

## Workers Compensation and Injury Management Act 2023

# Implementation proposals for regulations and administrative instruments

## Implementation Consultation Paper 1: Deemed Workers & Excluded Workers

**October 2023**

Public comment on the implementation proposals  
should be submitted to:

[consultation@workcover.wa.gov.au](mailto:consultation@workcover.wa.gov.au) by **1 December 2023**

All submissions will be publicly accessible unless confidentiality is requested.

For further details on making a submission see:

<https://www.workcover.wa.gov.au/resources/modernising-was-workers-compensation-laws/>

**\*\*\*Draft proposals only\*\*\***

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

# Implementation Consultation – Deemed workers and excluded workers

## Scope

This document sets out proposals for deemed workers and excluded workers in regulations under the *Workers Compensation and Injury Management Act 2023 (WCIMA23)*.

## Background and intent

The definition of ‘worker’ in the *WCIMA23* covers individuals working under a contract of service or apprenticeship (primary definition) and certain contractors (extended definition).

**Deemed workers:** The definition of worker in the *WCIMA23* also includes individuals who satisfy certain circumstances as set out in the regulations even though they do not, or may not, meet the primary or extended definition of ‘worker’ in the *WCIMA23*. If covered by the regulations, these individuals would be considered workers and would be eligible for compensation as other workers under the *WCIMA23*.

**Excluded workers:** The *WCIMA23* also provides for the exclusion of certain workers in circumstances prescribed in the regulations. Excluded workers will not be entitled to compensation under the *WCIMA23* if excluded by regulations.

The proposed regulations:

- prescribe the classes of deemed worker
- prescribe the classes of excluded worker.

There is no intention to make regulations to deal specifically with gig economy workers or domestic workers at this time (see section 3 of this paper).

## WCIMA23 key provisions

Section 13 enables regulations to provide:

- that an individual of a specified class or description, who otherwise would not be, or may not be, a worker is to be considered a worker for the purposes of the *WCIMA23*
- that an individual of a specified class or description, who otherwise would be, or may be, a worker is not a worker for the purposes of the *WCIMA23*.

Section 13 also requires the regulations to provide for the identification of the employer where an individual is a deemed worker for the purposes of the *WCIMA23*.

## Regulations

### 1. Deemed workers

This section identifies the classes of persons intended to be deemed a 'worker' through the regulations either because the arrangement is not covered under the primary or secondary definition of 'worker' in the *WCIMA23*, or it is unclear.

#### 1.2 Deemed worker: crown workers

It is intended regulations will set out that certain classes of individuals employed by the Crown and statutory office holders will continue to be covered as workers under the *WCIMA23* and will set out how the person's employer is identified. Proposed [Table 1](#) provides for the classes of Crown workers deemed to be workers for the purposes of the *WCIMA23*, and the person or entity taken to be the worker's employer.

Table 1 includes magistrates and judges, persons employed by the Governor in an official role, as well as officers serving roles in Parliament.

Public service officers are generally covered under the section 12 definition of worker in the *WCIMA23*, while working under a contract of service with an agency of the State. The classes of Crown workers and corresponding employers in Table 1 are consistent with the 1981 Act.

#### 1.3 Deemed worker: religious clergy

Under the 1981 Act clergy of a church can be covered as a worker by the governing body of the church making a request to the Minister administering the 1981 Act. The Minister may declare a clergyperson as a worker and declare the entity that is the employer of the clergyperson. Declarations are published in the Government Gazette.

Under the *WCIMA23* declarations will no longer be made and historical declarations will have no effect from the commencement date of the *WCIMA23*.

From commencement of the *WCIMA23* it is intended where necessary the regulations will provide that a minister of religion/clergy member of a certain religious body or organisation listed in a schedule to the regulations is taken to be a worker for the purposes of the *WCIMA23*, and the religious body or organisation specified in the schedule is taken to be the worker's employer.

If PAYG tax is withheld for religious clergy then a deeming arrangement by regulations will not be made, as PAYG withholding is compelling evidence of a contract of service: the clergy would satisfy the primary definition of worker in the *WCIMA23*.

Many churches engage clergy under a contract of service making a deeming arrangement unnecessary under the *WCIMA23*, including for those individuals that have been declared workers historically. However, there may be some clergy who do not work under a contract of service and regulations can therefore be made to include them as workers if coverage is requested.

WorkCover WA will contact religious bodies of clergy gazetted under the 1981 Act to determine their status and need for inclusion before the regulations are finalised.

#### 1.4 Deemed worker: NDIS support workers

The status of people employed or engaged to support a person with a disability is a type of working arrangement that causes some confusion under the 1981 Act and requires clarification in the regulations.

National Disability Insurance Scheme (NDIS) support workers provide support and care to NDIS participants to assist the participant to live a full and independent life.

However, the many ways support workers can be engaged and paid under the NDIS system sometimes makes it difficult to determine what employment relationships, if any, are being established between the support worker, the participant and other parties.

For example, some participants self-manage NDIS funds and engage support workers directly. Others seek support through a business that specialises in providing care and support workers. While more complex arrangements involve an intermediary like a labour hire firm, a booking platform, or a fund manager.

It is sometimes difficult to determine whether a support worker is a 'worker' of the NDIS participant under the 1981 Act. This uncertainty is likely to continue with respect to the definition of 'worker' in s.12 of the *WCIMA23*.

The NDIS website provides practical resources regarding NDIS participants who are directly engaging their own staff and refers to responsibilities that may come with being an 'employer' including potential obligations regarding tax and workers compensation. However, it remains unclear as to whether self-managed participants are in fact 'employers' given the complexities of the NDIS funding arrangements, and the different laws that apply in each state or territory.

WorkCover WA's view is the arrangement that requires clarification and ought to be covered is the one that closely resembles a contract of service; that is where the NDIS participant is self-managing their funds and directly engaging NDIS support workers. Self-managed NDIS participants have exercised choice and control: they have ultimate control over support workers, the hours they work, the tasks that they perform, and the payments to be made, usually based on time or an hourly rate.

It is intended the regulations will provide that a NDIS support person is a worker if they are an individual who has been engaged directly by a self-managed NDIS participant and is paid with funds under a plan for the provision of 'services and supports' by the individual to the NDIS participant. In these circumstances, the NDIS participant has ultimate control over support workers, the hours they work, the tasks that they perform, and the payments to be made.

The regulations will make clear the individual engaged to provide the services to the NDIS participant is deemed to be a worker and the NDIS participant will be taken to be the worker's employer.

The terms 'NDIS', 'NDIS participant', 'services' and 'supports' will have the same meaning as in the *National Disability Insurance Scheme Act 2013* and rules made under that Act.

The regulations are intended to apply to the 'direct' engagement model only, not to support workers supplied by a firm or labour hirer that specialises in supplying support workers, or via a platform (it is likely the firm or labour hirer would be the employer of the support worker in these circumstances).

Neither is it intended the regulations will apply to support workers engaged to provide services to those NDIS participants who are not self-managing their funds, or to excluded casual arrangements (see 2.4 of this paper).

## 2. Excluded workers

This section identifies the classes of persons intended to be excluded from the definition of 'worker' through the regulations, consistent with the 1981 Act.

### 2.1 Excluded worker: serving police officers

Serving police officers and aboriginal police liaison officers are not covered as workers under the 1981 Act. They receive compensation under the police legislation and industrial instruments. It is intended these workers will continue to be identified as 'excluded workers'.

As is the case under the 1981 Act, dependants of serving police officers and aboriginal police liaison officers who have died in work related accidents can receive compensation under the *WCIMA23* even though the deceased officer will be considered an excluded worker.

### 2.2 Excluded worker: member of crew of fishing vessel

Share fishermen are not classified as workers and not covered under the 1981 Act where they are involved in a joint venture or any entrepreneurial engagement where the individuals have a financial stake of some kind in terms of the cost of working the vessel.

It is intended the regulations will preserve the same position as the 1981 Act by providing a member of the crew of a fishing ship is not a worker if:

- a) the member's entitlement to remuneration is contingent upon the working of the ship producing gross earnings or profits; and
- b) the remuneration is wholly or mainly a share of the gross earnings or profits.

### 2.3 Excluded worker: contracted sporting contestants

Sporting contestants (other than jockeys) are not classified as workers and not covered under the 1981 Act. Sporting contestants are generally taken to have voluntarily accepted the risks inherent in a particular sport. This includes the risk of injury that might arise from minor or expected breaches of the playing rules. Sporting groups obtain insurance specifically designed to cover sports injuries, liabilities and events.

It is intended the regulations will preserve the same position as the 1981 Act by providing a person is not a worker while pursuant to a contract the person is:

- a) participating as a contestant in any sporting or athletic activity
- b) engaged in training or preparing with a view to participating
- c) engaged in promotional activities in accordance with the contract pursuant to which the person participates
- d) engaged on any journey in connection with the above.

The proposed regulation does not apply to a jockey pursuant to section 15 of the *WCIMA23* (licensed jockeys are covered under deeming provisions in the *WCIMA23*).

#### 2.4 Excluded worker: Casual not working for another person's trade or business

Under the 1981 Act an individual is not a worker if the individual is engaged in any casual arrangement and the individual is not doing work for another person's trade or business. For example, the current exclusion would apply if:

- a) an individual is engaged in a one-off or irregular (casual) work arrangement under which the person who engages them can elect to offer employment for a particular day or days, and the individual has the election to work or not; and
  - (i) the person who engages the individual is not operating a trade or business (e.g. work is for private/domestic purposes), or
  - (ii) the work is being done for the purpose of the individual's own trade or business.

It is intended the regulations will preserve the same position as the 1981 Act by excluding an individual whose employment is of a casual nature and is not for the purpose of another's person's trade or business.

### 3. Status of domestic and gig economy workers

There is no intention to make specific regulations about domestic workers or gig economy workers at this time.

#### 3.1 Domestic workers

Domestic workers are workers who perform work in or for a private household, such as cleaning, childcare, or gardening services on behalf of a householder.

Domestic workers may be covered under the *WC/MA23* if they meet the definition of worker by being engaged under a contract of service. The normal indicia established by court precedent would continue to apply in working out whether there is a contract of service or not. Domestic workers may be excluded if the person is engaged in any casual arrangement for a homeowner and is not doing work for the homeowner's trade or business.

There is no intention to change the scope of cover for domestic workers in regulations.

#### 3.2 Gig economy workers

Due to uncertainty about the policy and legal status of gig economy workers and the various reviews and inquiries examining the issues no regulations are intended to be made about the status of gig economy workers at this time.

The gig economy is also called the platform economy, share economy, and on-demand work.

Participants (gig workers) in the gig economy are typically engaged by or access work through an app or website (the platform).

The gig economy is broad and covers a wide range of working arrangements. They include odd jobs, one-off tasks, ride sharing, food delivery, care services, and various professional services. The most common platforms are transport (ride sharing) and food delivery.

Many gig workers are generally characterised as independent contractors rather than employees and lack workplace entitlements and protections. However, the exact status of an individual gig worker is difficult to ascertain as engagement models vary significantly and the legal status of gig workers remains unclear.

Key unresolved issues largely relate to which types of gig workers ought to be protected by industrial relations, workers compensation and workplace health and safety laws, how to define them in legislation, and who should provide protections as the employer and ultimately bear the cost of premiums.

There have been a number of inquiries and reviews looking into these issues and the potential rights and entitlements of gig workers. This includes the recent Senate Select Committee on Job Security report (and reiterated in the Senate Select Committee on Work and Care) that recommended:

*The Australian Government works with state and territory governments to lead the reform of state based workers' compensation schemes so that they extend to platform workers regardless of their visa or work status, and they require platform companies to pay workers' compensation premiums for these workers (Job Security Inquiry - First interim report: on-demand platform work in Australia, recommendation 6)*

The Commonwealth Department of Employment and Workplace Relations is currently undertaking public consultations on reforms to empower the Fair Work Commission to set minimum standards for workers in 'employee-like' forms of work, including the gig economy. These reforms do not specifically consider workers compensation coverage.

A number of States including New South Wales, Victoria and Queensland have undertaken reviews and inquires but are yet to finalise or legislate a position.

WorkCover WA will maintain a watching brief on any legal developments, and the outcomes of the various inquiries to ascertain whether regulations should be made to clarify the status of gig workers in the future.

## Attachments

1. Table 1 – Crown workers specified as workers for the purposes of the *WCIMA23*.

Table 1 – Crown workers

	<b>Worker</b>	<b>Employer</b>
1.	A person who holds a judicial or other statutory office	The State/Crown
2.	A member of the Governor's Establishment within the meaning of the <i>Governor's Establishment Act 1992</i>	The State/Crown
3.	(i) A member of the Department of the Legislative Council  (ii) Electorate officer	President of the Legislative Council
4.	(i) A member of the Department of the Legislative Assembly  (ii) Electorate officer	Speaker of the Legislative Assembly
5.	(i) A member of the Department of the Parliamentary Reporting Staff  (ii) A member of the Department of the Parliamentary Library  (iii) A member of the Joint House Department	President of the Legislative Council and the Speaker of the Legislative Assembly acting jointly

The terms in items 3-5 are defined in the *Parliamentary and Electorate Staff (Employment) Act 1992*.