



Insurance Council
of Australia

1 December 2023

Mr Chris White
Chief Executive Officer
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By email: consultation@workcover.wa.gov.au
CC: chris.white@workcover.wa.gov.au

Dear Mr White

Workers Compensation and Injury Management Act 2023 – Implementation Consultation Papers 1-19

The Insurance Council of Australia (**ICA**), on behalf of its insurer members (**Insurers**) welcomes the opportunity to provide comment on the *Workers Compensation and Injury Management Act 2023* (**WCIMA 2023**) implementation consultation papers 1-19 (**Papers**).

The ICA and Insurers share WorkCover WA's commitment to ensuring that the Workers' Compensation Scheme (the **Scheme**) is implemented to best meet the needs of injured workers, employers, and businesses in Western Australia. The ICA and Insurers consider that ensuring the regulations and administrative instruments proposed to support WCIMA 2023 are optimal, is key to the success of the Scheme.

Please find **attached** a table containing industry feedback on specific aspects of the Papers.

The ICA and its Insurer members are of the view that to best meet the overarching objectives of the Scheme, these aspects of the Papers require further consideration.

Please note we do not propose to make any specific comment in relation to the Papers' application to self-insurers.

We do consider that the effect and application of many of the proposals in the Papers will turn upon the precise wording of the Regulations to WCIMA 2023, noting the Regulations are yet to be distributed or made available for consideration. The ICA has therefore not yet provided or attempted to provide finalised feedback on issues or clauses that are subject to the as yet unknown precise wording of the Regulations.

The ICA and Insurers would welcome the opportunity for further consultation once the proposed Regulations have been drafted and we would appreciate WorkCover WA's undertaking to allow for a further review and analysis at that time. We seek a continuation of the consultative approach which has historically been in play in Western Australia.

We also recommend once again that WorkCover WA plan a review of the impact and consequences of the changes to be effected by WCIMA 2023 within three years post-implementation.

We trust that our submission is of assistance to WorkCover WA in implementing the changes in WCIMA 2023. We look forward to working with WorkCover WA into the future regarding these and any other relevant aspects of the Papers.

We are available to discuss our submission and any questions that may arise in more detail at your convenience. Please do not hesitate to contact me or [REDACTED] if you have any queries.

Yours sincerely,



Andrew Hall
CEO & Executive Director



Implementation consultation papers 1 to 19: ICA submissions*

Implementation consultation papers	Equivalent provision of 1981 Act & current regulations (where relevant)	ICA submission
Paper 1: Deemed workers and excluded workers	<p>Section 9 WCIMA 1981: ministers of religion and religious clergy</p> <p>Section 5 WCIMA 1981: NDIS support workers</p>	<ul style="list-style-type: none">▪ With reference to WorkCover's stated intention to contact religious bodies of clergy gazetted under WCIMA 1981 to determine their status and need for inclusion before the Regulations are finalised: ICA requests advance notice of the content of the Regulations before finalisation (as this will impact Insurers providing employers' indemnity insurance to religious bodies & organisations).▪ While Paper 1.4 expresses the intent of the Regulations, the efficacy will turn on the precise wording of the Regulations: given the significance of the issue for (potentially currently uninsured) NDIS participants, ICA requests the opportunity for further consultation once the Regulations are drafted and before finalisation (both in relation to Paper 1 as a whole and point 1.4 in particular).▪ Paper 1.4 does not provide any clarification whether NDIS support persons engaged by an NDIS participant who is a minor, or otherwise lacks legal capacity to enter into a contract, will be deemed to be 'workers' under the Regulations.▪ In that respect, ICA notes that:<ul style="list-style-type: none">○ section 13 of WCIMA 2023 states that the Regulations may provide that an individual of a specified class or description who otherwise would not be, or might not be, a 'worker' under section 12(2) of WCIMA 2023, is a worker for the purposes of the Act;○ section 12(3) of WCIMA 2023 provides that: <i>'the person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker's employer';</i>○ section 13 of WCIMA 2023 does not expressly state that the Regulations may override the express requirements of section 12(3) of WCIMA 2023 (as section 13 refers only to an expansion of section 12(2));○ ICA therefore queries whether WCIMA 2023 empowers the making of Regulations deeming individuals to be 'workers' if there is no contract in place to meet the requirements of section 12(3) of WCIMA 2023; and

- ICA notes that the requirements of section 12(3) could not be satisfied in the case of an NDIS participant who is a minor or otherwise lacks capacity to enter into a contract of the type under consideration.
- ICA therefore again requests the opportunity for consultation once the Regulations are drafted and before finalisation (both in relation to Paper 1 as a whole and point 1.4 in particular) noting these issues and their impact remain unclear.
- ICA further requests clarification and clear advice and communications from WorkCover regarding the type of policy any NDIS participants affected by Paper 1.4 and the Regulations will be required to take out (that is, a standard workers' compensation policy in the prescribed form, or a modified domestic policy) noting the significance of this issue to ICA's Insurer members from an underwriting perspective, and the significance of the issue to (vulnerable, potentially uninsured) NDIS participants.

Paper 2: Presumptive Diseases Schedule 3 WCIMA 1981

With reference to the comment in Paper 2 that:

*'with the exception of PTSD and COVID-19..., it is intended regulations for prescribed diseases and prescribed employment will only apply to diseases **diagnosed after commencement of the WCIMA 23** by a suitably qualified medical practitioner (or where the worker dies, on the day the worker dies)' (our emphasis);*

ICA submits that without having the benefit of viewing the precise wording of the proposed (yet to be drafted or published) Regulations, this statement is broad and imprecise, and may lead to ambiguities, particularly when having regard to section 10(4) of WCIMA 2023, which provides as follows:

'Unless the regulations otherwise provide, this section extends to:

- (a) an injury suffered before, and employment before, the coming into operation of the regulation by which the disease concerned is specified as a prescribed disease; and*
- (b) an injury suffered before, and employment before, this section comes into operation.'*

For instance, it is not presently clear whether a claim for a prescribed (presumptive) disease alleged to have been suffered before proclamation of WCIMA 2023, for which a claim was made and liability was declined under WCIMA 1981, will now fall to be determined under WCIMA 2023, if the worker obtains a fresh diagnosis after commencement of WCIMA 2023 (which we suspect is not what was intended).

**Implementation consultation
papers**

**Equivalent provision of 1981 Act &
current regulations (where relevant)**

ICA submission

ICA respectfully submits that to avoid ambiguity, the Regulations should provide to the effect *that with the exception of PTSD and COVID-19, the regulations for prescribed diseases and prescribed employment will only apply where:*

- (a) the claim in question has been made under WCIMA 2023 after commencement of WCIMA 2023; and*
- (b) the disease in question was diagnosed after commencement of the WCIMA 23 by a suitably qualified medical practitioner.;*

ICA also respectfully requests the opportunity for further consultation once the Regulations are drafted and before finalisation.

Paper 3: Workers Compensation
Claim Form

1982 Regulations, appendix I, prescribed
form 2B

Section 25(2) of WCIMA provides that a claim is made under WCIMA 2023 when the worker has given to the employer:

- (a) a completed claim in the approved form; and
- (b) a certificate of capacity for the claim.

However, with reference to the proposed approved workers compensation claim form (attachment 1 to Paper 3) **(the proposed form)**:

- the proposed form provides for the worker to sign and date the form (at 'Worker's Declaration');
- however, neither WCIMA 2023, the content of Paper 1, nor the explanatory notes to the proposed form, indicate what constitutes a 'completed' claim form, and in particular, whether the proposed form must be signed for the form to be 'complete.'

ICA respectfully requests that:

- to avoid confusion and in the interests of clarity, the Regulations specify that the claim form is not complete until signed by or on behalf of the worker;
- the explanatory notes to the proposed form be amended to specify that the form is not complete until it is signed; and
- ICA have the opportunity for further consultation once the proposed Regulations are drafted and before finalisation.

With reference to the proposed removal of the section of the general claim form providing for disclosure by a worker of 'Other/Previous' claims:



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papers**

**Equivalent provision of 1981 Act &
current regulations (where relevant)**

ICA submission

- the stated reason for removal of that WCIMA 2023 '*prohibits workers being required to disclose previous workers compensation claims*';
- in ICA's submission this is however inaccurate;
- section 506 WCIMA 2023 prohibits disclosure of information about any claim for compensation by the person **for the purpose of selection for employment**, but does not otherwise prohibit disclose of such information for all persons;
- disclosure by a worker of 'Other/Previous' claims on the general claim form serves a legitimate and valid purpose by enabling employers to seek contribution from prior employers for the purposes of the Act where an injury is attributable to more than one employment, and further, assists employers and insurers in legitimate investigations whether a new 'injury' has in fact occurred for the purposes of WCIMA 2023 (which is clearly the intent of WCIMA 2023 having reference to, for example, sections 28(2)(b) and section 34, which require prompt and honest notification of prior claims by a worker for their effective operation);
- ICA submits there is no valid reason for removal of this portion of the claim form, and further, that removal will render WCIMA 2023 section 34 unworkable; and
- ICA submits the removal of this portion of the claim form is contrary to the aims and optimal operation of the Scheme.

Otherwise, ICA requests the opportunity for further consultation once the proposed further forms (noise induced hearing loss and dependency claims) are prepared and before finalisation of the Regulations.

Paper 4: Certificates of Capacity

1982 Regulations, appendix I, prescribed forms 3, 4 and 4A

No comment.

Paper 5: Liability Decisions and Provisional Payments

WCIMA 1981 sections 57A & 57BA (amongst other provisions)

ICA submission on proposed provisional payment notices

With reference to the stated intention in Paper 5 that Insurers are expected to ensure systems and procedures are in place to ensure that from the commencement of WCIMA 2023, '*provisional payment notices are issued within 3 days of the provisional payment day*', ICA respectfully notes that:

- section 36 of WCIMA 2023 gives delegates power for the making of Regulations prescribing the provisional payments day;



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ICA submission

- however, there is no delegation of power for making of Regulations prescribing the requirement to issue a provisional payments notice, either within a specified timeframe or at all (noting WCIMA 2023 makes no reference to any such notice).

ICA respectfully requests:

- confirmation that issuing of a provisional payments notice will be required only from a regulatory perspective (and is not required by the Regulations);
- confirmation that the Regulations will not mandate the issuing of a provisional payments notice;
- confirmation that the Regulations will not specify adverse consequences if a provisional payments notice is not issued within 3 days of the provisional payments day;
- confirmation of any proposed consequences from a regulatory perspective of late- or non-compliance with this timeframe; and

the opportunity for further consultation once the Regulations are drafted and before finalisation.

ICA submission on impact of transitional provisions

ICA also submits that Regulations are required to clarify and confirm the intended effect of the transitional provisions contained within Part 14 Divisions 1 and 2 of WCIMA 2023 upon claims pended under WCIMA 1981, insofar as provisional payment of income compensation are concerned.

The relevant provision of WCIMA 1981 is Section 57A, noting that under WCIMA 1981:

- within 14 days of being notified by the insured employer of a worker's claim for weekly payments under the Act, if the insurer is not able to make a decision whether or not to accept liability for the claim within the timeframe allowed, the insurer may, under section 57A(3)(c) of the Act, notify the worker, the employer and the Director notice in the prescribed form that a decision is not able to be made;
- the form in question is a form 3C notice under the 1982 Regulations, commonly referred to as a pending notice (and where the notice has been issued, such claims are commonly referred to as a pended claim);



- if the insurer does not then issue a notice in the prescribed form either accepting or disputing liability within a further 10 days, section 57A(3a) provides that *'the claim by the worker shall be deemed to be disputed.'*

Section 551 of WCIMA 2023 (within Part 14 of WCIMA 2023), titled *'Pending claims under former Act'*, provides that where a claim for weekly payments of compensation made under WCIMA 1981 ('a former Act claim') is not decided under the former Act before commencement day of WCIMA 2023, the claim *'must be dealt with as a claim for income compensation under this Act as if made under this Act.'*

Whether a claim under the former Act has been *'decided'* for section 551 purposes before commencement day governs whether a liability to make provisional payments may arise under WCIMA 2023, as Section 559 of WCIMA 2023 (also within Part 14) provides that:

'An employer is not required to make provisional payments of compensation in respect of a claim for compensation made before commencement day unless the claim is required by section 551 to be dealt with under this Act as if made under this Act.'

Section 551(2) of WCIMA 2023 relevantly provides that a former Act claim is considered to have been decided under the former Act when:

- (a) liability for the weekly payments claimed was accepted under the former Act by the insurer or employer; or*
- (b) an arbitrator determined under the former Act that the worker is entitled to the weekly payments claimed.'*

Clearly, a claim where a decision on liability has been pended under WCIMA 1981 is not a claim that has been *'decided'* under the former Act, noting section 551(5) provides that: *'If a liability decision on a former claim that must be dealt with under this Act was deferred before commencement day, this Act applies to the claim as if a deferred decision notice for the claim had been given on commencement day.'*

The intention appears clear that where (before commencement of WCIMA 2023) liability for a claim is in **dispute**, sections 36 to 42 of WCIMA 2023 will have no application, and an employer will **not** be required to make provisional payments of income compensation, as section 551(4) confirms that where a liability dispute was not determined before commencement day under WCIMA 1981, *'the dispute must be dealt with under this Act'* (but without specifying that a claim where liability is in dispute is to be dealt with under WCIMA 2023 *'as if made under this Act'*).



ICA notes that:

- under WCIMA 1981, unlike WCIMA 2023, there was no specific obligation placed on an insurer or employer to issue a notice disputing liability for a claim for weekly payments after deferring a decision on liability;
- rather, by means of the operation of section 57A(3a) of WCIMA 1981, if liability was not accepted within 10 days of the issue of the form 3C notice, liability was deemed to be (and was) in dispute for the claim under WCIMA 1981.

ICA therefore presumes that the intention of WCIMA 2023 is that:

- section 559 of WCIMA 2023 will only apply to claims made under the former Act (WCIMA 1981) where a form 3C notice was issued **within days of commencement** of WCIMA 2023;
- where a claim for weekly payments was made under WCIMA 1981, and a decision on liability was deferred (pending) **more than 14 days before commencement of WCIMA 2023** (but no formal notice accepting or disputing liability has been issued), as liability for the claim (by operation of s57A(3a)) is in dispute, the claim falls within s551(4), and an employer is therefore **not** required to make provisional payments of compensation in respect of such a claim.

ICA is however concerned that there is potential for ambiguity in the interpretation of section 551(4) of the Act, the concern being that the phrase:

'liability for a former Act claim that ...was disputed by the insurer or employer';

may be considered to apply only to claims where a formal notice (form 3B under the 1982 Regulations) was issued by the insurer, rather than also encompassing a former Act claim where liability is in dispute before commencement of the 2023 Act because of the operation of s57A(3a) of WCIMA 1981.

If this (in ICA's view incorrect) interpretation was given to the transitional provisions, the consequences for licenced insurers would be significant and very onerous, necessitating review by Insurers of all past claims (irrespective of the date) where liability was pending, then deemed disputed (by operation of s57A(3a) of WCIMA 1981) without a form 3B notice being issued, where the worker did not challenge that decision.

This would necessitate licensed insurers reviewing all past claims (including closed claims) with a view to issuing liability notices indicating liability is not accepted, within 14 days of commencement of WCIMA 2023.

Moreover, ICA and its members are concerned this may be confusing and distressing to workers who did not pursue a determination of liability, in circumstances where their claim may have been closed months or years before.

ICA submits that Paper 5, and the comments in Paper 5 regarding 'Transition', do not resolve this ambiguity.

ICA notes that WCIMA 2023 permits the making of Regulations to prescribe the provisional payments day and the deemed liability acceptance day, and further, section 544(2) of WCIMA 2023 specifically authorises the making of Regulations where *'there is no sufficient provision in [Part 14] for dealing with a transitional matter.'*

To avoid ambiguity, distress to workers, and imposition of an onerous and unnecessary burden upon Insurers, ICA respectfully requests the issue of Regulations to confirm that:

- where a claim for weekly payments was made under WCIMA 1981, and before WCIMA 2023 commencement day, liability for the claim is in dispute by means of the operation of section 57A(3a) WCIMA 1981:
 - the employer's insurer will be taken to have issued a liability decision notice in the approved form stating that the insurer does not accept liability for the claim, for the purposes of section 28(2)(c) of WCIMA 2023; and
 - the employer will not be required to make provisional payments of compensation.

ICA also respectfully requests the opportunity to review and further consult following preparation of and before finalisation of the Regulations on this issue.

ICA submission on period of provisional payments of income compensation

With reference to the inclusion of the provisional payments scheme in WCIMA 2023, the clear intent was to enable workers to have access to income compensation and medical and health expenses compensation for a limited period of time/ in a limited amount, while investigations into their claim are undertaken, whilst also imposing reasonable restrictions on the time period allowed to employers and insurers to undertake those investigations.

This is clear from WorkCover's *Review of the Workers Compensation and Injury Management Act 1981: Final Report (the Final Report)*, which provided at clause 245 that having considered the merits of other jurisdictions where provisional payments are made, WorkCover recommended:

- *'an extension of the timeframe before provisional payments commence (additional 14 days from when the notice is first given that a decision cannot be made). This means provisional payments would not commence for up to 28 days from when the insurer first receives the claim from the employer;*
- *the capping of medical expenses for pending claims at \$5,000'* (our emphasis).

The recommendations in the Final Report regarding provisional payments of income compensation were clearly supported by the legislature: refer, for example, the *Explanatory Memorandums to the Workers Compensation and Injury Management Bill 2023* presented in both the Legislative Assembly and the Legislative Council, which both state that:

'The provisional payment obligations implement a key recommendation of [the Final Report]. Clause 36 imposes a new requirement for insurers and self-insurers to make provisional payments to workers if a deferred decision notice is given but the insurer or self insurer has not given a liability decision notice before the day prescribed by regulations as the provisional payments day.

The intent to cap the provisional payments available for medical and health expenses has been implemented: refer section 40(2) of WCIMA 2023 which limits the amount payable in provisional payments to 5% of the medical and health expenses general limit amount.

ICA is however concerned that **ambiguity or uncertainty may arise** from the manner in which WCIMA 2023 and Paper 5 implement the intent that provisional payments of income compensation be payable for a limited period of time, commencing 14 days from the issue of a deferred decision notice.

In this respect ICA notes that:

- section 36 of WCIMA 2023 provides in short that:
 - the Regulations are to prescribe the 'provisional payments day'; and
 - where an insurer or self-insurer has given a deferred decision notice, but has not given a liability decision notice before the provisional payments day, the employer is required to make provisional payments;
- section 29 of WCIMA 2023 provides that the Regulations are to prescribe the 'deemed liability acceptance day';
- Paper 5 proposes that the Regulations will provide for the following:
 - provisional payments day: **28 days** from the insurer being given the claim;

- deemed liability acceptance day: **120 days** from the insurer being given the claim;
- in respect to provisional payments of income compensation, section 41 of WCIMA 2023 provides that:
 - 'Provisional payments in respect of income compensation are to be made for the period that **begins on the day on which the worker first has an incapacity for work as a result of the injury and ends on the earliest of the following days:***
 - (a) *the day on which a certificate of capacity is issued that specifies that the worker no longer has any incapacity for work;*
 - (b) *the day on which the insurer or self-insurer gives a liability decision notice for the claim to the worker;*
 - (c) *the day on which the insurer or self-insurer is taken under section 29(3) to accept that the employer is liable to compensation the worker for the injury'* (our emphasis).

Clearly the intent of WCIMA 2023 is that the *'day on which the worker first has an incapacity for work as a result of the injury'* for the purposes of section 41, means the day on which the worker first has a certified incapacity for work that is **not earlier than the provisional payments day** (that is, not earlier than 14 days after the deferred decision notice is issued).

This would be consistent with the intent of the Final Paper and WCIMA 2023 that provisional payments of income compensation are only to be made for a confined period, commencing no earlier than the provisional payments day, and ending on (at the latest) the deemed liability acceptance day.

This allows for a worker to receive provisional payments of income compensation for a period of no more than 92 to 120 days, which ICA submits is consistent with the intent of the consultation leading to introduction of WCIMA 2023.

However, this is not expressly stated in section 41 which simply refers to the period of provisional payments as beginning *'on the day on which the worker first has an incapacity for work as a result of the injury.'*

If this were taken to mean that a worker can receive provisional payments of income compensation for a period of time predating the provisional payments day, this could lead to significant unintended consequences, imposing an excessive and onerous burden on employers, insurers and self-insurers; for example, take the following scenario;



- noting a worker has 12 months to make a claim for compensation after the injury occurs: section 25(1) WCIMA 2023;
- a worker obtains a certificate of capacity from their general practitioner on 1 February 2024, after advising their doctor that they had suffered an injury at work a month earlier on 1 January 2024;
- the certificate of capacity specifies total incapacity for work from 1 February to 30 March 2024;
- the worker then resigns from their employment, without making any claim and without reporting any alleged injury to the employer (and the worker does not obtain new employment);
- the worker completes a general claim form on 10 September 2024 in relation to the alleged injury of 1 January 2024;
- the worker gives the claim form and certificate of capacity to their employer to comply with section 25 of WCIMA 2024, and the claim is in turn given to the insurer by the employer on 14 September 2024;
- the insurer issues a deferred decision notice on 28 September 2023, but is unable to make a decision on liability for the claim by the provisional payments day of 12 October 2024 (and subsequently gives a liability decision notice disputing liability on 31 October 2024 once its investigations are concluded);
- if the interpretation of section 41 referred to above were applied, **the worker would be entitled to provisional payments of income compensation from 1 February 2024 to 31 October 2024** (that is, from the the day on which the worker first has an incapacity for work as a result of the injury to the day on which the insurer gives a liability decision notice) being a 9 month period, which cannot be the intent of the Act.

To avoid ambiguity and uncertainty, and the imposition of an onerous and unintended financial burden upon employers (and Insurers), ICA respectfully requests:

- the issue of Regulations to confirm that provisional payments of income compensation are to be made for the period that begins on the day on which the worker first has an incapacity for work as a result of the injury and which is **no earlier than the provisional payments day**; and
- the opportunity to review and further consult following preparation of and before finalisation of the Regulations on this issue.



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Equivalent provision of 1981 Act &
current regulations (where relevant)

ICA submission

Paper 6: Injury Management and
Return to Work

No equivalent

Attendance at return to work case conference of worker's representative

With reference to the proposal that the persons who may attend a return to work case conference to support a worker are:

'the worker and any support person (union, legal representative, authorised agent, family member, carer)';

ICA submits that it is inappropriate to permit a union representative, legal representative or authorised agent to attend a return to work case conference, and that such attendance can serve no purpose, where Paper 6 specifically states that a return to work case conference cannot be used for any purpose other than its intended purpose, and cannot be used for *'discussing matters relating to liability for the claim including how the injury happened, where it is a new injury or recurrence of a pre-existing condition, or challenging the worker or medical practitioner on factual grounds.'*

ICA submits that the attendance of a legal representative, union representative or authorised agent will not assist in (and is likely to be detrimental to) the stated aims.

ICA submits that the proposed Regulations should provide that the persons who may attend a return to work case conference to support a worker are:

'the worker and any support person (including a family member, carer or friend but not including a union representative, legal representative or authorised agent).'

ICA requests the opportunity for further consultation before finalisation of the Regulations.

Notice period for attendance at return to work case conference and selection of treating practitioner willing to attend

With reference to the intention stated in Paper 17 that the Regulations will address various matters with respect to return to work case conferences, ICA respectfully notes that:

- Section 165 of WCIMA 2023 provides that an injured worker who has an incapacity for work may be required to attend a return to work case conference, which may be arranged by (amongst other specified persons) the worker's treating medical practitioner.



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Equivalent provision of 1981 Act & current regulations (where relevant)

ICA submission

- section 165(2) of WCIMA 2023 provides that in arranging a return to work case conference, the employer, insurer, medical practitioner or workplace rehabilitation provider must, by notice in writing given to the worker, specify various matters;
- section 163(5) of WCIMA 2023 provides that a worker must comply with any requirement to attend a return to work case conference under section 165 and must participate and cooperate in the conference;
- however, WCIMA 2023 does not specify how much advance notice must be given to a worker of the requirement to attend a return to work case conference;
- it would in ICA's view benefit all stakeholders to the scheme for this notice period to be clearly articulated in the Regulations;

- Section 165(3) of WCIMA 2023 states that Regulations may provide for various matters concerning return to work case conferences including, broadly, at s165(3)(e), '*any other matter relevant to a return to work case conference.*' there is however no expressly stated intention in Paper 6 to issue Regulations specifying a notice period.
- As WCIMA 2023 contains no provisions compelling a treating medical practitioner to attend a return to work case conference, and the intent of WCIMA 2023 on this point will be frustrated if treating medical practitioners do not comply.

ICA therefore respectfully requests that:

- Regulations should be issued requiring a worker to select, as their treating medical practitioner, a practitioner who is reasonably prepared to attend a return to work case conference.
- Regulations be issued specifying the period of notice which must be given to a worker of the requirement to attend a return to work case conference; and
- ICA be given the opportunity for further consultation once the Regulations are drafted and before finalisation.

Paper 7: WA Guidelines for the
Evaluation of Permanent
Impairment

Various

ICA refers to clause 47 of the WorkCover WA Guidelines for the Evaluation of Permanent Impairment: Consultation Draft, and in particular, clause 47, which provides that:

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**Equivalent provision of 1981 Act &
current regulations (where relevant)**

ICA submission

'The person requesting the assessment from the APIA will be required to bear the cost of any further investigation. If the assessment is requested by the worker the cost of the assessment, the costs of any notification given by the APIA that the worker's condition has not stabilised to the extent required for the assessment to be made, and any further investigation costs are paid out of the worker's entitlement under section 91 of the Act.'

ICA respectfully submits that the Guidelines should be amended to define the term 'investigations' (specifically, to ensure investigations are confined to tests in the nature of radiological investigations, blood tests and the like, and do not extend to more invasive and costly procedures such as exploratory surgery or the like).

ICA would welcome consultation with WorkCover to prepare a suitable definition.

Paper 8: Approval of Permanent
Impairment Assessors

Section 146F WCIMA 1981

No comment.

Paper 9: Medical and Health
Expenses Compensation

Schedule 1, clause 17(1) of WCIMA 1981

With reference to the statement that:

'Fees payable for compensable medical and health services are not covered by this paper and will be set by Ministerial fee order. The Ministerial fee order will be made closer to implementation and providers will be consulted in due course';

ICA submits that as its member Insurers are also stakeholders with a concern and interest in the fees to be set for providers, ICA should also be consulted in due course on this issue.

Further, with reference to Paper 9 and the relevant provisions of WCIMA 2023, ICA respectfully queries how WorkCover proposes to monitor the implementation and application of the new (increased) caps upon medical and health expenses, and miscellaneous expenses, without any changes being made to the regulatory reporting requirements for licensed Insurers? ICA would welcome consultation on this issue.

From a practical and regulatory standpoint, ICA and its members query whether payments for first aid and emergency transport (within the meaning of section 85 of WCIMA 2023), that were paid before the commencement of WCIMA 2023 (ie before 1 July 2024), in relation to claims where the prescribed amount for medical expenses is not fully exhausted before commencement day, must be reversed and recorded as paid as Miscellaneous Expenses? ICA and its members would welcome consultation and assistance on this point.

Implementation consultation papers

Equivalent provision of 1981 Act & current regulations (where relevant)

ICA submission

Paper 10: Dust Disease

Various

ICA notes with respect to dust disease compensation claims that:

- section 26(1) of WCIMA 2023 provides that within 7 days after a worker claims compensation from an insured employer, the employer must give the worker's claim to the insurer;
- section 122(1) of WCIMA 2023 provides that within 7 days after a worker makes a dust disease compensation claim on an employer, the employer must give a copy of the claim to the CEO;
- section 123 of WCIMA 2023 provides that the CEO must then refer a dust disease compensation claim to a Panel;
- section 121 of WCIMA 2023 provides that the timeframe for an insurer to give a liability decision notice for a dust disease compensation claim to a panel is 14 days after notification of the determination of the Panel;
- however, there is no requirement within WCIMA 2023 for the CEO to notify an employer's insurer when a dust disease compensation claim is referred to a Panel;
- ICA is therefore concerned that if an insured employer fails to notify its insurer of a dust disease compensation claim as required by section 26(1), but does notify the CEO of the claim, an insurer may not become aware of the claim until being provided with the Panel's determination (leaving only 14 days to give a liability decision notice, which is likely insufficient time to make a decision).

ICA respectfully requests:

- the issue of Regulations providing that the CEO will notify an employer's insurer (if known to the CEO) when referring a dust disease compensation claim to a Panel; or
- if Regulations are not issued, that the CEO adopt a practice of providing such a notification as a courtesy to licensed insurers, and to assist with the smooth running of the Scheme to the benefit of all stakeholders.

ICA and its members otherwise requests consultation with WorkCover, as to the following:

- confirmation whether dust disease compensation claims made before 1 July 2024 and/or alleging injury before 1 July 2024 will continue to be managed by the Insurance Commission of Western Australia (ICWA); and
- clarity as to how claims alleging injury before (or involving gradual injury involving a period before) 1 July 2024 will be managed.

Paper 11: Settlements

With reference to the indication in Paper 11 that the Director will scrutinise an application to register a settlement agreement 'as soon as practicable' after receiving it, ICA respectfully submits that it would be appropriate for:

- Regulations to be issued stipulating the timeframes within which the Director will scrutinise an agreement, and will indicate whether the agreement will be registered (or whether further enquiries may be required); or
- at the least, provision to stakeholders of the expected/ estimated timeframes for this process;

noting certainty would assist all stakeholders of the scheme, particularly in circumstances where weekly payments of compensation are agreed to continue until registration of a settlement agreement (which is, presently, an unknown timeframe).

With reference to Paper 11, ICA and its members otherwise request the opportunity for further consultation once the Regulations proposed in Paper 11 are drafted and before finalisation.

Paper 12:
Workplace Rehabilitation
Services

Various

Regarding the statement that *'there is no intention at this time to move towards outcome-based models or alternative service delivery models'*, ICA and its members respectfully submits this should be reviewed within 3 years' post-implementation of WCIMA 2023, as part of ongoing review to ensure optimal performance of the Scheme.

Paper 13: Approval Framework
for Workplace Rehabilitation
Providers

Various

Regarding the stated intention to convert all existing approved providers to approved WRPs under WCIMA 2023 for an indefinite period, ICA respectfully submits the approval of all providers should be reviewed within (at a minimum) 3 years' post-implementation of WCIMA 2023, as part of ongoing review to ensure optimal performance of the Scheme.

Paper 14: Licencing Framework
for Insurers

Various

Regarding the indication (page 4) that WorkCover will update its standards framework for evaluation of licensed insurer performance, and that:

'the updated framework will include expectations relevant to the new provisions for dealing with deferred claims and making provisional payments';



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Implementation consultation papers	Equivalent provision of 1981 Act & current regulations (where relevant)	ICA submission
		ICA requests the opportunity for further consultation once the updated framework is drafted and before finalisation.
Paper 15: Licencing Framework for Self-Insurers	Various	No comment.
Paper 16: Workers Compensation Insurance Policies	WCIMA 1981 section 160 & associated provisions	<p>(1) With reference to the <i>Prescribed Form of Workers Compensation Policy (Policy)</i>:</p> <ul style="list-style-type: none">▪ ICA presumes that the reference in clause (b) of the Preamble to the Policy, to exclusion of damages cover for 'injury to or the death of a deemed worker (as defined in the Act) of the employer,' is intended to refer only to persons deemed to be workers of an employer by reason of section 215 of WCIMA 2023;▪ ICA submits however that this is not clear, and that the Preamble is in fact ambiguous, given Paper 1 proposes (by means of the Regulations) to create other classes of what are referred to in Paper 1 as 'deemed workers' (such as certain crown workers, religious clergy, NDIS support workers and the like). <p>ICA submits that the Preamble should be amended to insert the words 'section 215 of', that is, so that the relevant portion of clause (b) refers to 'injury to or the death of a deemed worker (as defined in <u>section 215 of the Act</u>) of the employer.'</p> <p>(2) With reference to the expressed intention that the Regulations will specify certain information to be provided by employers in order for insurers to issue a workers compensation policy or provide a premium quote, as it unclear whether provision of the specified information referred to is to be mandatory or optional. Therefore the ICA respectively requests:</p> <ul style="list-style-type: none">• that the Regulations should clarify whether provision of the specified information is to be optional or mandatory• that the specified information should be expanded to specifically include completion of a reinsurance and underwriting risk assessment questionnaire; and• given the above, requests the opportunity for further consultation once the Regulations are drafted and before finalisation. <p>(3) With reference to the proposed increase in the acts of terrorism claims limit and funding of the same, with reference to the indication in Paper 16 that actuarial advice will be taken and arrangements for the levy for the financial year of commencement will be considered by WorkCover's Board closer to the commencement date of WCIMA 2023, given the commencement date is quite imminent, and given the impact on and significance of this</p>

point to ICA's Insurer members, ICA respectfully urges WorkCover WA to ensure that the actuarial advice under consideration is disclosed to ICA and that there is early consultation regarding the arrangements for the levy **as soon as is possible**.

ICA queries whether there will be an initial levy, how the funds will be gathered and managed, and how it is proposed that licensed insurers be given sufficient information to forecast contributions so as to build contributions into 30 June 2024 rates (and ICA queries if any levy will be built into the Gazette rates to be published in March/April 2024?).

(4) ICA otherwise submits the following matters require addressing, to allow for smooth and seamless operation of the scheme on the part of all stakeholders and proper costing of the scheme:

- With reference to the indication that the Regulations will require employers to provide 'the total number and details of the cost of workers compensation claims made by the employer's workers in the previous 5 years':

amendment of the Regulations to include a requirement that employers also provide 5 years' historical wage records, to enable licensed insurers to properly assess and consider exposure changes when assessing an employer's historical claims experience;
- Acknowledgement that while it is now proposed that the policy schedule specify the payment schedule, licensed insurers already provide this information to insureds on a separate template (and consideration of whether this may remain appropriate rather than requiring a further new filed in the policy schedule);
- With reference to the provision of the proposed Policy that:
'this policy covers only the employer entity described in the Schedule unless details of another entity have been supplied to us and we have confirmed its acceptance of the extension of the policy by endorsing the schedule accordingly';

noting this is extensive information to be recorded on the schedule, ICA queries if the following words could be added:
'or by otherwise recording this information';

and ICA notes any guidance from WorkCover as to the expectations around recording of information of this nature by licensed insurers would be welcomed;
- With reference to the proposal that the policy schedule record 'details of any NDIS or domestic arrangements (if covered)', and with reference to ICA's extensive submissions above regarding Paper 1.4 and NDIS support workers, ICA and its



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members consider more information is required to clarify this requirement and requests the opportunity for consultation on this issue;

- With reference to section 238 of WCIMA 2023 and the definition contained therein of 'adjustable premium policies', ICA notes many licensed insurers have traditionally issued 'Burner' policies, rather than conventionally rated policies, and ICA requests urgent clarification of:
 - WorkCover's understanding of the definition and scope of an adjustable premium policy (and whether this includes burner policies); and
 - Clarification of how an adjustable premium policy differs from a standard policy request within the Policy;and ICA would welcome further consultation with WorkCover on this issue;
- Noting the stated intent that no regulations will be issued pursuant to section 221 of WCIMA 2023 to prescribe the additional remuneration records a principal contractor is required to keep, ICA requests reconsideration, and submits that Regulations should be prepared and issued specifying the records a principal contractor should keep, to ensure consistency with WorkCover's remuneration guidelines.

ICA notes that the proposed permitted circumstances for insurers refusing indemnity are similar to section 174A of the 1981 Act but remove the ability of insurers to refuse indemnity based on a breach of a policy condition by the employer. ICA would like to understand what the proposed regulations will be in respect to preventing indemnity refusal simply for an employer's breach of a condition of the policy.

Paper 17: Stopping or Reducing
Compensation

Section 72 WCIMA 1981

With reference to section 66 WCIMA 2023, and the stated intention in Paper 17 to require mandatory completion of an approved form (*Attachment 6: Confirmation of worker's custody or imprisonment*) (**the Form**), ICA notes the form is to be completed in part by the relevant insurer or self-insurer, and in part by the relevant government authority, which it is noted may include:

- the chief executive officer (prisons) as defined in the Prisons Act 1981;
- the registrar (MIRT- Mental Impairment Review Tribunal) established by the Criminal Law (Mental Impairment) Act 2023;

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current regulations (where relevant)

ICA submission

- a relevant government authority principally assisting the Minister responsible for administering the relevant law in the administration of that law.

ICA is concerned that completion of the Form by the relevant government authority is proposed to be **mandatory** (not optional).

ICA submits that various government authorities (such as, for instance, the relevant officer of an interstate or federal prison or custodial authority) may be unfamiliar with the Form, and may not be prepared or equipped to promptly complete the Form.

ICA respectfully suggests amendment to allow for provision of **either**:

- the completed Form; or
- in the alternative, written confirmation from the relevant authority providing, in substance, the information specified in the Form.

With reference to attachment 2 to Paper 17 (the suggested approved form titled '*Reducing or discontinuing income compensation: return to work*'), ICA respectfully suggests amendment by inserting, below the field for 'from the following date', an **additional field titled 'to the following date/ permanently'**, with the option to either insert a specific date or specify that the agreed reduction or discontinuance is permanent. ICA considers this would benefit all stakeholders by removing any room for uncertainty.

Paper 18: Catastrophic
Workplace Injuries

No equivalent

(1) ICA repeats its concern (set out in ICA's earlier submissions of 30 November 2021) with reference to what are now sections 80, 92 and 96 of the WCIMA 2023, that the provisions:

- are ambiguous in that they fail to clarify whether a worker who participates in the catastrophic injuries support scheme (**CISS**), but then later ceases participating in CISS, can from the date they cease participating in CISS, once again claim medical and health expenses compensation, miscellaneous expenses compensation and workplace rehabilitation expenses from their employer and its workers compensation insurer:

submission: ICA requests this ambiguity be addressed by suitable regulations;

- are incomplete in that they do not provide any mechanism for an employer and its workers compensation insurer to recover compensation of this nature paid to an injured worker **before** they became a participant in CISS, from the *Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund (CIF)*:

submission: again ICA requests this be addressed by the introduction of suitable regulations providing for a clear recovery mechanism.



(2) With reference to the statement in Paper 18, section 4, that:

'It is expected ICWA will notify the worker's employer or insurer of the worker's employer when a decision is made to accept a worker as an interim or lifetime participant. This notification can then be used by the insurer or self-insurer to cease the worker's entitlement to medical, health or workplace rehabilitation expenses which will be provided to the worker by ICWA as a CISS participant';

ICA respectfully submits that:

- regulations should be enacted expressly requiring ICWA to provide this notification in writing within a specified time period (say, 7 to 14 days) with publication of an associated approved form; and
- WorkCover's expectations (as set out at Paper 18, page 9) should be amended to include a further expectation, namely, that WorkCover also expects:

'ICWA to comply with its obligation to notify and provide information to licensed workers compensation insurers regarding decisions to accept or exclude a worker as an interim or lifetime participant of CISS.'

(3) Otherwise, regarding funding of CISS claims, ICA and its members continue to propose and request (as set out in ICA's earlier submissions dated 30 November 2021) that:

- the process for calculation of the contributions to be paid by licensed insurers to the CIF be transparent and open;
- in the interests of transparency and parity, all actuarial data be disclosed to licensed insurers by both ICWA and WorkCover WA;
- WorkCover WA and ICWA provide confirmation that all contributions by licensed insurers and self-insurers to the CIF will be factored into the actuarial calculations for the financial year(s) in question;
- a mechanism be published and agreed for calculation and payment of insurer contributions on an annual levy percentage basis (refer the former Supplementation Fund Levy) with inclusion of a cap on the percentage of total premium income that a licensed insurer can be required to contribute to the DI Fund and CIF (combined) in any financial year;
- ICWA provides confirmation, and if necessary, Regulations be drafted to confirm, that the cost of catastrophic claims arising from motor vehicle accidents (currently falling under the *Motor Vehicle (Catastrophic Injuries) Act 2016 WA*) will be



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ICA submission

excluded from any calculation of CIF contributions, and that the costs of CIF claims will be kept separate and distinct from such costs; and

- ICA and its members be given the opportunity for consultation on how it is proposed that ICA and licensed insurers share information and collaborate in claims with a CISS component.

ICA respectfully requests that licensed insurers be notified of the required contributions as soon as this is available.

ICA requests and invites further consideration with WorkCover WA, ICWA and other relevant stakeholders regarding these provisions before WCIMA 2023 and the proposed associated Regulations are further progressed/commence.

Paper 19: Common Law

Part IV Division 2 WCIMA 1981

Transitional provisions

Section 589 of WCIMA 2023 provides that in some instances, the new common law provisions do not apply to proceedings for damages that were '*validly commenced*' before the commencement day for WCIMA 2023.

However, WCIMA does not expressly define the term '*validly commenced*'.

For the avoidance of doubt and to ensure smooth operation of the scheme during the transitional period, ICA respectfully seeks guidance from WorkCover on its interpretation of '*validly commenced*', and specifically, whether WorkCover will consider a damages claim to have been '*validly commenced*' for the purposes of WCIMA 1981 if the worker had filed a Writ to pursue a common law damages claim, but had not registered a common law election.

Otherwise

Noting that as there is no equivalent in WCIMA 2023 to section 92(f)(ii) of WCIMA 1981, and that the Director will no longer scrutinise memoranda of the terms of settlement of an action for damages for fraud or misrepresentation, ICA and its members respectfully request that consideration be given to issuing Regulations to enable licensed insurers (and self-insurers) to obtain information from WorkCover WA regarding any previous (statutory and common law) settlements registered with WorkCover WA in respect of the same worker and the same injury, as a screening mechanism to enable insurers to identify claims involving fraud or misrepresentation. ICA submits this would benefit the scheme and all stakeholders in reducing scheme costs.



*References above are to the following:

- WorkCover WA (**WorkCover**)
- *Workers Compensation and Injury Management Act 1981 WA* (**WCIMA 1981**)
- *Workers Compensation and Injury Management Act 2023 WA* (**WCIMA 2023**)
- *Workers Compensation and Injury Management Regulations 1982 WA* (**1982 Regulations**)
- Proposed new Regulations to be made under WCIMA 2023, not yet published (**Regulations**)
- Insurance Council of Australia (**ICA**)
- Insurer members of ICA (**Insurers**)