

## Workers Compensation and Injury Management Act 2023

# Implementation proposals for regulations and administrative instruments

## Implementation Consultation Paper 10: Dust Disease

**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 – Dust Disease

## Scope

This document outlines proposed implementation requirements and streamlined legislative and administrative processes associated with workers compensation statutory and common law claims for dust disease under the *Workers Compensation and Injury Management Act 2023 (WCIMA23)*.

## Background and Intent

Pneumoconiosis, silicosis, mesothelioma, lung cancer and diffuse pleural fibrosis – each referred to as a ‘dust disease’ in the *WCIMA23* – are covered under a presumption of work injury.

The *WCIMA23* clarifies the presumption of work injury for dust disease and streamlines provisions for how dust disease claims are made and determined.

The presumption will apply if a worker has been exposed to asbestos at work (or in the case of pneumoconiosis or silicosis, has been exposed to mineral dust harmful to the lungs) and has suffered a dust disease.

To rebut the presumption an employer must prove the disease was not suffered in the course of employment or prove any relevant exposure of the worker in the course of employment was trivial or minimal.

Claims will continue to be given to the WorkCover WA CEO for referral to a Dust Disease Medical Panel (known as the Industrial Diseases Medical Panel under the 1981 Act) to make a final and binding decision on the diagnosis of the dust disease, extent of any incapacity and degree of any impairment.

The claim and panel determination processes have been clarified in the *WCIMA23* along with the timeframes for progression of a claim by the last employer, modification of the timeframes for insurers and self-insurers to make liability decisions on dust disease claims, and special provisions relating to dust disease common law claims.

Proposed administrative improvements include:

- a single approved form for claiming compensation for dust disease and/ or seeking an assessment of a worker’s degree of permanent whole of person impairment from a Dust Disease Medical Panel for both statutory compensation and common law purposes
- consolidation of the Dust Disease Medical Panel’s determination and assessment report of the worker’s degree of permanent whole of person impairment for statutory compensation and common law purposes.

## WCIMA23 key provisions

Part 2 Division 9, s. 25, s. 28, s. 35, s. 186, s. 421, s. 422, s. 426.

## Process overview

Streamlined legislative and administrative arrangements will apply to:

- making a dust disease claim
- Dust Disease Medical Panel assessments and determinations
- liability and compensation for dust disease claims
- common law damages for dust disease

### 1. Making a Dust Disease Claim

The approved claim form for general workers compensation claims is not to be used for dust disease claims.

The proposed workers compensation claim form intended to be approved and used for dust disease from the commencement date of the *WC/IMA23* is [Attachment 1 - Dust Disease Compensation Claim Form/ Request for WPI Assessment](#).

As for other claims the dust disease claim form must be accompanied by a certificate of capacity. The first certificate of capacity intended to be approved and used from the commencement date is identical in form and substance to the certificate used currently (only form number will change – see *Implementation Consultation – Certificates of Capacity*).

If a claim is made on an employer, the dust disease claim form and certificate of capacity given to the employer must be forwarded to the WorkCover WA CEO within 7 days.

### 2. Dust Disease Medical Panel

Referral to a Dust Disease Medical Panel

All dust disease claims will continue to be expedited to an expert, independent and experienced Dust Disease Medical Panel (formerly Industrial Diseases Medical Panel) to make a binding determination relating to the diagnosis of the dust disease and extent of any incapacity and degree of any impairment.

The questions a Dust Disease Medical Panel is required to determine are:

- (a) Is or was the worker suffering from diffuse pleural fibrosis, lung cancer, mesothelioma, pneumoconiosis or silicosis?
- (b) Is or was the worker incapacitated for work as a result of the injury by dust disease and, if so, what is or was the extent of the worker's incapacity for work?
- (c) What is assessed to be the degree of permanent whole of person impairment resulting from the injury by dust disease?

Question (b) relating to incapacity for work and extent is relevant for a claim for income compensation.

Question (c) relating to the degree of permanent whole of person impairment is relevant for dust disease lump sum compensation (s. 119) and common law damages (ss. 421, 426). Only a Dust Disease Medical Panel can assess whole of person impairment. APIA cannot assess impairment relating to a dust disease.

Lump sum compensation is payable if a worker suffers some degree of permanent whole of person impairment — see section 3 below. A worker's degree of permanent whole of person impairment must be at least 15% for the worker to be able to pursue common law damages — see section 4 below.

In determining the questions before it a Dust Disease Medical Panel will continue to maintain independence in its practices and procedures. There is no intention to prescribe practices and procedures in regulations.

Guidance will be issued by WorkCover WA on the general requirements of a Dust Disease Medical Panel so that all tests and information is available to the panel and an assessment and determination can be made as soon as possible.

#### Dust Disease Medical Panel Determination

The *WCIMA23* requires a Dust Disease Medical Panel determination to be made within 28 days after the panel has obtained all the information and documents necessary for the making of the determination.

A Dust Disease Medical Panel determination must be in writing in the approved form and must include the reasons for the determination.

In relation to the assessment of a worker's degree of whole of person impairment, a panel is required to provide a report of the results of the assessment in the approved form, including the certificate as to the worker's degree of permanent impairment and a statement of the reasons to justify the assessment.

The proposed approved form for a Dust Disease Medical Panel determination and assessment of a worker's degree of permanent whole of person impairment is at [Attachment 2 - Dust Disease Medical Panel Determination & WPI Assessment](#). The proposed form consolidates the determination and assessment.

### 3. Liability and compensation for dust disease claims

#### Liability for compensation

The *WCIMA23* and proposed regulations relating to liability decision making on claims (see *Implementation Consultation – Liability Decisions and Provisional Payments*) apply to a dust disease compensation claim with the following modifications:

- The time within which a liability decision notice must be given is 14 days after the insurer or self-insurer is notified of the Dust Disease Medical Panel determination in respect of the dust disease claim (instead of within 14 days after the claim is given to the insurer or self-insurer)
- An insurer or self-insurer cannot decline the claim on the issue of causation without having the required proof the dust disease was not from employment. The burden of proof shifts to the insurer/self-insurer who must prove the disease was not from employment in order to rebut the presumption. This is because a dust disease is taken to be (i.e. deemed to be) an injury from employment unless the employer proves otherwise.

Section 35 of the *WCIMA23* provides a mechanism for liability and apportionment issues to be resolved where there may have been exposure to asbestos or mineral dust in employment with more than one employer, without prejudice to the worker.

If there is more than one employer liable or potentially liable for a dust disease, the *WCIMA23* obligates the last employer who exposed the worker to the asbestos or mineral dust to deal with the claim and pay compensation even if the last employer believes some other employer is liable or there are questions as to how liability ought to be apportioned. The insurer must indemnify the employer.

In these circumstances the *WCIMA23* requires a worker to provide to the last employer any information in the worker's possession that the last employer may reasonably request for the purpose of identifying any relevant employment in which the worker worked before employment with the last employer. In order to facilitate this the [Attachment 1 - Dust Disease Compensation Claim Form/ Request for WPI Assessment](#) includes a comprehensive employment and exposure history.

Payment of income compensation, medical and health, and miscellaneous expenses

If a worker is entitled to income compensation for incapacity for work, or medical and health or miscellaneous expenses compensation, resulting from an injury by dust disease the compensation is payable in accordance with the *WCIMA23* as it is for any other injury.

Payment of lump sum for permanent impairment from dust disease

If a worker is entitled to lump sum compensation for permanent impairment resulting from a dust disease, the lump sum is only payable when the employer's liability is commuted by a settlement agreement (see *Implementation Consultation – Settlements* for further information on the settlement process).

#### 4. Common law damages for dust disease

Threshold requirements for dust disease common law claims

In order to commence or receive common law damages a worker suffering a dust disease must comply with the following requirements:

- The worker's degree of permanent whole of person impairment resulting from the injury by dust disease must be at least 15% as assessed by a Dust Disease Medical Panel; or
- As an alternative to an assessment by a Dust Disease Medical Panel the worker and employer may reach agreement that the worker's degree of permanent whole of person impairment is at least 15% and as to whether or not the worker's degree of permanent whole of person impairment is at least 25%.
- The assessment by the Dust Disease Medical Panel, or the agreement between the worker and employer, is recorded by the Director as the supporting assessment for the worker's election.
- The worker has elected in accordance with the regulations to retain the right to seek damages and the Director has:
  - (i) registered the election in accordance with the regulations
  - (ii) notified the worker that the election has been registered.

The *WCIMA23* requires that an agreement between a worker and employer must be accepted by the Director as if it were an assessment by a Dust Disease Medical Panel as to the worker's degree of permanent whole of person impairment resulting from the dust disease.

See *Implementation Consultation – Common law* for proposed approved forms for making an election and recording the agreement between a worker and employer as to the worker's degree of permanent whole of person impairment relating to dust disease.

#### WPI assessment by Dust Disease Medical Panel

If a worker has made a claim for compensation for dust disease, the Dust Disease Medical Panel to which the worker's claim was referred is the panel that assesses the worker's degree of permanent whole of person impairment for common law purposes.

If a worker has not made a claim for compensation and the parties do not agree on the worker's degree of permanent whole of person impairment for common law purposes the WorkCover WA CEO must constitute a Dust Disease Medical Panel to determine the following questions:

- (a) Is or was the worker suffering from diffuse pleural fibrosis, lung cancer, mesothelioma, pneumoconiosis or silicosis?
- (b) What is assessed to be the degree of permanent whole of person impairment resulting from the injury by dust disease?

The proposed form [Attachment 1 - Dust Disease Compensation Claim Form/ Request for WPI Assessment](#) also serves the purpose of an application or request for the Dust Disease Medical Panel to assess a worker's degree of permanent whole of person impairment where a worker may not wish to make a claim but is seeking common law damages only. A check box on the form is to identify whether the type of panel determination/ assessment required is for the purposes of both dust disease compensation and common law or is for common law purposes only.

A worker is taken to have a degree of permanent whole of person impairment resulting from the disease of at least 25% if the Panel determines the worker is:

- suffering from mesothelioma
- suffering from diffuse pleural fibrosis, lung cancer, pneumoconiosis or silicosis and that disease or condition is likely to cause the death of the worker within 2 years.

A Dust Disease Medical Panel determining a question for the purposes of dust disease common law damages claim is not bound by a previous assessment of a Dust Disease Medical Panel if the previous assessment has not been recorded by the Director as the supporting assessment for the worker's election to retain the right to seek damages (as required by the *WCIMA23*, s. 421(1)(b)).

#### Special arrangements relating to terminal dust disease

The *WCIMA23* provides for a worker suffering from a terminal dust disease to commence common law proceedings before the threshold requirements mentioned above have been complied with (assessment/ agreement of the worker's degree of whole person impairment and election registered). This preserves a worker's common law rights and enables proceedings to begin with respect to the terminal dust disease action whilst awaiting an assessment/determination of the worker's degree of permanent whole of person impairment by a Dust Disease Medical Panel and lodging the election.

#### Silicosis accrual period extended

Amendments to the *Limitation Act 2005* provide that the accrual of any common law action for a worker suffering silicosis is the same as for any worker who suffers asbestosis (accrues when the level of whole of person impairment is at least 25%).

This amendment ensures workers suffering silicosis with a low initial impairment are not time barred, which would have otherwise occurred if the worker's degree of impairment has not reached 15% or more within the 3-year limitation period (from date of diagnosis).

## WorkCover WA expectations

WorkCover WA expects insurers, self-insurers, legal representatives and authorised agents to actively assist workers and employers to use the proposed dust disease claim form.

## Transition

### Dust disease claims

The proposed dust disease claim form should be used for claims made from the commencement date of the *WCIMA23*. WorkCover WA expects insurers and self-insurers to accept the various types of administrative claim forms used for dust disease under the 1981 Act for an extended period of transition. After the commencement date claims should not be declined or delayed due to the use of the previously utilised claim forms for dust disease.

A claim made under the 1981 Act will be taken to have been made and continue under the corresponding sections of the *WCIMA23*.

If a worker has made a claim on an employer before commencement of the *WCIMA23*, a new claim form does not have to be made. The claim is taken to have been made under the *WCIMA23* and the employer and employer's insurer must respond to the claim as required under the *WCIMA23*.

### Medical panel determinations

A determination of a question by a medical panel under sections 38 (relating to dust disease compensation claims) or 93R (relating to dust disease common law claims) of the 1981 Act is taken to be a determination of that question by a Dust Disease Medical Panel under the *WCIMA23*.

### Common law actions

The common law provisions of the *WCIMA23* extend to a cause of action that accrued before commencement but do not apply to proceedings for damages that were validly commenced before commencement day of the *WCIMA23*, subject to some exceptions.

Transitional provisions in the *WCIMA23* address various scenarios relating to a cause of action for dust disease that accrued before the commencement of the *WCIMA23* and the status of elections, panel assessments or agreements as to a worker's degree of permanent whole of person impairment if proceedings on the cause of action have not been validly commenced (they are taken to be validly made under the *WCIMA23*).

Compliant settlement deeds (pursuant to s. 92(f) of the 1981 Act) where the worker has not elected to retain their right to proceed to common law which are received by the Director prior to implementation date will be recorded in accordance with the 1981 Act.

Common law deeds cannot be lodged after implementation date unless the worker has elected to retain their right to proceed to common law.

## Attachments

1. Dust Disease Compensation Claim Form/ Request for WPI Assessment
2. Dust Disease Medical Panel Determination and WPI Assessment



## Attachment 1 - Dust Disease Compensation Claim Form/ Request for WPI Assessment

### Section A – Type of Panel determination/ assessment requested

Dust disease compensation and common law purposes  Common law purposes only

### Section B - Diagnosed or suspected dust disease

Mesothelioma  Lung Cancer  Diffuse Pleural Fibrosis  
 Pneumoconiosis  Silicosis

### Section C – Worker’s details

Title  Given names  Surname

Occupation  Date of birth   Male  Female

Postal address   Unspecified

City/suburb  State  Postcode

Interpreter required?  Yes  No If so,  Language/dialect

### Section D – Worker’s representative details (if represented by a legal practitioner or authorised agent)

Company name

Contact person  Reference number

Phone number  Mobile  Fax

Email address

### Section E – Occurrence & other conditions

When and where did the applicant first become aware that they were suffering from a dust disease?

Date  Place

Is the applicant suffering from any other disease or injury?

Yes  No

Nature of disease/injury

Is the applicant under the care of a specialist?

Yes  No

Specialist Name Address

**Section F – Employment details of last employer where applicant was exposed to dust disease**

Employer name

Address

City/suburb

State Postcode

Occupation of applicant

**Section G – Current Employer**

Employer Name

Address

**Attached employment history form must be completed**

**Section H – Other claims or compensation**

Has the applicant claimed or received compensation or damages or does the applicant intend to claim compensation or damages from any other source (e.g. another State or Territory, the Commonwealth Government, overseas, common law) for the dust disease, other than by this claim?

Yes  No

Details of other claims or money received for dust disease

**Worker's declaration**

I declare that each and every answer above and the particulars contained herein or annexed hereto relating to myself and the occurrence are true both in substance and in fact to the best of my knowledge and belief. I take notice that, under the provisions of section 32(1) of the *Workers Compensation and Injury Management Act 2023*, I am required to give notice to my employer within 7 days if I commence work with another employer after making a claim, or while receiving income compensation.

Dated this: \_\_\_\_\_ day of: \_\_\_\_\_ Year \_\_\_\_\_

Signature of worker \_\_\_\_\_ + \_\_\_\_\_

**Consent authority (to be signed at the option of the applicant)**

I authorise any doctor who treats me (whether named in this form or not) to discuss my medical condition, in relation to my claim for workers compensation and return to work options, with my employer and with their insurer.

I consent to my employer's insurer and its appointed service providers collecting personal information, inclusive of sensitive information such as medical information about me and using it for the purpose of assessing and managing my workers compensation claim, including determining liability and whether my claim is true. This consent extends to my employer's insurer disclosing my personal information, inclusive of sensitive information, to other insurers, medical practitioners, rehabilitation providers, investigators, legal practitioners and other experts or consultants for the purpose of assessing and managing my claim. My personal information, inclusive of sensitive information, may also be disclosed as required or permitted by law. I also consent to my employer's insurer disclosing my personal details to WorkCover WA which is authorised to use this information to fulfil its functions and obligations under the *Workers Compensation and Injury Management Act 2023*. I have read all the information on this form regarding the consent authority and I consent to the Insurer dealing with my personal information in the manner described.

Dated this: \_\_\_\_\_ day of: \_\_\_\_\_ Year \_\_\_\_\_

Signature of worker \_\_\_\_\_ + \_\_\_\_\_

**Employment History**

Year start	Year end	Employer's Name & Location	Occupation and tasks performed	Exposure to asbestos?	Exposure to mineral dust?
				Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
				Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
				Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
				Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

## Attachment 2 - Dust Disease Medical Panel Determination & WPI Assessment

*Workers Compensation and Injury Management Act 2023*

<b>Questions</b>	<b>DDMP determination</b>
1. Is or was the worker suffering from diffuse pleural fibrosis, lung cancer, mesothelioma, pneumoconiosis or silicosis?	If yes, specify which disease(s)
2. Is or was the worker incapacitated for work as a result of the injury by dust disease and, if so, what is or was the extent of the worker's incapacity for work? <b>[Complete only if dust disease compensation claim made]</b>	If yes, specify whether total or partial incapacity
3. What is assessed to be the degree of permanent whole of person impairment resulting from the injury by dust disease?	% WPI]  Specify degree of WPI as a percentage (whole number), e.g. 65% WPI

Signed: \_\_\_\_\_ Date of Determination: \_\_\_\_\_  
signed by the Chairperson DDMP

Chairperson	Dr
Member	Dr
Member	Dr

**Dust Disease Medical Panel: Reasons for Determination****Assessment and Certificate of Worker's Degree of Permanent Whole of Person Impairment**

Name of worker	Click here to enter text.
Address	
Phone number	
Email address	
Date of Birth	
Injury	

Name of Employer/Insurer	
Address	
Phone number	
Email address	

Purpose of Panel	<input type="checkbox"/> Dust disease compensation and common law – s.123 & s.426 <input type="checkbox"/> Common law only – s.426
Date of Examination/ Assessment	
Examination/ Assessment Location	

**Reports and documents provided** (list of documents and information provided)

**A narrative history** (as provided by the worker on history of injury, occupational history and exposure, past medical history, smoking history)

**Physical examination**

State whether worker submitted for physical examination by panel or in absentia

**Diagnostic studies**

State whether worker submitted for physical examination by panel or in absentia

**Diagnosis and impairments**

**Statement as to the reasons for diagnosis of dust disease**

**The proportion of permanent impairment due to any previous injury that was not asymptomatic**

Disease	% of permanent impairment

**Impairment rating and rationale:**

The *American Medical Association Guides to the Evaluation of Permanent Impairment 5<sup>th</sup> Edition* (AMA 5) applies to the assessment of permanent impairment of the respiratory system, subject to the modifications set out by the *WorkCover WA Guidelines for the Evaluation of Permanent Impairment*.

Disease	AMA 5 (Respiratory System) Chapter 5 Table / Figure number	% of permanent impairment
Pneumoconiosis		
Silicosis		
Mesothelioma		
Lung cancer		
Diffuse pleural fibrosis		

**The calculation of the worker's degree of** permanent impairment (show how the degree of permanent impairment was calculated, detail if any combination of disease)

FEV1 is	% predicted normal
FVC is	% predicted normal
Total lung capacity is	% predicted normal
DLCO uncorrected is	% predicted normal
Transfer factor	

**Statement as to the reasons for arriving at the calculation of the worker's degree of permanent impairment**

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**Certificate of the worker’s degree of permanent whole of person impairment**

We certify that having assessed the above worker the degree of permanent whole of person impairment is \_\_\_% resulting from [insert dust disease]

**Statement as to the reasons for the worker’s capacity or incapacity for work and extent of incapacity, if any (complete only if dust disease compensation claim made)**

<p>Outline clinical reasons, e.g.</p> <p>No capacity for any work from [insert date] to [insert date]</p> <p>Partial incapacity for work from [insert date] to [insert date] performing:</p> <ul style="list-style-type: none"><li>1. Pre-injury duties/ modified or alternative duties/ workplace modifications</li><li>2. Pre-injury hours or modified hours of x hrs/ day or x days/ wk</li></ul> <p>Other conditions contributing to the worker being unfit for work</p>
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Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Chairperson: Dr Click here to enter text.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Member: Dr Click here to enter text.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Member: Dr Click here to enter text.

Note: WorkCover WA will forward copies of this Determination/ assessment to both the worker/worker’s representative and employer/insurer.