



**HIA Submission**  
***Workers Compensation and Injury***  
***Management Act 2023***  
**Implementation Consultation Papers 1 – 19**

WorkCover WA  
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## Introduction

Housing Industry Association (HIA) takes this opportunity to provide feedback on the Implementation Consultation Papers 1 through 19 and the Regulations Indicative Structure for the *Workers Compensation and Injury Management Act 2023* (WC Act).

HIA made a submission on the Consultation Draft *Workers Compensation and Injury Management Bill 2021* (Draft Bill) on 10 November 2021. While a number of the changes proposed under the Draft Bill now form part of the WC Act, there were several issues raised in HIA's submissions that were matters to be dealt with by regulation. Our position on those matters is reiterated in this submission.

HIA supports injured workers returning to work in a timely, safe, and efficient manner and sees moves that would reduce delays and disputation regarding this process as positive, noting the complexity of the return to work process. It is also essential that the workers compensation laws support businesses in their day-to-day operations. The laws and the systems established thereunder must operate effectively and fairly, and not introduce unnecessary red tape, administrative burdens or costs in implementation when weighed up against the outcomes they seek to achieve. Conversely, if the laws do not operate in the way they are intended, they add to the compliance load with minimal impact in improving outcomes, which has a direct adverse impact on housing affordability.

To this end, the modernisation and clarification of the laws under the WC Act assists all stakeholders in understanding and meeting their obligations. HIA is also supportive of the intention by WorkCover WA to minimise changes to the existing framework and forms where possible, and to provide continuity in coverage by licensed and registered scheme participants such as medical practitioners and self-insurers, as outlined in the Implementation Consultation Papers.

Maintaining reasonable premiums is a fundamental component of a successful workers compensation scheme. HIA's primary concern continues to be the increase in costs to business, both in premiums and from an administrative perspective. It was known from the outset that the proposed changes would result in an increase in insurance premiums, and this must be closely monitored, both as a direct result of a particular change and from a holistic perspective, taking into account all changes to the workers compensation laws, as well as other related legislation.

## Executive Summary

A summary of HIA's position in response to the Implementation Consultation Papers and the Regulations Indicative Structure is set out below.

### Premiums

- Increases in premiums should be kept to a minimum and if proposed should not outweigh the anticipated benefits, including any impacts on housing affordability.
- The residential building industry is distinct from the commercial construction industry and should be considered separately, including categorisation, reporting, and data collection.
- Appropriate transitional arrangements will be necessary to ensure minimal impacts on any work in the pipeline and to allow scheme users time to learn and implement the new requirements within their businesses.



### **Deemed and excluded workers**

- Workers compensation should be the responsibility of employers and not extend to independent contactors or other deemed employees.
- HIA supports the use of a standard definition for ‘worker’ and opposes the use of complex deeming and exclusion provisions in the regulations.
- HIA supports the deliberate omission of gig economy workers under the regulations given the ongoing federal reforms to the Fair Work Act.
- Any future move to address gig economy workers by regulation should first be covered by a RIS.

### **Liability decisions and provisional payments**

- HIA does not oppose the use of timeframes for liability decisions and provisional payments to provide clarity and support to scheme participants. However:
  - consideration must be given to whether self-insurers are able to meet the same timeframes as insurers; and
  - employer cash flow must not be compromised, and certainty should be provided around the timeframe for provisional payments to be made by the insurer to the employer.

### **Dust disease**

- The complexity of diagnosing and assessing dust diseases must be reflected in the relevant processes. Streamlining should not come at the expense of necessarily thorough and detailed investigations.

### **Settlements**

- Changes to settlement arrangements must be widely communicated ahead of time to ensure parties are not disadvantaged by the proposed changes.

### **Workers Compensation Insurance Policies**

- HIA does not oppose the principle that the regulations may set out requirements for workers compensation insurance policies, however this must not come at the cost of commercial viability for insurers and employers. A proper cost-benefit assessment of any proposed regulations is necessary.
- HIA supports the use of remuneration guidelines to assist scheme participants in understanding the payment requirements.

### **Catastrophic Workplace Injuries and Common Law**

- Additional support and education will be necessary for scheme participants to properly understand the changes to the claim, compensation, and support options.
- Impacts on premiums as a result of the Catastrophic Injury Support Scheme (CISS) should be closely monitored and managed.

## **The Residential Building Industry**

The residential building industry is one of the most heavily regulated industries in Western Australia.

Those in the industry must manage a complex web of national, state, and local laws, regulations and codes ranging from planning, design, environment, health and safety to local authority inspection and certification and a multitude of building, electrical, mechanical, and plumbing processes. Industry participants must also



comply with a legislative framework that spans a multitude of issues including licensing, owner-builders, dispute resolution, builders warranty obligations and contractual requirements.

The industry is further complicated by a spectrum of business sizes and structures, from large project home builders to small family run operations, from companies to partnerships and sole traders. In addition, the industry is supported by a multitude of trade contractors who provide the 'hands on the ground' support to the industry, as well as manufacturers, suppliers, consultants, and other professionals operating at all scales.

The variety of work undertaken on a residential building project and the range of businesses involved in undertaking that work creates a complex arrangement in relation to workplace health and safety and workers compensation. It is important to recognise the unique nature of residential building work, particularly low rise domestic construction. Given the complex nature of the workforce involved in residential building work the responsibility to effectively and practically control activity on a building site is a shared one.

HIA seeks to ensure that the unique characteristics of the residential building industry are taken into consideration in any proposed changes to the workers compensation framework and that these specialised businesses receive the appropriate level of support for their operations. Businesses in the industry already bear significant costs, and any further cost increases, administrative burden and red tape will only have undesirable consequences for industry.

The prevalence of small businesses and independent contractors within the residential building industry represents the greatest challenge to acceptance and compliance with change. Communication with these stakeholders is not only critical, but exceptionally difficult. Principal contractors and industry organisations play a part, but the reach is limited to those parties they have direct contact with, such as a contracting relationships, membership, and subscriptions.

It is therefore essential that the government not only actively consults with stakeholders by leveraging various available avenues, such as licensing, inspections, and social media, but that WorkCover WA also engages in a targeted education and information campaign to assist all businesses in complying with any changes. This should include training and information in various forms, with adequate funding to ensure it is effective in reaching all areas and levels of industry.

## **Housing affordability**

It is essential that the Government takes into consideration the potential impact of any legislative amendments on housing affordability, weighed up against the benefit to stakeholders. The introduction of any changes to current legislative frameworks at this stage has the potential to impact the industry's abilities to respond to the current critical shortfall in housing and to push up the cost of delivering a home.

Any approach to regulatory reform should ensure that the regulatory objectives are achieved, and genuine improvement is made, with minimal impact on housing affordability. Measures to test any proposed reforms should include a regulatory impact statement including a cost-benefit analysis and investigation of alternative approaches, comprehensive consultation and targeted engagement with stakeholders and industry representatives.

The initial impact of an increase in premiums will be felt by the employer, however in the residential building industry these costs are inevitably passed up the contractual chain. In a residential context, subcontractors pass costs on to builders, who then pass costs on to homeowners.



The result is a compounding of additional insurance costs in the contract price for a new home. This doesn't convert to an increase in the value of the home for the consumer, but instead results in reduced housing affordability. This cost is also not necessarily applied proportionately to the contract price and could see homeowners at the lower end of the market experiencing steeper increases than those at the higher end of the market.

## **Transitional arrangements**

Transitional and interim measures will be necessary to allow industry time to adjust to any new or amended requirements. Transitional provisions must be put in place to allow duty holders to understand the new requirements and make any necessary adjustments within their business.

Where there is the possibility that new requirements may have cost implications for businesses, including administrative impacts and direct premium increases, transition periods should take into account the impact on any work in the pipeline and limitations on passing on those costs under fixed price contracts that have already been signed.

Appropriate transitional arrangements should also apply with regard to enforcement, whereby minor or technical breaches are addressed with an educative approach rather than the highest available penalty. A similar enforcement approach similar to that taken for changes under the *Work Health and Safety Act 2020* using a Statement of Regulatory Intent may also be appropriate in this instance.

## **Premiums**

Workers compensation insurance premiums are usually the largest single government on-cost for employers. Based on the proposed changes, HIA's biggest concern is the potential for significant increases to insurance premiums. With the scheme holding significant unfunded liabilities, there is always potential for further premium increases. To this end, government must be mindful of the potential impacts any changes may have on insurance premiums.

## **Impact of proposed changes**

While many of the changes under the Act or proposed for implementation don't materially impact the operation of the workers compensation laws, the increased cap on medical expenses and the extended step-down period for income compensation are matters of concern. These two significant changes will undoubtedly result in an increase to insurance premiums.

The question remains as to whether the estimated 2-3% increase in premiums is a reasonable and accurate estimate. It is noted that WorkCover WA had the cost impact of these changes assessed prior to consultation on the Draft Bill, however no evidence or supporting information for these figures appears to have been provided. Further, significant inflation has occurred since the time the increases were suggested, and industry has experienced skyrocketing pay rates driven by labour and skills shortages.

## **Compounding impacts**

Government should also consider the compounding impacts of any other related legislative reforms or amendments, such as the recent changes to the *Work Health and Safety Regulations 2022* to include the management of psychosocial hazards in the workplace.

Another compounding factor is associated changes in industry and workplace conditions that may further impact the financial requirements of the scheme and lead to premium increases. For example, there has been a general increase in awareness of mental health and wellbeing in the years since the pandemic.



While it would be reasonable for businesses to adapt to these changing circumstances in isolation, the impact of concurrent reforms and other conditions on premiums must be proactively managed.

## **Industry classifications**

In the same way that mining and resources construction is different to commercial construction, residential building work is different again. For example, the construction of a single residential detached dwelling is very different to multi-residential (apartment) construction, and similarly small-scale commercial versus medium-to-large scale commercial construction. The operating methods, site hazards and level of risk, are distinctly different between different construction types, resulting in entirely different injury outcomes.

To ensure that premiums are calculated fairly and in accordance with appropriate industry risk, it will be imperative that the industry classification system allows for the categorisation of different industries and activities, for example, residential building work as a distinct category to commercial building work. It is also necessary that reporting and data collection by WorkCover WA reflects the differences between the residential sector and other sectors in the building and construction industry, particularly given the cooperative arrangements in place between WorkCover WA and WorkSafe WA with regard to workplace incidents.

## **Implementation Consultation Papers**

### **Paper 1 – Deemed Workers & Excluded Workers**

The use of subcontractors and contracting arrangements is the backbone of the residential building industry.

Those in the industry are often faced with many tough decisions in relation to the labour they engage, including the decision as to whether an individual would be deemed to be a worker for the purposes of the workers compensation scheme, influencing premiums and the ability to claim in the event of a work-related injury. These decisions can have a significant impact on the costs faced by a business in the industry, related directly to premiums, as well as consequentially in administrative costs.

Clarity in coverage is not only a critical part of managing costs associated with workers compensation, but also in facilitating compliance.

#### **Definition of ‘worker’**

Workers compensation is a responsibility of employers not principal contractors. HIA opposes the extension of workers compensation benefits to independent contractors and the deeming of independent contractors as employees for workers compensation purposes.

HIA supports a definition of independent contractor based on the satisfaction of the results test set out by the Alienation of Personal Services Income (APSI) rules under the Commonwealth income tax laws. Persons running their own business should be responsible for purchasing and paying for their own sickness, accident and income protection insurance. Working company directors should not be covered for workers compensation.

HIA reiterates its position in its submission on the Draft Bill, and continues to oppose the use of the regulations to alter the definition of ‘worker’ under the Act. The benefits of utilising a standard definition fall away and businesses will be exposed to greater uncertainty in the scope of their workers compensation coverage.



In addition, HIA has concerns in relation to situations in which a contractor is deemed a worker for the purpose of the WC Act, that there is the potential for double-dipping of premiums. Whilst the principal is required to pay a premium for the monies paid to the contractor, the contractor will be required to pay a premium in relation to any salaries paid by the company.

### **Gig economy workers**

HIA understands there is currently no intention to make specific regulations about gig economy workers and this is due to the ongoing reforms to the Fair Work Act, particularly in relation to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*. HIA is supportive of an approach that reduces duplication and potential conflict between federal and state laws.

HIA also understands that once there is further certainty around the status of gig economy workers arising from the federal reforms, that WorkCover WA may seek to amend the regulations. Further consultation, including a Regulatory Impact Statement and cost-benefit analysis will be necessary prior to finalising any changes of this nature. However, in principle, HIA opposes any moves to include gig economy workers under the service user's workers compensation insurance.

## **Paper 5 – Liability Decisions & Provisional Payments**

### **Provisional payments**

It is proposed to include by regulation a provisional payment regime for instances where the insurer or self-insurer provides a deferred decision notice and has not given a liability decision notice by 28 days after the date of the claim. Provisional payments will be required to be made to the worker to cover income compensation and medical expenses and the employer can be penalised in the event they don't comply.

The requirement to make provisional payments is problematic for employers. Many employers, and in particular those involved in the building industry, are dependent on ongoing cash flow. They don't necessarily have working capital or overdraft facilities that would allow them to carry potentially significant costs in the event of a worker being seriously injured. In some cases provisional payments may continue up to the deemed liability acceptance day which will be set as a maximum of 120 days, approximately four months, from the date the claim is received.

While it is acknowledged under s.43 that an insurer shall indemnify the employer for any provisional payments made, the timeframe for payment to be made to the employer is uncapped under the WC Act. The consultation paper makes no indication that any maximum timeframe for payment by the insurer would be prescribed by regulation. This does nothing to provide the employer with certainty as to the duration in which they will be required to carry these costs.

With provisional payments being the responsibility of the employer, there is currently no incentive for the insurer to make a timely assessment. A better arrangement would be for the insurer to be immediately responsible for making provisional payments in the event they do not make a determination within the necessary timeframe. Alternatively, the insurer should be required to make payments to the employer for provisional payments within a period of 14 days after the payments are made by the employer.

### **Liability decisions**

With regard to liability decisions, a distinction should be made between insurers and self-insurers. Insurers are generally companies whose primary and day-to-day business is insurance. They are well-versed in the operation of the law in relation to their products and keep up to date with any changes. However self-insurers are responsible for the day-to-day running of all parts of their business, which is usually not insurance. For a residential builder, the business is focused on building homes.





While it is acknowledged that there self-insurers must meet specific criteria in order to be licensed and this may preclude those with lower operational capacity to deal with the additional burden on their business, it is still important to acknowledge that self-insurers may face additional challenges in meeting the timeframes prescribed. It may be reasonable to provide self-insurers with a level of leniency or reduced impacts if they do not comply. They should not be subject to the same penalties as insurers.

## **Paper 10 – Dust Disease**

There is no argument regarding the serious and debilitating nature of dust diseases.

Exposure to substances causing dust diseases may occur decades prior to any symptoms becoming apparent. The considerable latency period and progressive nature of these conditions means the impact of any changes to the presumptive dust disease provisions may not be properly quantifiable for many years. Further, there is an additional level of uncertainty linked to where and when the exposure first occurred, whether the worker's condition has stabilised, and in some instances whether the condition is genuinely linked to work activities.

It is noted that dust diseases are commonly linked to employment, however the latency period makes determination and rebuttal of a related claim particularly complex. Caution must be taken in the streamlining of processes to the extent that the necessary rigor to appropriately determine the cause and responsibility for compensation for dust diseases is undermined. This outcome would be problematic for all stakeholders.

The nature of work in the residential building industry must be considered in relation to any future expansion of the deeming provisions to include workers beyond direct employees, including those in the gig economy, and the proposed benefits of coverage assessed against employer's potential exposure and prospective increases to premiums. Under the new laws, the burden rests with the employer to demonstrate that a presumptive disease is not reasonably linked to the employee's work. This would be exceptionally challenging, if not impossible, for transient workers and subcontractors.

In some circumstances it may be appropriate for the worker to demonstrate that they acquired the disease in the course of their employment. For example, it may be appropriate to assume that a worker who has been working in asbestos removal for 20 years has acquired mesothelioma because of exposure at work. By comparison, the transient nature of work in the building industry means that a worker may have undertaken various roles throughout their working life and only more recently transitioned to a role in with a high risk of long-term progressive injury. In this instance the disease may not have been contracted due to conditions in the work environment but may have been exacerbated by it.

Exposure to asbestos is further complicated in WA by the widespread use and exposure to asbestos outside of workplace settings and in particular, the likely exposure of many children to asbestos and other hazardous dusts during the 1960s – 1990s. Many who grew up in WA can recount a family holiday to Wittenoom, playing in piles of asbestos tailings or even amongst general building site rubbish that was likely to contain fibro sheeting.

HIA reiterates its position regarding the seriousness of dust diseases and urges WorkCover WA to focus its efforts on ensuring that the processes are appropriately thorough and accurate rather than expedited, to provide optimised outcomes for both workers and employers.

## **Paper 11 – Settlements**

It is intended that the regulations include strict timeframes with respect to settlements made under the *Workers' Compensation and Injury Management Act 1981*, which could see some settlements become



ineligible. In particular, parties seeking to utilise common law deeds that do not retain common law claim rights, as well as Form 15C memorandums of agreement, may incur additional costs and barriers in resolving a matter if they are not aware of this change. This is likely to have an adverse effect on all parties involved.

It will be important for a comprehensive communication strategy to be implemented for all stakeholders to ensure they are aware of these timeframes.

## **Paper 16 – Workers Compensation Insurance Policies**

Generally, HIA does not oppose the prescription by regulation of the terms of a workers compensation insurance policy to ensure that employers are not unexpectedly left without appropriate coverage. There may however be circumstances where the level of prescription limits the commercial viability of the insurance or requires the insurer to carry an unnecessary level of risk such that it adversely impacts on employer premiums. To be properly understood and to demonstrate that any changes will not have unintended outcomes, the draft regulations must be properly analysed using current inputs.

### **Application information**

HIA does not oppose the prescription of information to be provided by the applicant to the insurer as a part of its application. In principle this gives both parties clarity on the minimum requirements for an application and provides for consistency. To ensure this change does not unnecessarily increase the administrative burden on employers, the regulations should not be overly prescriptive, and the current requirements of insurance providers should be taken into account as a gauge.

### **Refusal of indemnity**

HIA does not oppose the change by regulation that prevents insurers from refusing indemnity on the basis of an employer's breach of the policy.

### **Cancellation**

It is understood that the regulations will permit a 90 day period of default on payments, taken from the commencement of the policy period, before an insurer can cancel a workers compensation policy. While 90 days may be a reasonable period, it will be important that an insurer is unable to take this action without making reasonable attempts to notify the business of the potential cancellation of its policy.

### **Remuneration guidelines**

HIA supports the use of remuneration guidelines to provide necessary clarity around appropriate payment amounts. This will assist employers in determining the appropriate rates of income compensation and reduce the chance of non-compliance.

## **Paper 18 – Catastrophic Workplace Injuries**

The Catastrophic Injury Support Scheme (CISS) has been in place for motor vehicle incidents for many years, however its application has now been extended under the WC Act to catastrophic workplace injuries. The scheme is currently administered by the Insurance Commission of Western Australia (ICWA) and is subject to different laws, procedures and other requirements than the long-established workers compensation framework.

This new avenue for support will require a period of education and adjustment for employers, which will be necessary through existing workers compensation communications channels, including via WorkCover, insurers and peak bodies. It is important that employers understand any additional steps, such as notifications, that are necessary in the event of a potential CISS claim, and distinguish between their



communications with their insurer, WorkCover and ICWA. Further, it is important that employees are properly supported in understanding the available claim pathways to ensure they make informed elections based on their circumstances.

Although the cost of injured worker participation in the CISS will be funded by an annual levy contribution by insurers and self-insurers via WorkCover WA, ultimately this cost will be passed on to the employer through insurance premiums. HIA understands that injuries of the severity required to participate in the CISS are very uncommon, however it should also be acknowledged that the expansion of the CISS will have an impact on insurance premiums.

### **Paper 19 – Common Law**

HIA opposes common law claims. Where they exist, they should be restricted to those seriously injured, leading to severe disability or death and balanced against the total benefits provided to injured workers under the scheme.

As with other claim pathways, it will be important that information on common law claims is made available to assist scheme participants in understanding the different options. Presenting this information in table or flowchart form will allow workers and employers to easily understand the timeframes and other implications.

### **Regulations Indicative Structure**

HIA does not oppose the current indicative structure of the regulations.

Despite the request for feedback on the Implementation Consultation Papers and the Regulations Indicative Structure, it will not be possible for the full impact of the regulations to be considered until such time as a consultation draft is released for feedback. It is anticipated that a consultation draft will be released in due course, with sufficient time prior to finalisation.

HIA would be pleased to provide feedback on the consultation draft and encourages continued engagement by the Minister for Industrial Relations and WorkCover WA.