Workers Compensation and Injury Management Act 2023

Proposed Act Amendments

Consultation Paper

February 2026

Draft proposals only

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

D2026/44773

Overview

The *Workers Compensation and Injury Management Act 2023* (the Act) came into operation on 1 July 2024.

The Act was part of a suite of changes to modernise workers compensation laws and included changes to subsidiary legislation and WorkCover WA administrative instruments.

WorkCover WA monitors data and information from various sources to ensure the Act is implemented as intended.

The Act has been in operation for over 18 months and the feedback has been generally positive.

However, a rewrite of a large statute that governs the operation of the whole workers compensation and injury management scheme will inevitably result in some issues requiring further technical changes or refinements.

In early 2025 WorkCover WA undertook an administrative review of key forms and processes. Following a consultation process WorkCover WA implemented a small number of minor changes to key forms and administrative instruments, effective 1 July 2025.

While the scope of the administrative review did not extend to potential amendments to the Act, some submissions and informal discussions with key stakeholders since 1 July 2024 highlighted issues that may require Act amendments. Through its monitoring activities WorkCover WA has also identified a number of areas where Act amendments would be beneficial to ensure the Act operates as intended.

This paper proposes a number of Act amendments for public comment and covers the following issues:

1. Streamlining the process for reaching agreement on a worker's percentage permanent impairment for permanent impairment compensation
2. Providing capacity to include extended medical and health expenses and income compensation in settlement agreements
3. Clarifying processes for registration and scrutiny of settlements
4. Improvements to the process for confirming a worker is in custody
5. Providing for arbitrators to determine state of connection disputes
6. Facilitating early WorkCover WA oversight of uninsured employer claims requiring a liability decision
7. Clarifying when WorkCover WA's Default Insurance Fund is required to pay damages of an uninsured employer for historical long latency claims
8. Confirming the obligation of the Insurance Commission of WA (ICWA) to make financial contributions to WorkCover WA's general account as a licensed insurer.

Consultation and next steps

WorkCover WA is seeking feedback on the proposals contained in this paper and any proposal considered necessary to ensure the Act operates as intended.

The scope is limited to required technical amendments to address issues associated with the implementation of the Act on 1 July 2024 and is not intended to consider entitlement reform or scheme redesign.

The proposals are intended to facilitate public comment and do not represent the final position of WorkCover WA, the Minister or Government.

WorkCover WA invites written submissions by **10 April 2026** which may be provided by email to:

Manager Policy and Legislative Services

Email: consultation@workcover.wa.gov.au

All submissions will be published on the WorkCover WA website, unless confidentiality is requested.

After the public consultation period ends, WorkCover WA will review the submissions, provide a consultation report and finalise recommendations to the Minister for Industrial Relations.

For supporting information on the legislative framework and for a link to the Act and Regulations refer to the WorkCover WA website:

Legislative Framework: Approved Instruments, Forms and Notices - WorkCover WA

Settlements Overview

The Act provides a worker and employer may enter into a written agreement to commute to a lump sum the liability of the employer to pay compensation to the worker and permanently discharge the liability of the employer.

The intention of the settlement provisions in the Act is to establish a single settlement pathway for statutory claims.

Registration of a settlement agreement is the only pathway to settle a statutory workers compensation claim. The Act precludes the use of common law agreements (deeds) to settle statutory claims.

There are minimal barriers to settlement of statutory claims compared to the *Workers' Compensation and Injury Management Act 1981* (the 1981 Act).

A settlement agreement must be in the approved form and has no effect unless registered by the WorkCover WA Director (the Director). The registration of a settlement agreement requires an explicit acknowledgement the injured worker is aware of the consequences of registering the settlement agreement. This acknowledgement forms part of the approved form of the settlement agreement.

The Director is required to scrutinise settlement agreements for genuineness and to be satisfied agreements include the correct amount payable for any permanent impairment (PI) compensation. The Director must refuse to register a settlement agreement if of the opinion the agreement was obtained by fraud, undue influence or other improper means.

The approved settlement form is published on the WorkCover WA website as *SF1 Settlement Agreement*. An application to register a settlement agreement must be completed using the EDS (WorkCover WA Online).

The Conciliation Service Registry undertakes various compliance checks on behalf of the Director including:

- completeness and accuracy of all information on the settlement agreement and supporting documents, including lump sum compensation amounts and degree of permanent impairment
- indications that the agreement was obtained by fraud, undue influence or other improper means
- checking whether maximum limits have been or will be exceeded
- ensuring payments for common law damages are not included.

Key Issues

Non-compliant settlements

A high volume of non-compliant settlement applications after 1 July 2024 led to a processing backlog. As a result, registration timeframes ballooned to well outside the usual one to two weeks.

Extra WorkCover WA resources were put in place in early 2025 to assist with the increased volume of settlements and the administration for applications that require either a rejection notification or an invitation to rectify errors. These compliance checks and notifications have consumed settlement agreement processing resources, particularly in the first year of operation.

Common errors/issues include:

- illegible documents
- unsigned or undated settlement forms
- inconsistencies between data entered by lodging party and the supporting documents uploaded
- no response to invitations to rectify errors or partial response despite reminders
- non-compliance with the permanent impairment notice process (s.105) and sequencing errors with dates of PI notices and settlements

- settlements lodged with no amount for permanent impairment compensation despite the worker having an obvious impairment based on the worker's medical condition
- errors in reports by approved permanent impairment assessors, including calculation/ rounding and requirements around maximum medical improvement (MMI)
- whether a special assessment is permitted when MMI not reached
- amounts that exceed statutory limits for particular forms of compensation.

To assist parties in the lodging of compliant settlement agreements and accompanying documents, WorkCover WA published a settlement registration guide. The settlement registration guide includes:

- an overview of the steps in registering a settlement agreement
- a high-level summary of common errors
- a checklist for parties to use when lodging a settlement agreement with WorkCover WA
- a detailed description of common errors and how to rectify them.

The backlog of settlements has been addressed and timeframes are back to usual.

WorkCover WA continues to monitor the quality of entered application data and the lodgement of required settlement documents. However, while the error rate has reduced it is not yet at an optimum level. There is a need to consider legislative issues that may also contribute to these problems.

ATO class ruling – Tax on settlement amounts

The insurance and legal industry approached WorkCover WA and the Minister in late 2024 regarding a private ATO tax ruling given to a plaintiff law firm that determined tax is payable on the income compensation component of settlements registered with WorkCover WA.

WorkCover WA was informed by insurers and law firms that historically settlement negotiations on the amount of weekly compensation for lost earnings (under the 1981 Act) had generally been based on net values rather than gross values, and that the ATO ruling is a change in position.

On 17 December 2025 the Australian Taxation Office (ATO) published Class Ruling CR 2025/88 with respect to settlement of a workers compensation claim in the Western Australian workers compensation scheme.

WorkCover WA facilitated the ATO Class Ruling to provide certainty to stakeholders and avoid the need for individual stakeholders to seek private rulings.

The Class Ruling published on 17 December 2025 sets out the income tax consequences under the *Income Tax Assessment Act 1997* of specific listed compensation amounts received under a registered settlement agreement in accordance with section 149 and Part 2, Division 12 of the 2023 Act.

The Class Ruling confirmed the position in the 2024 private ruling and provides income compensation commuted to a lump sum in a settlement agreement is assessable as 'ordinary income' under tax law and must be included in a worker's income tax return in the year it was received.

Other forms of compensation commuted to a lump sum in a settlement agreement are not assessable as ordinary income and should not be included in a worker's income tax return.

The position of the ATO on settlements is not directly related to terminology changes from 'weekly payments' to 'income compensation' between the 1981 and 2023 Acts. Had a more recent class ruling been obtained under the 1981 Act it is highly likely the position would have been the same. For example, the ATO ruling directly refers to a 2003 Administrative Appeals Tribunal decision which applied the same principle to 'weekly compensation payments' under the Comcare scheme.

The ATO considers the character of the income compensation payment to be a substitute for periodic payments of salary or wage, or loss of earnings. From a scheme perspective the ATO have not otherwise mischaracterised the payment type from what it was before.

There are potential cost and administrative impacts as a result of the ATO Class Ruling and these are currently being considered. WorkCover WA is working with industry and the ATO to clarify these impacts.

The characterisation of payments which attract tax obligations with respect to settlement agreements is a decision for the ATO and should not be addressed with legislative amendments.

Settlements: Limit on Amount(s)

The Act provides for the following forms of compensation and compensation limits which are relevant to settlement agreements:

- income compensation (general limit)
- medical and health expenses (general limit)
- permanent impairment compensation (lump sum limit)
- dust disease impairment compensation (lump sum limit)
- workplace rehabilitation expenses (limit)
- miscellaneous expenses (reasonable, caps apply to wheelchair)

The Act also provides a limit on the combined total of income compensation and permanent impairment compensation (cannot be more than the income compensation general limit).

The Act provides that a settlement agreement that provides for damages cannot be registered. This ensures the statutory settlement pathway is limited to compensation only. Any provision for damages must be made as part of a common law claim in compliance with the election procedures in the Act.

Issues:

The following issues have been raised by scheme participants:

- consideration of whether the Act should be amended to authorise a global lump sum amount in settlement agreements, either as an uncapped global settlement amount, or a global capped amount but with less categorisation of the settlement component parts (income compensation, permanent impairment compensation, medical and health expenses compensation, workplace rehabilitation expenses)
- constraints on including extensions to the medical and health expenses limit in settlement agreements
- constraints on including extensions to the income compensation general limit in settlement agreements.

Global uncapped settlement amount

The capacity to negotiate a global uncapped lump sum amount in settlement agreements may be argued to have the following benefits:

- lump sum amounts are generally negotiated with a global figure in mind
- greater flexibility to negotiate a lump sum amount on a commercial basis
- parties should be free to agree on whatever amount is negotiated
- avoids having to account for the component amount(s) of a settlement agreement and the errors and delays this causes in the registration process and with the ATO
- more akin to the common law settlement pathway in the 1981 Act that was used to settle complex statutory claims in the District Court with or without a common law election.

WorkCover WA does not support settlements comprising a global uncapped lump sum amount without any regard to entitlement caps or limits.

The capped entitlements in the Act provide for different circumstances – to pay for medical and health treatment, compensate for incapacity for work, or compensate for permanent impairment resulting from an injury. These different entitlements and caps, and the worker's specific circumstances should be considered on their merits whether as part of the ongoing management of a claim or as part of settlement negotiations.

An uncapped global lump sum amount would remove any reference point in the Act as to what a maximum amount should be for a particular form of compensation and potentially include an amount for damages which should be prohibited.

While it is acknowledged negotiations may be held with a global lump sum in mind, the Act provisions, entitlements and lump sum limits relating to a worker's medical condition, individual circumstances, incapacity for work and any permanent impairment should frame these discussions.

Identification of settlement amounts for each compensation type

Complying with lump sum limits and entitlement caps but with less categorisation of the make-up of a settlement does not appear to be a viable option.

The Act has clearly established limits on all major forms of compensation and the expectation is that prior compensation paid for each type of entitlement is factored into the calculation of settlement amounts for each component part of the settlement agreement.

In any event, the amount of permanent impairment compensation cannot be negotiated; it is set out in the Act as a percentage of the lump sum limit for the relevant item based on the agreed or determined percentage of the worker's permanent impairment.

The Act also requires a settlement agreement to include permanent impairment compensation to which the worker is entitled, and the Director must be satisfied the correct amount of permanent impairment compensation is included in the settlement agreement (see proposal 4 regarding changes in this regard).

There is also a statutory limit on the combined amount of permanent impairment compensation and income compensation (cannot be greater than the income compensation general limit).

Without specific reference to the amount of income compensation and permanent impairment compensation it would be impossible to verify whether the combined amount for permanent impairment compensation and income compensation exceeds the income compensation general limit. A settlement agreement therefore needs to identify the amounts for both income compensation and permanent impairment compensation as a minimum.

It would not be appropriate to amend section 157 to address this problem by removing the combined limit on income compensation and permanent impairment compensation. This would potentially result in significant cost increases to the scheme, doubling the entitlement of a worker eligible for 100% of the permanent impairment lump sum and who is also permanently incapacitated.

In the absence of a clear way to facilitate global settlements under the Act, there is no proposal to make amendment to the Act in this regard. The settlement agreement should continue to identity the amount(s) payable for each type of compensation entitlement.

Proposals to address specific entitlement limits and the registration and scrutiny of settlements comprising permanent impairment compensation are considered in the following sections.

Proposal

Proposal 1 – Transparency of settlement amounts

The settlement agreement form continues to identify the amount(s) to be paid for each form of compensation, in addition to the total amount settled.

Medical and health expenses above limit

The Act currently does not permit workers and employers to include an extended amount above the medical and health expenses general limit in a settlement agreement.

Instead, sections 77 and 78 only permit an arbitrator to order a standard or special increase to the medical and health expenses general limit if the eligibility criteria are satisfied.

WorkCover WA proposes Act amendments to permit parties to include extended amounts for medical and health expenses in a settlement agreement, as an alternative option to an arbitrator's order.

Any extended amount in a settlement agreement would be limited to the caps specified in sections 77 and 78 of the Act respectively, with the onus on the worker to satisfy the insurer or self-insurer the criteria are met, rather than an arbitrator.

Insurers and self-insurers are well placed to assess applications for additional medical expenses, having done so under the 1981 Act, and because they have knowledge of the worker's injury and treatment pathway having managed and approved medical treatment as part of the worker's claim journey.

The ability to apply for an arbitrator's order will continue to be provided for in the Act if there is a dispute about extended medical and health expenses.

Income compensation above general limit

The Act currently does not permit workers and employers to include any additional income compensation amount ordered by an arbitrator under section 52 to be included in a settlement agreement.

WorkCover WA proposes Act amendments to permit parties to include in a settlement agreement the amount of additional income compensation ordered by an arbitrator.

Unlike the proposal for additional medical and health expenses it is proposed the decision to extend the income compensation limit should remain a decision of an arbitrator only. This is because there are additional criteria to consider in awarding an additional amount of income compensation beyond the general limit including whether a worker has a permanent total incapacity for work - which is often contested.

Section 52 should also be amended to:

- clarify the total limit of any additional income compensation amount awarded is 75% of the income compensation general limit amount applying on the day on which the order is made, and
- an Arbitrator can order payment of a specified lump sum (not only the applicable compensation rate paid periodically for a specified period).

Proposal

Proposal 2 – Inclusion of extended medical and health expenses and income compensation in settlements

Amend sections 77 and 78 to provide for a worker and employer to agree to extend the medical and health expenses general limit (up to the limits for a standard or special increase respectively) and for the agreed extended amount to be included in a settlement agreement, without the need for an order of an arbitrator.

Amend section 52 to provide for a worker and employer to include the total amount of any additional income compensation up to 75% of the income compensation general limit in a settlement agreement if ordered by an arbitrator under section 52.

Settlements – Agreement on Degree of Permanent Impairment

Permanent impairment compensation is only payable as part of settlement of a worker's claim.

The Act provides that a worker and employer must reach agreement on the percentage of permanent impairment based on an assessment by an Approved Permanent Impairment Assessor (APIA) for permanent impairment compensation purposes. Agreement is reached and recorded on an approved form known as a permanent impairment notice (PI Notice) which is signed by the worker and employer.

There are two PI notices: SF3 is completed in all instances with SF4 only used if there is no agreement on the level of permanent impairment specified in the SF3 notice and a further APIA assessment is exchanged between the parties.

An application to register a settlement agreement that includes permanent impairment compensation must be accompanied by:

- the permanent impairment notice indicating the worker and employer's agreement on the degree of permanent impairment
- APIA assessment report(s) on which the agreed degree of permanent impairment is based.

The process and timeframes that apply to agreement on the level of impairment are that within 28 days after being given the SF3 permanent impairment notice the employer must:

- notify the worker, in the manner required by that notice, whether the employer does or does not agree with the assessed degree of permanent impairment
- if the employer does not agree with the assessed degree of permanent impairment, request a further assessment with the cost of that further assessment to be paid by the employer.

If the employer requests a further assessment of the worker's degree of permanent impairment, the employer must, within 14 days after obtaining the further assessment, give a copy of the further assessment to the worker using the SF4, and either:

- agree with the degree of permanent impairment indicated in the original assessment; or
- negotiate with the worker to agree on a degree of permanent impairment that is within the range of the original assessment and the further assessment.

If the employer does not comply with these requirements, the employer is taken to agree with the assessed degree of permanent impairment.

Issues

The process for reaching agreement on the level of impairment and the procedures for settlement are set out in the Act and have been a significant factor in many of the errors and delays in settlement registration.

While the Act provides for a worker to commence the permanent assessment process, it is common practice for insurers to initiate and request an assessment of the worker's degree of permanent impairment as part of claim management and potential settlement negotiations.

Where this occurs, there have been instances of the statutory PI Notice process not being followed correctly including PI notices being initiated by the employer/ insurer and/ or being signed after the date of the settlement agreement. In some cases parties are not correctly indicating whether or not they agree or disagree with the level of impairment, as required by the Act.

The Act requires the worker to initiate the PI Notice process even if the employer/ insurer has requested the assessment. The Director (also determined by arbitrators when referred) has determined that the worker must sign the PI Notice before the employer does, and the parties must sign the settlement agreement on a date after the date the employer signed the PI Notice. If this does not occur the settlement will be refused registration and referred to the Registrar.

Notwithstanding the Act requirements, WorkCover WA acknowledges that insurers initiate a significant number of permanent impairment assessments, and that worker representatives and insurers are looking for a more practical and efficient process when reaching agreement on the worker's percentage permanent impairment and when giving workers documents to sign as part of settlement negotiations.

Sequencing errors in agreeing the percentage of permanent impairment and lodgement of documents could be avoided by less prescription.

It is WorkCover WA's view the Act should be amended such that agreement on the level of impairment should be accommodated as a single step as part of a settlement agreement rather than the multi-step process currently required by the Act.

It is proposed the Act no longer prescribes who must initiate the process.

Proposal

Proposal 3 – discontinuation of PI Notice process

Amend section 105 to discontinue the multi-step permanent impairment notice process for reaching agreement on a worker's degree of permanent impairment.

Amend section 105 to simply require the parties to agree the worker's degree of permanent impairment based on an APIA report, or a degree of impairment between two APIA reports, when entering the settlement agreement.

Modify the settlement agreement approved form to include a statement about the agreed percentage permanent impairment between the worker and employer.

Clarify that the APIA report(s) on which agreement on a worker's degree of permanent impairment is reached can be initiated by the worker, employer or employer's insurer.

Settlements - Registration and Scrutiny

Permanent impairment compensation entitlement and scrutiny

Under the Act if a settlement agreement includes provisions for commuting the liability for permanent impairment compensation the application for registration must be accompanied by:

- a copy of the PI Notice (SF3 or SF4) which indicates the agreement between the worker and the employer on the degree of the worker's permanent impairment (s.105) and
- a copy of each APIA Report under section 192(1) of the Act on which the agreed degree of permanent impairment is based
- if the worker and employer did not agree under section 105 of the Act with the assessed degree of permanent impairment – copy of any determination made by an arbitrator under section 106(2) of the Act regarding the worker's degree of permanent impairment.

As indicated in the previous section it is proposed the PI Notice be discontinued which should streamline settlements and reduce errors.

However, there are other Act amendments to consider relating to permanent impairment compensation.

Section 150 requires that if a worker is entitled to permanent impairment compensation, or dust disease impairment compensation, a settlement agreement must include provision for commuting the liability for that compensation.

Section 154 also requires the Director to be satisfied the amount of any permanent impairment compensation for which the settlement agreement provides is the correct amount to which the worker is entitled.

The Act does not provide adequate clarity as to when a worker is ‘entitled’ to permanent impairment compensation, or what the Director is required to consider to be satisfied the correct amount is paid.

This has resulted in some settlements being rejected by the Director and referred to the Registrar where there is an obvious permanent impairment but no payment for permanent impairment compensation is included in the settlement agreement.

The issue relates to ambiguity as to what ‘entitled’ means in section 150 and what is required of the Director when scrutinising the settlement under section 154.

For example, the reference to ‘entitled’ might be interpreted as a ‘potential’ entitlement based on the medical condition of the worker. An alternative interpretation is ‘entitled’ means only where liability is accepted or determined for the claim and the process for agreeing the worker’s degree of permanent impairment is followed.

WorkCover WA proposes to amend sections 150 and 154 so that the requirements for accessing permanent impairment compensation are that the worker has been assessed by an APIA and the worker and employer agree on the worker’s degree of permanent impairment. A liability decision will not be a pre-condition for registration of a settlement comprising permanent impairment compensation accepted (see proposal 6).

The Director will not be required to inquire as to any potential permanent impairment entitlement based on the worker’s medical condition even if it appears there is, or may be, an impairment. A worker will also not be compelled to claim permanent impairment compensation in a settlement agreement.

The Director’s scrutiny function on permanent impairment compensation will be to ensure the amount payable for permanent impairment compensation (if claimed) is correctly calculated.

This will involve consideration of the APIA certified degree of permanent impairment (or the agreed percentage within the range of two or more APIA assessments) and how that percentage is converted into the amount of compensation for the relevant item specified in the settlement agreement. This is a check to be undertaken on the face of the documents submitted. Some changes may be required to the APIA report/ certificate and the settlement agreement form to streamline the process.

It is also proposed the Director reject settlements with permanent impairment calculation errors, rather than refer the matter to an arbitrator, in order to enable parties to resubmit an application with corrected information more quickly.

Other scrutiny functions

The Director will continue to scrutinise settlement agreements for genuineness and must refuse to register a settlement agreement if of the opinion the agreement was obtained by fraud, or undue influence, or by other improper means.

Proposal

Proposal 4 – permanent impairment compensation and settlements

Amend section 150 to clarify that a worker is not entitled to permanent impairment compensation unless the worker has been assessed by a permanent impairment assessor and the parties have agreed the worker's percentage permanent impairment.

Modify the settlement agreement approved form to include a statement about the agreed percentage permanent impairment between the worker and employer.

Amend section 150(b) and regulations made under section 152 to require the settlement agreement to be accompanied with the APIA report(s) on which the agreed percentage permanent impairment is based.

Amend section 154(1)(b)(ii) to clarify the Director is only required to undertake a check of the amount of permanent impairment compensation in a settlement agreement is calculated correctly based on the agreed percentage permanent impairment for the relevant item(s), and the APIA assessed permanent impairment percentage.

Amend the Act to provide settlement agreements that have permanent impairment compensation calculation errors are to be rejected and not referred to an arbitrator, in order to allow parties to resubmit corrected settlement applications more quickly.

For the avoidance of doubt, amend the Act to clarify the Director is <u>not</u> required to:

(i) check and identify any 'potential' permanent impairment entitlement based on other medical information when a settlement agreement is lodged

(ii) check and identify any errors made by an APIA in an APIA Report.

Permanent impairment results from injury: disputes

Another potential issue for consideration is that the Act does not provide for agreement or a pathway to dispute resolution regarding whether a worker's permanent impairment *resulted* from an injury; it provides only for agreement or determination of the degree of permanent impairment. There may be cases where liability is accepted for the injury and incapacity for work, but the employer/ insurer does not agree the impairment resulted from the injury.

Proposal

Proposal 5 – disputes about permanent impairment

Amend section 106 to clarify that in addition to determining any dispute about a worker's *degree* of permanent impairment, an arbitrator can also determine whether permanent impairment did or did not *result* from an injury from employment that is a personal injury by accident.

No admission of liability

The Act is intended to provide minimal barriers to settlement of statutory workers compensation claims, other than the Director's scrutiny checks.

In parliamentary debate it was confirmed there is no legislative requirement for liability to be accepted or determined nor any timeframe prescribed before a settlement can be registered.

While settlement agreements without admission of liability are being registered, it may be beneficial to amend the Act to make this intent clear and avoid potential conflicts with other provisions in the Act regarding worker entitlements and requiring the Director to be satisfied of the genuineness of the agreement, the correct amount of permanent impairment compensation, and the agreement not being made by fraud, undue influence or other improper means.

The capacity to settle a claim without admission of liability will also apply with respect to a worker's entitlement to permanent impairment compensation as long as the worker has been assessed by an APIA and the parties agree to the worker's percentage permanent impairment.

Any settlement will continue to be subject to caps and limits that apply to particular forms of compensation, and the Act will continue to prohibit any amount for common law damages in a settlement agreement.

Proposal

Proposal 6 – Settlements and liability decisions

Amend section 149 to clarify a settlement can be registered at any time after a worker has made a claim in accordance with the Act and can be registered without a decision on liability and without the insurer or self-insurer having issued a liability decision notice or deferred decision notice by the statutory timeframes.

Modify the settlement agreement approved form to accommodate settlements without an admission of liability and with no decision on liability.

Strengthen the statement a worker signs in the settlement agreement so that the worker fully understands the risks and consequences of a settlement, particularly in the early phase of a claim.

Confirmation of Worker in Custody

The Act provides payments of income compensation are suspended if a worker is in custody under a law of WA, or another state, or the Commonwealth, or the worker is otherwise serving a term of imprisonment.

An employer must have written confirmation in the approved form from the relevant government authority of the facts relevant to the worker being in custody or serving a term of imprisonment. The relevant government authority is the authority administering the law under which the worker is in custody or serving a term of imprisonment.

The approved form of the notice for seeking and confirming a worker is in custody or serving a term of imprisonment is *CN6 Custody or imprisonment notice*.

The approved form was revised from 1 July 2025 to clarify the process for requesting and receiving confirmation of custody or imprisonment, however the following issues have been raised with WorkCover WA:

- lack of awareness about the requirement to use the CN6 form to obtain confirmation of custody status, or incomplete information for the relevant authority to provide the confirmation.
- time taken to receive the confirmation from the relevant Government authority in some cases
- the Act provides for the confirmation to be given to the worker's employer only while it is the insurer that is managing the claim
- problems seeking confirmation of custody arrangements where a worker is in custody or serving a term of imprisonment in another state or territory
- lack of clarity about the process for reinstating compensation when a worker is no longer in custody.

To address these issues it is proposed the Act is amended.

Proposal

Proposal 7 – Confirmation of custody or imprisonment

Amend section 66 to provide:

- The employer or insurer must make a request to the WorkCover WA CEO in the approved form and provide any information that the WorkCover WA CEO requires to identify the worker and claim status.
- A government authority must confirm custody or imprisonment to the WorkCover WA CEO as soon as practicable after receiving a request. The process and timeframes will therefore be managed within Government.
- The WorkCover WA CEO will forward information about custody arrangements on the advice of the relevant government authority.
- Amend the meaning of 'relevant government authority' to include a government authority in another state or territory principally assisting the Minister responsible for administering the law in that State or territory under which a worker is in custody or serving a term of imprisonment.
- Income compensation payments must be reinstated for any period a worker is no longer in custody, confirmation of which must be obtained by the worker, employer or insurer in the approved form following the process above.

State of Connection Determinations

Liability for compensation arises only if a worker's employment is connected with Western Australia (s.19).

Part 12 provides for how to work out the State with which a worker's employment is connected and for a court to determine a worker's state of connection.

An application can be made to the court by party to a claim for compensation, or by a party to proceedings before a court in relation to a claim.

Arbitrators do not have jurisdiction to determine state of connection disputes even if the question of state of connection is one of a number of issues in dispute for determination by an arbitrator.

The lack of authority for arbitrators to determine a worker's state of connection compromises the timely resolution of claims where state of connection is one of a number of issues in dispute.

It is proposed the Act is amended to give jurisdiction to arbitrators to determine whether a worker's state of connection is WA. This will ensure all matters are dealt with in dispute proceedings under the Act.

Additional amendments may be required regarding the status of arbitration orders on courts in WA and state of connection provisions in other jurisdictions.

Proposal

Proposal 8 – determination of state of connection disputes

Amend Part 12 to give arbitrators jurisdiction to determine a worker's state of connection either as part of a dispute proceeding or on application by a party to a claim for compensation.

Claims on Uninsured Employers

The Act provides for how claims are to be dealt with and how compensation and damages are to be paid where an employer is uninsured.

Two issues have been identified for clarification via amendments to the Act:

1. The failure by some uninsured employers to progress claims before WorkCover WA is informed and before the claim is taken to be accepted, compromising WorkCover WA's statutory functions to exercise the rights of the uninsured employer in responding to the claim.
2. Whether WorkCover WA's Default Insurance Fund is required to pay common law damages on behalf of an uninsured employer where the liable employer on risk did not have insurance cover for damages for a period before 1 October 2011 (when the 1981 Act first required employers to insure common law liabilities as part of a statutory workers compensation policy).

Responding to uninsured employer claims

If an employer is uninsured section 31 sets out how the uninsured employer must respond to the claim given there is no insurer to give the claim to for a liability decision. The requirements mirror the liability decision requirements and timeframes that apply to self-insurers.

This includes making a liability decision within the statutory timeframes and imposing default claim acceptance if no liability decision notice is given in time.

WorkCover WA must also be notified and WorkCover WA may decide to exercise its powers under section 272 in place of the uninsured employer. This might be done if an uninsured employer fails to perform any obligation under the Act with respect to the claim.

There have been some cases where uninsured employers have failed to respond to a worker's claim in time and also failed to notify WorkCover WA, before the Act imposes liability acceptance by default.

While that may be an appropriate outcome in some cases it also applies irrespective of the merits of the claim (for example, an uninsured employer believes they are not required to do anything because they believe the person claiming compensation is not a worker or suffered a non-work related injury).

Amendments are required to vary the operation of the claim process and timeframe where an uninsured employer has failed to respond to the claim and failed to notify WorkCover WA under section 31, so that WorkCover WA has the opportunity to promptly assess the claim and make a liability determination in place of the employer so as to avoid disadvantage to the worker.

Proposal

Proposal 9 – Responding to uninsured employer claims
Amend section 31 to provide that if an uninsured employer fails to give a liability decision notice or deferred decision notice in respect of a claim, as and when required, and/or has also failed to give notice to WorkCover WA:

1. WorkCover WA may exercise its powers under section 272 and make a liability decision under section 28 in place of the uninsured employer.
2. If WorkCover WA exercises its powers under section 272 in place of the uninsured employer –
   (i) sections 28(6), 29(3) and 36(1) do not apply in respect to the failure of the uninsured employer to respond to the claim
   (ii) the requirement to give a liability decision notice or deferred decision as and when required under sections 28, 29 and 36 apply to WorkCover WA
   (iii) the claim is taken to be given to WorkCover WA on the day WorkCover WA is notified or has become aware that a claim has been made on the uninsured employer.

Amend section 272 to clarify WorkCover WA may exercise the rights of an uninsured employer in place of the employer at any time after a claim is made (e.g. before a liability to pay compensation or damages arises so that WorkCover WA can make a liability decision if the circumstances require it).

Common law damages where employer is uninsured

An issue has arisen as to whether section 267 (and the comparable provisions in the 1981 Act) apply to common law actions where the liable employer on risk did not have insurance cover for damages for a period before 1 October 2011.

The issue sometimes arises with long latency claims such as asbestos related diseases where the asbestos exposure occurred during employment decades ago.

The application of section 267 to long latency common law actions requires clarification as it determines whether or not WorkCover WA's Default Insurance Fund (common law safety net) will respond and pay damages.

Section 267 of the Act provides that if insurable damages are awarded by judgment against an employer who is uninsured, WorkCover WA must pay from the Default Insurance Fund the amount of damages if the employer does not pay the damages within 30 days after the due date for payment.

The intent is for WorkCover WA's Default Insurance Fund to provide for a common law safety net in the event an injured worker cannot receive damages from their employer because the employer failed to take out workers compensation insurance as required by the Act and cannot pay the damages.

The common law safety net was made available via amendments to the 1981 Act which took effect from 1 October 2011. Amendments to the 1981 Act were also made at the same time which required employers to insure any liability to pay common law damages as part of standard workers compensation insurance policies.

Prior to 1 October 2011 it was mandatory for employers to obtain insurance coverage for statutory liabilities under the Act but not for common law damages.

Historically, most insurers generally provided separate cover for common law damages either as an extension to the standard workers compensation policy or as an alternative form of cover. The availability of common law cover and the terms varied by insurer. WorkCover WA was not privy to the historical records and practices of insurers and is not aware if common law cover was provided or not for particular working arrangements as this was a contractual and commercial matter outside the Act.

WorkCover WA's view is that the common law safety net should not respond to these historical common law claims where the employer was uninsured and the liability to pay damages is for a period predating 1 October 2011.

The statutory scheme is a mandatory insurance based scheme and WorkCover WA's Default Insurance Fund should not be responsible for liabilities that were not required to be insured under the Act at the relevant time.

This does not prevent the worker from pursuing the employer for damages, it simply means that the WorkCover WA Default Insurance Fund is not required to respond to or pay these claims if the employer was uninsured.

WorkCover WA's view is consistent with key terms in relevant provisions of the Act and the 1981 Act. For example, the term 'insurable damages' referred to in section 267 is defined at section 200 and means damages in respect of which an employer is required by section 202 to insure. Under comparable provisions of the 1981 Act, when read with transitional provisions in the 2023 Act, employers were only required under the Act to insure liability for damages from 1 October 2011.

However, there has been a small number of cases (including claims for third party contribution of damages) which appear to indicate the intent and operation of section 267 is not as clear as it should be.

WorkCover WA therefore recommends either an avoidance of doubt provision or redrafting of section 267 to clarify that section 267 does not apply with respect to the liability of an uninsured employer to pay damages for any period that employer was uninsured before 1 October 2011.

Proposal 10 – Common law damages where employer uninsured

Amend section 267 and any related provisions to clarify that damages are not payable from the WorkCover WA Default Insurance Fund with respect to a liability of an uninsured employer to pay damages for any period that employer was uninsured for common law damages before 1 October 2011.

ICWA Contribution to WorkCover WA's General Account

Licensed insurers and self-insurers must pay levy contributions to the following statutory funds (if a levy is required in a financial year):

- WorkCover WA's General Account
- WorkCover WA's Default Insurance Fund
- The Insurance Commission's Catastrophic Injuries Fund.

Under the Act as drafted the Insurance Commission of WA (ICWA) is not required to contribute to WorkCover WA's General Account or WorkCover WA's Default Insurance Fund. The reference to ICWA not contributing to WorkCover WA's General Account is an error in the Act. As a large scheme participant ICWA has always paid a levy contribution to WorkCover WA under the 1981 Act and was expected to do so under the 2023 Act.

Proposal

Proposal 11 – ICWA contribution to WorkCover WA General Account

Amend section 235(5) by deleting the reference to 'General Account' and requiring ICWA to make a financial contribution to WorkCover WA's general account when required to do so by WorkCover WA, like all other licensed insurers and self-insurers.

Injury v Incapacity Date

Part 2 Division 3 subdivision 3 of the Act provides for the calculation of income compensation.

A worker's average weekly rate of earnings is calculated over the period of 1 year ending on the day before the day on which the worker's injury occurred.

Some stakeholders have advocated for the reference to the date of injury to be changed to the date of incapacity when calculating income compensation periods.

The issue appears to be that although the date of injury and incapacity are often the same there can be a significant period of time between the injury and incapacity date for some injuries such as disease injuries. In these circumstances if a worker's average earnings increase over the period between the injury and incapacity, the amount of income compensation payable for any subsequent incapacity for work will not reflect the worker's higher earnings for this period, but instead will be calculated from the date of injury when the worker was earning less.

That would indeed be the case if it were not for section 55(5) which addresses this problem. Section 55(5) ensures an amount must be added to or deducted from the worker's pre-injury weekly rate of income to reflect the percentage increase or decrease in the worker's base rate of pay effective after the date of injury. Therefore, the concern is addressed without the need to change the reference point.

WorkCover WA's view is that, while technically correct, there are greater risks with amending the reference point from the 'injury' date to the 'incapacity' date in subdivision 3.

The date of incapacity is not as clear as the date of injury, even though the incapacity date must be worked out when the first income compensation payment is made (which is backdated to when the worker first has an incapacity for work). Sometimes debate arises about the relevant date of incapacity including whether it is when the worker was first unfit for work, when the treating medical practitioner certified the worker unfit ,the date specified in the certificate as unfit (and whether this can be backdated).There are sometimes factual and legal disputes about this which are less common than for the date of injury.

The injury date is also referenced in all forms and is also the reference point for certain diseases which have a default date of injury.

Clarity is essential in the reference point otherwise the risk of miscalculations, errors and potential disputes on rate of pay and average earnings increases significantly.

Further, 'pre-injury' earnings is accepted terminology in all schemes and by all scheme participants, even though income compensation is payable only as a result of incapacity for work and not the injury itself. The alternative label 'pre-incapacity earnings', while technically correct, losses the connection to the injury event causing that incapacity.

Proposal

Proposal 12 - Appropriate reference to date of injury or incapacity

Although there is no proposal to amend references from the 'date of injury' to the 'date of incapacity' in Part 2 Division 3 Subdivision 3 of the Act, stakeholder feedback is sought on this matter.

Feedback on Other Technical Matters

The proposals above relate to matters raised informally with WorkCover WA or that WorkCover WA has identified via its monitoring activities.

Stakeholder feedback is sought on these proposals and any other proposal considered necessary to ensure the Act operates as intended.

Comments should be focussed on potential technical amendments to address implementation issues associated with the rewrite of the Act. Entitlement reform or scheme redesign proposals are out of scope.

Proposal

Proposal 13 – Other proposals to address implementation issues

Stakeholder feedback is sought on any other potential technical amendments required to the Act to address implementation issues since commencement of the Act on 1 July 2024.