



# Claims Administration Manual & Guidelines review – Australian Manufacturing Workers' Union

---

The AMWU supports the regulators intention of enlivening s192A & s194 of the NSW Workers Compensation Act 1987. Notwithstanding this support, the union also notes that the penalties are totally inadequate to act as a deterrent given the level of damage done to injured workers & their claims by noncompliant insurers (or their agents) and when considering their size. The union has serious concerns in relation to the robustness and transparency that the regulator will enforce these provisions and pursue penalties given its past performance. This combination presents a substantive risk of this process delivering nothing more, than 'lame duck' quasi-legislation.

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission with relation to the Claims administration manual & Guidelines review discussion paper.
2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU NSW Branch has a membership of 20,000 workers. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.
3. An objective of any workers compensation systems needs to be an equitable, fair and just system of income protection, genuine compensation for loss, access to early diagnosis and medical treatment and mechanisms to assist injured workers back to work. An objective should also be to provide for the timely, educated, transparent and fair administration of the legislation recognising that workers compensation is beneficial legislation provided for workers as part of the social contract.
4. The Safe Work Australia publication, The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community: 2012–13, states “In terms of the burden to economic agents, 5 per cent of the total cost is borne by employers, 74 per cent by workers and 21 per cent by the community. The trends over the three iterations of this report are for an increasing proportion of costs borne by workers...”. The administration of the workers compensation scheme should ensure that financial impact of a workplace injury is not shifted onto workers and their families’, whilst returning injured workers back to the maximum achievable medical recovery and the highest quality of life.
5. At the outset of our submission the union supports the regulators intention of enlivening s192A & s194 of the NSW Workers Compensation Act 1987 (the 1987 Act). Notwithstanding this support, the union also notes that the penalties are totally inadequate to act as a deterrent given the level of damage done to injured workers & their claims by noncompliant insurers (or their agents) and when considering the size of the insurers. The union has serious concerns in relation to the robustness and transparency that the regulator will enforce these provisions and pursue penalties given its past performance. This combination presents a substantive risk of this process delivering nothing more, than more ‘lame duck’ quasi-legislation.

**Do you have any comments regarding the introduction of the CAM and the review of the Guidelines?**

6. Whilst the union supports the principles trying to be achieved, there are a number of areas within the discussion paper which draw out concerns.
7. The paper within the executive summary makes mention of “customer-focused” without providing clarity what cohort this is referring to. The union notes that SIRA has been advised on a number of occasions that injured workers and their unions find this term when making reference to injured workers, insulting and hurtful as the notion of customer insinuates choice to which injured workers are devoid. We seek clarity in relation to who it refers to as its “customers”.
8. The union does not support the claims administration manual (CAM) simply being “a leading-edge online tool to assist insurers navigate the legislative landscape” & “Designed with claims managers in mind”. The CAM must be openly available and easy to use guide for claims managers, employers and workers. This is then consistent with the proposal on page 6 of the discussion paper as highlighted below.



The CAM will be:

**Central** - a single 'source of truth' and the first point of contact for claims managers to locate the information they need.

**Clear** - accessible and transparent, and clearly communicate our expectations for sound claims management practice and insurer behaviour.

**Consistent** - applying to all insurers to ensure that the claims experience for all injured workers across NSW is consistent and fair.

9. Minimum standards by which insurers are obligated to administer the legislation must be freely available, so as to empower injured workers with regards to their rights and expectations, providing them with an opportunity to make educated decisions affecting their claims & to ensure an easier process for workers to flag non compliance to better enable the timely resolution of issues. To assist this, it is imperative that the CAM be written in language which will be easily understood by all stakeholders.
10. The union has concerns in the use of language "a process to simplify and consolidate the current suite of workers compensation guidelines". Previously the regulator has used this language to gut guidelines. An example is the Return to Work Program Guidelines which have been rendered near useless by SIRA as a practical document in workplaces. The review of guidelines should not be a process of disablement but rather enablement, ensuring fair and transparent processes that protect injured workers are being followed as part of the administration of the legislation whilst at the same time ensuring all parties are aware of the roles and responsibilities.

#### Coverage of the CAM

11. The union notes that sections 192A & 194 of the 1987 Act are limited to licenced insurers. The union raises its concerns with regards to this project creating two standards of administration of the legislation, licenced insurers who will have to comply with the CAM and self-insurers who will not. The removal of a level playing field and all NSW workers not having their claims managed to the highest standards is not only contrary to the objectives of the WIMWCA 1998, but a totally unacceptable way forward.
12. The union recommends that self-insurers & licenced insurers, licence conditions contain provisions which will ensure compliance with the CAM as a minimum standard. That failure by the insurer to comply with the CAM or apply a higher standard which does not create or lead to a reduction in benefit(s) and/ or right(s) to the injured worker, not only be considered a contravention of its licence, but result in a penalty not less than that which is found in s192A or s183A of the 1987 Act whichever is the higher. Such conditions need to be inserted immediately to all new or renewed licences so as to limit legal and contractual conflicts into the future.

## The Development & Review of CAM and Guidelines

13. The development of the CAM and the review of the guidelines present an opportunity for NSW in being able to ensure a best practice framework for the administration of workers compensation whilst at the same time presenting risks as a result of unintended consequences, creating perverse incentives and harming rights of vulnerable injured workers.
14. The quality to which SIRA consults key stakeholders will be telling with the quality of the final products. In an effort to both achieve quality consultation and at the same time possibly expedite the process, the union recommends that a working group(s) consisting of the key stakeholders be established and funded by SIRA for the purpose of assisting the development of draft documents. In doing this it is likely that some major sticking points may be resolved through this forum speeding up the broader consultation which will be required.
15. It should be left to the working group to determine what topics of the CAM it should concern itself with. Should SIRA impose itself as a gate keeper it is likely that matters it had not considered will affect the quality of the CAM and lead to unintended consequences.
16. Given that “the CAM will be a dynamic tool that will continue to be updated to reflect the changing workers compensation insurance landscape”, the union recommends that the working group(s) be left in place following the creation of the CAM and review of the guidelines, so as to be able to continue to assist in this work.

## Compliance and Enforcement

17. SIRA and its predecessors (WorkCover NSW) record in relation to ensuring compliance and enforcement with regards to workers compensation legislation in the unions view has been negligent. Historically it has pursued a narrow area of its remit focusing on fraud (which the union is not excusing as unimportant) at the expense of the rest of the legislation. As a regulator this failure has left injured workers more vulnerable than they otherwise would have been, whilst at the same time rewarded insurers engaged in unlawful practices as a mechanism of gaming the system.
18. As part of the implementation of the CAM the union recommends the development of a detailed compliance and enforcement policy with a narrow hierarchical enforcement pyramid. Following the CAM’s initial implementation and education the union is of a view there is no excuses for the regulator to fail to ensure compliance and enforce penalties on all insurers. The NSW Workers Compensation system creates a massive power imbalance favouring other stakeholders over injured workers. Only with an empowered, active and engaged inspectorate can some of this imbalance be alleviated.
19. The union also recommends that as part of the implementation of the CAM and its ongoing monitoring, that insurers be required to provide ‘regulator approved’ training to all Case Managers and others that may have influence on workers compensation decisions and regular audits conducted by SIRA to ensure training is rolled out as intended. This training should be a prerequisite to any administration or decision making by a Case Manager. To avoid cost shifting the CAM should include that no worker (per the definition of NSW WHS Act 2011) of the insurer is to suffer any levy, cost or charge as a result of the insurer providing the approved training.

Do you have any have any feedback on the proposed content?

Are there topics that are not covered that you would like to see included in the CAM?

Do you have any feedback or information that you would like SIRA to consider regarding these topics?

20. The union recognises that the list of proposed content is comprehensive. We do recommend the development of administrative standards to be developed for **case conferences**. This can be a powerful tool when used appropriately in avoiding disputation and providing clarity to all parties with regards to decision making and goals. It is likely this will be best established under the Claims Management chapter.
21. There also needs to be a topic in relation to **identification and mitigation of risks of secondary psychological injuries**. Again this should be found in the Claims Management chapter. We are mindful that this is an activity which needs to be done at both the initial stages and ongoing.
22. An area covered within the claims management chapters, both initial (Investigations) & ongoing (Surveillance) is the use of **Factual Investigators**. The union is of a view that it is appropriate for there to be a guideline with regards to their engagement, role and conduct. The continuing unregulated use of factual investigators by insurers has lead to a perverse outcome of investigation firms crafting reports to deliver outcomes that satisfy those desired by insurers and being rewarded with ongoing business. Further to this, factual investigators are being appointed to matters where insurers Case Managers could have derived the same information, creating an unnecessary cost burden on the scheme.
23. The union is mindful that there are no underpinning professional standards established with regards to the appointment and ongoing use of factual investigators, which has lead to a number of occurrences of unlawful practice and bias or incorrect reports. We note that at a meeting at Unions NSW on 19<sup>th</sup> April 2018, SIRA provided a report (limited to ICare claims) that there was an average ‘ten fold’ cost increase in relation to claims where a factual investigator had been appointed. The union acknowledges that sometimes it may be appropriate to engage factual investigators. This however needs to be weighed against the potential for further damaged to injured workers and protecting their rights.
24. The union attaches the Factual Investigations & Surveillance Guidelines developed by the former NSW WHS&WC Advisory Council, with a recommendation that they be adopted.

#### Focus Areas

What would you like SIRA to consider in these areas?

Are there any other claims management matters you believe would benefit for clarification from SIRA?

25. It is noted that many of the current list of issues identified as focus areas are already covered by guidelines. The union does not share SIRA’s views that there is a lack of clarity or ambiguity with regards to independent medical examinations or injury management consultants. Instead the system suffers from as identified in paragraph 17 “insurers engaged in unlawful practices as a mechanism of gaming the system”, whilst the regulator is asleep at the wheel.
26. As a result of the development of the CAM the union recommends that some minimum standards be established with regards to correspondence with injured workers. As a minimum correspondence should provide a reference or link back to the appropriate part of the CAM and/or guideline so that injured workers are able to inform themselves.

27. The union recommends that the current practice of providing workers with advice regarding provisional medical expenses and weeks of provisional weekly benefits below the statutory cap should be stopped. This process is causing anxiety with injured workers who interpret this information as a cut off, whilst at the same time nominated treating doctors are providing treatment advice based on misguided information limiting treatment or recommending substandard treatments based on artificial cost barriers they believe are in place. This misinformation is further exacerbated when insurers fail to make claims decisions within these limited timeframes or before medical expense caps are breached and fail to provide adequate communication to injured workers, which is too often the case.
28. The union recommends the adoption of the “A best practice framework for the management of psychological claims in the Australian workers’ compensation sector” (attached) as part of the “Managing psychological claims” focus area within the CAM. This document was supported during its development and final endorsement by the NSW representatives at Safe Work Australia in 2017. It would be disingenuous for it not to be implemented as part of this process.
29. The union notes the Victorian Ombudsman’s report in to workers compensation and the adverse findings which were made in relation to the conduct of the insurers and scheme agents within that scheme. We are also aware than many of these adverse practices identified within that report were occurring in NSW (and likely still are) and that many of the insurer’s identified in the report are working across both schemes. The union recommends that the CAM should clearly specify in the overarching document, that the practice of insurers linking bonuses, incentive payments and/or determination of contracts with their workers or third party providers to deliver adverse outcomes for injured workers is unlawful and will be considered as a noncompliance with the CAM.

## Recommendations

- That the penalties are totally inadequate to act as a deterrent given the level of damage done to injured workers & their claims by noncompliant insurers (or their agents) and when considering the size of the insurers and as such need to be recalibrated
- That SIRA provides clarity in relation to who it refers to as its “customers”
- The AMWU does not support the claims administration manual (CAM) simply being “a leading-edge online tool to assist insurers navigate the legislative landscape” & “Designed with claims managers in mind”.
- Standards by which insurers are obligated to administer the legislation must be freely available
- The review of guidelines should not be a process of disablement but rather enablement, ensuring fair and transparent processes that protect injured workers
- That self-insurers & licence insurers, licence conditions contain provisions which will ensure compliance with the CAM as a minimum standard
  - Such conditions need to be inserted immediately to all new or renewed licences so as to limit legal and contractual conflicts into the future.
- That a working group(s) consisting of the key stakeholders be established and funded by SIRA for the purpose of assisting the development of draft documents
- It should be left to the working group to determine what topics of the CAM it should concern itself with
- That the working group(s) be left in place following the creation of the CAM and review of the guidelines, so as to be able to continue to assist in updates and reviews

- The development of a detailed compliance and enforcement policy with a narrow hierarchical enforcement pyramid
- That insurers be required to provide 'regulator approved' training to all Case Managers and others that may have influence on workers compensation decisions and regular audits are conducted by SIRA to ensure training is rolled out as intended
- The development of administrative standards for **case conferences**
- The development of administrative standards in relation to **identification and mitigation of risks of secondary psychological injuries**
- The adoption of the Factual Investigations & Surveillance Guidelines developed by the former NSW WHS&WC Advisory Council
- That some minimum standards be established with regards to correspondence with injured workers
  - correspondence should provide a reference or link back to the appropriate part of the CAM and/or guideline
- That the current practice of providing workers with advice regarding provisional medical expenses and weeks of provisional weekly benefits below the statutory cap should be stopped
- The adoption of the "A best practice framework for the management of psychological claims in the Australian workers' compensation sector"
- That the CAM should clearly specify in the overarching document, that the practice of insurers linking bonuses, incentive payments and/or determination of contracts with their workers or third party providers to deliver adverse outcomes for injured workers is unlawful and will be considered as a noncompliance with the CAM

END