

Appeal Costs under the Independent Legal Assistance and Review Service (ILARS) for workers compensation Court matters

July 2024

Background

Decisions by superior Courts perform an important function in the workers compensation system, enabling authoritative decisions on contested provisions in workers compensation legislation, promoting scheme objectives¹ and assisting insurers and injured workers to find solutions to disputes.

The Independent Review Office (IRO²) funds some appeals from the Personal Injury Commission (Commission³) to the Supreme Court of New South Wales including the Court of Appeal and any other relevant superior Court of record (collectively referred to as Courts). The funding is administered under ILARS.⁴

The ILARS Funding Guidelines⁵ (Guidelines) provide for the funding of appeals. Stage 4 funding is outlined in Part 3.4 of the Guidelines and canvasses the considerations for approving funding and paying reasonable costs (see **Appendix A** for a more detailed explanation of the current funding arrangements).

The Guidelines note that funding where the appeal is to a Court extends to 'fair and reasonable'⁶ costs but are otherwise silent on the amount of funding to be provided for appeal matters to Courts.

IRO has adopted an interim approach to appeal funding based on a time costing model (set out below) and is proposing to adopt this approach on an ongoing basis.

Between 2020 and 2022 the IRO undertook a review of Appeal Costs arrangements (AC Review). In addition, in 2022 an expert committee external to the IRO examined whether the Guidelines enable the effective achievement of ILARS's statutory purpose – the ILARS Review – that is to:

¹ [Workplace Injury Management and Workers Compensation Act 1998 No 86 - NSW Legislation](#) – section 3

² The IRO commenced on 1 March 2021, and superseded the Workers Compensation Independent Review Office or WIRO. A reference to the IRO includes a reference, where relevant, to the previous WIRO.

³ A reference to the Commission includes, where relevant, a reference to the Workers Compensation Commission, which was superseded by the Personal Injury Commission from 1 March 2021.

⁴ [Personal Injury Commission Act 2020 No 18 - NSW Legislation](#) – Schedule 5, Clause 9

⁵ [IRO Funding Guidelines \(nsw.gov.au\)](#)

⁶ 3.4.5 Guidelines

- provide funding for legal and associated costs for workers under workers compensation legislation seeking advice regarding the decisions of insurers under workers compensation legislation; and
- provide assistance in finding solutions for disputes between workers and insurers.

This resulted in a number of recommended changes to the Guidelines, some of which concerned funding for appeals. These informed IRO's initial policy position. The outputs of the AC Review are discussed in **Appendix B**.

Part 3.4.5.1 of the Guidelines – Costs orders in Court proceedings

At a high level, the ILARS Review concluded that the Guidelines enable the effective achievement of ILARS's statutory purpose and effectively support the objectives of the workers compensation system, including by:

- setting fees for professional costs and disbursements that achieve the balance of being fair to Approved Lawyers and the system; and
- providing processes and incentives for early resolution of matters.

The ILARS Review considered appeal costs arrangements in the Guidelines and in particular the current requirements (in 3.4.5.1) that require Approved Lawyers to use their best endeavours to seek a mutual assurance or an undertaking from the insurer that neither party will seek to enforce a costs order made by the Court or alternatively that both parties will seek an order that each party is to bear its own costs, and recommended that this aspect be reconsidered.

The ILARS Review noted that the current policy means '*that in relation to appeals the cost burden is borne by the IRO when costs could have been pursued against the insurer, be it either icare or a self or specialised insurer*'.

Recommendation 30 of the Review Report⁷ deals with appeals costs, and states:

Acknowledging that work is continuing within the IRO on [the AC review], the Review Committee recommends that the IRO continue this work and that it clarifies the following:

- *Workers should seek a costs order to be paid by insurer if they are successful in an appeal (whether as applicant or respondent)*
- *If a worker is successful in an appeal, but the Court declines to award costs, the IRO will fund the appeal*
- *If a worker is unsuccessful in an appeal (as applicant), that the IRO will not pay their costs*
- *The IRO will fund the costs of an injured worker where they are respondent to an appeal*
- *The method by which costs will be assessed.*

⁷ [ILARS Review - Final Report \(Dec 2022\).pdf \(nsw.gov.au\)](#)

It is noted that these arrangements largely reflect the existing Guidelines, except that it recommends workers should seek a costs order to be paid by the insurer if they are successful in an appeal (whether as applicant or respondent), rather than that lawyers seek an assurance/undertaking from the insurer that neither party will seek to enforce a costs order made by the Court or that both parties will seek an order that each party is to bear its own costs.

IRO accepts Recommendation 30 of the ILARS Review. IRO's experience is that it is problematic to require Approved Lawyers to seek an assurance from insurers that neither party will seek to enforce a costs order made by the Court or that both parties will seek an order that each party is to bear its own costs.

Approved Lawyers often advise us that insurers will not agree to such an approach. And in matters where costs orders are made against insurers, Approved Lawyers may be instructed to enforce the order rather than to claim costs from IRO.

Given this, and that the ILARS Review recommended workers should seek a costs order to be paid by insurer if they are successful in an appeal (whether as applicant or respondent), this requirement will be removed from 3.4.5.1 of the Guidelines. This means insurers who are unsuccessful in Court proceedings are more likely to bear the worker's costs for those proceedings, rather than the costs being borne by IRO.

It will remain the case that:

- IRO will usually not indemnify a worker where a costs order is made in favour of an insurer by the Court
- Approved Lawyers will only be required to support a request for funding for an appeal (as the proposed appellant,) by addressing merit, where the request is for unconditional funding – parts 3.4.3.2 and 3.4.4.1 of the Guidelines
- Full funding (unconditional funding) will be considered by the IRO for worker-initiated appeals on a case-by-case basis.

Time costing model based on NSW Attorney-General's rates

We confirm and formalise the continued use of a time costing model based on NSW Attorney-General's rates for matters concerning appeals to Courts. Our reasons for this are set out below.

Time-costing

IRO has considered matters including the recommendations of 2022 ILARS Review and AC Review (including advice provided by costs specialists), our experience and current practice in appeal matters.

The expert advice provided to IRO examined possible costs options including lump sum costs (a lump sum regardless of the amount of work involved), ad valorem costs (costs at a fixed proportion of the value of the claim) and event-based costs (similar to the current Part 6 of the ILARS Guidelines), all of which were thought not to be appropriate in Court appeal matters.

Time costing is the most common approach and reflects costs practice before NSW Courts. It is comparatively simple to administer, both as a costing framework generally, and in its application in individual matters.

IRO does not fund many appeals to the Court in any given year. In 2022-23, IRO finalised twelve (12) grant matters where an appeal had been made by the worker or insurer/employer to a Court. IRO paid professional fees (including disbursements) at a total cost of \$252,456 (or an average cost of \$22,950).

In any given Appeal matter, invoices are scrutinised by experienced IRO Principal Lawyers, and where necessary requisitions are sent to Approved Lawyers about any activities that do not appear fair or reasonable.

Given the low volume of matters, there is limited justification for developing and maintaining a dedicated attendance-based fee scale, especially in a jurisdiction that has moved away from that approach over the last several decades, as identified in AC Review.

Overall, IRO has determined that a time costing approach is preferable.

In addition, for Court matters, merit advice from Counsel not previously instructed in a matter may be required to address these issues. In many appeal matters Senior Counsel will be instructed, having regard to factors such as complexity and the significance of the legal questions under review.

Recognising these issues, our view is that the fixed fee is not appropriate for merit advice, and instead adopting a time costing approach for advice, where a maximum number of hours (for example, ten (10) hours) will be funded for merit advice, is preferable.

NSW Attorney-General's rates

The NSW Attorney General's rates for legal representation⁸ are set by the Attorney-General and payable to legal representatives engaged by or on behalf of Government departments and agencies. The rates, which are based on time costing with capped hourly rates and daily maximums, and are inclusive of overheads, are published and regularly reviewed.

In 2021, IRO established internal interim guidance adopting the NSW Attorney-General's rates as an appropriate comparator for appeal costs. Reasons for this included that IRO is a government agency, and that the Attorney-General's rates reflect the added complexity of appeal matters and the higher level of skill required.

Our view is that the adoption of the Attorney-General's rates as a guide in appeals before the Courts has generally been accepted by Approved Lawyers, although some concerns have been raised:

- that the fees are not set at a high-enough level, and may impact on whether Counsel will act in a matter
- that the fees do not take into account where a matter is conditionally funded only.

We noted that it was open for Approved Lawyers to propose a rate that is lower than those provided for in the NSW Attorney-General's rates where that is fair and reasonable, and in

⁸ [Attorney-General's rates for legal representation \(nsw.gov.au\)](https://www.nsw.gov.au/attorney-general/rates)

addition, if an Approved Lawyer believes that rates are not fair and reasonable and a higher rate is appropriate, we would consider their view and the reasons for it, before making a decision.

Our experience since adopting this practice is that it has not proved controversial and has increased certainty for Approved Lawyers. We have not found it necessary to approve rates in excess of those prescribed.

In addition, it should be noted that the Attorney-General's rates will only apply to matters where IRO ultimately pays the Approved Lawyer's costs in an appeal. IRO does not seek to impose on Approved Lawyers any requirement to charge fees in accordance with the Attorney-General's rates in matters where an insurer is ultimately responsible for paying the costs in an appeal.

Reasonable costs

The AC Review expressed concerns about the disadvantages attached to time-costing and discussed the potential for there to be a lack of control over final costs in a matter. There is a need to balance fairness to legal practitioners with the broader financial viability⁹ of the workers compensation scheme. Therefore, it is appropriate to place a cap on hourly rates for legal services.

Although an hourly rate will be applied, the total time spent on any particular activity must be reasonable in all the circumstances. IRO proposes will set caps for the number of hours spent by counsel in preparing merit advices and monitor costs in matters where the work is likely to exceed 30 hours.

Approved Lawyers are required to inform the Principal Lawyer managing a grant when time spent on an appeal matter is likely to exceed 30 hours. This will permit IRO to understand the complexity of a matter and provide assurance to Approved Lawyers about any likely objections to payment of total costs in a grant.

Complexity uplift

The AC Review identified that, in some cases, the NSW Attorney General's rates may not be an appropriate level of remuneration due to what might broadly be described as the complexity of the matter. It recommended IRO consider providing for payment of a higher amount of costs in such matters.

The *Legal Profession Uniform Law Act 2014* provides for an uplift fee for professional costs, not exceeding 25%, where the payment of some or all of the legal costs in a matter is conditional on the successful outcome of the matter to which those costs relate. The uplift fee reflects that the lawyer is taking a risk the matter might not be successful, and as a consequence might not be paid for their services.¹⁶

Where IRO provides conditional funding for a Court appeal, it is appropriate to consider a similar uplift, given the Approved Lawyer has assumed the risk they may not be paid for their services if unsuccessful.

⁹ [Workplace Injury Management and Workers Compensation Act 1998 No 86 - NSW Legislation](#) – section 3

Similarly, matters that are funded unconditionally may also have features of complexity or significant difficulty which warrant payment of a higher fee.

In both types of matters IRO will, on application by the Approved Lawyer, consider paying a complexity uplift on a similar basis to part 4.1.6 of the Guidelines. Factors relevant to IRO's decision to grant an uplift include the skill, care, responsibility, complexity and difficulty of a matter. Requests for an appeals uplift should address these issues.

Summary

From 12 August 2024, IRO's policy for funding of appeals to a Court will guide IRO's procedural expectations in relation to appeals funding. These amendments will be reflected formally in Guidelines in due course and will operate as follows:

1. Approved Lawyers, when acting for a worker who has been successful on appeal, are to seek an order for costs to be paid by an insurer
2. Costs payable by IRO will be paid on a time-costing basis
3. Adopt the Attorney-General's rates for the provision of legal services where costs of an appeal are ultimately paid by IRO
4. Where the amount of work in an appeal is likely to exceed 30 hours Approved Lawyers are required to inform the ILARS grant manager and to provide sufficient information, on an ongoing basis, to assist the grant manager in assessing whether IRO should limit payment of costs at the conclusion of the appeal.
5. Approved Lawyers may apply for a complexity uplift on costs payable by IRO

Appendix A

Current funding provisions

The IRO ILARS Funding Guidelines (Guidelines) provide for the funding of appeals to a Court. Under Stage 4 funding (see Part 3.4 of the Guidelines), funding may be considered for the following types of appeals:

- Appeal (by way of application for judicial review) against a direction or decision of the Commission (to Supreme Court)
- Appeal (by way of application for judicial review) against a decision of an Appeal Panel (to Supreme Court)
- Appeal against a decision of the Commission constituted by a Presidential Member (to Court of Appeal)
- Appeal against a decision of the Supreme Court
- Appeal against a decision of the Court of Appeal.

The Guidelines provide specific arrangements for Stage 4 funding, including the following:

- a lawyer approved under ILARS (Approved Lawyer) must request an extension of funding if seeking funding to represent a worker in an appeal (3.4.3).
- where the worker is the respondent, the IRO will provide full (unconditional) funding (3.4.4.2).
- where the worker initiates the appeal, full funding is considered on a case-by-case basis, having regard to whether:
 - there are reasonable grounds for believing, based on provable facts and a reasonably arguable view of the law, that the appeal has reasonable prospects of success, and
 - the matter involves an important question of lawand where full funding is not granted conditional funding (where payment of legal costs will only be made in the event of a successful outcome in the matter) will be provided (3.4.4.1).

The Guidelines are silent as to the amount of funding to be paid, or the method of calculation.

Where the appeal is to a Court:

- full funding extends to fair and reasonable party/party and solicitor/client costs and includes filing fees, reasonable counsel's fees, and other reasonably necessary disbursements (3.4.5)
- the Lawyer should use their best endeavours to seek a mutual assurance or undertaking from the insurer that neither party will seek to enforce a costs order made by the Court or alternatively that both parties will seek an order that "*each party is to bear its own costs*" (3.4.5.1)
- if the worker is successful in Court proceedings, a costs order will not be pursued against the unsuccessful insurer and that an account for full costs will be provided to the IRO for

approval and payment. The IRO generally does not indemnify a worker where a costs order is made in favour of an insurer by the Court.

The Guidelines relevantly provide, as regards professional fees:

- professional fees payable are to be agreed between the IRO and the Lawyer at the conclusion of the matter (3.4.8.2)
- disbursements may include filing fees, reasonable counsel's fees (as agreed with the IRO), appeal books and other reasonably necessary disbursements (3.4.9.2).

IRO practice is generally aligned to the Guidelines. Payment of professional costs has usually been at the rates set by the NSW Attorney General for legal representation: [Attorney General's rate for Legal Representation as at 1 August 2021 \(nsw.gov.au\)](https://www.nsw.gov.au/attorney-general/rates-legal-representation).

In addition, if an Approved Lawyer believes that rates are not fair and reasonable and a higher rate is appropriate, IRO would consider their view and the reasons for it, before making a decision.

Appendix B

Options for appeal costings

The AC Review examined possible costs options including lump sum costs (a lump sum regardless of the amount of work involved), ad valorem costs (costs at a fixed proportion of the value of the claim) and event-based costs (similar to the current Part 6 of the ILARS Guidelines), all of which were thought not to be appropriate in Appeal matters.

Two options were recommended for further investigation:

- Time costing – where lawyers are remunerated for the time spent completing work.

This is the most common form of costing but does not provide an incentive to be efficient and may encourage unnecessary work.

In exploring this option, a number of matters were raised, including:

- control of legal costs is an integral part of management of the workers compensation scheme, and this needs to be balanced with the (sometimes conflicting) aim of fair remuneration
- for professional fees, generally time costing is broken down into 6-minute units – which can make the effective hourly rate greater as tasks that take less than 6 minutes will still be charged as a unit
- differential rates may be applied depending on the level of qualification and experience
- there are a number of possible comparators to set an hourly rate, such as:
 - daily rates set for part-time members of the Commission¹⁰
 - time-cost rates for costs for legal services set out in Schedule 7 of the *Workers Compensation Regulation 2016*¹¹
 - rates permitted under Federal and Family Court scales (see below)
 - the rates provided for under the NSW Costs Assessment Rules Committee¹²

Some of these are generous, and may need to be reduced as part of managing scheme costs

- additional limits can also be considered, such as restricting the number of days of preparation, the number and/or hours of conferences or the amount of time permitted to prepare submissions.
- Attendance-based scales – where items of work are allocated a particular value regardless of the time taken to complete the items.

¹⁰ [2022 annual determination-soort-public office holders group - for publication.pdf \(nsw.gov.au\)](#)

¹¹ [WORKERS COMPENSATION REGULATION 2016 - SCHEDULE 7 \(austlii.edu.au\)](#)

¹² [230522 Revised Guideline .pdf \(nsw.gov.au\)](#)

These scales were abolished in NSW almost 30 years ago, and in the workers compensation jurisdiction over 20 years ago.

Attendance-based scales are used in Federal¹³ and Family¹⁴ Court matters for specified activities (e.g., initiating applications, attending conferences and daily hearing fees in Family Court matters; specified rates based on the number of words for preparing and reading documents in Federal Court matters), with other activities able to be charged on a time costing basis.

A review of appeal files

As part of the AC review, six (6) files of Approved Lawyers where there was a Court appeal were examined in detail by expert costs lawyers external to the IRO.

The files were from the period 2017-2021, and included:

- matters such as Medical Appeal Panel appeals and appeals of Presidential decisions of the Commission
- matters where the worker was the appellant, and others where they were the respondent
- some matters where the appeal was to the Supreme Court, and others where the appeal was to the Court of Appeal
- some matters where the costs were paid by the IRO, and other matters where the costs were paid by the insurer.

Costs in all matters were calculated on a time-costing basis. All matters preceded the interim guidance of the IRO in 2021 that used the rates set by the NSW Attorney General for legal representation as the comparator for IRO costs. The rates charged in the matters are set out below:

- Solicitors' cost rates ranging from \$250-\$600/hour (average main rate approximately \$520/day)
- Junior Counsels' cost rates ranging from \$300-\$350/hour
- Senior Counsels' cost rates ranging from \$5,000-\$13,000/day
- Total costs ranging from \$34,215.50-\$168,845.50 including disbursements.

In one matter, the costs (to be paid by the insurer) were referred for assessment, and the lawyers' professional costs were reduced by approximately 25%.

In another matter, where IRO agreed to pay the costs of the appeal, the professional costs and disbursements for Counsels' fees were reduced by approximately 16% after the IRO raised concerns about the amount of costs invoiced in the matter.

¹³ [Legal costs allowable for work done and services performed \(fedcourt.gov.au\)](https://www.fedcourt.gov.au)

¹⁴ [Legal costs in family law matters | Federal Circuit and Family Court of Australia \(fccoa.gov.au\)](https://www.fccoa.gov.au)