

## **INQUIRY INTO 2020 REVIEW OF THE WORKERS COMPENSATION SCHEME**

**Organisation:** Australian Manufacturing Workers' Union

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# **Submission of the Australian Manufacturing Workers' Union to the NSW Standing Committee on Law and Justice 2020 Review of the Workers Compensation Scheme**

## **About the Australian Manufacturing Workers' Union**

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

## Introduction

1. The Australian Manufacturing Workers' Union NSW Branch (AMWU) welcomes the opportunity to make a submission to the Standing Committee on Law and Justice 2020 Review of the NSW Workers Compensation Scheme.
2. Our union represents thousands of workers across NSW. Many of our members perform physically demanding work, and the manufacturing industry remains overrepresented for interactions with the workers compensation scheme. The AMWU has played a proud role in advocating for injured workers and will continue to do so.
3. The AMWU has previously made submissions in relation to the NSW Workers Compensation scheme, including in 2012, 2014, 2016 and 2018. The AMWU repeats and relies on many of the concerns raised and recommendations made in these previous submissions. Unfortunately, many of the issues identified remain outstanding.
4. The NSW Workers Compensation scheme falls short of its objectives in a number of important respects.
5. Section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ('the 1998 Act') describes amongst other objectives a system '*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*'.
6. Unfortunately for AMWU members the scheme falls short of this worthy ambition. Workers face a complex and insufficient scheme involving arbitrary reductions in income maintenance and compensation for medical expenses and gaps in coverage.
7. These submissions focus on a few of these key shortfalls in the scheme. Concerns regarding the administration of the scheme are not rehearsed in detail here; rather the focus is on problematic design features.
8. Successive reforms to the scheme, especially those in 2012, have prioritised cost savings over compensating injured workers. This has led to a flawed and costly scheme that fails to achieve its professed objectives. Urgent reform is required.
9. The AMWU is prepared to supplement these submissions in writing or orally if that would assist the Committee.

## **Cessation and reduction of entitlements**

10. The AMWU reiterates its objection to the premature cessation of entitlements. Several measures across the scheme reduce workers' entitlements to compensation without justification.
11. Work Capacity Decisions are made without reference to actual work opportunities. Section 32A(b) makes clear that suitable employment is defined without regard to whether the work is unavailable, whether the work is generally available, the nature of the worker's pre-injury employment and the worker's place of residence.
12. A worker who is fit for work that is unavailable is left without any form of income maintenance, and any real capacity to obtain alternative remuneration. It is absurd to cease a worker's weekly payments because they are assessed as fit to perform a hypothetical job that is in fact unavailable in the labour market or totally impractical for the worker. This makes a mockery of the object of a workers compensation scheme.
13. Generally, workers can only receive 2.5 or 5 years of income maintenance. Only those with 20% Whole Person Impairment or higher can continue to receive payments after 5 years. Medical expenses similarly cease for most workers within 2 or 5 years of the last receipt of weekly payments.
14. The AMWU has many members who due to the complexity and/or severity of their injury require ongoing medical assistance beyond 2 or 5 years from the cessation of their weekly benefits who fall below the 20% WPI threshold. These workers suffer from significant injuries that preclude employment. Chronic lower back injuries, for example, are frequently suffered by our members, often resulting in a whole person impairment of approximately 10%. These injuries can be career ending, but only entitle a worker to limited assistance under the scheme.
15. The AMWU recommends that the artificial medical caps be removed to assist workers to recover from injuries and return to work. A premature refusal to cover medical expenses where there is genuine need is not only cruel, it is uneconomical. Such workers are unlikely to return to work. These workers are precluded from participation in the economy, and their significant needs must be met by other state expenditure.
16. The suspension of weekly payments and medical expenses bears no relationship to the worker's needs. Similarly, the step down provisions reducing workers' income after arbitrary periods do not reflect a genuine scheme aimed at compensating injured workers. There is no evidence that these punitive measures have assisted workers in recovery from injuries or returning to work.

17. To the extent that these cost saving measures have assisted the sustainability of the scheme, such logic could be used to justify any reduction in workers' entitlements. The primary and overriding goal of the scheme must be to compensate workers. Cost cutting must never displace or obscure the reason for the scheme.

#### **Exclusions and inconsistent standards**

18. The scheme is characterised by anomalous exclusions and increased evidentiary burdens on workers, transparently aimed at short term cost cutting rather than assisting workers. The scheme nominally exists to compensate injured workers but contains provisions that have been introduced to make compensation difficult or impossible to access.
19. For example, the 2012 changes drastically reduced coverage of journey claims. The imposition of a requirement for a "real and substantial connection" between employment and the accident creates uncertainty and discourages workers from making meritorious claims.
20. For AMWU members, many journey claims where the worker is at fault and not covered by CTP insurance arise as a result of impairment caused by the effects of fatigue, exposure to chemicals, heat, stress or noise. Nonetheless they face an additional burden in establishing the causal link due to the introduction of section 10(3A).
21. The increased prevalence of journey accident insurance is a testament to the scheme's failure to offer compensation to injured workers. When private insurance policies displace the workers compensation scheme, the scheme has failed. Section 10(3A) should be repealed.
22. Similarly, section 9B of the 1987 Act provides that a worker is not entitled to compensation for a heart attack or stroke "unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature".
23. This provision is not based on any evidence of improper or illegitimate claims for heart attack or stroke, or any other concern other than the cost of compensating workers. Heart attacks and strokes are obviously extremely serious, life threatening injuries. Raising the standard of causation in these cases can have the effect of forcing families into litigation following the death of a loved one in the workplace. This cruel practice is not justified by purported cost savings.
24. The introduction of s 151AD similarly hurt bereaved families, by denying compensation for nervous shock in connection with the death or injury of a worker. As set out above,

the 1998 Act speaks of the provision of support to injured workers 'and their dependants'. The exclusion of nervous shock claims fails to uphold this objective.

25. Provisions excluding liability in otherwise meritorious claims are inconsistent with the purpose of the scheme, and should be withdrawn in their entirety.

### **Deemed diseases**

26. The AMWU reiterates its previous submission that Schedule 1 - Diseases taken to be work-related be replaced with the Deemed Diseases Schedule set out in the Safe Work Australia report *Deemed Diseases in Australia* of August 2015.<sup>1</sup>
27. The reason for the exclusion of these deemed diseases remains unclear. Other jurisdictions have recognised the administrative benefits of an appropriate approach to deemed diseases, along with the obvious benefits to users of the scheme.
28. The AMWU notes that the NSW government supported this report's adoption at the SWA Technical Advisory Group, SWA Workers Compensation Significant Issues Group and finally at a Safe Work Australia meeting in 2015.
29. The current Schedule 1 creates an injustice. The schedule is 40 years out of date and creates unnecessary barriers to legitimate claims. This adds cost to the scheme as a result of delays and disputation. This is contrary to the objectives of the legislation.
30. *Deemed Diseases in Australia* is a peer reviewed scientific report prepared by Dr Tim Driscoll (MBBS BSc (Med) MOHS PhD FAFOEMFAFPHM). Dr Driscoll is an independent consultant in epidemiology, occupational health and public health, and a specialist in occupational medicine and public health medicine and a Fellow of the Australasian Faculties of Occupational and Environmental Medicine and Public Health Medicine and peer reviewed by Professor Malcolm Sim from Monash University.
31. Adoption of the Deemed Diseases would ensure that workers would be compensated where the following factors are present:
  - a. A strong causal link between the disease and the occupation exposure, and
  - b. Clear diagnostic criteria, and
  - c. The disease comprises a considerable proportion of the cases of that disease in the overall population or in an identifiable subset of the population.
32. The AMWU recommend that Schedule 1 be updated to include the recommended content in Safe Work Australia's 2015 report without exclusion.

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<sup>1</sup> Dr Tim Driscoll, *Deemed Disease in Australia*, Safe Work Australia, August 2015, see table 6.1, p. 38.

## Ministerial Advisory Council

33. The AMWU reiterates its previous submissions on the restoration of the Ministerial Advisory Council as follows.
34. The state's compliance with the Work Health and Safety Act and the related Intergovernmental Agreement was swept away as a result of the 2012 amendments abolishing the only tripartite mechanism for health and safety and workers compensation, namely the Workers Compensation and Work Health and Safety Council.
35. The lack of tripartite oversight and any consultative body, in part, has led to an unresponsive and unaccountable regulator to those whom it was established to serve and no dedicated programs to improve the scheme and the systems which underpin it.
36. In line with the state's obligations under the intergovernmental agreement relating to the Work Health and Safety laws, it is recommended that the NSW Government establish the Workers Compensation and Work Health and Safety Council (Ministerial Advisory Council) broadly in line with the original provision of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) or schedule 2 of the *Work Health and Safety Act 2012* (SA).
37. This recommendation aligns with recommendation 14 of the 2014 Review of the exercise of the functions of the WorkCover Authority/Standing Committee on Law and Justice.

## Oversight

38. The scheme is beset by a lack of oversight. In Victoria, by contrast, the Ombudsman conducted major reviews of the scheme, finding appalling failures.
39. The AMWU has no doubt that if similar scrutiny were applied to the NSW scheme, the problems uncovered would be just as alarming.
40. The problems involved in engaging agents to administer claims are present here, as are the features of the scheme that pressure workers off weekly payments and medical expenses before time. Although these issues are equally prevalent in NSW, no analogous investigation has taken place.
41. A NSW Workers Compensation Ombudsman with real investigatory powers should be established to ensure that there is sufficient oversight of a scheme beset with risk and abuse.

## **Conclusion**

42. The interests of injured workers must be at the centre of any workers compensation scheme. The patchwork NSW scheme, scarred by successive cuts, fails to deliver for injured workers. A scheme that arbitrarily reduces income and medical expenses and excludes legitimate claims without rhyme or reason is not fit for purpose.
43. AMWU members contend with structural features of a scheme that is all too often punitive rather than supportive. Without adequate oversight and consultation these structural problems will continue.
44. A series of reforms have led to a scheme that in both design and implementation falls substantially short of its objectives. The scheme unfairly limits, constrains and refuses compensation to workers and their families.
45. If NSW is serious about establishing and maintaining a scheme to compensate injured workers, major reform is necessary and overdue.

18 June 2020

AMWU NSW Branch