Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Australian Rail Tram and Bus Union WA PTA Branch 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 Rail Tram and Bus Union (the RTBU) 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 a 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 the view of the RTBU 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.

RAIL WORKERS & PTSI

Bill Clause	Comments
Bill Clause No 11	The table of recognised diseases should be expanded to include a rebuttable presumption for post-traumatic stress injury ("PTSI") for many railway workers. The range of incidents that Railcar Drivers, CMR Operators and Transit Officers attend or are involved in over their careers, such as fatalities, suicides, assaults, domestic violence matters, drug overdoses and the like provides more than sufficient exposures to warrant this recognition in legislation. There is, on average, at least 10 people every year that throw themselves in front of a train to take their own lives. Our Cleaner members at Claisebrook Depot then are required to clean these trains. One who over his years has cleaned approximately 40 trains that have hit people. These workers 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 RTBU 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 rail workers are just as deserving and have sufficient cause for equivalent coverage. **Submission:** PTSI is recognised as a presumptive for Rail Workers such as Transit Officer, CMR Operators, Cleaners and Railcar Drivers at the very least.

FURTHER DRAFT BILL SUBMISSIONS

Bill Clause	Comments
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 RTBU 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 RTBU 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 RTBU 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. **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

Bill Clause	Comments
	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 RTBU 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' 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. 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 is left 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

Bill Clause	Comments
	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 RTBU's 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 RTBU'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 RTBU does not believe the existing arrangements do not provide sufficient information or processes to prevent the insurer from determining and managing claims. **Submission:** Removal of the mandatory consent changes in the Bill.
Bill Cl No 37 to 45 - Provisional payments	The RTBU 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.

Bill Clause	Comments
	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 worker 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 RTBU fears this will reduce the weekly payments for partially incapacitated workers. **Submission:** Clause 49(3) is removed from the bill.
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.

Bill Clause	Comments
	There is no valid reason for reducing a worker's wages and in the RTBU'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 RTBU 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 RTBU's submission on the increase to the proscribed amount below.
Bill clause No 62	The RTBU 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

Bill Clause	Comments
	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 No 164 – Compulsory Case Conferences	The insertion of compulsory case conferences will be to the determent of injured workers. The RTBU 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.

Bill Clause	Comments
	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 RTBU supports clause 170, for the employee to have a clear right to choose their own treating medical practitioner. The RTBU 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 theRTBU'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 RTBU 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. 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	Comments
	The RTBU holds concerns on the new definitions that relate to 'Return to Work' and 'Suitable Employment'. These terms have not been causing issue from the RTBU's experience and do not require a change in definition, which the RTBU views as likely to lead to workers being worse off and should not procced in their current form.
Bill Clause No 5 and Part 3, Div 2 - Return To Work	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 RTBU 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 RTBU'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. 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	Comments
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 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.

Bill Clause	Comments
	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 RTBU 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. 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 Clause	Comments
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 RTBU 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. 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.

Bill Clause	Comments
	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 Public Transport Authority has essential physical pre-employment screening to be able to recruit appropriate personnel into the Transit Officer Unit. 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.