) have no ability to provide suitable duties prior to termination**

Inspectorate

42. The Macquarie University Report identifies that NSW has fallen significantly behind in comparison to Victoria in relation to inspectors.

43. *"The productivity commission also reports that the Victorian Work Health and Safety regulator directs a greater proportion of its budget to enforcement activities (43% VS 12%) and has half as many worksites per inspector (1086 vs 2296) while in NSW the regulator directs a greater proportion to education and WHS programs (41% vs 57%). NSW also has the targets workforce and the largest number of workplaces (O'Neill, 2012:4)"*[11]

[8] Safety, Return to Work and Support Divisions, SRTWSD Summary Report, Early Return to Work Engagement with Workplaces Pilot, 2013

[9] Safety, Return to Work and Support Divisions, SRTWSD Summary Report, Early Return to Work Engagement with Workplaces Pilot, 2013, p 10

[10] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 62

[11] Ibid. p. 73

44. Additionally Safe Work Australia- Comparative Performance Monitoring Reports, indicate that NSW has 10% less field inspectors per 10,000 employees than the national average thus making enforcement more difficult.[12]

Inconsistent Application of the Legislation

45. It appears that WorkCover's application of the legislation is inconsistent depending on whether the WorkCover Authority is exposed to media scrutiny.

46. On 9 December, 2013 the ABC 7.30 Report ran a story on an amputee Mr Passfield who had 28% impairment. WorkCover and the Minister rightly bent the application of the law to allow Mr Passfield access to continued medical expenses for prosthesis limbs, even though he didn't meet the 30% impairment threshold. Unions NSW understands there has been no similar flexibility for other amputees with 28% impairment. [13].

47. Similarly when the media were about to report on the impending removal of workers compensation medical expenses for tens of thousands of injured workers on January 1, 2014, the Government released the *Workers Compensation Amendment (Medical Expenses) Regulation 2013.* This Regulation allowed an 11 day window for injured workers to get pre-approval of medical expenses in order to extend the deadline to receive medical expenses in 2014. Six of these days were public holidays or weekend when most specialists and many insurance claims offices were shut down over Christmas.

48. While we are in favour of any increase in entitlement for injured workers, unfortunately this was a "Clayton's offer of goodwill". It could not be acted upon due to the timing. Further, a number of workers who made enquiries with their insurer were told that their treatment could not be approved as the insurance company had not been told of the change of policy by WorkCover.

49. The Macquarie University Report also states that insurers have been apparently delaying pre-approval until eligibility for coverage of medical procedures expired.[14]

50. Given the apparent inability of WorkCover to enforce its own legislation in a consistent manner we submit that there is a need to have a tripartite panel to ensure compliance activities are appropriately carried out.

Recommendation:

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.**

[12] Ibid. p. 93

[13] Australian Broadcasting Corporation, 7.30 Report, http://www.youtube.com/watch?v=1LXYT5v4M64#t=13

[14] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 44

Operational Matters

51. S 22 1 (b) of the 1998 Act requires WorkCover to be responsible for the day to day operational matters relating to the schemes to which any such legislation relates.

52. The Macquarie University Report[15] refers to the history of the WorkCover Authority to integrate injury prevention, rehabilitation and compensation into a single body with a unified mission.

53. The formation of the Safety Return to Work and Support Board adds an extra layer of complexity as to who is responsible for day to day operational matters. This is clearly outlined in the Parliamentary transcript of the general Purpose Standing Committee No.1 (GPSC No.1)[16].

54. This is further complicated by the contracting out of services such as scheme agents.

55. The link between the two WorkCover Authority Divisions is further complicated by a percentage of the premium pool being allocated to administer the functions of the WorkCover Authority. There is a significant capacity to utilise the complimentary elements of the two Divisions. For instance inspectors could prevent injuries through safety interventions, ensure premium recovery through inspection of wage books and policy, and improve return to work through greater interventions. This does not appear to be currently undertaken.

56. It has been asked at the GPSC No. 1 whether it is worthwhile considering dividing the two agencies. Unions NSW are not of that opinion however, we recommend separating the management functions to minimise conflicts of interest and make the executive more accountable.

Recommendation:

6. **That the functions of the WHS Division and the Workers Compensation Division be separated under different executive management and advisory councils to avoid conflict of interest.**

Monitor and Report

57. Section 22 1 (c) of the 1998 Act requires WorkCover to monitor and report to the Minister on the operation and effectiveness of the workers compensation legislation and the work health and safety legislation, and on the performance of the schemes to which that legislation relates.

[15] Ibid. p. 5

[16] Report Of Proceedings Before General Purpose Standing Committee No. 1 Inquiry Into Allegations Of Bullying In WorkCover NSW, 11 November 2013, page 24 onwards, http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/B496A9DFF40AB2E2CA257C21000995A4

58. It is unclear apart from the Annual Report what is reported to the Minister. The Statistical Bulletin has been removed from publication, and a number of inclusions in the Annual Report have been removed including references to scheme agent fees and other financial information- as discussed in the Macquarie University Report[17].

59. While it is understood that a number of statistics are included in the Safe Work Australia Comparative Performance Monitoring Report, that report is time delayed, and offers limited information as to specific indicators for the operation of the NSW WorkCover Authority.

Recommendation:

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.**

Consultation

Section 22 1 (d) of the 1998 Act requires WorkCover to undertake such consultation as it thinks fit in connection with current or proposed legislation relating to any such scheme as it thinks fit,

This also relates to the following term of reference (b).

Term of Reference (b):

To monitor and review the exercise by any advisory committees, established under section 10 of the Safety, Return to Work and Support Board Act 2012, of their functions

60. Consultation is not occurring. The only mechanism of consultation is the Safety Return to Work and Support Board. This has significant limitations due to the requirement to keep a majority of discussion at this forum "in camera". Further the Board must analyse and deliberate on a very broad portfolio of at least four agencies with other subordinate or arm's length agencies also included such as the Workers Compensation Commission and WIRO.

61. Since June 2012, the WorkCover Board was abolished as was the WorkCover Advisory Council and Industry Specific Industry Reference Groups. There is no specific tripartite

[17] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 83

advisory council in existence at present. While tripartism may appear to be a choir for the management of WorkCover it serves several important purposes, including:

- Utilizing the skills and knowledge of industry and the workers they are meant to be serving;
- Providing a contemporary feedback and review system that will advise of over-reach or omissions of the Authority;
- Using collaboration to formulate and develop workable publications and policies, which was a regular outcome of the IRG process;
- Enabling transparency and scrutiny of the actions and decisions of WorkCover.

62. Contrary to Australia's obligations under ILO Conventions to consult with employer and worker representatives on safety, in NSW we have no specific group of persons that fulfils this function in relation to the functions of the WorkCover Authority of NSW.

63. The Minister has appointed the Secretary of Unions NSW to the Safety Return to Work and Support Board where he attends as an individual under Ministerial appointment. The Board falls well short of the requirements for consultations under the Convention.

64. There has been no formal industry feedback mechanism for the development of health and safety, workers compensation, and injury management publications, legislative development, and WorkCover Authority positions on emerging issues. Unions NSW has made a recommendation to reconstitute tripartite advisory councils for workers compensation and work health and safety.

65. In the past, government agencies for safety such as NOHSC, have also allowed staff and members of the public to raise issues with the management of the Board (if it requires a policy decision) and also to observe the decision making procedures of the Board. Unions NSW makes a recommendation of a similar nature below.

Recommendations:

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.**

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.**

Term of Reference (a): Functions Continued

Financial Viability

66. Section 22 1 (d1) of the 1998 Act requires WorkCover to monitor and review key indicators of financial viability and other aspects of any such schemes.

67. It is noted that the scheme was back in the black as of June 30, 2012. Since then the Minister has announced 12.5 % in premium reductions for employers but has returned none of the benefits taken from injured workers. [18]

68. Clause 27 (4) of Part 19H of Schedule 6 the Workers Compensation Act 1987 provides:

> *"(4) However, if the Minister determines on actuarial advice that the scheme under the Workers Compensation Acts is projected to return to surplus before the end of the period of 2 years:*
>
> *(a) the review is to be undertaken as soon as possible after that projected date, and*
>
> *(b) the report of the outcome of the review is to be tabled within 12 months after that projected date."*

69. The formal review of the amendments should have commenced as per this legislative requirement but the Government has already squandered 12.5% of premium returns before any review has occurred.

70. It seems perverse that these premium savings have occurred when injured workers are being removed from workers compensation, having their employment terminated due to the workplace injury, having medical expenses cut off and losing their livelihood, when no formal review of the scheme has occurred to see if the amendments made on the basis of the projected deficit have gone too far.

Recommendations:

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.**

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.**

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

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

[18] Premier Barry O'Farrell, Media Release , 1 May 2013, http://www.workcover.nsw.gov.au/aboutus/newsroom/Ministerial%20Media%20releases/010513-ofarrell-reform-results.pdf
NSW Government News Webpage, 20 October 2013, http://www.nsw.gov.au/news/further-premium-cuts-way-business-workcover-returns-surplus

Prevention

Section 22 (3) (a) of the 1998 Act states that WorkCover in exercising its functions, the Authority must promote the prevention of injuries and diseases at the workplace and the development of healthy and safe workplaces.

71. Unions NSW refers to its previous submissions. There are serious deficiencies with the prevention of injuries and diseases at the workplace due to the WorkCover Authority's reduced focus on education and enforcement. This has seen a plateauing of a number of indicators including fatalities, which should be on a continual shift downwards as the Australian economy shifts away from the traditional heavy industry.

Promote Efficient and Effective Management of Injuries

72. Section 22 (3) (b)of the 1998 Act states that WorkCover in exercising its functions, the Authority must (b) promote the prompt, efficient and effective management of injuries to persons at work

73. There are a number of conflicts of interest that are described in the Macquarie University Report [19] that inhibit the fulfilment of the functions in Section 22 (3) (a) and (b) as noted above. These include the problems of the removal of the dedicated business advisory group as discussed in paragraph 31-33 above.

74. These potential conflicts of interest include that the contracting of policy and claims management services to insurers that are driven by maximising profits risks attempts to minimise expenditure through unlawful claims liability determinations or through reduced access to services such as rehabilitation. This is rewarded by a lack of willingness by WorkCover to enforce the laws with insurance companies because they are minimising the costs to the nominal insurer (WorkCover).

75. Similarly the Scheme Agent Deeds have performance indicators that provide fees for services undertaken that are designed to get workers off workers compensation. These fees are payable regardless of the level of rehabilitation that is applied and incentivise workers' claims being closed. This is made easier for scheme agents with the use of work capacity decisions which require no evidence to be considered as per Section 32 A.

76. The Macquarie University Report describes other conflicts of interest at p. 67:

> "*Examples of conflicts of interest include:*
>
> - *WorkCover is both the nominal insurer, with commercial incentives to minimise insurance claim payments, and a regulator, with responsibility to monitor insurers and enforce contracts.* ***This becomes a conflict of interest***

[19] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 65

when, for instance, WorkCover needs to ensure that insurers are providing injured workers with their entitlements.

- *Contracted insurers and licensed self-insurers have an inherent conflict of interest as their responsibilities to compensate injured workers and assist them to recover and return to work are overshadowed by their mandate to maximise profits. This conflict has risen to the fore with the new system of work capacity decisions.*
- *Independent Medical Examiners (doctors) and rehabilitation providers are paid by the insurers. They have incentives to assist insurers to minimise expenditures for services and payments to injured workers. They do not, however, have incentives to minimise expenditures for their own services, nor do they have incentives to assist the worker to recover. These conflicts of interest have been exacerbated by the legislated changes.*
- *Legal practitioners have had incentives to encourage multiple claims and to protract legal claims. These issues have been substantially minimised by the legal changes."*[20]

(emphasis added)

77. These conflicts of interest are also reported in the Journal of Safety Health and Environment[21]. These conflicts of interest are exacerbated because a work capacity assessment or decision as to what a workers current work capacity, what is suitable employment and where it is, what the worker can earn or the amount of the injured workers pre injury average weekly earnings, and whether it is safe for the worker to undertake work, etc. is assessed by an insurance claims officer potentially without any expertise to make this assessment. There is no capacity for an independent review of the worker's work capacity decision as the two parties who undertake the review are conflicted being the insurer and the WorkCover Authority. The requirement for work capacity decisions to have any meaningful connection with the reality of an injured worker's actual circumstance is degraded by the definition of what suitable employment in Section 32A of the Workers Compensation Act as follows:

> ***"suitable employment",*** *in relation to a worker, means employment in work for which the worker is currently suited:*
> *(a) having regard to:*
> *(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and*
> *(ii) the worker's age, education, skills and work experience, and*
> *(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and*
> *(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and*

[20] ibid. p. 67
[21] Purse K., Workers' compensation and the impact of institutional barriers on return to work outcomes, Journal of Health and Safety and Environment, 2013, 29 (4): p. 214

> *(v) such other matters as the WorkCover Guidelines may specify, and*
>
> ***(b) regardless of:***
> ***(i) whether the work or the employment is available, and***
> ***(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and***
>
> ***(iii) the nature of the worker's pre-injury employment, and***
>
> ***(iv) the worker's place of residence. "***
>
> **(emphasis added)**

78. Section 32A definition of suitable employment has seen scenarios where fictional work anywhere in Australia has been chosen for the worker, even without regard to medical opinion as to whether the work is safe for the worker.

79. A procedural review is available at WIRO but there is some probability that a worker may never get there or at least not get a review prior to their weekly payments and medical expenses cutting out.

80. This is because the insurer has 30 days to review their own decision and the WorkCover review only has a recommendation to review work capacity decisions within 30 days under the Guidelines. Therefore a number of affiliates have advised WorkCover has taken in excess of four months to review work capacity decisions.

81. The implementation of an administrative assessment review of a work capacity decision by a party with a vested interest and with no effective appeal mechanism is far from ideal.

82. As stated above, the capping of medical expenses (including rehabilitation) and cutting workers off medical expenses will not have the effect of returning injured workers to work. Instead Macquarie University[22] states that this will cause cost shifting and quotes a number of government agencies such as the Industry Commission, Productivity Commission and the National Commission of Audit that state cost shifting to injured workers and the tax system (through Medicare and Centrelink) is not effective. Additionally to terminate a workers access to medical expenses after one year of cessation of weekly payments runs counter to the evidence that injured workers often require medical assistance for a number of years after injury in order to maintain work.[23]

83. A number of workers have also advised Unions NSW that their insurers are delaying decisions on pre-approval of medical expenses for a number of major operations. The reason this is occurring is to avoid the liability to pay, due to time related cap on medical expenses. This is contrary to the legislation yet is tacitly encouraged by WorkCover as they do not act on these complaints. [24]

[22] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 11
[23] Ibid. p. 43
[24] Ibid. p. 44

84. Section 60 (2A) of the Workers Compensation Act 1987 (the 1987 Act) requires the insurer to approve all medical expenses after 48 hours of the injury. The failure to pre-approve medical expenses delays or terminates recovery for many workers and simply jeopardises the employability of the injured worker.

85. Additionally as noted below in paragraph 122 workers access to rehabilitation remains one of NSW's poorest indicators, which demonstrates serious deficiencies in meeting this function.

Recommendations:

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

15. **That the 12 month limit on medical expenses after weekly payments cease, be removed and delay in the pre-approval of medical expenses be able to be taken to the Workers Compensation Commission.**

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

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.**

Effective Insurance Arrangements

86. Section 22 3 (c) of the 1998 Act requires WorkCover to ensure the efficient operation of workers compensation insurance arrangements.

87. As stated above the workers compensation insurance arrangements are conflicted in a number of areas. For example the conflict that incentivises insurers not to rehabilitate injured workers.

88. Similarly WorkCover management seems to believe efficient management of workers compensation solely requires lower costs. Delayed rehabilitation, increased terminations and increased recruitment costs are not good for business no matter what size and this is what the workers compensation changes have caused to occur.

89. The WorkCover actuaries Ernst and Young actually pointed to a number of inefficiencies in their reports including the ballooning costs of scheme agents[25]. This was not a focus of the 2012 cuts.

Co-ordination of administration

90. Section 22 (3) (d) requires WorkCover to ensure the appropriate co-ordination of arrangements for the administration of the schemes to which the workers compensation legislation or the work health and safety legislation relates.

91. The Macquarie University Report provides ample evidence of the considerable failure by WorkCover to administer the two schemes.

92. It is in the Government, public, workforce and employers' interests if injuries can be minimised so that the workers compensation system is more scarcely used and more beneficial. However, since 2006 we have seen a decline in enforcement and a lagged halt to the decline in severe workplace injuries.

93. The reduction in liability and benefits for injured workers is likely to benefit the key performance indicators of the NSW WorkCover Authority WHS Division under the national OHS strategy. This will be a false improvement as it will be based on the removal of liability. The ABS data provide a better benchmark for the assessment of the coordination between the WHS and Workers Compensation functions.

94. Unions NSW refer to our recommendation above regarding the separation of the Executive and Board management of each Division.

Recommendation:

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.

Research

95. Section 23 (1) requires WorkCover to initiate and encourage research to identify efficient and effective strategies for the prevention and management of work injury and for the rehabilitation of injured workers

96. Of considerable concern is the loss of specialist WorkCover officers in the 2013 WHS Division restructure. The loss of these specialists, many with considerable research experience and knowledge, places WorkCover at a significant disadvantage in executing this function. These officers often worked to assist inspectors with technical expertise enabling the more

[25] Joint Select Committee on the NSW Workers Compensation Scheme, 2012:123 quoted in Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University - Centre for Workforce Futures, p. 16

efficient operation of the inspectorate. It also raises some concerns regarding obligations under the Labour Inspectorate Convention that require technical experts (Article 9 of ILO Convention 81).

97. There has been a failure in recent years to advertise rounds of WorkCover Assist Research Grants. In the past these grants included a number of useful research projects regarding health and safety as well as injury management topics at an industry or broader levels.

98. Additionally as noted in the Macquarie University Report the offer to participate in this independent research was declined by the WorkCover CEO and her staff.

Recommendation:

19: That a tripartite panel be established to assist WorkCover in undertaking this function of encouraging research.

Education and Training in Prevention, Management and Rehabilitation

99. Section 23 1 (b) of the 1998 Act requires WorkCover to ensure the availability of high quality education and training in such prevention of work injury, management and rehabilitation of injured workers.

100. Not since 2011 has the last WorkCover Education Assist grant program been released. These programs enabled WorkCover to utilise quality industry participants to deliver high quality training to their members and enable greater reach than would otherwise be available to WorkCover. This program also assisted in developing cooperation between the management and labour as many of the grant recipients reported training workers and management in their grant funded sessions. This is a function required by the Act.

101. Further, recently there have been some issues raised regarding the quality of several registered training providers. At the time of submission Unions NSW, with affiliates, are working with the Third Party Management Unit to investigate the claims.

Recommendation:

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

102. Section 23 1 (c) requires WorkCover to develop equitable and effective programs to identify areas of unnecessarily high costs in or for schemes to which the workers compensation legislation or the work health and safety legislation relates.

103. The WorkCover Authority has often been criticised by the union movement for not focussing its resources on emerging issues or issues of high cost. For example WorkCover have now committed significant resources to research the prevention of quad bikes incidents that have caused countless injuries and death to mainly rural workers. While this research is

appreciated, a strategic use of enforcement via a prosecution of a manufacturer of quad bikes would provide a swift solution to the hazard.

104. Additionally in the area of psychological injuries or "mental disorders" there has been a large reluctance by WorkCover to address and prioritise these areas of growing prevalence including violence, workplace bullying and other mental stresses.

105. The Statistical Bulletin from WorkCover identified a number of claims in the occupational disease sub category of mental disorder. Unfortunately WorkCover's published statistics do not narrow down the cause of the mental disorder claim. The most relevant statistics available in NSW to Unions NSW are now dated and are included below in Table 5.

	2002/2003	2003/2004	2004/2005	2005/2006	2006/2007
Claims all industries	388	884	1,054	927	895
TMF- Claims all industries	40	280	361	332	336
Total GIC	$7,577,051	$19,502,576	$20,637,507	$16,372,966	$16,289,141
TMF- Total GIC	$1,156,770	$6,013,098	$7,838,291	$5,731,571	$7,497,510
Total Time Lost (weeks)	5,081	14,119	13,149	12,136	10,209
TMF- Total Time Lost (weeks)	672	5,244	4,825	4,154	3,919

Table 5: Work Related Harassment and/or Workplace Bullying Claims- all Industries

Source: WorkCover Authority NSW, (2008), (1) Business Intelligence Report, November December 2008, *Analysis of Occupational Disease Claims*

106. Table 5 apart demonstrates an increase in this category of injury but gives no comparison between mental disorder claims and other physical injuries. Mental disorder claims tend to be between 2 and 3 times the cost of average physical claims. Yet there has been a reluctance to tackle these difficult but expensive issues. Only limited resources have been provided.

107. On the other hand WorkCover is at the forefront for taking decisive action to minimise these claims. This includes reluctance to formulate a guide on violence and bullying at work. Even in 2013 at the Safe Work Australia Significant Issues Group, WorkCover voted against the recommendations of Safe Work Australia that the form of publications on bullying and fatigue be codes of practice. WorkCover instead voted for these publications to become less enforceable optional guidance material.

108. Similarly there was a reluctance to tackle issues of armed hold ups of cash deliveries, and truck driver fatigue until such time as the TWU was able to exert enough public pressure by the countless lives lost to commence regulating these industries.

109. The reluctance to target and resource these high cost safety risks is contrasted with Regulators in other States where they do prioritise enforcement, particularly in areas of high cost.

Recommendation

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.

Cooperative Relationships

110. Section 23 1 (d) to foster a co-operative relationship between management and labour in relation to the health, safety and welfare of persons at work,

111. This section of the 1998 Act comes from the ILO Labour Inspectorate Convention 81. At present there is minimal fostering of the relationship between management and labour in relation to the health, safety and welfare of persons at work.

112. As discussed above there are limited tri-partite bodies that enable the effective discussion of health, safety and welfare at work at a peak level.

113. Additionally unions have identified a number of occasions when WorkCover has thwarted any cooperative relationship at the workplace level by meeting alone with management without the knowledge of the elected representatives, incorrectly interfering in issue resolution to favour the employer over the statutory intention of the WHS Act, or simply hindering issue resolution by not intervening in matters where the employer is obviously not applying the law.

114. Unions NSW believes that the reason why these acts or omissions may be occurring is that there is a belief from some inspectors that they may be counselled or reprimanded if a complaint is made by an employer, about the inspector using of their powers. There is considerable evidence to support this occurring as provided to the General Purposes Standing Committee No 1 Inquiry into Allegations of Workplace Bullying at WorkCover.

115. Many unions are now utilising the Fair Work or Industrial Relations Commissions' industrial disputation provisions in order to resolve disputes over safety where there is jurisdiction. This proves to be a more effective mechanism for resolving safety disputes and fostering cooperation between employers and labour due to the fact that matters are properly addressed and then resolved.

116. The tri-partite forums that used to exist have a good record at resolving issues raised by the parties.

Recommendation:
See the recommendations above regarding the reinstatement of the WHS and Workers Compensation Advisory Councils.

Remove dis-incentives to return to work

117. Section 23 (1) f required WorkCover to identify (and facilitate or promote the development of programs that minimise or remove) disincentives for injured workers to return to work or for employers to employ injured workers, or both.

118. Unions NSW refers again to the conflicts of interest stated above particularly regarding the scheme agents and WorkCover having a conflict of interest about returning injured workers to work. As stated above the WorkCover Authority ran a Return to Work Pilot Project that looked at the effectiveness of interventions by inspectors and return to work outcomes. Despite the small sample it appeared that the intervention of inspectors had an improved outcome for return to work. Unions NSW believe this program should be immediately expanded and implemented.

119. Since the June 2012 cuts there has been minimal approval of workers to the JobCover Placement Program. This program provides at minimal cost to employers a long term injured worker for one year. Although the program was advertised that the subsidy was generously increased in previous annual reports, rehabilitation providers have reported that there have been minimal approvals for these highly successful placements in recent times.

120. Other than this program there are minimal incentives for employers to employ injured workers. Many workers report feeling like lepers if they get injured or compromised when they are required to disclose previous injuries in job applications.

121. Loss of work due to termination is debilitating for the worker often leading to secondary injury. However, as stated in the Journal of Health Safety and Environment,

> *"Less obvious is the pressure placed on scheme costs. The indiscriminate termination of injured workers employment inevitably leads to a larger scheme tail, and with it, substantial cost increases. In prudently managed schemes, minimising the potential for employment termination would therefore be viewed as a financial priority"*[26].

122. The Research went on to state:

> *"the New South Wales Study …provided an even bleaker picture with its conclusion that 7857 detached workers seeking new employment had an average delay of 123 weeks before they received their next rehabilitation referral following the termination of their employment."*[27]

[26] Purse K., Workers' compensation and the impact of institutional barriers on return to work outcomes, Journal of Health and Safety and Environment, 2013 29 (4): p. 213

[27] Australian Rehabilitation Providers Association, Inquiry into NSW Workers Compensation Scheme, Sydney 2012:4, quoted in Purse K., Workers' compensation and the impact of institutional barriers on return to work outcomes, Journal of Health and Safety and Environment, 2013 29 (4): p. 213

123. It is clear that apart from delaying return to work and extending scheme tails that termination leads to fundamental problems for return to work. Therefore we have included the following recommendations. The extension of employment protection is in line with the Fair Work Act protections for parents having one year off work when the arrival of a new baby occurs.

124. The Macquarie University Report also reports that return to work is more durable when employment is not terminated[28].

Recommendations:

22. That the outcomes of the Return to Work Pilot Project are released and the Pilot be extended to the whole inspectorate with a high level of resourcing.

23. That the JobCover Placement Program be reintroduced and promoted.

Recommendation 3 is repeated

24. That WorkCover review and improve how it assists or incentivises employers with at work rehabilitation and re-employment of injured workers after short term and long term absences.

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.

Fraud

125. Section 23 (1) g of the 1998 Act requires WorkCover to assist in the provision of measures to deter and detect fraudulent workers compensation claims.

126. We repeat our submission in reference to paragraphs 23-30 and the recommendations that follow.

Target Groups

127. Section 23 (h) requires WorkCover to develop programs to meet the special needs of target groups, including:
- workers who suffer severe injuries
- injured workers who are unable to return to their pre-injury occupation
- injured workers who are unemployed
- persons who live in remote areas
- women
- persons of non-English speaking background
- persons who have a disability,

[28] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p.61

128. In relation to workers who have suffered severe injuries, while the Government stated that the scheme better assisted workers with severe injuries, the data tends to support that this is not the case.

129. The introduction of work capacity decisions mean that a number of severely injured workers who do not meet the 30% impairment threshold have or will soon lose access to weekly payments and medical expenses. This will see all but a very small minority of workers transitioned onto Commonwealth social security and Medicare.

130. It is estimated that only 994 workers have been assessed as having greater than 30% permanent impairment since 1987[29]. It is likely that only these workers will be shifted to the NIIS which will continue to be funded by the workers compensation schemes of the states. This indicates that workers with an amputation, loss of significant sight and other similarly rated injuries are unlikely to be able to access workers compensation in the long term.

131. In relation to injured workers who are unable to return to their pre-injury occupation, and injured workers who are unemployed, Unions NSW refer the Committee to our recommendations and commentary in paragraphs 117-124 and Recommendations immediately thereafter.

132. In relation to the treatment of persons who live in remote areas, Unions NSW cites the following illustrative example.

133. In order to return to work and rehabilitate themselves a worker moved to a remote community where the worker commenced employment and returned to work with a different employer. Unfortunately the remoteness of the location meant that the Doctor was not regular and was brought in as part of a rotating tour (locum). The constant requirement to retell their story of workplace bullying created some difficulty for the worker and some of the doctors that treated the worker. Alternatively the worker could drive 10 hours to the nearest large town to see a doctor for ongoing treatment and certificates. This meant that the worker missed out on several weeks of pay either waiting for a doctor to come to town on circuit. The alternative requirement to travel for two days some 2000 kilometres each time a doctor's work capacity certificate needs to be renewed cannot be an efficient use of injured workers resources or the schemes resources to compensate for the travel and lost time.

134. WorkCover currently does not accept remote consultations via electronic link and work capacity certificates are required to be signed off by a Doctor even if there is simply a need for further medical treatment.

[29] Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures, p. 28

135. This worker was subjected to the scrutiny of several doctors by the insurer who pursued a relentless fishing expedition try to get the right answer. This experience is also confirmed by the Macquarie University Report[30].

Recommendation

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

136. A number of injured workers have also complained that the work capacity assessment process was being used to push them around the State or risk being assessed as un-cooperative.

137. The Macquarie University Report states:

> *"Case evidence has shown these assessments need not be proximate to the worker's home, and that workers may not be given fair notice to attend, although if they fail to attend or to "cooperate" their payments can be suspended."*[31]

138. The Macquarie University Report also states:

> *Due to the difficulties of remote access a number of regional workers have reported difficulties with the insurer dictating attendance at Doctors with relatively short notice*[32]*.*

139. Macquarie University Report also found evidence of insurers:

> *"Refusing to pay transportation costs for injured workers to visit doctors while requiring them to travel (with their injury) several hundred kilometres to visit specified medical practitioners and inferring that non-attendance will be deemed as failing to comply and payments could be suspended."* [33]

140. Additionally as described above the work capacity decision definition of suitable employment in Section 32A allows the insurer to require an injured worker to travel for work to different locations, even if the work is not actually available and "regardless of the workers place of residence".

Recommendations:

28. There is a need for an independent body to review on grounds of merit and process work capacity decisions and assessments. [in accordance with recommendation 14]

29. Section 32A is amended to remove part b of the definition of suitable employment.

141. In relation to women, persons of non-English speaking background and persons who have a disability WorkCover is not performing its functions.

[30] Ibid. p. 71
[31] Ibid. p. 32
[32] Ibid. p. 71
[33] Ibid. p. 71

142. For example the Macquarie University Report refers to NESB workers a number of times including them being provided with written notifications that are inaccessible and difficult to understand.[34]

143. The Macquarie University Report also provides an example of an injured NESB worker from the construction industry being assessed as having work capacity to commence a new career as a sales representative. This shows the removal of reality from the work capacity assessment process and the impact this particularly has on people from a NESB.[35]

144. WorkCover's ability to develop programs for people with special needs is greatly inhibited due to the conflict of interest and power imbalance of the relationship. For instance, the Macquarie University Report states, *"insurance companies have a financial incentive not to provide workers with clear and detailed information about eligibility and entitlement to compensation and benefits"*.[36]

145. Additionally the fact there is no allowance for legal representation during work capacity assessments or in the appeal of work capacity decisions will disadvantage groups who are already in the margins of the employment sphere.

146. Section 23 (1) i requires WorkCover to facilitate and promote the establishment and operation of work health and safety committees at places of work.

147. The predominate mechanism for consultation now appears centred on the Health and Safety Representative in the WHS Act 2011, not WHS Committees.

148. Unions have experienced a reluctance by WorkCover to intervene in a constructive manner when there are attempts under Section 50 to negotiate HSR representation. Even in high risk industries the union experience is that intervention has only lead to the delay of consultation occurring as per the WHS Act. WorkCover should foresee that greater consultation arrangements in high risk industries will minimise more serious injuries.

Recommendations:

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".

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.

[34] Ibid. p. 72
[35] Ibid. p. 27
[36] Ibid. p. 67

149. Section 23 (1) of the 1998 Act requires WorkCover to facilitate and promote the establishment and operation return-to-work programs

150. In relation to formulating and promoting Return to Work programs, prior to the workers compensation cuts NSW already had the highest return to work rate out of any jurisdiction.[37]

151. There is now the absurd contradiction since the amendments in 2012, that unions need to be involved in the negotiation of return to work programs but have little ability to inspect these programs to ascertain that they exist.

152. The WorkCover Return to Work Pilot also identified interventions by inspectors encouraged greater return to work. Similarly if all inspectors undertook an audit of RTW programs and intervened when one was not present then WorkCover would likely improve the adoption of return to work programs and return to work rates.

153. A number of submissions to the Parliamentary Special Inquiry into Workers Compensation (May 2012) also stated that a significant impediment to return to work is the refusal for employers to take workers back to work who have made a claim.

154. Despite there being a requirement to:

a) return workers to work;
b) have a return to work program negotiated with the workers;

Unions NSW have rarely seen WorkCover Authority issue a notice to enforce these obligations.

155. A number of inspectors state that return to work is an industrial issue and simply refer the worker elsewhere despite a clear jurisdiction.

156. Unfortunately examples have been provided to Unions NSW where a doctor has stated that a worker has capacity to work if the work is made safe or minor reasonable adjustments occur. This enables the insurer to cease payments due to the existence of work capacity, yet the employer insists that there is no availability of work so the worker gets no income from workers compensation. The worker is on their own.

157. The current maximum penalty for non-compliance with return to work for an employer is in the realm of 50 Penalty Units which hardly makes the enforcement risk worthwhile for the WorkCover Authority given the burden of evidence required to achieve a prosecution.

Recommendations:

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

[37] Safe Work Australia - Return to Work Survey, headline Measures Report (Australia and New Zealand), pages 2-5 indicating that NSW shared with Comcare Returned to Work rate of 88% and a Current Return to Work Rate (durable return to work) at 80%, highest with the Commonwealth.

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

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

34. That fines for employers are increased for non-compliance with return to work provisions

Accidents

158. In relation to the function to investigate accidents is covered above in paragraphs 14-30.

Policies

159. Section 23 (1) (k) requires WorkCover to develop policies for injury management, worker rehabilitation, and assistance to injured workers.

160. As discussed above there are no effective or existing formal tri-partite arrangements allowing for the development of policies.

161. With the removal of these consultative forums WorkCover has had to rely on projects arising from the Safe Work Australia and HOWSA /HOWCA forums where there is limited scope for NSW stakeholder participation or "industry stakeholder" participation.

162. A number of policy, specialist and experienced research workers have also been lost to WorkCover as a result of recent restructures.

163. The number of documents and policies being formulated has diminished as a result.

Recommendation:
That recommendation 8 in this submission for the reinstatement of tripartite forums is repeated

Industry Data

164. Section 23 (1) m of the 1998 Act requires WorkCover to collect, analyse and publish data and statistics, as the Authority considers appropriate.

165. With the cessation of the Statistical Bulletin it means that Unions NSW only receive data and statistics via GIPA requests, or via the diluted and delayed National Comparative Performance Monitoring Report.

166. Previously when the Industry Reference Groups existed industry participants would be given timely data and statistics relevant to the operation of safety and workers compensation and injury management in their industry.

167. As there has been a number of restructures, the WHS Division now only focuses on certain industries. This means that many industries will be unaware of how their industry is performing or where improvements are being realised and why.

Recommendation

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.

That Recommendation 7 is re submitted to restore the Statistical Bulletin to increase industry knowledge and statistics.

168. Section 23 (1) n of the 1998 to provide advisory services to workers, employers, insurers and the general community (including information in languages other than English).

169. The Claims Assistance Service (CAS) is meant to fulfil this function. However, it is a general view that the CAS does not get back to callers, or get back to callers in a timely manner. There is also a view that they are not empowered or inclined to initiate interventions to support injured workers or initiate interventions with insurance companies. This is not acceptable as the principal port of call for a worker contacting the WorkCover Authority.

170. The WIRO has now established the WIRO Assist service. Unions NSW needs further time to assess its usefulness. However, due to the greater independence of the WIRO, it may offer some assistance to workers to navigate the workers compensation system[38].

171. Unions NSW refers to paragraph 142-145 our commentary about NESB people dealing with WorkCover. While the advisory services are slightly better at facilitating multilingual communications there are still a number of issues as noted in above.

172. The removal of legal advice in relation to work capacity decisions has also been mentioned as a key area where injured workers are not being provided with adequate advice. Kim Garling states:

> *"That's had a significant impact because there's no one to give the injured worker information about their rights and about how they can work their way through the process. So the current view is that the bulk of workers are just accepting the decisions and walking away"* [39]

Prevention through Education

173. Section 23 (1) (o) of the 1998 requires WorkCover to 23 (1) o to provide funds for or in relation to:
    - measures for the prevention or minimisation of work injuries or diseases
    - work health and safety education,

[38] http://wiro.nsw.gov.au/

[39] Garling Kim (WIRO), quoted in The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1, p.26

174. The WorkCover Authority initiated a program called the 10:5:5 which have been replaced by a new program name "focus on industry programs".

175. It is unknown what additional funds are provided to minimise target industries injury rates. There is a small psychosocial unit to address one of the 5 occupational diseases however there appears to be limited results arising in the form of enforcement or education from the unit.

176. Additionally a number of the specialist scientists and technical experts have recently been made redundant in a restructure in 2013. These provided invaluable assistance for injury prevention by the inspectors and also often provided expert education at forums and other training forums.

177. The WorkCover Education Assist program appears to have been scrapped which provided access to vast networks of people via employer and worker registered organisations. This program provided education to tens of thousands of employees across all industries in NSW through face to face and other mediums such as online learning development.

178. As noted above the Business Advisory Group was also disbanded thus requiring greater need for inspectors to play an educative role.

Interpreter Services

179. Section 23 (1) p to arrange, or facilitate the provision of, interpreter services to assist injured workers,

180. As stated above it is uncommon for injured workers of a NESB background to be afforded an interpreter from the insurer.

181. It has been suggested that poor communications may be a strategy to improve the performance of the insurance agent[40].

Legal Aid

182. Section 23 (1) q to provide and administer (subject to the regulations) a legal aid service for persons who are parties to proceedings relating to workers compensation

183. The ILARS process is a welcome amendment from the original June 2012 cuts. There are elements of the ILARS changes that Unions NSW supports. The qualitative element of licensing solicitors prior to enabling a solicitor to gain legal aid is a process that will, if supported by ongoing professional development and culling of the occasional workers compensation solicitor, lead to some reductions in wasted legal expenses and hopefully better representation for injured workers.

[40] Ibid p. 68

184. The problem is that there is no avenue for workers to access ILARS when there is a work capacity decision or when an insurer uses work capacity to deny liability for weekly payments through a crude assessment of weekly earnings. This is strictly prohibited under S44 (6), which even prohibits workers from accessing lawyers who charge if a worker choses to pursue this.

185. Attacking legal services is just not fair. Unions NSW has received copies of correspondence to injured workers written by solicitors on legal letterhead, describing how the solicitor was authorised by the insurer to undertake the work capacity decision. This decision undertaken by a solicitor will be charged to the insurer and be a cost. However, due to the nature of the work capacity decision process, unless the worker is in a union or can find a generous lawyer prepared to offer pro bono advice, the worker cannot be similarly represented and therefore will have limited capacity to challenge the merit or process of the work capacity decision.

186. This restriction on accessing legal aid or legal advice in general coupled with the inability for an independent merit review of work capacity decisions, creates an enormous power difference between the insurer and the worker and also creates an administrative moral hazard[41].

Nominal Insurer functions of Authority

187. Section 23A of the 1998 Act describes the Nominal Insurer functions of WorkCover Authority. The Authority has such additional functions as may be necessary or convenient for enabling the Authority to act for the Nominal Insurer and to ensure that the Nominal Insurer's functions are able to be exercised without restriction by any of the Authority's other functions. When acting for the Nominal Insurer, the Authority has and may exercise all the functions of the Nominal Insurer and is not limited by any of the Authority's other functions. When acting for the Nominal Insurer, the Authority must exercise its functions so as to ensure the efficient exercise of the functions of the Nominal Insurer and the proper collection of premiums for policies of insurance and the payment of claims in accordance with this Act and the 1987 Act.

188. The role of WorkCover as the nominal insurer raises a number of conflicts of interest that may be contributing towards the approach to reduce benefits to injured workers. As the Macquarie University Report states:

> *"WorkCover is both the nominal insurer, with commercial incentives to minimise insurance claim payments, and a regulator, with the responsibility to monitor insurers and enforce contracts. This becomes a conflict of interest when, for instance, WorkCover needs to ensure that insurers are providing injured workers with their entitlements."*[42]

189. An additional conflict that Unions NSW identifies is the fact that workers compensation appears almost exclusively ring fenced unlike most other areas of civil tort with minimal

[41] Ibid. p. 27
[42] Ibid. p. 67

capacity to make claims outside of the scheme for injuries that occur to workers at work. That is, workers are captured by the legislation. However, in order to appear to reduce health and safety incidents and burdens to the scheme the WorkCover Authority simply reduces liability for a range of injuries such as occurred in June 2012. This included reduced liability for items such as journey claims, heart attacks and strokes, degenerative injuries and illnesses and by imposing limits requiring one off claims rather than top ups when the condition becomes more severe. The worker is not any less injured or able to cope with their incapacity but the nominal insurer has determined to reduce their liability by making a whole class of workplace injury un-compensable.

190. One of the largest examples of this conflict was with the removal of the journey claim by the creation of the real and substantial connection test. Journey claims under Section 10 were for journeys between a workers abode and their workplace. These claims amounted to approximately 2.6% of the claims in the scheme. It is estimated that approximately half the expense for this claim was recouped through accessing the motor vehicle insurance claims system.

191. The incidence of journey claim was often skewed towards regional workers and commuters due to the large distances that they travel. These workers are undertaking a journey simply to attend work and would not otherwise be inclined to undertake this journey. While the arguments for reducing the entitlement were that the employer has minimal control over a journey claim (this is disputed), the employer's premium was not sensitive to these claims anyway. It also fails to take into account that the workers compensation scheme is a non-fault system. We now have the inefficient scenario for a number of workers who are injured either when they are at fault in a motor vehicle or when they commuting to work via alternate means such as walking or cycling being uninsured when they have an injury. This now sees workers being put off and at times terminated as they wait for elective surgery and minimal allied health assistance under the congested Medicare system. This simply leads to a profit for the nominal insurer at the expense of injured workers.

Recommendation
37. Reinstate Journey Claims which was a minimal cost to the scheme.

Term of Reference (d)

to examine each annual or other report of the authorities and report to the House on any matter appearing in, or arising out of, any such report,

192. Unions NSW refers to our submissions in paragraphs 14-30 that the WorkCover Authority has over seen a significant reduction in enforcement activities.

193. Unions NSW also refers to our submission in paragraphs 31-33 regarding a significant reduction in advisory services.

194. As shown by Table 3 the work fatality rate has plateaued as have major injuries. This is not in line with the previous trends or the national trends. It would be expected that these figures would trend downwards with the transition from heavy industry to the service economy, and with the relative decline of manufacturing, forestry and construction sectors as a share of the NSW economy.

195. The Macquarie University Report provides an indication as to why the major injury data remains high.

> *"However, if WHS standards are inadequately enforced there is likely to be a deceptively benign delay before injuries start to occur. WHS failures can be seen to accumulate with growing levels of severity before injuries or illnesses start to occur (O'Neill, 2012:7). Thus both the educative/advisory and the inspectorate/enforcer roles of WorkCover are critical for the regulation of WHS standards (industry Commission Australia, 1994: XLI)"* [43]

196. As noted above there is a notable omission of data surrounding the insurance agents' fees in the Annual Report or the Statistical Bulletin. At the same time their fees had been increasing and the insurer's influence over the organisation's functions has been growing.

197. A significant number of statistics such as fraud and premium auditing are no longer reported in the Annual Report. Unions NSW refers to our submissions as detailed in paragraphs 23-30.

198. Comprehensive statistics detailing NSW WorkCover's performance was formerly published in the Statistical Bulletin and was more detailed on WorkCover's key functions. The Annual Report appears now to focus mainly on financial performance and governance and has a summary of the actual core functions of the WorkCover Authority. There is minimal detail supplied in order to make a definitive decision about safety or injury management in a particular industry.

Term of Reference (e)

to examine trends and changes in compensation governed by the authorities, and report to the House any changes that the committee thinks desirable to the functions and procedures of the authorities, or advisory committees.

199. As discussed above, the definition of suitable employment in Section 32A has been used to shorten the tail of a number of workers injury claims who were injured under the previous Workers Compensation Act 1987. There can be no denying the retrospective element of the legislation. This saw a number of workers taken off weekly payments due to an administrative assessment of the scale of injury or what work could be performed theoretically. The true extent of the cost shifting exercise for a number of these workers will

[43] Ibid. p. 73

occur when their access to medical expenses is terminated 12 months after the work capacity decision terminates weekly payments.

200. A number of workers, which we estimate to be in the realm of up to 60000, who solely relied on workers compensation to pay for occasional or periodical medical expenses, such as hearing aid replacement, prosthetic limb replacement or knee or joint replacement will lose this entitlement . This includes injured workers for whom a decision was made in the workers compensation commission regarding liability for medical expenses.[44]

201. There is no ability to appeal the merits of a work capacity decision with an independent body or with adequate legal representation.

202. All new claims can be work capacity assessed at any time.

203. There has been less that 1000 claims that have been assessed as greater than 30% since 1987[45]. Most of these workers will be transitioned to the NIIS when it is rolled out as a complimentary stream to the NDIS.

204. We submit that the trend in the scheme for a short tail scheme for all but the 1000 or so severely injured workers who will meet a 30% impairment test. All others will simply become at the mercy of a congested Medicare and social security system rather than engaged in ongoing active employment.

205. We submit that there are a number of conflicts of interest for the WorkCover Authority with no requirement to have tripartite engagement with the representatives of those the scheme is designed to support.

206. The benefits to WorkCover as the Nominal Insurer, rent seeking self-insurers, and scheme agents will be significant increases in surplus/profit from this shift of cost to injured workers and the tax payer.

207. Unions NSW submit that the provisions that we seek to reinstate can be done comfortably as there will be significant reductions in claims liability as the scheme is transformed to a short tail scheme.

208. Unions NSW do not endorse this shift.

209. Unions NSW will continue to campaign for a fairer workplace safety and injury support system.

End of Submission

[44] Ibid. p. 27
[45] Ibid. p. 28

Attachment- Embargoed until advised and not for publication

Markey R, Holley S., O'Neill S., Thornthwaite L., The Impact on Injured Workers of Changes to NSW Workers Compensation: June 2012 Legislative Amendments, Report No 1 for Unions NSW, (2013), Macquarie University- Centre for Workforce Futures