Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

United Professional Firefighters Union of WA Submission

Bill Clause	Comments
General	The use of regulations (subsidiary legislation) to ensure the Act remains up to date moving forward is understandable and has some merit, but the United Professional Firefighters Union of WA (the Union) holds very serious concerns about the lack of any details on regulations and the amount of content (and therefore worker rights and entitlements) that it is proposed they contain. The amount of content proposed to be addressed by regulation is too extensive and key parts of the Act must be retained in the Act itself. The overuse of regulations will leave workers with less secure rights and ones that are more liable to be altered with changes in governments. It is of extreme concern that during the consultation process the Insurance Commission of WA's Chief Executive was quoted in an newspaper article in *The West Australian* ('stressed, sick and expensive' on 1 November 2021) that outlined discussions on "how to rein in claims" with the government. Combined with the absent regulations, this raises important questions around the genuine nature of this consultation from broader government and how the regulations will be drafted. If there is a concern from ICWA around the number of claims the focus should be on a better system to prevent injuries, and how to better look after injured workers so they return to work quicker, rather than look at ways to deny and limit legitimate claims.

Bill Clause	Comments
	In our view the current consultation process is only partial, and not full and final, as the regulations have not been provided at the same time. These regulations must be drafted and further consultation must occur prior to the draft bill being legislated. In addition, there are a several changes, or a lack of changes, that are against the current party of government's policy platform, some of which are pointed out in our submissions on specific clauses below. Any modernising of the Act by this Government should be in line with its own policy platform and should be aimed at protecting the rights of workers.

FIREFIGHTER DISEASES

Bill Clause	Comments
Bill Cl No 11 and 550	- Hazardous Firefighting Employment should be clarified to read (additions underlined): ***hazardous firefighting employment****, in relation to a worker, means firefighting employment during which the worker —* *(a) is engaged as a member or officer of a permanent fire brigade as defined in the Fire Brigades Act 1942 section 4(1);* ~~*or*~~ *(b)* <u>*For those not covered by sub(a) above*</u>*, attends hazardous fires at a rate at least equivalent to the rate of 5 hazardous fires per year;* This is to ensure that the current distinction between FES and Non-FES employees is still clear, and that be clearer that people who have service in both FES and Non-FES employment can have the cumulative service recognised as 'hazardous firefighting employment'. **Submission:** The definition of 'hazardous firefighting employment' be amended as the proposed drafting above outlines.

Bill Clause	Comments

- The proposed "note" currently inserted between 11(2) and 11(3) should be deleted. The sentence immediately prior to the note in cl 11(2) makes it clear this is a rebuttal presumption and this insertion is unnecessary.

Submission: The "note" in clause 11 is deleted.

- The table of Firefighters Diseases should be amended:

  - To action the recommendations Commonwealth Attorney-General Departments '*Review of the Firefighter provisions of the Safety, Rehabilitation and Compensations Act 1988'* (2017) regarding the updating of the Firefighter Diseases:
    - Recommendation No. 1 to reduce the qualifying period for Oesophageal Cancer from 25 to 15 years;
    - Recommendation No. 2 to introduce malignant mesothelioma as a firefighting disease, with a qualifying period of 15 years.

  - Rates of Skin Cancer and Melanoma have been shown to occur at significantly higher rates in firefighting populations compared to the general population, with an Australian study of firefighters finding a 45% increased occurrence for career firefighters (Final Report Australian Firefighters' Health Study, School of Public Health & Preventative Medicine, Faculty of Medicine, Nursing and Health Sciences, Monash University, December 2014, Table 10, page 49). This is consistent with findings from studies in other countries such as the 2009 Nordic Study ("Occupation and cancer - follow-up of 15 million people in five Nordic countries", E Pukkala, J I Martinsen, E Lynge, H K Gunnarsdottlr, P Sparen, L Tryggvadottir, E Weiderpass, K Kjaerheim, Acta Oncologica, 2009, 48: 646-790, accepted 20 March 2009.)

  - The "2006 Lemasters Study" was a meta-analysis review of 32 studies involving more than 110,000 firefighters ("Cancer Risk Among Firefighters: A Review and Meta-Analysis of 32 Studies", G K Lemasters PhD, AM Genaidy PhD, P SUccop PhD, J Deddens PhD, T Sobeih PhD, H Baniera-Vlruet PhD, K Dunning PhD, J Lockey MD MS, Journal of OccupatJonal and Environmental Medicine, Volume 48, Number 11, November 2006.). This study found a 58% increased occurrence of stomach cancer for career firefighters over that expected in the general population.

  - To bring the update and modernise the list of diseases to reflect current medical , and best practise in other jurisdictions – please see further information on these other additional diseases below.

Submission: The qualifying period for Oesophageal Cancer be reduced to 15 years, malignant mesothelioma, skin cancer, melanoma, and stomach cancer be added to the list of Firefighting diseases.

Bill Clause	Comments
	- Clause 11(3) should have some clarifying words so that it is clear all firefighters covered by clause 11 do not need to meet 11(3) (a) and (b), and potentially (c), to meet the establish a claim under this clause. Specifically, we submit that it must be amended so that it is clearer that clause 11(3)(a), and any criteria under 11(3)(c), apply to permanent brigade employees. - Clause 11(3)(b), despite being reflective of the current wording in the Act, is a confusing clause that needs to be re-written. The Union's understanding is that this clause is to provide for an additional criteria for currently defined Non-FES employees to meet regarding attending the required number of hazardous fires. The Union holds concern that sub (11)(3) is currently worded in a way that may result in (11)(3)(b) being applied to permanent brigade members, which we believe should not occur. The sub clause should be amended to make it clear it applies to non-FES/non-permanent brigade firefighters only. Further, the wording around "the lesser of the following" is unclear as the two options have an "and", and could be made clearer with an "or", or ";". We note the FES Act re-write has ";" instead of the current "and", in section 36ZN. However, the need for a "lesser" period at all is questioned as the timeframe to be evidenced should be the respective qualifying period, which for all currently listed Firefighter diseases is 5 years and over. **Submission:** Draft Clause 11(2) be amended to be clearer and ensure it applies only the current Act Non-FES employees. Removal of current 49E: The Union supports the removal of the 5 year review and subsequent requirement to table a report in parliament. Clause 550: The separation of the time limitation on claims under clause 11 to clause 550 may also cause confusion and provide false hope to firefighters who read the new bill and believe there is not a time limitation in clause 11. The Union believes that no limitation dates for clause 11 should exist in the draft bill at all, as firefighting did not suddenly become carcinogenic in 2013, which the new bill should recognise, and given the timeframes would only be a potentially relevant change for a very small number of firefighters. **Submission:** The 5 year review of the firefighting diseases is removed, along with the commencement date for the clause to give full retrospective application to it.

Bill Clause	Comments
Bill Clause No 11	Currently under Schedule 4A the *Workers Compensation and Injury Management Act 1981* there are 12 cancers listed as presumptive cancers for firefighters. Since this schedule came into effect on 13 November 2013 additional evidence has come to light to provide support that female firefighters are also being diagnosed with female reproductive cancers of which are associated to their role as a firefighters and the toxic, carcinogenic and hazardous materials they are exposed to within their role. Further, since the introduction of this Schedule the number of female career firefighters in Western Australian has increased with this trend only further increasing as time passes. As a result the current Schedule 4A is no longer in favour of the "worker", with male firefighters afforded more protection for their reproductive organs than female firefighters. Studies from other jurisdictions, who have larger populations of female Firefighters that have served for greater periods of time, such as San Francisco in the USA has resulted in additional female presumptive cancers, being recognised as presumptive. The International Agency on the Research on Cancer (IARC) has linked ovarian cancer to exposure to Benzenes, which are a common toxin produced by fires. (IARC Monographs on the evaluation of cardnogenlc risks to humans" Benezene, Volume 120, International Agency for Research on Cancer, World Health Organisation, 2018.) **Submission:** To ensure the firefighting diseases in clause 11 are modernised and reflective of best practise we recommend that cancers suffered by female firefighters such as ovarian, thyroid and cervical are all added on to the list of presumptive cancers.
Bill Clause No 11	The table of recognised firefighter diseases should also be expanded to include a rebuttable presumption for Post-traumatic stress injury ("PTSI"). The range of incidents that firefighters attend over their careers, such as car crashes, suicides, rescues, fires and the like all under pressure, provides more than sufficient exposures to warrant this recognition in legislation. Firefighters deserve to have this recognition so that they can be adequately assisted to obtain the assistance required as early as possible to treat and prevent deterioration in mental health which has been caused by their work. The Union understands this presumptive recognition is being provided to our fellow front line emergency workers in the privately run St Johns Ambulance service. This is commendable and appropriate. We believe the state government employed Firefighters are just as deserving and have sufficient cause for equivalent coverage. We also note other jurisdictions have already provided this presumption for firefighters, including in Australia. The introduction of this rebuttal presumption is also consistent with the current party of government's policy platform at paragraph 247(i). **Submission:** PTSI is recognised as a presumptive for Firefighters.

FURTHER DRAFT BILL SUBMISSIONS

Bill Clause	Comments
No Current Clause - Cancer Notification Schemes	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.

Bill Clause	Comments
	The cancer registry in Norway estimates that in men 20% of lung cancers, 84% of mesothelioma, 32% of nasopharynx and naso/sinus 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. The introduction of this scheme would be consistent with the currently party of government's policy platform, *WA Labor Party Platform 2019* (Labor Party Platform), paragraph 239, regarding assessing ways to better recognise occupational cancers. **Submission:** The draft bill should adopt a system for reporting of occupational exposures and reporting occupational cancers based of the Norwegian model.
Bill clause No 7	The addition of the new exclusions for reasonable administrative action is unacceptable and is a significant change to the current Act. These changes appear to copy the section 5A exclusion in the *Safety, Rehabilitations and Compensation Act 1988* (Cth), which has increased psychological claims denied under that Act. The effect of these changes would have a similar impact and deny legitimate claims from workers, with terms used – such as 'informal counselling' very broad and vague. Given *The West Australian* newspaper article of 1 November, referred to above, in relation to an active discussion on how to deny or limit claims, the Union sadly cannot help but theorise that this is a shameful attempt to deny and limit claims. The inclusion of such provisions will likely lead to the exclusion of legitimate stress claims and is a regression, not modernisation, of the current Act. These provisions do not represent the fairness that should be at the heart of a decent workers' compensation system and will exclude many genuine stress and mental health claims. Further the Union believes accepting and treating all stress claims would be cheaper for the insurer and a more worker friendly option. The investigation and claims processes in place for stress claims are costly and causes delay, and therefore often result in delayed treatment or additional stresses and deterioration in the workers' health. Early intervention is key to ensure good outcomes and the best chance of a return to pre-injury roles as soon as possible. The Union has seen many of its members have their health issues exacerbated by the claims process and the new legislation should not be introducing new barriers and ways of denying claims but instead should be making access and treatment easier. This is also not consistent with the Labor Party Platform, paragraph 235, as it would prevent injuries that have 'arisen out of or in the course of employment', and therefore undermining the whole purpose of the Act.

Bill Clause	Comments
	Submission: The total removal of the current additions to the reasonable administrative action exclusions.
Bill clause No 9	**Submission:** Sub- clause 9(2)(a) should be removed so that journeys to and from work covered by the draft Bill. This would be consistent with the Labor Party Platform, paragraphs 236(i) and 251.
Bill clause No 12	The proposed definition of "Worker" will exclude workers from the coverage of the draft bill who are already covered by the Act and is too narrow and simplistic. It will also provide a number of challenges and limitation for occupational diseases or those which require proof of employment further back than the 7 year employers are required to keep PAYG statements. A body of case law has developed over the years regarding the issue of who is a worker, and this should be codified and not overruled or modified by the new definition. 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. We 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, with employers seeking to use legal loopholes to exclude workers from basic industrial rights. This change to the definition of worker is also does not align with the Labor Party Platform, paragraph 235, that workers compensation should be available "on a non-fault basis where an injury 'arises out of or in the course of employment'. The Union submits "out of the course of employment" is a broader definition that proposed and should guide any considerations in relation to defining who is covered by the Act. **Submission:** Definition of 'worker' not be amended to reflect the current definition, including case law, with the addition of the deeming provisions to ensure the bill provides appropriate coverage for WA workers.
Bill clause No 19(3)(b)	The limitation on making claim if the worker has not resided in Australia for the past 24 months prior to making a claim does not appear to take into account or recognise latent injuries.

Bill Clause	Comments
	Injuries such as those occurring under the dust diseases, Noise Induced Hearing Loss or presumptive cancers provisions all take time to become apparent and the fact that the worker has not resided in Australia for 24 months prior to the diagnosis does not mean the injury lacks sufficient connection with WA, where the exposure or entire required qualifying period may have occurred. This provision isfleft as is could see injured workers unfairly and unjustly denied claims when there is a strong link and connection to the state. **Submission:** Draft clause 19(3)(b) should be removed and the issue of 'significant connection' with the state should be determined on the merits of the circumstances on a case by case basis.
Bill Clause No 34	The proposed introduction of a mandatory consent mechanism is a regressive change and one that undermines the basic principle of a person having ownership and control over their medical information and the right to privacy contained in the *Privacy Act 1988 (Cth)*. Even the term mandatory consent is itself an oxymoron. There are several fundamental flaws to this mandatory consent mechanism and how it would reasonably be applied. Further there is no need for this provision with workers currently signing authorities and from the Unions perspective there is no issue with vexatious withdrawing/revoking of authorities. Many workers rightfully wish to seek legal advice before the signing of any release. It is also the Union's experience that vulnerable workers will often sign broad authorities that allow for the release of information far beyond what is required to assess a compensation claim without understanding the implications such an authority. It is entirely appropriate that workers have the right to revoke such authorities. Another issue with this proposal 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. The reality of this provision is that it will likely lead to entire medical and hospital records being released to insurers/employers, releasing personal and non-relevant information. 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 draft bill seeks to circumvent the proper method of settling legal disputes by outsourcing 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. The Union does not believe the existing arrangements do not provide sufficient information or processes to prevent the insurer from determining and managing claims.

Bill Clause	Comments
	Submission: Removal of the mandatory consent changes in the Bill.
Bill Cl No 37 to 45 - Provisional payments	The Union supports the introduction of provisional payments for claims that are pended. 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 which leads to a perverse power imbalance when the negotiation of these settlements occurs. However, further clarity is required in these provisions, specifically: • Access to the provisional payments should occur following the issuances of a deferred decision notice, and not a later date proscribed in the regulations. • If a worker incurs unpaid medical expenses while the claim is Pended, and then the claim is then rejected, the insurer should remain liable for the unpaid medical payments; and • 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. **Submission:** Further drafting should occur on the Provisional Payment clauses commence at soon as the claim is pended, that it is made clear medical costs incurred whilst claims are pended are the liability of the insurer, and that a workers has the right to apply to conciliations while a claim is pended.
Bill Clause No 49(3)	The current draft clause 49(3) is of concern and should be removed. The open and vague wording of 49(3) could easily provide an insurer with the argument to exclude a range of income/earnings from the wage calculation, such as overtime and allowances. The Union fears this will reduce the weekly payments for partially incapacitated workers. **Submission:** Clause 49(3) is removed from the bill.

Bill Clause	Comments
Bill clause No 55 and 56	Whilst supporting and welcoming the calculation of weekly payments based income from the 52 weeks prior to the injury and the extension of 100% of weekly payment for 26 weeks, the expansion of the step down provision must be removed. No step downs should occur and any step downs are opposite to basic principles of compensation, as the person is receiving a wage cut/underpayment for an injury that the employer is liable for. The reality under the current Act is that most workers payments are not stepped down, and only receive a loss in unusual or on-off payments post 13 weeks, and by increasing the step down provisions this change leaves most workers worse off. The application of step downs have been tested in numerous court cases, including District and Supreme Court decisions, and should be undermined and over-ruled by the draft bill. This provision appears to be a benefit on its face but in reality will result in an entitlement reduction if unchanged. There is no valid reason for reducing a workers wages and in the Union's experience is an employer/insurer tool to increase pressure on workers to return to work for financial reasons, and not due to medical opinion or workers progress on their recovery from injury. This undermines the basis of the workers compensation system. The effect of step downs on workers' pay often leads to increased stress and financial issues, none of which is conducive to assisting recovery from the workers compensation injury. The Union believes in the strongest terms that all form of step downs should be removed from the bill. This would be consistent with the Labor Party Platform, paragraphs 236(i), 240 and 247(f) that payments should be consistent with pre-injury earning and the current party of government will oppose any stepdown arrangements. **Submission:** Removal of all step down provisions, with workers to receive compensation that reflects their pre-injury average earnings.
Bill clause No 57	No caps should also be present on weekly wage payments. Higher earning workers earning above the capped amount and are disadvantage by the cap, making compensation payments insufficient. This also goes against the most basic principle of compensation to place the worker back into the same position the would have been in but for the injury. **Submission:** Removal of weekly payments cap. This submission should be considered in tandem with the Unions submission on the increase to the proscribed amount below.

Bill Clause	Comments
Bill clause No 62	The Union supports the proposed clarification that leave entitlements accrual for injured workers when they are in receipt of weekly payments of compensation.
No current Clause	However, on a related point of the above submission on bill clause 62, the need to clarify that Superannuation payments should continue whilst an employee is on weekly payments should also be inserted into the bill. Employees should not be penalised and left worse off for their work-related injury in this regard. Some employers already pay superannuation for injured employees but not all and this should be standardised. In the event this is added into the draft bill any Superannuation payments should not be taken out of any compensation amounts but, like the accrual and taking of leave entitlements above, be an obligation of the employer. The lack of contributions to workers superannuation whilst receiving weekly payments is a significant disadvantage for workers, particularly younger workers, with the compounding effects of contributions amplifying the effect of forgone payments. **Submission:** Include a provision for employers to continue to pay Superannuation while the worker is in receipt of weekly wages.
Bill Clause No 64 and 65	Changes in clause 64 and 65 alter the process to cease of weekly payments to the disadvantage of the worker. Employers and insurers must have the requirement to provide a notice in compliance with the Act remain, that is supported with medical evidence, and that the employee must have the right to dispute any notice. These changes also do not accord with the WA Labor Party Platform, at paragraph 237(b). **Submission:** Current processes in section 61 of the current Act should be retained and incorporated into the draft bill.
Bill Clause No 162 and 163	Both new clauses create a very wide and open means for insurers and employers to cut workers off from their weekly payments due to an employer's belief the worker is not complying with the return to work duties listed in the clause 162. This could see workers payments cease for failing to produce a progress medical certificate within 7 days of it being issued to the worker. **Submission:** These expanded provisions be removed and the current review of payment mechanisms retained.

Bill Clause	Comments
Bill No 164 – Compulsory Case Conferences	The insertion of compulsory case conferences will be to the determent of injured workers. The Union finds 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, not be mandatory. If a worker 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, that do not attend case conferences does not justify mandating attending. An injured workers right to be represented in any case conference should also be enshrined in the Act and not left to regulations. **Submission:** Retain the current case conference model and ensure any re-drafting of the case conference provisions in the bill outline a clear right for injured workers to have representation at all stages of the injury management process, including case conferences.
Bill Clause No 170 and 171	The Union supports clause 170, for the employee to have a clear right to choose their own treating medical practitioner. The Union also supports the clear protection provided in clause 171 for employees attending medical examination as this has been an area of chronic misuse. However, as a constant area of concern and issue in the Union's experience, clause 171 must have penalties applicable for breaches of this provision to ensure compliance given the consistent issues experienced in this area. **Submission:** Creation of a penalty provision for employers who breach 170 or 171 to protect employees.
Draft Bill Cl Part 2 - Div 5	The Union supports the inclusion of First Aid and emergency transportation costs to be covered by the Miscellaneous expenses provisions.
Bill Clause Part 2, Div 11 - Settlements	The proposal to significantly curtail the ability to settle all together is not supported.

Bill Clause	Comments
	No longer being able to use the current Act section 92(f) deed will see a large delay, larger costs and more processes to finalise claims. The process to have to utilise arbitration to resolve liability would be expensive and extremely time consuming. Especially when appealed. As such this is a regressive change to the current ways of settling a claim. The proposal to require insurers to accept liability for the claim before it can be settled is also problematic, particularly given that contentious claims which are the most beneficial to settle rarely have liability accepted. This would cause significant issue for the worker who would have justice delayed and expenses increased before reaching a settlement. A key area of reform must be the WorkCover conciliation and arbitration services. **Submission:** Continue to allow claims to be settled regardless of whether liability has been accepted.
Bill Clause No 5 and Part 3, Div 2 - Return To Work	The Union holds concerns on the new definitions that relate to 'Return to Work' and 'Suitable Employment'. These terms have not been causing issue from the Unions' experience and do not require a change in definition, which the Union views as likely to lead to workers being worse off and should not procced in their current form. Clause 165 outlines a definition of 'suitable employment' that is broader than the current meaning of this term under the current Act, and as established by court decisions. The legal principles of 'suitable employment' have largely been established to protect the cessation of weekly payments pursuant to s 61 of the current Act. The Union views the changes as undermining and undoing the decision of *Department of Education v Kenworthy* (1990) 3 WAR 1 which prevents an employer from discontinuing or reducing weekly payments other than as authorised by the Act. **Submission:** The proposed definitions are amended so that they outline current definitions and case law in relation to Return to Work and Suitable Employment.
Bill Clause No 172	It is essential that injured workers have the ability to choose their own rehab provider and have decision making ability about the management of their injury. Removing the costs of this from a 'reasonable expense' will result in employees being forced into rehab providers chosen by the employer or insurer. In the Union's experience employer rehab providers lead to poorer outcomes for injured workers and will be a regressive step if legislated, with the fear that they will be used more as a tool to manager injured workers than assist and provide a service in their best interests. There is an inherent conflict in duties of a rehab provider appointed and paid by an employer with the concept of the rehab provider best serving the interests of the injured worker at the same time.

Bill Clause	Comments
	It will mean that employers or insurers will choose from a panel of their own rehab providers and implement rehabilitation that suits employers. This proposal removes choice from injured workers and strips workers of an existing entitlement. **Submission:** The Employee retains the right to choose their own rehab provider, with an express clause added to make this clear.
Bill Clause No 188	Secondary conditions should form part of the WPI assessment, as they directly connect to, and are as a result of, the accepted injury. **Submission:** Clause 188 be removed.
Bill Clause No 216, 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 insurance brokers are increasingly becoming involved in claims management with injured workers, with the apparent only goal of reducing the cost to employers. These interactions are 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 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. **Submission:** The draft bill must; • 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.
Bill clause No 421	The threshold of 15% whole of person impairment required to pursue common law claims is an outlier compared to other Australian jurisdictions and is far too high, particularly given the low proscribed amount provided for under the Act. These two factors work together to disadvantage WA workers and provide worse Workers Compensation coverage compared to other Australian jurisdictions. The 15% whole of person impairment threshold should be reduced significantly, or ideally abolished, to modernise the legislation properly. Many other forms of compensations claims do not

Bill Clause	Comments
	require any threshold of WPI to be able to commence proceedings such as medical negligence, motor vehicle or a public liability claim. Currently employers can escape liability for neglecting their strict duty of care to employees where an employees does not reach 15% WPI, which is a significant threshold. **Submission:** Whole Body Impairment be reduced to 5% prior to enabling an election for a Common Law claim.
Bill Clause No 422 and 423	On a related submission to the above, the constraints on common law damages when a person does reach the current 15% WPI, but not 25% or more WPI, are an issue. This cap should be removed and all common law claims over the threshold be treated equally, without a cap in place. In addition to the cap itself; Given any compensation under the Act is considered and off set, and a person who makes an election for a Common Law claim has statutory payments ceased, the overall effect is to disincentive such claims proceeding at all. **Submission**: Arbitrary maximums and caps for common law compensation should be removed, with cases decided on their individual merit. Clauses 422 and 423 should be removed from the draft Bill entirely.
Bill Clause No 505	The Union 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 specific 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 make a claim. **Submission:** Pre-employment screening protect workers who have made claims previously to deter discrimination on the basis of making a claim.
Bill clause No 537	The current proscribed amount is insufficient, and leaves WA workers with some of the worst amounts of potential compensation in Australia.

Bill Clause	Comments
	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 some of, if not the, lowest. This is further exacerbated by the higher incomes and costs of living in WA compared to other states. The proscribed amount should be increased to at least $350, 000, or 3 years wages for the injured workers, whichever is the greater, and a better mechanism for indexation implemented to truly 'modernise' the draft bill and provide more appropriate levels of compensation for injured workers. This would also align with the Labor Party Platform, paragraph 237(d) regarding the need to have 3 years annual earnings as part of determining the proscribed amount for employees. **Submission:** Increase proscribed amount to $350,000 or 3 years earnings, whatever is the greater.
Bill Cl Div 4 Conciliation and Arbitration	Further amendments to the Conciliation and Arbitration clauses should occur so that there is a mechanism to 'fast track' a claim to an arbitrated hearing where liability is disputes and medical treatments is needed urgently. 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. These amendments would also align with the Labor party platform at paragraph 236(f). **Submission:** The Union submits that: - The introduction of a 'Fast track' for 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, and - 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.
No Current Clause - Diverted 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.

Bill Clause	Comments
	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 the injury that 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. **Submission:** A specific new clause should be inserted into the bill to create penalties for employers who divert claims and create an obligation to report all lost time injuries to protect potential future claims.
No Current Clause, Pre-Employment Screening coverage	The Fire Brigade has essential physical pre-employment screening to be able to recruit appropriate personnel into the service. Injuries can occur whilst undertaking these pre-employment screenings and we believe that these applicants should be included in the new definition of worker and any injuries that occur while undertaking pre-employment physical screenings should be covered by the employer's workers compensation insurance. **Submission:** Injuries that result from Pre-employment testing be covered by the Draft bill.
Bill Clause No 560(2)	All forms of age discount, exclusion or restrictions should be removed from the draft bill. If a person is working they should receive equal coverage of the Workers Compensation laws regardless of age. This is increasingly becoming an issue with more workers remaining in the workforce past 65 years of age. The age discrimination that is in the draft bill should be removed. The removal of this age discrimination is also consist with the current Labor Party Platform, at paragraphs 236(i) and 251. **Submission:** All forms of age discrimination are removed to modernise the act and ensure it covers WA workers as they work later into life.

DUST DISEASES

Bill Clause	Comments
General	The proposed bill fails to modernise the Act into a modern piece of legislation regarding dust diseases, leaving WA workers still significantly worse off compare to other Australian Jurisdictions. Several aspects of the draft bill would negatively impact on future dust disease claims, in terms of unnecessary processes and low total compensation, and some such as the definition of worker would leave WA workers worse off. These issues have the real potential to reduce and limit access to compensation, introduce additional unnecessary processes, and ultimately fails to recognise the significant impact of dust diseases as other jurisdictions do in terms of fair compensation.
Bill clause No. 12(2)	In addition to other concerns regarding the current definition of “worker” that is proposed, specifically in relation to Dust Disease claims: Definition of "worker" and the associated proof may be easily obtained for a general worker's compensation claim, but raises significant barriers to access of the Act for latent diseases and historical claims. Exposure to asbestos which falls within the latency period is at least 20 years and up to as much as 60/70 years prior. The Tax office does not hold records going back this far and most are retired having discarded paperwork of this nature decades prior. The tax office only requires people to hold financial records for 7 years. **Submission:** We recommend a signed Statutory Declaration be sufficient proof of being a “worker” for the purposes of the Act.
Bill clause No. 113 & associated note	The current proposed wording of clause 113, specifically: *"unless the employer proves that the injury was not from that employment" and the associated note which states "An employer can prove that the injury was not from employment if the employment did not contribute to a significant degree to the injury".* Significantly undermines and is opposite to the no fault nature of the Act, bringing issues of causation/fault into consideration. Such changes will give rise to endless disputes over whether the exposure is significant and delay in the claim's process. Significant contribution is also not defined in the Act. Questions over the sufficiency of exposure belong in the common law jurisdiction.

Bill Clause	Comments
	This is approach is particularly problematic for benign conditions such as asbestosis and diffuse pleural fibrosis where all of the exposure contributes to the disease and in order to recover 100% of damages at common law you need to sue for all of the exposure. If an exposure is deemed "not significant" for the purposes of the Act, then how will this affect the overall common law claim? Does the Plaintiff have to take a reduction in damages to account for the 'empty chair' exposure? The current process is much simpler whereby the last employer where exposure occurred is served with the claim and responsible for the payment with an entitlement for recovery from other employers where exposure occurred. **Submission:** No change to the current process should occur. In the alternative, if some kind of reversal of onus is necessary (which we strongly submit it is not) then a fairer position is to say that if the employer can prove the exposure was "de minimis" then it is not related to the employment. Significant degree requires a much higher threshold which will entice more litigation and potentially larger empty chair exposure in a common law claim.
Bill clause No. 115	At the end of the paragraph the words: - "only and not any common law entitlements" should be added. This is to make it very clear that the terminology regarding dust diseases taken to be a "single injury" is only in regards to the lump sum payment available under the Act and not in regards to common law entitlements. We believe this would be an unintended consequence and unfairly limit common law entitlements. **Submission:** The words "only and not any common law entitlements" must be added to clause 115.
Bill Clause No. 116(2)	The proposed limit of 30% of the proscribed amount, or another greater amount outlined in regulations, is totally insufficient and fails to modernise the Act and bring it into line with current laws on dust diseases in Australia. WA workers should not be as significantly disadvantaged compared to workers in other around Australia, in particular New South Wales, Queensland and Tasmania. Queensland for example has a sliding scale which takes into account a person's age and impairment level. The compensation can be as much as $700,000 to $800,000 and also includes a payment for gratuitous care on top of the permanent impairment payment. Statutory Benefits must be measured by equity and adequacy. **Submission:** Increase the lump sum entitlement in clause 116(2) to $120,000.00 which is to be indexed annually to properly modernise the Act and bring it closer in line to the statutory entitlements available to dust disease sufferers within the other States of Australia.

Bill Clause	Comments
	Further in the alternative, if the 30% is to be adopted then this 30% calculation needs to be 30% of the "total" prescribed amount which includes wages, medicals and vocational rehabilitation expenses.
Bill clause No. 116(3)	Lump sum compensation under this section not payable until settlement agreement registered under Division 11. Under the current Act the entitlement arises once the election is filed and served on the employer/insurer. This is better than the proposed registration of the settlement agreement as it relies upon signatures from the employer/insurer. It is particularly problematic in urgent matters which already require us to obtain medical reports/records proving the condition, a full employment/exposure history, complete the required Industrial Diseases Application, wait for a Dust Diseases Panel ("DDP")to be convened and provide a determination, have the worker sign the Election, file it with WorkCover and serve the Election on the employer/insurer. Adding the requirement for a fully executed and registered settlement agreement makes this process in urgent matters even more difficult particularly when insurers are well aware that the entitlement to this lump sum payment dies with the worker. There is no obligation/incentive on the employer/insurer to act swiftly to ensure the worker recovers compensation.
Bill clause No. 123	The Panel powers outlined in clause 123 must have reasonable limits outlined to prevent expensive and time consuming processes relating to panel requests. The costs of these requests are borne by workers, unless and until the claim is accepted, which is also unfair to workers and provides more of a basis for tempering the panel's powers. There have been instances of requests that medically unreasonable and/or unnecessary under the current panel powers. **Submission:** The powers needs to be reasonable in light of the issues at hand and restrictions on the panel requests inserted into the clause. Further if the panel deems directing a workers to a medical appointment or the like necessary in determining a claim, the associated costs should be covered by the insurer.
Bill clause No. 416	This list needs to be updated to include mesothelioma and terminal dust diseases defined as less than 2 years life expectancy, so that they are excluded from the Division. It is not uncommon to first obtain instructions from a mesothelioma or terminal asbestosis/lung cancer sufferer on their bedside or with weeks to live. In order to protect the recovery of

Bill Clause	Comments
	general damages at common law a Writ of Summons needs to be filed in his or her lifetime. Regularly in these circumstances it is difficult to obtain instructions on the exposure (necessary to file and protect proceedings) let alone comply with all of the procedural requirements under the Act including providing a full employment/exposure history, medical reports and records required by the Dust Disease Panel (DDP) to make a determination, completing and signing the Application, waiting for a DDP to be convened and for the determination to be provided, signing the election, filing the election with WorkCover and then serving it on the employer/insurer all before a protective Writ of Summons can be filed. A terminal disease is clearly a significant disease and the onerous procedural provisions of this Division are unnecessary and unfairly disadvantage workers access to compensation. **Submission:** Mesothelioma and terminal dust diseases defined as less than 2 years life expectancy be excluded from the Division. In the alternative Clause 425(7) should include not only mesothelioma but also any terminal dust disease with less than 2 years life expectancy arising from the condition.

NOISE INDUCED HEARING LOSS

Bill Clause	Comments
General	The regulations for noise induced hearing loss are yet to be finalised. The list of items that the regulations will address is long, with the content of these regulations potentially having a significant impact on workers. Without these regulations it is not possible to provide considered and final submissions in respect to the proposed draft bill. Many of the areas that will be addressed via the Regulations under this draft bill should be contained within the body of the Bill itself. A non-exhaustive list of examples of key areas that should be drafted into the bill are: - Cl 111(1)(b) regarding the compulsory nature of testing, - Cl 111(1)(e) assessment process including who is responsible for arranging and paying for NIHL assessments, - Cl 111(1)(j) timeframes for processing and paying a claim, and - Cl 111(1)(g) disclosure to specified persons of specified information. The current process for NIHL is not worker friendly (as WorkCover WA acknowledge in its own Information Sheet on NHIL stating it is “highly technical”) and this process must be outlined so that consultation and submissions can occur about these processes.
General	The process for a workplace to become a proscribed noisy workplace needs to be made clear and have a set of key criteria that must be met that can be demonstrated independently of the employer choosing to self-identify as a noisy workplace. Currently the process is not contained in the Act, or readily accessible anywhere, and ultimately leaves it up to employers to recognise and proscribe themselves. As being proscribed can potentially lead to claims for NIHL there is an inherent disincentive for employers to not recognise themselves as a proscribed noisy workplace. The threshold of noise required to for a workplace to be recognised as ‘noisy’ should be lowered from the current 90dB(A) or above during an eight house shift or 140dB(lin) at any time, to 85dB(A) over an eight hour shift or 140dB(lin) at any time, that is the standards currently adopted by Safe Work Australia.
Bill clause No. 105(4)	This clause notes that a compensation claim for noise induced hearing loss must be made in accordance with the regulations. As noted above these regulations are not finalised and therefore how are we to know what the required process is and whether that is fair for the worker. Clause 111(1)(a)-(m) as well as clause 111(2)(a)-(c) sets out what "may" be within these regulations however, no additional details are given. This is insufficient and must be expanded.

Bill Clause	Comments
	Submission: Greater clarity on the required process must be provided, rather than the current 'may' position. This should then lead to a further period of consultation to ensure the process is worker friendly.
Bill clause No. 106(a)	Under this section an employee can only receive lump sum compensation if they are found to suffer from 10% NIHL for an initial claim or in the event of a further 5% loss for a subsequent claim. No payment is given towards medical expenses. The lump sum received by a worker is to be used in order to pay for medical treatment such as hearing aids as well as compensating the worker for the loss they have suffered. This is totally insufficient and fails to fairly compensate or assist the injured employee. In other jurisdictions, such as South Australia, a worker is able to claim for both reasonably incurred medical expenses as well as lump sum compensation. In South Australia there is no percentage NIHL against which the medical expenses is tested. In practice, it is a question whether the requirement for hearing aids reasonably arises because of the NIHL as opposed to other non-work caused deafness such as presbycusis (age related deafness). In South Australia, if a worker suffers at least 8.8% NIHL assessed by an accredited Ear Nose and Throat specialist non-economic loss compensation can be claimed also. This method should be adopted in Western Australia. An employee should be compensated for their permanent impairment, just as they would be if they were to sustain a physical injury such as a shoulder injury through schedule 2 of the *Workers' Compensation and Injury Management Act 1981*. An employee should also be able to make a claim for medical expenses, inclusive of future medical expenses. Hearing aids are constantly adapting with improvement to technology and are expensive to maintain. Therefore, an employee should not be required to use the lump sum payment for permanent impairment to fund their medical expenses if an Ear Nose and Throat Specialist determines the prescribed noisy workplace caused their hearing loss. Further, if an employee is assessed to be under 10%, they should be able to apply for compensation for medical expenses only especially if the loss is attributed to their workplace noise exposure. This could be a capped sum which should not be offset in the event the employee is then assessed as over 10% and can make a claim in the future. This would assist employees who suffer from NIHL under 10% to improve their hearing ability. It can be a case by case assessment, for example if a worker has 7% NIHL but 5% non work caused deafness they should be able to access hearing aids to improve their hearing ability. **Submission:** Changes to adopt a South Australian model of compensation should be adopted, with medical expenses recognised and compensated to prevent lump sum payments being used for medical treatment and to bring into line this injury with the rest of the Act. This includes a means to access medicals for those under the 10% threshold.

Bill Clause	Comments
Bill clause No. 111(g)-(h)	These two subclauses within Clause 111 allow for WorkCover WA to advise "specified persons" of information about workers' who have made a NIHL claims as well as will require a worker who makes a claim for NIHL to disclose to "specified persons" information regarding the claim made. Who are specified persons and what is the purpose of this? Is this in relations to an existing claim or when a worker is obtaining new employment? This must be more specific in the regulations and should be open for public comment before finalisation. Currently there are no equivalent provisions in the Act and the proposed insertion raises many questions about intent and purpose that must be clarified and proven to be worker friendly. **Submission:** No inclusion of increased levels of disclosure without these provisions being properly particularised and reasoned.
Bill clause No 111 (b) Exit test	Currently under the Act Schedule 7 allows for an employee who leaves their employment within a prescribed workplace to undergo an exit hearing test within 3 months of ceasing their employment. This test must be requested by the employee in writing. This test should be compulsory in the same way hearing test when entering the workforce are, otherwise the purpose of the entry and subsequent tests if undermined. In the alternative the new regulations should flip this onus and require the employer to advise the employee of the said test and to schedule the exit hearing test as soon as practicable once advised that the employee is leaving their employment. This amendment would also see the removal of the 3 month period. Currently many employees are not aware they have the right to undergo an exit test and therefore potentially miss out on receiving compensation for NIHL, an injury they suffer due to their employment. The employer should be obligated under the new regulations to inform the employee of their ability to undergo an exit hearing test. This is a logical amendment as it would provide a corresponding provision to the current requirement that employees must be tested when entering a proscribed workplace. By making entry testing compulsory but exit testing not **Submission:** Exit testing to become the employer's obligation to schedule and provide for all employees exiting a noisy workplace. In the alternative employers, should at a minimum, have to advise employees of and to schedule for employees leaving a NIHL proscribed workplace. 3 month time period to request exit test is removed.

Bill Clause	Comments
Draft Bill Div 7 General	<u>Asymmetrical hearing loss</u> When an employee suffers from asymmetrical hearing loss, the percentage of noise induced hearing loss is taken from the hearing losses in the better ear. Medicine adopts this practice because noise effects the ear equally, such that the ear should show the same deafness. Where there is a greater loss in one ear, those greater losses are disregarded as noise induced hearing loss unless there is an explanation for the asymmetry such as one sided noise exposure over a long period of time. Various employments, such as firefighting for example, tend to result in asymmetrical hearing loss. This is as a result of a workers positioning on the pumps as well as how they handle various machinery and rescue equipment. **Submission:** Provision must be included within the regulations to address asymmetrical loss and the standard which is to be met in order for the full losses to be considered and not have the ears equalised.