

New costs item for section 92(f) agreements in Western Australia: Contentious Business indeed

The latest *Legal Profession (Supreme and District Courts) (Contentious Business) Report 2018* was published in the Government Gazette on 21 June 2018 and contains an important update relevant to the WA Workers' Compensation Scheme.

“New” Item 37

The *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2018* (“**Supreme Court Scale**”) introduces item 37, which is a stand-alone item allowing up to a maximum of 10 hours at a Senior Practitioner’s rate for work associated with effecting settlements pursuant to section 92(f) of the *Workers’ Compensation and Injury Management Act 1981*.

For matters that resolve in the course of proceedings in the WorkCover WA Conciliation and Arbitration Service, practitioners will be entitled to costs under both the *Workers’ Compensation (Legal Practitioners and Registered Agents) Costs Determination 2015* (“**WorkCover Scale**”) and the Supreme Court Scale. Notably, the rates under the Supreme Court Scale are substantially higher than the WorkCover Scale.

Maximum Hourly Rates – Supreme Court Scale

Fee earner	Senior Practitioner (permitted to practice on own >5 years)	Junior Practitioner (permitted to practice on own < 5 years)	Restricted Practitioner (0 - 2 years)	Clerk / Paralegal
Supreme Court Scale	\$495	\$352	\$297	\$231
WorkCover Scale	\$407	\$308	\$308	\$203.50 (registered agents)

We anticipate that practitioners representing workers will seek an allowance pursuant to item 37 when claiming costs. Decision makers at WorkCover WA have already reported an appreciable increase in the costs awarded so far.

However, irrespective of a new costs item having been introduced, the proposition that a worker’s solicitor can claim costs associated with effecting a section 92(f) agreement is not new.

It was generally accepted amongst the industry that costs for work performed could be taxed under existing items on the Scale, although there was some lingering uncertainty. This view was echoed in the Report by the Legal Costs Committee in its explanation for item 37:

“Whilst the Committee is of the view that this work is already claimable under other items in the Determination, the introduction of a special item is intended to remove any doubt in that regard”.



Tips for Managing Costs

The introduction of item 37 to the Supreme Court Scale provides a timely reminder for insurers, self-insured employers, claim managers and their legal representatives to consider the following when assessing and negotiating costs:

1. **Is a section 92(f) agreement necessary?** Consider alternative settlement mechanisms such as a Memorandum of Agreement, Schedule 2 lump sum payment, or, where possible, a Consent to Finalising Order.
2. **Who has performed the work and what level of experience are they?** Bear in mind that it is not always the Senior Practitioner who is doing all of the work (although costs are commonly claimed on this basis). Also consider that the definition of Senior Practitioner under the Supreme Court Scale is a practitioner who has been permitted to practice on his or her own for at least five years. A practitioner must complete a minimum of two years of supervised legal practice and therefore to meet this definition, the practitioner must have been practicing for a minimum of seven years.

Not sure how to check the experience of a practitioner? Search the practitioner's name on the roll: <https://www.lpbwa.org.au/Practising-Certificates/Search-the-legal-profession-in-Western-Australia.aspx>

3. **Remember that it is a maximum, not an automatic entitlement.** Just because item 37 provides a maximum of 10 hours does not mean that a worker's solicitor is automatically entitled to it. It is still necessary to demonstrate that the work was carried out. In our view, the maximum amount should only apply to unique or difficult and complex matters, which involve multiple issues, injuries, employers and/or insurers.

It may prove necessary to run a "test case" to taxation at the District Court in order to obtain some guidance with respect to assessing costs under item 37.

If you have any queries relating to item 37 of the Supreme Court Scale or costs generally, please get in touch with HBA Legal.

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