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Mr Rob Thomson
General Manager
Workers Compensation Division
WorkCover New South Wales
Locked Bag 2906
LISAROW NSW 2252

Dear Mr Thomson

Legal Costs – Schedule 6 and Schedule 7 Workers Compensation Regulation 2003

As promised by the Law Society's representatives, I now enclose a schedule detailing anomalies within Schedule 6 of the Workers Compensation Regulation 2003. I ask WorkCover NSW to rectify these anomalies as soon as possible, noting that a review of the current Schedule was initially promised within six months of its inception in 2006.

The attached schedule does not include the Law Society's position as to the adequacy of fees currently provided for by Schedule 6 and only addresses anomalies with the Schedule that have been identified by members of the legal profession over the past three years.

The Law Society looks forward to consulting with WorkCover NSW in relation to agreeing general uplifts on the rates applicable under Schedule 6 and Schedule 7, and the content of new items to be added to Schedule 7 in light of foreshadowed amendments.

Whilst no date for the implementation of new fee schedules has been agreed, given the significant time that has passed since the fee schedules were implemented and review was promised, the Law Society would like a firm commitment from WorkCover NSW as to when this process is expected to conclude.

Yours sincerely

Joseph Catanzariti
President

SCHEDULE 6 ANOMALIES

ANOMALY	CURRENT SCHEDULE 6 REFERENCE	SOLUTION	FEE PROPOSAL
<p>Particularised claims for benefits not previously agreed to be paid and resolved without recourse to litigation</p> <p>– eg. section 40 claims where there is no dispute on liability and the claim resolves before proceedings are commenced.</p> <p>This item should include situations where a decision has not been made on an existing entitlement (including section 60 and other expenses) but a claim for the entitlement has been particularised and subsequent negotiations result in a resolution of an entitlement.</p> <p>This is fair because a failure to determine can amount to a <i>dispute</i> and rather than institute proceedings, the issue is proactively resolved. The work necessarily performed should be fairly remunerated.</p>	Table 3, Item E	<p>Amend</p> <p>Item E to read: "Where an outstanding entitlement to weekly payments or treatment or other expenses is resolved by payment of a benefit to the worker (not previously agreed to be paid to the worker) as a consequence of a legal service. "</p>	Flat fee - \$2,000
<p>Pre-Nov 2006 matters</p> <p>There are very few of these matters left. However, those left have been able to take advantage of processes such as reconsiderations which do not attract a cost item under the old Schedule 6, except item 9.01.</p> <p>These claims should be treated uniformly with post-November 2006 claims.</p>	Old Schedule 6	Apply current Schedule	Apply current schedule
<p>Payment to insurer representatives - Part A, clause 1(3) and clause 9</p>	Part A clause 1(3) and clause 9	Clause 9 should be amended so that it only applies to a claimant.	

<p>An insurer representative has no control over the number of claims brought by an applicant, when they are brought and the manner by which the claim needs to be responded to.</p>		<p>The word "claim" may require definition.</p> <p>Amend clause 9 (1) to add after "recoverable" the words "by an applicant". See below.</p>	
<p>Part A, clause 9</p> <p>This clause should be re-written. The wording should be reversed so that costs are payable unless the respondent successfully applies to the Commission for an order that the costs payable are limited to one party only.</p>	<p>Part A, clause 9</p>	<p>Amend clause 9(1) to read:</p> <p>"If a subsequent claim or dispute is resolved in respect of an injury which was the subject of a previous claim or dispute the maximum costs recoverable by the applicant is set out in clause 8 of this Part."</p> <p>Insert a new clause 2(c) as follows:</p> <p>"(c) the subsequent claim or dispute referred to in subclause (1) arises from a dispute notified by the insurer or scheme agent after the commencement of the original claim or dispute."</p>	
<p>Part A clause 2(3)</p> <p>The current wording does not include discontinued proceedings. It can be argued that if proceedings are discontinued the insurer representative does not get paid in circumstances where the dispute may remain on foot albeit the proceedings are discontinued.</p>	<p>Part A clause 2(3) + clause 5</p>	<p>Amend clause 2(3) to add after the word "concluded" the words:</p> <p>"or by way of discontinuance of proceedings or otherwise".</p>	
<p>Part A clause 4(1)(a)</p> <p>This restriction should be removed for respondent representatives.</p>	<p>Part A clause 4(1)(a)</p>	<p>Amend clause 4(1)(a) to insert after the words "that maximum amount" the words:</p> <p>"payable to an applicant only"</p>	
<p>Part A clause 10</p> <p>This clause can be interpreted to mean that "reviewing the determination of the Commission" also refers to a reconsideration application, which of course it is not.</p> <p>The clause should be amended and a fee allowance for reconsideration applications and</p>	<p>Part A clause 10</p>	<p>Amend clause 10 to add after the words, "reviewing the determination of the Commission" the following:</p> <p>"not otherwise performed for a reconsideration application or review"</p>	<p>Insert a fee and resolution type to Tables 1,2,3,4 to specifically allow for reconsideration applications, reviews etc.</p> <p>The fees payable should reflect those currently listed in Part B, table 1</p>

<p>reviews be inserted into the schedule. There is currently no allowance in Tables 1 -4 for a reconsideration application under sections 329 or 378 of the Workplace Injury Management Act, 1998</p>			
<p>Small Claims – weekly payments and medical expenses</p> <p>The current Schedule does not appropriately reward a claimant for small claims (as opposed to Provisional Liability claims) This issue was the subject of a written submission by Messrs Brennan and Moroney in January 2007 and has been under consideration by WorkCover NSW for over 2 ½ years.</p>	<p>Table 3, Item A</p>	<p>Small Claims (General resolution type 6 & 12).</p> <p>Small claims must be identified as such where they fall outside the Provisional Liability period and be included in Table 1, Items C, D, E and F.</p> <p>Commission forms will require amendment. This issue was raised with the President at the Users Group meeting in June 2009.</p>	<p>Table 1 as per General Resolution Types 6 & 12.</p>
<p>General Resolution Types 4 and 5</p> <p>When a matter that falls within general resolution type 4 and is referred to an arbitrator for a teleconference for whatever reason the work and attendances necessarily performed should be fairly remunerated.</p> <p>The requirement in type 5 for a dispute notice or referral to an arbitrator ignores the reality that many type 4 matters are also referred to arbitrators and may also be the subject of a dispute notice</p> <p>In general resolution type 5 the words “or where the matter is referred to an Arbitrator for determination” creates unnecessary debate as to whether this includes matters where a Reply puts injury in issue, for example, and at a teleconference the injury issue is conceded and the claimant is referred back to the Registrar for appointment of an AMS.</p> <p>The amended type should clarify that it includes the situation where a teleconference is appointed for whatever reason and fees</p>	<p>Part B, Table 2, General Resolution Types 4 and 5</p>	<p>The simple solution is to meld general resolution types 4 and 5 together and deal with lump sum compensation for permanent impairment claims as a single type.</p>	

<p>under Table 1, items C, D or E or F applies for both claimant and insurer. [Note: no fees for insurer under Table 1, item A and B].</p> <p>General resolution type 2 (section 67 claims only) is misguided in only referring to A & B of Table 1. There exists competing case law addressing these issues.</p>			
<p>Table 4, Item 1</p> <p>Currently, appeals that fail for whatever reason are not remunerated. This is unfair. The Act already has a prohibition on the payment of costs in limited circumstances and the current wording of Table 4 extends these circumstances, arguably unlawfully. The Commission should be given power to order no costs in appropriate circumstances.</p>	Table 4, Item 1	<p>Amend Table 4, Item 1 Column 1 (a) and Item 4 Column 1 (a) to delete the words "nil if unsuccessful" and insert "upper limit of \$to be determined unless otherwise ordered by the Presidential member".</p> <p>This could have the added effect of allowing Column 3 to become applicable to both parties and for Columns 1, 2 and 4 to be removed thereby simplifying the table greatly.</p>	The upper limit should be the same as Column 3 as amended from time to time.
<p>Table item 3</p> <p>Currently, medical appeals that fail for whatever reason are not remunerated. This is unfair. The Act already has a prohibition on the payment of costs in limited circumstances and the current wording of Table 4 extends these circumstances, arguably unlawfully. The Commission should be given power to order no costs in appropriate circumstances.</p>	Table 4, Item 3	<p>Amend Table 4, Item 1 Column 1 (a) and Item 4 Column 1 (a) to delete the words "nil if unsuccessful" and insert "upper limit of \$to be determined unless otherwise ordered by the Presidential member".</p> <p>This could have the added effect of allowing Column 3 to become applicable to both parties and for Columns 1, 2 and 4 to be removed thereby simplifying the table greatly.</p>	The upper limit should be the same as Column 3 as amended from time to time
<p>Dispute notice drafting</p> <p>Drafting and/or settling of dispute notices fee must be added as a separate item in addition to other fees.</p>	N/A	<p>New item needed in Table 3.</p> <p>New Item H. This is an additional item and should not be restricted by clause 4 (1) (a).</p>	The upper limit should be the same as Table 3 Item F as amended from time to time.
<p>Advice to insurer after section 74 notice issued or on review</p> <p>For performing a review and drafting or issuing a section 287A (section 74) notice.</p>	N/A	<p>New Item needed in Table 3.</p> <p>New Item I. This is an additional item and should not be restricted by Clause 4 (1) (a).</p>	The upper limit should be the same as Table 3 Item F as amended from time to time.

<p>Section 52A discontinuance notice</p> <p>For advising on and/or settling a section 52A discontinuance notices.</p>	<p>N/A</p>	<p>New Item needed in Table 3.</p> <p>New Item J. This is an additional item and should not be restricted by Clause 4 (1) (a).</p>	<p>The upper limit should be the same as Table 3 Item F as amended from time to time.</p>
<p>Table 2, Item 2 - section 67 claims</p> <p>Table 2 Item 2 unfairly restricts costs to Item A or B. See position set out above general resolution types 4 and 5.</p> <p>General resolution type 2 should also refer to Table 1 Items C, D E or F costs because these matters are always referred to an Arbitrator for determination.</p>	<p>Table 2, Item 2</p>	<p>The simple solution is to meld general resolution types 4 and 5 together and deal with lump sum compensation for permanent impairment claims as a single type.</p> <p>This could have the added effect of allowing Table 2 Item 2 to be removed thereby simplifying the table greatly.</p>	
<p>Situations involving combinations of general resolution types.</p> <p>This applies where more than 1 benefit is being claimed. Currently there is no provision for claims involving multiple benefit claims which may fall within various types.</p> <p>Creating a combination type will encourage claims to be brought together in the one ARD and not to encourage multiple claims. It will appropriately remunerate for their efficiency.</p>	<p>N/A</p>	<p>Add to Table 2 a definition of combination of general resolution types.</p>	<p>These should be costed as general resolution types in accordance with Table 2 Column 2.</p>
<p>Arbitration extending beyond 4 hours (1 day)</p> <p>The dispute resolution model allows 4 hours for arbitration. There is no allowance for matters that proceed beyond the time permitted. The absence of an advocacy fee presently means that costs are substantially eaten into in difficult and complex matters.</p>	<p>Table 1, Item F</p>	<p>There are 2 suggested solutions which should be simultaneously implemented:</p> <ul style="list-style-type: none"> i. The addition of an Advocacy fee; and ii. Arbitrations which go beyond 4 hours should be paid on a daily rate thereafter in addition where the Arbitrator certifies that additional days were required. 	<p>The advocacy fee should be \$1,500 per day.</p> <p>The additional daily rate should be \$1,500 per day.</p>
<p>Appeals generally - where the appeal is withdrawn.</p> <p>Costs should be awarded to the respondent to</p>	<p>N/A</p>	<p>A new Item should be added to Table 4 allow costs for respondent to an appeal in these circumstances.</p>	<p>The rate should be the rate in Table 4 Columns 2 and 3 as amended from</p>

the appeal where an appellant withdraws the appeal before final determination but after filing of notice of objection.			time to time.
<p>Appeals – Medical Assessment</p> <p>If the Registrar refuses to allow the Appeal to proceed (section 327(4) WIM Act) then the respondent to the appeal should be allowed costs</p>	Table 4, Item 3	Add in new item to allow costs: "Costs payable to the respondent to the Appeal if resolved by a decision of the Registrar".	The rate should be the rate in Table 4 Columns 2 and 3 as amended from time to time.
<p>Matters remitted to an Arbitrator for determination after Appeal or Reconsideration</p> <p>Where after Appeal or Reconsideration the matter is referred to an arbitrator for determination the parties should be entitled to costs for having to conduct the proceedings for a second time.</p>	N/A	<p>Include provision in Part A, Schedule 6 an allowance for a resolution type and costs for this type of event.</p> <p>"Where after appeal or reconsideration the matter is referred to an arbitrator for determination"</p>	Item D, E or F of Table 1 should apply again.
<p>Claims for compensation for permanent impairment under Section 66 (1987 Act) and section 16 (1926 Act)</p> <p>If an insurer instructs a law firm to represent them in a claim for permanent impairment under section 66 of the 1987 Act or section 16 of the 1926 Act they should be remunerated for the actual work performed. Currently they are not entitled to be paid. The situation is manifestly unfair.</p>	N/A	<p>Part B Table 1 Items A and B should be amended to delete the notation under Items A and B that limits insurer costs to Item 2 only.</p> <p>Part B Table 2 Items 1, 3, and 4 should be amended to delete "(Claimant only – item A or B of Table 1)".</p>	The figure for insertion into Table 1 Items A and B Column 4 should be \$2,375 and \$3,700 respectively.
<p>Termination or reduction applications – clarification of wording</p> <p>The general resolution types do not adequately explain or deal with these types of claims.</p>	Table 2 Item 8	Commence Table 2, Item 8 by inserting the words "Application for.."	
<p>Termination, reduction or increase applications – payment of worker's costs</p>	Table 2, Item 9	In Table 2 Items 9 and 10:	

<p>There is no justification for not paying a worker's costs to defend an application by an insurer or for legitimately bringing an increase application, the merits of which will usually be determined on discretionary grounds.</p>		<ul style="list-style-type: none"> • Delete the word "Successfully". • Delete the words "(Claimant only – item C, D, E, or F of Table 1)." <p>In Table 2 Item 11:</p> <ul style="list-style-type: none"> • Delete the words "(Insurer only – item C, D, E, or F of Table 1)." <p>In Table 2 Items 9, 10 and 11:</p> <ul style="list-style-type: none"> • Insert after the word "compensation" the words "unless otherwise ordered by the Commission". 	
<p>Submissions</p> <p>When requested by an Arbitrator the work undertaken should be fairly remunerated.</p>	N/A	<p>New Item needed in Table 4.</p> <p>New Item 8. This is an additional item and should not be restricted by Clause 4 (1) (a).</p>	<p>The upper limit should be the same as Table 3 Item F as amended from time to time.</p>
<p>Supplementary Submissions</p> <p>If requested by Presidential member the work undertaken should be fairly remunerated.</p>	N/A	<p>New Item needed in Table 4.</p> <p>New Item 9. This is an additional item and should not be restricted by Clause 4 (1) (a).</p>	<p>The upper limit should be the same as Table 3 Item F as amended from time to time.</p>
<p>Multiple Respondent Claims - Table 4, Items 5, 6 and 7 – self and specialised insurers</p> <p>Where self and specialised insurers are involved the solicitor acting for them should receive the benefit of an uplift because the Lead agent provisions do not apply to them.</p>	Table 4, Items 5, 6 and 7	Table 4 requires a new Item 8.	
<p>Redemptions applications</p> <p>There is currently no specific provision dealing with redemption applications.</p>	N/A except arguably by Table 3 Item C	Add in Table 3 a new special resolution type, Item H.	<p>The upper limit should be the same as Table 3 Item D as amended from time to time.</p>
<p>Commutation applications – costs where</p>	N/A	Amend Table 3 Item D to:	<p>This amount should be 80% of the amount in</p>

<p>application rejected</p> <p>Where an application is made pursuant to section 87EA of the 1987 Act and the application is rejected there is currently no remuneration for work necessarily performed in order to make the application.</p> <p>There is no justification for not paying costs for legitimately bringing an application, the merits of which will usually be determined on discretionary grounds</p>		<ul style="list-style-type: none"> • In the heading delete the words "Registration of" • Insert a new sub-clause under the special resolution type to add: "2. Where an application for commutation is rejected by WorkCover Authority on discretionary grounds" 	<p>Table 3 Item D 1 as amended from time to time.</p>
<p>Resolution of existing proceedings by way of an application for a commutation or redemption</p> <p>In circumstance where the parties agree to resolve an existing proceedings by way of a subsequent application for a commutation or redemption that the costs of the application should be paid in addition to ordinary costs for the resolution of the dispute.</p>	<p>N/A</p>	<p>Part A clause 2 (2) and (3) should be amended to define resolution of a dispute as an agreement to apply for a commutation or redemption</p>	
<p>Claims under section 74 and 75 1987 Act – claims for damage to clothing and artificial limbs etc</p> <p>Even where a dispute notice has been issued and these matters proceed through the ordinary dispute resolution model they are not costed as a general resolution type.</p> <p>It is also inappropriate for these matters to be treated as a form of IPD claim if they are the subject of a dispute notice.</p> <p>Where there is a dispute notice the claim costs should fall to be paid under a general resolution type and not at the Table 3, Item C rate [\$1100].</p> <p>A similar issue was the subject of a written submission by Messrs Brennan and Moroney</p>	<p>N/A except arguably by Table 3 Item C</p>	<p>Small claims of this type should be provided for by general resolution type Table 2 Item 12.</p> <p>General claims, ie. not small claims should be provided for by Table 2 Item 13.</p>	<p>Small claims of this type should be provided for by general resolution type Table 2 Item 12.</p> <p>General claims, ie. not small claims should be provided for by Table 2 Item 13.</p>

in January 2007 and has been under consideration by WorkCover NSW for over 2 ½ years.			
<p>Travel by metropolitan & regional practitioners.</p> <p>Outer-Sydney practitioners are disadvantaged by the fact they take hours to get to the city. There should be a travel allowance for non-CBD practitioners.</p>	Schedule 6, Part C	<p>Add a separate allowance for travel for non-CBD practitioners.</p> <p>The restriction on practitioners with CBD offices to charge for travel when their usual place of work is not in the Sydney CBD should be removed.</p>	
<p>Section 53 applications – Orders for payments to be made overseas</p> <p>There is currently no specific provision dealing with section 53 applications.</p> <p>One of the difficulties with this type of application is that they seek an order for future payments by way of an award. They are therefore akin to an application provided for by way of general resolution type Table 2 Item 7.</p>	N/A except arguably by Table 3 Item C	<p>Amend Table 2 Items 6 and 7 to add after the words, "Weekly payments compensation":</p> <p>"including an application pursuant to section 53 of the 1987 Act".</p>	
<p>Workplace Injury Management Disputes</p> <p>The insurer gets the same amount whether it is the applicant or respondent. It should get more to bring the claim and less to respond.</p>	Table 3, Item B 1	The figures in columns 3 and 4 should be reversed.	