Consultation Papers

Workers Compensation and Injury Management Act 2023 Implementation proposals for regulations and administrative instruments

Submission to WorkCover WA

NOVEMBER 2023

Consultation Papers

Workers Compensation and Injury Management Act 2023 Implementation proposals for regulations and administrative instruments

Submission to WorkCover WA

Ai Group appreciates the opportunity to make a submission in relation to the implementation proposals for regulations and administrative instruments to support the Workers Compensation and Injury Management Act 2023 (WCIMA223).

Papers addressed in this submission

Ai Group is not responding to all of the Consultation Papers. Where we have responded, we have only responded to the content that is relevant to the employers that we represent, and on the topics where we have expertise.

Consultation Paper 1: Deemed Workers and Excluded Workers

3.2 Gig economy workers

Ai Group strongly supports the decision to not address the status of gig economy workers at this time. There are a range of ways in which gig economy work is managed and structured.

Safe Work Australia[1] is currently undertaking work to document the various ways in which work in the gig economy is undertaken and managed, with a view to adopting a national approach to workers compensation for relevant sectors.

The outcomes of this work will be of value to all jurisdictions, to ensure that there is a rational and consistent approach to workers compensation for these workers, which may lead to some types of gig work being included and other types being excluded.

[1] Safe Work Australia is a national body with members from the Commonwealth, each state/territory WHS regulator, two employer representatives (Ai Group and ACCI) and two employee representatives from the ACTU.

Consultation Paper 3: Workers Compensation Claim Forms

Introductory information: Page 4 – Employers

Second dot point.

We understand that employers are no longer able to ask questions about previous claims. Hence the removal of this information from the claim form, and the information in this dot point that the employer must not ask workers to disclose this information. It would be helpful if this document specifically identified whether, or not, the insurer can subsequently seek this information, either from the claimant, from other insurers, or from WorkCover WA.

Final dot point.

It would be helpful if further clarification was included in this dotpoint that this does not stop the employer from accompanying the worker to the location of the treating medical practitioner and, subsequent to examination or treatment, being involved in a discussion with the worker and treating medical practitioner about return to work considerations.

The Claim Form – explanatory information

First page.

The new information included under the heading "what happens if my claim is deferred" is currently very eye-catching, as it is in red. However, once the form reverts to normal printing, it may not be so obvious. It would be helpful if the content with the small box was reworded to say:

No entitlements are paid unless:

- Liability decision notice not given in time; or
- A liability decision cannot be given within 28 days of receipt of the claim.

Second page, second dot point.

Information has been removed that advises the worker to check that their doctor charges the rate set by WorkCover. It is Ai Group's view that this is important information that the worker should be aware of. We note that the box following these dot points does refer to "maximum amounts". However, we think the words that have been removed should be retained, either in the dot point, or moved to the box.

Second page, third dot point under the heading "you".

This might just be a typo; the third dot point should be a continuation of the previous dot point, rather than separate.

Second page, last dot point under the heading "you".

The words in brackets are not clear. On first reading, it seemed to say that if your treating doctor gave the worker a certificate, the worker did not need to give it to their employer. In line with the wording of s.163(7) of the WCIMA23 it should be reworded to say "unless the treating doctor has given the certificate to your employer or insurer".

Second page, third dot point under the heading "your employer".

It is not clear why the words "in a return to work case conference" have been added to this sentence. Is it intended that this is the only way that the employer can talk to the treating doctor. We cannot identify where the legislation establishes this level of restriction. It would be counterproductive if an employer is unable to have an early discussion with the treating practitioner about return to work due to a bureaucratic requirement to set up a formal RTW case conference.

Second page, fifth dot point under the heading "your employer".

It is stated that the employer is required to keep the pre-injury position available "from when you were unfit for work". We understand that the guidance is trying to use simple language. However, the wording is not consistent with the employer obligation which states "the day on which the worker first has an incapacity for work as a result of the injury". This could be an incapacity which resulted in the worker being unable to do their normal duties, but able to undertake modified duties. The wording should be changed to more accurately reflect this important difference.

Third page, deleted information marked (b).

It would be helpful to understand why this information has been removed. However, the consent statements have not been amended from the wording in the current certificate. As most people don't read the words of a consent when they are signing them, it would seem appropriate to still have this information clearly in the explanatory information attached to the claim form.

The claim form

First page, "date employer received the Certificate of Capacity".

It is unclear why this information has been removed. If the claim is not valid until the certificate is received, this seems to be relevant information to reflect when the employer became obligated to forward the claim to the insurer.

First page, work location.

A new box has been included to tick "working from home". This is a very important information with the new broad approach to hybrid work. However, working from home may be the person's normal workplace. Therefore the first option may need to be something like "working at your normal workplace, which is not at home".

The later questions also become difficult to assess, as "working from home" might also involve an injury away from work during a break. It might be necessary to add "on work break, at home", "on work break away from location where work was being undertaken".

First page, describe the occurrence, (iii).

It is useful to remove reference to "most serious". However, there should be a pointer that the worker can list more than one injury. Either by changing "injury or disease" to plural, or by having a note that says "please list all".

Second page, worker's declaration and consent authority.

Is it possible to use plainer English for these sections. Particularly words such as "the particulars contained herein or annexed hereto".

Consultation Paper 6: Injury Management and Return to Work

Page 2, Background and intent, second paragraph.

It is stated that "The WCIMA23 clarified that a worker cannot be dismissed solely or mainly due to the worker's incapacity for work…". This is not a full picture of the legislative status of this prohibition, which only applies during the *obligation period* (s.168).

It is important that, if this statement is made in any of the finalised document, there must be reference to the obligation period which is defined in s.166 of the WCIMA23 as "12 months beginning on the day on which the worker first has an incapacity for work as a result of the injury".

Return to work case conferences.

Ai Group welcomes the requirements placed on a worker in the legislation by the inclusion of case conferences. We agree with the proposed frequency, conduct and matters that can, and cannot, be discussed.

However, we have two areas of concern.

- This provision could be interpreted as meaning that this is the only time and manner in which an employer can seek information from a treating practitioner. This would be unfortunate, as early information from the treating practitioner can assist an early an successful return to work.

It is hoped that the guidance material will clarify that the employer may seek information from the treating practitioner at other times, if appropriate.

- Whilst the injured worker is required to participate in a return to work case conference, it is unclear how an employer, or insurer will be able to ensure that the treating practitioner is actively engaged in the process of return to work conferences. We have presumed that treating practitioners will be paid for the time involved in the conference, but this is unclear. Whilst the cooperation of treating practitioners may not be an issue for the regulations or administrative instruments, it is a practical issue that needs to be addressed. Information for treating practitioners and employers should be developed as part of this process.

Consultation Paper 12: Workplace Rehabilitation Services

Page 3, exclusion of specialised retraining programs.

Ai Group acknowledges that the specific details surrounding specialised retraining programs has been removed from the Act.

However, it is our view that there may be times when this type of training is required, and this appears to be reflected in the list of prescribed WRS in attachment 1 to the paper, i.e. (2) vocational counselling and (5) training and education.

As part of the transitional arrangement, it would be helpful if there was an explanation of why the requirements in the Act have been removed, and that they are not intended to result in workers not being able to receive vocational advice and retraining.

It is our understanding that the comparison document published by WorkCover WA as part of the 2021 consultation will be updated once the regulations are finalised. It is our view that this would be an important topic to include, noting that the issue was not addressed in the initial comparison document.

Page 4, relevant considerations.

Ai Group supports the list of relevant considerations.

Page 5, worker choice.

We note that the regulations will "embed worker choice and independence of the WRP".

We recognise the value of a worker having input into who will be their WRP. However, with little exposure to the scheme, they are unlikely to be able to form a view about which WRP will be best for them.

Some employers have preferred WRPs who have a good understanding of the workplace and would be able to quickly apply that knowledge to the return to work process for individual workers.

Further, insurers may be able to identify WRPs who have specific expertise relevant to the type of injury, especially psychological injury claims.

In Victoria, where choice applies, the worker is able to choose from a short-list of three. It is Ai Group's view that this would be a better approach a list of all approved WRPs.

Where it is the insurer or employer that nominates the involvement of a WPR, rather than the worker or their treating practitioner, the worker may be reluctant to participate. To address any possible delays caused by this, the worker should be required to nominate their WPR within 7 days, or be allocated a WPR chosen by the insurer or employer.

Page 5, change of provider.

It is stated that "there is no intention to make any regulation at this time regarding a change in provider". It is not clear whether this means the worker (or employer/insurer) is not able to seek a change, or if it intended just to be silent enabling a change to occur without constraints.

Ai Group believe that the regulation should state which of these is intended to apply.

Consultation Paper 17: Stopping or Reducing Compensation

Page 3, Reducing or discontinuing income compensation – worker has returned to work

Ai Group welcomes the legislative change that removes the requirements of s.61 of the current Act to provide "21 clear days' prior notice" of the intention to reduce or discontinue payments.

However, it is our view that the proposed requirements in the s.63 of the WCIMA23 are still too onerous and without practical application.

Regulation 63 states that the employer must not reduce or discontinue income compensation "… unless the employer has informed the worker in accordance with the regulations."

It has been our experience that the initial stages of a return to work may have some "bumps in the road", with the worker's attendance being inconsistent and sporadic. It would seem to be inappropriate for the employer to be required to provide a written notice every time a change occurred.

It is Ai Group's suggestion that the notice could be reworded to state something along the lines of:

> *As you are returning to work the money you receive from us with be a combination of weekly compensation and payment for hours worked. The combination of these payments will be equal to [the amount that would previously have been the compensation amount]. Your pay docket will clearly show the amount paid to you for hours worked and the hours paid to you for weekly compensation.*

It is our view that this would provide a simplified process, and also give more certainty to the worker who will see the total amount they expect to be paid, not just the compensation amount.

Page 4, Reducing or discontinuing income compensation: medical evidence.

The wording of the provision of the Act seems a little strange. It would seem that a decision on medical evidence, would normally be done by the insurer. The only time that we could see the employer making this decision is if the worker provides a certificate that says that they are fit, but the worker makes no attempt to return to work.

The regulations will need to specify how an employer would make such a decision and/or clarify that the decision is actually made by the insurer.

Page 5, Suspending income compensation: failure of worker not residing in State to provide declaration.

The regulations will need to clarify whether it is actually the "employer" who issues this notice, or the insurer on their behalf. Lack of clarity, may lead to an employer taking steps that are without the intention of the legislation.

Page 6, Suspending income compensation: worker in custody.

The regulations will need to clarify whether it is actually the "employer" who issues this notice, or the insurer on their behalf. Lack of clarity, may lead to an employer taking steps that are without the intention of the legislation.

Page 7, Review of income compensation

Ai Group does not have any comment to make on this provision.

Consultation Paper 18: Catastrophic Workplace Injuries

We note that the cost of the CISS will be funded by a levy on all employers. It is likely that some of these claims may commence as workers' compensation claims and transfer to the CISS at a later state. It is not clear how this transfer would occur. Ai Group is seeking confirmation that the regulations will specifically state that the costs of these claims that transfer to the CISS can not be included in the premium considerations of insurers.

About Australian Industry Group

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years.

Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our purpose is to create a better Australia by empowering industry success. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We *listen* and we *support* our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We *provide solution-driven* advice to address business opportunities and risks.


www.aigroup.com.au