

30 April 2024

Mr Jeffrey Gabriel
Acting Independent Review Officer
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Haymarket NSW 2000

By email: Marilyn.Cassidy@iro.nsw.gov.au

Dear Mr Gabriel,

Appeals Costs under the ILARS for Workers Compensation Court Matters – Draft Policy Paper

Thank you for the opportunity to comment on the Appeal Costs under the Independent Legal Assistance and Review Service (ILARS) for workers compensation Court matters – Draft Policy Paper (“Draft Policy Paper”).

We note that a number of our committee members are also members of the IRO Approved Users Group and have had the benefit of providing feedback to you, through that forum, in relation to an earlier iteration of the Draft Policy Paper. This submission is directed at the proposal to adopt the Attorney General rates as a basis for calculating costs. At the conclusion, we offer an alternative way of calculating costs that we submit would be fairer approach.

Background

Prior to 2012 the NSW workers compensation scheme operated on a model where the injured workers were significantly disadvantaged in their options to run appeals. Where an appeal did run it was truly a ‘David and Goliath’ battle. In matters where an insurer had lodged an appeal the injured worker was often faced with no practical ability to defend it. In circumstances where they had reasonable prospects of commencing an appeal the risk of an adverse costs order often meant that their rights were not pursued. Most importantly lawyers for workers carried their losses, in effect substantially subsidizing the scheme. This argument has been accepted over and over again by the Parliamentary Committee charged with reviewing the legislation (Scheme) every two years.

Not only do insurers have significantly more resources to pursue and defend appeals but then, as is still the case now, a scheme agent (insurer) did not risk their own money in pursuing or defending an appeal. If an appeal is run, or defended, by a scheme agent then their legal costs are met regardless of the outcome. This imbalance has led to many unmeritorious appeals being pursued to the higher courts by zealous insurers, where there is evidence of a ‘suggestion’ by the insurer that the worker will be pursued to meet the insurer’s costs if they do not put in a submitting appearance.

It was not until the introduction of the WIRO and the ILARS, together with the policy to fund appeals, that the playing field was levelled. In our view this has led to injured workers having greater access to justice to both correct wrong decisions made in the Commission and defend their position, often successfully, in addition to a healthier and more robust scheme where more guidance on critical topics is given by appellate courts.

When should costs be paid

The ALA has considered the letter dated 27 March 2024 inviting consultation on 'Appeals Costing' and the Draft Policy Paper (March 2024) circulated by the IRO.

The ALA supports the IRO's commitment to **fair and reasonable costs** where matters are determined outside the Personal Injury Commission. We also generally accept Recommendation 30 of the review Report refined as follows:

1. There should be no 'conditional funding arrangements' which require ILARS Principal Lawyers to assess the merits of an application to the Supreme Court of Court of Appeal
2. Workers as applicants in the Supreme Court or appellants in the Court of Appeal should be provided with a funding assurance (IRO may continue to refer to it as 'conditional') in circumstances where:
 - a. The applicant/appellant worker is **successful**, and
 - b. The applicant/appellant worker seeks a costs order from the relevant court
 - c. The Court declines to order costs, and
 - d. The insurer declines to pay.

If all those conditions are met then IRO will pay the legal costs.

3. Where the worker is a respondent to an application or appeal to a Court, IRO will pay the legal costs in circumstances where either:
 - a. the respondent worker is **unsuccessful (ie the applicant/ appellant employer is successful)** , or
 - b. The respondent worker is **successful**, and
 - (ii) The respondent worker seeks a costs order from the relevant court, and
 - (iii) The Court declines to order costs, and
 - (iv) The insurer declines to pay.
4. The IRO will indemnify a respondent worker where the employer/insurer is successful and seeks costs from the worker and where the respondent worker seeks an order that each party bear their own costs.
5. The IRO should retain its discretion to offer full funding on appellate matters (regardless of the outcome) where a matter is of significance in interpreting the legislation or of significant importance to the scheme. The discretion should be exercised by the Officer and not delegated.

The Data

The ALA considers that the appropriate starting point when considering any change in policy is to analyze the current data in an attempt to draw conclusions as to the present position, why change is needed and how current policies are driving behaviour.

The Draft Policy Paper states that in 2022-2023 IRO finalized 12 grant matters for a total of \$252,456.00 in professional fees and disbursements at an average of \$22,950 per matter. The Draft Policy Paper then later goes on to say:

“There is a need to balance fairness to legal practitioners with the broader financial viability of the workers compensation scheme. Therefore, it is appropriate to place a cap on hourly rates for legal services”

To the extent that this implies \$252,456 risks the viability of the workers compensation scheme is genuinely alarming. The ALA does not support this assertion.

The IRO Annual Report 2022/2023 it provides the following data on appeals.

| Appeals | Other Outcome | Grant Achieved | Desired outcome |
|---|---------------|----------------|-----------------|
| Court of Appeal | 1 | 1 | |
| By the Employer in favour of Employer | 1 | - | |
| By the worker in favour of worker | - | 1 | |
| Supreme Court | 2 | 7 | |
| By the Employer in favour of worker | - | 2 | |
| By the worker in favour of the employer | 2* | | |
| By the worker in favour of the worker | - | 5 | |
| High Court | - | 1 | |
| By the Employer in favour of the Worker | - | 1 | |

As we understand the proposed policy, had it been in force for the 2022-2023 year, it would have worked to apply the Attorney General (AG) rates to the two matters indicated by an asterix. All other matters appear to fall into a category where the injured workers lawyers will seek to be paid via a cost order in their clients’ favour or through a grant of full funding.

This signifies that, so far as the 2022-2023 year is concerned, the drive to introduce AG rates “to balance fairness to legal practitioners with the broader financial viability of the workers compensation scheme” would have impacted only two matters with cost impact of a maximum \$45,900.00. Had they been assessed under the AG rates the impact would have been less. To imply that any such saving would assist the financial viability of the scheme is a worrisome suggestion.

Although the Draft Policy Paper does not address it, the ALA suggests a further purpose of introducing the proposed Policy would be to drive good behaviour or discourage bad behaviour by Approved Lawyers. The ALA is of the opinion that the data does not support an issue with ‘bad behaviour’. Of the 12 matters where funding was finalised in the 2022-2023 year, nine (9) of them received orders in favour of the worker. In only two (2) matters commenced by the worker was the appeal unsuccessful. The ALA contends that this evidences that injured workers and their lawyers are pursuing meritorious claims and defending claims appropriately. Certainly, for those matters where the worker responds to an appeal the ALA supports in all matters that the worker should be funded to respond and argue their position appropriately supported by legal advice and lawyers – this was the fundamental principle on which the ILARS was engendered under former Minister Pearce and the inaugural Officer.

The ALA submits that introducing a cap on professional fees based on the AG rates will only serve to under-remunerate lawyers for their work and embed lawyers subsidizing the scheme. This is contrary to the ILARS foundation principles. It is fundamental that lawyers receive fair remuneration.

The ALA submits that having regard to the current data and the results under the current policy there is just cause for the introduction of the AG rates.

In our view that should be the end of the matter. However, there are further issues in relation to the fairness of the proposed new policy that should also be considered.

Comparison of the Rates

> The Attorney-General's rates (AG's rates)

The ALA does not support the AG's rates as an appropriate vehicle or reference for remuneration of lawyers conducting appellate work in the workers compensation scheme.

The AG's rates are designed for legal work conducted for and by Government agencies. (see <https://dcj.nsw.gov.au/legal-and-justice/strategies-and-plans/information-for-government-lawyers/attorney-generals-rates-legal-representation.html>)

The AG's rates do not apply to the Crown Solicitor for Government core legal work. The AG's rates do not apply for major litigation or commercial transactions. The AG's rates do not apply to private law firms (panel law firms) who can be engaged to represent the government or its agencies and whose fees are set under the relevant Panel agreements. Schedule 4 of the NSW Government Legal services Panel Deed states:

- (a) Unless a Client and Service Provider agree to a price for any Services which is not based on hourly rates, the rates set out in the rates matrix (as adjusted under this agreement) will be the maximum rates that may be charged.*
- (b) The Service Provider must not charge for any items listed in paragraph 3 below.*
- (c) As an alternative to charging on the basis of the Rates, the Service Provider may agree with a Client to charge on an alternative basis, which may include:
 - (i) a price based on the agreed value of the Services to the Client; or*
 - (ii) a fixed fee agreement for a particular type of Services for a defined period.**

The rates matrix is negotiated between the panel firm and the agency and inserted into the Deed. Whilst we do not have reference to a complete Panel Deed we have assumed that the rates would be significantly higher than the AG's rates.

> Schedule 6 Workers Compensation 2016 rates

In 2003 Schedule 6 of the *Workers Compensation Regulation* set the hourly rate for statutory benefits matters resolved before or in the Commission at \$250 per hour. That rate was maintained in 2006 with the wholesale amendment to Schedule 6.

Schedule 6 has undergone two increases since 2006 – 15% in 2012 and 10% in 2021. The equivalent hourly rate is now \$316.25.

The ALA does not accept the rate of \$316.25 as being adequate given the complexity of the statutory benefits regime and the processes of the Commission compared with Court work. But what is evident is that for statutory benefit matters the Draft Policy Paper is proposing a rate that is **lower than what is currently paid for matters of significantly less complexity and legal acumen.**

It should not be, as a matter of fairness and reasonableness, that work in the Commission is paid at a higher rate than work in the Supreme Court and Court of Appeal.

> **Costs Assessment Rules Committee (CARC) v AG’s rates**

The *Costs Assessment Rules Committee Guideline – Costs Payable Between Parties under Court Orders* sets out a range of rates intended to provide guidance for Costs Assessors when assessing party/party costs. These are the costs that Approved Lawyers can reasonably expect to receive in appeal matters if their client successfully receives a costs order. The ALA submits that is the most appropriate comparison point when assessing whether the AG’s rates are appropriate.

In the table below we compare the rates:

| Service Provider | CARC Rates | AG’s rates hourly | AG’s day max |
|--|--------------------|-------------------|--------------|
| Senior partner/partner/specialist (10+ years) (hourly) | \$540 - \$900 | \$315.40 | \$3,154 |
| Senior associate (5 years plus) (hourly) | \$360 - \$600 | | |
| Employed solicitor / junior associate (1-4 years) (hourly) | \$240 - \$480 | | |
| Senior counsel, where the assessor considers that it is fair and reasonable to have briefed senior counsel (daily) | \$6,000 - \$10,000 | - | \$5,217 |
| Senior counsel (hourly) | \$600 - \$1,000 | \$521.74 | - |
| Junior counsel (daily) | \$2,400 - \$5,600 | - | \$2,365 |
| Junior counsel (hourly) | \$240 - \$560 | \$315.40 | - |

It will be noted that the solicitor’s hourly rate provided for in the AG’s rates is significantly below the bottom of the range for senior associates (5 years plus).

In our opinion, adopting the AG’s rates would have the effect of encouraging firms to push workers compensation appellate work to young inexperienced lawyers. Firms would be better placed having senior lawyers work on matters outside the workers compensation space where they can guarantee commercial rates for their work that are reflective of their experience. The ALA submits that the appellate work is the very type of work where the whole scheme would benefit from the most senior lawyers being involved as these are the matters that have most potential to impact the scheme. They are the matters that provide guidance to government policy advisors, regulators and decision makers for the whole scheme. In our view IRO should focus on removing as many barriers as possible to ensuring this crucial aspect of the scheme/system. Adoption of the AG’s Rates is one such barrier.

It will also be noted that both Senior and Junior Counsel’s daily AG’s rates are below the range on the CARC Guidelines. Again, appellate work is the type of work where the IRO should want to encourage

as many experienced and quality counsel as possible to be engaged in the space. Our fear is that the rates will discourage quality, in demand, experienced counsel from engaging in this important work. Our experience is that some Counsel are already refusing to take on work in this area unless they are paid commercial rates.

> **Alternative Proposal**

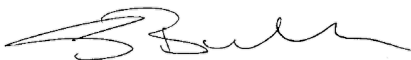
The ALA proposes that the Draft Policy should adopt, as a guide, the mid-point of the ranges provided by CARC. The rates are more closely aligned with commercial rates and the reality of legal practice for appellate work. The guidelines themselves note that it is intended that they be reviewed annually which should provide IRO the comfort in knowing that the rates will be up-dated and reviewed regularly by experts in the field.

Conclusion: Fairness between the parties

We understand that the lawyers representing the insurers are not required to accept AG's rates if they are unsuccessful in the pursuing an appeal. We see no reason, in principle, why lawyers representing injured workers should be required to do so. Both groups of representatives are professionals, acting on instructions, in complex litigation where the outcome can be uncertain. Yet one group can use the funds of the scheme with no risks to their own personal financial situation and the other group is being left to subsidise the scheme by working at below market rates.

The proposed Draft Policy proposes to punish one group while another group are paid at commercial rates regardless of the outcome. The whole notion appears to go against the underlying principles of the ILARS model and the once held strong views of the IRO to even up the playing field by giving David a fighting chance against Goliath.

Your sincerely



Shane Butcher
Chair, NSW Workers Compensation Committee
Australian Lawyers Alliance