

**INQUIRY INTO WORKERS COMPENSATION  
AMENDMENT BILL 2021**

**Organisation:** The Australian Workers' Union

**Date Received:** 13 December 2021

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**Legislative Council of New South Wales**  
Portfolio Committee No. 1 – Premier and Finance

*Inquiry into the Workers Compensation Amendment Bill 2021*

Submission of  
**THE AUSTRALIAN WORKERS' UNION**

13 DECEMBER 2021

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## Introduction

1. The Australian Workers' Union (**AWU**) welcomes the opportunity to make a submission to the Committee's inquiry into the *Workers Compensation Amendment Bill 2021* (**Bill**).
2. The AWU has a substantial interest in this legislation, as a registered trade union representing over 20,000 members in New South Wales. In particular, we are the principal union in the civil construction and funeral industries, both of which are covered by the presumptions which this Bill seeks to remove.
3. The AWU considers the passage of this legislation would have unfair and deleterious effects on frontline workers, for the reasons given below, and accordingly urges the Committee to recommend that the Legislative Council not pass the Bill.

## The COVID-19 Presumption Scheme

4. The current arrangements in s 19B of the *Workers Compensation Act* (the Act) provide that employees in certain industries who contract COVID-19 will be presumed to have acquired the disease in the course of their employment. The list of industries is set out in paragraph (9) of the section, and is supplemented by the further industries prescribed in clause 5D of the *Workers Compensation Regulation 2016*. Section 19B was inserted into the Act by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*, which was passed through Parliament in May 2020.
5. The effect of the Bill would be to repeal the COVID-19 presumption scheme, with the result that the burden of proving that their exposure to COVID-19 was in the course of employment would fall on employees working in those high-risk industries. By contrast, at present the burden falls on the insurer to rebut the presumption of workplace exposure.

## Actuarial Modelling is Out of Date

6. The Government has argued that the Bill is necessary because, if it is not passed, the following additional costs will flow-on to New South Wales employers:
  - a. \$638 million in additional claims costs to the scheme over the next year
  - b. An estimated volume of 25,000 COVID-19-related claims
  - c. An average premium impact for small business employers of more than \$950 (from \$3,579 to \$4,535)
7. The problem with these figures is that they are an actuarial estimate based on the Doherty Institute modelling of the trajectory of COVID-19 incidence in New South Wales

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*“based on reopening the economy at the 70 per cent vaccination rate”*. But that approach does not seem appropriate when the modelling has now been overtaken by events. No information has been put forward by SIRA or the Government as to actual increased costs to date, since the reopening of the economy, due to the COVID-19 presumption scheme. One assumes such information would be provided if it supported the aims of the Bill.

8. Further, the Doherty Institute modelling was based on a number of assumptions which no longer reflect the reality in NSW, including the facts that (a) vaccination levels have reached nearly 95% first-dose and (b) the predicted number of daily infections, and the predicted effect on the hospital system, have not eventuated.
9. These reasons all suggest that the actuarial estimate given by the Government far exceeds the actual cost increase (if any) caused by COVID-19-related claims. It should also be noted that any additional cost relating to COVID-19-related claims may be offset by changes in the composition of other kinds of claims. It seems quite likely that mandatory working-from-home arrangements for a substantial portion of the year will have impacted the quality and quantity of physical injury claims made, for instance. Yet no data or projections have been provided regarding the effects of the lock-down on scheme performance more broadly.
10. Further, in addition to the higher levels of vaccination than expected, we can also assume that COVID-19 treatments will continue to advance given the prioritisation given to research in this area as the global pandemic continues.

#### Nearly All Claims Will Be Rejected if the Bill is Passed

11. While the Government has pressed that the Bill is needed to protect the interests of employers, it has not mentioned the likely effect upon employees working in these high-risk industries if the Bill becomes law.
12. The Minister in his Second Reading Speech said in defence of the Bill that “I will say it now and I will say it again, removing the presumption does not remove a worker's right to make a workers compensation claim when there is a link between them contracting the illness and their work.” That is true in theory. But the practical outcome is clear.
13. If a worker makes a claim for compensation after acquiring COVID-19 at work, and the Bill is passed, the insurer will reject the claim on the basis that COVID-19 is now endemic in the community, unless the worker can show (a) that a workplace exposure event occurred and (b) the worker was not otherwise exposed to COVID-19 at another location.

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14. How likely is a worker to be able to show both (a) and (b)? First, it will be very difficult for the worker to 'prove a negative' and demonstrate that he or she was not exposed to COVID-19 elsewhere in the community. Second, it is likely to be harder and harder to confirm workplace exposure events, as case numbers rise and contact-tracing efforts will need to be rationed to focus on the most pressing needs (as occurred during the height of the lockdown). Even if a worker can show that a colleague also acquired COVID-19 at around the same time, the insurer may refuse liability if the claims officer is not convinced of the link.
  15. The claims assessment process is not well-suited to the acquisition of a disease such as COVID-19, as it places the onus on the claimant, a blue-collar worker who is very likely to lack the time or resources to prove that the most likely source of transmission was the workplace. In contrast, a presumption that a worker in a high-risk industry was exposed at work is an effective and appropriate amendment to the law, which continues to allow rejection of claims where the contrary is shown.

#### Construction and Funeral Industry Workers Deserve Fairness

16. Workers in the construction and funeral industry continued to do their jobs as essential workers throughout the lockdown, placing themselves at far higher risk of acquiring the disease before they had a chance to be vaccinated. Many of us instead had the luxury of working from home during this period. Now the Government says that those critical workers should be denied the tailored and limited protection afforded to them as a result of the higher risk they assumed on behalf of the community. It is unjust and unwarranted.
17. Essential workers remain at higher risk of exposure to COVID-19 in the workplace than most white-collar workers and should not be required to prove their case to busy claims managers. The burden should fall on the insurer to review the circumstances of the case should it consider there is a reason to doubt the presumption holds. No evidence of actual scheme impact has been provided to support the change, just outdated estimates based on modelling which has been superseded by events.
18. For all the reasons given above, the Committee should recommend that the Bill not be passed.