

**Submission**

**Draft Workers' Compensation  
(Legal Practitioners and  
Registered Agents) Costs  
Determination 2011**

**To**  
WorkCover WA Costs Committee

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## Draft Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2011

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The Law Society of Western Australia acknowledges receipt of correspondence dated 6 September 2011 from Michelle Reynolds, Chair of the Costs Committee and thanks the Costs Committee for the opportunity to comment on the revised draft *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2011* (Draft Costs Scale).

It is noted that comment on the Draft Costs Scale is required by 3 October 2011 in order that the Costs Committee may finalise its deliberations and make a report to the Minister for Commerce by the commencement date of the new dispute resolution process of 1 December 2011.

### Conciliation and Arbitration Rules

By letter dated 23 August 2011 from Ms Reynolds in her capacity as Chief Executive Officer of WorkCover WA, Ms Reynolds advised that drafting instructions for the Conciliation and Arbitration Service Rules (Rules) that will govern the new dispute resolution processes have been approved by the Minister and forwarded to Parliamentary Counsel. A copy of the Rules has not yet become available to the Society.

The Rules are fundamental to the implementation of the new dispute resolution processes. The new processes are fundamental to the fairness and reasonableness of the Draft Costs Scale.

A costs scale must be approached from the basis of the work that is actually done. The Society will not be in a position to know what work is actually required for each stage of the dispute resolution process until the Rules have been finalised and provided to the Society.

The Society's comments on the Draft Costs Scale can therefore be based only on what information is currently available.

### Revised form of Draft Costs Scale

Table 8 to the *Workers' Compensation Scale of Costs 2005*, which is the heading to the scale in the 2007 Costs Determination, (current Scale) is an event based scale allowing a specified number of hours for each stage of the dispute resolution process.

Items 1-3, Part XI matters of the current Scale (Column A) are:

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
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

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
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The total of these allowable hours is 27.

The maximum allowable hours in items 1 to 4 in the Draft Costs Scale (see below) total 14 and the provision for a degree of complexity (Column B) and Stand-Alone items has been removed.

	Draft Costs Scale	Maximum allowable hours
1	Obtaining instructions from client and attempts to resolve the dispute by negotiation prior to lodging an application	3
2	Preparation and lodging an application to the Conciliation Service including relevant supporting documentation in approved form in accordance with the Conciliation Rules	+4
3	Where the dispute is resolved after lodging the application and prior to a conciliation conference, including all necessary preparation and documentation in approved form in accordance with the Conciliation Rules.	+2
4	Where the dispute is resolved after a conciliation conference, including all necessary preparation and documentation in approved form in accordance with the Conciliation Rules.	+5
	Add for each additional conference	+3

There is an allowance of 15 hours in item 1 in the current scale but only 9 hours for items 1 to 3 in the Draft Costs Scale.

Without knowledge of the Rules there appears to be no discernible difference between the work to be done.

### **Negotiation and Conciliation**

It is understood that conciliation is to play a fundamental role in the new dispute resolution processes. It is noted that under the new section 182F that an application for conciliation cannot be accepted by the Director unless the Director is satisfied that reasonable attempts have been made to resolve the dispute by negotiation with the other party or parties to the dispute, and that the onus is on the applicant to satisfy the Director.

It is the experience of legal practitioners that to properly take instructions for an application, including reading all medical reports, can often take up to eight hours. In addition, section 182F must be complied with.

On the face of it the maximum number of allowable hours is significantly insufficient. It is worth noting that the allowance for getting up in the Magistrates Court Civil Scale is 50 hours at senior practitioner rate.

## **No provision for resolution of a dispute at a conciliation conference**

The 2005 Scale provides for resolution of a dispute after lodging but prior to a teleconference, at a teleconference or conciliation conference, and after a completed conference. The Draft Costs Scale refers only to resolution prior to a conciliation conference (item 3) and after a conciliation conference (item 4). There is no mention of resolution at a conciliation conference.

## **Arbitration Service**

Item 5 of the Draft Costs Scale reads:

*Preparation and filing an application to Arbitration Service including all necessary documentation in approved form in accordance with the Arbitration Rules – 8 hours.*

If a legal practitioner is instructed to appear at arbitration (but not prior conciliation) there is no provision in the Draft Costs Scale for taking instructions.

## **Stand Alone items**

It is submitted that the reference to section 76 in item 8 of the Table to the Draft Costs Scale should be deleted and that item 8 should be amended as follows:

Settlement of the claim by agreement under Schedule 2 or redemption and filing a ~~section 76~~ memorandum of agreement or redemption orders (excluding disbursements which are to be paid in accordance with item 10).

## **Maximum allowable hours /inability to charge in excess of scale**

Section 274 of the Act                      Effect of costs determination

(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.*

Section 275 of the Act                      Agreement as to costs

(1) *An agreement is not to be made for a legal practitioner or agent to receive, for any legal service or agent service, any greater reward than is provided for in a costs determination.*

(2) *An agreement made contrary to this section is void.*

As already mentioned, there is provision in the current Scale for a degree of complexity. Not only has this provision been removed but the maximum number of allowable hours has been decreased.

A legal practitioner is prohibited from entering into a costs agreement for the provision of legal services at a rate higher than the scale for a proceeding before the dispute resolution directorate.

In acting for a client, a legal practitioner must act honestly and ethically and with competence and diligence. A legal practitioner must spend whatever time is required to provide a competent and diligent legal service regardless of the remuneration the practitioner will receive.

The maximum allowable hours in the Draft Costs Scale have been allocated without any experience of the current processes but at the same time it must be accepted that they reflect minimal remuneration for legal services.

The dispute resolution directorate is an important jurisdiction. The parties' interests are best served when they have legal representation. It would be detrimental to the interests of the parties if a consequence of the new costs scale was a defacto disincentive for legal practitioners to act in this jurisdiction in which parties are vulnerable and subject to considerable stress. It is also considered to be in the interests of the dispute resolution process that the parties have competent representation to assist in distilling the issues and resolving disputes.



Hylton Quail  
**President**