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SUBMISSION TO THE NSW PARLIAMENT

Workers Compensation Legislation Amendment (Reform and Modernisation) Bill 2025

Submitted by: Council of Small Business Organisations Australia (COSBOA)

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About COSBOA

The Council of Small Business Organisations Australia (COSBOA) is the national peak body for small business in Australia, representing the interests of small businesses across all industry sectors through our member organisations.

Small businesses, represent 96.6% of all Australian businesses, 43.8% of private sector employment, and 34.7% of private sector value-added to the economy. They are the backbone of the NSW economy, employing most workers and driving innovation and growth.

Regulations that treat small businesses as if they have the same capabilities and resources as large corporations are fundamentally unjust and economically damaging. Our role is to advocate for policies that enable small businesses to start, survive, and thrive while contributing to economic growth, innovation, and community wellbeing.

Executive Summary

COSBOA welcomes the opportunity to provide feedback on the Workers Compensation Legislation Amendment (Reform and Modernisation) Bill 2025.

While we acknowledge the need to address sustainability challenges within the NSW workers compensation scheme, particularly regarding psychological injury claims, we have serious and fundamental concerns about several aspects of this legislation that will impose disproportionate burdens on small businesses without adequate safeguards or support mechanisms.

Our key concerns relate to the excessively broad Digital Work System Duty that creates compliance uncertainty for businesses using everyday software, unrestricted union access through WHS entry permit holders gaining unprecedented access to proprietary business systems without adequate protections, automatic liability provisions placing small businesses at risk by default if unable to meet tight information provision timeframes, new employer excess payments without evidence of effectiveness, and insufficient transition support with no dedicated resources for small businesses to implement changes.

COSBOA strongly opposes Schedule 4 in its current form, provides qualified support for psychological injury reforms subject to amendments, and requests significant amendments to protect small business interests.

We set out our more detailed consideration of the proposals below.

1. Digital Work System Duty – Schedule 4

1.1 Overview of concerns

- a) Schedule 4 proposes inserting new section 21A into the Work Health and Safety Act 2011 (NSW), creating a duty for persons conducting a business or undertaking using "digital work systems" to ensure work allocation does not create health and safety risks. The definition encompasses "an algorithm, artificial intelligence, automation, online platform or software."
- b) COSBOA strongly opposes this provision in its current form due to its excessive breadth, lack of clarity, and disproportionate impact on small businesses.

1.2 Overly broad and ambiguous definition

- a) The definition of "digital work system" is so broad it captures virtually every modern business tool including rostering software, time and attendance systems, project management tools, email and calendar systems, customer relationship management systems, point-of-sale systems with staff scheduling features, and basic spreadsheets used for work allocation.
- b) Small businesses using these commonplace tools, often without understanding they involve "algorithms" or "automation," would suddenly face a new statutory duty with potential criminal liability for non-compliance.

1.3 Lack of clarity on compliance requirements

- a) The Bill provides no guidance on how to assess whether a digital work system creates "excessive or unreasonable" workloads or metrics, what constitutes "reasonably practicable" measures, whether off-the-shelf software vendors' standard configurations meet the duty, how small businesses should conduct risk assessments for digital systems, or what documentation is required to demonstrate compliance.
- b) A small café using rostering software to manage eight casual employees would, for example, need to assess whether the system creates "excessive or unreasonable monitoring or surveillance" but has no guidance on what this means in practice.

1.4 Disproportionate impact on small business

- a) Small businesses typically use commercial off-the-shelf software with limited customisation capability, lack in-house IT expertise or HR specialists, cannot afford external consultants to conduct digital work system audits, and have limited bargaining power with software vendors.

- b) The new duty created by section 21A effectively requires small businesses to become experts in software algorithm analysis, work health and safety risk assessment, digital workplace monitoring standards, and psychological hazard identification in technology systems. Meeting this duty is unrealistic and unachievable for most small businesses.

1.5 Misalignment with legislative purpose

- a) The Government's stated justification references "abuse of artificial intelligence in the gig economy" and companies "using technology to excessively allocate work to those who work longer shifts." However, the provision captures far more than gig economy platforms, and small businesses using basic rostering tools are not creating the problems the legislation seeks to address.
- b) Existing primary duty of care provisions in the Act already covers health and safety risks from work allocation, making the introduction of a new duty a solution in search of a problem that does not exist for the majority of small businesses.

1.6 National harmonisation concerns

- a) The proposed provision creates NSW-specific divergence from the model WHS laws at a time when Safe Work Australia is reviewing harmonisation of WHS laws nationally and the Federal Government is convening roundtables on AI regulation in workplaces.
- b) Creating state-based regulation ahead of national frameworks risks creating a patchwork of inconsistent requirements, with small businesses operating across state borders facing increased complexity and compliance costs.

1.7 Recommended actions

- a) **COSBOA recommends** the NSW Parliament remove Schedule 4 entirely pending completion of Safe Work Australia's harmonisation review, the Federal Government consultation on AI workplace regulation, and the development of clear guidance on what constitutes problematic digital work systems.
- b) Should the Government insist on proceeding, the legislation must be substantially amended to:
 - exclude small businesses with fewer than 50 full-time equivalent employees from the provisions
 - exclude off-the-shelf commercial software used for standard business functions
 - require detailed guidance materials before commencement,
 - delay commencement by at least 12 months to allow businesses to prepare, and
 - provide government-funded advisory services for small businesses.

2. WHS Entry Permit Holder Powers – Unrestricted Access

2.1 Expansion of union powers

- a) Schedule 4 also proposes to expand WHS entry permit holder rights, requiring PCBU's to provide "reasonable assistance to access and inspect a digital work system relevant to a suspected contravention," which may include code or algorithms used in digital systems, performance metrics and data analytics, records and data logs, and audit trails produced by systems.
- b) COSBOA strongly opposes this provision without significant safeguards to protect small business interests and proprietary information.

2.2 Proprietary information at risk

- a) Many digital work systems contain proprietary business processes and workflows, commercial-in-confidence operational data, trade secrets embedded in custom configurations, commercially sensitive performance metrics and benchmarks, and customer and supplier information.
- b) Under the proposals, small businesses will have no protection against PCBU's accessing, copying, or potentially sharing information with competitors or using it for industrial purposes unrelated to genuine safety concerns.

2.3 Inadequate threshold for access

- a) The threshold of "suspected contravention" is extremely low and entirely subjective. Unlike SafeWork NSW inspectors who must have reasonable grounds, entry permit holders can suspect a contravention based on worker complaints about workload which may be subjective or unfounded, disagreement with management decisions, general concerns about technology use, or strategic industrial purposes.
- b) There is no requirement for PBCUS to gather or produce objective evidence before gaining intrusive access which places small businesses at risk of vexatious or strategically motivated entry demands.

2.4 Absence of notice and confidentiality protections

- a) Unlike other entry provisions, the Bill appears to propose no notice requirement before entry permit holders can demand access to digital systems, meaning small business owners may be confronted without warning, have no opportunity to seek legal advice, have no time to prepare relevant information, and face potential disruption to business operations.
- b) The Bill imposes no confidentiality obligations on entry permit holders who access proprietary algorithms or business rules, commercially sensitive operational data, individual employee performance information, or financial or commercial information embedded in systems.

- c) Once accessed, information gathered could be used for industrial campaigning or shared with other businesses or unions, and we are concerned it may be used to support industrial disputes unrelated to safety.

2.5 Disproportionate to safety concerns

- a) The provision assumes digital work systems pose unique risks requiring special inspection powers, yet standard work allocation by small businesses using common software rarely creates safety risks, existing WHS entry powers already allow inspection of work practices and consultation with workers, and SafeWork NSW inspectors have adequate powers to investigate genuine safety concerns.
- b) The proposed expansion of inspection powers appears designed to facilitate industrial intervention rather than address safety. COSBOA consider this inappropriate and beyond the proper scope of work health and safety legislation.

2.6 Impact on small business

- a) Small businesses cannot afford legal representation to be present during entry and inspection and will likely have limited understanding of their rights and obligations. They may inadvertently disclose confidential information under pressure whilst not easily able to protect proprietary information once accessed, and face competitive disadvantage if information reaches competitors.
- b) Many small business owners operate systems they do not fully understand themselves, raising the question of how they can determine what constitutes "reasonable assistance" or identify the information that should be protected from disclosure.

2.8 Recommended actions

- a) **COSBOA recommends** removing union entry provisions from Schedule 4 entirely, as SafeWork NSW inspectors have adequate powers to investigate genuine safety concerns.
- b) If the provisions are retained, the legislation must implement mandatory safeguards including higher threshold requirements such as "reasonable grounds to suspect" rather than mere suspicion, preliminary consultation with the employer, and documented basis for the suspected contravention.
- c) Notice and procedural protections must include:
 - minimum 48 hours' written notice before access required
 - a right to legal representation during inspection
 - a right to redact commercially sensitive information not relevant to the suspected contravention, and
 - clear perimeters on the information can be photographed, copied, or recorded.
- d) Confidentiality obligations must include:
 - statutory confidentiality requirements for all information accessed

- a prohibition on disclosure except to SafeWork NSW or in legal proceedings
 - penalties for misuse of confidential information, and
 - requirements for secure storage and destruction of information.
- e) Small business protections must include:
- an exemption for businesses with fewer than 50 full-time equivalent employees
 - a government-funded legal advice service for small businesses that are subject to entry to provide clear guidance on "reasonable assistance" obligations, and
 - a right to seek SafeWork NSW determination if there is a dispute about access scope.
- f) Accountability measures must include:
- a right to complain to SafeWork NSW about unreasonable entry conduct
 - an ability to seek IRC review of entry permit holder conduct, and
 - compensation provisions for businesses where entry is found to be vexatious.

3. Psychological Injury Reforms

3.1 Overall position

- a) COSBOA provides qualified support for proposed reforms aimed at improving sustainability of the workers compensation scheme and better outcomes for injured workers.
- b) We acknowledge the significant increase in psychological injury claims which have doubled since 2018, rising average costs which have nearly doubled since 2020, poor return-to-work outcomes with only 50% of workers with psychological claims back at work within a year compared to 95% for physical injuries, and projected 36% premium increases over three years without reform.
- c) However, several aspects of the Bill require amendment to ensure fairness for small businesses.

3.2 Automatic liability for failure to provide information

- a) Under the accelerated claims process, if an employer fails to provide sufficient information to the insurer within tight timeframes, liability is automatically accepted. This provision is fundamentally unfair to small businesses.
- b) Small businesses typically lack dedicated HR departments or legal teams, with the owner often responsible for all administrative functions while also operating the business. Gathering relevant information for psychological injury claims involving workplace interactions may require reviewing emails and messages, consulting with multiple staff members, reconstructing events from months ago, and obtaining external records from contractors or other parties.

- c) The 6-week insurer decision period, combined with a 14-day internal review, leaves minimal time for employers to respond, especially if the owner is on leave or ill, key witnesses are unavailable, records are not immediately accessible, or the claim is complex or involves historical matters.
- d) Automatic liability creates perverse incentives where insurers may rely on automatic acceptance rather than investigating. Employers rushed to provide information may make errors or omissions with genuine cases being conflated with spurious claims, or appropriate consideration not being given to the merit of a claim.
- e) Consider the example of a small retail business with eight employees that receives notice of a psychological injury claim alleging bullying by the owner while the owner is overseas on a rare family holiday. The claim involves interactions over several months with multiple staff members, some of whom have since left the business, and the insurer requests detailed information within 14 days. Under the proposed provision, the insurer would accept automatic liability because the owner could not provide comprehensive information while overseas, despite the claim potentially being unfounded.
- f) **COSBOA recommends** removing the automatic liability provision entirely. If it is retained the legislation must:
 - implement small business safeguards including extending timeframes for businesses with fewer than 50 full-time equivalent employees to a minimum of 28 days
 - allow a one-time extension for reasonable cause such as key person unavailable
 - require insurers to accept partial information and follow up for clarification
 - limit automatic liability to cases where the employer completely fails to respond rather than provides an insufficient response, and
 - allow employers to contest liability post-acceptance if information later shows the claim is unmeritorious.

3.3 Employer excess payments

- a) The Bill introduces a new employer excess of up to two weeks' income payments to "incentivise injury prevention." COSBOA has significant concerns about this provision.
- b) The Bill provides no evidence that excess payments reduce workplace psychological injuries. Unlike workplace safety equipment or training, excess payments do not directly prevent injuries and represent a punitive measure after an injury has already occurred.
- c) Excess payments would introduce a new, direct cost for every accepted claim. For an employee earning \$1,500 per week, the excess would be up to \$3,000, with multiple claims compounding the cost, and there is no proposed cap on annual excess payments per employer.
- d) The excess would apply after a claim is made and accepted, rather than rewarding proactive prevention measures, creating a misaligned incentive structure. Small

businesses with limited cash flow will feel this impact more acutely than large organisations with risk management budgets.

- e) **COSBOA recommends** removing the employer excess provision. If it is retained:
- the excess must be capped at \$1,000 maximum per claim
 - businesses with fewer than 50 full-time equivalent employees must be exempted
 - rebates should be provided for employers who have completed accredited mental health training programs, and
 - implementation should be delayed until 12 months after the reforms commence to allow assessment of impact.

4. Administrative Concerns

4.1 Lack of small business impact assessment

- a) The Bill and supporting materials provide extensive analysis of workers compensation scheme sustainability and detailed consideration of union and worker perspectives, but minimal analysis of small business compliance costs and capability constraints.
- b) **COSBOA recommends** the Government:
- conduct and publish a comprehensive Regulatory Impact Statement specifically analysing small business impacts,
 - estimate the compliance costs for businesses of different sizes
 - assess the capability constraints and resource requirements of affected small businesses, and
 - consider alternative measures that achieve policy objectives with a lower compliance burden on small business.

Further, the Government should establish a transition period with a 12-month education and support phase before enforcement. There should be no penalties for good faith compliance attempts, and a proactive program of advisory visits by SafeWork should be the focus rather than enforcement action.

5. Broader Policy Concerns

5.1 Departure from national harmonisation

- a) The model WHS laws were designed to create consistency across Australian jurisdictions, reducing compliance complexity for businesses operating across state borders.
- b) NSW's recent trajectory includes industrial manslaughter provisions, enhanced union entry powers, mandatory Codes of Practice compliance, and now digital work system duty and expanded entry rights, resulting in increasing divergence from the model WHS framework.

- c) This creates serious complexity for interstate businesses, places NSW businesses at a competitive disadvantage, reduces the effectiveness of national training and guidance materials, and creates confusion about which obligations apply in which jurisdiction.
- d) **COSBOA recommends** the Government:
- align proposed changes with national harmonisation efforts rather than creating NSW-specific provisions
 - participate actively in Safe Work Australia's review processes
 - defer jurisdiction-specific reforms until national frameworks are settled, and
 - only proceed with state-based reforms where there are clear evidence-based justification and minimal alternatives.

Conclusion

COSBOA recognises the genuine challenges facing the NSW workers compensation scheme and supports the objective of creating a sustainable system that delivers better outcomes for injured workers.

However, this cannot come at the cost of imposing unreasonable, unclear, and disproportionate burdens on small businesses that lack the resources and expertise to navigate complex new regulatory frameworks.

COSBOA stands ready to work constructively with the Government to develop workable solutions that balance the legitimate needs of injured workers, scheme sustainability, and small business viability.

Yours sincerely,



Matthew Addison

Chair

Council of Small Business Organisations Australia (COSBOA)