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***Workers Compensation and Injury Management Act 2023 Proposed Act Amendments Consultation Paper***

UnionsWA is the peak body of the trade union movement in Western Australia. We strengthen WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents 29 unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA welcomes the opportunity to provide a submission to WorkCover WA's *Workers Compensation and Injury Management Act 2023* Proposed Act Amendments Consultation Paper. Workers' compensation schemes across Australia are an outcome of union campaigns to protect and compensate injured workers. These schemes are critical to fair, inclusive and productive workplaces. Workers who are injured or made ill from work must be provided the highest level of support. This includes financial and vocational support as well as the ability to seek and receive treatment, rehabilitate and return to meaningful, healthy and safe work.

**Proposal 1 – Transparency of settlement amounts**

UnionsWA considers the scheme needs to empower workers to make decisions that best suit their individual circumstances, as well as ensure there are robust safeguards in place to protect their interests. It is critical that workers receive comprehensive information about their options, including the long-term financial and medical implications of each choice. Further, workers need to have access to independent legal and financial advice to help them make well-informed decisions.

As such, UnionsWA contends that a distinction needs to be recognised between what is necessary to protect the interests of unrepresented workers from where agreements are reached between represented workers and insurers. In those latter circumstances, many settlement agreements are based on the acceptance of a global offer consisting of a lump sum monetary amount paid to a claimant worker.

Requirements to identify and categorise the amounts to be paid for each form of compensation means that monetary amounts in each category may simply be allocated in such a way in order to be seen to adhere to the WorkCover processes, with the amounts not necessarily providing a true reflection of discussions and agreements between the parties. UnionsWA would suggest that where those agreements are reached between represented workers and insurers, there is no clear benefit for an approach that is overly prescriptive. Parties should be able to agree to a

total amount and not allocate express amounts for each form of compensation, as this represents how settlements often occur in a 'global' way. This reflects the practical reality of negotiations and settlements and removes the need for parties to arbitrarily ascribe figures post an agreement, with the amounts not necessarily providing a true reflection of discussions and agreements between the parties.

**Proposal 2 – Inclusion of extended medical and health expenses and income compensation in settlements**

UnionsWA supports the proposal to amend s 77 and s 78 to provide for a worker and employer to agree to extend the medical and health expenses general limit (up to the limits for a standard or special increase respectively) and for the agreed extended amount to be included in a settlement agreement, without the need for an order of an arbitrator. UnionsWA also supports amending s 52 so that the total amount of any additional income compensation up to 75 per cent of the income compensation general limit may be included in a settlement agreement if ordered by an arbitrator under s 52. We consider, however, that as with s 77 and s 78, a worker and employer should have the flexibility to negotiate and agree to extend the income compensation general limit, rather than having to first proceed to a dispute arbitration.

**Proposal 3 – Discontinuation of PI Notice process**

As noted within the Act and reiterated in the Consultation Paper, it is currently the worker who is responsible for commencing the permanent impairment assessment process. Despite this, it has been raised with UnionsWA that many permanent impairments are instead initiated by the insurer, particularly in circumstances where the worker is yet to be legally represented. Insurers are then providing workers with the PI Notice, creating confusion and leading to workers signing the document without fully understanding the implications. Workers that are not represented or assertive are therefore vulnerable to this process and sign themselves out of a fair settlement, even if they engage representation/union at a later stage. Affiliates have raised with UnionsWA that it is not immediately clear what the current process contributes beyond an additional form/process.

Conversely, it has been raised with UnionsWA that the current process can be beneficial where a worker is otherwise unable to progress a claim due to the unresponsive insurers. As a result of the timeframes in the process, in those circumstances it can be possible to secure action from insures and faster resolutions of claims. UnionsWA recommends that if the current process continues, that there would be benefit in making it clearer to workers what the implications are when they are signing PI Notices and that they could be entitled to more.

**Proposal 4 – permanent impairment compensation and settlements**

UnionsWA considers that it is important that there are appropriate safeguards in place to protect workers. UnionsWA recognises that under Proposal 4, the Act would be amended to clarify that the Director is not required to inquire as to any potential permanent impairment entitlement based on the worker's medical condition even if it appears there is, or may be, an impairment. This is presumably in the interests of ensuring that applications can be addressed

quickly. Affiliates have suggested that in the cases of unrepresented workers, there may be merit in the Director being required to exercise a higher level of due diligence on such matters.

It has been raised with UnionsWA too that obtaining permanent impairment assessments is sometimes not possible or practicable. This can be for a number of reasons, including that the claim is settled too early to assess the injury or at an early stage when liability is in dispute or has not been accepted. We query, therefore, whether there may be unintended consequences that could result from amending section 150 to clarify that a worker is not entitled to permanent impairment compensation unless the worker has been assessed by a permanent impairment assessor and the parties have agreed the worker's percentage permanent impairment.

Affiliates raise too that there are still ongoing delays in registration of settlement agreements due to WorkCover WA's own internal processes continually changing. This includes WorkCover changing the requirements needed for settlement documents. We understand recently date formatting and the description of injury were issues encountered. Although we understand consistency is integral, it is disadvantageous to the worker for such minor elements to delay a settlement by requiring the parties to amend the documents. We have been advised of a recent request to amend due to the date on the PI Notice being written in a different format compared to that as on the settlement agreement. For example, in the format of '9.02.2026' on one document and '9 February 2026' on the other. Both dates the same, just written differently. This is unnecessary, especially given it was not an issue in the past.

**Proposal 5 – disputes about permanent impairment**

UnionsWA's affiliates have raised with us their concerns that an amendment of this nature would simply create an opportunity to be exploited by employers or insurers, resulting in unnecessary distress and hardship for injured workers. As such UnionsWA does not support Proposal 5, that in addition to determining any dispute about a worker's degree of permanent impairment, an arbitrator can also determine whether permanent impairment did or did not result from an injury from employment that is a personal injury by accident.

**Proposal 6 – Settlements and liability decisions**

It is not apparent to UnionsWA that the proposed amendment to clarify section 149 of the Act is necessary, however we have no opposition to the proposal.

**Proposal 7 – Confirmation of custody or imprisonment**

UnionsWA questions whether the issues relating to requesting and receiving confirmation of custody or imprisonment are so significant that legislative reform is required. In addition, UnionsWA queries the policy intent of suspending income compensation when a worker is in custody, rather than only where they are imprisoned. Being in custody does not entail that a person has been sentenced or found to have committed any wrongdoing. As such, the suspension of income compensation for being in custody would appear to run contrary to the fundamental legal principle that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

We note that the relevant Victorian,[1] Queensland,[2] South Australian,[3] ACT[4] and Commonwealth Acts[5] are all limited to where a worker is serving a term of imprisonment, rather than more broadly including where a worker is in custody. The South Australian *Return to Work Act* also includes provision for a determination to be made that weekly payments should be paid to the dependants of a prisoner.

As such, UnionsWA strongly considers that s 66 of the *Workers Compensation and Injury Management Act* should likewise be limited to where a worker is imprisoned in connection with their conviction of an offence, rather than also include where a worker is in custody.

**Proposal 8 – determination of state of connection disputes**

UnionsWA strongly supports the proposal to amend Part 12 to give arbitrators jurisdiction to determine a worker's state of connection either as part of a dispute proceeding or on application by a party to a claim for compensation. Currently, state connection issues can result in significant delays for workers. UnionsWA has heard reports from its affiliates that insurers utilise ambiguities or questions around the state of connection to 'bounce' workers between different jurisdictions.

The District Court process can take a significant time before a resolution is reached, meaning workers can be left in limbo without any payments for extended periods of time. As such, not only should arbitrators be given jurisdiction to determine these matters, but it is also critical that these applications are run on an expedited basis.

**Proposal 9 – Responding to uninsured employer claim**

UnionsWA does not oppose this proposed amendment. We do, however, consider that the most critical action to address the issue is an increase in compliance and enforcement to reduce the number of uninsured employers, and would support increased staff resourcing within WorkCover to facilitate this action

**Proposal 10 – Common law damages where employer uninsured**

UnionsWA is strongly opposed to the proposal to amend section 267 and any related provisions so that damages are not payable from the WorkCover WA Default Insurance Fund with respect to a liability of an uninsured employer to pay damages for any period that employer was uninsured for common law damages before 1 October 2011.

As WorkCover WA notes in this consultation paper, the more likely scenario in which this arises are in relation to 'long latency claims such as asbestos related diseases where the asbestos

[1] *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 177.
[2] *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 137.
[3] *Return to Work Act 2014* (SA) s 193.
[4] *Workers Compensation Act 1951* (ACT) s 83.
[5] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23 (2).

exposure occurred during employment decades ago.' UnionsWA does not consider it to be an acceptable proposal to cut off access to the critical common law safety net for these workers.

**Proposal 11 – ICWA contribution to WorkCover WA General Account**

UnionsWA supports amending section 235(5) by deleting the reference to 'General Account' and requiring ICWA to make a financial contribution to WorkCover WA's general account when required to do so by WorkCover WA, like all other licensed insurers and self-insurers.

**Proposal 12 - Appropriate reference to date of injury or incapacity**

UnionsWA supports not amending references from the 'date of injury' to the 'date of incapacity' in Part 2 Division 3 Subdivision 3 of the Act.

**Proposal 13 – Other proposals to address implementation issues**

*Penalties*

UnionsWA is concerned that the quantum of penalties in the Act are insufficient to function as a meaningful deterrent to workers' compensation insurers and employers from committing these offences. We consider that there is an immediate need to significantly increase these penalties. In addition, unions have raised concerns that the common practice for WorkCover is to issue cautions rather than monetary penalties. As such, we encourage WorkCover to take a more stringent approach to enforcement that imposes pecuniary penalties.

UnionsWA also recommends adopting a penalty units approach rather than the current flat dollar figure penalties. A penalty unit system allows for adjustments based on inflation, ensuring that penalties remain relevant and effective over time without needing frequent legislative changes. Penalty units can be used to ensure that they are proportionate to the offence. Additionally, it simplifies the process for updating fines and penalties, as changes can be made by adjusting the value of a penalty unit, rather than revising each individual penalty amount in the legislation. For these reasons, penalty units are utilised by a number of enforcement agencies, including the Australian Securities and Investments Commission, the Australian Taxation Office and the Australian Competition and Consumer Commission.

*Enforcement*

As noted above, it is the observations of unions that the usual practice is for WorkCover to issue cautions to non-compliant insurers, even when the facts indicate wilful non-compliance. Overwhelmingly, the prosecutions that WorkCover engages in are for businesses employing workers without a policy of workers compensation in place. This is critical work, but does not reflect the full spectrum of non-compliance with the requirements on insurers and employers under the Act.

As such, UnionsWA considers that there should be a significant increase in focus on compliance and enforcement. If that is not going to occur, UnionsWA suggests that WorkCover

should relinquish its exclusive jurisdiction to prosecute under the Act and provide unions standing to pursue breaches.

This would not represent a new or novel approach, but merely an expansion of existing rights in a way which is consistent with the *Fair Work Act 2009* (Cth) and the *Industrial Relations Act 1979* (WA). It is common for proceedings under the *Fair Work Act 2009* (Cth), for example, to be brought by parties other than Government regulators, including claims for pecuniary penalty. We note, for example, that employee associations have standing to bring civil penalty applications with respect of a contravention of the National Employment Standards, a Modern Award, an enterprise agreement, the obligation to pay wages in full, as well as employee record and payslip contraventions. It is inconsistent that a union can prosecute an employer for failing to pay wages in full, but not for a failure to pay income compensation.

*Illegal cessation of income compensation payments and disputes*

UnionsWA considers that this consultation process and subsequent amendments to the Act should be utilised to address the implementation issue that has come to light as a result of the case of *Richdale v WorkCover WA* [2025] WASC 284. Namely, the question of the illegal cessation of income compensation payments and access to the dispute resolution procedures provided by the Act.

The powers of a conciliator, as outlined in s 317 of the Act, include the power to require a party to the dispute to attend at a conciliation conference, to answer questions put by the conciliator; and to produce documents. Further, as noted by the Court, s 320 of the Act which provides that a conciliator may give an interim compensation direction, includes a power to require the payment of income compensation. A person to whom money is payable under a conciliation decision or a conciliation agreement, may enforce the conciliation decision or conciliation agreement in a court of competent jurisdiction.

UnionsWA notes that arbitrators are expressly able to determine matters relating to reducing or discontinuing income compensation on the basis of worker's return to work[6] or on the basis of medical evidence.[7] Notably too, employers and insurers are able to seek orders from an arbitrator for the recovery of erroneous payments of compensation.[8]

From the information set out in *Richdale v WorkCover WA*, however, it appears that it is the position of WorkCover that if an employer simply stops paying the income compensation, then a worker has no ability to seek for the matter to be addressed through the Conciliation Service under the Act. This means that a worker whose employer has unlawfully ceased paying income compensation is unable to access the powers and decision-making authority provided to that service. While it is the case that WorkCover can prosecute the employer for the illegal cessation of income compensation payments, that does not in itself address the immediate issue facing the worker.

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[6] *Workers Compensation and Injury Management Act 2023* (WA) s 63.
[7] *Workers Compensation and Injury Management Act 2023* (WA) s 64.
[8] *Workers Compensation and Injury Management Act 2023* (WA) s 146.

As such, UnionsWA consider that it would be appropriate for the Act to be amended so that illegal cessation of income compensation payments unambiguously does constitute a dispute for the purposes of the Act and thereby aggrieved workers are entitled to access the dispute resolution procedures provided by the Act.

*Claiming permanent impairment compensation if the worker suffers from a disease*

Section 97(1) of the Act only allows for a lump sum amount for permanent impairment if the worker suffered from an injury that is a personal injury by accident. This directly disadvantages occupational groups such as firefighters, inhibiting them from being compensated for any permanent impairment suffered due a 'firefighter' disease. This is contrary to the purpose of the Act. Its purpose is to be a beneficial piece of legislation for workers but there is no benefit to the worker in this instance. Currently, a firefighter can be diagnosed with a firefighter's disease, such as terminal brain cancer, and hold an accepted claim but cannot be compensated for the impairment they suffer from. This appears to be a result of legislative oversight and rather than intended to be a legislative parameter set by Parliament. On this basis, under s 97 a lump sum amount for permanent impairment caused by a disease should be allowed.

In addition, the table under Section 101 of the Act must be amended to allow for the relevant impairments caused by firefighter's diseases. In the alternative, their own schedule or permanent impairment table must be created. Other diseases, including AIDS and dust diseases, hold their own permanent impairment compensation. Inclusion, therefore, of firefighter's diseases is only fair and reasonable. Consultation with an Approved Permanent Impairment Assessor is strongly recommended.

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If you wish to discuss any matters raised in this submission further, please contact me at [redacted] or [redacted]

Yours sincerely,

**Rikki Hendon**
**Secretary**