

Workers Compensation and Injury Management Act 2023

Implementation proposals for regulations and administrative instruments

Implementation Consultation Paper 19: Common Law

October 2023

Public comment on the implementation proposals
should be submitted to:

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 – Common Law

Scope

This document outlines the proposed process and procedure that will apply on commencement of the *Workers Compensation and Injury Management Act 2023 (WCIMA23)* with respect to:

- electing to make a common law claim, including the supporting assessment on the worker's degree of permanent whole of person impairment
- lodgement of common law settlements.

Background and Intent

The threshold requirements for the awarding of damages under the *WCIMA23* are the same as the 1981 Act:

- the worker's degree of permanent whole of person impairment must be at least 15%
- the worker must elect to retain the right to seek damages.

However, under the *WCIMA23* threshold requirements apply to both the commencement of proceedings and the awarding of damages.

This means a writ cannot be issued, or settlement of the common law claim effected, without the impairment assessment and election being registered.

Special provisions apply with respect to common law dust disease claims, including assessment of the worker's degree of permanent whole of person impairment by a Dust Disease Medical Panel or via agreement between the worker and employer. Proceedings for terminal dust disease common law claims may commence before a WPI assessment or election is made in order to preserve the action.

The maximum damages that can be awarded for less than 25% whole of person impairment is the same as the 1981 Act, as are the provisions for a reduction in compensation following the election.

Common law settlement agreements must still be lodged with the Director. However, the Director will no longer have a role in scrutinising any common law settlement for fraud or misrepresentation.

WCIMA23 key provisions

Part 7, s. 421, s. 422, s. 426, s. 433, s. 589, s. 590, ss. 655-658.

Process overview

Threshold requirements for common law claims

Common law proceedings cannot commence, and common law damages are not to be awarded until the procedural requirements in the *WCIMA23* are met:

- the worker's degree of permanent whole of person impairment resulting from the injury must be at least 15% as assessed by an approved permanent impairment assessor (unless a dust disease common law claim – see below)
- the worker has elected in accordance with the regulations to retain the right to seek damages and the Director has:
 - (i) registered the election and supporting assessment; and
 - (ii) notified the worker that the election has been registered
- the worker's statutory workers compensation claim has not been settled via a registered settlement agreement under the *WCIMA23*.

It is intended the regulations will require the election to be lodged with the Director in the approved form of [Attachment 1 - Election to pursue a common law claim](#).

The approved election form includes a section to specify the worker's degree of permanent whole of person impairment and requires the APIA assessment report to be lodged as the supporting assessment for the election (see *Implementation Consultation – Assessment of Permanent Impairment* for proposed APIA report and certificate).

It is a general principle that an assessment of a worker's degree of permanent impairment can only be done when a worker's condition has stabilised (i.e. has reached maximum medical improvement-MMI), unless the injury is a dust disease.

It is intended revised WorkCover WA Guidelines for the Evaluation of Permanent Impairment will provide for circumstances when a 'special assessment' can be done, notwithstanding MMI not being satisfied in relation to an assessment supporting an election for common law purposes. The Guidelines will provide for the assessment of a worker's degree of permanent impairment, notwithstanding the worker's condition has not stabilised (a 'special assessment ') if the following conditions are met:

- if, after the expiry of the period of 18 months after the day on which a 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.

If a special assessment is done for common law purposes this will be indicated by the APIA on the assessment report/ certificate.

The Director may refuse to register the election if not satisfied the worker has been properly advised as to the consequences of the election. The election form [Attachment 1 - Election to pursue a common law claim](#) includes a section for the worker to acknowledge awareness of the consequences.

As an alternative option the form also facilitates completion of a declaration by the worker's legal representative (where applicable) confirming the worker has been properly advised and understood the consequences of the election, and that the worker has instructed the legal representative to lodge the election for registration.

It is intended the regulations will require the Director to record the election and supporting assessment in a register kept for that purpose, as soon as practicable after the election form is lodged, unless the Director refuses to register the election.

The Director is required to notify the worker and employer that the election has been registered and the date of the registration (the election registration day) by completing the relevant section of the approved election form [Attachment 1 - Election to pursue a common law claim](#).

The election is taken to be registered on the day it is registered by the Director.

An election that the Director has registered cannot be withdrawn and, after the election is registered, another election in respect of the same injury cannot be registered.

The Director may rectify an error that was made in registering an election.

Dust disease common law claims

An election is also required in the case of a dust disease common law claim, but a worker's degree of permanent whole person impairment is as assessed by the Dust Diseases Medical Panel (not an APIA), or as agreed to between the worker and employer.

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.

Therefore, either the Dust Disease Medical Panel determination/ assessment or the agreement is to be lodged as the supporting assessment for the election.

It is intended an approved form will be issued by the Dust Disease Medical Panel to indicate the worker's degree of permanent impairment and will be required to be lodged if being used to support the worker's election for a common law dust disease claim (see *Implementation Consultation – Dust Disease* for proposed form of DDMP determination and WPI assessment).

It is intended an approved form will be used to indicate agreement between a worker and employer about the worker's degree of permanent impairment and will be required to be lodged if being used to support the worker's election for a common law dust disease claim: [Attachment 2 – Agreement about degree of WPI – Common law dust disease](#)).

A worker is taken to have a degree of permanent whole of person impairment of at least 25% resulting from the disease 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).

Common law settlements

The *WCIMA23* requires that where an action for damages is settled by agreement between the parties a memorandum of the terms of the settlement must be filed with the Director in the approved form within three months of execution of the agreement.

Unlike the 1981 Act, the *WCIMA23* does not require the Director to scrutinise the settlement for fraud or misrepresentation.

It is proposed the memorandum of the terms of the settlement agreement is taken to be in the approved form if:

- 1) If it is in the form of [Attachment 3 – Memorandum of terms of common law settlement](#), or
- 2) a copy of the settlement agreement is lodged that identifies the parties, the date and description of the injury and the amount of damages paid.

Lodgement and use of EDS

It is intended the substance of Part 8 of the regulations under the 1981 Act regarding lodging documents will apply to the election process and lodgement of common law settlement agreements.

This is to provide for matters such as the use of the electronic document system (EDS, or WorkCover WA Online), the effective day of lodgement and notification by the Director.

Unless otherwise approved by the Director, applications to lodge elections and common law settlement agreements will be made through the EDS. This will involve completion of the online application form, uploading a PDF scan of the signed election form and supporting WPI assessment report, and any common law settlement agreement.

WorkCover WA expectations

WorkCover WA expects parties to:

- use the approved forms for the election and provide supporting WPI assessment reports for all elections lodged after the implementation date
- ensure elections do not contain any blank, extraneous, deleted, strikethrough or irrelevant content
- request registration of elections on behalf of workers in a timely manner, having regard to the interests of the worker and the potential for delays in processing of elections by the CAS Registry
- lodge election documents and common law settlement agreements (s. 433 [s. 92(f) under the 1981 Act] via the EDS (WorkCover WA Online).

Transition

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 damages that accrued before the commencement of the *WCIMA23* and the status of elections, dust disease 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*).

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 were received by the Director prior to the implementation date of the *WCIMA23* will be recorded in accordance with the 1981 Act if they are compliant. Non-compliant settlement deeds will not be recorded by the Director and the effect of the Director's refusal to record the settlement agreement is set out in s.92(f) of the 1981 Act.

Compliant WPI assessments/agreements and/or common law elections received by the Director prior to the implementation date of the *WCIMA23* will be recorded in accordance with the 1981 Act. Non-compliant WPI assessments/agreements and/or common law elections will not be recorded by the Director and new documentation compliant with the *WCIMA23* will need to be lodged by the worker if they wish to proceed with recording of the WPI assessment/agreement and/or common law election.

Attachments

1. Attachment 1 – Election to pursue a common law claim
2. Attachment 2 – Agreement about degree of WPI – Common law dust disease
3. Attachment 3 – Memorandum of terms of common law settlement

Attachment 1: Election to pursue a common law claim

Workers Compensation and Injury Management Act 2023

Section 421

Personal details of worker

First Name(s)	Unit No. No. Street
Surname	Suburb
Date of Birth	State & Postcode
Occupation	Phone No
Claim number	Email address

Details of employer

Employer name	Employer address
Contact name	WorkCover number
Title	Phone No
	Email address

Details of insurer

Name	Address
Contact name	Phone No
Title	Email address

Injury Details

Description of injury	
Date of injury	Claim No
Date claim made	

Whole of person impairment assessment/ agreement

1. The worker's degree of permanent whole person impairment has been assessed by an Approved Permanent Impairment Assessor and is: %
.....
 Dust Disease only:
2. The worker's degree of permanent whole person impairment has been assessed by the Dust Disease Medical panel and is: %
.....
3. The worker's degree of permanent whole person impairment for a dust disease has been agreed to between the worker and employer as is:

At least 15%	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
and, whether or not,				
at least 25%	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>

Note: in each case above, the assessment/ agreement must be lodged with the election.

Record of whole of person impairment - supporting assessment

The Director has recorded an agreement or assessment as to the worker's degree of whole of person impairment supporting this election. Record number:

Warning notice

An election cannot be withdrawn after the Director registers it and a subsequent election cannot be made in respect of the same injury or injuries (see section 421(6) of the Act).

Registration of an election may affect your entitlement to statutory compensation under the *Workers Compensation and Injury Management Act 2023*.

You should seek appropriate independent advice before lodging this form.

Advice of consequences of election and request election be registered

I have been advised of the consequences of registering an election and understand that registration of an election may affect my entitlement to statutory compensation. I request that the Director registers this election.

Worker name Date
.....
 Worker signature
.....

The following is to be completed only if the worker's legal representative has advised the worker of the consequences of registering an election and is lodging the election on the worker's behalf:

I have advised [name of worker] of the consequences of registering an election and have been instructed by [name of worker] to request that the Director registers this election.

Legal representative's name _____

Law firm _____

Legal representative's signature _____

Date _____

Registration

This election has been registered by the Director:

Director's signature _____ Date _____

Election registration number _____

Attachment 2 – Agreement about degree of WPI – Common law dust disease

Workers Compensation and Injury Management Act 2023

Section 426

Details of worker

First Name(s)	Unit No. No. Street
.....
Surname	Suburb
.....
Date of Birth	State & Postcode
.....
Occupation	Phone No
.....
Claim number	Email address
.....

Details of employer

Employer name	Employer address
.....
Contact name	WorkCover no
.....
Title	Phone No
.....
	Email address

Details of insurer

Name	Address
.....
Contact name	Phone No
.....
Title	Email address
.....

Injury Details

Description of injury:	Pneumoconiosis	<input type="checkbox"/>	Lung cancer	<input type="checkbox"/>
	Silicosis	<input type="checkbox"/>	Diffuse plural fibrosis	<input type="checkbox"/>
	Mesothelioma	<input type="checkbox"/>		

Date of injury _____ Claim No _____

Date claim made _____

Agreement

It has been agreed between the worker and the employer that the worker’s degree of permanent whole of person impairment resulting from the dust disease is:

At least 15% Yes No

and, whether or not

at least 25% Yes No

Note: this agreement must be lodged with the Director to support an election to pursue common law damages. See approved form - Election to Retain Right to Seek Damages.

Signatures

Worker name _____ Date _____

Worker signature _____

Employer name _____ Date _____

Employer signature _____

Attachment 3 – Memorandum of terms of common law settlement

Workers Compensation and Injury Management Act 2023

Section 433

Note: use of this form is not required if the parties lodge with the Director a copy of the settlement agreement that identifies the matters listed in this approved form.

Date of agreement 01/01/2023
.....

Parties to agreement

Claimant Mr A Sample
.....

Defendant/s XYZ Pty Ltd
.....

Third party
.....

Election reference number

Reference number:
.....

Settlement

Terms of settlement Set out the key terms of the agreement including settlement
.....
sum (e.g. offer is inclusive/ exclusive of settlement of Medicare/
.....
Centrelink repayment), legal fees with balance to worker
.....
including any agreement as to costs of the claim, claim for
.....
damages, etc.
.....

Signatures

Worker name

Date

Worker signature

Employer name

Date

Employer signature