

## INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

**Organisation:** Australian Manufacturing Workers' Union

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Australian Manufacturing Workers' Union (AMWU)

# NSW Legislative Council

Standing Committee Law and Justice  
2022 Parliamentary Review of The Workers

Compensation Scheme —

“To Focus On The Increase in Psychological Claims”



**July 2022**

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# About the AMWU

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'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.

During its 170 years the AMWU has played a proud role in advocating for injured workers and will continue to do so.

## Submission

The Australian Manufacturing Workers' Union NSW & ACT Branch (AMWU) welcomes the opportunity to make a submission to the Standing Committee on Law and Justice regarding 2022 Parliamentary Review of the Workers Compensation Scheme with a "Focus on the Increase in Psychological Claims".

Our union represents thousands of workers across NSW. Our members perform work of a hazardous nature that exposes their physical health and psychological health to hazards and risks which impact their safety whilst working (and commuting and travelling) The manufacturing industry remains overrepresented for interactions with the workers compensation scheme.

With regards psychological health and safety matters including injury – illness and disease - those that come to the AMWU's attention are amongst the most complex and difficult to resolve with employment, capacity and income lose significant in nearly all circumstances.

It is beyond the scope of this submission to outline the AMWU's views in general on the NSW Workers Compensation scheme and overall regulatory framework. The AMWU has previously entered submissions in May 2012, May 2014, June 2016, September 2016, June 2020 and October 2021 in addition to SIRA, and iCare requests for submissions, and responses.

We refer SIRA to the AMWU's submission to the NSW Standing Committee on Law and Justice for the 2020 Review of the Workers Compensation Scheme for a summary of these views and the previously described submissions commencing in May 2012. Aspects of those submissions remain relevant, and we reiterate the views expressed therein.

To outline the harms arising from psychological health and safety hazards and risks the AMWU described the problem for workers in its submission to the Safework Australia's Consultation Regulation Impact Statement 2018 pages 7 to 17.<sup>1</sup>

“To Focus On The Increase in **Psychological Claims**”: It is necessary to consider both prevention and reaction; the workers compensation domain and the work health and safety domain. The work health and safety (WH&S) domain can prevent and or mitigate injury whether illness or disease. The workers compensation domain is focused upon injury management and return to work along with the other aspects of workers compensation; clearly though in producing the objectives of the NSW Legislation the parliament envisage a workers compensation system, a scheme that contributed to prevention; see objectives (a), (b) and (c) below.

*(a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury, [AMWU Note - prevention is the key to psychological health and safety, as it is for physical health and safety, without doubt they intertwine and are dependent on each other.]*

*(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;*

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<sup>1</sup> [Recommendations of the 2018 Review of the Model Work Health and Safety Laws, submission by the AMWU in response to SafeWork Australia's Consultation Regulation Impact Statement August9, 2019 - pages 7 to 17 - Aug\\_9\\_2019.pdf \(d3n8a8pro7vhmx.cloudfront.net\)](#)

*(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.<sup>2</sup>*

*And*

*(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.*

The workers compensation domain can contribute clearly to prevention, in doing so though it must be aligned with the work being done in the work health and safety domain. If there is a desire, an ambition to implement best practice that goes above then that would be a worthwhile ambition however it cannot do work that is contradictory or leads to confusion about what is required to ensure healthy and safe work; “3 Object (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by: (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant, and ... (2) In furthering subsection (1) (a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.”

## **Workers Compensation**

Regarding the scheme, the concern remains that compliance by, and execution of legislative obligations remains poor. The commencement of a claim requires execution of the initial notification and provisional liability process consistently and diligently. Compliance is poor. If it is poor for physical claims then it is all the poorer for injuries inclusive of a psychological element, whether primary or secondary.

The provisional liability claims model has been in place since the 1<sup>st</sup> of January 2002. It is vulnerable to frustration if organisations are a mind to delay etc. however implemented and executed as described by the legislation, it is a sound model that leads to ‘timely, safe and durable return to work’ [Chapter Three WIMWC Act NSW 1998, see foot note 3] as that is supported by timely injury management including treatment and return to work.

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<sup>2</sup> [WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998 - SECT 3 System objectives \(austlii.edu.au\)](http://www.austlii.edu.au/au/other/dfat/special/wimwc/sect3.html)

The reasonable excuses remain valid for all injury types unless an organisation is of a mind to introduce complexity and exceptions where there is none required as it seems to now occur with psychological injury. This we would assert is what has and is occurring with psychological injury. Of particular concern is the use of a reasonable excuse where there is a clearly described injury and diagnosis reported on the injured workers certificate/s of capacity despite that been contrary to the long-standing reasonable excuses.

Reasonable excuse “Excuse - The Injury is not work related. Reason – The insurer has information that:”<sup>3</sup> this reasonable excuse is not been used correctly. It is not for the insurer to make a Section 11a decision at the time of deciding provisional liability. The decision required at the time of commencing Provisional Liability or reasonable excusing commencement of Provisional Liability is to decide whether the injury is related to work, its work relatedness. See Guidelines [Foot note 5], and *Ly v Healthshare NSW [2021] NSWPIC 400*<sup>4</sup>. The misinterpretation, the misreading, the misuse of this reasonable excuse as it is constructed is particularly distressing for a vulnerable cohort of injured workers. This reasonable excuse must be properly applied.

Claims of being unable to contact the worker whilst not leaving a voicemail, voice to txt SMS and or SMS is frustrating and alarming – ‘...there was no message left...no missed call...no SMS...’ are also a continuing source of harms to injured workers, and timely claims commencement.

The provisional liability concept is an important feature of NSW workers compensation legislation that allows an injured workers to seek treatment and to be paid earnings similar to their preinjury income whilst the claim is investigated, and liability determined. It requires consistent execution that is diligent, professional, and thoughtful.

Compliance by insurers and other stakeholders with their obligations remains a continued source of harm and frustration for injured workers. Having put the effort into consulting with tripartite members, social partners, and with industry to produce guidance materials such as Standards of Practice and Guidance Notes in addition to the Act and Regulation it is beyond frustrating, it is harmful to injured workers that they are not followed, expediency seems to be the focus. Knowledge may be power however it is unacceptable use it to manipulate the injured and the ill. The regulator, and the nominal insurer must do more. Compliance with the legislation including the supporting ‘standards’ must be the minimum required of decision makers.

It must be ensured that all insurers, and the insured meet the requirements of the legislation at a minimum. It is disturbing for instance that the changes to legislation regarding for instance workers compensation information for workers, and access,

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<sup>3</sup> Table 2.1 Reasonable excuses for not starting provisional weekly payments. [Workers compensation guidelines | SIRA: Workers compensation claims management guide \(nsw.gov.au\)](#)

<sup>4</sup> <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPIC/2021/400.html>

information, and training of workers in using injury registers has been gamed to frustrate and control access. The legislation is clear on these matters yet in workplaces the information and access to the information is being controlled. This is the same issue regarding workplace return to work programs.<sup>5 6 7 8 9</sup>

The decision to unilaterally move Return To Work Coordinator Training online, remembering the important relationship with workplace return to work programs along with workers compensation insurer information and injury register information requires review by the tripartite/social partners which did not occur when these three amendments were made.

The AMWU strongly supports tripartite mechanisms in the workers compensation field. It has provided demonstrably better outcomes for workers. Workers' representatives and unions should have an institutionalised role in the design, monitoring, and enforcement of workers compensation

## Work Health and Safety

We hold that WHS legislation must be honoured as it is in the WHS domain that psychological injury by hazard assessment and elimination, and by hazard and risk control can the harms of psychological injury be prevented.

NSW WHS legislation in the form of the 2011 Act<sup>10</sup>, and within the Managing psychosocial hazards at work, May 2021, Code of Practice<sup>11</sup> establish the foundations for a comprehensive program to eliminate and failing that mitigate psychological health and safety harms. Further the model WHS Regulation<sup>12</sup> - Clause 55A to 55D - now describes the things that must be done to ensure psychological healthy and safe work. This provides a comprehensive structure for addressing this element of workplace injury. It will also lead to improved physical health and safety as work design improves the entirety of work holistically.

With findings from the Mentally Healthy Workplace Project 2018<sup>13</sup> [mid-point evaluation] – 2022 led by Safe Work NSW yet to be realised NSW is in a position to deal with this subject in a comprehensive manner if it chooses to do so. We look forward to the

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<sup>5</sup> WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998 - SECT 231 Notification of summary of Act and insurance details (austlii.edu.au)

<sup>6</sup> WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998 - SECT 232 Worker's right to information (austlii.edu.au)

<sup>7</sup> WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998 - SECT 256 Register of injuries (austlii.edu.au)

<sup>8</sup> Clause 39, Workers Compensation Regulation 2016 - NSW Legislation

<sup>9</sup> Clause 40, Workers Compensation Regulation 2016 - NSW Legislation

<sup>10</sup> Work Health and Safety Act 2011 (nsw.gov.au)

<sup>11</sup> Code of practice – Managing psychosocial hazards at work (nsw.gov.au)

<sup>12</sup> Model-WHS-Regulations-28November2016 (safeworkaustralia.gov.au)

<sup>13</sup> Evaluation of the NSW Mentally Health Workplaces Strategy 2018-2022

evaluation of the Project. There is the opportunity to develop the strategy and tactics necessary to prevent psychological injury and improve NSW Workplaces.

The State Insurance and Care Act 2015 (NSW)<sup>14</sup> should be amended to include, separately however similarly the same routine scrutiny of Safe Work NSW that SIRA undergoes (i.e. Miscellaneous s27 supervision) it is essential that Safework is subject to the same scrutiny as SIRA.

The AMWU strongly supports tripartite mechanisms in the work health and safety domain. It has provided demonstrably better outcomes for workers. Workers' representatives and unions should have an institutionalised role in the design, monitoring and enforcement of work health and safety.

## **Conclusion**

The AMWU and the broader trade union movement hold that after sustaining a physical or psychological work-related injury, all workers are entitled to comprehensive and quality rehabilitation services and to return to suitable and decent employment. Injured workers are entitled to compensation that restores them to the position they enjoyed prior to their injury, including full access to superannuation and leave entitlements.

The AMWU available to participate in the improvement of work for workers and the community whether in the workers compensation and or work health & safety domains

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<sup>14</sup> State Insurance and Care Governance Act 2015 No 19 - NSW Legislation