

Proposed amendments to the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2015*

To

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1. Introduction

- 1.1 The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to the 'Costs Determination Consultation Paper' (September 2018).
- 1.3 The Society has previously expressed concern as regards the adequacy of the costs determinations for Arbitration, made pursuant to the *Workers Compensation and Injury Management Act 1981 (WA)* ("WCIM Act").
- 1.4 Below, in addition to outlining the statutory framework as regards costs in the Arbitration Service and current costs determination, we now set out these concerns in greater detail, together with our proposals for reform.
- 1.5 The Society has no concerns as regards the current cost regime for Conciliation.

2. Statutory Framework for Costs in the Arbitration Service

- 2.1 Costs are in the discretion of the Arbitrator, who is empowered to determine "by whom to whom and to what extent costs are to be paid": s. 264(1) and (2) of the WCIM Act.
- 2.2 Section 268 is concerned with the amount of costs payable and gives a regulation making power in relation to costs:
 - (1) *If a dispute resolution authority makes an order for the payment of costs and does not fix the amount of costs, that amount is to be assessed or settled in accordance with the regulations.*
 - (2) *Without limiting subsection (1), the regulations may-*
 - (a) *make provision for or with respect to any matter for or in connection with which provision is made by the Legal Profession Act 2008 Part 10 Division 8; and*
 - (b) *adopt, with or without modification, any of the provisions of the Legal Profession Act 2008 Part 10 Division 8; and*
 - (c) *make provision for or with respect to the assessment of costs by an arbitrator or another officer of the DRD.*
 - (3) *To the extent that regulations under this section make provision for the costs payable to a legal practitioner, those regulations displace the provisions of the Legal Profession Act 2008.*

2.3 The applicable regulations appear in the Workers Compensation and Injury Management Regulations 1982 (as amended), reg. 18A-18K. Of importance to present discussion is reg. 18G:

18G Assessment to give effect to order and costs determination

An assessment of costs must be made in accordance with, and so as to give effect to, orders of the dispute resolution authority and any costs determination published under section 273 of the Act.

2.4 The determination referred to in Reg 18G and s. 273 is the determination of the Costs Committee in relation to the “fixing of maximum costs for legal services” made pursuant to s. 271 of the WCIM Act:

271 (1) *The Costs Committee may make a determination-*

- (a) *fixing maximum costs for legal services and agent services;*
- (b) *fixing maximum costs for matters that are not legal services or agent services but are related to a claim for compensation (for example, expenses for witnesses or medical reports).*

(2) *A provision of the determination-*

- (a) *may authorise any matter or thing to be determined applied or regulated by a specified person or body;*
- (b) *may fix a cost or amount by reference to a cost or amount fixed by a costs determination (as defined in the Legal Profession Act 2008 section 252).*

(3) *The power under this section to make a determination for services or matters includes power to make a determination that no amount is recoverable for a particular service or matter or class of services or matters, with the result that a legal practitioner or agent is not entitled to be paid or recover any amount for the service or matter concerned.*

2.5 Another relevant section is s. 274 which specifies the effect of a costs determination.

274 (1) *A legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by a costs determination.*

(2) *An agent is not entitled to be paid or recover for an agent service or other matter an amount that exceeds any maximum costs fixed for the service or matter by a costs determination.*

(3) *This section does not entitle a legal practitioner or agent to recover costs for a legal service or matter that a dispute resolution authority determines were unreasonably incurred.*

2.6 In summary, the WCIM Act provides a discretionary power to award costs and a regulatory regime via the determinations of the Costs Committee, that sets the quantum of costs that a legal practitioner can be paid or recover.

3. The Current Costs Regime

3.1 The Costs Committee has made five costs determinations. The first was in 2005 and subsequent determinations were made in 2007, 2011, 2014 and 2015. The intention of the 2005 Determination was to establish an “events based” system of costs assessment in place of the more common, “activities based” system. This is a significant departure from the costs scale used in other courts, which are generally activities based, for example, the *Legal Profession (Supreme Court) (Contentious Business) Determination 2018* and *Legal Profession (Magistrates Court) (Civil) Determination 2018*. This is made clear in paragraph 3(4) of the Costs Committee’s 2007 Report that this philosophy was carried over from the initial 2005 Determination into the subsequent determinations:

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.

3.2 In line with this intention, the table to clause 9 of the latest 2015 Determination lists various milestone events said to comprise an application for an arbitration hearing, with a number of hours being specified for each such milestone. The following are the milestones provided for an arbitration hearing in the 2015 Determination:

Item No.	Description	Hours
5.	Preparation of and lodging an application or reply to the Arbitration Service including all necessary documentation in approved form in accordance with the Arbitration Rules.	8
6.	Where the dispute is resolved after the lodging of an application to the Arbitration Service and prior to the arbitration hearing, including all necessary preparation and documentation in the approved form and attendance at a Directions in accordance with the Arbitration Rules.	+6
	Add for each additional Directions hearing.	+2
	Add for each interlocutory application	+3
7.	Where the dispute is resolved at or after an arbitration hearing, including all necessary preparations and documentation in the approved form in accordance with the Arbitration Rules.	+7
	Add for each additional hearing day.	+7

3.3 As can be seen, the maximum hours of work that a solicitor can be paid for the preparation of an arbitration hearing is 14 hours, which is the sum of items 5 and 6 of the 2015 Determination.

3.4 By contrast, in the costs scales used in the Magistrates Court and the District Court, the maximum allowance for trial preparation is as follows:

Magistrates Court	Item 13	Preparation for Trial: 50 hours
District Court	Item 17	Preparation for Trial: 120 hours

3.5 There is further allowance in both scales for preparation for trial by the barrister briefed for a trial as follows:

Magistrates Court	Item 15(a)	2 days preparation (20 hours)
District Court	Item 21(a)	3.5 days preparation (35 hours)

3.6 Adding these various items together produces a maximum allowance for trial preparation in the Magistrates Court of 70 hours, and the District Court of 155 hours.

3.7 The maximum hourly rates chargeable are specified in the table to Clause 8 of the 2015 Determination, by reference to the Magistrates Court costs scale as follows:

Fee Earner	Maximum Allowable Hourly Rate
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 rates 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.

3.8 Presently, the hourly rates specified in the Legal Profession (Magistrates Court) (Civil) Determination 2018 are as follows:

- Senior Practitioner \$418.00
- Junior Practitioner \$319.00

4. Criticisms of the Current Costs Regime in relation to Arbitration

4.1 The Society considers both the hourly rates, and the system of determining the maximum hourly rate charged according to a practitioner’s seniority, are appropriate and fair.

4.2 However, in the Society's submission, the allowance for preparation for an arbitration hearing is not sufficient or adequate. As a formal proceeding before a judicial officer (the Arbitrator), where witnesses are called and sworn, and formal submissions (oral and written) are made, the equivalent in other jurisdictions would be a “trial”.

4.3 As we have detailed above, the maximum allowance for an arbitration hearing of 14 hours is dwarfed by the maximum allowance in the Magistrates Court at 70 hours, and that in the District Court of 155 hours. Further, since the new system for arbitration hearings was introduced in 2005 (with the accompanying costs determination) the way in which

arbitration hearings are conducted has evolved.

4.4 In particular, the Arbitration Service has formulated its own practices regarding the conduct of arbitration hearings. These practices, while assisting in the arbitration process, have greatly increased the amount of preparation required by a party for arbitration. In particular, the Society understands the following documents are presently routinely ordered by Arbitrators to be provided by parties to their opposite number and to the Arbitrator.

- Witness statements
- Particulars of Claim
- Written submissions
- Indexed Books of Documents

4.5 However, despite being ordered, none of these documents are allowed for by the current cost determination. It seems only reasonable that if a party's solicitor is ordered to provide the document by an Arbitrator, the practitioner instructed by his or her client should be allowed to charge his client for that service. This is the compliance cost of following the orders of an Arbitrator.

4.6 A useful comparison can be made with the Magistrates Court and the District Court scales with respect to some of these items:

- **Witness Statements.** These are not ordinarily used in either of the Magistrates Court nor District Court, so there is no allowance on either scale for drafting these documents. Under the Federal Court Rules 2011 – Schedule 3, the allowance for “preparing documents” is \$52.00 per 100 words. Most witness statements covering substantial matters would comprise at least 1000 words.
- **Particulars of Claim.** These are allowed for in Item 2 as a (“Statement of Claim”) in the Magistrates Court at a scale maximum of 8 hours. The equivalent allowance in the District Court scale is 10 hours in Item 1(c).
- **Written Submissions.** These are allowed for in Item 20(g) of the District Court scale as “an amount which is reasonable in the circumstances”. There is no specific allowance in the Magistrates Court scale for written submissions but Item 25 which provides for “time reasonably spent by a legal practitioner on work requiring the skill of a legal practitioner.... but not covered by any other item”.
- **Book of Documents.** There is no specific allowance for books of documents, however these are provided for in the catch all previously mentioned in Item 25 of the Magistrates Court scale, and it equivalent in the District Court scale at item 33.

4.7 Further, there are significant sums that can be involved in proceedings under the WCIM Act. For example, a dependency claim for the death of a worker is the “Notional Residual Entitlement” which is currently \$305,000.00. Claims where a worker has suffered severe or catastrophic injuries often reach the “prescribed amount” which is currently \$230,000.00.

4.8 This should be contrasted with the jurisdictional maximum of the Magistrates Court, which is currently \$75,000.00.

4.9 Ultimately, the Society respectfully contends that the costs allowed for preparing for an arbitration hearing are not satisfactory, and are well below the amounts allowed in other Western Australian jurisdictions. As outlined, the Arbitration Service has matured since 2005, and it has developed practices to assist in the timely resolution of disputes, that could not have been anticipated when the 2005 scales were drafted. As a result, the practices developed have not been allowed for in the current scale. Fairness dictates that if a party is required by an Arbitrator to draft legal documents, that party's solicitor should be allowed to charge for enabling his client to comply with the order made by the Arbitration Service.

5. Proposals for Reform

5.1 It is submitted that the allowance for an arbitration hearing be increased to the Magistrates Court Scale of 50 hours. It would seem appropriate that this Scale be used as a benchmark, as it has been used to fix applicable hourly rates within the jurisdiction.

5.2 The Society also recommends allowance be made for the three practices that have been referred to above, where ordered by an Arbitrator. The following would be a reasonable addition to the Costs Scale:

Item	Description	Hours
6.	Where the dispute is resolved after the lodging of an application to the Arbitration Service and prior to the arbitration hearing, including all necessary preparation and documentation in the approved form and attendance at any directions hearing in accordance with the Arbitration Rules.	+ 25
	ADD for each additional directions hearing	+2
	ADD for each interlocutory application	+3
	ADD each witness statement	+2
	ADD Book of Documents (where ordered)	+2
	ADD Particulars of Claim/Defence (where ordered)	+5
	ADD written submissions (where ordered)	+5

We trust that these remarks will be helpful, and would be happy to discuss them further with you.



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President