Submission No 17

INQUIRY INTO 2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: AMWU NSW Branch

Date Received: 22 June 2018

AMWU - Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

Submission to NSW Legislative Council – Standing Committee on Law and Justice

2018 review of the workers compensation scheme

For AMWU Members it has long been a feature of the NSW workers compensation scheme that statutory organisations with roles and responsibilities to provide information, advice and assistance of the legislation have demonstrated a continuing lack of knowledge and empathy towards injured workers and their circumstances, contributing to or creating needless disputes and prolonging those disputes. We remain sceptical until the detail is available of what an improved workers compensation dispute resolution system will look like and have not been convinced of how a single personal injury jurisdiction would benefit injured workers.

The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission to NSW Legislative Council – Standing Committee on Law and Justice 2018 review of the workers compensation scheme with relation to Recommendation 16 (the Recommendation) of the First review of the workers compensation scheme by the NSW Legislative Council, Standing Committee on Law and Justice.[i]

1. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU NSW Branch has a membership of 20,000 workers. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.
2. An objective of any workers compensation systems needs to be an equitable, fair and just system of income protection, access to medical treatment for injured workers and mechanisms to assist injured workers back to work. The objective should also provide for the 'timely resolution of any dispute which arises', this however is not an aspect of the NSW legislation.
3. The workers compensation scheme should seek to return injured workers back to the maximum achievable medical recovery and the highest quality of life. Workers compensation legislation is beneficial legislation targeted at injured and ill workers and in the context of decisions made in the course of workers compensation, that should be aimed at supporting and benefiting the claimant.
4. In considering the terms of reference the AMWU have considered the objectives of the Workers Compensation Act NSW 1987 and Workplace Injury Management & Workers Compensation Act NSW 1998 – the legislation. We are unable to see how a single personal injury jurisdiction would place an injured worker at the centre of matters as the objectives of the legislation clearly imagine.[ii]

"Injured workers are being pushed around and in some cases damaged, in a workers compensation system which has emerged over decades from piecemeal reforms mainly designed to harm and limit their entitlements. Whilst the union supports a dispute resolution system made easier for injured workers the proposal for a 'one stop shop' would appear to be motivated in the interest of other objectives, not that of injured workers. A singular point of entry for all dispute resolution is more likely to benefit injured workers who require dispute resolution, delivering more timely cost effective outcomes and reducing stress on injured workers."
AMWU submission to the Department of Finance, Services & Innovation February 2018; Appendix 1

5. Any consideration of a "…more comprehensive specialised personal injury jurisdiction in New South Wales" requires a jurisdiction with the specialised competencies and proficiencies essential to delivering due process to injured workers concerned with workers compensation. The AMWU does not accept an interpretation of a personal injury jurisdiction as being one with all forms of personal injury (in this case workers compensation and CTP) collected together. Workers compensation requires a stand-alone specialised jurisdiction. Administrative arrangements that contribute to the achievement of the objectives of the workers compensation legislation may only be considered if such arrangements delivered for injured workers all of the beneficial objectives of the legislation, not just fiscal objectives which benefit parties other than injured workers.

6. The AMWU tables it's submission to the recent Department of Finance, Services & Innovation NSW (the Dept FS&I) consultation regarding Workers Compensation Dispute Resolution, is to be considered in its entirety as forming part of this submission (attached, Appendix 1).
7. We note the outcome of the Dept. FS&I consultation regarding workers compensation dispute resolution as announced by Minister Victor Dominello MP on the 4th May 2018[iii]. As the detail is limited at this time the AMWU can only acknowledge the announcement as the detail remains unclear.
8. The AMWU submits that the NSW workers compensation dispute resolution pathway is difficult and requires specialised knowledge. For the injured worker it is an essential element that service is delivered to them is done by unbiased, competent and proficient organisations inclusive of their representatives. That (statutory) organisation's representatives are capable and able to provide accurate and timely, information, advice, assistance and when required facilitate/mediate/decide matters appropriate to their delegation. This is what injured workers expect the legislation and scheme to deliver to them.
9. For AMWU Members it has long been a feature of the NSW workers compensation scheme that statutory organizations with roles and responsibilities to provide information, advice and assistance of the legislation, demonstrate a continuing lack of knowledge and empathy towards injured workers and their circumstances, contributing to or creating needless disputes and prolonging those disputes. The prolonging or other wise of disputes leads to exacerbation of and compounding of injury including secondary injury. We remain sceptical until the detail is available of what an improved workers compensation dispute resolution system will look like and have not been convinced of how a single personal injury jurisdiction would benefit injured workers.
10. It is acknowledged that some complex matters may move beyond the jurisdiction of the Workers Compensation Commission due to their unique nature however we would expect that that would remain rare as it is now.
11. The AMWU would like to comment upon the supporting information published with the Recommendation in the committee's first review.[iv] It is hard not to feel that we are responding to an unsolicited idea that has not been researched nor validated. There is considerable risk of further harm and disadvantage occurring to (injured) workers arising from this review. The AMWU believes that the committee itself should (have) considered the pro and cons of this change before seeking submissions It is unfortunate that the stakeholders, service providers and functionaries who expressed these summarised views were not invited to clarify (or published) in some detail what those concerns were. We would of course welcome insight into the claims made by the proponents of these proposals so that we may comment more effectively; this legislation is beneficial legislation for (injured) workers it is not a scheme to be modified to assist service providers or other scheme participants with their business models.
12. If the objectives of the workers compensation legislation are to be addressed in the entirety (not just a narrow economic measurement of the scheme) the AMWU can propose changes address improvements. Changes must not however be at the cost of injured workers who bear an inordinate amount for the cost of injury already and whose burdens do not decrease with each change to the legislation. It is disturbing to the AMWU that the language of work

capacity has crept into both CTP and Workers Compensation (along with such terms as Recovering at Work and Remaining at Work) whilst little or nothing is done to address the requirements of the objectives of the legislation to provide timely and appropriate support for treatment that would address the objectives. Without timely and appropriate treatment that leads to "…maximum achievable medical recovery and highest quality of life" (Appendix 1, paragraph 4) all of this activity is of questionable value to injured workers. A competent, timely and proficient judicial dispute resolution body forming part of a logical and appropriate dispute resolution system for the benefit of injured workers would be supported by the AMWU and we remain committed to participating in such developments.

13. We caution against a single personal injury jurisdiction for the application and interpretation of the law to injured workers. The want for this 'reform' remains unknown and therefore the need remains out of sight.
14. Recommendation that tripartite consultation inclusive of the social partners – government, trade unions, employer associations - and industry participants – legal profession, insurers, regulators, rehabilitation providers – take place to establish that improved outcomes for injured workers are at the centre of any changes.
15. Recommendation is that a standalone NSW Workers Compensation jurisdiction must remain; that reaonsable administrative arrangements may be considered for the efficient management and resourcing of the jurisdiction however not to the detriment of injured workers health, employment, time or other resources.
16. The AMWU thanks the committee for this opportunity to respond. We remain available for ongoing dialogue and consultation.

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Improving workers compensation dispute resolution in NSW – Australian Manufacturing Workers' Union

Injured workers are being pushed around and in some cases damaged, in a workers compensation system which has emerged over decades from piecemeal reforms mainly designed to harm and limit their entitlements. Whilst the union supports a dispute resolution system made easier for injured workers the proposal for a 'one stop shop' would appear to be motivated in the interest of other objectives, not that of injured workers. A singular point of entry for all dispute resolution is more likely to benefit injured workers who require dispute resolution, delivering more timely cost effective outcomes and reducing stress on injured workers.

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission with relation to the Improving Workers Compensation Dispute Resolution in NSW discussion paper.
2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU NSW Branch has a membership of 20,000 workers. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.
3. An objective of any workers compensation systems needs to be an equitable, fair and just system of income protection, access to medical treatment for injured workers and mechanisms to assist injured workers back to work. The objective should also provide for the 'timely resolution of any dispute which arises', this however is not an aspect of the NSW legislation.
4. The workers compensation scheme should seek to return injured workers back to the maximum achievable medical recovery and the highest quality of life. Workers compensation legislation is beneficial legislation targeted at injured and ill workers and in the context of decisions made in the course of workers compensation, they should be aimed at benefiting the claimant.

5. At the outset of our submission the union identifies a significant problem with the way the paper has sought to frame the definition of a dispute. The assertion that there is "no single, agreed definition" is contested. The matter was central to a decision of the President of the NSW Workers Compensation Commission in Divertie v Startrack Express Pty Limited (formerly Neilsen Brame Pty Limited) (2008) 6 DDCR 26[v].
6. Unfortunately the paper has sought to define a dispute in the exact opposite manner to the considered position of the President, placing the onus on the injured worker which does not exist in the legislation.
7. The union notes that concepts of "formal" and "informal" disputes does nothing to address the problems and in themselves creates more confusion.
8. Future considerations need to address these matters otherwise there will be unintended consequences including with regards to the application of Chapter 3 of the WIMWCA 1998.

9. **Do you support developing a single system for resolving personal injury disputes? What do you think might be the benefits and/or costs of a single system?**
10. The union does not support a single system for resolving personal injury disputes. The NSW Workers Compensation scheme is extremely complex, in some part due to decades from piecemeal reforms often designed to harm and limit the rights of injured workers. As a result of this complexity and its unique nature it is imperative that there be a workers compensation specialist jurisdiction.
11. The cost of moving away from a specialist jurisdiction would at best be further delays eroding justice for injured workers and at worst miscarriages of justice as a result of decisions which neither reflect the legislation or its intent.

12. The paper in Part 2 does not acknowledge the role of the NSW Industrial Relations Commission as part of the dispute resolution system and the role it plays in relation to Part 8 of the WCA 1987. Also the paper fails to recognise SafeWork NSW in the delegated role it plays under Chapter 3, Part 3 of the WIMWCA 1998. The union can only imagine this was an oversight. It is important to note however, as the roles of the NSWIRC & SafeWork NSW need to be included in any consideration.

13. The union noted with interest point 2.1.2 **Legal support**. Traditionally unions were able to play a more proactive role in dispute resolution particularly around injury management disputes, but as the paper states "Almost all claimants and insurers are legally represented in disputes before the WCC". Consideration should be given to why this is the case and secondly, why this is would be a preferred model of dispute resolution.
14. The AMWU submits that this is a result of legislative decisions and decisions of the WCC to ensured that, unions can no longer receive a fee for work done in the WCC and secondly, the abolition of the Expedited Assessment Officers. This has removed a constructive process of EAO's working with non-legally trained Officers of unions and recognising that a deeper knowledge of workplaces would result in other benefits to the disputes process and brought a more practical skill set to the table when resolving injury management disputes.
15. Point 2.1.4 **System oversight** the paper looks at the role of the NSW Ombudsman and its role to deal with complaints about administrative conduct of the respective statutory bodies. This is of particular concern to the union as our recent experience with the NSW Ombudsman in regards to workers compensation suggests that it is neither resourced nor skilled to be able to manage issues pertaining to workers compensation.
16. A member of the AMWU wrote to the NSW Ombudsman in June 2017 and had a follow up conversation with an Officer of the NSW Ombudsman in relation to a complaint where SIRA were engaged in making decisions without power under the Act and such decisions were in direct conflict with the workers compensation legislation.
17. Following this the NSW Ombudsman wrote[vi] to the injured worker stating "…our office would not be taking action on your complaint because you were pursuing your concerns via the WCC…". The matter before the WCC was an injury management dispute (IMD) which had been explained, the WCC never had jurisdiction to deal with the conduct of the Regulator which should have been known. As a result of the NSW Ombudsman's conduct coupled with that of SIRA, the injured workers employer exercised a termination the workers employment before the WCC was given an opportunity to resolve the IMD thus terminating the jurisdiction of the WCC, harming both the worker and his family.
18. In contrast Victorian Ombudsman has conducted 2 significant investigation (2011 & 2016) within 5 years in relation the their scheme with particular focus on regulators, scheme agents and insurers and demonstrates a better level of knowledge in relation to the operation of that scheme.
19. The capacity of the NSW Ombudsman will need to be significantly improved if workers are expected to have any faith in it as an independent oversight.

20. Does the case for change outlined here reflect your experience or knowledge of the system?

21. The union agrees "that being involved in a workers compensation claim or dispute can be stressful, isolating and psychologically damaging", "that overlapping responsibilities of scheme participants is a problem throughout the dispute resolution system. For example, an injured worker with a complaint against an insurer can go to SIRA or WIRO or icare, all of whom will handle their complaint slightly differently. This can be confusing and frustrating for claimants".
22. The aspiration for a clear, supportive system that resolves issues early and puts the claimants' needs at the centre is one supported by the union and the dot points as set out starting on page 17 of the discussion paper are worthy of consideration.

23. Under point 5 **Options for the preventing disputes** the paper seems to have missed a key opportunity which is central to reducing disputes, enabling early treatment(s) and facilitating timely return to work.
24. Many injured members who come to us have had their medical treatments delayed for unreasonable periods of time or denied without the support of medical authority, which undermines the recommendations and referrals of treating doctors and specialists. Injured workers are put at a disadvantage due to prolonged delays in receiving necessary treatment with the vast majority of these matters decided in support of the injured worker and their doctors. Research agrees that any delay in medical treatment can have adverse effect on the prognosis and timeliness of recovery. This puts upwards pressure on the scheme undermining is viability which is of minor significance when considering the additional stress placed on these workers and the poorer health outcomes delivered.
25. The union recommends that the counterproductive practice of pre-approval of medical expenses be stopped and, that any reasonable medical costs incurred by an injured worker be reimbursed in a timely manner.
26. Point 5.1 **Reform of the independent medical examination system** suggests the concept of a carousel type arrangement for IME's. The paper suggests this single pool of IME's could be managed by SIRA, the regulator who was repeatedly rebuked in the Law and Justice Committee for its failure to carry out its functions and regulate the legislation including reigning in the conduct of insurers regarding IME's.
27. The union has lost faith in SIRA's capacity to adequately and fairly manage this proposed carousel type arrangement for IME's. The IME Guidelines to which the paper identified SIRA are currently reviewing (thou not in consultation it would appear), are not themselves flawed though there are always areas that can be improved, such as ensuring that IME are in clinical practice. If parties could meet compliance with the legislation by a stronger regulator, the scheme would be in a better place and workers frustrations surrounding the lack of procedural fairness would be diminished or eliminated. Better still, if all parties respected that workers' compensation is beneficial legislation a sensible, cost effective and timely resolution would be for insurers to accept a complying report when a claim is made.
28. The union notes with concern enhancing its opposition to the papers IME carousel proposal, due to the likely reputational damage which could be suffered by those advocating for injured workers. Should an injured worker be unlucky enough to 'draw a short straw' and be sent to a doctor who carries particular bias, beliefs or prejudice damaging to the injured workers case, it will likely be the party who sought the IME referral who shall be considered the wrongdoer.
29. The union does not oppose point 5.2 **Establish a single claim identifier and improve data collection**.
30. Point 5.3 **Commutation, or lump sum exit from scheme** presents the union with a level of conflict. Commutation for the purpose of escaping a broken and unfair scheme does nothing to fix the underlying problems. Historically the union has seen this escape come at great cost to the injured workers as they are often offered a settlement below the true value of entitlements and driven by desperation to accept.
31. That is not to say that it cannot be done in a proper and fair manner as was the case with redemptions at the NSW Dust Diseases Board. We understand that in some cases workers will benefit by being freed up from jumping through the insurers hoops.
32. Accordingly the union holds a view that there should be considered exploration about how beneficial legislation could manage commutations.

33. The union does not oppose point 5.4 **Simplifying insurers' notices to claimants** so long as in doing so key information is not being lost.
34. The union does not oppose point 5.5 **Provide simpler, clearer public information about dispute resolution options and processes**. This becomes difficult whilst the dispute processes themselves are complex or difficult.

35. Should any of these options for preventing disputes be implemented? Which one/s and why?
Can you suggest any other ways to prevent disputes?

36. The union supports a single claims identifier and improved data collection, simplifying insurer's notices and clearer public information as ways.
37. The union has highlighted within this paper that other logical ways to prevent disputes would be the counterproductive practice of pre-approval of medical expenses and treatment be scrapped, that any reasonable medical costs incurred by an injured worker be reimbursed in a timely manner & for insurers to accept a complying IME reports (being in accordance with the IME Guidelines) when a claim is made.

38. Which option do you prefer and why?
Are there other options for a one stop shop you would prefer? If yes, what are they and why?

39. The union does not support any of 4 the options presented in the paper. None of the options put forward put the injured worker at the centre. The opportunity to improve dispute resolution is generational and as such should not be limited by current limitations.
40. In looking at a system which puts injured workers at its centre it is important to look at the type of issues/disputes they face and the current arrangements.
41. Current issues facing injured workers and responsible authorities/jurisdictions includes

SIRA	• No injury register • No return to work program • Failure of employer to notify insurer • Use of other insurance scheme for workplace injury • Incorrect information provided by employer to insurer (i.e. wages) • Provisional payments not made • No injury management plan • Failure to decide liability within statutory timeframe • Unlawful IME(s) • Failure to advise worker how to remedy reasonable excuse • Failure of employer to pass on weekly benefits • Capacity decision merit review
SafeWork NSW	• No first aid • Withdrawal of suitable duties (delegated SIRA) • Failure of employer to provide suitable duties following request (delegated SIRA) • Dispute in relation to suitable duties (delegated SIRA)
NSWIRC	• Protection of injured workers from dismissal
NSW Ombudsman	• Failure by regulator to carry out functions or administrative mistake

WIRO	• Capacity decision procedural review • Conduct of insurers • Matters relating to the operation of Acts
NSW WCC	• Withdrawal of suitable duties • Provisional payments not made • No injury management plan • Failure of employer to provide suitable duties following request • Insurers failure to decide liability within statutory timeframe • Insurer disputing liability (benefits & treatment) • Dispute in relation to suitable duties
Law and Justice Committee	• Failure by regulator to carry out functions or administrative mistake • Performance of legislation

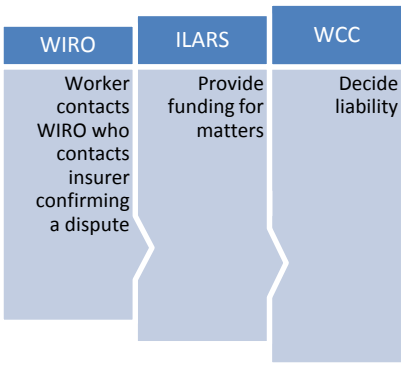
42. At every step and with every authority or jurisdiction the injured worker is required to make fresh contact, retell their story and try to convince them to help. This is particularly problematic with a regulator which refuses to proactively carry out their functions.
43. The union supports rather than a 'one stop shop' which is problematic given the specialist roles of the authority's or jurisdiction's involved, a single point of contact where a dispute would flow seamlessly from one organisation to another as it progresses or dependant on its complexity. The single point of contact should have the skills to triage a matter, direct it to the appropriate organisation and provide the necessary support for the injured worker so as to ensure natural justice is delivered.
44. The current 131050 SIRA assistance fails to serve injured workers and often fails to assist injured workers representatives. The unions experience has been the call centre is ill equipped to deal with many matters and in some cases having been insulting and dismissive in dealing with our member's issues. When injured workers make contact they don't want to be given the run around or another number to call they want 'help'.
45. It is on this basis that we consider WIRO a better alternative. Our members experience with WIRO has been more positive than SIRA and the unions experience with WIRO suggests they have a greater capacity and skills set to understand the issues. This capacity would better enable WIRO to understand matters and be able to direct the matter to the appropriate next stage or body.
46. To assist this process and reduce the escalation of disputes, where matters are brought forward in relation to insurers, recommendations made by WIRO per section 27A(2) of the WIMWCA 1998 should be <u>binding</u> making them directions and a review process and penalty regime introduced. Further to this, directions should enable WIRO to provide for restorative justice to the aggrieved worker, not only delivering a sense of justice but reducing the likelihood of a matter having to progress past this point.
47. If the matter relates to 'suitable duties' and initial attempts with the insurer are unsuccessful, WIRO would provide a brief to SafeWork NSW and automatically an Inspector for the purpose of Chapter 3 Part 3 of the WIMWCA 1998 would be assigned. Should the Inspector have to issue a notice per s59B and the employer fails to comply within the period specified then the Inspector would (send that on to SIRA to pursue penalties &) at the same time notify the injured worker and WIRO of the need for the matter to move to the WCC enabling the worker to get assistance from their union and/or lawyer. An alternative to the

Inspector having to notify SIRA of the contravention would be to empower the WCC to issue penalties as part of the IM dispute.

Injury Management Dispute (suitable duties)

48. Liability disputes would be a more direct path. The contact with WIRO will enable the worker to gain an understanding of the WCC and ILARS process so it can be started in a timely manner.

Liability Disputed



49. It is likely that the proposed model would remove the necessity of workers having to directly communicate with SIRA as their role should be focused on legislative compliance and not the resolution of disputes to which they are not empowered and are lacking in skills.

50. The union has also considered the number of jurisdictions which are currently part of the process. The union has arrived at a view to move jurisdiction for Part 8 of the WCA 1987 away from the NSWIRC into the NSWWCC. The WCC is in a superior position to be able to make judgements regarding the reinstatement of workers who have been sacked by their employer because they suffered a workplace injury. The nature of these disputes is almost indistinguishable from IM disputes.
51. Without significant investment in the NSW Ombudsman and the need to establish the specialist knowledge needed just to interpret the nature of complaints, the community cannot be expected to share faith in the Ombudsman's ability to provide the necessary oversight.
52. An alternative that the union is recommending would be to broaden out the function of WIRO under section 27(d) enabling it to keep the relevant statutory offices under scrutiny, scrutinising agency systems, overseeing investigations or reviewing the delivery of services. To assist in this WIRO should be able to initiate an enquiry at its discretion or as directed by the Minister and reports be provided to Parliament.

53. It would be imperative that WIRO continue to provide the Minister will annual reports and account for the conduct of their functions over a year and be answerable to the Law and Justice Committee in its bi-annual deliberations.

54. What digital solutions could help improve the dispute resolution system?
The union considers the recommendation at point 7.1 worthy of further consideration. Whilst injured workers personal private medical information will need to be safeguarded from those who don't need to know or don't have a legal right, it is evident that many workers would benefit from a digital portal. The union is aware that Victoria WorkCover is trialling a similar concept.

55. Do you think insurers should be required to conduct internal reviews of all disputed decisions as the first step in the formal dispute resolution process?
Point 7.2 fails on the basis that it is time wasting and based on the flawed definition of a dispute that was presented in the discussion paper. The union is of a view that in adopting the definition of dispute as established by the President of the WCC, the proposal for an internal review for all disputed matters makes sense.

56. How this would translate would be, at the point in time that the insurers Case Manager decides to dispute a claim (including adverse capacity decisions), the decision should automatically go to internal review and only following that review should the injured worker be notified. In doing this based of the papers own figures up to 40% of workers would not receive what can be very stressful information.

57. Do you think removing the requirement for full documentation before conciliation would be beneficial?
NSW has previously had a 'low doc' system and the current system requires documents to be lodged on application. Part of the issue with 'low doc' systems historically had been the unscrupulous use of IME's by insurers once a matter had commenced as part of a fishing exhibition to either find/create evidence to defeat the injured workers case or in an attempt to find justification for decisions which had already been made.

58. Based on this experience the union would withhold objections to a 'low doc' system for issue resolution on the basis that documents could not be table which were produced after the lodgement of dispute resolution and further restriction on insurers with regards to IME's.

59. Should any of these proposals for process improvements be implemented? Which one/s and why? Can you suggest any other process improvements?

60. Points set out in 7.4 ranges in their usefulness and practicality. Separating the conciliation and arbitration stages to encourage settlement at conciliation is likely to do little more than draw out the resolution process further eroding justice for the injured worker. The union is not aware of a high level of concern within the WCC regarding perceptions of procedural fairness and the level of appeals to Presidential Members would support this perception.

61. Allowing more mediation or conciliation at more points in the process is unlikely to deliver outcomes any more effectively or timely. The unions experience has been that both parties normally come to the first 'teleconference' conciliation with set positions. If by the second conciliation 'face to face' the parties have not been able to resolve the dispute, further conciliations are likely to just delay justice not only increasing the stress suffered by the injured worker but increasing costs.

62. Increasing the use of 'fast track' expedited assessments is a proposal that the union believes is worthy of further exploration. This measure supports one of the unions' primary goals of reducing stress on injured workers without limiting access to the WCC.
63. Removing section 65(3) of the 1987 Act could be an option considered though not in line with the papers suggested "...facilitate settlement negotiations between the parties... ". The union has concerns with the conduct of a few lawyers who appear more interested in their own "compensation" as oppose the injured workers. The union has been approached numerous times by unhappy injured workers who felt they were sold out by their lawyers, not involved in the decision making and were not educated on the consequences of these negotiations.
64. Despite rigorous tightening of the NSW workers compensation guidelines for the evaluation of permanent impairment aimed mainly to limit workers entitlements, insurers continue to dispute liability as normal course of business. The union believes this practice undermines the essence of beneficial legislation.
65. The scheme could eradicate these disputes if the insurer was compelled to accept liability where information complying with the requirements of the Guidelines for Claiming Workers Compensation[vii] is provided i.e. It must include a report from a permanent impairment assessor listed on the SIRA website, as trained in the assessment of the part or body system being assessed. The report must include:
    a. a statement that the condition has reached maximum medical improvement
    b. an assessment on the part or system of the body being assessed including the percentage of permanent impairment in line with the NSW workers compensation guidelines for the evaluation of permanent impairment in effect at the time of the examination
    c. if the claim relates to hearing loss, a copy of the audiogram used for the medical report.

66. Other matters which should need to be considered to deliver a holistic improvement in dispute resolution of workers compensation matters include;
    a. Where a dispute is caused as a result of an unlawful act or behaviour of an insurer, SIRA should manage these matters (post referral from the WIRO Officer) and be empowered to not only take the appropriate punitive action against the insurer but also issue directions providing for restorative justice for in injured worker. In allowing this it is like the delivery of justice and recuperation of any loss to the worker would negate the need for taking such matters further.
    b. The establishment of a tripartite body empowered to conduct enquiries, provide reports to the Minister including recommendations for legislative change, provide oversight in the development of any guidance particularly guidance called up under legislation.
    c. The expansion of the WCC jurisdiction to deal with disputes which arises from capacity decisions. Capacity decisions are matters of liability as they have a direct effect on injured workers weekly benefits. The current system of seeking an internal review from the insurer then through SIRA, then WIRO and finally subject to administrative law judicial review in the NSW Supreme Court in a cost jurisdiction for the injured worker in inherently unfair and weighted against the injured worker. Each application needs to be separately, at no stage does one flow onto another. This type of system is designed to injure workers and make them give up.

d. The requirement for a simplified PIAWE definition has been recommended countless times since the 2012 changes. This needs to occur as a priority to reduce disputation. The union would also support the recommendation found on page 19 of the SIRA commissioned report on PIAWE[viii] which states "…an online app and system that includes a PIAWE calculator and concierge service should be developed to ensure accurate and consistent application of the legislation".
e. There is a need to consider the employment protections offered in the WCA 1987 which in the unions experience fails to preserve the employment of workers with significant injuries. The termination of employment of injured workers as a result of the workplace injury must be set as an offence of the WCA 1987.

67. AMWU Recommendations

68. That an independent investigation be undertaken into the NSW scheme regulator
69. The reinstatement of Expedited Assessment Officers
70. That the counterproductive practice of pre-approval of medical expenses be stopped and, that any reasonable medical costs incurred by an injured worker be reimbursed in a timely manner
71. That IME's are in clinical practice
72. That insurers to accept a report done in compliance with the IME guidelines when a claim is made by a worker
73. Not oppose point 5.2 Establish a single claim identifier and improve data collection.
74. There should be considered exploration about how beneficial legislation could manage commutations
75. Not oppose point 5.4 **Simplifying insurers' notices to claimants** so long as in doing so key information is not being lost
76. Supports a single claims identifier and improved data collection, simplifying insurer's notices and clearer public information as ways
77. Abolish the counterproductive practice of pre-approval of medical expenses and treatment ensuring that any reasonable medical costs incurred by an injured worker be reimbursed in a timely manner
78. Rather than a 'one stop shop' which is problematic given the specialist roles of the authority's or jurisdiction's involved, a single point of contact where a dispute would flow seamlessly from one organisation to another as it progresses or dependant on its complexity
79. Where matters are brought forward in relation to insurers, recommendations made by WIRO per section 27A(2) of the WIMWCA 1998 should be <u>binding</u> making them directions and a review process and penalty regime introduced. Directions should enable WIRO to provide for restorative justice
80. Empower the WCC to issue penalties as part of a dispute where the matter is determined as having arisen from an unlawful act
81. SIRA should be focused on legislative compliance and not the resolution of disputes
82. Move jurisdiction for Part 8 of the WCA 1987 away from the NSWIRC into the NSWWCC
83. Broaden out the function of WIRO under section 27(d) enabling it to keep the relevant statutory offices under scrutiny, scrutinising agency systems, overseeing investigations or reviewing the delivery of services. To assist in this WIRO should be able to initiate an enquiry at its discretion or as directed by the Minister and reports be provided to Parliament
84. Whilst injured workers personal private medical information will need to be safeguarded from those who don't need to know or don't have a legal right, it is evident that many workers would benefit from a digital portal

85. Decision should automatically go to internal review and only following that review should the injured worker be notified
86. 'fast track' expedited assessments is a proposal that the union believes is worthy of further exploration
87. SIRA empowered to not only take the appropriate punitive action against the insurer but also issue directions providing for restorative justice for in injured worker
88. Establishment of a tripartite body
89. Expansion of the WCC jurisdiction to deal with disputes which arises from capacity decisions
90. Simplified PIAWE definition
91. PIAWE calculator and concierge service
92. The termination of employment of injured workers as a result of the workplace injury must be set as an offence of the WCA 1987

END

[1]
25. Startrack argue that there is no dispute between the parties due to the fact that the Worker has been notified that in the opinion of its doctor the effects of the work injury have ceased and the Worker has failed to take action to apply to the Commission for the resolution of a dispute in relation to liability. Startrack argues that the Commission has no jurisdiction because its denial of the claim has not been "disputed" by the Worker by the filing an Application for Resolution of a Dispute. This ignores the fact that an application, (at least in so far as it relates to a claim for benefits under sections 66 and 67 of the 1987 Act), could not be filed at the time of the referral for the reasons stated in paragraph [16] above.
26. Clearly there is dispute in this matter. Startrack has denied the claim and has served a notice dated 19 October 2007 under the provisions of section 74 of the 1998 Act. Section 74 uses the same wording as section 41A: it provides, "If an insurer disputes liability….". That is in fact what has happened in this matter. The fact that the Worker has not yet filed an application seeking weekly compensation is of no consequence. It is not the filing of the application that triggers the dispute. The Worker has (through his solicitors) indicated his intention to file an application seeking weekly compensation and lump sum benefits in accordance with the assessment by Dr Bodel as and when he is able to do so in accordance with the relevant statutory provisions (see paragraph [16] above).
27. The Worker has sustained a workplace injury and was on light duties until they were withdrawn shortly after the section 74 notice was issued disputing liability. The dispute is whether the effect of the work injury has ceased. That dispute is alive notwithstanding that it has not yet come before this Commission.
28. I am reinforced in these views by section 58 of the 1998 Act, which states that nothing done by an employer under, or for the purpose of, an injury management programme or injury management plan, constitutes an admission of liability by the employer. Clearly, this section contemplates that the employer will be required to do certain things under Chapter 3 of the 1998 Act at a time when liability is disputed.
[1]

Ombudsman
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23 June 2017

Our reference:
Contact: Patrick Dodd
Telephone: 02 92861000

Dear

Your complaint about the State Insurance Regulatory Authority

Thank you for your emails received on 5 June 2017 and 10 June 2017 about the State Insurance Regulatory Authority (SIRA).

In your correspondence to our office you complain about a decision made by SIRA to remove an Employer Improvement Notice (EIN) from your workplace, . You add that the EIN was placed on by SafeWork NSW on the grounds that the company was not fulfilling its workplace health and safety responsibilities in relation to your return to work. You also indicate that you have commenced proceedings with the Workers Compensation Commission (WCC) with a view to resolving your concerns.

What the Ombudsman does

One of our roles is to ensure NSW government agencies and local councils act reasonably in performing their functions. We can deal with complaints from the public that show an agency or local council may have been unreasonable.

We do not make inquiries on every complaint we receive. The Ombudsman has policies that guide us in deciding which matters will be pursued. We generally:

- Do not act on complaints where the complainant can take, or could have taken, other action to resolve their concerns;
- Do not act on complaints where it appears the government agency has acted within its powers and there is no clear evidence of wrong conduct, and
- Focus on complaints we consider raise serious issues which, if acted on by us, are likely to result in marked improvements in government processes and systems.

Where a public authority acts within its lawful powers and there is no firm evidence of wrong conduct, the Ombudsman will not tell the authority it should have used its power differently.

Outcome of your complaint

In the course of our telephone conversation of 13 June 2017, I explained to you that our office would not be taking action on your complaint because you are pursuing your concerns via the WCC and we consider that to be an appropriate avenue to resolve such issues.

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[1] https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/workers-compensation-policies/Guidelines-for-claiming-workers-compensation-8084.pdf
[1] https://www.sira.nsw.gov.au/__data/assets/pdf_file/0009/323766/Report-on-NSW-workers-compensation-arrangements-PIAWE-March-2017.pdf

End AMWU submission Department of Finance, February 2018

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[i] Recommendation 16 of the NSW Legislative Law Council, First review of the workers compensation scheme

That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales – First review of the workers compensation scheme, Report 60 – March 2017 – Standing Committee on Law and Justice

Hyperlink -First review of the workers compensation scheme, NSW Legislative Council, Standing Committee on Law and Justice

5.89 While the matter was addressed by only a minority of stakeholders, some participants did express the view that a more unified approach to personal injury dispute resolution, especially in regards statutory schemes, would be beneficial. Clearly there are significant differences in the liability issues and benefits payable in schemes such as the compulsory third party system for motorists and the workers compensation scheme. These distinctions are both fair and appropriate. However there are many common issues faced by claimants and insurers alike when determining matters such as the extent of an injury or the effect of an injury on a person's capacity to work in these schemes.

5.90 While not a single stakeholder proposed extending the unwieldy dispute resolution system for workers compensation to Compulsory Third Party disputes, there is some merit in producing a specialised and well regarded personal injury jurisdiction in New South Wales. We therefore recommend that the NSW Government consider the benefits of developing such a jurisdiction.

Recommendation 16

That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales."

Page 86 Report 60 – March 2017 - **Extract ends**

[ii] Objectives of NSW workers compensation Acts – 1998 & 1987

1998 Workplace Injury Management and Workers Compensation Act 1998

"3 System objectives

The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives:

(a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,

(b) to provide:

- *prompt treatment of injuries, and*
- *effective and proactive management of injuries, and*
- *necessary medical and vocational rehabilitation following injuries,*

in order to assist injured workers and to promote their return to work as soon as possible,

(c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,

(d) to be fair, affordable, and financially viable,

(e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,

(f) to deliver the above objectives efficiently and effectively."

And

"Section 41 Object and application of Chapter

(1) The object of this Chapter is to establish a system that seeks to achieve optimum results in terms of the timely, safe and durable return to work for workers following workplace injuries.

(2) The various provisions of this Chapter apply only in respect of injuries that happen after the commencement of the provision concerned."

Note – NSW Workers Compensation Act 1987 – the objectives of the legislation reside within the 1998 Act and they are to be read as one.

[iii] https://www.finance.nsw.gov.au/about-us/media-releases/new-dispute-resolution-process-workers-compensation

[v]