28 February 2025

UnionsWA Incorporated • ABN 64 950 883 305
Tel: +61 8 6313 6000 • Level 4, 445 Hay St
PERTH WA 6000 • WHADJUK COUNTRY
PO Box Z5380, St Georges Tce PERTH WA 6831
admin@unionswa.com.au • www.unionswa.com.au

WorkCover WA
Manager Policy and Legislative Services
Email: consultation@workcover.wa.gov.au

Workers Compensation and Injury Management Act 2023 Implementation Review

UnionsWA is the governing peak body of the trade union movement in Western Australia. As a peak body we strengthen WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around thirty affiliate unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA welcomes the opportunity to provide a submission on the *Workers Compensation and Injury Management Act 2023* Implementation Review Consultation Paper. We acknowledge that the cope of this review does not extend to potential amendments of the Act or other WorkCover WA administrative instruments, and so any matters we raise outside of the scope will not be able to be addressed directly through this particular review.

As has been raised with us by affiliates, it is not uncommon for workers compensation disputes to take between 9 to 12 months to be adjudicated. As such, with the implementation of the Act occurring on 1 July 2024, we note that there may be issues with the implementation that do not become apparent until a later date and so will need to be addressed in a subsequent review process. The following comments and recommendations, therefore, reflect the experiences of affiliates with the implementation of the *Workers Compensation and Injury Management Act* at this point in time.

1. Settlement agreement approved form

Affiliates have noted a number of challenges arising from the current settlement form and process, which are outlined below.

Process of registration

Affiliates have observed that since the commencement of the new Act that the process of registering settlement agreements is now taking significantly longer, with WorkCover heavily scrutinising the settlement agreements and applications. Though WorkCover has a critical role in reviewing applications, settlement agreements and permanent impairment notices, there are concerns that when WorkCover is flagging minor errors that are not material to the settlement itself, such as differing postcodes or the use of '&' instead of 'and' in the employer's name, as requiring rectification.

This causes unnecessary delays. While we recognise and understand the need to rectify errors relating to relevant and material settlement information, such as the agreed settlement sum, minor technical errors should not delay the registration of settlements.

Global agreements

Despite many settlement agreements being based on the acceptance of a global offer consisting of a lump sum monetary amount paid to a claimant worker in exchange for the worker foregoing their claim, the current settlement form does not allow for global agreements. The structure of the form creates an implicit requirement that monies payable be identified and categorised.

In these circumstances, the monetary amounts in each category may simply be allocated in such a way in order to be seen to adhere to the WorkCover processes, with the amounts not necessarily providing a true reflection of discussions and agreements between the parties.

Taxing settlement amounts

An affiliated union has raised that a recent ATO ruling, of which WorkCover is likely aware, has determined that the amount for future income compensation identified in the settlement agreement form is now taxable, which has not previously been the case.

Prior to the introduction of the current settlement form, settlement monies paid to a claimant were generally classed as damages for loss suffered and not as a windfall or income and therefore was not taxable. This resulted from the requirements of the new form, which appears to be an inadvertent consequence of those changes. To address this, the implicit requirement to identify and categorise the makeup of a settlement payout on the settlement form could be removed.

Permanent impairment

An affiliate has noted that the Director may reject or not approve a settlement agreement if they are of the view that the worker is entitled to a permanent impairment payment and that this is not allowed for or contemplated in the settlement agreement. Despite this, obtaining a permanent impairment assessment in the approved form is often not possible or practicable. This can be for a number of reasons, including that the claim is settled too early to assess the injury or at an early stage when liability is in dispute or has not been accepted.

There are challenges too where permanent impairment in the future has been contemplated by the parties and allowed for within a global amount, but put into a different item in the agreement, meaning the Director may still refuse the settlement.

It has further been raised that the Insurance Commission of Western Australia has a policy that they will make no allowance in settlement negotiations for permanent impairment unless a formal assessment in the approved form has been made and agreed upon in accordance with s105 of the Act. This may cause difficulties in reaching early settlements with the Insurance Commission when it is apparent that the worker will later have a permanent impairment entitlement.

The current form also makes no allowance for additional income compensation pursuant to section 52 of the Act in relation to permanent total incapacity.

Registering by the Director

UnionsWA acknowledges and supports the intent behind the proposal to include a statement in the settlement agreement that any compensation entitlement will not cease until the settlement agreement is registered by the Director. Concerns have been raised with us, however, that this intent may be undermined by s 62(d) on the Act, which states that income compensation can be discontinued with the written consent of the worker given in the approved form.

As a result of that section, where parties agree, it may still be lawful for income compensation to be discontinued for a certain period following a settlement agreement even in the absence of it having been registered by the Director.

This potential inconsistency could be addressed through an amendment to the s 62(d) form or guidance that this form is not necessary in the event of a settlement.

2. Permanent impairment agreement – PI notice process

WorkCover states in the Consultation Paper that it may be necessary to consider whether the Act should be amended to reduce the 'two step' process currently required. It is our recommendation instead to remove the permanent impairment notice altogether. Historically, a PI Notice has not been required, and it is the experience of affiliates that the PI Notice is not contributing anything beneficial to the process.

As noted within the Act and reiterated in the Consultation Paper, it is the worker that commences the permanent impairment assessment process. Despite this, many permanent impairments are instead initiated by the insurer, particularly in circumstances where the worker is yet to be legally represented. Insurers are then providing workers with the PI Notice, creating confusion and leading to workers signing the document without fully understanding the implications. Workers that are not represented or assertive are therefore vulnerable to this process and sign themselves out of a fair settlement, even if they engage representation/union at a later stage.

As such, the removal of the PI Notice is recommended.

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

UnionsWA strongly agrees with the concept that workers should be informed as to whether they are receiving wages only or a combination of wages and income compensation. It is critical that workers understand the amount of compensation that is available to them.

Concerns have been raised with us, however, that while the proposed amendments assist in addressing the uncertainty as to what is regarded as income compensation or wages when a

worker returns to work, there remains an outstanding issue related to where a worker has returned to work with some residual incapacity.

Affiliates report to UnionsWA that it is a common occurrence for employers and insurers to unilaterally deem that a return to work has occurred in circumstances where a worker is:

- undertaking full preinjury hours, but
- is only undertaking restricted duties to accommodate the injury.

In those circumstances, income compensation payments are then ceased through the issuance of a s63 notice to the worker on the grounds that the worker has returned to work. When the worker can then not sustain the alleged 'return to work' due to, for example, becoming incapacitated due to the aggravation or regression of their injury, there is no automatic right that the income compensation be reinstated.

Insurers will typically argue that this constitutes a new incapacity and that the onus is on the worker to prove that the 'new incapacity' results from the injury for which liability had previously been accepted. To have the income compensation reinstated, a worker will have to engage in lengthy and costly litigation, during which time they are often without any income.

Though this may require changes beyond the scope of this review, further amendments to the CN2 form could assist in reducing the issues that could be disputed or that a worker would need to prove in the event of any future potential litigation. We recommend that a requirement be created for the insurer to identify whether the worker has:

- returned to their full range of preinjury duties – yes or no
- returned to their full preinjury hours of work – yes or no

This information would also ensure that any incorrect assertions on the form in respect of return to work are immediately obvious to the worker. It also more readily allows workers to legally dispute the form at the time it is issued, rather than waiting until the worker fails to sustain the alleged 'return to work'.

6. Return to work program

UnionsWA has no objection to further clarity on staged progression of return to work being provided in the WorkCover WA explanatory guide. We stress, however, that this should be accompanied by a greater emphasis being placed on the certificate of capacity requirements. Though a staged progression of return to work is positive, any return-to-work plan must be consistent with respect to the current certificate of capacity process.

7. Noise Induced Hearing Loss compensation claim form

The proposed changes in this section are supported. We understand that previously it was common for recreation history to be included in the audiologist reporting prior to the commencement of the current approved form. This is also explored further later in the current NIHL process and therefore including it at the audiological assessment stage is beneficial.

9. Broker access to personal worker information

UnionsWA strongly supports the position that insurance brokers should not be allowed to access a worker's personal information from an insurer without consent being given by the worker. We are of the view that insurance brokers have no role to play in injury management, contribute no benefit to the efficiency of the workers compensation scheme or injured workers, and certainly should not be holding personal information about workers.

It has been our experience that when insurers have not disputed claims and are paying entitlements to workers, this has been disputed by insurance brokers who unnecessarily insert themselves into the claims process, have questioned medical information and aggressively questioned workers at Injury Management Case Conferences. Affiliates have reported to us that the involvement of insurance brokers in the claims process results in increased level of and protraction of disputation and/or litigation, all of which disproportionality disadvantage injured workers.

UnionsWA supports that the new standard CF1 form only allows consent for that information to be shared with the insurer or self-insurer to investigate and manage the claim and expressly prohibits the sharing with other parties such as insurance brokers.

We are aware that the National Insurance Brokers Association and the Insurance Council of Australia have developed a consent form in order to work around the intent of the legislation. We consider that it should be made very clear to workers that there is no reason for insurance brokers to hold personal medical information and that these forms are not part of any official documentation in the workers compensation scheme.

10. Additional modified penalties

UnionsWA is concerned that the quantum of modified penalties proposed are insufficient to function as a meaningful deterrent to workers' compensation insurers and employers from committing these offences. $800 is simply too low a figure to dissuade large employers or insurers from these actions. As such, it is not apparent that it beneficial to issue infringement notices in those circumstances rather than pursuing formal prosecution.

Affiliates have also noted their concerns that the common practice for WorkCover is to issue cautions rather than monetary penalties. As such, we encourage WorkCover to take a more stringent approach to enforcement that imposes pecuniary penalties.

UnionsWA also recommends adopting a penalty units approach rather than the current flat dollar figure penalties. A penalty unit system allows for adjustments based on inflation, ensuring that penalties remain relevant and effective over time without needing frequent legislative changes. Penalty units can be used to ensure that they are proportionate to the offence. Additionally, it simplifies the process for updating fines and penalties, as changes can be made by adjusting the value of a penalty unit, rather than revising each individual penalty amount in the legislation. For these reasons, penalty units are utilised by a number of enforcement agencies, including the Australian Securities and Investments Commission, the Australian Taxation Office and the Australian Competition and Consumer Commission.

Additional Feedback

In late 2024, WorkCover changed their position with respect to the requirements to lodge an application in the event the insurer fails to provide to the worker or their legal representative relevant claim documents requested under s 306 of the Act within the 14-day timeframe prescribed by the Regulations.

If an insurer simply ignores the request and does not explicitly state that they refuse to comply with the request, WorkCover will not intervene and will not accept an application for the production of the documents. WorkCover's current position is that the insurer must now openly stipulate that they will not provide the requested documentation, and only then will an application be accepted. Should an insurer simply ignore the request, but not state they will not comply, WorkCover will only issue a fine to the insurer.

This does not function as a sufficient incentive for insurers to comply with a section 306 requests as stipulated under the Act and Regulations. We believe the process should be reverted to prior practice.

In addition, we provide the following comment with respect to the prescribed forms used in dust disease claims. Currently the common law election can be signed by either the worker or their representative. The PI Agreement, however, can only be signed by the worker. We propose that the PI Agreement also be amended to allow for it to be signed by either the worker or their representative. In many dust disease matters, such as those which relate to sufferers of mesothelioma, it would be beneficial for the sufferer if the significant amount of paperwork they are required to deal with can be simplified and, where they provide consent, signed on their behalf by a representative.

*

If you wish to discuss any matters raised in this submission further, please contact me at [redacted]

Yours sincerely,

Rikki Hendon
Secretary