FIRST STATUTORY REVIEW OF THE 2012 WORKERS COMPENSATION CHANGES

Submission to the Law and Justice Committee

9 October 2016
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**Introduction**

It was Mahatma Gandhi that said “the true measure of any society can be found in how it treats its most vulnerable members”.

On this measure, because of its treatment of injured workers, Mike Baird and the NSW Government are bankrupt.

The NSW Parliament need look no further than:

- the 100 personal stories told to the Unions NSW Return to Work Inquiry that are attached to this submission at Annexure A;
- the three reports from Macquarie University’s Centre for Workforce Futures on the impact on injured workers of changes to NSW workers compensation system (Annexures B, C and D to this submission);
- the Report of the Legislative Council Standing Committee on Law and Justice, Review of the exercise of the functions of the WorkCover Authority, 17 September 2014;
- the Report of the Legislative Council, General Purpose Standing Committee No 1., Allegations of bullying in WorkCover NSW, 19 June 2014;

The evidence is plain to for those who will look, that the changes made to the NSW Workers Compensation scheme have caused untold damages to injured workers, their families and our society.

Unions NSW’s submission to this first statutory review of the workers compensation laws by the Law & Justice Committee of the NSW Parliament will present overwhelming evidence of the complete failure of the workers compensation cuts.
We submit the Government can have no choice but to scrap NSW’s system of workers compensation and start again. To support this proposition, Unions NSW will advance three main arguments:

1. That the harsh cuts to workers’ compensation made in June 2012 have failed. Many sick and injured workers are *not* returning to the workforce, and are being left to fend for themselves;
2. Sick and injured workers have been driven to suicide and despair because workers compensation support is now so limited and the system treats them so badly;
3. The workers compensation system introduced under the stewardship of then-Treasurer Mike Baird has been constructed to serve the interests of insurers and employers. Sick and injured workers are not even a consideration.

The submission will then outline the principles Unions NSW proposes should underpin a new scheme, and canvas our top 17 short term fixes.

**Section 1: The harsh cuts have failed with many sick and injured workers not returning to the workforce and having to fend for themselves**

In this section of our submission, Unions NSW will organise our arguments around four elements of the cuts: income support; return to work; journey claims; and medical costs. Our submissions will be drawing on the evidence Unions NSW gathered during the Return to Work Inquiry we conducted in August 2016. Unions NSW took evidence at 11 different locations around NSW: Sydney, Penrith, Blacktown, Bathurst, Wollongong, Maitland, Newcastle, Central Coast, Coffs Harbour, Grafton and Lismore. We also held a separate hearing for one seriously injured worker and members of Asian Women at Work. Injured workers were also encouraged to tell us their stories online. Unions NSW also conducted hearings over the phone for those unable to attend in person.
The Inquiry was convened by Unions NSW Assistant Secretary Emma Maiden. Unions NSW was also represented by Shay Deguara and/or Kate Minter. Rowan Kernebone from the Injured Workers Support Network also sat on the Inquiry panel.

50 injured workers or their family members appeared before the Inquiry. A further 50 injured workers told us their story online or over the phone, taking our total number of case studies to 100 injured workers.

Each personal story has been de-identified at the instruction of the Law and Justice Committee Secretariat and are attached at Annexure A to this submission. We encourage members of the Law and Justice Committee to read every one of these stories. They are a testament to the damage caused by the workers compensation system, the failure of many employers and insurers to take their return to work obligations seriously and the failure of the system to require that they do so.

**Injured workers are not receiving the income support they need and are being cut off before they have recovered**

**Six ways to reduce income support:**
Unions NSW has consistently argued that the 2012 workers compensation changes were all about cutting injured workers off workers compensation, not returning them to work. You need look no further than the fact the 2012 changes to workers compensation made six significant changes to the level of income support received by injured workers and zero changes to encourage return to work. The six significant changes to the level of income support were:

1. **Step downs:** Weekly payments were reduced to 95% of Pre-Injury Average Weekly Earnings (PIAWE) from day 1 of the injury with a further step down to 80% after 13 weeks and 80% of base pay only after 12 months (95% can be maintained if working at least 15 hours per week).

2. **Reduction for notional income:** Weekly payments were reduced by the amount of notional income an injured worker could earn in “suitable employment”. For example, if the injured worker is certified for 10 hours of work per week, their weekly payment is reduced by 10 hours pay, even if they are not able to secure 10 hours of work. This fictional employment does not pay the bills.
3. **Work Capacity Decision cut off:** Weekly payments can be cut off at any time if a Work Capacity Decision deems the injured worker has the capacity to earn more than their weekly payment (called the ‘fantasyland cut off’ by injured workers).

4. **2.5 year cut off:** Weekly payments cut out at 2.5 years unless:
   a. at least one year before the cut off the worker applies in writing to retain the payment;
   b. the injured worker has no work capacity or is working at least 15 hours a week;
   c. the insurer certifies the worker as likely to be indefinitely incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.

5. **5 year cut off:** The only category of injured worker who can receive weekly payments for longer than 5 years are workers with the highest needs (defined originally as 30% Whole Person Impairment (WPI) but reduced to 20% WPI).

6. **PIAWE:** The definition of PIAWE is extremely complex and injured workers are commonly paid much less than they are entitled. The Parkes Inquiry recommended a simple fix that has been ignored by Government.

Insurers also commonly deny claims (8% in 2013/14), depriving injured workers of any income support until they can win their case before the Workers Compensation Commission (WCC). Approximately 80% of all cases of denial of liability are overturned at the WCC. These figures correspond with the those published by WIRO that indicate 70-80% of Independent Legal Assistance and Review Service (ILARS) grants are for cases won by injured workers.

Shirley, a workers compensation lawyer, gave evidence to the Unions NSW Return to Work Inquiry that this figure is as high as 90% in her country NSW town.

**Extent of reduced income support:** Insurers have taken full advantage of these ways of reducing their liability and have enthusiastically reduced the income support for injured workers.
Unions NSW estimates tens of thousands of injured workers have been cut off the scheme since the 2012 cuts. The exact figures should be available from the State Insurance Regulatory Authority (SIRA) together with the reason they were cut off (2.5 year cap, Work Capacity Decision etc.), but it is not. This lack of transparency regarding workers compensation in NSW is a serious concern.

Unions NSW notes there will be a further tens of thousands of injured workers cut off from 2017 under the five year cut off.

The 2014 Unions NSW Survey of injured workers found 40% of workers who were injured and receiving weekly payments on 1 October 2012 had their payments reduced or cut off due to the 2012 changes. The figure was comparable (37%) in the 2015 Unions NSW Survey.

The Unions NSW Survey also showed what adjustments injured workers are making due to being injured and having reduced income. This is outlined in the table below.

Unions NSW submits that it is unconscionable to cut off weekly payments in circumstances where the injured worker is still injured (carrying medical restrictions) and has been unable to secure employment at the same wage level.

To do otherwise involves no recognition that the reason the worker is in this predicament is because they were injured at work and therefore owed a duty of care.
to receive income (and medical) support until they get back on their feet. It also involves no recognition that finding employment while carrying restrictions or even just a history of workers compensation is near impossible.

The Unions NSW Survey of Injured Workers in 2014 and 2015 showed respectively 56% and 59% of workers who had applied for other jobs had been asked by prospective employers if they had ever made a workers compensation claim. The Unions NSW Survey of Injured Workers in 2014 and 2015 showed respectively 56% and 59% of workers who had applied for other jobs had been asked by prospective employers if they had ever made a workers compensation claim.5

This is reflected by the Unions NSW Return to Work Inquiry:

- **James** says employers frequently ask whether you have a workers compensation claim and “**you know the moment you tick yes that you have had a claim, you are cactus**”.
- **Jo** says “**As soon as you say you have a workers compensation history there is very little chance of actually stepping into a new career.**”
- **Ryan** says “**No one will put me on. Even my second job won’t employ me. Too much risk with a spinal injury. I lost my second job as well...My rehab provider told me not to tell them that I have an injury. They said wait until you get employed and then tell them.**”
- **Lucinda** a regional retail worker has been applying for jobs for 5 years. She says “**No one touches you when you are on workers compensation**”.
- **Annie** says “**As soon as people hear you have made a workers compensation claim, they’re not interested. Luckily, I went for an interview for one job where the boss didn’t ask whether I had a history of workers compensation so I stayed there for ten years**”.
- **Harold** says “**I’m meant to apply for four jobs a month but I apply for heaps more. They all suit my injuries. I get told all the time I’d be hired if it wasn’t for the compo. I wish I didn’t have to declare my injury.**”

Cutting workers off while injured and with no comparable employment is exactly what the Work Capacity Decision, 2.5 year and 5 year cut off do.

Most injured workers are cut off at 2.5 years because they have some work capacity but have long since been terminated by the employer that injured them and no one
else will give them a go. It is heartless and involves no consideration of injured workers individual circumstances. Cutting them off transfers the cost of the injured worker to Centrelink and Medicare, their personal savings, super, charities or family and friends. The Productivity Commission, Access Economics, Allens Consulting and Safe Work Australia have described where the burden of workplace injury falls:

“In terms of the burden (of workplace injury) to economic agents, 5 per cent of the total cost is borne by employers, 74 per cent by workers and 21 per cent by the community.”

Because of the onerous conditions attached to the 5 year cap, very few injured workers access weekly payments for 5 years. It should also be noted that only 2,357 out of 57,966 workers in the scheme at 22 August 2014 (4%) meet the definition of “worker with highest needs” and therefore have the chance of receiving weekly benefits beyond 5 years. Every single injured worker except this 4% have had their workers compensation benefits decimated.

The Work Capacity Decision (WCD) cut off can happen at any time with 3 months’ notice. A WCD can refer to a number of actions by the insurer that affects weekly payments but the most common WCD is when the case manager assesses the injured worker has sufficient work capacity to go out into the labour market and secure suitable employment that earns more income than their weekly payments. Essential to this assessment is what the injured worker could earn in “suitable employment”.

The definition of suitable employment following the 2012 changes is as follows:

"suitable employment" in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:

(i) the nature of the worker’s incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker’s age, education, skills and work experience, and

(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of:
   (i) whether the work or the employment is available, and
   (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
   (iii) the nature of the worker’s pre-injury employment, and
   (iv) the worker’s place of residence.9

Unions NSW has reproduced this definition from the Act in full so the incredulity of the bolded section can be fully appreciated by the Committee. This is why injured workers refer to the WCD cut off as the fantasyland cut off. The insurer is completely allowed to ignore real life when deciding whether an injured worker can go out and earn the same as their weekly payments. The same definition is used to reduce weekly payments by “notional income”.

It should also be emphasised that this decision is made by an over-worked, under-trained case worker, who has no medical expertise and who need not even consult the medical records on the injured workers file to make the decision.

The case worker will often use a “vocational assessment” carried out by a rehabilitation provider in making a WCD. Workers frequently attend these vocational assessments with high hopes that they will be a first step towards finding meaningful alternative employment only to have those hopes dashed by the reality that the rehabilitation provider is simply jumping through hoops identifying jobs that frequently don’t meet an injured workers restrictions or interests. The assessment is then used by the insurer to argue there is work out there somewhere for the injured worker in fantasyland and therefore they can be cut off.

An injured worker cannot currently engage legal representation to challenge a WCD. This is due to change with the Workers Compensation Amendment Act 2015 (the 2015 WC Act), however the enabling Regulation is yet to be enacted making it hard to predict if this will make things easier for injured workers. The proposed Regulation
that Unions NSW sited in confidential consultations was likely to have minimal effect in supporting injured workers if at all.

The essential point to remember about the WCD cut off (as well as the 2.5 year and 5 year cut off) is that the injured worker can be cut off when they are still injured and when they have not achieved comparable employment.

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<th>Stories from the Unions NSW Return to Work Inquiry regarding income support</th>
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<td>• <strong>Meaghan</strong> is taking the largest employer in NSW to court to get them to return her to work said, “I got my first work capacity decision in October 2013. I found it was not based on medical evidence, and there was no information about what evidence it was based on. It said I was good to work. I could work as a teacher in a different high-school. The work capacity decision ended my income and I started to use up my sick leave until Feb 2014.”</td>
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<td>• <strong>Simon</strong> only had 2 weeks off work when he broke his ankle. He never had it properly diagnosed and was in terrible pain, which remains 2 years later. He says “I made a decision pretty early in the piece because I’ve been injured before at work and you’re not really treated the same and with a young family I needed to go back full-time. The bills don’t stop.”</td>
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<td>• <strong>Lyle</strong> is challenging the denial of his claim for a knee injury sustained when he fell off a tipper truck. He has been receiving Centrelink payments from January 2014 and despite help from the Salvation Army to reorganise his loan repayments, he had to declare bankruptcy this year.</td>
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<td>• <strong>Tom</strong> spent 5 months in hospital and underwent 32 operations after 2 tonnes of timber fell on him yet it took 7 years for the insurer to accept liability and pay him weekly payments.</td>
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<td>• <strong>Emily</strong> is a single mother reliant on her work income. The injury she sustained when she fell working in a correctional facility and the resultant drop in wages has caused her much financial pressure. “I can’t even tell you how short of money I am. The difference in my wages makes a great deal of difference to...&quot;</td>
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my standard of living. It has caused me so much stress, which further impacts on my injury and well-being”.

- **Graham**, a Government employee attacked at work never took a day off work because he didn’t want to be financially penalised. “I’m worried some people are working when they should be at home”.

- **Patricia Fernandez**, the National Secretary of the Australasian Meat Industry Employees Union (**AMIEU**), said employers advise workers that they will be getting a 5% pay reduction if they go on workers compensation, so workers just use their sick leave or annual leave.

- **Shan** was injured in 2007. He describes the old system as basically a living rate plus what you could earn up to 80% of your old income. However he describes the new system as “evil” as existing injured workers are only paid 80% of the **statutory rate** under the old system, not 80% of their old income (minus what the insurer assesses you as being capable of earning). He can’t understand why existing injured workers can’t also get the 80% based on their pre-injury income. It would mean a big difference to him in pay. He says “the transition rate is criminal!”

- **Harold** is facing his 5 year cut off next year. He has identified numerous viable employment options but his insurer has blocked them and any re-training required at every turn. He has a wife and 4 children, including a severely disabled son. He constantly applies for jobs and is in serious financial distress.

- **Jo** was working as a theatre nurse in a large chain of private hospitals when she suffered a brain injury when a box fell on her head during a stocktake. Her memory, balance and pain issues have been debilitating but her claim was denied after 8 months as there were no witnesses and she could not prove a workplace incident caused the injury. Jo had to rent out her house and move her husband and three children in with her aged mother due to the denial of her workers comp claim and her partner’s unrecognised journey claim.

- **Penelope** relies on her partner and parents to make ends meet on workers comp.
• **Bruce** has had to re-draw his mortgage. He worked for 5 years after his serious arm injury but his employer still sacked him because of the injury, reducing his weekly payments.

• **Lynn** was studying and only working 17.5 hours a week when she was injured. Now she receives only $275 a fortnight on workers compensation. “I’m supplementing the weekly payments with welfare at the moment. I need a food parcel from the community some nights. I’ve ended up at the food kitchen. I was paying $422 a fortnight in rent but I’ve got Government assistance so that has reduced to $270 per fortnight. I’ve also been receiving a Centrelink hardship allowance of $311 per fortnight for the last 4 weeks. I’ve cleaned out my bank account to cover my costs. I have no savings left. Some weeks I only had 12 cents in the bank.”

• **Olga** is facing losing her home after having her claim denied (even though the Independent Medical Examiner (IME) agreed it was a work-related injury).

• **Lachlan** says his injury has cost him about $300,000 in lost wages, expenses and superannuation. When his claim was denied he had to withdraw his super to pay off his mortgage so he could be debt free.

• **Sam** says “If I wasn’t with my partner I would be on the street. She has supported me. I couldn’t afford to pay bills or rent. They have pushed me into a corner where I have had to use all my sickness benefits, all my holiday pay. I’ve used up everything.”

• **David** says “The worst part about being injured at work is getting a base wage and having to pay for medical costs. These added costs put strain on an already tight budget. SO my life has been turned upside down, I became anti-social as it was embarrassing to say that I have no money. Family and friends can only put up with hearing that excuse for so long. The invites stopped coming.”

• **Cary** says “I’m currently not receiving weekly payments. I was initially cut off from April to November 2015, but they ended up back-paying for that period of time. The insurer said I needed to move to a new job with a new employer”.

• **Craig**, a machinist, was sacked after 17 years of loyal service when he injured his back. He was cut off workers compensation after 2012, although he
doesn’t understand why. “I was happy before 2012, but since then life has been a struggle. I’ve had to break into my superannuation to make ends meet. I now work for my son, but only earn half as much as I earned in my previous job. I’m 65 next year, due to retire, but really worried about my future.”

Weekly payments & PIAWE:
19% of respondents to the 2015 Unions NSW Survey said they were unsure why their weekly payments had been reduced. This was reflected in the stories of numerous workers who appeared before the Unions NSW Return to Work Inquiry and expressed disbelief and confusion regarding the calculation of their weekly payments. They did not understand how their weekly payments had been calculated and felt their payments were not equal to what they were entitled to. Some had taken the matter to WIRO but many did not know that was an option or were too exhausted to do so.

More than one employee from the Department of Corrections stated the Department applied the 95% of PIAWE rate to the entire pay period, even if you were injured on the final day of the pay cycle. They said it made sense to not make a claim, so your wage didn’t reduce and you didn’t have to give up pay for time you had already worked. This is not the correct way to work out weekly payments but if a large government department can’t get it right, it’s no wonder so many get it wrong. It is injured workers and their families who suffer with reduced income, at a time they are less likely to be in a position to fight it.

The move to PIAWE from the 2012 changes to workers compensation was intended to be about “the simplification of the earnings base from which to calculate weekly income benefits... (to create) a uniform measure (that) would simplify the administration of benefit arrangements”. Yet the PIWE system that was created could not be more at odds with this objective. This view is widely held, including by the Centre of International Economics which stated “The PIAWE approach is complex and often difficult to calculate”. As a result, workers, insurers, unions and merit review officers struggle to understand the system, which leads to differing interpretations and incorrect PIAWE decisions. The
detailed submission by the CFMEU regarding the problems with PIAWE is endorsed by Unions NSW and is attached at Annexure E.

Unions NSW endorses the principles regarding PIAWE that came out of the Parkes Project which are as follows:

1. The calculation of Pre Injury Average Weekly earnings should be a simple and fair process;
2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged);
3. ‘PIAWE’ should reflect the current value of ‘pre-injury average weekly earnings’ (Indexation) as should the maximum cap on weekly payments;
4. Where there has been an inadequate payment of weekly payments, adjustments should be easily arrived at and paid from the date of the claim/notification.

The recommendations from the Parkes Project have been included in Section 5 of this submission.

**Injured workers are being punished:**
Unions NSW submits to step down or cut off weekly payments is unnecessarily punitive against the injured worker. It wasn’t Scott’s fault that he intervened to prevent the assault of a co-worker and ended up being assaulted himself, yet from the moment he was injured he received only 95% of his PIAWE, dropping to 80% after week 13 and even more after 12 months. Such an approach to income support for injured workers does not, as the Government alleges, encourage injured workers to return to work it simply punishes them for being injured.

**Employers are allowed to routinely ignore their return to work obligations and insurers are an impediment to injured workers returning to meaningful work**

Boosting return to work was one of the main reasons championed by the Government for introducing the 2012 changes to workers compensation.
In 2012, the Government included Improvement Notices as a tool WorkCover (now SafeWork) inspectors could use to target non-compliance with return to work obligations by employers. Apart from an initial trial period, inspectors have proven reluctant to utilise these tools, only hiring and training specialist inspectors in the last 12 months. There have been more recent minor incentives for employers who hire injured workers including $1000 in return to work assistance and an $8,000 training grant for workers with more than 20% WPI who have been injured for more than 1.5 years. The latter has been championed by the Government despite a similar and more generous provision already being in existence.

Other than these meagre provisions there have been no changes to the scheme to encourage return to work not counting the punitive measures covered in our submission above.

So it comes as no surprise that the Macquarie University Report No. 3 found there is no evidence of improvements in return to work rates for injured workers in NSW since the changes were made.\textsuperscript{13}

Further, the Unions NSW 2014 and 2015 Survey of Injured Workers showed workers were increasingly less likely to be working with the same employer and were more likely to have been terminated by their employer. Even those that remained in employment were not having a positive experience.\textsuperscript{14}

A number of the stories told to the Unions NSW Return to Work Inquiry show an almost complete failure of employers to return injured workers to on-going work unless they can show they are 100\% fit.

The Return to Work Inquiry stories show employers, even large Government Departments, do not take their return to work obligations seriously and that insurers do little to enforce compliance. Return to work orders from the Workers Compensation Commission are being routinely ignored and enforcement action of any kind by the inspectorate has dramatically reduced by every measure in the past 6 years\textsuperscript{15}. The Return to Work Inquiry stories show that workers who managed to transition to new careers did it because of previous skill-sets, their own networks or
good luck. Insurers resisted retraining and had an attitude that the worker should have no say in their retraining or career options.

Stories from the Unions NSW Return to Work Inquiry regarding return to work:

- **Penelope** has had to fight for being given the opportunity to return to work. As a nurse employed in the public hospital system who had returned to various light duties during the up and down of a number of back surgeries, she was told there were no more light duties in the entire public health system when she tried to return to work after her fourth and final back surgery. She had to take the Department to court to win a position in a Neonatal Unit. She has now been assessed as 61% WPI and is unfit for work right now. She wants to retrain as a speech pathologist but her insurer is refusing stating “*they are the ones that make the decisions regarding my training and that it is not about what I want to do*”.

- **Mina** has also had a bad experience with NSW Health. A social worker, she was injured in 2010. She tried suitable duties in a number of different positions but two years after she was injured, was told she had to return to her substantive position or resign. She was then sent to an IME who said her injury was not real and she was cut off. When she finally got the surgery she needed in 2014 and presented as fit for work, NSW Health refused to place her back at work.

- **Rebecca** is another example from NSW Health. She had a shoulder injury that required surgery but returned to work on restricted duties. After 6 months she was terminated. She fought the decision and returned to full duties with modifications, which she has successfully managed for over 10 years.

- **Meaghan** is a teacher who had 10 years’ service and an unblemished record when she was assaulted in 2012 at her Department of Education school. The Department is a self-insurer. She was initially left off work for 15 months with no return to work plan. She began a staged return to work but she had a car accident meaning she needed 3 weeks to recover. From this point on she was on her own. She put herself through TAFE courses and started a University degree. She found casual work with the Department doing distance
Unions NSW 2016 submission to the Law & Justice Committee re the 2012 Workers Compensation Changes

education, which she did for a year. They tried to terminate her when they found out about her injury. She took the case to the Industrial Relations Commission, which ordered her reinstatement, but after another year of casual employment, they refused to offer her more shifts. Orders and recommendations from the WCC for reinstatement were routinely ignored. She is now taking the Department to the District Court seeking orders to remedy a breach of statutory duty. If she loses, she will lose her house. If the biggest employer in NSW can ignore their return to work obligations, what hope do injured workers have.

- **Kylie** has serious injuries to both arms but the IME declared her as fit for work. They said “I can work full time in any job without using my hands”.

- **Jo** used her contacts at the private hospital where she worked when she was injured to find two days a week working as a receptionist in a specialist’s rooms. She found the letters from the return to work coordinator rude and harsh and as soon as her claim was denied (8 months after the injury) it was made very clear she would never return to her workplace.

- **Magda** has RSI that first appeared in 2005. She has returned to work many times, to only have the injury recur. When the RSI returned again in 2016 her insurer promised a proper return to work plan, yet when she returned to work she was placed in exactly the same job and has been excluded by her team.

- **Tim** injured his back lugging coinage but his employer refused to provide suitable duties so he has had to stop work.

- **Deloris** was diagnosed with an acute adjustment disorder from workplace bullying. Her initial return to work plan was overseen by the two managers who bullied her, causing her to relapse. After 9 months her employer agreed to place her in a different office under different management and she is now back to full-time hours.

- **Shirley** is a workers compensation lawyer who works in a country town. In her experience country employers take a claim personally and are therefore more likely to deny suitable duties and push the employee out the door as soon as possible. She knows of a government worker who injured her arm. She is still carrying the injury but can now perform all her duties. Yet her insurer is
sending her to an IME who will likely certify she is not 100% fit, meaning she won’t be allowed to return to work.

- **Aaron** returned to work after he was nearly blinded in September 2013. His employer had him doing menial work and sacked him 2 years later when it was clear he would never be 100%. “When I was terminated .. I felt betrayed. I had 16 years of service. I’ve never been in trouble. When I was on light duties the work coordinator on the shift was told to watch me and report even if I was one minute late back on the smoke break. I felt victimized.”

- **Fiona** was injured when her arm was crushed in a door as her supported accommodation facility went into lock down. She made several attempts to return to work, but her arm needed a resting splint and she had a meltdown with the stress and pain. Her employer has now refused to return her to work because they say she can’t be working with people who have mental health problems if she has a mental health problem herself. She has now been certified as fit for all duties, except mopping, which could be fixed if her employer bought a steam mop. Her employer is telling her to job search.

- **Natalie** is employed by a large retail self-insurer. She was pushed back to full duties after a shoulder injury, significantly aggravating her injury such that it required surgery. The large retailer originally said there were no suitable duties for her, but she fought this and after 2 months off, returned to work. The light duties re-aggravated her injury so she is off work again “My case manager said that the insurance agent was under no obligation to help me find redeployment and it was my responsibility to find alternative employment”.

- **Carmela** was also employed by a large retail self-insurer. She injured her shoulder in 2013. The doctor recommended surgery but the insurer declined due to her age. After 10 months of workers compensation, her claim was also denied. Her employer said she had to resign or work with her injury. She has now been terminated.

- Since injuring his back in 2008 **Harold** has worked on and off, but nothing recently. In 2009 he asked the insurer if he could set up a pallet allocation business. They refused, saying he could fiddle his wages if he worked for
himself. He’s currently paying his own way to qualify as a driver trainer but needs to lose weight before he can complete the training. He identified a job as a casual driver trainer but the insurer ruled it out as it involved too much sitting, but Harold is confident it would meet his restrictions. “I’m due to be cut off in July next year under the 5 year cap but it seems the insurer wants to put barriers in the way of me working again rather than helping me get back on my feet”.

- **Melissa** says her list of light duties were the exact same tasks she usually had do before she was injured. She told her boss but he insisted, so her injury flared up again.

- **Lachlan** injured his back when he slipped pushing a trolley down a steep embankment. His claim was denied, which he overturned, but the school were “harsh and merciless”. The manager said “I am not concerned about you at all, I am only interested in what is the best financially for the school.” Lachlan says “I shall never forget that statement for as long as I live. This was a private Christian School and I would have expected far better considering all the bleating about love and us being one big family”.

- **Carla** was a bus driver employed by a large council who ruptured the ACL in her knee assisting a passenger. She returned to work on office duties, increasing her time to match her usual part-time hours. She was carrying out these alternative duties for 1 ½ years when they were abruptly withdrawn and she was sent to an IME. The IME confirmed her injury but she never returned to worked, being terminated by a letter in the mail 2 months later. Carla says there were decades of boxes of archives that needed to be scanned when she left. “They just wanted to get rid of me”. Carla says her rehabilitation provider recommended she go to TAFE and do a cert 3 in business admin. But the case manager said there was no way she was going to be up-skilled. The decision was overturned by merit review.

- **Sarah**, another bus driver, was able to return to driving after a back injury. She worked for another 5 years, carrying various restrictions. But when she couldn’t reach her pre-injury hours, she was terminated. QBE refused to provide re-training unless it was in the security industry but Sarah was not
interested in this kind of work. Her rehabilitation provider recommended she see an employment consultant but QBE refused to pay so the appointment had to be cancelled.

- **Carmen** had a breakdown after working 19 years as a social welfare worker. Despite being cleared to return to work 16 hours in any non-frontline role, the Department of Family and Community Services (FACS) have said they can find nothing that meets these restrictions. Carmen is confident she can gradually build up the hours but FACS won’t budge. The insurer says she should become a real estate agent or a travel agent. Carmen says “I don’t want to do that. I’ve been working in this field for 19 years…I’ve got another 20 years of working life in front of me. I want to do work that will make a difference and use my expertise. I don’t want to walk away from my profession and I shouldn’t be expected to”.

- **Min** injured her back working in a furniture factory. She returned to work but the light duties were very similar to what she was doing before and she re-injured herself and developed mental health problems. Her employer gave her an ultimatum, get cleared for full duties or work somewhere else. He sacked her. Since then she hasn’t had any vocational assessment or offers of retraining.

- **Steale**, an injured building worker, had multiple requests for re-training denied by the insurer. The insurer conducted a vocational assessment that said he could be a delivery driver (his pain killers don’t allow him to drive) and a Foxtel installer (he can’t get on a roof with his back injury). “They are not dealing in the real world. I’ve been a bricklayer since I left school and I still want to do something that is connected to my trade”.

- **Shayne** worked for 30 years doing manual roles for a government-owned power station. He has 28% WPI from accumulated injuries. As his body deteriorated after injuries his requests for lighter duties were denied. After he went on workers compensation the vocational assessment indicated he could move into customer sales or be a call centre worker. He hates computers and has only ever been interested in physical jobs.
Pete has worked in a rural production factory since school. The workplace is unsafe and he has raised many issues about safety over the years. He has been injured at least four times and has had to have several operations. After his last operation he was called in for a meeting and told not to bring a lawyer. The two senior managers at the meeting had a lawyer. They asked Pete whether if he got injured again he would make a workers compensation claim. When he said yes they terminated him.

Thane was an engineer when he injured his knee. His employer returned him to work and he managed to reduce his restrictions so that he was working full-time with climbing stairs only when necessary. Despite this, because he was not 100% recovered, his employer terminated him. The insurer refused to retrain him as a teacher’s aide as they said there were too few job opportunities. After he was terminated his wife insisted he volunteer at her school helping a kid with cerebral palsy. He encouraged the school to apply for funding to place him as a teacher’s aide, which it did. He is now a teacher’s aide and general school assistant and loves his new career, even though he earns much less money.

Shan has managed to transition from his teaching career to one as a diving instructor following a catastrophic knee injury playing sport at school. He has 28% WPI and has had no assistance from his employer, which actually transferred him to another school and made it harder for him to do his job after his surgeries. He made his own luck, turning a hobby into a new career.

Aimee injured her shoulder in 2011 working as a youth officer with Juvenile Justice. She returned to suitable duties for about 8 months but bullying led to a secondary psychiatric injury. After this she sent herself to various courses, which the insurer refused to pay for. There was no offer from the Department to transition to other work like being a parole officer. She now works casually in a mobile coffee barista van, which she enjoys even though she only earns about ¼ of her previous wage.

Craig, a machinist, was sacked after 17 years’ service when he injured his back. He had to find his own job and now works for his son, but only earns half as much as he did in his previous job.
Unions NSW also refers to the Macquarie University Report Number 3 and its study of the return to work experiences of 20 injured workers.

“The return to work coordinator for MSA1 took an even less constructive approach. She repeatedly asked MSA1, ‘Why don’t you leave?’ and ‘Do you want to work here?’ This return to work coordinator allegedly labelled herself ‘The Terminator’, with reference to her ability to terminate injured workers. It is extremely concerning if employers are able to interpret the role of a return to work coordinator as being one of terminating injured workers, rather than supporting them to return to work”.

Fixing return to work must be one of the main objectives of this Committee. All the evidence shows employees who can return safely to their pre-injury workplace have the best chance of achieving a durable return to work.

Unions NSW submits there are 3 main barriers to return to work. First, the ability for an employer to terminate an injured worker after six months if they cannot return to pre-injury duties. Second, the ability for the employer to get away with not offering suitable duties. Third, the ability of prospective employers to easily discriminate against injured workers. How these issues should be addressed is outlined in both Section 4 and Section 5 of this submission.

Workers who are injured on their way to and from work have no right to compensation

Journey claims have substantially diminished since they were all but excluded from the scheme in 2012. There were 10,371 journey claims in 2011/12, which reduced to 751 claims in 2012/13, 33% of which were contested by the insurer.

Unions NSW believes the first journey claim not recognised due to the 2012 changes to the scheme occurred in Bathurst in August 2012. James Cantrill was critically injured on the way to work at Central West Linen Service when he was involved in a motor vehicle collision that was not his fault. James would not have been on the road that morning if he wasn’t travelling to work. James is left with nothing – no vehicle, no income, mounting medical bills and horrific injuries. He is left to rely on the public health system and his family to carry the burden.
Stories from the Unions NSW Return to Work Inquiry regarding journey claims:

- **Xanthe** was injured driving home from work in 2015. She has used up all her super and accrued leave to take 10 months off to recover. She sought to return to work 3 days a week initially but has been isolated, bullied and harassed. She now has a psychological injury as a result of her treatment. She is about $70,000 out of pocket and with retirement around the corner, she is worried about her future.

- **Jo** was off on workers compensation herself when her partner had a journey injury in 2016. He used to ride to work on his motorbike. A car did not see him and drove him off the road. The driver must not have realised they had caused an accident as they did not stop. He was in intensive care for five days and has been unable to identify the driver. The Motor Accidents Scheme denied liability and there is no longer liability under the workers compensation scheme. His employer has recently changed its policy regarding working from home making recovery more difficult and placing extra pressure on him to return to work before he is physically capable to do so. With both Jo and her husband off work, the financial difficulties have been enormous.

- **Lily** was involved in a car accident on the way to work in May 2016. The other person was negligent so she was covered by compulsory third party insurance. Luckily her employer agreed to a gradual return to work program, which she found very helpful.

Further stories about denied journey claims can be found in the Macquarie University Report No. 1.20

The burden of withdrawing cover for journey claims falls higher on regional workers, who frequently have to drive longer distances to work, and shift workers, who suffer from disrupted sleep patterns.

The cost of journey claims to the workers compensation scheme was very small. Journey claims represented a mere 2.6% of all claims, did not impact on premiums.
and half of all journey claim expenses were recovered from the compulsory third party (CTP) motor accident insurers.\textsuperscript{21}

Given these low costs, the fact the scheme now has a $4 billion surplus and the financial impact of a lack of coverage on individuals and their families, Unions NSW can see no reason why journey claims should continue to be excluded from the workers compensation scheme.

\textbf{Despite ongoing medical costs arising from workplace injury and illness, sick and injured workers now have their medical expenses delayed and capped and must find a way to foot their own bills}

26,500 injured workers were cut off medical cover between when the 2012 changes were made and 31 December 2013.\textsuperscript{22} Unions NSW estimates tens of thousands more have been cut off medical cover since then.

The 2015 WC Act recognised the injustice of the one year medical cap that arose from the 2012 changes and partially reversed it as follows:

- Injured workers with 10\% or less WPI have had their medical benefits doubled to 2 years after payments cease;
- Injured workers with more than 10\% but less than 21\% WPI can receive medical benefits up to 5 years after payments cease;
- Injured workers with 21\% or more WPI can receive medical benefits indefinitely.

There have also been further changes to ensure indefinite compensation for crutches, artificial limbs, eyes, teeth and artificial aids (including hearing aids and batteries). There are also no limits to modifications of a worker’s home or vehicle. Secondary surgery can also be covered as long as it is approved by the insurer within 2 years of the earlier surgery.

While these improvements are welcome, it remains that any caps on medical cover will prevent necessary medical treatment for injured workers. Further, tying different levels of medical cap to WPI does not ensure that treatment will go to those that most in need. An injured worker with 8\% WPI may be in desperate need of shoulder surgery 3 years after their weekly payments end while another injured worker with...
17% WPI may have a stable injury with no further need for medical intervention. It should also be remembered that WPI is an arbitrary measure that the medical community has consistently opposed as a basis for awarding compensation.  

Another problem with medical cover that has arisen from the 2012 changes is the requirement for medicals to be pre-approved by the insurer. The timeframe of 7 days was extended to 21 days for approval, but it is routinely breached by the insurer and delays are impeding injured workers recoveries. Other medical claims such as domestic assistance are not advertised by case managers to injured workers and when they are sought by injured workers they are routinely rejected, despite manifest need.

Stories from the Unions NSW Return to Work Inquiry regarding medical costs:

- **Harold** is facing his 5 year cut off next year. He has a serious back injury that needs surgery but he’s been struggling with the injury for 8 years so he’s put on weight, which means the surgeon won’t operate. As his insurer has refused to pay for a gym program he doesn’t know when he’ll be able to get the surgery he needs and whether by then it will be covered by workers compensation. Harold has also stopped using prescription pain medication, switching to unsafe doses of over-the-counter medicine, after the insurer repeatedly refused to pay his chemist bills in a timely manner. His low weekly payments simply did not give him the financial latitude to cover the cost until his insurer got around to paying up.

- **Bruce’s** insurer won’t pay for dental treatment when his teeth starting falling out due to years on heavy painkillers.

- **Ryan** is approaching the five year cap. He hasn’t had a WPI because his prognosis is uncertain and, given workers are only allowed one, he can’t risk doing it at the wrong time. He also needs serious back surgery (spinal fusion and an artificial disc). Who knows what medical cap will apply to him?

- **Tim** injured his back in lugging 60kg bags of coins to and from banks, continuing to work with the injury for 14 years. His insurer recently sent him to
an IME “who said that there was nothing wrong with me and my deterioration was due to a defect I’ve had from birth”. The WCC rejected the IME report.

- Betty’s insurer fought her request to reimburse her for front opening bras that she needed after a shoulder reconstruction. They cost 4 times what she would normally pay so she asked the insurer to pay the difference, a mere $440 a year. The insurer paid $3000 in legal fees to fight it and lost.

- Alan’s medical treatment has not been great. His first operation was cancelled because it hadn’t been approved by the insurer yet. “I had to be awake for the surgery and it was freaking me out. Then it was cancelled and the mental trauma that caused was unbelievable.”

- Brionny, an Assistant in Nursing, so badly injured her shoulder and spine at work she needed surgery. That hasn’t stopped the insurer denying her claim, meaning she has had to cover all her medical expenses herself.

- Lynn’s specialist has recommended surgery for her shoulder injury but the insurer wants to take a more conservative treatment approach so has declined it. Lynn is an Assistant in Nursing and if she could get the surgery, she could finish her nursing qualification. Lynn is now waiting on the public hospital list and having trouble surviving on her tiny weekly payment of $275 a fortnight. She would be capable of doing suitable duties in the office at the nursing home but this has not been offered.

- Jan fractured her foot in mid-February and it took five months for the approval to order a Cam Boot. If she had the boot straight away she would have healed much quicker.

- Sam has had trouble getting medicals paid by his employer, a large retail self-employer. His back injury claim was accepted for 1 ½ years, then declined. He was organising to get the back surgery he needs, but that won’t happen now. The insurer would also consistently not pay his chemist. The account was 190 days overdue and the insurer would only pay random amounts.

- Lyle’s chemist is also owed about $1,100.

- Lucinda says at one stage she had a new case manager every 3 weeks. “The struggle is with everything as they do no approve physiotherapy, and then they do not pay for weeks. They do not pay for medication. They send
Danielle’s spinal surgery had to be postponed when her insurer, EML, didn’t approve it in time. They also delayed approving transportation to attend physio appointments, suggesting she drive herself (against medical restrictions) and stop the car on the freeway every five minutes to stretch.

Todd’s insurer refused the surgery he needed on his knee so he funded it himself. It took a year to win reimbursement through WIRO. The insurer is still sitting on a request for further knee surgery submitted over 6 months ago. The pain in his knee is reducing the number of hours he can work, eating into his sick leave and annual leave to make up his pay. “It seems that the insurer can just wait and stall as there is no incentive for them to progress the matter.”

Belinda’s insurer has refused to pay for the medical treatment she needs following a broken shoulder and injured knee. She pays for it herself.

Ben’s insurer tried to blame gout and varicose veins for my knee injury. He went to specialists that disproved these claims but the insurer continued to deny liability. In the end, Ben funded his own operation.

The burden on the Medicare system from the 2012 changes to workers compensation should also not be overstated. The Hon. Andrew Constance, then-Minister for Finance and Services, has conceded that costs that were previously met by the scheme are now being met by Medicare. Given Medicare does not cover all costs associated with medical care or many other treatments like physiotherapy or dental, there is also a large burden falling on injured workers and their families.

The Government cannot continue to turn its back on the evidence regarding the failure of the 2012 changes to return injured workers to work and provide the necessary income and medical support they need.
Section 2: Sick and injured workers have been driven to suicide and despair because workers’ compensation support is now so limited and the system treats them so badly

For many injured workers, the feeling of absence of hope and helplessness that arises from their severe pain, constant abuse from the employer or insurer, constant denials of even the most basic medical and other care or services, extreme financial distress and even the prospect of permanent disability may cause such prolonged periods of extreme stress or emotional upset that they have suicidal behaviour or idealisation or depression.

The 2012 changes have played a big role in removing hope and feelings of helplessness because they remove, for most injured workers, an ongoing financial and medical safety net.

The Unions NSW Survey of injured workers in 2014 and 2015 shows that the longer a worker is in the workers compensation system, the greater the likelihood they have had suicidal thoughts. The Surveys showed for those injured prior to the changes (and therefore in the system the longest) 25% had suicidal thoughts. For those injured after the changes, 15% had suicidal thoughts in 2014, rising to 18% with suicidal thoughts a year later. Further 24% were suffering secondary mental health issues in 2014, rising to 29% in 2015.25

This is broadly consistent with the anecdotal evidence that suggests changes to workers compensation in 2012 have driven injured workers to suicide and despair.

Of the 100 of injured workers who told their story to the Unions NSW Return to Work Inquiry, 44 reported suffering depression and 7 mentioned suicidal thoughts. The most common reasons given for suicidal thoughts were pain, treatment by their employer and insurer and financial distress.

Stories from the Unions NSW Return to Work Inquiry regarding suicide:

- **Zara** has tried to commit suicide twice. She was injured in November 2012 and her mental health problems emerged in early 2014 due to constant pain,
harassment by management and family conflict. Her secondary psychiatric injury has been accepted by the insurer. Her large employer withdrew her suitable duties 3 months ago, even though it was a viable ongoing job.

- **Vanessa** is the wife of an injured worker. Her husband suffered a minor injury but was so badly treated by his employer, he became suicidal. The case study admits she has felt so overwhelmed she has considered suicide and taking her children with her. She says: “I have no words to express the extent to which my partner's injury has impacted upon our lives... I have seriously contemplated murdering my family and suiciding as a way to end the torture. We were once happy and healthy. Family are the collateral damage and there is no consideration or compensation... My children have been distraught seeing both their parents suffering and witnessing the yelling, threatening behaviour of those engaged by the insurer on the phone and in our home. They begged me to have this stopped but there was nowhere to go. They ask what's wrong with Daddy. Then they begin asking me if I'm ok and they see I'm not coping. It was shocking to watch my partner's health decline to a point I don't recognise him anymore. He is broken - permanently and psychologically impaired. He self-harms. He is suicidal. He was hospitalized back in 2013 as with the stress he had become emaciated and gaunt, looking like a prisoner of war..."

- **Penelope**, who has been assessed at 61% WPI, said to her case manager in frustration: “You’d like it if I killed myself. That would make your life easier.” To which the case manager replied: “yes it would”.

- **Ryan** is an injured manual worker and father of 5. He was sectioned after he tried to drive his car under a truck when an IME said he would have to work as a clerk or a storeman (despite a serious back injury and no skills in that area) or be cut off the scheme.

- **Pete** considered parking his car in front of a truck on the highway when he was off work for 15 months.

Most unions can point to members who have tried to commit suicide while being on workers compensation both in the public and private sectors. For example, an injured worker set himself alight at the QBE office in Honeysuckle in January 2015.
suffering serious injuries and a health worker jumped off a bridge when she received her decline letter. The Injured Workers Support Network has had to actively intervene in 5 cases during the last 2 years where an injured worker was felt to be an imminent risk to themselves.

Yet iCare keeps no data that Unions NSW is aware of regarding the incidence of suicide among current or former workers compensation recipients in NSW. In our submission this lack of data is evidence of a gross lack of empathy with the plight of injured workers and their families. It seems it is irrelevant to the Government how a worker is removed from the scheme, suggesting a lack of interest in whether an injured worker has returned to durable ongoing employment, retired, had a work capacity decision or committed suicide. The Government’s attitude is perhaps best characterised in the following way: “as long as they are off the scheme we don’t care.” This is an indictment on the Premier and this Government.

In the absence of data from iCare, Unions NSW has obtained data from the National Coronial Information System (NCIS) regarding the incidence of suicide in NSW. The NCIS data is set out in the table below. It excludes suicides among the employed, students, those on home duties and prisoners. It should be noted the 2015 data is an underestimate due to the fact that only 71.8% of all 2015 NSW coronial cases have been closed.

Table 1: NSW suicide rates

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2012 was the highest year recorded
The data shows an alarming spike in suicide rates in 2012, the year the workers compensation changes were introduced. There was a change in the database at the Coroner’s Court at this time that may explain some of the spike but Unions NSW submits the data is worthy of further urgent exploration. This is particularly the case since suicide rates in 2013 and 2014 of 359 and 376 respectively are also well above the average yearly suicide rate over 2005-2011 of 327.

Stories from the Unions NSW Return to Work Inquiry regarding the emotional impact of being in the workers compensation system:

- **Laurie**, a mental health nurse, saw the inability of his local hospital to cope with the rise in young mental health patients due to workers compensation. He says there are “so many broken people because of workers compensation”.

- **Jo** says “This probably breaks my heart more than anything is the affect it has on my whole family. The accident happened to me and I deal with it…but to see the ripple effects on my family is really hard, because I know I am the cause of it…”

- **Brent**, a police officer who suffered a breakdown, says “I was so affected by the processes that I ended up leaving my then wife and retracting away from everyone for a lengthy period of time.”

- **Stanley** says “My life is a nightmare with no end in sight. So win or lose, no matter the outcome for me, I am going to be in pain – disfigured and suffering, worthless until my end.”

- **Allan** says “To all injured workers and their families – try to keep safe and as well as you can. Stay strong because you need to be when exercising your so called ‘rights’…clearly the humiliation, denigration, stress and financial duress placed on the injured worker and their family means nothing to our politicians”.

- **Aaron** says “I’m trying to learn to live my life with what I’ve got. But the insurer plays mental games. You’ll feel good for a couple of weeks, getting on with your life, then the insurer does something and it gets you down and makes you feel like a criminal.”

- **Olga**, a nurse, was bullied after she raised serious allegations of irregularities in the dispensing of narcotics at her nursing home. She wants to return to
work and did for a few days, then her employer withdrew the light duties. Her claim has been denied (even though the IME found it was a work related injury) and she was terminated after 9 months. “The process – it’s just terrible, it’s humiliating and it just makes you feel like a criminal. You have to justify and explain yourself and I’ve done nothing wrong. I’m not the same person anymore. I don’t know if I’ll ever be.”

- **Aimee** slipped and fell on the wet kitchen floor of her Government Department. She is depressed and her marriage has been ruined.

- **Natalie** says “I often feel distressed and distraught around the threats and lack of care shown. I feel the injury has severely affected my day to day life. I now struggle to do simple everyday tasks like putting on my underwear.”

- **Sarah** says “I was treated like a criminal, as if I had no idea of my own capabilities or limitations, and was made to feel like a burden, a malingerer, a total waste of their time, and a nuisance”.

- **Lyle** says despite years of faithful service “throughout this almost three years of extreme financial difficulty, constant physical; pain and emotional and psychological distress; I have not received any query or gesture of health or well-being enquiry from my previous employer”.

- **Carmela** says “I feel like I’m only a number, being replaced by newer models…The way they speak to you, the way they treat you, you feel as if you are nothing.”

- **Belinda** says “I cannot walk more than 100 metres and I live in constant pain. I am a 61 year old woman who cannot go back to the job she loved and did for 32 years. I dread getting mail, I dread answering the phone and I react in fear every time I hear from my case manager. Like so many other injured workers, I have been treated more like a damaged car than a human being by insurance companies”.

- **Kylie** says “They sent me to another Doctor for a functional assessment who was so rude, and he was so demeaning and condescending. He said do you have any complaints about the meeting and I said, ‘I felt like a criminal’ as that is how he made me feel”.

The recent Victorian Ombudsman Report “Investigation into the management of complex workers compensation claims and WorkSafe oversight”\(^{27}\) echoes these stories.

- An email from a health care professional following the announcement of the investigation of the Victorian workers compensation system said “I commend you on attending to the number of people suffering twice- once from their injury and then again via the system”.

- A family member who struggled to get medical assistance for their loved one before they committed suicide said “These insurers rely on people being too sick and exhausted to fight back… Words will never describe how angry, how hurt and how sad I am that my [parent] is gone… I know that they are a business and some people cheat the system, but my [parent] was not one of them. [They were] truly and completely mentally ill and they cut off [their] treatment”.

The Government cannot continue to turn its back on the compelling and horrifying evidence regarding suicide and depression directly resulting from its workers compensation scheme. Unions NSW submits it is arguable the Government is legally liable at common law for allowing the perpetuation of a scheme that systematically causes such pain and suffering. The NSW workers compensation scheme is broken and must be scrapped.

**Section 3:** Mike Baird’s workers’ compensation system has been constructed to serve the interests of insurers and employers. Sick and injured workers are not even a consideration.

When the then-Treasurer the Hon. Mike Baird introduced into Parliament the Bills that made the workers compensation cuts he said:

“These bills will ensure better protection for injured workers, save businesses from unnecessary premium hikes and get the scheme back into surplus. The purpose of the bills is to deliver urgently needed reforms to the New South
Wales workers compensation scheme. With a deficit in excess of $4 billion, the scheme currently is unsustainable...

“The Workers Compensation Legislation Amendment Bill represents a fundamental shift towards properly meeting the needs of the most seriously injured workers in the scheme while strongly incentivising return to work for those workers who have the capacity to return to work...The Government is taking steps also to ensure insurers direct more resources to support injured workers to improve their return-to-work outcomes and will focus on reducing the costs of insurers, which also are impacting on the scheme.”

The now Premier owes the injured workers of NSW and the NSW Parliament an apology for these misleading statements.

- The Bills did not ensure “better protection for injured workers” as has been comprehensively outlined in sections 1 and 2 of this submission.
- The Bills were not about preventing “premium hikes”, they were about facilitating premium reductions.
- The scheme was not “unsustainable” as even on the Government’s own figures it took a mere 12 months to get back into surplus.
- The Bills do not encourage “return to work” as outlined in section 1 of this submission.
- The Government has not ensured insurers help injured workers “improve their return-to-work outcomes” as outlined in section 1 of this submission.

It is insurers and employers that have benefited from the changes to the workers compensation system.

The smokescreen created the Government to do the bidding of employers and insurers was the so-called $4 billion deficit. Yet by October 2013 (one year after the new system came into operation for pre-existing injuries) the Government officially declared the workers compensation scheme in surplus. That surplus is now at least $4 billion.

This $8 billion turnaround was achieved because:
• the Government’s maths on the so-called $4 billion deficit never added up (much of the deficit was due to the GFC and changes to key assumptions - the discount rate, inflation rate and the risk margin 29); and
• the cuts have had a devastating impact on the injured worker community.

Unions NSW submits that workers compensation is not a business. It should be a support scheme for sick and injured workers. As we said in the introduction, the true measure of any society can be found in how it treats its most vulnerable members, not whether the executives at the insurance companies are making their bonuses.

The insurers are laughing all the way to the bank. Scheme expenditure paid directly to claimants reduced by 9% in 2012/13 and a further 5% in 2013/14. Meanwhile, services to claimants were reduced by 4% in 2012/13 and a further 9% in 2013/14.

The contracts between the regulator (SIRA) and the scheme agents are not public documents so it is impossible to know what the profit margins of the insurers are. Yet if we apply the same logic to workers compensation as the insurers have to CTP, we can assume a staggering 19% profit margin. The table below shows where CTP premiums are spent. Profit is 19% on top of the nebulous category of “insurer expenses” at 15%.30

![Figure 1: Where the Premium is Spent](image)

Table 2: Where CTP premiums are spent
This level of profit is echoed by the fact that in 2012 the insurers’ profit margin was just below 24%. This profit margin was meant to sit at 6-8% per annum by the scheme designers, but it has regularly exceeded this amount.

The following tables compare the insurers (scheme agents) fees to the amount paid out to injured workers. They show that even though the amount paid to injured workers has significantly diminished and varied (regardless of injury rates), the direct fees paid to the insurers have been steady and rising as a proportion of claims.

Table 3: Claims Incurred compared to Insurer Fees (WorkCover Annual Reports 2003-2004 through to 2014-2015, GIPA request 2015-2016)
Table 4: Claims Incurred compared to Insurer Fees (%) (WorkCover Annual Reports 2003-2004 through to 2014-2015, GIPA request 2015-2016)

It should be noted the spike in 2005-2006 is due to it being a transition year back to the nominal insurer model. The 2012 decline in claims appears to be due to “transitioning” workers off the system.

Unions NSW also understands the insurer contracts include financial incentives for insurers who remove an injured worker from the scheme for whatever reason.

Insurers haven’t been the only ones raking it in. The whopping 17.5% reduction in premiums for employers has been built on the back of society’s most vulnerable and fragile people. It has meant an extra $447 million in the pockets of employers in the 3 years from July 2012 and 2015. Another $200 million premium reduction was also announced in 2015 on the back of reduced support to injured workers.

Injured workers should not be treated as replaceable commodities. They are not “tissue workers” as one specialist described Sam after his back injury working for a large retail self-insurer. “He said you’re a tissue worker, you’re broken and the company will just get another one out of the box”.

It seems everyone but the injured worker is profiting from the workers compensation scheme. There are layers of consultants feeding off this dysfunctional system:
1. **Insurers** are contracted by iCare to be the Government’s insurance agents in relation to workers compensation. This is a business for them so they are literally profiting from the misery of injured workers. They employ the **case managers** that make liability decisions, work capacity decisions, decisions to send an injured worker to an IME and so on. Case managers are given little training, turn over frequently and are partisan in acting at all times in the interests of the insurer.

2. **Return to work coordinators** manage injured workers and their return to work. They must be appointed for all employers with a premium over a set threshold (usually over 20 employees). For large employers this may be a full-time role but if the employer is small this role might be performed by existing management personnel or contracted out. Unfortunately, as outlined in section 1, these coordinators are frequently more focused on preventing return to work.

3. **Rehabilitation providers** are consultants accredited by WorkCover to supposedly assist employers and workers in the return-to-work process. Injured workers can nominate their own rehabilitation provider and there are many that are fair and hard working. Unfortunately, the insurer rarely tells the injured worker they can pick their own rehabilitation provider and therefore contracts the work to consultants that are in their or the employer’s “network”. Rehabilitation providers also frequently organise **vocational assessments** to identify what jobs an injured worker could do. Those that carry out the assessments seem to have little or no expertise, leading to job suggestions that are improbable at best or completely inconsistent with restrictions at worst.

4. **Injury Management Consultants** are registered medical practitioners who provide an opinion on return to work issues when there are different views between the parties. Many have as few scruples as the worst ‘cash for comment’ IMEs.

5. **Merit Review Officers** are so-called “independent” decision-makers from the SIRA Merit Review Service that conduct a merit review of the insurer’s work capacity decision and will outline findings and recommendations. These are binding on the insurer. Workers can go to WIRO if they disagree with the Merit
Review Officer’s finding. At first almost all the reviews to WIRO were upheld. The rate remains high at 61.6% in favour of the worker.34

6. **Independent Medical Examiners** are anything but “independent”. Like guns for hire for the insurers, they know who is paying their bills and seem to generally side with the insurer’s version of events in terms of the injury. **Aaron** saw an IME of advanced years that said attending his town and doing workers compensation reports for the insurer every year was his yearly holiday. Injured workers commonly report IME’s using pre-written reports frequently resulting in injured workers receiving reports with their name or the employer’s name being wrong.

7. **Nominated treating doctors** are nominated by the injured worker to manage their injury and issue Certificates of Capacity. Some employers pressure workers to use the company doctor or a particular doctor as their nominated treating doctor. This is a particularly common practice by self-insurers.

8. **Investigators** are used by insurers to supposedly assess the authenticity of an injured workers claim, although many injured workers feel intimidated, bullied and harassed. Many do not appear to adhere to any reasonable code of conduct.

9. **Lawyers** are paid by grants from the ILARS to take action generally about disputed matters in the WCC after a WIRO merit assessment. Lawyers may not be used by injured workers in relation to work capacity decisions at this stage although the 2015 amendments were meant to change this. Employers and Insurers can engage lawyers at any stage for any reason.

Each layer adds cost to the scheme under the guise of helping injured workers or minimising fraud. Yet for all the above categories (except nominated treating doctors and lawyers) there is little or no benefit to the injured worker. It should also be noted that before the 2012 changes there was no evidence of widespread fraud in the scheme.
Stories from the Unions NSW Return to Work Inquiry regarding insurers and their agents:

- **James** retrained himself and found himself a job using computers at Telstra. “I went back to the rehab provider and said I’m not coming anymore as I got a job. They said good, we will put it down we got you this job. I said, ‘you will not...how dare you try to take the credit and get the money and you did nothing’”.

- **Betty** is a social worker who helps families cope with a dying child. After she returned to work on reduced hours she got a call from the case manager. “I said I have got 2 minutes to talk to you as I’ve got clients coming and she said: ‘you will talk to me 24/7 if you want to keep getting paid. You have to be at my beck and call.” Betty says “The insurance company has no semblance of client focus. It is very much how can we get out of paying for this. Rather than, let’s look at how we can support this person to live life as well as they can. Their attitude seems to be how we can make the most money for the shareholders and screw the clients”.

- **Ryan** says “They keep blaming the injured workers for costing the system so much, but one of the first rehab providers I saw billed $12,000 and they did nothing for me…The case manager does not talk to you. I had a new case manager and they have spoken to me once and sent 3 emails in 6 months. I have had one email off the new one that has just been appointed to me”.

- **Shirley**, a workers compensation lawyer, observed “There is a great turnover of case managers. Injured workers just get used to dealing with one case manager. Some of them manage to build up a relationship - then all of a sudden they’ve got another case manager. You have to jump through these hoops again. The new case manager doesn't understand what they've already gone through. They have to rehash it all again and then maybe in another week’s time you get another case manager. A lot of them are not properly trained. They don’t actually know the legal system or the workers comp system and they make decisions to the detriment of the injured workers.”

- **Aimee** says she has had 15-16 case managers, with only two being reasonable. Her case manager has told her that if they find suitable work in
Sydney (5 hours’ drive away) she will have to sell her farm and move, or be cut off weekly payments. Given her husband works locally this threat has frequently had her in tears.

- The vocational assessment carried out for Thane identified jobs he could do in Albury when he lived on the North Coast of NSW.

- Aaron says “it seems like every time I have a new case manager the following tends to happen: I don’t get paid on time; I get sent stupid requests (especially seeing a new IME); and I have to repeat the whole story even though it’s on file.”

- Cary says “Every time I rang GIO I got a different person or they don’t ring you back at all. I don’t know the course to take to get these people to do something for you.”

- Sarah was put under constant surveillance by her insurer. They followed her to the shopping centre, the swimming pool, the hairdresser. They talked to her neighbours. Her claim was never denied.

- Danielle works for a self-insurer and has found her employer unsympathetic and unprofessional after she suffered a nasty spinal injury. They encouraged her to use sick leave, not see her union or any doctor they didn’t approve. Danielle could not be released from hospital because they had delayed providing the home equipment she needed.

- Belinda says “I have had case managers tell me that if I don’t do what they tell me to do they will refuse me treatment”.

- Mick seriously injured his wrist in 2014, requiring 4 surgeries. He has had trouble with investigators, even though his claim has never been declined. He says “one day I was home with the flu and a taxi came to my door which I hadn’t ordered. When I answered the door and told the taxi driver I hadn’t ordered a taxi, I saw a car outside taking my picture. The following day I was in bed at 9 a.m. and I got a phone call telling me there is a parcel at the post office but I must pick it up at noon. I went to pick up the parcel but there’s nothing there.”

The recent Victorian Ombudsman report “Investigation into the management of complex workers compensation claims and WorkSafe oversight” reads as a
playbook for the NSW scheme agents. This is hardly surprising given that the same insurers operate in both states and the 2012 changes were modelled on the Victorian system.

The Report refers to the following behaviour by insurers:

- highly ineffective and unfair outcomes for complex cases;
- unreasonable decision making by agents;
- selective use of evidence in decision making including doctor shopping;
- inappropriate use of IMEs;
- drawing decisions out;
- agents allowing employers to influence decision making;
- allowing rewards to be used to create perverse incentives for the agents and individual case managers;
- lack of Regulator oversight of service providers such as agents and IMEs; and
- systematic gaming of terminations in order to gain more profitability.

Unions NSW submit this Committee look closely at this Report in making its own recommendations. We note there seem to be no moves by the NSW Ombudsman or the SIRA Board to initiate a similar commendable investigation in NSW.

For a NSW example of perverse incentives for unscrupulous behaviour by insurers the Committee need look no further that the 2015 Care and Service Excellence Awards. Among the finalist nominees for the prizes at this expensive event were case managers nominated by their employer for high termination (case closure rates) and effective manipulation of review mechanisms in order to close files and/or reduce weekly payments. Why would iCare even consider rewarding callous activities that are designed to unfairly remove access to support services for injured workers and are against the public interest?

While the workers compensation scheme has been ruining the lives of injured workers, the Government has also dropped the ball in terms of stopping workers from getting injured in the first place, as evidenced by the two charts below.
As can be seen in the table below, serious injury rates in NSW remain high, so there is no excuse for such low levels of enforcement action. [insert source]
Clearly Mike Baird is not serious about preventing injuries to workers or supporting them once they are injured. He governs just for the wealthy and powerful.

**Section 4: Introduce a new workers compensation scheme**

Unions NSW submits sections 1-3 of our submission shows the evidence is so overwhelming of the complete failure of the workers compensation cuts, the Government can have no choice but to scrap NSW’s system of workers compensation and start again.

Unions NSW has undergone a thorough consultation process with people who are workers compensation experts and have a particular understanding of the injured workers perspective due to years of helping injured workers. This process has produced 12 guiding principles for workers compensation reform, which are outlined below:

1. **Workers compensation should be available on a no-fault basis where an injury “arises out of or in the course of employment”, even where it is the aggravation of an existing injury or disease.**
2. Premiums must recover the costs of the system as well as encourage safe work practices.

3. The regulator must be properly resourced to carry out its functions properly including an increased emphasis on prevention and compliance.

4. Meaningful tripartite consultation must be a central part of the system.

5. The system of scheme agents and self-insurers should be abolished and all workers compensation functions should be internalised within government.

6. Trade unions must have the power to enforce non-compliance with workers compensation law together with rights of entry, inspection and other investigative powers.

7. The Workers Compensation Commission should provide a quick, easy, effective and legally binding mechanism to resolve disputes about all aspects of the workers compensation system.

8. Return to work should be elevated as a central tenet of workers compensation by:
   a. placing an absolute obligation on employers to provide suitable duties;
   b. preventing termination unless the injury management plan states that the return to work goal is a different job and a different employer;
   c. incentivising the employment of injured workers; and
   d. preventing any requirement to disclose a previous work injury.

9. Journey claims and recess claims should be covered by the system.

10. Weekly payments should be set at a level equivalent to an injured worker’s pre-injury average weekly earnings irrespective of their fitness for work and should not be subject to any caps or step-downs.

11. Costs associated with medical and all related treatment should be covered for workers compensation purposes with no arbitrary caps or limits.

12. Work Capacity Reviews and Decisions should be removed from the workers compensation legislation. Consideration of a worker’s functionality is properly addressed as part of their rehabilitation plan.

Unions NSW submits the above 12 principles would result in a workers compensation scheme that puts the health and well-being of the injured worker at its centre, where it should be.
A scheme crafted around our 12 principles would not result in a blow-out in scheme costs or a large increase in premiums because it would be accompanied by a long overdue crackdown on employers who fail to provide safe workplaces or provide ongoing meaningful employment to the workers that have been injured on their watch.

**Section 5: The top 17 short term fixes**

If the Government does not agree that the workers compensation system should be scrapped and replaced with a system modelled on our 12 principles of workers compensation reform, Unions NSW implores the Government to make following changes to ensure the workers compensation scheme is better for injured workers in the short term.

**1. Change the definition of suitable employment**

The definition of suitable employment in section 32A of the 1987 Act must be amended. The current definition is why injured workers refer to the WCD cut off as the *fantasyland cut off*. The definition allows the insurer to completely ignore real life when deciding whether an injured worker can go out and earn the same as their weekly payments.

The current definition of suitable employment is also being used to pressure injured workers to move to different work with a different employer, in some cases within weeks or months of an injury. This is a great disadvantage to the worker who loses their experience and skills from their old workplace or occupation as well as the valuable support networks vital to maintain mental health in times of pain and disruption.

**Unions NSW recommends** that the definition of suitable employment be changed to reflect the following principles:

1. Delete limb (b) of the definition. The definition of suitable employment comes from South Australia but when NSW adopted it the second limb was added. It doesn’t exist in that form in any other jurisdiction.
2. Suitable employment must be based on actual jobs not theoretical jobs. When deciding suitable employment the assessor/insurer should not be able to say “just ask not to do that task”.

3. The nominated treating doctor’s assessment of capacity must be the paramount consideration. Insurers must not be permitted to deviate without good cause.

4. A person’s whole capacity must be taken into account. It may be that a person has a heart condition that will limit their capacity. Currently the insurer is only required to consider the compensable injury for which they are responsible.

5. The duties must be as close to the pre-injury duties as possible. The insurer should not be permitted to send you down the river for a demeaning or nominal job.

2. Change PIAWE

Unions NSW recommends that PIAWE should be changed to reflect the recommendations of the Parkes Project\(^37\) as follows:

- Simplify the definition and computation method of pre-injury average weekly earnings. As a guide, some of the features of the former section 43 (Computation of Average Weekly Earnings) could be retained including providing for the employer to provide to the worker such details of the earnings of the worker as will enable the worker to determine his or her pre-injury average weekly earnings.

- Provide for a “default” (or “interim”) rate of weekly payments where calculation of PIAWE cannot be accurately completed to enable weekly payments to commence within 7 days of injury.

- Amend Section 82A to ensure indexation of PIAWE in all circumstances.

- Clarify the meaning of a “week” in the context of calculating PIAWE.

- Provide for adjustment and backdating of adjustments of PIAWE to encourage early and prompt payments and avoid unnecessary time consuming disputation. Considerations:
  - Exclude PIAWE calculated in the provisional liability period from the definition of ‘Work Capacity Decision’ and/or
- Mandate the provision of the employer’s completed PIAWE form and exchange of information required to calculate PIAWE between the parties as part of the ‘revision’ process and/or
- Permit backdating of adjustments to PIAWE to the date of injury with force and effect from that date.

- Amend Schedule 3 in relation to ‘Workers employed by 2 or more employers’ (Items 2, 3, 4, 5, 6, and 8) so as not to penalise such workers in the calculation of PIAWE and therefore weekly payments.

3. Qualify termination after 6 months

Section 49 of the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act) states the following:

(1) If a worker who has been totally or partially incapacitated for work as a result of an injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer liable to pay compensation to the worker under this Act in respect of the injury must at the request of the worker provide suitable employment for the worker.

(2) The employment that the employer must provide is employment that is both suitable employment (as defined in section 43A of the 1987 Act) and (subject to that qualification) so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was at the time of the injury.

(3) This section does not apply if:
   a. it is not reasonably practicable to provide employment in accordance with this section, or
   b. the worker voluntarily left the employment of that employer after the injury happened (whether before or after the commencement of the incapacity for work), or
   c. the employer terminated the worker’s employment after the injury happened, other than for the reason that the worker was not fit for employment as a result of the injury.
This means employers are required to provide employment that is both suitable and, as far as reasonably practicable, the same as or equivalent to the employment the worker was in at the time of the injury. This obligation does not apply when it is “not reasonably practicable”, the worker has resigned or the worker was terminated (but not termination due to the injury). Yet employers routinely terminate employees after six months seemingly on the basis that section 248 of the 1987 Act states termination within 6 months of injury is an offence.

Unions NSW submits section 49 of the 1998 Act clearly overrides section 248 of the 1987 Act in that it prevents termination of injured workers due to their fitness for employment. However given the widespread misuse and abuse of section 248 of the 1987 Act, Unions NSW submits it must be clarified.

**Unions NSW recommends** section 248 of the 1987 Act be amended as by adding the following words in red:

1. **An employer of an injured worker who dismisses the worker is guilty of an offence if:**
   
   (a) the worker is dismissed because the worker is not fit for employment as a result of the injury, and
   
   (b) the worker is dismissed during the relevant period after the worker first became unfit for employment, and
   
   (c) the workers nominated treating doctor has certified their optimal chance of a durable return to work is with another job with another employer.

This amendment recognises it is the best option to return an injured worker to their previous employer and comparable employment.38

4. **Disclosure of workers compensation claims by job seekers**

Injured workers are being discriminated against for simply having a workers compensation history. The impact of this widespread discrimination is especially
harsh due to the caps on workers compensation benefits and the definition of suitable employment from the 2012 changes.

**Unions NSW recommends** the workers compensation and anti-discrimination laws be changed to prohibit a prospective employer from asking whether the worker has a workers compensation history. In order to satisfy their duty of care, employers could be permitted to ask: “Are you fit and physically/psychologically able to undertake this role?” Further as many employers require pre-employment medical examinations, the amended legislation should also make it clear that such inquiries must be limited to the inherent requirements for the position.

5. Return to work

After the 2012 changes WorkCover (now SafeWork) established a Return to Work Inspectorate to focus on boosting employers’ compliance with their return to work obligations. Unions NSW does not have the exact figures but we believe the number of Inspectors dedicated to this work is about 8. Given there were 88,363 workers compensation claims in NSW in 2013/14, this Inspectorate could never be expected, even if it was more functional, to make a significant contribution to return to work rates in NSW.

Insurers, on the other hand, already have an assigned case manager for every workers compensation claim. While we are highly critical of the current case manager system, **Unions NSW recommends** that insurers should be tasked with enforcing employer compliance with their return to work obligations. This is unlikely to involve legislative amendment but may require changes to the contracts between SIRA and the insurers.

**Unions NSW also recommends** that we adopt the case conference model currently being trialled in the United Kingdom where a case conference is held 10 days after injury between the worker, treating doctor, rehabilitation provider, return to work coordinator, union, insurer and employer. This enables the worker to get all the information they need and early access to a return to work and injury management plan so they can get on the path for recovery. This will be particularly helpful in complex cases or psychological injury cases.
6. Independent advocate

Many of the stories from the Unions NSW Return to Work Inquiry referred to injured workers not having anyone to support them and advocate for them; no one to give them genuinely independent answers about the way the scheme works, what their rights are and help them assert those rights. Many unions play this role and a number of injured workers were very thankful, however not all unions employ workers compensation specialists and, unfortunately, not all workers join their unions. Further, access to lawyers is limited, doctors have little understanding of workers compensation or time to get involved and WIRO is well-meaning but under-resourced and serves a different role.

Unions NSW believes the lack of an independent advocate is one of a number of reasons why so many injured workers are experiencing secondary psychiatric injuries. We believe many of these secondary injuries are preventable if the scheme can be improved, including by ensuring injured workers have quick access to independent advice.

The Injured Workers Support Network (IWSN) has been endeavouring to play this role but it is severely underfunded and understaffed to provide the independent advocacy injured workers need, on the scale required. **Unions NSW recommends** that Government funding be committed to the IWSN to play this role.

7. Disclosure of Scheme Agent KPIs

WIRO Annual Reports, people working in the industry and the stories from our Return to Work Inquiry indicate that the NSW scheme agents are using the same tactics documented in the Victorian Ombudsman Report to game the system by delaying and denying liability, prolonging disputation, and cherry-picking IMEs and medical information.

WorkCover previously issued a report called “Scheme Agent Performance Report” which listed a range of key performance indicators for each scheme agent and the fees paid to each scheme agent. This Report is no longer produced. SIRA only provides a draft deed with individual scheme agent details removed for “commercial in confidence” and will not even release figures under GIPA provisions.
Unions NSW recommends the regular publication of the Scheme Agent Performance Report to add transparency to the system. It must include the type of targets that the scheme agent met to receive their fees.

8. Independent Medical Examinations (IME)

IME’s are called by some injured workers “cash for comment” doctors. They are not independent and are simply used to deny or minimise liability for the insurer. IME reports are expensive and unreliable. They are often not even from a specialist with expertise in the field of the worker’s injury. They are also often used to intimidate and undermine injured workers by being requested multiples times (often when the first IME report didn’t provide the answer the insurer wanted), often contrary to the IME Guidelines.

Insurers tend to pose written questions to the IME and some IMEs confine their interaction with the injured worker to those questions alone, limiting access to the full story and causing distress for the worker.

Injured workers also often never get access to the IME report until they are in a formal dispute with the insurer before the WCC. Given these reports are often relied upon in work capacity decisions and decisions to decline liability, to deprive the injured worker of access to the report as soon as it is available is a denial of procedural fairness. The reports also frequently contain blatant factual errors that need to be corrected. IMEs will often resist making any corrections to their reports.

Unions NSW recommends that the IME system should be overhauled consistent with the following principles:

- an IME should only be able to be requested where there are reasonable grounds. For example:
  - where the injured worker has not presented a report from a relevant specialist; or
  - where there is a dispute about WPI;
• excessive requests to attend IMEs should be able to be declined by the injured worker without financial penalty with recourse to the WCC if necessary;
• all IME reports should be provided to the injured worker as soon as they are available and there should be a process for correcting errors of fact;
• the IME should be re-named as “client referred medical examiner”;
• requests to attend an IME must be mindful of the workers location, circumstances and travel limitations; and
• the IME Guidelines must be followed with penalties for non-compliance.

9. Self-Insurers

Unions NSW acknowledges that SIRA is undertaking a paper review of self-insurers at present. For this reason, our submission has not covered our extensive disquiet about the self-insurance process.

Self-insurers are inherently conflicted. They have power over workers as employer, insurer, case manager, return to work coordinator and often treating doctor. Many self-insurers direct injured workers to attend company doctors and allied health professionals with implied penalties if they do not comply. These health professionals do not have the interests of the injured workers as their sole priority and have a contractual arrangement with the employer for ongoing work. Unions NSW has seen these company health professionals not diagnose serious injuries and require workers to return to work without access to critical medical interventions.

**Unions NSW recommends** self-insurers should be required to notify SafeWork of all workplace injuries and should be banned from having company doctor/health professional arrangements. Further reform is needed and as such we eagerly await the outcome of the SIRA review.

10. Retrospectivity

In 2017 there will be thousands of injured workers who will be cut off income support under the five year rule. Many of these workers had settled workers compensation claims in the WCC with orders detailing ongoing payments and support. These
orders have now been torn up by the 2012 changes. Yet the Government has denied the cuts were retrospective.

Further the calculation of weekly payments for workers who were on the statutory rate at the time of the 2012 changes has severely disadvantaged them by stipulating they can now only receive up to 80% of the statutory rate (called the transitional rate).

**Unions NSW recommends** that all these eligible workers be allowed to continue to receive weekly payments after 5 years and that the payments are no lower than what they would have received under the old system.

### 11. Medical Benefits

Many workers have life-long medical costs due to their workers compensation injuries. Many of these expenses are prophylactic medication or regular physiotherapy that can be a key contributor to whether a worker is able to continue to maintain employment. Cutting medical expenses off at any point in time runs counter to promoting a durable return to work.

Further the delay in approval of medical treatments is compromising care and the denial of liability to treat fitness and weight issues post injury is denying workers the surgery and assistance that they need to get on with their life.

**Unions NSW recommends** that:

- medical benefits should be continued for the life of the injury;
- the pre-2012 system of medical approvals be reinstated; and
- insurers be instructed to approve fitness programs and treatments for weight gain where recommended by the nominating treating doctor.

### 12. 2015 Changes – Legal Assistance and PIAWE

The failure of the Government to implement the 2015 WC Act regarding legal assistance and PIAWE by failing to pass enabling regulations has deprived thousands of injured workers access to fair weekly payments and fair representation in WCD Reviews. We note the draft Work Capacity Legal Assistance model provided
to Unions NSW during confidential consultations did not provide access to fair representation.

**Unions NSW recommends** that SIRA commence consultation with unions and the legal representative bodies to urgently develop the promised Regulations for Legal Assistance and PIAWE.

**13. Work Capacity Decisions**

**Unions NSW recommends** the abolition of WCDs. Injured workers should remain on the scheme as long as they are injured and have been unable to return to comparable employment.

**14. Deemed diseases**

The definitions of deemed diseases have been stagnant in the Workers Compensation Regulations for near on four decades. This has caused unnecessary disputation for very sick workers. This could have been fixed by the recent review of the Regulation, but it was not. The new definitions have been signed off by NSW as part of the Safe Work Australia peer reviewed research paper Deemed Disease in Australia.43

**Unions NSW recommends** that the updated deemed diseases provisions be included in the NSW Workers Compensation Regulation.

**15. Journey claims**

Given the low cost of journey claims, the fact the scheme now has a $4 billion surplus and the financial impact of a lack of coverage on individuals and their families, **Unions NSW recommends** journey claims be once again included in the NSW workers compensation scheme.

**16. NESB and regional workers**

Workers from a Non-English Speaking Backgrounds (NESB) and regional workers stood out to Unions NSW as groups that were particularly disadvantaged by the workers compensation system. NESB workers don’t understand the system and their rights and how to enforce them. Regional workers have difficulty accessing basic
help such as medical diagnosis, care and rehabilitation. They often lack privacy regarding their workers compensation claims and there are fewer alternative work options, often resulting in harsh and unrealistic job search requirements.

Stories from the Unions NSW Return to Work Inquiry regarding NESB and regional workers:

- Cindy, an outworker, was so scared of losing her job when she injured her back that told her employer she was going to China but instead was on 3 months bed rest at home. She never lodged a workers compensation claim as she wasn't sure if it would cover her. She just kept working until she retired.

- Min injured her back working in a furniture factory. She was terminated and went to the WCC but she has no idea what it all means and is unsure whether she is receiving payments from Centrelink or workers compensation. She speaks very little English, having migrated from Vietnam. She gets her forms filled out by her children or friends. She remembers WorkCover asked what language she spoke and she ticked Vietnamese. “But they still wrote to me in English only” so she has to get the letters translated by the secretary at her lawyer’s office.

- Annie, is Chinese-born and doesn’t speak much English. She was injured when she fell through a floor at a small food manufacturer. Despite the pain, she didn’t make a claim for 4 years and doesn’t really understand the workers compensation system. Her solicitor gets all her letters (because they are written in English) and organises an interpreter for her.

- Donny is an educated Chinese-born worker but because of his poor comprehension of English he was a labourer for many labour hire employers, suffering a number of injuries. Donny often had difficulty navigating the workers compensation system.

- Patricia Fernandez, the National Secretary of the AMIEU, reported that many of the NESB workers in her industry are under very close supervision of labour hire companies, who frequently control many of the aspects of the worker’s lives. Patricia reported that it was very difficult to access and support injured NESB workers as the supervisor is the translator or they are removed from the workplace as soon as they are injured and not informed of their rights. In relation to regional workers, Patricia reported that often the only doctor...
in town is the company doctor who is reluctant to issue a workers compensation certificate. There are also few specialists in country towns.

- **Lucinda** said “*They do not send you to Coffs for IMEs and often send you to Newcastle or Sydney. My husband has to take a day off work to go there and back to support me without reimbursement*”.

- **Ryan** said in the country a lot of doctors only come up occasionally. He tried to make an appointment but they are booked out. Then there is a delay with the case manager giving permission for you to attend. “*It just gets stretched out for way too long*”.

- **Shirley** reported that many country employers saw it as a personal affront to notify a workers compensation claim, which made returning a worker to the same employer more difficult.

- **Aimee** was told she would have to sell her farm 5 hours north of Sydney and move down or be cut off if the insurer found her a job in Sydney.

**Unions NSW recommends** that a special package of measures be developed for regional and NESB injured workers in consultation with stakeholders.

### 17. Improve safety

The best mechanism to reduce the costs of workers compensation is to increase prevention of injuries through a better resourced regulator, with a strong enforcement role to complement its educative function. Sadly, a proactive attitude to enforcement has been absent from WorkCover (now SafeWork) for a number of years.

In August 2016 SafeWork launched the *NSW Safety Roadmap*. It adopted safety targets set out in the National Roadmap. Unfortunately due to the changes in liability in 2012 and simple industrial demographic changes, most of the targets have already been met or are close to being met. Rather than being a cause for celebration this is a classic case of SafeWork giving itself an easy run, at the expense of the community.

**Unions NSW recommends** the targets in the Roadmap be increased and that SafeWork be resourced and managed to put a much higher emphasis on prevention and enforcement.
Endnotes

1 Macquarie University Report No. 3, page 38
2 Form 2 Outcomes, from the Workers Compensation Commission, Workers Compensation Commission Annual Review 2015, p. 23
3 Based on transitional numbers.
4 Macquarie University Report No. 3, page 51
5 Macquarie University Report No. 3, page 56
8 Macquarie University Report No. 3, page 6
9 Section 32A, Workers Compensation Act 1987
10 Macquarie University Report No. 3, page 51
11 Joint Select Committee Inquiry into the Workers Compensation Scheme, Final Report, paragraph 3.126.
13 Macquarie University Report No. 3, page 43
14 Macquarie University Report No. 3, pages 54-56
15 Macquarie University Report No. 3, page 45
16 Macquarie University Report No. 3, pages 22, 14-34
17 Johnson D, Fry T., Factors Affecting return to Work after Injury: A study for the Victorian WorkCover Authority
21 Joint Select Committee on the NSW Workers Compensation Scheme, 2012: 53-54.
23 American Medical Association Guidelines
24 Letter from Minister Constance, Minister for Finance and Services to Emma Maiden Unions NSW Deputy Assistant Secretary, 4 February 2014.
27 Victorian Ombudsman, Investigation into the management of complex workers compensation claims and WorkSafe oversight, September 2016.
28 Workers Compensation Legislation Amendment Bill 2012 Safety, Return To Work And Support Board Bill 2012, Proof 19 June 2012 Bills, Second Reading Mr Mike Baird (Manly—Treasurer) [4.23 p.m.]
29 Macquarie University Report No. 1 and NSW Auditor General 2012. NSW Auditor General’s Report to Parliament, Volume 5, Workers Compensation Nominal Insurer (trading as the NSW WorkCover Scheme)
30 On the road to a better CTP scheme: Options for reforming Green Slip insurance in NSW, page 6
31 As advised to a meeting of the now defunct OHS and Workers Compensation Advisory Council
32 Macquarie University Report No. 3, page 1
34 WIRO Annual Report 2015
37 WIRO, Parkes Project Advisory Committee Recommendations, Page 1
38 See National Occupational Health and Safety Commission, Guidance Note for Best Practice Rehabilitation Management of Occupational Injuries and Disease [NOHSC: 3021 91995]), page 5
39 Safe Work Australia
[40] See for example Cary’s story and Jane’s story.
[43] Driscoll T., Safe Work Australia, Deemed Diseases In Australia, August 2015