2023 Act Implementation Review
Consultation Paper Submissions

EBM Insurance & Risk Est. 1975

Thank you for the invitation to provide feedback on:

- The proposals contained in the Consultation Paper;
- Any other aspect of the processes; and
- WorkCover WA approved forms implemented on 1 July 2024

As a recognised stakeholder within the scheme, we submit our feedback via the submissions below. Further we'd like to express our interest in being a targeted stakeholder on the wording or marked up changes to drafts of the Regulations and key WorkCover WA approved forms before they are formally made.

The proposals contained in the Consultation Paper

1. The consultation paper contains proposals arising from 10 issues:
    a. Settlement agreements – approved form
    b. Permanent impairment agreement – PI Notice process
    c. Permanent impairment assessment by APIA
    d. Giving notice of intention to reduce or cease income compensation – return to work
    e. Giving notice of intention to reduce or discontinue income compensation – worker in custody
    f. Return to work program – approved form and guidance
    g. Noise induced hearing loss – claim form
    h. Noise induced hearing loss – audiological test report
    i. Broker access to personal information
    j. Additional modified penalties

Settlement agreements – approved form

2. With respect to Proposal 1, we agree with deleting the reference to 'future' amounts
3. We do not agree with including a statement in the settlement agreement that any compensation entitlement will not cease until the settlement agreement is registered by the Director
    a. The *Workers Compensation and Injury Management Act 2023* (WCIMA) provides a number of different ways in which income compensation can be lawfully discontinued
    b. These include circumstances where, inter alia, a worker has returned to work, commenced remunerated employment elsewhere, the general limit amount has been exhausted, or a worker has provided their consent for payments to cease
    c. The negotiated agreement for income compensation payments to cease the earlier of a specified date, or when the settlement agreement is registered, provides financial certainty to insurers as well as to the Director
    d. Not all settlement agreements will occur in circumstances where there is an ongoing entitlement, or desire, by a worker to receive income compensation payments from the date the settlement agreement is entered into and the date the settlement agreement is registered

e. Circumstances may prevail where the ongoing receipt of income compensation renders the settlement amount invalid or result in a windfall for the worker
    i. For example, a worker may be approaching the general limit amount and has indicated a preference to receive the remaining entitlement, after four weeks, by way of a lump sum settlement
    ii. In circumstances where income compensation continues to be paid, that worker would either receive more than the general limit amount when the settlement is registered, or the Director would refuse to register the agreement
    iii. Where the Director refuses to register the agreement, it will leave open the issue of any legal costs which may be claimed and, ultimately, prejudice the worker
    iv. Further, if the Director requests additional information be provided by the parties, or refuses to register an agreement and refers the matter to the Registrar, it would be prejudicial to the employer for income compensation payments to continue during that process in circumstances where the amount for future payments was predicated on the worker obtaining a future capacity – the worker would receive a windfall if the agreement was subsequently registered; it would be in the worker's financial interests not to expedite proceedings any more than is absolutely necessary

f. In circumstances where a settlement agreement is reached and the insurer has provided the forms to the worker for signing, and those forms are not returned for lodgement in a timely manner (or are returned incorrectly), the proposed amendment would prejudice the employer/insurer

g. In circumstances where the settlement agreement is reached and the insurer does not correctly lodge the agreement, the costs reflected against the claim will increase; whilst this may be taken into account by the insurer at renewal of the policy so as not to impose the financial burden onto the employer (by the insurer recouping its costs), where no consent is provided by the injured worker to share their information with the employer's insurance broker it will prejudice the employer/their insurance broker in marketing the account with any other insurer – essentially "pinning" the employer with the same insurer. This will create a financial incentive for insurers not to lodge documents correctly or in a timely manner.

Permanent impairment agreement – PI Notice process

4. We agree with Proposal 2

Permanent impairment assessment by APIA

5. We do not submit any proposed changes

Giving notice of intention to reduce or cease income compensation – return to work

6. We do not agree with Proposal 4
7. With respect to the proposal to add a statement of the amount of wages/remuneration paid/to be paid in the return to work position:

a. It is not practical in all circumstances to advise a guaranteed remuneration to be paid
    i. For example, casual workers are engaged on the basis of no guarantee of work/labour to be provided
    ii. A worker may be engaged to perform different tasks paid at different rates, such as higher duties, shift work, attendance for educational purposes, travel et al.
    iii. Workers may be entitled to remuneration for other expenses such as tools, uniforms/laundry, use of motor vehicle et al, subject to varying methods of calculation (such as per hour for each task, or quantity per swing etc)

8. With respect to including a declaration signed by an employer or insurer verifying the worker has returned to work:
    a. The person who has witnessed the return to work may not be authorised to execute documents on behalf of the employer
    b. The person executing the document may not be authorised to know the remuneration circumstances of the worker
    c. The supervisor or person monitoring the "return to work" may not be an employee of the employer
    d. The employer may not understand the full and legal concept of return to work for a variety of reasons (general application of the law, language barriers etc)
    e. Employers in WA often operate in remote areas and cannot always be contacted in, or execute forms in, a timely fashion
        i. This issue can extend to an employer being unable to provide a declaration due to health or other reasons
    f. Whether or not a worker has made a "return to work" is a finding of fact. The employer is not in a position to make a finding of fact, especially in circumstances where the return to work is not in the pre-injury role, but in a position that is similar in status and pay, noting the large volume of legal precedent dealing with such a finding.
    g. If the intention is to ensure the worker is informed as to whether they are receiving wages, or a combination of wages and income compensation, the form without a finding of fact by the employer satisfies that intention – it remains open to the worker to dispute the notice if they do not agree with it
9. Part 6 (Dispute Resolution), s305 of the WCIMA states:.

The object of this Part is to provide a fair and cost effective system for the resolution of disputes under this Act that —

(a) is timely; and

(b) is accessible, approachable and professional; and

(c) minimises costs to parties to disputes; and

(d) in the case of conciliation — leads to final and appropriate agreements between parties in relation to disputes; and

(e) in the case of arbitration — enables disputes not resolved by conciliation to be determined according to their substantial merits with as little formality and technicality as practicable.

10. With respect to whether 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:
    a. There is nothing compelling the worker or the other employer to provide any of this information
    b. The intention of this notice is interlocutory in nature – to add a requirement to addend evidence (the nature of which is not regulated and therefore open to dispute in each and every case) to the notice:
        i. adds unnecessary burden on the employer/insurer;
        ii. will result in a windfall to the injured worker; and
        iii. will frustrate the legislative purpose to resolve disputes in a timely manner
11. With respect to the return to work notices in general, we submit it ought to be open to both the employer and insurer to issue the notice

Giving notice of intention to reduce or discontinue income compensation – worker in custody

12. We generally agree with Proposal 5
13. We consider it appropriate to put expeditious timeframes, such as no more than seven days, in place for the Government to provide a response to the insurer
14. In circumstances where no response has been received, where the employer/insurer has reasonable grounds to believe the worker is in custody, it ought to be open to the employer/insurer to suspend income compensation until advised otherwise by WorkCover WA

Return to work program – approved form and guidance

15. We do not have a position with respect to the return to work program, form IM1

Noise induced hearing loss – claim form

16. We agree with Proposal 7, provided the worker is required to attest on the form that the date being provided as being true and correct.

Noise induced hearing loss – audiological test report

17. We agree with Proposal 8

Broker access to personal information

"Insurance brokers" and "workers compensation insurance brokers"

18. Under s11 of the *Insurance Contracts Act 1984* (Cth) an *insurance broker* means a person who carries on the business of arranging contracts of insurance, whether in Australia or elsewhere, as agent for intending insureds.
19. An *insurance broker,* as an insurance intermediary, can act as agent for the intending insured and also has capacity to act for insurers under binder agreements. When acting for the either party, the *insurance broker* is bound by the common law principles of agency.
20. Pursuant to the *Corporations Act 2001 (Cth)*, an *insurance broker* is required to hold an Australian Financial Services License (AFSL) when providing financial services, including dealing in or advising insurance products.
21. In addition, *insurance brokers* are also subject to provisions of the *Insurance Contracts Act 1984* (Cth), as well as the *Australian Securities and Investments Commission Act 2001* (Cth), the *Competition and Consumer Act 2010* (Cth), and the *Privacy Act 1988* (Cth).
22. Further, *insurance brokers* that provide financial services to retail clients are members with the Australian Financial Complaints Authority (AFCA).
23. *Insurance brokers* also have the option of becoming members of *the* National Insurance Brokers Association (NIBA) and being bound by the *Insurance Brokers Code of Practice*. Membership is voluntary, but many *insurance brokers* choose to join because NIBA represents the insurance broking industry and provides professional support.
24. Section 212 of the WCIMA provides a subset definition of *insurance broker*, namely that of a *workers compensation insurance broker*. Relevantly, it states:

    workers compensation insurance broker *means a person who engages in a business that includes acting as agent for an employer in connection with insurance required by this Act (**workers compensation insurance**).*

25. When an *insurance broker* is engaged by an employer to arrange workers compensation insurance for the prospective insured in accordance with an employer's obligations under the WCIMA, the broker is an *insurance broker* and a *workers compensation insurance broker*.
26. The Consultation Paper states "Brokers" currently operate in the WA scheme without legislative oversight. As outlined in 18-23 above, i*nsurance brokers* (whether performing the function of a *workers compensation insurance broker* or otherwise) do operate with significant legislative oversight.

Observations of an inconsistent approach

27. The collection, use and disclosure of a worker's personal information is not, in all cases, limited to recognised stakeholders under the WCIMA.
    a. For example, employers will often outsource the management of payroll and other HR functions (such as the management of sick leave) to an external party

   b. In that instance, the insurer must liaise with the external party to not only collect information but to use the worker's personal information (such as income compensation rate, leave entitlements, termination payments and the like)

28. It is not uncommon for an arrangement to see employees from multiple organisations working onsite with one another
    a. This may arise due to multiple parties being contracted to perform services and/or the engagement of a labour hire provider to supply labour where one or more employers have been unable to do so
    b. In these circumstances, without the sharing of the workers personal information – such as their medical information with the onsite supervisor for the purposes of a return to work program – the employer, worker, workplace rehabilitation provider and/or insurer would not be able to fulfil its statutory function
29. Section 13 of the WCIMA (and Reg15 of the *Workers Compensation and Injury Management Regulations)* state NDIS scheme participants as being the employer (in prescribed circumstances). It many cases, the disabled participant may not have the mental capacity or physical capability to satisfy their obligations as an employer
    a. In these cases, the NDIS participant will engage a third party – much like a *workers compensation insurance broker* – to act on their behalf
    b. These third parties may also be organisations structured to assist in the management of NDIS funds, accountants or family members of the participant
    c. An NDIS participant may not have attained the age of 18 years and would be limited in its ability to enter into any agreements or execute documents as the "employer"
30. These are examples of circumstances which are not uncommon and which the Bulletin released in July 2024 would suggest should be dealt with via a signed consent from the worker in each and every circumstance
31. This is simply not practical.

Statutory product

32. Given workers' compensation is a statutory product wherein the policy wording and claims management is legislated and falls outside the control of the insurer, other factors have higher prevalence for employers when choosing to place business with an insurer
33. In many cases, this is borne from the fact the authorised officer(s) for the employer has an obligation to exercise due diligence when selecting an insurer and authorising the use of funds to procure the insurance
34. Notwithstanding the concept that each insurer is required to provide terms when approached by an employer/*workers compensation insurance broker*, the reality in practice is that there are 4 insurers – Allianz, CGU, GIO, and QBE - where business will likely be placed
35. Each insurer uses different algorithms to price a policy, often in line with its market risk appetite

36. In addition, each insurer approaches claims management philosophy differently, risk prevention and education is different, and each insurer has different experience, capability and resources with which to manage claims
37. Not all insurers are always adequately staffed or have adequately educated claims officers to manage claims with the necessary authority

Insurer and Self-insurer Principles and Standards of Practice (ISPSP)

38. The ISPSP compels insurers to provide a base line level of communication and service to stakeholders
39. In our experience as a stakeholder – *workers compensation insurance broker* – insurers (overall) are failing to consistently meet the base level of service
40. Further, client feedback as a stakeholder – employer – reflects our own experience.
41. We have also received consistent feedback from other stakeholders – workplace rehabilitation providers, healthcare providers, and legal providers – in line with our own experience
42. Whilst each insurer within the underwritten scheme is a profit driven Company, without differentiation between insurers on claims management and pricing, the opportunity for employers to actively consider which insurer is best placed to help their injured workers return to work and hold an equitably priced policy to cover the costs of any claims will significantly deteriorate, if not disappear.
43. This will have in negative economical impact as well as a financial impact on scheme performance and compliance
44. Pricing factors will often include elements such as safety procedures, investment in plant and equipment, as well as onsite or external experienced and qualified personnel. It will also consider claims history – such as frequency, cost, duration, and severity of claims.
45. These are all elements an *insurance broker* must be aware of when looking to best represent their employer client during discussions with an insurer to place business
46. Claims cost, duration and severity are all directly impacted by the insurers claims management performance: are liability decisions being made in a timely manner, are income compensation payment being correctly calculated, are appropriate return to work efforts being enacted and the like
47. The ISPSP seek to positively influence these factors
48. Employers are not experts in workers compensation. Employers rely on *insurance broker* to assist them in placing business at the most appropriate price with the insurer that will provide the most appropriate claims management assistance.
49. Further, we submit employers do have many statutory obligations under the WCIMA, for example:
    a. obtaining an insurance policy
    b. establishing and maintaining an injury management system
    c. receiving and managing claims
    d. commencing income compensation payments
    e. reducing, suspending or discontinuing income compensation

f. retention of the worker's position
g. managing return to work programs

50. Employers then rely on their *insurance broker* to assist them in ensuring:
    a. they are meeting their statutory obligations; and
    b. the insurer is acting responsibly and equitably.
51. It is appropriately expected that where the insurer is not doing so, the *insurance broker* will assist in navigating the often complex and challenging pathways to restore the proper course of action and bring stability to the situation.
52. Accordingly, an *insurance broker* requires access to the worker's personal information because it is reasonably necessary to enable to *insurance broker* to perform its duties and the information is obtained in a professional capacity

The impact

53. The reality is that by excluding *insurance brokers* from that process, it:
    a. removes a necessary level of stakeholder oversight on the performance of an insurer;
    b. diminishes the overall scheme participants satisfaction, especially that of the injured worker;
    c. places undue burden on employers;
    d. leaves an employer without professional assistance (which may result in or cause injustice and significant costs for an employer);
    e. inflates claims costs;
    f. increases return to work and overall claim duration; and
    g. degrades scheme performance.
54. This, in turn, directly impacts the pricing of the policy on renewal and the ability of the *workers compensation insurance broker* to remarket the account.
55. We have already started to see the impact on a variety of clients
56. The impact extends to the experience of the injured worker as well as other service providers, as decisions are not made appropriately or in a timely manner, and communication with stakeholders has dropped off significantly.
57. Section 232(1) of the WCIMA states:

    (1) WorkCover WA may monitor and review the workers compensation functions of licensed insurers to determine whether those functions are being carried out effectively, economically and efficiently and in compliance with this Act, the regulations and any conditions of the insurer's licence.

58. There appears little to no appetite to hold insurers to account with respect to service, capability and capacity, despite the introduction of ISPSP and the purpose of s232(1)
59. This is particularly concerning, given the significant amount of resources that have been put into warning (often incorrectly, based on incorrect data from insurers), and prosecuting employers
60. The refusal to provide relevant information about the management of claims also affects the ability of the insurer to be transparent on how they have priced a policy.

a. For example, if the insurer recognises their negligence in the management of a claim has increased the claims cost by $100,000 in income compensation, the ISPSP indicate the insurer must indicate how they have discounted the premium cost at renewal; however, in doing so they would be releasing financial information without consent
b. The option of not discounting the premium in this instance, due to consent not provided by the worker, would financially prejudice the employer

The commentary in the Consultation Paper

61. With respect to combining insurers and brokers in a claim form consent authority, the commentary suggests that without consent, the insurer's capacity to make timely liability decisions and manage claims under the WCIMA may be compromised and that (in effect) the WCIMA does not impose the same obligations on an employer and *workers compensation insurance broker* as it does with an insurer
62. Therefore, the consent authority in the claim form is worded specifically to facilitate collection and disclosure of personal information to assist the insurers
63. We do not disagree with this position
64. The commentary proceeds to reference the NIBA/ICA consent authority and wording used to describe the role of the Broker/WR & IMC, before concluding there is not a proposal to include "brokers" or workplace risk and injury management consultants (BWRIMCs) on the claim form
65. No commentary (or subsequent proposal) is offered as to the potential for extending the purpose of the consent authority outside of facilitating liability decisions and claims management by insurers by including BWRIMCs (or just *insurance brokers,* or *workers compensation insurance brokers*)
66. Further, there is no commentary (or subsequent proposal) offered to amend the claim form to include an additional section for the specific purpose of allowing a worker to provide their consent for the insurer to share information with the employer's BWRIMC (or just *insurance broker,* or *workers compensation insurance broker*)
67. Notwithstanding the above, where the claim form is a regulated form in other underwritten workers compensation jurisdictions in Australia, the value of the *insurance broker* is recognised by their inclusion on the claim form
    a. In Tasmania, the claim form for an injured worker requests, at the worker's option, consent to release information by various stakeholders, to the worker's employer and the insurer
    b. With respect to the insurer collecting and using their information, implied informed consent is provided by the worker (see Page 6 of the claim form), in which insurance intermediaries (such as *insurance brokers*, *workers compensation insurance brokers,* and BWRIMCs) is referred to
    c. In the Norther Territory, a similar approach has been adopted, wherein the employer's service providers are included in the express consent provided by the injured worker
68. It then states BWRIMCs do not perform statutory functions and there is no legislative oversight, one consequence of which is that it is not appropriate for the role to be included in the Regulations
69. We submit that statement – for the purposes of an *insurance* broker - is flawed, for the reasons set out above

70. We agree with the comments under the heading "Communication expectations & non-personal information"
71. The paper provides commentary on the "Broker" status in disputes and settlements:
    a. Brokers are not permitted to use the WorkCover WA Online portal
    b. The NIBA/ICA consent authority also does not (and cannot) authorise brokers (or claim agents) to have any standing in, or have the same status and information and access rights as the employer or insurer with respect to:
        i. Settlement registration processes
        ii. Dispute proceedings
72. We submit it is appropriate for an authorised representative – being a person authorised by the employer to act on its behalf – to access copies of hearing notices and outcomes
73. In the Consultation Paper, under the heading "Combining insurers and brokers in claim form consent authority", commentary about the NIBA/ICA consent form acknowledges the wording is "*…appropriately worded to enable (BWRIMCs) to perform these non-statutory commercial functions on behalf of employers*"
74. Part of the wording, includes, '*…navigating the scheme in laymans terms, advising on compensation entitlements and income compensation calculations as well as suitable return to work options*'
75. We therefore submit BWRIMCs <u>are</u> authorised by the employer <u>and the injured worker</u> to attend with, or on behalf of, the employer in dispute proceedings, and be given access to the same information as the employer
76. Such an approach would also be consistent with the commentary in "Communication expectations & non-personal information"

Solution

77. We submit:
    a. *Insurance brokers* (and/or BWRIMCs) should be included on the claim form:
        i. as part of amended wording of the current consent authority; or,
        ii. as part of a separate section requiring a second signature; or
        iii. as part of the explanatory information to ensure there is implied informed consent.
    b. In the alternative, *insurance brokers* should be permitted access via amendment to the Regulations
78. If a separate consent authority is required, where the NIBA/ICA consent (or equivalent) has been provided, BWRIMCs be afforded the same access to information, and the same standing, as the employer (where authorised by the employer) in dispute proceedings

Additional modified penalties

79. We have no position with respect to Proposal 10

Any other aspect of the processes

80. We have no submissions with respect to any other aspect of the processes

WorkCover WA approved forms implemented on 1 July 2024

81. We have no submissions with respect to any other WorkCover WA approved forms implemented on 1 July 2024.