



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 8

WORKERS COMPENSATION

8.1	INTRODUCTION
8.2	STATUTORY COMPENSATION CLAIMS
8.3	STRUCTURE OF THE REGULATIONS
8.4	METHODOLOGY FOR DETERMINING COSTS
8.5	GENERAL COMMENTS ON COSTS REGULATED UNDER PART 17
8.6	COMPENSATION CLAIMS
8.7	WORK INJURY DAMAGES CLAIMS
8.8	ASSESSMENT OF COSTS

The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 ([LPUL Schedule 4 clause 18](#)).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 ([LPULAR clause 59](#)).

8.1 INTRODUCTION

There have been significant reforms to workers compensation costs since 2001. The Compensation Court of NSW, and the system of costs that existed under it, was abolished in December 2001. On 1 January 2002, the Workers Compensation Commission of NSW commenced operation and a new system of costs regulation was introduced, alongside very significant reforms to the system for resolving compensation disputes. In late 2006, the costs regime under the Workers Compensation Commission was substantially altered.

In June 2012, further significant changes were introduced to the Workers Compensation Scheme in NSW. These amendments also changed the costs provisions, prohibiting the making of any costs order in commission proceedings.

A new office of the Workers Compensation Independent Review Officer (WIRO) was established. WIRO may make recommendations that are binding on insurers and WorkCover. WIRO may also investigate complaints regarding insurers and make non-binding recommendations.

On 1 September 2015, the regulatory and insurance functions of WorkCover were assumed by three new discrete organisations: the State Insurance Regulatory Authority (SIRA) for workers compensation regulation; SafeWork NSW for work health and safety regulation; and Insurance & Care NSW (icare) for workers compensation insurance.

A new Independent Legal Assistance and Review Service (ILARS) was established in the office of WIRO. This service deals with applications for funding from injured workers who are seeking resolution of their dispute. It also provides grants of legal assistance to approved legal service providers to pursue meritorious claims for injured workers.

WIRO's role is to ensure that funding is made available for approved legal service providers at an early stage of the process to enable supporting material to be obtained. An application to become an approved legal service provider can be made by completing the application forms available at www.wiro.nsw.gov.au.

8.2 STATUTORY COMPENSATION CLAIMS

For claims lodged from 1 January 2002, costs were regulated under the Workers Compensation (General) Amendment (Costs) Regulation 2001. The Workers Compensation (General) Amendment (Costs in Compensation Matters) Regulation 2003, effective from 28 February 2003, increased some of the items in the scales in Schedule 6, and also permitted the recovery of certain travelling and accommodation expenses. A few extra items of costs were also introduced.

For claims lodged (or matters resolved without recourse to the commission) from 1 November 2006, a new costs regime was introduced by the Workers Compensation Amendment (Costs) Regulation 2006 (and then incorporated into the Workers Compensation Regulation 2003).

The Workers Compensation Regulation 2010 (2010 Regulation) took effect from 1 February 2011, replacing the Workers Compensation Regulation 2003.

The 2010 Regulation was automatically repealed on 1 September 2016 under [section 10](#) of the *Subordinate Legislation Act 1989*. The [Workers Compensation Regulation 2016](#) (2016 Regulation) commenced on 1 September 2016. The 2016 Regulation remade, with minor amendments, the Workers Compensation Regulation 2010.

Reference to clauses, unless otherwise stated, refer to the Workers Compensation Regulation 2016.

On 1 October 2012, Division 3 of Part 8 of the *Workers Injury Management and Workers Compensation Act 1998* (NSW) (WIM Act) was significantly amended with respect to party/party costs. Section 341 of that act now states:

341 Costs

- (1) Each party is to bear the party's own costs in or in relation to a claim for compensation.
- (2) The commission has no power to order the payment of costs to which this Division applies, or to determine by whom, to whom, or to what extent, costs to which this Division applies are to be paid.

This section applies to matters commenced in the commission after 31 March 2013.

An injured worker's legal costs for work done in respect of a claim for compensation are now paid by WIRO to the worker's practitioner as outlined above. These costs are not paid by the insurer as party/party costs.

8.3 STRUCTURE OF THE 2016 REGULATION

The structure of the 2016 Regulation assists in understanding how costs are regulated. Costs are dealt with in Part 17 as follows:

Division 1 – Preliminary deals with definitions and costs that are not regulated by Part 17.

Division 2 – Costs recoverable in compensation matters indicates the maximum costs recoverable in “compensation matters” for legal services or costs that are related to a claim (see Schedule 6). This Division also deals with maximum costs recoverable for medical or related treatment or health services fees.

Division 3 – Costs recoverable in work injury damages matters indicates the maximum costs recoverable in “work injury damages matters” for legal services or costs that are related to a claim (see Schedule 7), “except as otherwise provided by this Part”. Clause 93 allows a legal practitioner to contract out of the maximum costs on a practitioner/client basis (that is, a practitioner cannot contract out of the application of Schedule 7 to party/party costs). Clauses 94–99 set out certain restrictions on the awarding of costs.

Division 4 – Assessment of costs applies to assessment of costs, both in compensation matters and work injury damages matters. It explains how an application is made, what test is applied to the determination of costs, and avenues of appeal in relation to the Registrar's determinations.

Division 5 – Goods and services tax provides that GST may be added to fixed costs.

Division 6 – Miscellaneous provides that bills of costs must be in the approved form, and permits a Registrar to make a costs order in connection with certain events.

Schedule 6 sets out **maximum costs in compensation matters**. [Schedule 6](#) contains Parts 1, 2 and 3 as follows.

[Part 1](#) contains definitions and describes the application and operation of the tables in [Schedule 6](#).

[Part 2](#) contains four tables:

- **Table 1**, which sets out the phases during which claims and disputes may be resolved, and the costs that apply for the resolution at each phase.
- **Table 2**, which sets out the types of resolutions that apply to Table 1, and indicates the level of costs (that is, 75 per cent or 100 per cent) that will apply to that resolution type.
- **Table 3**, which sets out alternate or “special” resolution types and the applicable costs for each party. Tables 1 and 2 do not apply to these “special” resolution types.
- **Table 4**, which sets out additional legal services and other factors that may result in an increase to the costs claimable under Table 1.

[Part 3](#) lists regulated disbursements.

8.4 METHODOLOGY FOR DETERMINING COSTS

[Part 1](#) of Schedule 6 of the 2016 Regulation explains the methodology for determining costs as:

- When a claim or dispute is resolved, legal practitioners or agents representing the parties will need to determine what type of resolution has been reached and when. By applying these factors to [Schedule 6](#) of the 2016 Regulation, the legal practitioners or agents will be able to ascertain the costs to be recovered.
- If a claim or dispute involves a number of resolution types that are resolved concurrently, or within a specified time frame, the costs to be recovered are restricted to the resolution for the highest amount of costs payable.
- The costs to be recovered will be either:

- 8 a maximum flat, predetermined figure; or
- 9 in the case of certain “special resolutions”, a maximum amount establishing a range within which the parties may negotiate their costs entitlement.
- If a claim or dispute (other than a claim or dispute resolved by special resolution) includes “additional legal services” or involves “factors” as referred to in [Table 4](#) of the 2016 Regulation, there may be an additional allowance that can be added to the entitlement to costs.

8.5 GENERAL COMMENTS ON COSTS REGULATED UNDER PART 17

8.5.1 APPLICATION

The regulated amounts cover costs for legal services or agent services provided in, or in relation to, a claim for “compensation” or “work injury damages”, and costs for “matters that are not legal or agent services, but are related to a claim for compensation” (cls. [88](#) and [92](#)). The amounts set out in schedules [6](#) and [7](#) of the 2016 Regulation are the “maximum” costs.

[Schedule 6](#) of the 2016 Regulation applies both on a party/party and practitioner or agent and client basis. This means all practitioners practising in this area are affected.

8.5.2 CONTRACTING OUT

It is not possible to contract out of the regulated costs provisions in compensation claims. You can contract out in work injury damages claims.

8.5.3 COSTS

Costs are dealt with under Part 8 of the WIM Act and Schedule 7 of the 2016 Regulation. Under the 2016 Regulation, the meaning of “costs” is as per the legal costs legislation (as defined in section 3A of the [LPULAA](#)). This means “costs” also include practitioners’ and barristers’ expenses and disbursements, as well as their fees.

It also means the lump sum amounts allow for practitioners’ “costs”, including previous add-ons such as agents’ fees or practitioners’ travel costs. Faxes and copying can no longer be separately claimable. They are now rolled up into the lump sums for individual activities/events.

8.5.4 UNREGULATED COSTS

Costs that are not regulated for statutory compensation are listed in [clause 86](#) as the following:

- for an appeal under [section 353](#) (“Appeal against decision of the Commission constituted by Presidential Member”) of the WIM Act
- fees for investigators’ reports or for other material produced or obtained by investigators (such as witness statements or other evidence)
- fees for accident reconstruction reports
- fees for accountants’ reports
- fees for reports from health service providers (note: under [s. 339](#) of the WIM Act, the WorkCover Authority has, from 4 November 2003, fixed maximum fees for reports and appearances of health service providers before the commission)
- fees for other professional reports relating to treatment or rehabilitation (for example, architects’ reports concerning house modifications)
- fees for interpreter or translation services
- fees imposed by a court or the commission
- travel costs and expenses of the claimant in the matter for attendance at medical examinations, a court or the commission
- witnesses’ expenses at a court or the commission.

8.5.5 GST

GST may be added to compensation costs as well as work injury costs ([cl. 129](#)).

8.6 COMPENSATION CLAIMS

WIRO will pay costs based on the amounts prescribed in [Schedule 6](#) of the 2016 Regulation for approved work done (not dependent on success). WIRO will also consider paying for disbursements for medical reports of the kind identified in the original Application for Grant of Assistance. WIRO will not reimburse for GST paid on a medical report requested by the practitioner.

A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in [Schedule 6](#) and [clause 88](#) of the 2016 Regulation. The maximum costs that can be recovered are set out in this Schedule.

If a party changes legal representation, the relevant costs under [Schedule 6](#) of the 2016 Regulation are to be apportioned ([cl. 88](#)).

8.6.1 NO LEGAL COSTS FOR WORK CAPACITY DECISION REVIEW PROCESS FOR WORKER OR INSURER

[Section 44\(6\) of the Workers Compensation Act 1987](#) stated:

“A legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer.”

Clause 9, Schedule 8 of the [Workers Compensation Regulation 2010](#) states:

“A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to an insurer in connection with an internal or other review in relation to a work capacity decision of the insurer.”

However, no such prohibition exists under the Workers Compensation Amendment (Legal Costs) Regulation 2016. [Section 44BF](#) of the Workers Compensation Act has the effect of allowing a legal practitioner to be paid by the Insurer providing legal service to a worker in connection with the Application or proposed Application for a Merit Review of a Work Capacity Decision with SIRA's Merit Review Service. If the application is successful then a fee payable by the insurer to the legal practitioner is \$1,800.00. In any other case the fee payable by the insurer to the legal practitioner is \$1,200.00. This regulation takes effect in respect to work capacity decisions made after 16 December 2016.

8.6.2 COSTS ALLOWED BY SCHEDULE 6

The Workers Compensation Amendment (Further Transitional) Regulation 2012 inserted a new rates schedule in Schedule 6 of the Workers Compensation Regulation 2010. The new rates apply to all resolutions on or after 1 October 2012.

Under [Schedule 6](#) of the 2016 Regulation, practitioner's costs are based on a type of banding, which allows lump sums for categories of tasks grouped in the following stages:

- a. **Maximum amount for an individual activity/event:** Rather than claiming, for example, separate phone calls and letters to an examining specialist, the legal practitioner is allowed a maximum amount for this category of work (activity/event). Although there is a maximum amount for an individual activity/event, there is also a cap on the amount for a type of activity/event. The amounts for an activity/event are set out in the Compensation Costs Table in [Schedule 6](#).
- b. **No fee unless included in [Schedule 6](#):** If work does not fall within a description of an activity/event in the table, it does not attract a fee, unless it is not regulated (see above).
- c. **Hourly rates:** While certain work is stated to be at an hourly rate, the table places caps that limit costs recovery, regardless of the amount of work done. In the limited situations where a separate allowance is made to instruct a barrister, the practitioner's hourly rate is lower.
- d. **The table is divided into parts or stages:** [Part 1](#) relates to making a claim for permanent impairment or pain and

suffering, while [Part 2](#) relates to activities undertaken until the dispute is referred or an order is sought. [Schedule 6](#) Table 4 covers the filing of an application/response to the determination of the dispute by the commission constituted as an arbitrator. Certain parts are subdivided into activities/events undertaken exclusively on behalf of either a claimant or an insurer.

- e. **Barrister's fees:** There is no separate provision for a barrister's fees until Part 6 (referral of a question of law to the president). An allowance is also made under Table 4 (appeals to presidential member). Under these parts, various allowances are made for obtaining a barrister's advice and on hearing when an amount is allowed for a practitioner instructing a barrister and also for a barrister.
- f. **Multiple claims or disputes for an injury treated as a single claim or dispute:** This means that unless there is a 12-month gap between claims or disputes, or the commission or Registrar orders otherwise, the maximum costs for a type of activity or event for an injury is the maximum set out in the table "regardless of how many times the activity or event is carried out" ([Schedule 6](#), para. 2).
- g. **Multiple insurers party to claim:** In this instance, the costs as per the table are increased by 50 per cent per party (other than the party that made the claim). Payment is shared equally among the insurers who are parties ([Schedule 6](#), para. 4).
- h. **Minimum costs for medical disputes and disputes about weekly payments of compensation where award or agreement is for less than \$1,000:** The maximum costs are \$200 "despite any other provision of this Schedule" ([Schedule 6](#), para. 7).
- i. **Certain agents not entitled to costs:** An agent who does not fall within the definition of agent in [section 356\(6\)](#) of the WIM Act "is not entitled to be paid or recover any costs" ([Schedule 6](#), para. 16). Legal practitioners who are agents can recover costs.

8.6.3 TRAVEL COSTS AND OTHER MISCELLANEOUS COSTS

Certain travel and accommodation costs, and a few extra items of costs, are permitted by [Schedule 6](#) of the 2016 Regulation. Barristers' fees are not allowed in addition to the lump sums, other than in limited circumstances. This means if a barrister is retained outside the specific allowed attendances, their fees must be met out of the lump sum. In certain circumstances, WIRO will consider providing a grant of funding in relation to counsel, providing advice on evidence, appearing at a teleconference, or appearing in the Workers Compensation Commission for the purpose of a conciliation conference/arbitration hearing.

8.6.4 COMPLEX MATTERS

The [2016 Regulation](#) allows additional costs for complexity. See Part 2, Table 4, items 4 and 5 of [Schedule 6](#).

8.6.5 DISCLOSURE

The notes to the clauses that relate to maximum costs remind practitioners that they have to disclose ([cl. 88](#)).

8.7 WORK INJURY DAMAGES CLAIMS

The objective of the Workers Compensation Regulation was to fix “maximum costs and disbursements recoverable by a legal practitioner”. Accordingly, the regulated costs act as a ceiling on what can be obtained.

An important difference between work injury damages and statutory compensation claims is the ability to contract out of the scale for work injury damages claims. The Workers Compensation Regulation also provides for the assessment of costs by the Registrar of the Workers Compensation Commission. In addition, it places restrictions on the awarding of party/party costs in court proceedings for work injury damages.

8.7.1 APPLICATION

The regulated amounts cover costs for legal services or agent services, provided in, or in relation to, a claim for “work injury damages”, and costs for “matters that are not legal or agent services, but are related to a claim for compensation” (cl. 92).

8.7.2 SKILL, CARE AND RESPONSIBILITY

There is no separate discretionary allowance for complexity. The only relevant discretion is whether a practitioner is entitled to a maximum total or part thereof, for a type of activity. The only relevant discretion is to allow less, not more.

8.7.3 COSTS SCHEDULE

A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in [Schedule 7](#) of the 2016 Regulation (cl. 102). The maximum costs that can be recovered are set out in the Schedule.

If a party changes legal representation, the relevant costs under [Schedule 7](#) of the 2016 Regulation are to be apportioned (cl. 92(2)).

8.7.4 DISCLOSURE

The notes to the clauses remind practitioners of their obligation to disclose under [Division 3](#) of Part 4.3 of the LPUL, and to provide a client with information disclosing the basis on which legal costs will be calculated and an estimate of the total legal costs, as soon as practicable after instructions are given in relation to any matter (cl. 92 of the 2016 Regulation).

8.7.5 APPLICATION

Under [Schedule 7](#) of the 2016 Regulation, regulated amounts apply on a party/party and on a practitioner or agent and client basis, “or on any other basis” (cl. 91). This means all practitioners practising in this area are affected. While it is possible to contract out of the scale, there are strict formal requirements that if not met, mean the regulated amounts will continue to apply (see below).

8.7.6 SCHEDULE 7

Costs are set out in [Schedule 7](#). A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in [Schedule 7](#) (cl. 92). The maximum costs that can be recovered are set out in [Schedule 7](#).

If a party changes legal representation, the relevant costs under [Schedule 7](#) are to be apportioned (cl. 92(2)).

The tables in [Schedule 7](#) use banding and stages to set costs. Lump sums for costs are calculated depending on the stage reached and amount obtained. Where settlement amounts to more than \$20,000, costs are based, in part, on a sliding percentage of the settlement amount.

GST may be added to the costs to be recovered in work injury damages matters (cl. 129).

8.7.7 BARRISTERS' FEES

Barristers' fees are not allowed in addition to the lump sums, other than in limited circumstances. This means if a barrister is retained outside the specific allowed attendances, their fees must be met out of the lump sum.

Barristers' fees are only separately allowed under the Other Work Injury Costs Table in [Schedule 7](#). Fees are only allowed for advice on settlement (\$500) and representation in court (\$1,500/day for junior counsel and \$2,200/day for senior counsel). Senior counsel's fees, or fees for more than one advocate, will not be included unless the court so orders (cl. 2, [Schedule 7](#))

8.7.8 CONTRACTING OUT OF THE REGULATED COSTS BETWEEN SOLICITOR AND CLIENT

This is modelled on the Motor Accidents Compensation Regulation. To contract out of [Schedule 7](#) of the 2016 Regulation, the legal practitioner must follow the steps set out in [clause 93](#), which are to:

- give prior separate, written advice that the party (even if awarded costs) will be liable to pay the "gap" between the costs, as per the agreement, and "the amount that would be payable under the 1998 Act [WIM Act]"
- disclose, as required under [Division 3](#) of Part 4.3 of the LPUL. If disclosure has not been properly made, the agreement to contract out is likely to have no effect. Practitioners should be particularly careful to disclose barristers' fees, as these are often overlooked because they are usually incurred some time after the initial retainer; and
- enter into a costs agreement. In contracting out, the practitioner cannot enter into a conditional costs agreement that charges a success premium of more than 10 per cent ([cl. 93\(1\)\(b\)](#)). [Section 181](#) and [Section 182](#) of the LPUL also deal with conditional costs agreements that may provide for the payment of an uplift fee.

If you fail to contract out correctly, you will be limited to claiming the regulated costs set out in [Schedule 7](#) of the 2016 Regulation and not what might be regarded as "fair and reasonable".

8.7.9 RESTRICTIONS ON AWARDING PARTY/PARTY COSTS

The worker obtains party/party costs if they obtain an order or judgment that is "no less favourable" than the terms of the claimant's final offer of settlement in mediation under the act ([cl. 94](#)).

The worker must pay the insurer's costs if the former is less successful than the insurer's final offer, or if the insurer is found not liable ([cl. 95](#)).

There are provisions for a deemed offer when the worker obtains an order or judgment where the insurer has denied liability and there is consequently no mediation ([cl. 97](#)).

Except as provided above, the parties "to court proceedings for work injury damages are to bear their own costs" ([cl. 96](#)).

These limitations do not apply to ancillary proceedings, where the costs are to be awarded in accordance with the rules of the court ([cl. 98](#)).

8.8 ASSESSMENT OF COSTS

Costs disputes (practitioner or agent and client basis or party/party) are dealt with by the Registrar of the Workers Compensation Commission. This relates to both work injury damages and statutory compensation claims.

[Division 4](#) of the 2016 Regulation effectively adopts the model for assessment under the LPULAA. The tests of fairness and reasonableness remain the same, as do the discretionary factors.

Similarly, assessment appears to remain paper-driven. The Registrar must give reasons and a certificate of determination becomes, on filing in a court of competent jurisdiction, a judgment of that court for the amount of unpaid costs.

Appeals are only allowed for a matter of law. Such appeals are made to the commission constituted by a presidential member ([cl. 125](#)).

The main elements are:

- Practitioner or agent own client: Bills must include a description of the legal or agent services and an identification of each activity, event or stage specified in [Schedule 6](#) or [Schedule 7](#) of the 2016 Regulation, “by reference to the item number of the activity, event or stage, that was carried out” and the amount sought ([cl. 103](#)).
- The parties are to be given a reasonable opportunity to make written submissions for an application for assessment. The Registrar is not bound by the rules of evidence. The Registrar may determine whether proper disclosure has been made, and if a costs agreement exists and its terms ([cl. 109](#)).
- Practitioner own client: If a practitioner has failed to disclose and so would be liable to pay the costs of the costs assessment ([s. 178](#) of the LPUL), the Registrar must determine the amount of those costs and deduct them from the costs payable under the bill of costs. The practitioner must also pay the costs of the Registrar ([cl. 111\(4\)](#) of the 2016 Regulation).
- Under the [LPUL](#), costs cannot be assessed if there is a costs agreement that complies with that act and that agreement is for a lump sum, or the dispute only relates to the rate specified for calculating costs (unless the rate is found to be unjust) ([cls. 113–114](#) of the 2016 Regulation).
- Party/party: There are no formal requirements for a “bill” and an application for assessment is to be made in the form approved by the commission ([cl. 116](#)).
- In party/party assessments, the Registrar may obtain and have regard to a copy of the costs agreement. However, the costs agreement must not be applied in determining appropriate fair and reasonable party/party costs ([cl. 118](#)).

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