

# WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981

## WORKERS' COMPENSATION (LEGAL PRACTITIONERS AND REGISTERED AGENTS) COSTS REPORT 2007

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 2007*.
- (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 2007* ("Costs Determination").

### PART 2 – CONSULTATION

#### 2. Consultation under section 272 of the Act

- (1) The Costs Committee published 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) Considered the:
    - (i) *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2005*;
    - (ii) *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2006*;
    - (iii) *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2006*;
    - (iv) *Workers' Compensation and Injury Management Act 1981*;
    - (v) *Workers' Compensation and Injury Management Regulations 1982*;
    - (vi) *Workers' Compensation and Injury Management Amendment Regulations 2005*;
    - (vii) *Workers' Compensation (DRD) Rules 2005*;
    - (viii) *Workers' Compensation Regulation 2003* (NSW): Schedule 6 – Maximum costs – compensation matters;
  - (c) Examined the submissions received from stakeholders and resultant report prepared by WorkCover WA as part of the *Evaluation of the 2005 Legislative Reforms* project;
  - (d) Examined materials regarding legal practitioners' scales of costs in Australian jurisdictions, in particular the scales of costs available in NSW; and
  - (e) Consulted with the:
    - (i) Commissioner appointed under section 281 of the Act; and
    - (ii) Acting Director of the Dispute Resolution Directorate.

## PART 3 – REPORT ON THE COSTS COMMITTEE’S CONCLUSIONS

### 3. Scale of costs established

- (1) In the initial development phase, and during the process of reviewing the scale of costs set out in the Table to clause 8 of the Costs Determination, the Costs Committee was mindful that the Act is intended to:
  - (a) promote the early settlement of issues and disputes by agreement; and
  - (b) discourage unnecessary delay, excessive attendances and needless preparation of documentation.
- (2) 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.
- (3) 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.
- (4) Based on the consultation outlined in Part 2, the Costs Committee agreed to maintain the “event based” costs scale, with composite fees recoverable when specific milestones within the dispute resolution process have been achieved.
- (5) The Cost Committee considered indexation options for the costs scale. However, the Committee is of the view that the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2006* scale contains the most appropriate rates with which to align hourly rates in this Costs Determination in the first instance. The Costs Committee agreed to draft the costs scale to enable the hourly rates within this costs scale to be automatically adjusted in line with hourly rates available under the costs scale of the Magistrates Court.
- (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. The Costs Committee envisaged an exception to this rule with regard to appeals and referrals of questions of law; therefore, the structure of items 5A, 5B and 5C have been altered and the time allowed increased.
- (7) The Costs Committee received and considered submissions to assist in quantifying the number of hours reasonably required to achieve each milestone in the costs scale. The Costs Committee accepted submissions received from stakeholders that Column A of the costs scale is being treated as a maximum, rather than a fixed amount as was originally intended by the Costs Committee. To this end, the Costs Committee agreed to clarify its intent by removing reference to “No Minimum Charge” for Column A of the costs scale.
- (8) The Costs Committee also considered the overall financial health of the workers’ compensation scheme in revising the costs scale.

JANINE FREEMAN, Presiding Member

ROB GUTHRIE, Member

LISA BIGLIN, Member

MARCUS COCKER, Member

## Schedule

### WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981

#### WORKERS' COMPENSATION (LEGAL PRACTITIONERS AND REGISTERED AGENTS) COSTS DETERMINATION 2007

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) Costs Determination 2007* ("Costs Determination").

#### 2. Commencement

- (1) This Costs Determination comes into operation on 14 November 2007.

#### 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) This costs scale has been drafted so as to enable the hourly rates used to calculate costs to be adjusted consequent to any changes in the hourly rates available under the Magistrates Court costs scale, based on determinations of the Legal Costs Committee.
- (2) The Costs Committee may review this Costs Determination after two years of operation.
- (3) The Costs Committee may amend or revoke this Costs Determination at any time, 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 of the DRD Rules.

**“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 of the DRD Rules.

**“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 of the Act 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 of the Act.

**“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.

**“Magistrates Court costs scale”** means the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2006* made by the Legal Costs Committee under the *Legal Practice Act 2003*, or any subsequent determination made in substitution for that determination.

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

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

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

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

## **6. Maximum costs**

- (1) Column A is a fixed amount.
- (2) Column B is a maximum amount with costs being calculated having regard to the time involved and the complexity of the matter under dispute. 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 9(7)).

- (3) 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.
- (4) The costs payable to a legal practitioner or registered agent at each milestone described in the Table to clause 8 must not exceed the fixed amount corresponding to that event in Column A, or the maximum amount in Column B where an arbitrator has granted a special costs order.
- (5) 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.
- (6) Subject to (7), registered agents are entitled to be paid or recover 50 per cent of the amount provided for Senior Practitioners in the Table to clause 7.
- (7) Registered agents are entitled to recover 100 per cent of disbursements, in accordance with item 4 under "Stand-Alone Items" of the Table to clause 8.

## 7. Hourly Rates

- (1) This clause is to be read in conjunction with clauses 4(1) and 5(2).
- (2) 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 fixed amounts under Column A and the maximum amounts under Column B for each corresponding item in the costs scale set out in the Table to clause 8.
- (3) The maximum hourly rates which a legal practitioner or registered agent may charge are not to exceed the amounts set out in the Table to this clause.

**Table to Clause 7**

<b>FEE EARNER</b>	<b>MAXIMUM ALLOWABLE HOURLY RATE</b>
Registered Agent	50 per cent of the hourly rate applicable to Senior Practitioners under the Magistrates Court costs scale
Junior Practitioner (Admitted for less than 5 years)*	The hourly rate applicable to Junior Practitioners under the Magistrates Court costs scale
Senior Practitioner (Admitted for 5 years or more)*	The hourly rate applicable to Senior Practitioners under the Magistrates Court costs scale

\* Where a local practitioner has held an interstate practice certificate, the length of admission in that other jurisdiction is to be counted in assessing that practitioner's years of admission for the purposes of this Determination.

## 8. Scale of costs

- (1) The maximum hours for which a legal practitioner or registered agent may charge a client in relation to Part XI Matters, Part XII Matters and Stand-Alone Items 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 under Column B, so as to provide the taxing officer with an indication of the hours of work reasonably involved to reach each milestone.

**Table to Clause 8**

**WORKERS' COMPENSATION SCALE OF COSTS 2005**

ITEM	DESCRIPTION	DEGREE OF COMPLEXITY (Hours)	
		A	B
<b>PART XII MATTERS</b>			
1	Preparation of Part XII application, including all necessary preparation and documentation in approved form in accordance with the DRD Rules.	6 hours	
2	Preparation and filing of notice of consent or dispute in approved form for Part XII applications in accordance with the DRD Rules.	3 hours	
<b>PART XI MATTERS</b>			
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.	15 hours	30 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.	+6 hours	+11 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.	+6 hours	+11 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)	+7 hours +7 hours	+15 hours +10 hours
5A	Preparation for an appeal including, where applicable, reviewing transcripts and preparation and lodgement of any Notice of Appeal in approved form in accordance with the DRD Rules.	+10 hours	+15 hours
5B	Attendance on appeal. -Add for each additional day (per day)	+6 hours +7 hours	+10 hours +10 hours
5C	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)	+4 hours +6 hours +7 hours	+8 hours +9 hours +9 hours
<b>STAND-ALONE ITEMS</b>			
1	Where advice is given or a dispute is resolved prior to lodging an application but when all necessary preparation has been done.	3 hours	
2	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).	+ 10 hours	+20 hours
3	Allowances for witnesses 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 – (a) witnesses called because of their professional, scientific or other special skill or knowledge; and (b) witnesses called other than those covered in paragraph (a). 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.		
4	Disbursements (not to include counsel fees and must be justified by voucher).	Such amount that is necessarily and reasonably incurred under the circumstances.	

## 9. Degree of complexity

- (1) Column A: routine, non-complex disputes.
- (2) 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.
- (3) Column B: complex matters may include, but are not limited to:
  - (a) multiple employers; or
  - (b) presentation of latent injuries.
- (4) 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.
- (5) The rates by which the maximum level of remuneration is to be calculated for items under Column B are set out in the Table to clause 7 and are aligned with the hourly rates set out in the costs scale of the Magistrates Court, having regard to the type of fee earner (e.g. Junior Practitioner or Senior Practitioner), except with regard to Registered Agents whose maximum recoverable costs are to be calculated based on 50 per cent of the hourly rate available to Senior Practitioners in the Magistrates Court.
- (6) 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.
- (7) 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. For the purposes of making an Application for Special Costs Order:
  - (a) DRD Approved Form 18, approved by the Commissioner in accordance with the DRD Rules, 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 8 (refer to clause 9(9)).
  - (b) An arbitrator may determine whether a special costs order to access Column B is justified by the complexity of the dispute.
- (8) 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.
- (9) This Costs Determination operates on the basis that matters are routine, unless demonstrated otherwise, subject to clause 9(7).

## 10. Methodology – Part XI Matters

- (1) References to "items" under this clause are in reference to those items under "Part XI Matters" of the costs scale.
- (2) Items 1 to 4 inclusive of the scale are consecutive, cumulative milestones, subject to clause 10(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.
- (3) Subject to clause 3, costs recoverable for pending proceedings, refer to section 182 of the *Workers' Compensation Reform Act 2004* (the Reform Act), are remunerated according to the milestones reached in Determinations made under section 271 of the Act post 14 November 2005, subject to the milestones 1, 2, 3 and 4 not being cumulative in these circumstances.
- (4) For the purposes of clause 10(3), "**pending proceeding**" means –
  - (a) any matter the conciliation, review or other determination of which was sought but not commenced under the Act before a dispute resolution authority prior to the day on which section 130 of the Reform Act came into operation; or

- (b) any matter that has been partly or fully heard or otherwise dealt with before, but not determined by, a dispute resolution authority prior to the day on which section 130 of the Reform Act came into operation.
- (5) The legal services described in items 5A, 5B and 5C of the costs 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.
- (6) This clause should be read in conjunction with clause 11.

## **11. Stand-Alone Items**

- (1) References to "items" under this clause are in reference to those items under "Stand-Alone Items" of the costs scale.
- (2) Item 1 is a stand-alone item and the following rules should be observed with regard to its application. This item is:
  - (a) only payable or recoverable by an individual legal practitioner or registered agent once in relation to a dispute;
  - (b) 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; and
  - (c) not payable or recoverable in conjunction with any other item in the scale, with the exception of disbursements.
- (3) The legal services described in items 2 to 4 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.
- (4) Item 3 – 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.
- (5) Item 4 – Disbursements:
  - (a) Reference to voucher in item 4 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) Medical reports – except with the leave of an arbitrator, parties may only use as evidence the medical reports of one doctor in each medical speciality, with a limitation of three areas of medical speciality overall. 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. Refer to DRD Rule 91 for more information.

## **12. Payment under both Parts**

- (1) In appropriate circumstances, legal practitioners or registered agents 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) This costs scale does not apply to proceedings before the Supreme Court. Legal practitioners are entitled to recover an amount determined in accordance with the Supreme Court scale of costs, made under the *Legal Practice Act 2003*, when appearing before the Supreme Court.
- (3) 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).
- (4) 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.
- (5) 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 of the Act are void.

**15. Interpretation of item descriptions**

- (1) In interpreting item descriptors as set out in the Table to clause 8, 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 5C – 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 8, 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.