Workers Compensation and Injury Management Act 2023

2023 Act Implementation Review

Consultation Paper

January 2025

Draft proposals only

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

D2024/349417

Overview

As part of the implementation of the *Workers Compensation and Injury Management Act 2023* (the Act) on 1 July 2024 many forms and processes changed in key areas for WorkCover WA and stakeholders.

WorkCover WA communicated these changes via information materials and stakeholder workshops before 1 July 2024.

At the 6-month mark post implementation it is timely and necessary to consider how key forms and processes are operating and how best to respond to any concerns or issues.

The scope for this review includes key WorkCover WA approved forms and minor amendments to the *Workers Compensation and Injury Management Regulations 2024* (the Regulations).

The scope of this review does not extend to potential amendments to the Act, WorkCover WA administrative instruments (e.g. impairment guides, remuneration guidelines), Ministerial fee orders or CAS Rules. Any review or required amendments to those instruments will be considered and progressed separately.

With 6 months of experience with the new Act and engaging with stakeholders WorkCover WA has identified a number of areas that could require either further explanatory information or changes to forms and processes.

As a basis for consultation WorkCover WA has reviewed a number of key processes and, in some areas, is proposing refinements.

The key issues identified by WorkCover WA are:

1. Settlement agreements – approved form
2. Permanent impairment agreement– PI Notice process
3. Permanent impairment assessment by APIA
4. Giving notice of intention to reduce or cease income compensation - return to work
5. Giving notice of intention to reduce or discontinue income compensation – worker in custody
6. Return to work program – approved form and guidance
7. Noise induced hearing loss – claim form
8. Noise induced hearing loss – audiological test report
9. Broker access to personal information
10. Additional modified penalties

Consultation & next steps

WorkCover WA is seeking feedback on the proposals contained in this paper and on any other aspect of the processes and WorkCover WA approved forms implemented with the Act on 1 July 2024.

The proposals are intended to facilitate public comment and do not represent the final position of WorkCover WA, the Minister or Government.

WorkCover WA invites written submissions by **28 February 2025** which may be provided by email to:

Manager Policy and Legislative Services

Email: consultation@workcover.wa.gov.au

All submissions will be published on the WorkCover WA website, unless you specify that your submission is confidential.

After the public consultation period ends, WorkCover WA will review the submissions and finalise any changes for approval by the WorkCover WA CEO (approved forms and notices) and Minister for Industrial Relations (Regulations).

There may also be an opportunity for targeted stakeholder consultation on the wording or marked up changes to drafts of the Regulations and key WorkCover WA approved forms before they are formally made, if time permits. The indicative timeframe will see any changes implemented on 1 July 2025 with publication of the changes made no later than 30 April to allow for system changes (if any).

For supporting information on the WorkCover WA approved forms and notices the subject of this review, and for a link to the Act and Regulations refer to the WorkCover WA website:

Legislative Framework: Approved Instruments, Forms and Notices - WorkCover WA

1. Settlement agreement approved form

Issue

The Act provides a worker and employer may enter into a written agreement to commute to a lump sum the liability of the employer to pay compensation to the worker and permanently discharge the liability of the employer.

A settlement agreement must be in the approved form and registered with the Director, who performs registry and scrutiny functions under the Act.

The approved settlement form is published on the WorkCover WA website as *SF1 Settlement Agreement*. An application to register a settlement agreement must completed using the EDS (WorkCover WA Online).

WorkCover WA has identified a small number of issues with respect to the settlement agreement form that may require further explanation or potential refinements:

- the status of ‘future’ compensation
- the practice of ceasing payments at registration of the settlement agreement or after four weeks, whichever is sooner.

Status of ‘future’ compensation fields

Currently, the settlement agreement approved form requires parties to the agreement to enter the compensation amounts received prior to the date of the agreement, along with the amount for permanent impairment compensation, dust disease impairment compensation, and ‘other amounts’.

Other amounts are broken down into:

- future income compensation
- future medical and health expenses compensation
- future workplace rehabilitation expenses compensation
- future miscellaneous expenses compensation.

A concern has been raised about the settlement of claims where liability has not been accepted by the insurer, or where there is a dispute about past compensation paid (e.g. a dispute about rate of pay, or cessation of income compensation), for which the current fields referencing ‘future’ compensation are not strictly correct. In these circumstances there is not a suitable field to include compensation which may be for (unpaid) past amounts and future compensation.

As such, it has been proposed the ‘other amounts’ future compensation fields be amended to reflect that compensation paid at settlement does not always reflect future compensation amounts.

WorkCover WA intends to amend the settlement agreement approved form to remove reference to ‘future’ amounts. This will enable parties to a settlement to include any amounts of compensation in the fields relating to the settlement not already received by the worker.

Cessation of payments before settlement registered

It has become a common practice for employers/ insurers when negotiating settlement agreements to include a term that income compensation payments are to cease at the earliest of registration of the settlement agreement or after four weeks of the settlement date, and that medical, health and miscellaneous expenses to cease immediately. Whilst there may be some variation in the timeframe for cessation of income compensation (e.g. after three weeks or six weeks), often employers/ insurers are firm on this term being included before settlement will be agreed.

Historically, this particular term being included in settlement negotiations was rarely an issue. Settlement agreements were generally lodged and registered within the four-week timeframe and no party was materially affected. However, since the Act came into operation on 1 July 2024, along with an increase in the number of settlements there have been a significant number of errors identified in settlement agreements lodged by parties for registration.

This has required the CAS Registry to return settlement agreements to parties to rectify errors which in turn has led to delays in the processing of settlement agreements. As a result, some settlement agreements have taken in excess of four weeks to be registered, leaving workers without income compensation they would otherwise be entitled to, often for extended periods of time.

It is a fundamental principle of workers compensation that once compensation payments commence, they cannot be interfered with except as provided for at law. The Act is clear, in section 156(1), that an entitlement of a worker to compensation for an injury in respect of which a settlement agreement is registered, ceases at the date of registration of the agreement. As such, any purported agreement by the parties to agree to cessation of compensation prior to registration is contrary to the Act. Further, the Act provides that its provisions may not be excluded, restricted, or modified by contract, agreement, or other arrangement unless provided for by the Act.

The provisions of the Act must be adhered to. It is not acceptable for workers to be left without income compensation, potentially for extended periods of time, due to errors made when the agreement is lodged. As such, it is proposed wording be included in the settlement agreement approved form that stipulates income compensation will not cease until registration of the settlement agreement by the Director.

This should also ensure the settlement agreement is correctly lodged in the first instance. Where insurers have a financial incentive to ensure the settlement agreement is lodged quickly and accurately there is a greater incentive to avoid errors in the settlement agreement or when applying to register the settlement agreement.

Proposal

Proposal 1

Amend the WorkCover WA approved form *SF1 settlement agreement* by:

- deleting the reference to ‘future’ amounts
- including a statement in the settlement agreement that any compensation entitlement will not cease until the settlement agreement is registered by the Director.

2. Permanent impairment agreement – PI notice process

Issue

Permanent impairment compensation is only payable as part of a settlement of a worker's claim.

The Act provides that a worker and employer must reach agreement on the percentage of permanent impairment based on an APIA assessment for permanent impairment compensation purposes. Agreement is reached and recorded on an approved form known as a permanent impairment notice (PI Notice) which is signed by the worker and employer.

There are two PI notices: SF3 is completed in all instances with SF4 only used if there is no agreement on the level of permanent impairment specified in the SF3 notice.

An application to register a settlement agreement that includes permanent impairment compensation must be accompanied by:

- the permanent impairment notice indicating the worker and employer's agreement on the degree of permanent impairment
- APIA assessment report(s) on which the agreed degree of permanent impairment is based.

The process and timeframes that apply to agreement on the level of impairment are that within 28 days after being given the SF3 permanent impairment notice the employer must:

- notify the worker, in the manner required by that notice, whether the employer does or does not agree with the assessed degree of permanent impairment
- if the employer does not agree with the assessed degree of permanent impairment, request a further assessment with the cost of that further assessment to be paid by the employer.

If the employer requests a further assessment of the worker's degree of permanent impairment, the employer must, within 14 days after obtaining the further assessment, give a copy of the further assessment to the worker, and either:

- agree with the degree of permanent impairment indicated in the original assessment; or
- negotiate with the worker to agree on a degree of permanent impairment that is within the range of the original assessment and the further assessment.

If the employer does not comply with these requirements, the employer is taken to agree with the assessed degree of permanent impairment.

While the Act provides for a worker to commence the permanent assessment process it is common practice for insurers to initiate and request an assessment of the worker's degree of permanent impairment as part of claim management and potential settlement negotiations.

Where this occurs there has been instances of the statutory PI notice process not being followed correctly including PI notices being initiated by the employer/ insurer and/ or being signed after the date of the settlement agreement. In some cases parties are not correctly indicating whether or not they agree or disagree with the level of impairment, as required by the approved form.

The Act requires the worker to initiate the PI Notice process even if the employer/ insurer has requested the assessment. The worker must sign the PI Notice before the employer. The parties must sign the settlement agreement on a date after the date the employer signed the PI Notice. If this does not occur the settlement will be refused registration and referred to the Registrar.

Minor refinements to the SF3 form are proposed:

- under the Agreement section replace *requested* with *required* (employers/ insurers must indicate agreement or disagreement with the level of impairment)
- where employers indicate agreement/ disagreement with the level of impairment replace the instruction to 'delete as applicable' with a check box for clarity and ease of use.

Proposal

Proposal 2

Amend the WorkCover WA approved form *SF3 Permanent impairment notice* by:

- under the 'Agreement' section replacing 'requested' with 'required' (employers/ insurers must indicate agreement or disagreement with the level of impairment)
- where employers indicate agreement/ disagreement with the level of impairment replacing the instruction to 'delete as applicable' with a check box for clarity and ease of use.

As the process for reaching agreement on the level of impairment and the procedures for settlement are set out in the Act it appears nothing further can be done as part of this review to streamline the process.

There may be merit in examining whether the Act should be amended such that agreement on the level of impairment can be accommodated as a single step as part of a settlement application, rather than the two-step process currently required by the Act.

Another potential issue for consideration is that the Act does not appear to contemplate agreement or have a pathway to dispute regarding whether a worker's permanent impairment *resulted* from the injury; it provides only for agreement or determination of the degree of permanent impairment. There may be cases where liability is accepted for the injury and incapacity for work, but the employer/ insurer does not agree the impairment resulted from the injury even if there is no objection to the level of assessed impairment.

3. Permanent impairment assessment by APIA

Issue

The WorkCover WA Guidelines for the Evaluation of Permanent Impairment (Permanent Impairment Guidelines) are a statutory instrument required to be used by APIA in assessing a worker's degree of permanent impairment.

An APIA who makes an assessment of a worker's degree of permanent impairment must give the worker, the employer and the employer's insurer a report in the approved form, APIA1.

The report must include:

- a certificate as to the worker's degree of permanent impairment as assessed
- a statement of the reasons that justify the assessment
- other information required by the approved form.

If the permanent impairment assessment involves a psychiatric injury, the APIA must complete approved form APIA7.

The approved form for the report and certificate of the impairment assessment is APIA1 published on the WorkCover WA website.

The following issues have been identified:

- uncertainty as to the effective date of an assessment or when an assessment is taken to be conducted
- APIA issuing reports when a worker's condition has not stabilised, and the special assessment criteria have not been met
- whether a medical practice stamp or administrative signature can be used in place of a signature of the APIA on various APIA approved forms.

Effective date of assessment

An issue that arose as a transitional issue immediately after 1 July 2024 related to whether a worker's degree of permanent impairment was 'assessed' under the 1981 Act or new Act in circumstances where the examination occurred before 1 July 2024 but the APIA's report was issued after 1 July 2024.

References were made to the two dates in the APIA form; the date of the examination and the date the APIA signs the report/ certificate.

While this was largely a transitional issue that has been addressed with transitional directions and registry advice on individual cases, it is important to consider whether any changes to the form or guidance are needed.

For example, the same issue may arise again if WorkCover WA issues a new edition of the permanent impairment guidelines as the date of effect for the guidelines is made with reference to assessments of permanent impairment 'conducted' on or after a specified date. Clarity is required as to when is a worker taken to have been 'assessed' and what is the relevant date for determining when an APIA has 'conducted' an assessment. Is it the date of the report, the date of examination or some other date?

The Act provides that when an APIA is conducting an assessment of a worker's degree of permanent impairment the APIA may:

- require the worker to attend at a place specified by the assessor
- require the worker to produce any relevant document or provide any relevant information to the assessor
- require the worker to consent to another person who has any relevant document or information producing the document or providing the information to the assessor
- require the worker to undergo specified medical tests and assessments and provide the assessor with results and reports from those tests and assessments
- require the worker to answer any question about the injury
- require the worker to submit to examination by, or as requested by, the assessor.

It is clear from the underlined points above that conducting an assessment of permanent impairment can involve various activities, including but not limited to an examination. Not all will apply in every case.

It is also clear that the examination is not the same thing as the assessment because the assessment involves more than just an examination, even though each component of the assessment could be done on the same day.

WorkCover WA's view is that a worker has been assessed, and an assessment conducted when an APIA has dated and certified the worker's degree of permanent impairment in the report that forms APIA1. The information recorded in APIA1 is the result of the assessment and is the culmination of all of the things that were considered (examinations, reports, tests, and interviews) to arrive at the permanent impairment percentage.

This means an APIA will need to minimise the time taken between an examination and producing the APIA report when any Act amendment or permanent impairment guidelines changes are made. The changes will apply even if a worker has already been examined before the change takes effect. Depending on what the changes are this may require a worker to be re-examined.

Worker's condition not stabilised

The Permanent Impairment Guidelines provide an assessment of permanent impairment can only be done when a worker's condition has stabilised (reached maximum medical improvement – MMI), unless the injury is a dust disease.

If the assessment returns a finding that the worker's condition has not stabilised (i.e. not reached MMI), the APIA must notify the worker, the employer and the insurer of that finding by issuing approved form APIA6.

There is a prompt on the APIA1 report which requires APIA to confirm if the worker has reached MMI.

If MMI is not reached an assessment cannot be done unless a special assessment is authorised by the Permanent Impairment Guidelines and the APIA indicates on the APIA1 form it is a special assessment.

The Permanent Impairment Guidelines provide for circumstances when a special assessment can be done, notwithstanding MMI not being satisfied.

A 'special assessment' can only be done if the following conditions are met:

- If, after the expiry of the period of 18 months after the day on which the claim for compensation is made by a worker, an APIA notifies the worker, employer and insurer that the worker's condition has not stabilised to the extent required for an assessment of the worker's degree of permanent impairment to be made
- a request is made for a special assessment in the approved form
- the purpose of the special assessment of the degree of impairment is in order to make an election to pursue common law damages, or for an increase in medical and health expenses beyond the standard limit.

There have been some instances of APIA assessing a worker's degree of permanent impairment where MMI has not been attained and the special assessment criteria are not met. It is understood APIA may be pressured into making an assessment by a worker's representative in order for the worker to access permanent impairment compensation.

A 'special assessment' cannot be done for the purposes of permanent impairment compensation. MMI must be attained – there is no exception. It is not possible for a worker's settlement to be registered comprising permanent impairment compensation if MMI is not reached.

In order to reinforce this obligation it is proposed:

- the APIA1 form be amended to add an additional checkbox for the APIA to confirm that when a special assessment is done the APIA is satisfied the special assessment criteria are met
- Regulations are amended to require when a special assessment is sought the requesting party to provide evidence to the APIA, that at least 18 months has elapsed since the claim was made.

Signing of APIA forms

WorkCover WA has been approached by medico-legal companies with respect to the formal requirements for signing various approved permanent impairment assessor (APIA) forms.

The forms are part of the procedural process for a worker having their degree of permanent impairment assessed and are:

- APIA1 Permanent impairment assessment – report and certificate
- APIA2 Permanent impairment assessment – assessment request
- APIA3 Permanent impairment assessment – requirement to attend
- APIA4 Permanent impairment assessment – provision of information
- APIA5 Permanent impairment assessment – consent to provision of information
- APIA6 Permanent impairment assessment – condition not stabilised notice
- APIA7 Permanent impairment assessment – psychiatric impairment rating scale form

The question often asked by medico-legal companies is if the APIA is required to personally sign each approved form listed above, or if a practice manager can sign on their behalf, or in the alternative use a practice stamp to sign the approved form.

The practice of signing on behalf of the APIA, or using a practice stamp, is of concern in certain circumstances.

For example, only an APIA can conduct a permanent impairment assessment. The Act requires APIA to provide a report of the results of an assessment and certify the worker's degree of permanent impairment in the approved form (APIA1).

The reason why a signature is required is because the APIA's report/ certificate is a legal document used by workers to access entitlements and recorded as part of a settlement agreement and any common law election. The signature represents the APIA as affirming the report contents in accordance with the permanent impairment guidelines. It adds to the veracity of the findings certified.

A medical practice stamp or other person's signature in place of the APIA's signature is not appropriate in APIA1 as it opens questions about the person who conducted the assessment and its validity. The APIA's employer or business is irrelevant to the report that is issued. APIAs are individually approved by WorkCover WA and subject to criteria and conditions of approval, not the APIA's business or employer. For these reasons only APIA can sign the APIA1 report. This is not a burden for APIAs: Regulations to the Act specifically provide that a document 'given' or lodged by email may be signed with an electronic signature.

WorkCover WA has identified other APIA approved forms where the APIA signature, or indeed any signature, is of less value, and should be removed.

In response to concerns and queries by stakeholders, WorkCover WA intends to clarify which APIA approved forms must be signed by the APIA and intends to remove the signature requirement on the other, more procedural approved forms.

WorkCover WA has identified 'key' APIA approved forms for which the APIA is required to personally sign:

- APIA1 Permanent impairment assessment – report and certificate
- APIA6 Permanent impairment assessment – condition not stabilised notice
- APIA7 Permanent impairment assessment – psychiatric impairment rating scale form.

The above approved forms relate to the assessment of permanent impairment itself, and the APIA is required to personally sign each. The APIA's signature serves to certify the findings in the approved form.

It is proposed the following APIA approved forms will have the signature block removed, although the date of the document will still need to be included:

- APIA3 Permanent impairment assessment – requirement to attend
- APIA4 Permanent impairment assessment – provision of information
- APIA5 Permanent impairment assessment – consent to provision of information.

The above approved forms relate to administrative matters and do not require a signature. Such forms are administrative in nature and almost always sent with a cover letter or by email which will identify the person or organisation sending the approved form anyway.

The APIA2 Permanent impairment assessment – assessment request, is not completed by the APIA and the requirement for the requesting party to sign will remain.

The following is proposed in relation to permanent impairment assessment:

- amend APIA1 to add an additional checkbox for the APIA to confirm that when a special assessment is done the APIA is satisfied the special assessment criteria are met

- amend regulations to require when a special assessment is sought the requesting party to provide evidence to the APIA, that at least 18 months has elapsed since the claim was made
- retain the signature block and require personal APIA signature on APIA1, APIA6 and APIA7 approved forms
- remove APIA signature blocks on APIA3, APIA 4 and APIA5, but retain the date.

Proposal

Proposal 3

Amend WorkCover WA approved form *APIA1 Permanent impairment assessment – report and certificate* by adding an additional checkbox for the APIA to confirm that when a special assessment is done the APIA is satisfied the special assessment criteria are met.

Amend the Regulations to require when a special evaluation is sought the requesting party is to provide evidence to the APIA, at least 18 months has elapsed since the claim was made.

Retain the signature block and require a personal APIA signature in WorkCover WA approved forms *APIA1, APIA6* and *APIA7.*

Amend WorkCover WA approved forms *APIA3, APIA 4 and APIA5* to remove APIA signature blocks.

Scheme participants note that the effective date of an assessment (when a worker is taken to have been assessed and an assessment conducted) is when an APIA has dated and certified the worker's degree of permanent impairment in *APIA1*.

4. Intention to reduce or stop income compensation - return to work

Issue

Income compensation cannot be reduced or discontinued on the basis of a worker's return to work unless the employer or insurer has given the worker a notice in the approved form. The term 'return to work' is defined in the Act.

The approved form of the notice is published on the WorkCover WA website as *CN2 Intention to reduce or discontinue income compensation - return to work.*

The notice identifies:

- the date of the proposed action (when payments will reduce or cease)
- the position to which the worker has returned
- the capacity level of the worker
- the amount, if any, of income compensation to be paid.

The intention is to ensure workers are informed as to whether they are receiving wages only (return to work with full capacity) or a combination of wages and income compensation (return to work with some residual incapacity).

The following issues have been identified:

- notices not being sent or being sent without all relevant fields of the form being completed
- a view that the notice can be issued when a certificate of capacity is given indicating capacity for work, rather than confirmed return to work
- notices being issued without verification of return to work and level of earnings where a worker returns to work with another employer.

It is proposed to make the following amendments to approved form *CN2 Intention to reduce or discontinue income compensation – return to work*:

- include a statement of the amount of wages/ remuneration paid or to be paid in the return to work position
- include a declaration signed by the employer or insurer verifying the worker has returned to work and is deriving earnings in the position specified in the CN2 form
- if the worker has returned to work with another employer, the person issuing the notice must obtain confirmation of the worker's return to work and remuneration with that other employer (which may be a letter or email).

Proposal

Proposal 4

Amend WorkCover WA approved form *CN2 Intention to reduce or discontinue income compensation – return to work* by including:

- a statement of the amount of wages/ remuneration paid/ to be paid in the return to work position
- a declaration signed by the employer or insurer verifying that the worker has returned to work and is deriving earnings in the position specified in the form
- if the worker has returned to work with another employer, a requirement for the person issuing the notice to provide confirmation of the worker's return to work and remuneration with that other employer when providing the notice to the worker.

5. Custody or imprisonment notice

Issue

The Act provides payments of income compensation are suspended if a worker is in custody under a law of WA, or another state, or the Commonwealth, or the worker is otherwise serving a term of imprisonment.

An employer must have written confirmation in the approved form from the relevant government authority of the facts relevant to the worker being in custody or serving a term of imprisonment. The relevant government authority is the authority administering the law under which the worker is in custody or serving a term of imprisonment.

The approved form of the notice for seeking and confirming a worker is in custody or serving a term of imprisonment is *CN6 Custody or imprisonment notice*.

The following issues have been identified:

- initial lack of awareness about the requirement to use the CN6 form by some insurers and the relevant government authority
- timeliness in seeking confirmation of custody arrangements.

This may be due to incomplete requests and/ or a reluctance to provide private and confidential information to an employer/ insurer even though the Act provides for it.

To address this it is proposed WorkCover WA obtain all confirmations of custody arrangements on behalf of an employer or insurer, with the process and timeframes managed within Government.

It is therefore proposed approved form CN6 be repealed and the Regulations be amended to provide:

- the employer or insurer must request WorkCover WA to obtain the written confirmation of custody or imprisonment from the relevant Government authority by making a request in a new approved form to the WorkCover WA CEO
- WorkCover WA obtain the confirmation of custody or imprisonment from the relevant Government authority
- the Government authority to confirm custody or imprisonment by giving the new approved form to the WorkCover WA CEO.

Proposal

Proposal 5

Repeal WorkCover WA approved form *CN6 Custody or imprisonment notice*

WorkCover WA CEO issue a new approved form *Custody or imprisonment notice*

Amend the Regulations to provide:

- the employer or insurer must request WorkCover WA to obtain the written confirmation of custody or imprisonment from the relevant Government authority by making a request in the proposed new *Custody or imprisonment notice*
- WorkCover WA is to obtain the confirmation of custody or imprisonment from the relevant Government authority
- the Government authority is to confirm custody or imprisonment by giving the proposed new *Custody or imprisonment notice* to the WorkCover WA CEO.

6. Return to work program

Issue

The Act provides an employer must ensure the establishment, content and implementation of a return to work program that is in accordance with the Regulations.

Regulations require that a return to work program must be in the approved form. The approved form for a return to work program is *IM1 Return to work program* published on the WorkCover WA website.

WorkCover WA has also published an explanatory guide for completing the return to work program in consultation with ARPA WA and insurer injury management advisors.

Regulations also require:

- an employer must give the worker the opportunity to participate in the establishment of a return to work program
- an employer must take reasonable steps to ensure that a worker agrees with the content of the return to work program
- an employer must give a copy of the return to work program and any amended return to work program to the worker and the worker's treating medical practitioner
- if the treating medical practitioner of a worker on a return to work program amends a certificate of capacity or modifies in writing the restrictions on the work that the worker is considered capable of doing, the employer must amend the worker's return to work program to take account of the amendment or modification
- if an employer amends a workers' return to work program in circumstances other than the circumstances above the employer must take reasonable steps to ensure that the worker agrees with the content of the modified return to work program.

Form design

The approved form - *IM1 Return to work program* - was developed based on the WorkCover WA template published under the 1981 Act with some modifications based on template forms used by stakeholders in practice and feedback received during the consultation process on WorkCover WA's draft form proposals.

In the pre-1 July 2024 workshops and subsequently it became apparent stakeholders had used different templates historically and some of the matters included in historical return to work programs were not necessarily authorised or compliant with the Act (for example, anecdotal feedback indicated return to work programs set out rates of pay and income compensation payable which only the Act can determine).

The general layout of the approved form IM1 appears to provide appropriately for all of the relevant information that is required to facilitate a worker's return to work in accordance with the Act, and the worker's certificate of capacity from their treating medical practitioner that it must be consistent with.

The form includes the same information fields in templates used in other states, noting there is no consistency in layout and design of return to work programs/ plans across Australian jurisdictions.

Template return to work program forms used in two states provide for a separate medical assessment section and treatment section. However, this seems unnecessary to adopt in WA as medical matters can be accommodated under the current headings 'Duties' and 'Restrictions'. Where a worker is required to attend treatment sessions this would be set out in the 'Actions to be completed' section. WorkCover WA's explanatory guide for the return to work program instructs users to refer to the certificate of capacity when completing these sections, including referencing any medical restrictions.

Safe Work Australia has published a template return to work plan for use by jurisdictions, however this has not been mandated in any State. While the SWA template design is clear and user friendly, some of the explanatory information and fields in the SWA return to work plan are not consistent with requirements or terms used in the WA Act. The approach in WA for approved forms is to separate the mandatory fields and content of the form from any explanatory information about how to complete it.

No changes are proposed to the design of the return to work approved form.

Staged progression

Feedback on IM1 to date relates largely to how the approved return to work program form accommodates staged progression of return to work.

The WorkCover WA explanatory guide currently says:

> *Note: Staged progression*
>
> *The working hours table allows for the Working Hours, Duties and Restrictions to be duplicated to allow for a staged progression of return to work within the dates of the certificate of capacity.*

It is understood some stakeholders believe changes may be required to the explanatory guide and/ or the return to work program to better provide for staged progression of a return to work program.

The key issue with setting out a staged progression of return to work is that the stages and time period must be consistent with any certificate of capacity. The potential risk is that a staged progression (e.g. over 6 weeks) might specify levels of capacity, working hours, duties or restrictions that are inconsistent with a subsequent progress certificate of capacity.

The Regulations require that if a progress certificate of capacity is issued after the return to work program is in place that modifies a worker's capacity level, duties or restrictions in a way that is inconsistent with the return to work program, the return to work program must be amended to take account of the amendment or modification.

The note in WorkCover WA's explanatory guide implies this requirement via the reference to the dates of the certificate of capacity but could be clarified further.

Stakeholder feedback is sought on potential changes to the WorkCover WA explanatory guide to provide for staged progression of return to work having regard to the requirements of the Act and Regulations requiring the return to work program to be consistent with any certificate of capacity.

Proposal

Proposal 6

No change to the structure and content of WorkCover WA approved form - *IM1 Return to work program*.

Stakeholder feedback to be sought on potential changes to the WorkCover WA explanatory guide to provide for staged progression of return to work.

7. Noise Induced Hearing Loss compensation claim form

Issue

Claims for noise induced hearing loss (NIIHL) must be made in the approved form. The Act provides that different claim forms can be approved for different kinds of claims. Noting the unique nature of NIHL claims, the claim form for NIHL is separate and distinct from the claim form used for a standard workers compensation claim.

The approved form is published on the WorkCover WA website as *CF2 NIHL compensation claim form.*

The NIHL compensation claim form:

- identifies the personal details of the worker, employer, and relevant workers compensation insurer
- requires details of any previously accepted NIHL claim(s)
- requires the worker to state their assessed percentage NIHL
- requires the worker to attach relevant documentation to support the claim for compensation
- provides for the worker's signature and a consent authority for the release of personal information.

Regulations provide strict timeframes for the insurer to make claim decisions and, where a claim is accepted, to make payment of compensation. The employer on whom a claim is made, referred to in regulations as the 'last employer', must give the claim to their workers compensation insurer within seven days. An insurer must make a liability decision and give the worker a liability decision notice (or else issue a deferred decision notice) within 14 days of receiving the claim from the employer.

The last employer failing to give the claim to the insurer is an offence with a penalty of $5,000. An insurer failing to make a claim decision or issue a deferred decision notice in the required timeframe is also an offence with a penalty of $5,000. Further, an insurer who fails to make a claim decision, or issue a deferred decision notice in the required timeframe is taken to have accepted the last employer is liable to pay the worker NIHL compensation.

The consequences of an employer or insurer failing to meet their legislative obligations can be significant. Currently, there is no field on the NIHL compensation claim form to indicate when the last employer received the claim or when the claim was provided to the insurer. As such, WorkCover WA is impeded in its regulatory functions in ensuring the requirements of the Act and regulations are met by the employer and insurer.

To aid in its compliance activities and to ensure regulated timeframes are adhered to, WorkCover WA intends to amend and add the following fields to the NIHL compensation claim form:

- a field indicating the date the claim was given to the last employer
- a field indicating the date the last employer gave the claim to the insurer.

The field indicating the date the claim was given to the last employer would be completed by the worker. The field indicating the date the last employer gave the claim to the insurer will need to be completed by the insurer on receipt of the claim form.

Proposal

Proposal 7

Amend the WorkCover WA approved form *CF2 NIHL compensation claim form by* inserting the following:

- a field indicating the date the claim was given to the last employer
- a field indicating the date the last employer gave the claim to the insurer.

8. Audiological test report

Issue

The first step for a worker obtaining NIHL compensation is to seek an audiological test from an authorised audiologist. The audiological test must be in the approved form and hearing loss must be measured in accordance with standards approved or set by the CEO.

The Audiological test report approved form is published on the WorkCover WA website as *NIHL1 Audiological test report*.

The Audiological test report:

- identifies the personal details of the worker, employer, and the audiologist undertaking the test
- identifies who is responsible for paying for the audiological test and the date of the examination
- provides for preliminary examinations and matters to be considered prior to conducting the audiological test
- provides for results of the audiological test split into three parts – air conduction and bone conduction testing to calculate binaural hearing loss, an audiogram, and any additional testing at the discretion of the audiologist
- provides for a summary of the audiologist's findings
- requires the audiologist to state the assessed percentage hearing loss and date and sign the approved form.

A worker may only progress to obtain a NIHL assessment by an ENT specialist if the audiological test report shows hearing loss of at least 10% for an initial claim and 5% for any subsequent claim.

The Audiological test report approved form NHIL1 has generally been well received. A small number of stakeholders have made suggestions to refine the form, including:

- adding 'recreation history' to the narrative history section of the approved form

- allowing an ‘either/or’ approach to completing the air conduction and bone conduction test and the audiogram to avoid unnecessary replication and duplication errors
- revision of the approved form to include a table setting out hearing threshold levels to calculate binaural percentage hearing loss and binaural percentage hearing loss less presbycusis.

WorkCover WA proposes to make amendments to *NIHL1 Audiological test report* in line with suggestions made by stakeholders.

Adding recreational history to the narrative history section of the Audiological test report approved form will assist audiologists in any summary of their findings included in the report and provide a more holistic view of the worker’s hearing history. It should be noted that workers are required to provide an extensive history to an ENT specialist, including with respect to recreational noise history, when seeking an NIHL assessment.

Providing audiologists with the option to include either the threshold table or an audiogram is proposed as a method to avoid unnecessary duplication of results.

Changes to *NIHL1 Audiological test report* in the assessed percentage hearing loss section will aim to better present calculated binaural percentage hearing loss and hearing loss less presbycusis by providing a table to set out the result. The table provides for the frequency tested, the threshold levels in each ear and the percentage loss of hearing corrected for age to provide the binaural percentage hearing loss percentage, less presbycusis.

The proposed amendments to the Audiological test report approved form will be aimed at clarity, efficiency in avoiding unnecessary replication of results, the potential errors this produces, and avoiding errors when determining a worker’s binaural percentage hearing loss.

Proposal

Proposal 8

Amend the WorkCover WA approved form *NIHL1 Audiological test report* by:

- adding ‘recreation history' to the narrative history section
- allowing an ‘either/or’ approach to completing the air conduction and bone conduction test and the audiogram to avoid unnecessary replication and duplication errors
- including a table setting out hearing threshold levels to calculate binaural percentage hearing loss and binaural percentage hearing loss less presbycusis.

Minor changes to the WorkCover WA *Approved Standards for Performing an Audiological Test* may be required to reflect the proposed amendments to the Audiological test report approved form.

9. Broker access to personal worker information

Issue

On 9 July 2024 WorkCover WA issued a Bulletin clarifying that insurance brokers cannot access a worker's personal information from an insurer without consent given by the worker.

This is the legal position under the Commonwealth *Privacy Act 1988* and *Workers Compensation and Injury Management Act 2023*. The legal position was unaffected in the transition from the 1981 Act to the 2023 Act.

WorkCover WA therefore expects licensed insurers and insurance brokers to have systems in place to ensure consent is obtained from workers before personal information is disclosed to insurance brokers.

A consent authority was subsequently developed through the peak bodies, Insurance Council of Australia and National Insurance Brokers Association for use by brokers and workplace risk and injury management consultants.

Anecdotal feedback on the NIBA/ ICA developed consent authority appears to be mixed. While it appears to meet the legal requirements for obtaining consent to access personal information, some stakeholders have questioned its length and willingness of workers to sign it.

Some brokers have suggested WorkCover WA should assist in refining the NIBA/ICA consent authority, extend the consent authority in the workers compensation claim form, or make regulations providing for personal information to be disclosed to brokers to assist them perform insurance and claim functions on behalf of employers.

Combining insurers and brokers in claim form consent authority

The consent authority in the claim form is worded specifically to facilitate the collection and disclosure of personal information to assist insurers perform liability assessment and claim management functions that are imposed on them by the Act.

Worker consent is sought because without that consent an insurer's capacity to make timely liability decisions and manage claims under the Act may be compromised.

The Act does not impose a statutory claim or injury management function on employers or brokers that necessitates inclusion in the consent authority in the claim form on the same footing as insurers.

The section ‘Role of the Broker/ WR & IMC’ in the NIBA/ ICA consent authority illustrates the specific role of an insurer or agent of an insurer:

> *Your employer’s appointed insurance broker/WR&IMC are engaged to provide a broad range of workers compensation related services. This may include providing assistance to your employer to facilitate workers lodging a claim, provision of relevant claim documents, advising your employer of its relevant obligations under the Workers Compensation and Injury Management Act 2023 (WA), navigating the scheme in layman’s terms, advising on compensation entitlements and income compensation calculations as well as suitable return to work options.*

The NIBA/ICA consent authority therefore appears to be appropriately worded to enable brokers and consultants to perform these non-statutory commercial functions on behalf of employers.

WorkCover WA does not propose to extend the consent authority in the claim form to cover brokers or workplace risk and injury management consultants.

Regulations to permit disclosure of information without consent

There is provision in section 505(1)(f) of the Act to prescribe in Regulations circumstances in which information obtained by a person (such as an insurer) is authorised to be disclosed.

Brokers currently operate in the WA scheme without legislative oversight. The WorkCover WA *Insurance Brokers Principles and Standards of Practice* set out service expectations but are not law.

Clause 3.10 (worker consent authority) of the Standards and Principles is a statement of the effect of the *Privacy Act 1988*: it is an offence to collect and disclose personal and sensitive information about an individual unless permitted by that Act or disclosure is made with the written consent of the individual.

As brokers and workplace risk and injury management consultants do not perform statutory functions, and there is no legislative oversight, it is not appropriate to progress amendment regulations providing a right to access to personal worker information in the absence of worker consent.

Communication expectations & non-personal information

WorkCover WA encourages cooperation and collaboration between scheme participants. If an employer or broker provides an insurer with evidence of a worker’s consent it is WorkCover WA’s expectation the information covered by the consent is provided.

If the information a broker seeks from an insurer without consent is not restricted or limited by the *Privacy Act 1988* or the *WCIMA23* there is no barrier in providing the information to the broker.

Insurers are permitted to disclose information without consent to others, but it must be in good faith to assist them perform insurer functions under the Act - see ss. 505(1)(a).

Disclosure is also permitted if the information is in the public domain or statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates.

Broker status in disputes and settlements

There have been instances of unauthorised sharing of information to brokers using WorkCover WA Online (the electronic document system utilised in dispute proceedings and for registering settlement agreements and related documents), where a broker's details are entered into WorkCover WA online in place of an employer.

This initially resulted in some brokers being copied in on all documents and correspondence addressed to the employer including private communications between the Director (or Registrar/Arbitrator) and parties. This practice has since been addressed.

Brokers are not representatives or authorised agents of an employer for the purposes of settlement registration or dispute proceedings generally. Only a licensed insurer or a legal representative is authorised to have access to WorkCover WA Online on an employer's behalf.

The NIBA/ICA consent authority also does not (and cannot) authorise brokers (or claim agents) to have any standing in settlement registration processes or dispute proceedings. The commercial relationship between brokers and employers, and brokers and insurers, is not relevant to registration of a settlement agreement or representation in CAS proceedings and does not give the broker the same status and information access rights as the employer or insurer.

Proposal

Proposal 9

NIBA and ICA continue to cooperate to address any issues in the jointly developed consent authority for use by brokers and workplace risk and injury management consultants.

No change to Regulations or the claim form consent authority to facilitate brokers and workplace risk and injury management consultants accessing workers' personal information.

10. Additional modified penalties

The Regulations set out in Schedule 4 the offences for which an infringement notice may be issued and the corresponding modified penalty.

WorkCover WA has identified the need for an additional 3 items in Schedule 4:

1. Failure of employer to make income compensation payment when due [s.47(2)]: modified penalty $800.
2. Failure of employer to pay the amount of a settlement agreement when required [s.156(2)]: modified penalty $800.
3. Preventing another person from complying with the Act [(s.527)]: modified penalty $800.

The capacity to issue an infringement notice and modified penalty relating to items 1 and 2 above will address fundamental breaches (non-payment of compensation). The additional modified penalties are also consistent with existing item 5 (non-payment of provisional payments) and item 7 (unlawful reduction, suspension or discontinuation of compensation) in Schedule 4 which already have modified penalties.

WorkCover WA investigations have identified circumstances where a person has directly or indirectly prevented another person from complying with the Act. The capacity to issue an infringement notice in these circumstances may be an alternative compliance measure to formal prosecution.

Proposal

Proposal 10

Amend the Regulations to insert the following offences and modified penalties in Schedule 4:

- Failure of employer to make income compensation payment when due [s.47(2)]: modified penalty $800
- Failure of employer to pay the amount of a settlement agreement when required [s.156(2)]: modified penalty $800
- Preventing another person from complying with the Act [(s.527)]: modified penalty $800.