

Workers Compensation and Injury Management Act 2023
Costs Committee

Draft Costs Determination

Implementation Consultation Paper 22:
Draft Costs Determination Proposed by Costs
Committee
May 2024

Public comment on the draft Costs Determination is to be submitted to:

consultation@workcover.wa.gov.au by **31 May 2024**

All submissions will be publicly accessible unless confidentiality is requested.

For further details on making a submission see:

<https://www.workcover.wa.gov.au/resources/modernising-was-workers-compensation-laws/>

*****Draft determination only*****

The proposals in this consultation paper are in draft form to facilitate public comment and do not represent the final position of the Costs Committee.

Implementation Consultation – Draft Costs Committee Determination

Scope

This document sets out a proposed draft Costs Determination that, if made, will apply to costs charged by legal practitioners and authorised agents in relation to disputes in the WorkCover WA Conciliation and Arbitration Services (CAS), under the *Workers Compensation and Injury Management Act 2023* (WCIMA23), from 1 July 2024. The draft Costs Determination will replace the *Workers' Compensation (Legal Profession and Registered Agents) Costs Determination 2018* currently in operation under the 1981 Act.

Background and Intent

A Costs Determination governs the awarding of legal costs and agent services in CAS. The Costs Determination is made by the Costs Committee established under section 402 of the WCIMA23 and is approved by the Minister for Industrial Relations.

The last Costs Determination was made in 2018. In view of the timeframe since the last major review, and the WCIMA23 coming into operation on 1 July 2024, it is appropriate a review of the Costs Determination is undertaken in order to ensure the continued delivery of an effective dispute resolution service.

The 2018 Determination uses a milestone based scale. This means a maximum hours based allowance is made for having achieved a particular stage of the dispute resolution process. The milestone based scale has been employed in the Western Australian workers compensation dispute resolution forum for a number of years.

As such, the WorkCover WA Board determined to reconvene the Costs Committee. The Costs Committee is authorised under section 405 of the WCIMA23 to make, amend or revoke determinations with respect fixing maximum costs that may be charged for legal services and agent services in CAS.

Section 402 establishes the membership of the Costs Committee to be the WorkCover WA CEO, one or more WorkCover WA Board members, and two members of the Legal Costs Committee, nominated by the Chairperson of that Committee.

The Costs Committee is comprised of:

- Mr Chris White – WorkCover WA CEO – Chair
- Ms Sharryn Jackson – WorkCover WA Board Chair
- Mr Owen Whittle – WorkCover WA Board Member
- His Honour Judge Matthew Curwood SC – Legal Costs Committee Chair
- Ms Carolyn Meighan – Legal Costs Committee Member

The Costs Committee has been constituted and met initially on 7 May 2024, to discuss issues relating to disputes in CAS and the awarding of legal costs. On the basis of this discussion the Costs Committee approved releasing a draft Costs Determination which is at Attachment 1. The Costs Committee also considered proposed amendments to the scale of costs in light of a submission made by a key stakeholder prior to the Costs Committee being established and the consultation period opening.

The Costs Committee will meet after submissions have been made on the draft Costs Determination and the consultation period has finished. Due to the tight timeframes the submission period will close 31 May 2024, after which the Costs Committee will meet to consider submissions with the aim of recommending a final Costs Determination to the Minister for Industrial Relations prior to the new Act coming into operation on 1 July 2024.

Stakeholders may also be aware of impending changes to the Magistrates Court Costs Scale and contentious business determinations. These changes are likely to be made in June and may have some impact on the Costs Determination (for example, with respect to hourly rates for practitioners).

WCIMA23 key provisions

Part 6, Division 6, s.402-410.

Costs in the Conciliation Service

It is proposed there are no changes to the maximum allowable hours provided for in relation to proceedings in the Conciliation Service. The Costs Committee is not aware of any issues relating to Items 1-4 of the scale of costs.

Costs in the Arbitration Service

The Costs Committee proposes that Item 6 of the scale of costs be increased from +6 hours to +30 hours. The increase reflects the increased complexity and time required for legal practitioners when preparing for an arbitration hearing since the 2018 Costs Determination was made.

The Costs Committee also propose the time allowable for a directions hearing be reduced from +2 hours to +1 hour, to accurately reflect the actual time needed for directions hearings. Similarly, the time for each interlocutory application is proposed to reduce from +3 hours to +2 hours, again to accurately reflect the actual time needed for interlocutory applications.

It is also proposed to add a specific item for pre-arbitration conferences of +4 hours and an additional +2 hours for each subsequent pre-arbitration conference. The time for preparation of a pre-arbitration conference is appropriately dealt with in the proposed 30 hours allowable for preparation. The time provided is an accurate representation of the time required for a pre-arbitration conference and the rare case of a subsequent pre-arbitration conference.

Item 7 has been re-worded to refer only to attendance at arbitration along with incidental preparation on the day of the hearing. The current wording is confusing in that it appears to include some work that should be done under Item 6. It is also proposed to increase from +7 hours to +10 hours for attendance at an arbitration hearing. This reflects the maximum length of a hearing and additional time a legal practitioner may spend in discussions with their client. It is not proposed to provide any additional time for additional hearing days which will remain at +7.

There are no intention for any amendments to Items 8, 9, or 10 of the Costs Determination.

An alternative option

The Costs Committee considered, as an alternative to the above proposal, an option in which there is a reduction in the +30 hours proposed in Item 6, with a corresponding increase in hours at Item 7:

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 hearing in accordance with the Arbitration Rules.	+20
	Add for each additional directions hearing	+1
	Add for each interlocutory application	+2
	Add for the first pre-arbitration conference	+4
	Add for each subsequent pre-arbitration conference	+2
7	Attendance at an arbitration hearing, including any preparation of submissions, briefing of counsel or instructing solicitor, on the day of the hearing in accordance with the Arbitration Rules.	+20
	Add for each additional hearing day.	+7

This alternative option removes some of the 'front loading' of the scale of fees and provides a greater ability to charge fees for attendance at a hearing, and the necessary work that may go into that attendance including preparing submissions, briefing counsel, and other matters. No other changes to the scale of costs would be proposed with this alternative option.

The Costs Committee seeks submissions from stakeholders on this alternative option.

How to make a submission

The Costs Committee invites written submissions on the draft Costs Determination by no later than 31 May 2024.

Your submission 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 you specify that your submission is confidential.

Attachments

1. Draft *Workers Compensation Legal Profession and Authorised Agents Costs Determination 2024*.