



## **Submission**

# **State Insurance Regulatory Authority: Review of the Workers Compensation Regulation 2016**

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**Submission by:**

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## Introduction

1. Unions NSW is the peak body for trade unions and union members in NSW. It has over 65 affiliated unions and trades and labour councils representing approximately 600 000 workers across NSW.
2. Our union affiliates cover the spectrum of the workforce, stretching from workers in finance, agriculture, hospitality, manufacturing, retail, construction to communications.
3. Unions NSW has been an active campaigner in relation to the workers compensation system for over a century.
4. Unions NSW welcomes the opportunity to make a submission to this review. .

## Workers Compensation Review

5. The objectives of the workers compensation system are:
  - *Securing workers' health, safety and welfare while preventing work related injury*
  - *Providing prompt treatment and rehabilitation to assist injured workers to return to work*
  - *Providing income and treatment payments to injured workers and their dependents*
  - *Providing a fair, affordable and financially viable system*
  - *Delivering an efficient and effective system*
6. Unions NSW submits that the current workers compensation system is failing to achieve any of these objectives.
7. Unions NSW submits that the workers compensation legislation requires fundamental reform to restore it to achieve its stated objectives: that is to provide support for injured workers, both financial and medical, to return the worker to the state they would have been if not for injury, disease or death.
8. The workers compensation system contributes less than half its resources directly to injured workers<sup>1</sup>. The current system rewards service providers for cutting support and enables fictitious “return to work” outcomes.

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<sup>1</sup> Safe Work Australia, Comparative Performance Monitoring Reports 2015

9. Unions NSW has developed principles that should guide reform of the workers compensation system, which is at **Attachment A**. We recommend the principles for the attention of SIRA.
10. Unions NSW understands that the Review of the Workers Compensation Regulation 2016 (the Review) is not the appropriate time for a re-casting of the legislation in accordance with our abovementioned principles and therefore agrees with the pursuit of Option 3 in the Regulatory Impact Statement (RIS).

### **PIAWE and Legal Costs for Work Capacity**

11. In relation to PIAWE and Legal Costs for Work Capacity, Unions NSW has made detailed submissions to the two reviews into these issues. These are attached at **Attachment B** and **Attachment C**. The RIS states that these items are outside scope however, the provisions of the current Regulation are and will be affected by any outcome of these reviews. Therefore Unions NSW expressly includes these two submissions in our submission to this Review.

### **Deemed Diseases Expansion**

12. Last year Safe Work Australia Commissioned a report, *Deemed Diseases In Australia, August 2015*<sup>2</sup> authored by Professor Tim Driscoll. The report calls for an expansion of the deemed diseases schedule that are attributable to work.
13. Listing diseases as attributable to work enables earlier intervention and access to medical support and also significantly reduces disputation. The current list in Schedule 1 of the Workers Compensation Regulation has not been updated for three decades.
14. The criteria provided for the update were sanctioned by the Safe Work Australia members after design by Professor Driscoll and Mr Barry Sherriff. The criteria included:
  - “1. *Strong causal link between the disease and occupation exposure.*
  2. *Clear diagnostic criteria.*
  3. *The disease comprises a considerable proportion of the cases of that disease in the overall population or in an identifiable subset of the population*”
15. The work by Professor Driscoll has been peer reviewed and also endorsed by Safe Work Australia members (including NSW). The Northern Territory Government has recently commenced legislative processes to amend their legislation and several other jurisdictions are also about to commence the updating process.

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<sup>2</sup> Safe Work Australia (Prof Tim Driscoll), *Deemed Diseases In Australia, August 2015*

## Recommendation:

***Unions NSW submits that Schedule 1 of the Workers Compensation Regulation be updated in line with the deemed diseases in the Safe Work Australia Report.***

### Access to Information for a Worker

16. Currently often the last person to know what a doctor has written about an injured worker is the injured worker themselves.
17. Currently injured workers are required to lodge a dispute before the information is shared.
18. There are significant time constraints for workers who undertake a dispute or seek a review of a work capacity decision. These timeframes lead the worker to be at a disadvantage if they have not got a copy of the medical reports that have been written about them.
19. The secrecy also leads to unprofessional reports with inaccurate information which can lead claims into disputation.
20. The WIRO Parkes Review was unanimous (employers, insurers and workers) in its recommendation that workers be able to access their own medical reports.
21. Although the Parkes Review did not adopt the Unions NSW recommendation regarding a real time online portal for injured workers to access the entire file, which would be a better and innovative Regulation, they did recommend allowing workers or their representatives to access this information without the requirement for a dispute to be initiated.
22. The confidential document WIRO, *Access to Information by a Worker Discussion Paper* is at **Attachment E**. The recommendations of the WIRO Parkes Project Advisory Committee are at **Attachment F**.
23. Unions have reported cases where injured workers have been dismissed for being unable to undertake the inherent requirements of the job based on medical reports that they have not seen or verified. The Macquarie University research Unions NSW commissioned (**Attachment G**<sup>3</sup>), noted that workers are often terminated on the basis of information contained in their workers compensation medical reports. These reports, although designed to assess a workers capacity

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<sup>3</sup> Markey R., Holley S., Thornthwaite L., O'Neill S., The Impact on Injured Workers of Changes to NSW Workers Compensation Report No.3 for Unions NSW, 2015

to work, are unfortunately used to calculate hypothetical work capacity, which can be applied to reduce workers compensation payments. These reports are also often used to deem the worker unfit for the inherent duties of the work.

24. For example, a lawyer injures their back getting boxes of files to court. The back injury requires surgery and 7 months later they are on the path to recovery but require some consideration of standing and sitting times as well as lifting restrictions. Their doctor's report overstates these restrictions. The law firm says they can't accommodate the restrictions. The insurance clerk takes this report and uses it to say the lawyer is fit for office duties (at any office job that doesn't require heavy boxes to be carried around) and therefore reduces the workers compensation payment to zero. The employer then uses the failure to return to pre-injury duties as grounds to terminate.
25. Unions NSW submits there should be a prohibition on the use of workers compensation medical reports for purposes other than the workers compensation process.

### **Recommendations**

***The Regulation should be amended to allow workers to access medical and associated medical reports contained on their employer or insurer files.***

***The Regulation should be amended to prohibit the use of workers compensation medical reports for purposes other than workers compensation.***

### **Lyme Disease, Lyme Disease like syndrome**

26. A number of workers are now suffering Lyme Disease like symptoms from exposure to workplace tick bites, through their work in coastal bushland environments.
27. Due to NSW locations being at the centre of the species of tick responsible for this syndrome, there is a need to elevate the support provided to injured workers who suffer the effects of this debilitating syndrome.
28. Several cases have been before the Workers Compensation Commission. However, all have had delay in their response and support for the injured worker and have involved significant disputation.
29. The cases determined in the NSW Workers Compensation Commission include:
  - ***Matter No: 009518/10 James Lewis Tucker & Service Stream Communications Pty Limited***

- **Matter No: 006428/2011 Robert James Soutar & Pacific Bay Investments Pty Limited Trading as Coffs Harbour Pacific Bay Resort**
- **M1-002174/14 Appellant: State of New South Wales (Office of Environment and Heritage – National Parks and Wildlife Service)**

30. The NSW Ministry of Health has had a slow medical response as there has been no significant interest in investing research into an area affecting such a small population. If Schedule 2 could be amended in line with the medical diagnosis procedures contained in these cases and in consultation with consultant doctors with the Lyme Disease Association of Australia then the suffering of workers exposed to this biological hazard at work can be minimised.

### **Recommendation**

**Unions NSW submits that “Schedule 2 Medical tests and results” is amended to include procedures for diagnosis of Lyme Disease.**

### **Deemed Employment**

31. Due to the NSW Government’s amendments allowing Uber to operate parallel with the taxi industry there is a now significantly similar work and work arrangements being undertaken by two types of workers. One type of worker is clearly covered for workers compensation if they are injured and one is not.

32. Similarly delivery drivers for fast food **restaurant** chains are covered by workers compensation whereas drivers for fast food **delivery** chains appear to operate without any protection.

### **Recommendation**

**Unions NSW submits that the definition of deemed worker should be extended in clause 64 to ensure adequate protection for workers in these areas and a suitable contribution should be determined and levied on the principle contractors for the new business model.**

### **Return to Work Coordinators**

33. Clause 17 refers to Return to Work Coordinator requirements for Category 1 employers.

34. The Macquarie University Research Report<sup>4</sup> commissioned by Unions NSW and numerous testimonies from workers have indicated that the return to work coordinator can greatly assist the injured worker with a successful return to work.

35. However, the Report also identified that if not undertaken appropriately the role of a return to work coordinator can have a negative effect on the return to work process. It was indicated that this occurred from under trained return to work coordinators and also return to work coordinators who mistook their role as a HR role to threaten or terminate the worker.

36. Unions NSW submits that the role is useful but their needs to be ongoing training and a code of practice that the return to work coordinator must abide by.

### **Recommendation**

***That Part 5 is amended to ensure that return to work coordinators are required to undertake initial and regular training.***

***That Part 5 is amended to ensure that return to work coordinators are required to abide by a code of practice.***

### **Table of amendments to the Workers Compensation Regulation 2016**

37. Whilst the Regulation is amended to accommodate the 2012 amendments at various points, undertaking this submission or omissions, by no means equates to Unions NSW support for the 2012 changes.

38. The RIS lists a series of changes that have been made to the Regulation. The table below lists several of our concerns with these changes. We note that if the change is repeated then the concern remains but has not necessarily been mentioned.

<b>2010 Provision</b>	<b>2016 Provision</b>	<b>Comment</b>
<b>Part 3</b>	<b>Part 3</b>	CWWR changed to PIawe- Acknowledged change needed, in line with 2012 legislation that Unions NSW still opposes.
<b>Clauses 6-10</b>	<b>Deleted</b>	Are the provisions in Clause 38 the only provisions that require the exemption? Would not a statement retaining all benefits of the 2010 Regulation for exempted employees provide greater reassurance?
<b>Clause 10A</b>	<b>Clause 7</b>	Is this the best mechanism for employment contracts with alternate ordinary contract hours contained in industrial instruments?
<b>Part 5</b>	<b>NA</b>	See Clauses 6-10 above.

<sup>4</sup> Markey R., Holley S., Thornthwaite L., O'Neill S., The Impact on Injured Workers of Changes to NSW Workers Compensation Report No.3 for Unions NSW, 2015

<b>Clauses 12-13</b>		
<b>Clause 25</b>		No issue if there is a mechanism to prevent Cat 1 organisations from creating false structures to avoid their consultation requirements.
<b>Clause 43</b>	<b>Clause 36</b>	Unions NSW opposes any attempt to generalise the information provided by the Authority. For example it would be a disaster if the specialist advice provided by SafeWork/SIRA was moved to Service First. Despite Service First advertising to be all things for all people they often cannot provide specific advice about particular specialist areas. Workers Compensation is such an area. Workers Compensation CAS is also part of the issue resolution process for workers compensation claims and the failure of this area to be suitably specialised may simply lead to greater frustration and unnecessary disputation.
<b>Clause 46</b>	<b>Clause 39</b>	<ul style="list-style-type: none"> <li>• Needs to be re-written as per the Parkes Project above and provision of information to the worker.</li> <li>• The exempted workers need a broader statement preserving their benefits as described in clauses 6-10 above.</li> <li>• The issue of legal practitioner being replaced with a law practice is first raised in this amendment. Unions NSW agrees with the change as long as there is no impediment for legal practitioners working for a union from undertaking this work because of the changes. We also do not wish for there to be any impediment on the access to representation for agents as a result of the changes to the Regulation. Union lawyers and agents make the workers compensation system dispute resolution processes more timely and less costly to the scheme.</li> </ul>
<b>Part 9</b>	<b>New</b>	A new clause should be included strictly allowing injured workers to have a support person. This will reduce the incidence of medical reports containing false or incorrect information and resolve the issue of one person's word vs the other.
<b>Clause 185</b>	<b>Clause 176</b>	This clause has not been included in the Review draft of the Regulations.
<b>Schedule 5</b>	<b>Schedule 5</b>	Why wasn't this replaced with similar penalties elsewhere, and the penalties are all low?

## Attachment A: Union NSW Position paper "Workers Compensation Principles"



**Attachment B:** Unions NSW Submission on PIAWE Regulation

**Attachment C:** Unions NSW Submission on Legal Costs for Work Capacity Review

**Attachment D:** Safe Work Australia Report ,Deemed Diseases In Australia, August 2015 by Professor Tim Driscoll

**Attachment E:** WIRO, Access to Information by a Worker Discussion Paper is attached.

**Attachment F:** WIRO, Parkes Project Advisory Committee Recommendations

**Attachment G:** Markey R., Holley S., Thornthwaite L., O'Neill S., The Impact on Injured Workers of Changes to NSW Workers Compensation Report No.3 for Unions NSW, 2015

The END

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