Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

UnionsWA

Bill Clause	Comments
General	
7 - Reasonable Administrative Action	Section 7 of the Consultation Draft introduces the concept of "administrative action", which includes the following: • An appraisal of a worker's performance; • Counselling action (both formal and informal); • Suspension action; • Disciplinary action (both formal and informal); • Anything done in connection with the above; and • Anything done in connection with a worker's failure to obtain a promotion, classification, transfer or other benefit, or to retain any benefit, in connection with the worker's employment. The Consultation Draft then excludes any psychological or psychiatric disorder that wholly or predominantly arises from administrative action (unless it is unreasonable or harsh), or the expectation of administrative action. This is a significant expansion compared to the current provisions. Currently an injury does not include disease caused by stress if the stress wholly or predominantly arises from: • Dismissal, retrenchment, demotion, discipline, transfer or redeployment (unless it is unreasonable or harsh); and • Not being promoted, reclassified, transferred, or granted leave of absence or any other benefit in relation to the worker's employment (unless it is unreasonable or harsh); or • The expectation of these matters. These extra measures were not sought or recommended in the WorkCover Final Report, which raises concerns as to why they are included in the Consultation Draft.

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	UnionsWA believes that these provisions do not represent the fairness that should be at the heart of a decent workers' compensation system. Our experience with these provisions in the Comcare jurisdiction is that they tip the balance against the worker and will exclude many genuine stress and mental health claims from the workers compensation system. Compared to other Australian jurisdictions Western Australia has low rates of stress claims and the current provisions have been some of the most successful in Australia at arresting the increase in such claims (Guthrie 2010[1]). These concerns are compounded by the fact the concept of administrative action is designed to limit claims in relation to psychological injuries. This has been the lived example under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). Section 7 of the Consultation Draft replicate section 5A of the SRC Act. In *CBA v Reeve*, a Full Court of the Federal Court made the following comments on administrative action at [73]: *Here, the purpose of s 5A was to broaden the exclusion of matters from the previous definition of "injury" so that an employer would not be unduly inhibited in taking reasonable administrative action in respect of an employee's employment. The Parliament sought to ensure that an employer would be freer to deal with an employee, by taking disciplinary action or deciding to deal with that employee as an individual in respect of his or her employment, than had been the case under what it considered were narrow judicial interpretations of the old exclusion in s (4)(I).* Administrative action in the SRC Act has been subject to significant litigation in superior courts, including the High Court. Given the near identical nature of the provisions in the Consultation Draft and the SRC Act, it would be hard to see a situation where that case law does not bind the WA courts. We note that in WA, psychological injury and stress claims only make up a very small number of workers' compensation claims. In the 2021 WorkCover Statistical Report, mental stress claims only accounted for 3% of all lost time claims. [1]
12 - Definition of Worker	UnionsWA strongly opposes the adoption of a definition which will exclude some groups of workers who are currently captured by the existing definition of worker. Reducing the scope of the definition to cut workers out of the system is unjust and adopting this definition would be a deliberate decision to diminish workplace rights and protections to many working people. This definition was adopted in Queensland and the North Territory. After the five yearly review of the Queensland scheme the report commented that:

[1] https://www.workcover.wa.gov.au/wp-content/uploads/2021/07/Stress-Related-Workers-Compensation-Claims-Statistical-Note-2021-BISstatrep.pdf

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	Basing the employee definition largely on the PAYG concept has the advantage of simplicity, and simplicity is something that is liked by the parties, especially by employers. But it is not as simple as all that. Not all 'workers' are employees. The need to have a definition which encompasses all kinds of work is vital for the union movement. We have seen countless examples of employment structures created to avoid the PAYG definition. The Queensland report ultimately recommended that they move away from the PAYG test and adopt a different definition of worker. It would be unfortunate for WA not to learn from the experience in other schemes where this definition has been trailed and has failed. UnionsWA and our affiliated unions also hold concerns regarding the PAYG definition being enforceable for disease claims. It may take 20 or more years for some occupational disease to present after exposure at work. Record keeping requirements for employers and individuals are set at 7 years. This definition will likely create legal impediments and a raising of costs for workers as they attempt to prove employment status well after the fact. We support retaining the current definition of worker which is well understood by stakeholders in the system. Regardless of which definition of worker which is adopted, we strongly support the in addition of a deeming mechanism which would allow WorkCover to bring groups of workers into the scheme where they fall out of the definition in the Act. This is vitally important as there is ongoing structural change to how workers are engaged within the labour market employers seeking to use legal loopholes to exclude workers from basic industrial rights.
34 - Mandatory authority for collection and disclosure of information	Section 34 of the Consultation Draft introduces a mandatory consent mechanism. This mechanism provides that where a worker makes a claim for compensation, section 34 authorises the collection and disclosure of "relevant information" by authorised recipients. Under the current claim system, authorities for the disclosure of information are signed by workers on a voluntary basis. Authority can also be revoked at any point during the process. The WorkCover Final Report sought the introduction of this mandatory consent mechanism on the basis that, "A failure by a worker to consent to release of relevant medical information to an employer or insurer has the capacity to slow down and, in some cases, halt the claim process".[1] The Final Report goes on to explain how it saw such a mechanism operating:

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	It is WorkCover WA's intent that a worker be required to authorise release of personal information inclusive of sensitive information to the employer or employer's insurer where that information is relevant to the assessment and management of the claim including return to work options. *The party from whom information was required would need to satisfy themselves the information was relevant to the worker's claim before releasing it.* *The authority for the release of information collected by the insurer to other parties would likewise authorise the release of information for the purposes of assessing and managing the claim only.* There are several fundamental flaws to this mandatory consent mechanism and how WorkCover sees it being carried out. The first is the assumption that workers currently do not sign authorities or revoke them for vexatious reasons. Many workers rightfully wish to seek legal advice before the signing of any release. It is also the movement's experience that vulnerable workers will often sign broad authorities that allow for the release of information far and beyond what is required to assess a compensation claim without understanding the implications such an authority. It is entirely right that workers have the right to revoke such authorities. The second flaw is the assumption that there is common and wide agreement on what information is relevant to a claim. Section 34(1) defines "relevant information" as medical and personal information relating to the worker's injury; their claim or entitlement for compensation; or injury management for their injury. What is "relevant information" is a legal test. Currently when there is a dispute about disclosure of information is it settled by an Arbitrator. This is the appropriate mechanism for legal questions. Section 34 of the Consultation Draft seeks to circumvent the proper method of settling legal disputes by offshoring that determination onto "authorised disclosers". Authorised disclosers may include individuals such as doctors, nurses, physiotherapists, and rehabilitation providers. None of whom are legally trained, and yet WorkCover's position is that they should bear the onus of satisfying themselves that any information sought is relevant to a worker's claim.
37 - Provisional payments	UnionsWA supports the provisional payment provision for pended claims. The quick resolution of workers compensation claims is a fundamental tenant of any Workers Compensation scheme to ensure justice to injured workers. Unfortunately, the pending mechanism has long been used as a bargaining strategy to move workers to settlements. Often workers are in dire financial straits after having no payments for an extended period

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	which leads to a perverse power imbalance when the negotiation of these settlements occurs. However, we wish for WorkCover to clarify in the Act or regulations the following: • If a claim is rejected, if a worker incurs unpaid medical expenses while the claim is pended - if the claim is then rejected and the medical payments are unpaid that the insurer is liable for these expenses; • That a worker still has the right to apply for conciliation while the claim is pended. We also note that WorkCover will need to increase resourcing into conciliation and arbitration will be needed as this will increase the rate of rejected claims
56 - Step Downs	The trade union movement has long been opposed to stepdown provisions in Workers Compensation law and remain so. UnionsWA welcomes the move to move to extend step downs to 26 weeks. However, we have concerns regarding the extension of a 15% step down to encompass both all award and EBA workers. Under the current Act the lowest paid workers in WA are only currently required to lose over-award payments at the point of step down. While for some of these workers this is may be significant step down above the 15%, for most it does not represent at step down at all. The lowest paid workers in this state are, by and large, paid under the award. For many of these workers introducing a step down for the first time, even at 26 weeks, is unjust. This will save an extremely small amount of money for insurers in the system, but the reduction in compensation of 15% will have severe consequences to the long term injured, low paid workers themselves. It is a great myth in the workers compensation system that step downs provide an incentive to return to work. There is no compelling evidence that this is currently the case. There is no ethical reason for such a step down. Adding to worker's physical pain by inflicting financial pain is an anathema to the Labor movement. There is no evidence it restores workers to employment more quickly. It can therefore only be a mechanism to reduce costs to insurers and employers. The expenses of workers don't change after the point that compensation steps down. They are just asked to do the same with less compensation, often adding substantial stress to the workers compensation and return to work process.

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	The step-down provisions should be removed in their entirety for all workers.
61 - R**educing or discontinuing income compensation on basis of worker's return to work**	UnionsWA acknowledges that the detail of this will be in regulations, however the detail of this section is important for clarity and protection of workers, and we believe it should be maintained in the Act.
62 - Entitlement to accrue and take leave	This provision provides much needed clarity and ensures that workers who suffer from workplace injury does not receive additional disadvantage by missing accrued benefits. These accrued benefits can often be substantial for the worker and in some instances could make a worker a double victim by removing the accrual of other forms of leave that can be used as a safety net if a worker's personal circumstances or illness requires personal leave unrelated to the workers compensation claim.
73 - Requirement that medical and health expenses be reasonable	UnionsWA supports the submission of our affiliate the CPSU/CSA. We have concerns regarding the proposed introduction of gap payments for workers compensation claims in other schemes. A fundamental object of the scheme should be that a worker should not be out of pocket for having suffered a workplace injury. Any definition of reasonable expenses should reflect what the worker must pay and that any form of gap payment is expressly prohibited in the Act.
164 - Injury Management Case Conferences	The proposal to introduce a compulsory Injury Management Case Conference will be to the determent of injured workers. Unions find that these case conferences currently are often an unproductive exercise or used to ambush workers in a meeting filled with employer and insurer representatives. These conferences should be voluntary for the worker and should not be mandatory. If a work chooses not to attend, there are other appropriate avenues to discuss injury management or a worker's capacity to return to work. In our experiences workers attend the vast majority of case conferences. The small number of workers, often with genuine reasons not to, to attend case conferences does not justify mandating attending. Further to our previous submission on injury management case conferences, UnionsWA submits that a provision should be included to ensure that a conference only proceeds after both a claim and liability are accepted. UnionsWA believes that this safeguard will protect against some of the practices which we expressed concern about in our previous submission to WorkCover.

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171 - Prohibition on employer attendance at medical examination	UnionsWA and our affiliated unions have long held concerns about the behaviours of a number of other participants in the workers compensation scheme attending what should be private and confidential medical appointments with injured workers. We have had members who have had to undergo intrusive medical examinations or who have had to remove articles of clothing during appointments with the employer or a representative of the employer it the appointment. This has included young women with older male managers. In 2017, UnionsWA exposed the story of a young union members experience in this space.[2] Unfortunately, this is only the tip of the iceberg. Given the long-term trend with medical appointments, this provision should be implemented with no exemptions. This provision must ensure any representatives of insurers, brokers or the employer must be banned from attending. We support current structure of the provision; however, no penalties are attached to the section. This undermines enforceability and this must be amended to ensure that there is a real disincentive for insurers, self-insurers and employers.
Division 4 - Rehabilitation Payments	Rehabilitation is currently a reasonable expense, and part of a worker's entitlement. It forms part of the expenses a worker can claim as part of his treatment. The worker chooses his own provider, and it is capped. The proposal to remove it as an expense is mean and dangerous. It will mean that employers or insurers will choose from a panel of their own and implement rehabilitation that suits employers. This proposal removes choice from injured workers and strips workers of an existing entitlement.
Reform of extension of prescribed amount and lump sum payments.	The current prescribed amount is low by Australian standards. According to the latest Safe Work Australia Comparative Monitoring Report WA premium rates are at or near the lowest in Australia, while the maximum lump sum payments are also the lowest. Objectively it makes little sense as to why a worker in WA is entitled to less lump sum payments compared to other jurisdictions. Especially at a time of sustained low premium rates. Additionally, WA's prescribed rate is significantly behind other jurisdictions. Given the length of time between reviews and amendments to workers compensation schemes, UnionsWA strongly recommends that

[2] https://www.abc.net.au/news/2017-12-05/worker-forced-to-have-company-rep-at-doctor-appointment/9225290

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	WorkCover reviews the statutory maximum benefits as part of this review. For this review to be delayed for another decade would be manifestly unfair to workers in the scheme.
Payment of superannuation while injured	Superannuation should continue to be paid by employers on all payments of compensation as currently is done by the State Government for its workers. Loss of superannuation can be a significant extra loss by workers, amounting to up to $25,000 over a period of 30 plus years. It particularly punishes young workers (who lose the interest for a long period) and people who for family reasons are in and out of the workforce and already have reduced superannuation entitlements. Superannuation will not be taken as a payment of compensation but simply an obligation of the employer to continue to make those payments. According to a recent report by KPMG[3] *In the years approaching retirement age, the gender superannuation gap can be anywhere between 22 per cent and 35 per cent. The median superannuation balance for men aged 6064 years is $204,107 whereas for women in the same age group it is $146,900, a gap of 28 per cent. For the preretirement years of 5559, the gender gap is 33 per cent and in the peak earning years of 4549 the gender gap is 35 per cent.*
Settlements	UnionsWA recognises that WorkCover believes current structure outside the act for settlements is not sustainable. However, the proposal to significantly curtail the ability to settle all together is not supported. Reform the structure within to enable structure and access within the workers compensation system can occur to ensure the process has oversight. We recommend that the draft Act be amended to harmonise the Whole Person Impairment to 5% to be in line other schemes such as the *Motor Vehicle (Third party insurance) Act 1941.* The proposal to require that insurer accepts liability for the claim before it can be settled is problematic, particularly given that contentious claims which are the most beneficial to settle rarely have liability accepted. The process to go to an arbitrator to resolve liability would be expensive and extremely time consuming. Especially when appealed.

[3] KPMG Australia, *The Gender Superannuation gap: Addressing the options*, August 2021 (p.2) https://assets.kpmg/content/dam/kpmg/au/pdf/2021/addressing-gender-superannuation-gap.pdf

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	This would cause significant issue for the worker who would have justice delayed and expenses increased before reaching a settlement.
Cancer Notification Scheme	It is estimated that 3.6 million Australian workers are exposed to carcinogens at work and that over 5,000 new cancers each year in Australia are primarily attributable to an occupational exposure to known carcinogens. However, while thousands of cancers a year are diagnosed only a few hundred Australians per year receive compensation. The number of occupational cancers compensated is estimated to be less than 8% of the total, most of these (73%) are mesotheliomas. While the compensation path for mesothelioma patients is well understood by the public and medical professionals, the ability for patients to claim compensation for other occupational caused cancers is not as commonly known and is rarely identified by doctors. This 'under compensation' has a twofold impact, • it has an impact on workers and their families by not receiving the compensation they are entitled to under current law; and • it has an impact on the State Government through the public health system picking up the cost of treating cancer cases that might otherwise be funded through the workers' compensation system. Simple solutions exist in other countries which have addressed the problem of under compensation. We are strongly of the view that Western Australia should trial a system to address this problem by a process of sharing health information between government agencies. Such a system exists in Norway and has recently come to our attention. The Norwegian system works as follows: as certain cancer types known to be more commonly linked to occupational exposures are diagnosed and reported to the Cancer Registry, the information about potential causality is shared from the Cancer Registry to Norway's WorkCover equivalent. The WorkCover equivalent then proceeds to contact each patient with information containing: 1. Guidance on the possibility that the lung cancer, mesothelioma, or sino-nasal cancer diagnosed may have a link to specific industries, occupations, and substances; and 2. The regulation of medical support and the possible workers compensation related to cases that can be demonstrated to be linked to those exposures; and if appropriate 3. The next step for patients who believe they may have an occupational cancer, which involves an assessment of their circumstances regarding potential exposure history The cancer registry in Norway estimates that in men 20% of lung cancers, 84% of mesothelioma, 32% of nasopharynx and naso/sinus

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	cancers are contributed to by exposure to known occupational exposure to carcinogens. The sharing of information between government agencies, and the simple act of writing a letter has significantly increased the number of cancer patients who receive the compensation payments to which they are entitled and deserve.
Sanctions for Diverting Claims	Currently there is a large group of workers who do not make claims for fear of repercussions either express or implied. These workers are often in types of insecure employment such as labour hire or employed as casuals. When those workers later go to make a claim, they suffer significant difficulty, often with workers pressured to either have claims diverted to income protection, to take sick leave or to go on unpaid leave with employers covering medical expenses. Often these workers are left significantly worse off. This is all to ensure that the premium rates for the employer are kept low. If the injury is significant, often it does find its way to the insurer sometime after the injury with the outcome of delayed treatment to injury which prolongs the workers return to work. While acknowledging that many workers may not wish to lodge a workers compensation claim for extremely minor claims, often for risk of future discrimination or due to the poor reputation of workers compensation, employers should be obliged to at least report lost time injuries to their insurer even if no claim is made. That will have the effect of preserving a worker's claim for later or allow intervention by the insurer if the claim requires medical treatment. There should be significant enforced penalties for breach of the obligation.
Conciliation and Arbitration	A key area of reform for unions is the WorkCover conciliation and arbitration services. UnionsWA recommends the adoption of a number of reforms to the services. These include: Fast track arbitration hearings for liability disputed claims where medical treatment needed urgently. Often return to work is delayed due to wait times for dispute services. Ensuring quicker access will reduce long-tail claims. Additionally, Specialised services for mental health and stress claims within WorkCover will ensure that they are dealt with more effectively and efficiently to reduce pressures on the dispute services system.
160 - Employer may be ordered to establish and implement return to work program	UnionsWA supports the inclusion of this provision in the new Act. Return to work programs are often delayed when an employer refuses or is unwilling for industrial relations or other reasons to have the worker placed back in the workplace.

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	This change will allow some workers to get back into the workplace and off workers compensation sooner, benefiting the worker and employer.
505 - Pre employment screening	UnionsWA strongly supports this section. Discrimination based on workers compensation claims during employment processes is rife but can often be difficult or cost prohibitive to substantiate. We have previously had concerns around these practices as it relates to workers who have left employment after making a claim due to sexual harassment or bullying. Employer requests to disclose what can often be sensitive or traumatic experiences during a job application process should not be allowed to continue. The fear of future discrimination due to workers compensation claims also leads to underreporting in the system, as workers who fear future discrimination do not report small claims preferring to use personal leave or lose work rather than claim.
Prohibition on insurance brokers involvement in the medical or claims process	Insurance brokers are increasingly becoming involved in the claims process beyond just advising and consulting with employers and being an intermediary between the employer and in the insurers. Our experience is that that several insurance brokers are increasingly becoming involved in claims management with injured workers with the only goal of reducing the cost to employers. This motivation is increasingly leading to stress to workers as they are often accused of wrongdoing by brokers as they try to intervene on behalf of the employer against the insurer and worker to drive down the cost of the claim. This behaviour in the system would not be tolerated by other scheme participants, yet the lack of regulation around the brokers role results in limited repercussions. We believe the act should: • Ban brokers or those employed in broker firms from injury management case conferences; • Prohibit in participating in any form of medical reviews with worker; and • A mechanism be established to enable a broker regulation structure to be put in place in the future.
Workers Compensation Coverage for Pre- Employment Medical Appointments	Affiliates have expressed concerns to UnionsWA that workers while attending pre-employment medical conferences to prove capacity to work safely they have been asked to lift and carry weights beyond what would be acceptable in the workplace. Lifting weights of this weight would be considered dangerous in a workplace and the activity puts job applicants at risk. I Given these medical appointments are often the last step in gaining employment we believe that these applicants should be included in the

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	new definition of worker and any injuries that occur while undertaking them should be covered by the employer's workers compensation insurance