Submission No 33

INQUIRY INTO PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL INJURY IN NEW SOUTH WALES

Organisation: CFMEU Construction and General Division NSW Branch

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CFMEU
CONSTRUCTION

INQUIRY INTO THE PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL CLAIMS

CFMEU SUBMISSIONS

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TABLE OF CONTENTS

1 Introduction

The Construction, Forestry and Maritime Employees Union (**CFMEU**) welcomes the opportunity to make submissions to this inquiry.

The CFMEU represents approximately 25,000 members in the building and construction industries in NSW. The CFMEU has a long history of promoting safe workplaces, free from psychosocial hazards. The safety and wellbeing of our membership is our primary concern, and we are committed to ensuring, where possible, our members are working in safe environments.

Our members are regularly exposed to psychosocial hazards and are reliant on the CFMEU and their health and safety representatives (**HSRs**) to help minimise and address these hazards and support them in accessing workers compensation when needed.

The CFMEU has long advocated for a fair, effective and humane workers compensation system in NSW that supports injured workers, facilitates early recovery, and ensures that no one is left behind after being harmed at work. The proposed changes outlined in the Exposure Draft of the *Workers Compensation Legislation Amendment Bill 2025* (**the Bill**), which would require workers to first obtain a ruling from the NSW Industrial Relations Commission (**IRC**) before pursuing compensation for psychological injury related to bullying or harassment, represent a fundamental and dangerous shift away from these principles.

It is well established that psychological injuries require early intervention and swift access to treatment. Delays in recognition, diagnosis, or support compound harm and substantially reduce the likelihood of recovery and return to work. The proposed reforms insert significant procedural hurdles at a time when workers are most vulnerable. Requiring a public hearing, legal submissions, and adversarial cross-examination before care is provided will delay treatment and exacerbate suffering. Many will be deterred from seeking help altogether, with devastating consequences.

The Government's rationale that these changes are necessary to improve the scheme's financial sustainability overlooks the serious human impact and misrepresents the current system. Workers are not compensated for experiencing bullying or harassment; they are compensated for psychological injuries arising from work. Imposing a judicial process shifts the burden to injured workers and ignores the clear medical consensus on the urgency of early psychological care.

Through this submission, the CFMEU seeks to urge the Committee to reject the proposed reforms in their current form and to recommend a model that protects injured workers, prioritises early treatment, and fosters genuine recovery.

2 Background

2.1 Government's case for change

The Government claims that the NSW workplace health and safety, and workers' compensation laws are failing to prevent psychological injuries and failing to treat those with psychological injuries quickly.[1] They claim that psychological claims are growing exponentially and making the scheme unsustainable. Both the Treasurer and the Premier tried to justify their position with some data about the number of claims being made. What they have not done is explain:

- The difference in claim numbers between the TMF and the Nominal Insurer
- The mechanism of injury that underpins these claims
- What modelling has been done to justify these changes

They have been dragged into consultation against their will, hamstrung the Law and Justice Committee by imposing a ridiculously short time frame, and failed to release any modelling to support the changes.

We have heard about increases to premiums without any recognition of the premium reductions, approximately 14%, businesses received following the 2012 changes. We have heard that bullying and harassment claims are going to bankrupt the scheme, but

[1] Explanatory Note, Workers Compensation Legislative Amendment Bill 2025.

we haven't been given the data to explain how many psychological claims are as a result of bullying and/or harassing conduct.

The bulk of the discussion in the media has been about psychological claims, but there are significant changes in the Exposure Draft to entitlements for all injuries, including the adoption of a higher burden for medical expenses. This has not been supported by the limited data we have received.

The CFMEU is concerned that this Committee and stakeholders generally are being denied access to the economic modelling that supposedly supports these changes.

We implore this Committee to require the government to publish and/or provide the economic case for this proposal prior to the Bill being debated.

2.2 Does the proposal match the rhetoric

The Government claims that the Exposure Draft, outlines ways to

- Clarify and update important concepts, such as reasonable management action and thresholds for accessing long-term payments
- Expand early intervention powers to support rehabilitation and return-to-work plans sooner
- Strengthen anti-bullying protections, allowing workers to bring claims for bullying or harassment through the industrial relations system
- Establish clearer dispute resolution pathways, improving access to timely outcomes
- Modernise benefits and compensation thresholds to better reflect the cost of living and community expectations

Unfortunately, it does very little of what is promised. The Premier claims that it is the Government's intention to shift the workplace injury management system towards solving the root causes and preventing injuries in the workplace,[2] but this Bill offers nothing in the way of prevention.

[2] The Hon. Christopher Minns, Ministerial statement, 18 March 2025.

The effect of the Bill is to punish extremely vulnerable workers who have suffered a psychological injury at work. It treats these workers like they are a menace to the system that must be stamped out. It will discourage people from speaking up about their mental health because why speak up when there is no pathway to recovery and no support. All the work that has been done on suicide prevention will be undone.

If this Bill was about prevention, there would be more focus on the conduct of employers and how they manage psychological claims. In his submission to the 2022 Review of the Workers Compensation Scheme, Professor John Buchanan explained:

> Most discussions of RTW are based on data concerning workers. There are, however, two sides to the labour market – and it important we devote attention to the performance of both.[3]

This Bill gives employers a free pass and places the blame on injured workers.

Put simply, this Bill is cruel and dangerous and it will risk lives if it is accepted as currently drafted.

2.3 Objectives of the scheme

Any legislative change must be consistent with the overall scheme objectives. The scheme objectives are set out in s 3 of the 1998 Act as follows:

> 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,

[3] Professor John Buchanan, Submission No 12 to Standing Committee on Law and Justice, *Inquiry into 2022 Review of Workers Compensation scheme,* (22 July 2022) 10.

(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.

The Bill appears to completely reject the scheme objectives in favour of cost saving. It is difficult to see how this Bill could be seen to promote treatment of injuries to assist injured workers and promote return to work, or provide injured workers with income support. It certainly isn't fair and it doesn't deliver on the scheme objectives efficiently and effectively.

The Bill acts as though the scheme objectives do not apply to psychological injuries treating them as a menace to the scheme that must be stamped out.

We ask this Committee not to lose sight of the objectives while considering this Bill and the implication for injured workers.

3 Provisions we support

Before highlighting our concerns with the legislation, we think it prudent to identify the matters on which we agree.

As a strong advocate for reforming the PIAWE system, the CFMEU is pleased to see that finally PIAWE will be removed as a work capacity decision. This will allow for greater information flow between the insurer, employer and worker and will allow for recalculations to be done quickly without the need for a formal work capacity decision review.

While the work capacity review process will not be available should the insurer refuse to recalculate, the worker will still have a review option under s 42 of the 1987 Act.

This is a welcome and positive change that should save unnecessary disputation for what should be a simple calculation.

Some of the other matters of which we approve are:

- Updating of monetary amounts to reflect the current amounts from the Guidelines
- The death benefits disputes provisions – Division 1A
- The new offence for large employers who fail to give insurers information relevant to underinsurance – s173AA
- The prohibition on employers attending medical appointments – s231A
- The majority of the commutation changes

In relation to the commutation provisions, we have concerns about the regulations setting out the class of workers who are eligible to claim a commutation. With appropriate legal advice, commutations should be available to everyone.

While we welcome the new s 173AA offence, in the CFMEU's experience large employers are actually more likely to provide accurate information and are less likely to underinsure. We have provided past Committees with many examples of employers who have incorrectly declared wages, workforce numbers and industry classifications to icare, thereby avoiding paying their true premium. Most if not all of these examples are coming from the subcontractors in the construction industry who fall within the small-medium cohort.

The CFMEU is prepared to provide examples to the Committee should it assist in the deliberations.

We would like to see this provision extended to all employers. If the correct premiums are collected then there is more money for the system. It is in everyone's interest, including employers, that all workplaces pay their true premium.

4 Technical matters

The CFMEU has spent a significant amount of time considering the Bill and is astounded at the number of drafting issues it contains.

For instance, s 8F refers to the Tribunal, Commission or Court. We presume this is meant to be a Tribunal, Commission or Court, otherwise the Bill will need to define which Tribunal, Commission or Court it means.

There are also provisions that are either inconsistent with or simply ignore existing provisions that the Bill is not proposing to change.

It is clear that this Bill has been drafted quickly and without the necessary workers compensation expertise. Before the Bill is adopted, in whatever form, there needs to be greater emphasis on the drafting to ensure it does not create any unexpected consequences.

4.1 Definition of psychological injury

The Bill proposes to introduce a new definition of psychological injury. This definition is meant to provide "*both workers and businesses with certainty*"[4] and is intended to be an "*inclusive definition of psychological injury, not an exclusive definition*."[5]

While the intention is admirable, the definition creates additional issues that may not have been considered.

The proposed definition is set out at s8A and states:

> In this Act, ***psychological injury*** means an injury that is a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction.[6]

A mental disorder is defined by the DSM - 5 as:

> …a syndrome characterised by clinically significant disturbance in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning.

[4] The Hon. Daniel Mookhey, Ministerial Statement, 18 March 2025.
[5] Ibid.
[6] *Worker Compensation Legislative Amendment Bill* 2025, s 8A.

It is not clear whether the Bill intends to invoke the DSM-5 with its use of the term disorder, this could be an unintended consequence and in that case, there should be some explicit language to that effect. If however, the connection is intended, then this creates a barrier to all psychological claims.

A disorder of the kind envisaged by the DSM-5 can only be diagnosed by a psychiatrist. A GP does not have the skills or knowledge to accurately diagnose a mental disorder. If an injured worker must wait for a psychiatrist before they can even commence a claim, no matter the mechanism of injury, the return to work rates will plummet even further. There is currently a 16 week wait for someone to see a psychiatrist in NSW, longer in regional communities. In that 16 weeks, the worker will have no access to income support or medical treatment. This is not to mention that an initial appointment with a psychiatrist can be between $700 - $1,000 all out of the injured workers pocket before a claim can be made.

On the surface this seems to be an absurd approach and the CFMEU hopes this was not the intention. Assuming it is not the intention, then the Government must find a way to clarify the definition or provide greater guidance on how a *psychological disorder* is to be defined.

If it is the intention, then this appears to be an unnecessarily cruel proposal that should be abandoned.

4.2 Increased disputation

In his Ministerial speech, the Treasurer complained that the system is not sustainable. A simple way to reduce some of the costs on the scheme is to reduce the level of disputation.

Unfortunately, the Bill as drafted creates a range of new concepts that will need to be interpreted, many rely on the individual circumstances of a particular case. This is going to place a strain on the system that does not appear to have been considered.

Attached at Appendix A are a list of provisions that are likely to result in increased disputation.

4.3 Henry VIII clauses

The CFMEU is concerned at the number of provisions in the Bill that refer important processes to the regulations and the guidelines, known as Henry VIII clauses. Apart from removing those matters from the careful scrutiny of this Committee, it creates a regime that can fluctuate subject to the whims of the government of the day and is uncertain. Attached at Appendix B is a list of Henry VIII clauses contained in the Bill.

The push to move things to regulations is particularly troublesome given the amount of complexity already in the system. In his report McDougall describe the system as:

> …a unique area of insurance. It involves a mandatory scheme governed by labyrinthine, complex and not always consistent legislation, The operation of the legislation has been the subject of frequent amendments. The details of practice and procedure are government by regulations, guidelines and the like.[7]

Noting this complexity, McDougall recommended that the government give consideration to reconciling the Acts into a single consolidated piece of legislation.[8] It would seem moving more provisions to regulations and guidelines is explicitly contrary to the point that McDougall was trying to make. The important matters should be in one place, and that place should be the Acts.

The use of Henry VIII clauses has been controversial and was the subject of discussion during the Making of delegated legislation in NSW Inquiry. Importantly the Committee made the following observation that we implore this Committee to consider:

> The evidence in this inquiry, given by stakeholders with significant legal expertise, has highlighted concerns around the potential for executive overreach in the delegation of legislative power, particularly arising from the use of Henry VIII clauses, shell legislation and quasi legislation. Use of these legislative tools carries with it the risk that the executive may determine significant elements of statutory scheme in ways that the Parliament may not

[7] Report by the Hon Robert McDougall QC, Independent Reviewer, *icere and State Insurance and Care Governance Act 2015 Independent Review* (30 April 2021) (McDougall Report) 86,
[8] Ibid, 34.

> have intended. Why does it matter? In our view, it matters because the legitimacy of the laws made by delegated legislation may be adversely affected if the public perception is that the accepted balance between parliamentary and executive power has become skewed. At the end of the day, it is in the interests of good government that the potential for executive overreach is managed.[9]

4.4 Racial Harassment

The Bill proposes to require, in the case of bullying and harassment matters, that injured workers provide findings from a Tribunal, Court or Commission before they are eligible to make a claim for a psychological injury. In the case of racial harassment, this is impossible.

While the Bill provides a definition of racial harassment, a Tribunal, Commission or Court will not be interpreting this provision when making findings, they will be interpreting the *Anti-Discrimination Act 1977* (NSW) (**ADA**), *Race Discrimination Act 1975* (Cth) (**RDA**) or *Fair Work Act 2009* (Cth) (**FW Act**). None of these Acts have a cause of action called "racial harassment." It is either discrimination on the grounds of race or racial vilification.

It will be impossible for an injured worker to make a workers compensation claim for racial harassment because it is impossible to get findings of racial harassment under any existing legislation.

5 Bullying and harassment claims

5.1 Underlying misconceptions about existing provisions

There appears to be two major misconceptions about the way that psychological injuries are assessed by the scheme which may explain some of the more undefendable provisions.

[9] Regulation Committee, Parliament of NSW, *Making of delegated legislation in New South Wales,* (22 October 2022) 40.

The first is that the scheme compensates a worker because they have been bullied and/or harassed at work. This is incorrect as evidenced by the lack of definition of bullying and/or harassment. The scheme does not compensate a person because they have been bullied and harassed at work. Bullying/Harassment might be listed as the cause, but it is not what is being claimed.

A worker is entitled to compensation for a psychological injury if:

a) They have suffered an injury at work, and
b) That injury was as a result of conduct in the workplace.

The conduct could be a single act, it could be a verbal act, it could be a physical act, it could be the display of problematic materials or even antisemitic graffiti. Just because a worker's doctor writes bullying and/or harassment on a certificate of capacity does not mean that is why the worker is being compensated. They are being compensated for an injury that occurred in the workplace, plain and simple.

The second misconception is around reasonable management action. It is important to note that the reason for the management action might be reasonable (e.g. if the worker has breached safety policies) but the way that it is carried out is unreasonable. If the employer fails to follow its own policy, fails to follow basic procedural fairness or fails to notify the person of the reason for the action, then they will be unable to rely on the defence. In fact, icare has a wonderful seminar on how s 11A operates and if more employers watched it, they might be more successful in running the defence.

If the provisions are based on an incorrect premise then the whole of the proposal is tainted and should be reassessed.

5.2 What constitutes findings?

It is unclear what is intended by the requirement to get findings. Is it sufficient that the parties reach an agreement as the facts, or does it require a matter to proceed to hearing with a formal decision? Is a complying agreement, such that is common in the PIC, sufficient to meet the requirements?

Given this is a prerequisite to a workers compensation claim, more guidance on this is warranted. At the very least it should include, Statements of Agreed Facts, Settlement Agreements and Consent Orders, in addition to formal judgements.

5.3 Timeframes for resolution

If "findings" is intended to mean a formal decision of a Tribunal, Commission or Court, then workers can be waiting years for a determination without treatment or economic support.

For example, a report published on 17 February 2025, by the Australian National Audit Office found that the Human Rights Commission timeliness of complaints handling has been declining.[10]

> A significant backlog of complaints developed between the first quarter of 2019-20 and quarter 3 2021-22. With fewer complaints received in 2023-24 and some additional resources, the backlog has stabilised. It remains around double what it was prior to 2019-20.[11]
>
> …the proportion of complaints being finalised within 12 months has been declining, with AHRC not achieving its target for 2023-24[12]

This is only the conciliation phase. If conciliation has not been successful, then the AHRC will terminate the complaint and the worker must proceed to either the Federal Circuit Court or Federal Court where they will face more delays.

A worker could be waiting up to 4 years for a finding that they have been the subject of sexual harassment or racial discrimination.

Matters proceeding to Anti-Discrimination NSW may not face the same length of delay but the process is by no means quick:

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[10] Australian National Audit Office, *Management of Complaints by the Australian Human Rights Commission,* (17 February 2025) 8 - https://www.anao.gov.au/sites/default/files/2025-02/Auditor-General_Report_2024-25_24.pdf
[11] Ibid.
[12] Ibid.

> "Resolving complaints can take several months and a very complex cases may take longer. However, many complaints can be sorted out more quickly. We aim to deal with complaints within six months from the time you lodge your complaint."[13]

Again, this is just the conciliation phase. If the matter is unable to be resolved by conciliation/mediation, then the worker must take the matter to NCAT for determination.

The FWC bullying and harassment jurisdictions are no different. Section 789FE of the *Fair Work Act 2009* requires the FWC to start to deal with an application within 14 days after the application is made. There is no clarification about what it means to start an application, sending out a notice of listing for a time in the future may be sufficient to meet the requirement. However far it extends, beyond the heading of s 789FE stating the *FWC to deal with applications promptly*, applications are still required to proceed to conciliation in the first instance before heading to hearing. It will still be several months before a decision is issued, IF the worker makes it through the many hurdles.

5.4 Limitations of the FWC jurisdiction

Given the proposal seeks to push people towards the FWC bullying jurisdiction, it is important to identify the limitations of the jurisdiction, such as:

- It only applies to constitutional corporations, see *KL v Trade & Investment Queensland* [2016] FWC 4174 and *McInnes v Peninsula Support Services Inc* [2014] FWC 1395
- The conduct must be repeated and each action must be unreasonable, see *Re Page* [2015] FWC 5955 where the comment "I'm going to kill you" was found not to be bullying because it was a one-off comment.

[13] https://antidiscrimination.nsw.gov.au/complaints/how-we-handle-complaints/the-complaint-process.html

- The conduct must be towards the worker, compare this to sexual harassment under the *Anti-Discrimination Act 1977* (NSW) which doesn't require the conduct to be directed at the worker
- The conduct alleged must create a risk to health and safety
- Orders can only be made is there is a risk that the worker will continue to be bullied at work by the same individual or group (in practice applications are dismissed if this test is not met)
    - If the worker ceases to be employed then the FWC no longer has the power to consider the application, see *Shaw v Australia & New Zealand Banking Group Ltd* [2014] FWC 3408 at [15] and *Re KM* [2016] FWC 2088 at [62].
    - If the alleged perpetrator has left then the FWC loses jurisdiction, see *Re Fsadni* [2016] 1286 at [24]

It should be noted that under the FW Act, the assessment is an objective one, whereas workers compensation, in fact all personal injury scheme, apply a subjective test. Whether it was reasonable for the worker to be injured is irrelevant to workers compensation, all that matters is that they are injured. Requiring a worker to get a finding undermines the fundamental premise of personal injury schemes.

The biggest difference between workers compensation and the anti-bullying jurisdiction is that workers compensation is backwards focused while the bullying jurisdiction is focused on preventing future conduct.

5.5 Costs implications

While the workers compensation scheme provides access to legal expenses through the ILARS scheme, there is no mechanism in place for the discrimination and bullying jurisdictions. The worker will be responsible for the legal costs of running one of these matters while receiving no income support for their injury because they have yet to get findings. Workers will be priced out of pursuing their meritorious claims.

There does not appear to be any consideration of the financial strain this will place on workers who are already psychologically damaged.

A matter that seems to be overlooked in this proposal is how it will impact on the efficient resolution of industrial relations disputes, particularly if the "findings" requirement is for a formal decision. Most harassment and bullying matters are resolved by way of a compromised settlement. Tribunals, Commissions and Courts go to great lengths to encourage the parties to reach a settlement without the need of a hearing. If the requirement is for a formal decision, this proposal will undermine the efforts of those Tribunals, Commissions and Courts and will be a drain on their resources thereby clogging the system.

The move away from negotiated outcomes may also have costs implications for the worker. While the FW Act is a no costs jurisdiction, s 570 of the FW Act allows a Court to order a person to pay the other party's costs "if the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs."[14] This can include a failure to accept a reasonable offer of compromise.[15]

Section 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) applies a similar principle and allows NCAT, who hears matters under the Anti-Discrimination Act, to make an award of costs if special circumstances exists and includes drawing out the proceedings unreasonably.

Even the new costs provisions under the *Australian Human Rights Commission Act 1986* (Cth) allow a court to make a costs order if the court is satisfied that the applicant's unreasonable act or omission caused the applicant to incur costs.[16]

If the government is intent on bringing in the requirement to have findings, then more consideration needs to be had to the consequences set out above.

[F]*air Work Act 2009* (Cth), s570(2)(b).
[15] See *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; *McDonald v Parnell Laboratories (Aust) (No. 2)* (2007) 164 FCR 591.
[16] *Australian Human Rights Commission Act 1986* (Cth) s 46PSA (6) (b).

5.6 Does it prevent bullying?

In his Ministerial Speech on 18 March 20225, the Treasurer argued that "New South Wales should have workplace health and safety laws and a workers compensation system that places prevention ahead of compensation in responding to psychological safety".[17] The CFMEU does not disagree with this principle however the proposals on the table do little to prevent injuries from occurring.

One of the hallmarks of the upcoming Industrial Relations reforms, which are yet to have public consultation, is the creation of a new bullying and harassment jurisdiction in the IRC modelled on the federal law. It is unclear what this jurisdiction will include but if it is merely a copy and paste of the FWC jurisdiction then it is unlikely to prevent psychological claims, given the FWC has failed to curb bullying and harassment claims since its inception.

A look over the Fair Work Commission Annual reports shows that the number of bullying and harassment applications has remained steady since 2015.

Year	Number of applications
2015-16	734
2016-17	722
2017-18	721
2018-19	751
2019-20	820
2020-21	782
2021-22	631
2022-23	730
2023-24	987

These numbers reflect the number of applications made but given the widely known limitations of the jurisdiction, particularly the requirement for the person to still be employed, they are unlikely to be an accurate reflection of the number of bullying and

[17] Above n 4.

harassment complaints in the labour market. What these numbers do show is that the jurisdiction has done little to prevent bullying and harassment in the workplace.

6 Work Pressure Disorders

6.1 What is a work pressure disorder?

The Bill attempts to create a new category of claim that sits outside of the traditional workers compensation system for "work pressure disorders."

Section 148B states:

> (1) If, as a result of a work pressure disorder experienced by a worker, it is reasonable and necessary that medical or related treatment be provided to the worker, the worker's employer must pay the cost of the medical or related treatment (a ***special work pressure payment***) to the worker.

The first issue that arises is the term "work pressure disorder." This is not defined by the Bill nor in the existing Acts. Nor does it exist within the DSM – 5. Without clear guidance on what a "work pressure disorder" means, it is likely to be the subject of dispute between workers and employers.

6.2 No enforcement mechanism

The Bill explicitly removes work pressure disorders from the workers compensation scheme.

Subparagraph (6) states:

> (6) To avoid doubt, an application for payment of a special work pressure payment is not a claim for compensation.

Since a work pressure claim is not considered a claim for compensation, the dispute provisions will not apply, denying the worker any mechanism to enforce their right to the 8 weeks payment. This proposal appears to rely on the employer doing the right thing, which given the worker is injured because of work, is unlikely to happen.

The CFMEU would like to understand how the government intends to enforce this provision with a dispute resolution mechanism.

6.3 Constitutional considerations

As noted above, it appears that "work pressure" claims are intended to sit outside of the workers compensation system. This raises some issues about whether these provisions are constitutionally sound.

Section 26 of the FW Act provides that the FW Act is intended to apply to the exclusion of all State and Territory industrial laws that apply to national system employees and employers. It applies to laws that have the effect of regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action); providing for the establishment or enforcement of terms and conditions of employment.[18]

Section 27 of the FW Act sets out the laws that are not excluded by section 26 and includes workers compensation matters.

In January 2010, NSW passed the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) which referred its industrial relations powers for non-public sector workers to the Commonwealth Government.

If work pressure disorder claims are outside of the workers compensation system, there is a real question about whether it falls within the definition of non-excluded matters under s 27 of the FW Act. Section 148B of the Bill appears to alter the terms and conditions of employment between employers and employees falling foul of s 26 of the FW Act.

[18] *Fair Work Act 2009* (Cth), s26(2).

We suggest the Committee obtain legal advice on this point as a matter of urgency.

7 Reasonably necessary

The CFMEU strongly disagrees with the proposal to change the test for medical expenses from "reasonably necessary" to "reasonable and necessary." Despite the rhetoric from the Government that the Bill is targeted at tackling psychological claims, the proposal to change the test for medical expenses will apply to all injuries. It was not canvassed in the either the Treasurer's or Premier's speeches on 18 March 2025 and its inclusion in the Bill is a surprise to most stakeholders.

Only one stakeholder has suggested changing the test and given its history with claims management, siding with icare against the rest of the system seems unwise.

7.1 McDougall's recommendation

It is important to view McDougall's recommendation through a cautious lens.

McDougall was tasked with reviewing icare and the schemes it operates but was not a review of the benefits and entitlements under the Acts.[19] As part of their submission, icare recommended changing the test for medical expenses from "reasonably necessary" to "reasonable and necessary".

icare argued that the existing test included treatment that was low value. This reasoning has since been ameliorated with SIRA adopting a value-based healthcare model[20] for medical treatment and its new powers to direct service providers in the system.[21] They have also adopted a low-back pain model to bring consistency to the treatment of low-

[19] Above n 7, 9-10.
[20] https://www.sira.nsw.gov.au/__data/assets/pdf_file/0013/1001065/Value-based-healthcare-outcomes-framework-for-the-NSW-WC-and-CTP-schemes.pdf
[21] https://www.sira.nsw.gov.au/resources-library/regulation-and-fraud/regulation-of-health-and-related-services-providers.

back pain.[22] With these developments, the idea that "reasonably necessary" encourages treatment that is low value has no basis.[23]

In his consideration of the proposal, McDougall's lack of familiarity with the workers compensation system is on display. In his view the phrase "reasonably necessary" is unclear[24] and it is for this reason that he recommends changing the test. With respect, the opinion of someone who does not practice in this space, should be taken with a grain of salt at best.

The test for "reasonably necessary" is clearly set out in the decisions of *Rose v Health Commission* (NSW) (1986) 2 NSWCCR 32, *Diab v NRMA Limited* [2014] NSWWCCPD 72 and *Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1.

In *Rose v Health Commission,* Burke CCJ set out the guiding principles:

> In determining whether a particular regimen is medical treatment and whether it is reasonably necessary that such be afforded to a worker and that such necessity results from injury, it appears to me some general principles can be stated:
> 1. Prima facie, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
> 2. However, though falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the party seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.
> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.

[22] https://www.sira.nsw.gov.au/resources-library/treatment-advice-centre/model-of-care-for-the-management-of-low-back-pain.
[23] Above n 7, 271.
[24] Above n 7, 273.

These principles were then enshrined at s 297 of the 1998 Act and guide the determination of interim directions for medical expenses.

Practitioners are well versed in the principles underpinning "reasonably necessary" however, McDougall failed to question any other stakeholders about the test before making his recommendation relying on icare and his own opinion.

If the reason for this change is that it was a McDougall recommendation, then that reasoning is flawed. McDougall was plainly wrong in his assessment.

It is a change without basis that can only further harm injured workers. As icare admitted, the "reasonable and necessary" test creates a higher burden than "reasonably necessary" this change will just further punish workers, all workers, not just those with psychological injuries.[25]

If as the government says, this Bill is about psychological claims, then this proposal should be abandoned.

8 Options for reform

8.1 Pre-claim mediation

On 6 October 2022, icare made the decision to reform its case management model and invite more claims management providers into the system. A big part of this program was to identify claims service providers who would pilot programs to assist with the management of psychological claims.

Some of the claim services providers were chosen to fall within this category and were empowered to consider adopting new ways of managing psychological claims. EML chose to pilot pre-claim mediation as part of its claims service offering. The CFMEU understands from discussions with icare, that they have received research that suggests

[25] Above n 7.

that pre-claim mediation is more effective at managing workplace conflict than post-claim mediation.

We are aware that SIRA also offers facilitated workplace discussions, but these are not available until a claim is made. It seems sensible then, that instead of icare or the scheme paying the cost of post claim mediation, that money should be redirected to pre-claim mediation if it is more effective.

The CFMEU would like to see pre-claim mediation offered to a broader range of employers as a claims service offering and suggests that rather than cutting bullying and harassment claims, that the government give genuine consideration to this proposal.

8.2 Reform of the vocational training programs

The CFMEU is aware that SIRA offers a range of vocational training programs to assist with returning workers to sustainable work. These programs are varied and offer options for work trials, work placement and training. Attached at Appendix C is a breakdown of all the programs offered on SIRA's website.

The SIRA Tripartite Committee and icare NIAC committee have received information that indicates that these programs are underutilised. The data suggests that the job trial programs are incredibly successful at returning people to work, but there is almost zero take up in the case of psychological claims.

SIRA has done little to encourage take up of these programs and has failed to modernise them so they can apply equally to physical and psychological claims.

The CFMEU would like to see icare, SIRA and their stakeholder committees working together to reform these programs and make them attractive to psychological injuries in addition to physical injuries. In the meantime, SIRA should consider how it publicises these programs and whether they are effectively targeting the right workers.

8.3 Holding employers to account

If the Government was serious about prevention, then more needs to be done to force employers to comply with their legislative obligations with respect to notification and return to work. The CFMEU is not aware of SIRA prosecuting employers for their failure to comply with the Acts.

SIRA has a tendency to forget that it is also responsible for regulating the conduct of employers. The CFMEU would like to see SIRA holding employers accountable.

The SIRA annual report does not provide statistics of the prosecutions it has undertaken during the period, however it is worth noting that the only workers comp cases highlighted in the report are in relation to worker fraud.[26] No mention of employers.

8.3.1 Notification of injury

The SIRA annual report outlines the action it has taken against employers in the period 2023-24, including

- 234 employer improvements notices
- 200 penalty notices
- 131 caution letters[27]

The overwhelming majority of notices were for the employers failure to notify of a workplace injury within 48 hours, 296 notices out of 565. Failure to notify often means that workers face delays in accessing medical treatment and income support despite clearly being injured. In our experience, the delay in notification is usually because the employer is trying to convince the worker not to be make a claim.

[26] https://www.sira.nsw.gov.au/__data/assets/pdf_file/0004/1336999/SIRA_Annual-Report-2023-24.pdf, 57.
[27] ibid at 24.

8.3.2 Return to work obligations

Section 56 of the WIM Act states that any increased costs associated with a failure by an employer to comply with Chapter 3 of the 1998 Act *can* be taken into account in the calculation of the claims experience factor for the employer. Importantly, not all employers are subject to claims experience in relation to their premiums.

Section 48A of the WIM Act states that if a worker fails to comply with their RTW obligations the employer may:

- Suspend the payment of compensation in the form of weekly payments to the worker
- Terminate the payment of compensation in the form of weekly payments to the worker
- Cease and determine the entitlement of the worker to compensation in the form of weekly payments in respect of the injury under this Act.

A worker taking action to remove themselves from a toxic work environment to prevent a new or further psychological injury is punished by the scheme for doing so. Workers are forced to remain in a workplace that is actively harming them or risk losing their benefits.

Section 49 of the WIM compels an employer to provide suitable employment for the worker upon request. The maximum penalty under this provision is 50 penalty units. Tellingly, SIRA has reported no prosecutions or penalty notices for the failure to provide suitable employment. The employer need only show that it is "not reasonably practicable to provide employment in order to escape its obligations. It is then up to the worker to commence proceedings in the PIC to enforce their right to suitable employment.

Section 235A of the WIM Act titled "Fraud on workers compensation scheme" appears to apply solely to injured workers. The section seems to overlook the fraud perpetuated by employers when taking out workers compensation insurance. A person prosecuted under this section may be liable for a maximum penalty of 500 penalty units of 2 years imprisonment or both.

Interestingly, if an employer has received compensation money under the Act from an insurer and fails to pay the money to the person entitled to the money, the maximum penalty is only 50 penalty units, despite the conduct being tantamount to theft. Is this conduct not also a form of fraud?

Section 164 of the WCA prohibits an employer from providing information that the employer knows is false or misleading in a material particular with the object of procuring the issue or renewal of a policy of insurance. The maximum penalty for this provision is 100 penalty units significantly less than any fraud committed by an injured worker.

Section 173A of the WCA prohibits an employer from supplying information to an insurer relevant to the calculation of the premium payable that it knows is false or misleading. Another woefully small 50 penalty units.

The above analysis highlights the unfairness in the regulatory activities of SIRA and the Acts themselves. There are higher penalties for worker fraud than employers fraud and despite there being more civil penalty provisions targeted at employers, there are zero prosecutions.

If SIRA was serious about its role as regulator, rather than trying to expand its role into WPI assessments, it should start applying the civil penalty provisions against employers and actually regulate the whole of the system, not just the worker and icare.

More regulatory activity targeted at employers will assist in increasing return to work rates and curbing behaviour that worsens a workers psychological injury. This is where the government should be focussing its attention.

9 Conclusion

In the limited time we have had, we have been unable to address all the problems contained within the Bill. In that regard we rely on the submissions of the lawyers, doctors and other unions in particularly the submissions of Roshana May and Unions NSW.

In addition to the matters set out in these submissions, we also hold concerns about the following:

- SIRA having ultimate control of the WPI assessment process. As regulator they should have no role in the management of claims which is the reason why WorkCover was split in 2015
- The at least 31% threshold. This is incredibly high and it is extremely unlikely that injured workers will reach this threshold. As a comparison, 30% is the equivalent of an amputation above the knee. Below the knee is less that 30% as is a double knee replacement with no complications
- Indexations changes. This was not the subject of any discussion and appears in the Bill unprompted.
- The s 39 amendment to remove access to backpay. This is going to cause people to make risky medical decisions which will likely increase their WPI

There is very little in this Bill that is redeemable and we ask this Committee to give genuine consideration to the matters raised by stakeholders before writing its report. These changes are cruel and dangerous and are likely to increase suicide rates in this state.

APPENDIX A

Proposed provision	Effect	Comment
Section 3 *Indictable criminal conduct* – para (b)	Indicatable criminal conduct includes conduct that would constitute an indictable offence where it not for the fact that the person must not, or may not, be held to be criminally responsible for the conduct because of the person's age or mental illness	There are two major difficulties with this section: 1. What if the police or DPP choose not to indict someone for reasons unrelated to their age or impairment? 2. Who determines whether it is indictable conduct if no charges are laid? This is likely to result in increased disputation as insurers and/or employers attempt to downplay the conduct so that is less likely to be covered
Section 8D – reasonable way and reasonable in the circumstances	*Reasonable management action* means management action – (a) Taken in a reasonable way, and (b) That is reasonable in all the circumstances	It introduces new concepts into a provision that already has high levels of disputation. The phrase "reasonable way" is untested in any jurisdiction and is flexible to the circumstances. It does little to clarify and is likely to see an influx of disputes as stakeholders try to grapple with what is action taken in a reasonable way.
Section 8E – relevant event – para (c)	Witnessing an incident that leads to death or serious injury, or the threat of death or serious injury, including the following – (a) An act of violence, (b) Indictable criminal conduct, (c) A motor accident, a natural disaster, a fire or another accident	There is no clear guidance on how serious injury will be interpreted. The Acts do not contain a definition of serious injury. (this is defined by s 36 of the WHS Act)
Section 8E – definition of racial harassment	*Racial harassment,* in relation to a worker, means an act that is – (a) Reasonably likely in all the circumstances to offend, insult, humiliate or intimidate the worker, and	This creates a new concept that does not appear in the *Anti-discrimination Act 1977* (NSW) or the *Race Discrimination Act 1975* (Cth).

	(b) Done because of the race, colour or national or ethnic origin of the worker	The fact that a worker must get a finding of harassment to qualify for compensation means they must meet the definition as set out in those Acts. Providing a new concept also means that the PIC must determine whether the authorities related to race discrimination will also apply in this context. There will need to be disputes and findings in order for this to be resolved.
Section 8E – definition of sexual harassment	*Sexual harassment*, in relation to a worker means a person who makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the worker or engages in other unwelcome conduct of a sexual nature in relation to the worker.	Creating new definitions creates problems especially when workers are required to try their luck under other legislation first. As we have seen with the FW Act and s 351, not all authorities regarding discrimination apply in all settings. By creating a new definition, there are likely to be disputes about whether it is to be treated the same as under other pieces of legislation.
Section 8F – tribunal, commission or court	Notification of a primary psychological injury caused by sexual harassment, racial harassment or bullying is taken not to be an initial notification for the 1998 Act, Chapter 7, Part 3, Division 3A unless the worker provides a copy of the finding of harassment or bullying made by the tribunal, commission or court.	What is <u>the</u> tribunal, commission or court? The wording implies that it means a particular tribunal, commission or court. This may be a drafting issue but it is no less serious an error. As written, it is likely to result in disputes about whether a tribunal, commission or court is <u>the</u> tribunal, commission or court.
Section 8H – vicarious trauma	A worker experiences *vicarious trauma* of the worker becomes aware of any of the following acts or incidents that resulted in the injury to, or death of, a person with whom the worker has a close work connection …	This is a different definition of vicarious trauma than is commonly understood. This definition has capacity to confuse people.

		The term close work connection is undefined and is likely to be the subject of intense litigation. Is it enough to work in the same workplace? What if you know them but you work from home? What happens to those who are suffering vicarious trauma in the normal senses, see *Kozarov v State of Victoria* [2022] HCA 12
Section 19B – covid presumption	Replicates s 19B(5) as it currently exists	The inclusion of this 'change' is unclear. The regulation change to reduce the period that a person is incapable could be done without the legislative change. It is important to understand the rationale that underpins the time frames set out in regulation 5C. Given the anger and misinformation around covid-19, rather than requiring a person to submit for another test, the decision was made to provide a close off date which could be extended if further medical evidence was provided.
Section 38(9) – at least 31%	This section does not apply to a worker who has a primary psychological injury unless the injury results in a degree of permanent impairment of at least 31%	As a drafting comment, the provision should utilise the same drafting for thresholds as the Acts. For instance, workers with highest needs uses the phrase "more than 30%" Section 66 uses the phrasing "greater than 10%"

		Given that the proposal for s 59A(5) uses the terminology "worker with highest needs" it is nonsensical to use a different phrase. Good legislative drafting requires consistent terminology. This provision should be redrafted to be consistent with the Acts.
Section 60 and s 60AA – reasonable and necessary	Omit "reasonably necessary" and insert "reasonable and necessary	This is a fundamental change to the test for medical expenses in workers compensation. It is not as simple as importing the test from the Motor Accident scheme. The reasonably necessary test is well settled by *Rose v Health Care Commission.* The principles from that matter have been enshrined in s 297 of the 1998 Act. The test for medical expenses in workers comp is interpreted having regard to s 297. How that provision will be interpreted with the new test is unknown and likely to be subject to disputation as the scheme tries to grapple with two different sets of principles for medical expenses
Section 65AB – special provision for HIV/AIDS	(1) Permanent Impairment compensation is not payable for permanent impairment that is HIV/AIDS if the impairment resulted from voluntary sexual activity or illicit drug use.	These matters are likely to result in significant factual disputes, as involuntary sexual activity is potentially an indictable offence under the Crimes Act. In the event that a person claims that the sexual activity is not voluntary, and the other participant claims that it is, the first person will have to sit

		through a traumatic cross examination without the protections afforded a victim in criminal matters.
Section 148 – work pressure	*work pressure disorder* means a mental or psychiatric disorder caused by or arising from the pressures placed on a worker in the course of the worker's employment but only if the employment was the main contributing factor to the work experiencing the disorder	Given a claim for *work pressure* it is likely we will see a lot of litigation under this provision as employers try to claim a disorder is not a primary psychological injury. It is also unclear what "work pressures" might encompass It should be noted that s 9 of the 1987 Act states that a worker shall receive compensation from the worker's employer. While the employer is liable, in practice it is the insurer who makes the payments. It is unclear if the term employer in this provision is used in the same sense as s 9 of the 1987 Act or it means that the employer is solely responsible for these payments.
Section 280AAB	Compensation must not be recovered unless a claim for compensation has been made within 6 months after a finding by a Tribunal, Commission or Court that the relevant injury was caused by conduct that is sexual harassment, racial harassment or bullying.	No Tribunal, Commission or Court is going to make a finding of racial harassment as it is not a cause of action. Also (3) makes no sense the drafting is so poor.

APPENDIX B

Section	Section title	Words	Reason
8D(2)(o)	Meaning of reasonable management action	Another action prescribed by the regulations	Uncertainty for workers and employers as to what is acceptable and not acceptable.
8E (h)	Meaning of relevant event	Another event prescribed by the regulations	Uncertainty and lacking in scrutiny for what might be a complete narrowing or expansion of the term
8 G (3)	Primary psychological injuries	The regulations may provide for matters relating to primary psychological injuries, including- a. The type of matters or circumstances an insurer must take into account when determining whether an injury is a primary psychological injury, and B. The evidence a worker must provide for a claim in relation to a primary psychological injury	

19B(5)	**Presumptions relating to certain employment in relation to COVID-19**	The regulations may provide for when a worker is incapable of work for subsection (5).	Due to the fluctuating nature of Covid 19 and the immediacy of the 19 B insertion, a large part of this section relies on regulations to respond to changing circumstances.
44BB	Regulations	The regulations may provide for the procedures to be followed by insurers in connection with— (a) the making of work capacity decisions, including the adjustment of an amount of weekly payments a result of work capacity decisions, and (b) the making of decisions about pre-injury average weekly earnings,	General regulating power however Section 42 exisits for the purpose of adjusting PIAWE and should be used rather than regulation that may introduce pathways that are too onerous.

		including the adjustment of weekly payments as a result of decisions.	
87EA(2)(a)	Preconditions Commutations	2) Despite subsection (1), a liability in relation to an injury may be commuted to a lump sum under this division in a particular case if the President is satisfied— (a) the case is of a class prescribed by the regulations as a class to which this subsection applies, and (b) the circumstances of the case satisfy the requirements prescribed by the regulations as requirements that must be satisfied for this subsection, and (c) **unless the regulations otherwise provide**, the lump sum	Not only does this subclause fetter the opportunity for workers and insurers to agree on a commutation value but it proposes in the regulator the ability to arbitrarily change the "classes of "cases" for which a communication might be applied for outside subsection 1. Not only is this a Henry VIII clause but the whole of the amendment was written in 2012 and was not enacted then due to opposition. Merely changing the approving party from the

		to which the liability will be commuted is not inadequate and not excessive.	Authority to the Pres of the Commission is not sufficient.
87F(2A)	Commutation by Agreement	(2A) The regulations may require the provision of independent financial advice to a worker, at the expense of the insurer, before the worker enters into a commutation agreement and the requirement applies despite any other provision of this section.	Retrograde step and wholly unnecessary. Finacnial Advice was required when WorkCover approved Commutations The only relevant parties are the worker and insurer. A Worker must be able to make decisions for themselves as autonomous beings,

APPENDIX C

Name of program	Eligibility	What is involved
Work trial Program	You are receiving or are entitled to receive weekly benefits under the 1987 Act You have capacity for work but your pre-injury employer cannot provide suitable work You have not accepted a commutation or WID settlement	A work trial program places the worker with a new employer for a short-term work arrangement (up to 12 weeks) The rehabilitation provider helps the worker find a work trial host and undertakes a workplace assessment to match capacity to the requirements of the job Any costs relating to travel and essential equipment are covered by the insurer or SIRA The worker will continue to receive weekly payments from the insurer – no payments from host employer Work Trial Guidance Material
Training program	You are receiving or are entitled to receive weekly benefits under the 1987 Act You have not accepted a commutation or WID settlement	Training course should: • Be provided by an RTO or a higher education provider • Result in formal qualifications recognised by the Australian Quality Training Framework or provide an industry recognised licence or certificate • Be the best match for the worker's circumstances – proximity to residence, timeliness and availability, most suitable delivery method Expenses covered may include: • Compulsory course fees • Text book and stationary expenses – up to $500 for one year full time study • Accommodation if the course involved a period of external study

		Only available if the worker either doesn't have an entitlement under s 64C or if the worker has exceeded the cap under that section Training Program Guidance Material
JobCover Placement Program	Worker eligibility: You are receiving or are entitled to receive weekly benefits under the 1987 Act You cannot return to your pre-injury employer because of your injury You have not accepted a commutation or WID settlement Employer eligibility: Able to offer employment for a minimum of 12 months Able to provide a minimum of 64 paid hours per month or a return to pre-injury hours Hold a current workers compensation policy or self-insurance licence	Three benefits are available to employers: • Incentive payments of up to $27,400 for up to 12 months • Worker's wages not included in the new employer's workers compensation premium for two years • The new employer is protected against the costs associated with the worker's existing injury during the first two years of employment Incentive payments increase according to the length of time the worker remains employed: • Up to $400 per week for the first 12 weeks (max $4,800) • Up to $500 per week for next 14 weeks (max $7,000) • Up to $600 per week for next 26 weeks (max $15,600) JobCover Placement Program Guidance Material
Transition to work	Cannot return to work with pre-injury employer Have a barrier or need that is preventing you from finding or accepting new employment Are receiving or are entitled to receive, weekly benefits or recently stopped weekly payments because you started working	Provides funding of up to: • $200 to help you job-seek or start work • $5,000 to address immediate or short-term barriers that prevent you from accepting an offer of new employment The funding may be used for: • Travel costs • Relocation and accommodation • Child care • Clothing and related expenses

	Havent accepted a commutation or WID claim Have used your entitlements to new employment assistance	Transition to work guidance material
JobCover 6	Worker Eligibility: You have capacity for work and are looking for new employment You are receiving or are entitled to receive weekly benefits under the 1987 Act You have not accepted a commutation or WID settlement Employer Eligibility: Have offered employment for an agreed period for a minimum of 64 paid hours per month or a return to to pre-injury hours Hold a current workers compensation policy or a self-insurance policy	Provides three benefits to employers: • Incentive payments of up to $10,400 for up to 6 months ($400 per week) • Exemption of your wages from their workers compensation premium calculation for two years • Protection against the costs of changes to your existing injury for up to two years JobCover6 guidance material
Section 64C – Education or training assistance payments	You have been assessed as having a permanent impairment of more than 20 per cent You have received weekly benefits for a period of more than 78 weeks You will participate in education and training that is consistent with your injury management plan Ensure the training is provided by an RTO or a registered higher education provider	Provides for a cumulative total of $8,00 for expenses related to training and may include: • Course fees • Other related expenses (e.g. text books, travel) Guidance Material Section 64C of *Workers Compensation Act 1987*