

Workers Compensation and Injury Management Act 2023

Implementation proposals for regulations and administrative instruments

Implementation Consultation Paper 15: Licencing Framework for Self-Insurers

October 2023

Public comment on the implementation proposals
should be submitted to:

consultation@workcover.wa.gov.au by **1 December 2023**

All submissions will be publicly accessible unless confidentiality is requested.

For further details on making a submission see:

<https://www.workcover.wa.gov.au/resources/modernising-was-workers-compensation-laws/>

*****Draft proposals only*****

The proposals in this consultation paper are in draft form to facilitate public comment and do not represent the final position of WorkCover WA, the Minister or Government.

Implementation Consultation – Licensing Framework for Self-Insurers

Scope

This document outlines proposed regulations, requirements and implementation processes associated with the licensing of self-insurers under the *Workers Compensation and Injury Management Act 2023* (WCIMA23).

Background and intent

Under the *Workers' Compensation and Injury Management Act 1981* (the 1981 Act), the Governor may exempt an employer or group of employers from holding a workers compensation insurance policy if certain criteria are met. These exempt employers are commonly known as self-insurers.

Under the WCIMA23 an employer interested in becoming a self-insurer must apply to WorkCover WA for a self-insurer licence.

Self-insurance by an employer is an alternative to the employer obtaining a workers compensation policy from a licensed insurer for the employer's workers compensation and damages liabilities to its workers. To be a self-insurer, an employer must hold a self-insurer licence issued by WorkCover WA or be a related entity of the holder of a self-insurer licence that covers the employer.

The licensing framework provides for:

- criteria for the grant of a licence
- operational conditions
- performance monitoring and review by WorkCover WA
- self-insurer securities
- group self-insurer licence and coverage of related entities

The proposed licensing framework for self-insurers is similar to the 1981 Act with respect to the material and financial resources required of self-insurers, provision of a security to WorkCover WA, and the statutory and operational conditions that must be complied with.

The WCIMA23 provides greater clarity regarding use of the security by WorkCover WA, management of claims if a self-insurer defaults, and flexibility for WorkCover WA to consider different forms of security in the future. There is no intention at this stage to move away from a bank guarantee as the required form of security. The current requirement for common law and catastrophic injury insurance including the aggregate and retention amounts will be canvassed further in consultation with self-insurers after the commencement and implementation of the WCIMA23.

Impact on existing self-insurers

An approved self-insurer under the 1981 Act is taken to be a self-insurer and granted a self-insurer licence under the WCIMA23 on commencement of the WCIMA23 and will be subject to the WCIMA23.

The licence taken to be granted to self-insurers is also converted by the *WCIMA23* to remain in force indefinitely unless WorkCover WA decides otherwise.

It is WorkCover WA's intention to grant a new self-insurer licence to existing self-insurers for an indefinite period. The newly issued licence will clearly reference the criteria and conditions that apply to the licence under the *WCIMA23*.

Transitional provisions also deal with identifying a single licence holder for employers who are part of a self-insured group of employers under the 1981 Act (see section below which clarifies the status of a group self-insurer licence holder and coverage of related entities). Before commencement of the *WCIMA23*, WorkCover WA will contact all current self-insurers to confirm the entity that is to be the self-insurer licence holder and the group of employers (related entities) covered by the licence.

Transitional provisions also provide that a security given to the State by a self-insurer under the 1981 Act (bank guarantee) is taken to be a security provided by the self-insurer as required under the *WCIMA23*.

WCIMA23 key provisions

s. 245, s. 246, s. 247, s. 248, s. 250, s. 251, s. 252, s. 228, s. 229, s. 230, s. 231, s. 232, s. 233, s. 598

Licence framework overview

The self-insurer licensing framework comprises:

- criteria for the grant of a licence
- operational conditions
- performance monitoring and review by WorkCover WA
- self-insurer securities
- liability and responsibility of licence holder and related entities

These components are provided for in the *WCIMA23*, regulations, and WorkCover WA imposed conditions.

Criteria for grant of licence

It is intended the regulations will specify the criteria that must be satisfied for the grant of a self-insurer licence. The proposed criteria are set out in [Attachment 1 – Licence Criteria for Self-Insurers](#).

Licence criteria are threshold requirements that must be satisfied when applying for a licence and are required to be maintained after a licence is granted.

The criteria are in substance the same requirements that currently apply to self-insurers relating to having to demonstrate the self-insurer has the material and financial resources and the operational capability and capacity to discharge obligations under the 1981 Act and meet expected standards of service in Western Australia.

WorkCover WA will issue guidelines relating to the matters that are taken into consideration in determining an application for a self-insurer licence, and the information required by WorkCover WA to assess whether the licence criteria are met and maintained, along with information about the application and renewal process.

The current requirement for self-insurers to have and maintain \$50 million common law and catastrophic injury insurance, unless exempted in writing by WorkCover WA, is included in the proposed criteria. This requirement and the aggregate and retention amounts will be reviewed after the commencement of the *WCIMA23* in consultation with self-insurers.

One key proposed change is a threshold requirement for the applicant to employ or engage at least 500 workers as defined in the *WCIMA23* (refer to s. 12-16 for definition of worker). This criterion applies to new applicants only who are not already approved self-insurers under the 1981 Act at the time the *WCIMA23* commences operation, and only applies in relation to the initial grant of a licence (not at renewal). The criterion is one measure of the size of the employer and assists, along with other material and financial indicators, to determine whether the applicant has the capacity and economies of scale to perform self-insurer duties.

Duration of licence

It is intended WorkCover WA will issue new indefinite licences to current self-insurers subject to each self-insurer:

- confirming the criteria for approval are met (other than in relation to the number of workers)
- agreeing to general licence conditions as set out below

Self-insurer licences issued to new applicants will be granted for an initial 3-year period after which time, and subject to WorkCover WA review, a decision to convert to an indefinite licence will be made.

Operational conditions

A self-insurer licence is subject to conditions including any conditions imposed by the *WCIMA23*, regulations or by WorkCover WA.

There is no intention to include conditions in regulations at this time, however the operational conditions at [Attachment 2 – Operational Conditions for Licensed Self-Insurers](#) are intended to be imposed on all self-insurers by WorkCover WA when the new licences are granted.

The operational conditions are in substance the same requirements that apply to self-insurers under the 1981 Act relating to:

- compliance with obligations, requirements and timeframes as a licensed self-insurer in accordance with the Act and regulations
- compliance with *WorkCover WA's Insurer and Self-insurer Principles and Standards of Practice*
- participation in periodic audits or performance reviews as required by WorkCover WA
- maintenance of accurate records and provision of information to WorkCover WA upon request to demonstrate compliance with the Act, regulations, licence criteria and operational conditions.

The proposed conditions also include a number of important notifications required to be given to WorkCover WA about proposed changes to related entities covered by a group self-insurer licence, any significant corporate changes, solvency issues or major changes in service delivery models.

There is no intention to impose additional specific conditions to any particular self-insurer, however, WorkCover WA may do so as necessary to ensure service and performance standards are maintained.

Performance monitoring and review of self-insurers

Under the 1981 Act WorkCover WA monitors the performance of self-insurers in order to provide advice and recommendations to the Minister. The Governor, on recommendation from the Minister, has the power to issue or revoke self-insurer approval.

Under the *WCIMA23*, WorkCover WA will issue licences to self-insurers.

The *WCIMA23* provides for WorkCover WA to monitor and review the workers compensation functions of licensed self-insurers to determine whether those functions are being carried out effectively, economically and in compliance with the *WCIMA23*, the regulations, and any conditions of the self-insurer's licence.

WorkCover WA currently evaluates performance of self-insurers against WorkCover WA's *Insurer and Self-insurer Principles and Standards of Practice*. Before the *WCIMA23* commences operation, the standards framework will be updated to align with new terminology, processes and requirements in the *WCIMA23*, but otherwise there will be no significant changes to the framework. The updated framework will include expectations relevant to the new provisions for dealing with claims with a deferred liability decision and making provisional payments.

Suspension, cancellation or surrender of licence

The *WCIMA23* clarifies the effect of a suspension, cancellation and surrender of a self-insurer licence, including voluntary surrender of a licence.

In relation to compliance, WorkCover WA's regulatory approach is not prescriptive and varies depending on the nature of the issue, breach or complaint. Actions can range from education, warning notices, improvement notices (under the *WCIMA23*), infringement notices or formal prosecution for offences, suspension and cancellation of a licence.

WorkCover WA does not intend to make any significant change to its regulatory approach and will continue to undertake formal investigations in accordance with principles of procedural fairness and due process.

Self-insurer securities

Required form of security

Under the *WCIMA23*, a self-insurer licence is subject to the condition that security for the payment of all the self-insurer liabilities of the employer and each employer to which the licence extends must be provided and maintained on terms approved by WorkCover WA.

The only form of security currently approved by WorkCover WA is a bank guarantee.

A bank guarantee is an irrevocable promise by the bank to make payment to a beneficiary on written demand (being WorkCover WA). It provides a robust form of security separate from any asset or liability of the company that is the self-insurer. A bank guarantee is the only form of security that provides an unconditional charge enforceable by WorkCover WA.

While WorkCover WA has discretion to approve other forms of security such as bonds, indemnities to pay, there is no intention at this stage to move away from a bank guarantee as the required form of security.

Security amount

There is no intended change to the security amount currently set by WorkCover WA:

- 150 percent of the central estimate of outstanding claims liability, or \$2 million, whichever is the greater.

A minimum amount of security is appropriate particularly where the claims experience or financial position of the company is volatile.

The level of the security required will continue to be annually reviewed by WorkCover WA based on actuarial advice obtained by the self-insurer. Participation in the annual review will be a licence condition under the *WCIMA23*, rather than a statutory requirement, as WorkCover WA has direct responsibility for regulation and oversight of licensed self-insurers including the security amount.

Security for current self-insurers continues

For existing self-insurers, transitional provisions in the *WCIMA23* provide that a security given to the State by a self-insurer under the 1981 Act (bank guarantee) is taken to be a security provided by the self-insurer as required under the *WCIMA23*.

Group self-insurer licence holder and related entities

Relationship between licence holder and related entities

A self-insurer licence may be granted on terms that extend the licence to 1 or more related entities of the holder of the licence.

A 'related entity' of the holder of a self-insurer licence means –

1. A 'related entity' as defined in s. 9 of the *Corporations Act 2001*
For example, a parent company is the licence holder and the related entities are the subsidiaries of the company
2. Any other entity that WorkCover WA determines must be treated as a related entity of the licence holder on the basis of any relationship between the entity and the holder.

A related entity to which the group self-insurer licence is extended becomes a self-insurer but is not the holder of a licence.

WorkCover WA may at any time notify the holder of a self-insurer licence in writing to advise of the amendment to the terms of the licence and to change the related entities to which the licence extends (by adding, removing or changing the name of a related entity). This would be done when a licence holder informs WorkCover WA of changes to ownership and acquisitions and mergers, or in the case of WALGA, if there are new members, or changes to the legal structure of local government entities.

One of the proposed conditions to the licence requires timely notification to WorkCover WA whenever changes are being considered to the related entities covered by the licence (see Attachment 2).

WorkCover WA expectations

WorkCover WA expects licensed self-insurers to:

- always satisfy and maintain the licence criteria and comply with the operational conditions
- carry out functions and deliver services in accordance with the *WCIMA23*, regulations, *WorkCover WA Insurer and Self-insurer Principles and Standards of Practice*
- participate in WorkCover WA audit or performance monitoring activities and provide accurate, timely and reliable information.

Evaluation and monitoring

The *WCIMA23* provides for WorkCover WA to conduct performance monitoring and review of licensed self-insurers to determine compliance with legislation, regulations, licence criteria and operational conditions.

Attachments

1. Licence Criteria for Self-Insurers
2. Operational Conditions for Licensed Self-Insurers

Attachment 1: Licence Criteria for Self-Insurers

It is intended the regulations will specify the following criteria that must be satisfied for the grant of a licence to a self-insurer, or renewal of a licence, and required to be maintained.

Criteria

A self-insurer applicant, and any self-insurer granted a licence, must:

1. Be financially and prudentially viable including satisfying standards approved by WorkCover WA
2. Have material and financial resources and operational capability and capacity WorkCover WA considers sufficient to enable the self-insurer licence holder to -
 - a) meet current and future claim liabilities of the self-insured employer and any related employer entity to which the licence extends
 - b) carry out functions and obligations as a licensed self-insurer in accordance with the *WCIMA23*, regulations, and licence conditions
 - c) comply with requirements and timeframes as a licensed self-insurer in accordance with the *WCIMA23*, regulations, and licence conditions
 - d) provide a high standard of claims management to optimise timely decision making
 - e) provide a high standard of injury management to optimise return to work outcomes
 - f) effectively manage disputes and complaints arising from activities as a licensed self-insurer
 - g) provide a high standard of service to workers and other scheme participants
 - h) cooperate with, and provide accurate information to, WorkCover WA to assist in performance monitoring and compliance activities
 - i) meet all relevant state, territory and commonwealth legislative requirements in the operations of the business, including for records management, security, privacy and confidentiality.
3. Unless exempted in writing by WorkCover WA, have and maintain common law and catastrophic injury insurance for an aggregate amount, and any retention amount, specified by WorkCover WA.
4. Employ or engage at least 500 workers as defined in the *WCIMA23* (refer to s. 12-16 for definition of worker). This criterion applies to new applicants only who are not already self-insurers under the 1981 Act at the time the *WCIMA23* commences operation, and only applies in relation the initial grant of a licence (not at renewal).

WorkCover WA will issue guidelines relating to the matters that are taken into consideration in determining an application for a self-insurer licence, and the information required by WorkCover WA to assess whether the criteria are met and maintained.

Attachment 2: Operational Conditions for Licensed Self-Insurers

In addition to satisfying the criteria for grant of a self-insurer licence, or renewal of a licence, it is intended the licence will be subject to the following conditions (imposed by WorkCover WA, s. 248/229(1)(b) of the *WCIMA23*).

A licensed self-insurer must:

Statutory requirements

- Comply with obligations, requirements and timeframes as a licensed self-insurer in accordance with the *WCIMA23* and regulations

Principles and standards of practice

- Comply with *WorkCover WA's Insurer and Self-insurer Principles and Standards of Practice* as amended from time to time (the current edition will be updated for consistency with the *WCIMA23*).

Further conditions

- Comply with any further condition or variation of a condition following written notice by WorkCover WA

Performance and review

- Participate in an annual review of securities for current and future liabilities of the self-insurer and periodic audits or performance reviews as required by WorkCover WA.
- Maintain accurate records and provide information to WorkCover WA upon request to demonstrate compliance with the *WCIMA23*, regulations, licence criteria and operational conditions (including compliance with principles and standards of practice).
- Ensure staff are appropriately trained and provide support to assist them in professional development

Data and interactions with WorkCover WA

- Provide accurate and timely data and information to WorkCover WA to assist WorkCover WA perform functions under the *WCIMA23*
- Ensure senior staff are available to respond to WorkCover WA and contact details of senior staff are up to date.

Information security

- Comply with laws relating to records management and security of information

Outsourcing/off-shore processing

- Not contract out claim management functions, or outsource or offshore any self-insurer function unless approved by WorkCover WA

Notification by group self-insurer licence holder about changes to related entities

- Notify WorkCover WA, within 7 days, of:
Any process underway to ownership changes, mergers, acquisitions, or dissolving subsidiaries that will result in adding, removing or changing the name of a related entity from a group self-insurer licence. Notification must be given before ownership change or legal arrangements take effect.

Notification about significant changes to service delivery model

- Notify WorkCover WA of any proposal to make significant changes to the manner in which claim, injury management or self-insurer functions are delivered.

Notification about solvency

- Notify WorkCover WA within 3 days if:
 - 1) the self-insurer believes they may be unable to discharge in full any self-insurer liability of the employer or related entities covered by the licence holder
 - 2) the self-insured employer is or may be in the process of being wound up or a receiver or manager of the property has been appointed or the body corporate has been placed under administration

Notification about significant corporate changes

- Notify WorkCover WA, within 7 days, if any of the following things occur:
 - 1) any change, or any proposal to change, the licence holder's name
 - 2) any change to the licence holder's status under the Corporations Act, or any proposal to make such a change
 - 3) any change in the directors or secretary of the licence holder
 - 4) the licence holder becoming a subsidiary (as defined in the Corporations Act) of another body corporate (as defined in the Corporations Act)
 - 5) the licensed insurer ceasing to be a subsidiary of another body corporate
 - 6) any change in the control (as defined in the Corporations Act) of the self-insurer licence holder
 - 7) any change in the personnel responsible for the management of the self-insurer licence holder's Western Australian business operations
 - 8) any other change that may affect the ability of the licensed self-insurer to perform its obligations as a licensed self-insurer.