



Practice Note TITLE	Complexity Increases
ILARS Guideline reference	4.1.6, 5.2.6
Published Date	23 rd May 2024
Version	1

Purpose

This Practice Note provides guidance on the practice and implementation of clauses 4.1.6 and 5.2.6 of the ILARS Funding Guidelines (Guidelines) as they apply to complexity increases for Approved Lawyers and Counsel.

This Practice Note includes:

- The operational rules and criteria for IRO to approve a complexity increase.
- Information regarding the supporting documentation required to support a complexity increase request.
- The procedure to be followed when submitting a request for a complexity increase.

Criteria, Practice and procedure

Criteria

Grant amounts are paid based on the outcomes achieved (clause 2.16). The professional fees including a complexity increase will be determined on the conclusion of the legal relationship or when a final outcome is achieved, whichever is the earlier (clause 4.1.1).

The Grant Manager will communicate the professional fees based on the outcome. If an Approved lawyer disagrees with the determination they may seek a review of that decision (clause 2.12). A complexity increase is not a mechanism to remedy a reduction in costs resulting from an apportionment agreement.

IRO will consider a complexity increase request from an **Approved Lawyer** in accordance with clause 4.1.6 of the Guidelines as follows:

Where a Lawyer considers that the professional fees allowed are inadequate the IRO will consider an increase in professional fees on application by the Lawyer.

An increase in professional fees will **only** be considered where one or more of the following criteria are met:

- a matter has involved significant additional work due to complex issues
- there are multiple respondents
- there are multiple resolutions within the same proceedings or matter.

A request for an increase should be made at the conclusion of the matter **prior to the preparation of a Tax Invoice**.

The Lawyer should provide reasons in support of the increase sought identifying the complexities and any additional work undertaken.

Any increase in professional fees is at the discretion of the IRO.

IRO will consider a complexity increase request for **Counsel** in accordance with clause 5.2.6 of the Guidelines noting the requirement of **exceptional circumstances** as follows:

The IRO will consider an increase of counsel's fees in exceptional circumstances where a matter has involved significant additional work due to the complexity of the issues or matters not considered in the Disbursements Schedule. To support a request for an increase of counsel's fees, Lawyers should provide a short, signed submission from counsel in support of the requested increase at the conclusion of the matter. Any request for an increase and the supporting submissions should be provided to the ILARS Principal Lawyer for approval **prior to the issuing of a tax invoice**.

Practice

It is IRO's expectation that Approved Lawyers and Counsel will only submit requests for complexity increases in the circumstances set out in clauses 4.1.6 and 5.2.6 of the Guidelines and generally where there is an outcome in favour of the worker.

The following are the principles IRO has adopted for the assessment of a complexity increase:

- IRO is not bound by Schedule 6 of the *Workers Compensation Regulation 2016* (the Regulations) but will be guided by the principles in the Regulations
- Generally, complexity increases are not granted where there is **no outcome** achieved for the injured person unless it can be demonstrated that there are **exceptional circumstances**
- Complexity is not defined in the Guidelines nor in Schedule 6 of the Regulations however in the context of a grant, the term indicates an intricacy of fact, law and legislation that is significantly higher than that usually encountered in other proceedings for workers compensation disputes
- A matter does not become more or less complex as a consequence of the time the matter is on foot. There are many reasons why some matters or proceedings take longer than others, not necessarily involving complex issues
- The volume of the documentary material is of only limited relevance. It is something that may indicate complexity depending on its contents. However, there are many matters which are not complex, in which a substantial amount of material is obtained and put into evidence by one or both parties; for example, employment records or hospital records. It is necessary to have regard to the substance of the issues between the parties, rather than to the volume of documentary material generated
- Complexity increases are not an alternative for Approved Lawyer dissatisfaction with the decision of a grant manager on professional fees or apportionment of fees with another Approved Lawyer
- Generally, the upper limits set out in schedule 6 of the Regulations will be observed, although submissions can be made and will be considered for approvals higher than those set by the Regulations. Complexity increases which exceed those limits set out in the Regulations will be extraordinary matters involving novel and unique issues and/or circumstances.
- Complexity increases are not available for appeals as the costs for appeals in Part 6 of the Guidelines have been set taking into account the work generally involved in appeals

The following are examples of the types of matters where consideration will be given for a complexity increase due to **complex issues giving rise to significant additional work**:

- Complex psychological injury claims
- Psychological injury claims together with a physical injury claim where assessments are obtained for both injuries (see *Tokich v Tokich Holdings Pty Ltd* [2015] NSWCCPD 72 (21 December 2015))
- Conduct by other parties to the proceedings (such as the insurer) which result in significant additional work outside the course of the proceedings
- Matters where there are complex medical or factual situations such as:
 - Where there are multiple respondents
 - A serious head injury resulting in difficulty obtaining instructions (generally not in cases where instructions are difficult due to the requirement of an interpreter)
 - Matters where consideration is required beyond the scope of the running of an ordinary matter due to emerging issues/legal arguments
 - Matters where additional work arises due to the impact of transitional provisions
 - Significant additional work arising from **complexity** associated with the serving of late material by the insurer
 - Injured worker's conduct, if it can be demonstrated that it has caused additional work that is significantly outside the range that is expected in workers compensation matters
 - Work which is beyond what would be considered the normal expected trajectory of preparation for the conduct during Personal Injury Commission proceedings but excludes work resulting from the matter not being properly prepared.

It should be noted that the presence of any of these factors does not guarantee a matter will be granted a complexity increase. There may also be other kinds of matters which can satisfy the criteria set out in clause 4.1.6 and 5.2.6 of the Guidelines.

Procedure

When an Approved Lawyer wishes to request a complexity increase and believes there is a basis to do so, they will send an email to ILARSALmail@iro.nsw.gov.au including the following information:

- The subject line includes the words 'complexity increase'
- Confirmation the legal relationship has concluded or a final outcome has been achieved
- Submissions setting out the reasons a complexity increase is sought referring to clause 4.1.6 (for Approved Lawyers) and clause 5.2.6 (for Counsel)
- Documents in support of the request including but not limited to completion documents such as a signed complying agreement, Medical Assessment Certificate, Reasons and Certificate of Determination issued by the Personal Injury Commission.

Where the request for a complexity increase is not, or not adequately, supported by submissions and material/evidence the ILARS grant manager may request additional information or determine that no complexity increase is determined in that grant. In addition, the need to request additional information may result in a delay in finalising IRO's decision.

Example

Examples of the types of matters where consideration will be given for a complexity increase due to **multiple respondents** are where:

- Two or more respondents are joined to the proceedings in the Personal Injury Commission
- An Approved Lawyer is representing multiple parties such as death benefits claims and the Personal Injury Commission has ordered additional counsel be briefed to represent the different parties. In this case, a complexity increase may be appropriate as two sets of fees are not payable for one set of proceedings.

Examples of the types of matters where consideration will be given in relation to **multiple resolutions** within the same proceedings or matter, include:

- Where separate costs are not appropriate
- The complexities arising from the impact of legislative provisions lead to multiple resolutions
- Complexities arising from the implementation of PIC pathways and practice directions, resulting in multiple final outcome documents
- A further issue is notified by the insurer and added to proceedings in the Personal Injury Commission
- Where multiple injury dates, from discrete injuries, are included in one ARD
- It does not generally include matters which have two or more issues such as denial of liability, permanent impairment, weekly payments and medical treatment expenses being resolved for the same injury in one ARD.

Examples of the types of matters where consideration will be given due to conduct of third parties include:

- Witnesses not participating/cooperating
- Matters where the worker is joined to proceedings (eg between iCare and uninsured employer)
- Where the Personal Injury Commission orders a party to take an action not usually undertaken in that type of matter