

WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981

WORKERS' COMPENSATION (LEGAL PRACTITIONERS AND REGISTERED AGENTS) COSTS REPORT 2005

Made by the Costs Committee under section 273 of the *Workers' Compensation and Injury Management Act 1981* ("Act").

PART 1 – PRELIMINARY

1. Citation

- (1) This report may be cited as the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Report 2005*.
- (2) The costs determination set out in the Schedule to this report is referred to in this report as the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2005* ("Costs Determination").

PART 2 – CONSULTATION

2. Consultation under section 272 of the Act

- (1) The Costs Committee published a notice of its intention to make the Costs Determination, and considered submissions made to it in that respect, under section 272 of the Act.
- (2) Before making the Costs Determination the Costs Committee:
 - (a) Reviewed all submissions received as a result of the notice given under section 272 of the Act;
 - (b) Examined the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination (Number 2) 2005* (published in Gazette 30 June 2005 pp.2988-2993);
 - (c) Reviewed a list of events relevant to the operation of the Dispute Resolution Directorate;
 - (d) Considered the:
 - (i) *Workers' Compensation and Injury Management Act 1981*;
 - (ii) *Workers' Compensation Reform Act 2004*;
 - (iii) *Workers' Compensation and Injury Management Regulations 1982*;
 - (iv) *Workers' Compensation and Injury Management Amendment Regulations 2005*; and
 - (v) *Workers' Compensation (DRD) Rules 2005*.
 - (e) Examined materials regarding legal practitioners' scales of costs in Australian jurisdictions;
 - (f) Reviewed the:
 - (i) *Workers' Compensation Determination* in place prior to the introduction of 1993 legislative amendments; and
 - (ii) *Legal Practitioners (Workers' Compensation) (Conciliation Proceedings, Review Proceedings and Compensation Magistrate's Court) Determination 2003*.
 - (g) Reviewed Schedule 6 Maximum costs – compensation matters of the *Workers Compensation Regulation 2003* (NSW).
 - (h) Consulted with the:
 - (i) Commissioner appointed under section 281 of the Act; and
 - (ii) Director appointed under section 288 of the Act as the Director Dispute Resolution.

PART 3 – REPORT ON THE COSTS COMMITTEE’S CONCLUSIONS

3. Scale of costs established

- (1) In developing the scale of costs set out in the Table to clause 9 of the Costs Determination, the Costs Committee was mindful that the Act is intended to promote the early settlement of issues and disputes by agreement and to discourage unnecessary delay, excessive attendances and excessive preparation of documentation.
- (2) Based on the consultation outlined in Part 2, the Costs Committee agreed the scale of costs should generally comprise composite fees that are recoverable when specific milestones within the dispute resolution process are achieved.
- (3) The Costs Committee is of the view that this Costs Determination, read in conjunction with the *Workers’ Compensation and Injury Management Regulations 1982* and the *Workers’ Compensation (DRD) Rules 2005*, gives effect to the intention of the legislation to:
 - (a) promote the early settlement of issues and disputes by agreement; and
 - (b) discourage unnecessary delay, excessive attendances and excessive preparation of documentation.
- (4) The scale of costs is structured to create disincentives for over-servicing and reflects the philosophy of the Act with regard to expediting the resolution of disputes and introducing transparency and containment of legal costs in relation to disputes.
- (5) The Cost Committee considered the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination (Number 2) 2005* scale as containing the most appropriate rates with which to align hourly rates in this Costs Determination.
- (6) In arriving at the applicable rates, the Costs Committee took into account the expectation that on the whole matters could be run by the same legal practitioner throughout, therefore promoting efficiencies.
- (7) The Costs Committee received and considered submissions to assist in quantifying the number of hours reasonably required to complete work required to achieve each milestone.

JANINE FREEMAN, Presiding Member

CLARE THOMPSON, Member

DARYL CAMERON, Member

MARCUS COCKER, Member

Schedule

WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981

WORKERS' COMPENSATION (LEGAL PRACTITIONERS AND REGISTERED AGENTS) COSTS DETERMINATION 2005

Made by the Costs Committee under section 271 of the Act.

1. Citation

- (1) This determination may be cited as the *Workers' Compensation (Legal Practitioners and Registered Agents) (DRD) Costs Determination 2005* ("Costs Determination").

2. Commencement

- (1) This Costs Determination comes into operation on 14 November 2005.

3. Application

- (1) This Costs Determination applies to the remuneration of legal practitioners and registered agents in respect of work carried out for the purposes of proceedings before a WorkCover WA dispute resolution authority.
- (2) This Costs Determination does not apply to the remuneration of legal practitioners or registered agents in respect of business carried out before the commencement of this Costs Determination.
- (3) This Costs Determination is to be read and applied in its entirety. The scale of costs applicable under this Costs Determination is to be interpreted in accordance with the notes set out in this Schedule.

4. Review

- (1) The Costs Committee intends to review this Costs Determination after one year of operation. However, the Costs Committee may amend or revoke this Costs Determination, pursuant to section 271(4) of the Act.

5. Terms used in this Determination

- (1) Unless otherwise stated, all terms used in this Costs Determination have the same meaning given in the:

- (a) *Workers' Compensation and Injury Management Act 1981*;
- (b) *Workers' Compensation and Injury Management Regulations 1982*; and
- (c) *Workers' Compensation (DRD) Rules 2005*.

- (2) For ease of reference, the terms are reproduced hereunder. In this Costs Determination –

"agent service" means any service performed by a person –

- (a) in the person's capacity as an agent; and
- (b) in or for the purposes of a proceeding before a dispute resolution authority.

"application" means an application for a decision of a dispute resolution authority.

"approved form" means a form approved under rule 114.

“**arbitrator**” means an officer of WorkCover WA approved under section 286(2) of the Act as an arbitrator.

“**assessment of costs**” means an application for assessment of costs under rule 100.

“**Commissioner**” means the Commissioner appointed under section 281 of the Act.

“**costs**” means –

- (a) costs of a party (including fees, charges and disbursements);
- (b) costs of a proceeding; and
- (c) such other costs as may be prescribed by regulation.

“**costs determination**” means a determination published under section 273 of the Act.

“**Director**” means the officer of WorkCover WA approved under section 288 as the Director Dispute Resolution.

“**dispute resolution authority**” means the Director, an arbitrator or the Commissioner.

“**DRD**” means the Dispute Resolution Directorate established under section 278.

“**DRD Rules**” means the rules made under section 293 of the Act.

“**legal practitioner**” has the same meaning as prescribed under section 3 (Interpretation) of the *Legal Practice Act 2003*.

“**legal service**” means any service performed by a person –

- (a) in the person’s capacity as a legal practitioner; and
- (b) in or for the purposes of a proceeding before a dispute resolution authority.

“**pending proceeding**” means –

- (a) any matter the conciliation review or other determination of which has been sought but not commenced before a dispute resolution authority; or
- (b) any matter that has been partly or fully heard or otherwise dealt with before, but not determined by, a dispute resolution authority.

“**proceeding**” means a proceeding before a dispute resolution authority.

“**registered agent**” means a person registered under regulations made under section 277.

“**serve**” has the same meaning as rule 15.

“**taxing officer**” means the Director or an arbitrator.

6. Maximum costs

- (1) Column A is a fixed amount, to be applied subject to clause 7. Column B is a maximum amount. Costs under Column B may be assessed at taxation where a special costs order has been made enabling access to remuneration in accordance with Column B (refer to clause 10(10)).
- (2) In accordance with section 274 of the Act, legal practitioners and registered agents are not entitled to be paid or recover an amount that exceeds the costs fixed for the service by this Costs Determination. The costs payable to a legal practitioner or registered agent at each milestone described in the Table to clause 9, must not exceed the maximum amount corresponding to that event in Column A, or Column B where an arbitrator has granted a special costs order.
- (3) Further to this, in accordance with section 275 of the Act, an agreement is not to be made for a legal practitioner or registered agent to receive any greater reward than is provided for in this Costs Determination. Any agreement made contrary to section 275 of the Act is void.

- (4) Subject to (5), registered agents are entitled to be paid or recover 50% of the amounts provided for in the Table to clause 8.
- (5) Registered agents are entitled to recover 100% of disbursements, in accordance with item 10 of the Table to clause 9.

7. No minimum charge

- (1) The scale of costs is not intended to be interpreted as providing a minimum charge for any legal service or agent service.
- (2) Rates in Column A are a fixed maximum. Column A is not to be viewed as a minimum. Legal practitioners may charge below the rates in Column A for legal services provided.
- (3) Registered agents may charge below 50% of the rates in Column A for agent services provided.

8. Hourly Rates

- (1) The hourly rates set out in the Table to this clause are the maximum hourly rates inclusive of GST that shall be used to calculate the maximum amounts for each corresponding item in Column A and Column B in the scale set out in the Table to clause 9.
- (2) The maximum hourly rates which a registered agent may charge are not to exceed 50% of the amounts set out in the Table to this clause.

Table to Clause 8

ITEM	DEGREE OF COMPLEXITY (\$)	
	A	B
PART XII MATTERS		
1	\$198	
2	\$198	
PART XI MATTERS		
1	\$198	\$198
2	\$198	\$198
3	\$198	\$198
4	\$198	\$286
5	\$198	\$286
6	\$198	\$286
7	\$198	\$198
8	\$198	

9. Scale of costs

- (1) The maximum hours for which a legal practitioner or registered agent may charge a client in relation to Part XI and Part XII matters are not to exceed the amounts set out in the Table to this clause.
- (2) Stating the maximum number of hours in the scale of costs is intended to provide guidance to taxing officers when dealing with an assessment of costs, so as to provide the taxing officer with an indication of the hours of work reasonably involved to reach each milestone.

Table to Clause 9

WORKERS' COMPENSATION SCALE OF COSTS 2005

ITEM	DESCRIPTION	DEGREE OF COMPLEXITY (Hours)	
		A	B
PART XII MATTERS			
1	Preparation of Part XII application, including all necessary preparation and documentation in approved form in accordance with the DRD Rules.	4 hours	
2	Preparation and filing of notice of consent or dispute in approved form for Part XII applications in accordance with the DRD Rules.	1 hour	
PART XI MATTERS			
1	Where a dispute is resolved between lodging an application and prior to teleconference, including all necessary preparation and documentation in approved form in accordance with the DRD Rules.	13 hours	25 hours
2	Where a dispute is resolved at a teleconference or conciliation conference, prior to arbitration, including all necessary preparation and documentation in approved form in accordance with the DRD Rules.	+3 hours	+9 hours
3	Where a dispute is resolved after completed conference (of whatever kind) but prior to commencement of arbitration, including all necessary preparation and documentation in approved form in accordance with the DRD Rules.	+3 hours	+6 hours
4	Where a dispute is resolved at arbitration, including all necessary preparation and documentation in approved form in accordance with the DRD Rules (one day matter). -Add for each additional day (per day)	+6 hours	+10 hours
		+7 hours	+8 hours
5	Preparation for and attendance on appeal including, where applicable, reviewing transcripts and preparation and lodgement of any Notice of Appeal in approved form in accordance with the DRD Rules. -Add for each additional day (per day)	+6 hours	+10 hours
		+7 hours	+8 hours
6	Preparation of application or response in approved form in accordance with the DRD Rules where a question of law arises under section 246. -Attendance at hearing -Add for each additional day (per day)	+2 hours	+3 hours
		+6 hours	+8 hours
		+7 hours	+8 hours
7	Settlement of the claim e.g. by agreement for Schedule 2 or redemption and filing section 76 agreement in approved form in accordance with the DRD Rules (excluding disbursements which are to be paid in accordance with item 10).	+ 5 hours	+15 hours
8	Where advice is given or a dispute is resolved prior to lodging an application but when all necessary preparation has been done.	1 hour	
9	<p>Allowances for witnesses</p> <p>The amount of any costs to be paid in respect of work done by a practitioner in conducting any proceedings in a dispute may include a reasonable allowance for –</p> <p>(a) witnesses called because of their professional, scientific or other special skill or knowledge; and</p> <p>(b) witnesses called other than those covered in paragraph (a).</p> <p>In fixing an allowance for witnesses under paragraph (b) the taxing officer may have regard to the amount of salary, wages, or income (if any) actually lost by the witness, and any expenses in respect of meals, lodging and travel reasonably and necessarily incurred by the witness in attending the proceedings and justified by voucher.</p>		
10	Disbursements (not to include counsel fees and must be justified by voucher).	Such amount that is necessarily and reasonably incurred under the circumstances.	
11	Appeal to Supreme Court	An amount determined by the taxing officer of the relevant Court, in accordance with the appropriate scale applicable at the time.	

10. Degree of complexity

- (1) Column A: routine, non-complex disputes.
- (2) Subject to clause 7 of this Schedule, Column A is a fixed amount.
- (3) Part XII applications (Interim orders and minor claims) dealt with on the papers without a formal hearing, are routine in nature and fall within Column A.
- (4) The rate by which the maximum level of remuneration is to be calculated for items 1 to 8 inclusive of Column A is set out in the Table to clause 8 and is aligned with the junior practitioner rate in the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination (Number 2) 2005*.
- (5) Column B: complex matters may include, but are not limited to:
 - (a) multiple employers; or
 - (b) presentation of latent injuries.
- (6) The upper time limits for Column B are in recognition of the additional time required by a legal practitioner or registered agent in dealing with more complex disputes.
- (7) The rate by which the maximum level of remuneration is to be calculated for items 1 to 3 inclusive and 7 & 8 of Column B, is set out in the Table to clause 8 and is aligned with the junior practitioner rate in the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination (Number 2) 2005*.
- (8) The rate by which the maximum level of remuneration is to be calculated for items 4 to 6 inclusive of Column B, is set out in the Table to clause 8 and is aligned with the senior practitioner rate in the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination (Number 2) 2005*.
- (9) Column B is a maximum amount, the proportion of which a legal practitioner or registered agent is entitled to be paid or recovered may be determined by a taxing officer on an assessment of costs.
- (10) A legal practitioner or registered agent is required to lodge an Application for Special Costs Order (DRD Approved Form 18) to access Column B. To have costs assessed in accordance with Column B, a special costs order will need to be granted by an arbitrator.
 - (a) DRD Approved Form 18 has been approved by the Commissioner in accordance with the DRD Rules.
 - (b) DRD Approved Form 18 makes reference to submissions accompanying the special costs order to explain why the costs scale is considered inadequate. The reference to "costs scale" means Column A of the Table to clause 9 (refer to clause 10(12)).
 - (c) An arbitrator may determine whether a special costs order to access Column B is justified by the complexity of the dispute.
- (11) In taxing costs under Column B, the taxing officer is to assess the complexity of the dispute, based on evidence and submissions provided by the legal practitioner, and fix an appropriate amount under Column B accordingly. The maximum amount provided for under Column B is only to be awarded under exceptional circumstances and must be justified by the degree of complexity of the dispute.
- (12) This Costs Determination operates on the basis that matters are routine, unless demonstrated otherwise.

11. Methodology – Part XI Matters

- (1) Items 1 to 4 inclusive of the scale are consecutive, cumulative milestones, subject to clause 11(3). So, for example, to seek payment or to recover for legal services or agent services provided under item 4, the legal practitioner or registered agent must first conclude the milestones and thereby provide the legal services or agent services described in items 1 to 3 inclusive of the scale.
- (2) The legal services described in items 5 to 11 inclusive of the scale may occur at any stage in the process and are additional to the milestone events (regardless of which event or events have been achieved) and are to be read as being in addition to the overall total remuneration.
- (3) Subject to clause 3, costs recoverable for pending proceedings will be remunerated under the scale according to the milestone they next reach post 14 November 2005. Subject to the milestones 1, 2, 3 and 4 not being cumulative in these circumstances.
- (4) Item 8 of the scale is a stand-alone item and is only payable or recoverable by an individual legal practitioner or registered agent once in relation to a dispute. This item is not to be paid or to be recovered by a legal practitioner or registered agent when an application is subsequently lodged under either Part XI or Part XII in relation to the dispute. Item 8 is not payable or recoverable in conjunction with any other item in the scale, with the exception of disbursements.

12. Payment under both Parts

- (1) In appropriate circumstances, legal practitioners or registered agent may be entitled to be paid or recover for applications under Part XI and Part XII of the Act with regard to the same dispute.
- (2) If a legal practitioner or registered agent is required by the Act to file applications under Part XI and Part XII the legal practitioner or registered agent is entitled to be remunerated for both.

13. Allowance for non-attendance

- (1) An allowance can be made for attendance by a legal practitioner or registered agent in circumstances where, through no fault of the legal practitioner or registered agent, their client failed to attend a conference, arbitration or other proceeding before a dispute resolution authority.

14. Limitations with regard to exceeding the scale of costs

- (1) The limitation in the Act with regard to legal practitioners and registered agents not exceeding the scale is only intended to cover work done within this jurisdiction.
- (2) Advice provided by a legal practitioner in relation to Part IV civil proceedings in addition to or independent of this Act is not intended to be covered by this Costs Determination (see section 274 of the Act).
- (3) Regard should be had to section 87 of the Act when providing advice or representation to a client in relation to an action for damages, independent of this Act.
- (4) A legal practitioner cannot make any agreement, for appearing or acting on behalf of a person, where they will receive greater reward than is provided for by any legal costs determination (as defined in *the Legal Practice Act 2003*). In any case, agreements made contrary to section 87 are void.

15. Interpretation of item descriptions

- (1) In interpreting item descriptors as set out in the Table to Clause 9, regard should be had for the procedural requirements set out in the:
 - (a) *Workers' Compensation and Injury Management Act 1981*;
 - (b) *Workers' Compensation and Injury Management Regulations 1982*; and
 - (c) *Workers' Compensation (DRD) Rules 2005*.
- (2) Item 6 – Preparation of application or response where a question of law arises under section 246:
 - (a) It is intended that where costs are awarded under item 6 of the costs scale set out in the Table to clause 9, the appropriate level of costs a legal practitioner or registered agent is entitled to be paid or recover will be assessed by a taxing officer on the extent to which the legal practitioner or registered agent assists in the referral of a question of law to the Commissioner.
- (3) Item 9 – Allowances for witnesses:
 - (a) Where a witness is summonsed under section 202 of the Act, in accordance with Rule 88 of the DRD Rules, the summons must be served on the person whose attendance is required 7 days before the day on which the person is required to attend before an arbitrator.
 - (b) If the summons is not served on the person in accordance with sub-Rule 88(2) and any witness allowance for the expenses of attendance is not paid or tendered to the person at the time of service of the summons, or not later than a reasonable time before the time at which the person is required to attend, then the person to whom the summons is directed is not required to comply with the summons.
 - (c) In accordance with Rule 90 of the DRD Rules, except with the leave of the arbitrator, medical evidence must be given in writing and a medical practitioner may not be called to give oral evidence.
- (4) Item 10 – Disbursements:
 - (a) Reference to voucher in item 9 refers to copies of any vouchers, accounts and receipts relevant to the disbursements claimed.
 - (b) Disbursements must be necessarily and reasonably incurred under the circumstances.
 - (c) In accordance with Rule 91 of the DRD Rules, except with leave of an arbitrator, no more than three medical reports can be submitted with an application. Of the three reports, only one report is allowed per area of medical speciality. A report that contains observations from more than one area of medical speciality is to be taken to be one report from each of the specialities utilised within the report.