



Victoria Government Gazette

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Accident Compensation Act 1985
Workplace Injury Rehabilitation and Compensation Act 2013
MINISTERIAL DIRECTIONS

Ministerial Directions with Respect to Procedures under section 134AB of the
Accident Compensation Act 1985 and Division 2 of Part 7 of the
Workplace Injury Rehabilitation and Compensation Act 2013

I, Danny Pearson, Minister for WorkSafe and the TAC, make the following directions under section 134AF of the **Accident Compensation Act 1985** and section 352 of the **Workplace Injury Rehabilitation and Compensation Act 2013**. I hereby revoke the 'Ministerial Directions', Victoria Government Gazette, No. G 16, 21 April 2016, effective from 1 November 2024.

Dated 23 August 2024

THE HON. DANNY PEARSON MP
Minister for WorkSafe and the TAC

SPECIAL

Contents

- 1. Preamble**
- 2. Objectives of these Directions**
- 3. Definitions**
- 4. Calculation of time limits**
- 5. Application of these Directions**
- 6. Timing of application**
- 7. Contents of application and supporting documents**
- 8. Access to employer's premises prior to making an application**
- 9. Service of the application and supporting documents**
- 10. The advice**
- 11. Service of the advice**
- 12. Rebuttal affidavit of the worker**
- 13. Involvement of a party other than the Worker, Employer and (where relevant) the Authority ('the third party')**
- 14. Conferences**
- 15. Offers**
- 16. Settlements**
- 17. Employer's responsibilities**
- 18. Responsibilities of third parties**
- 19. Failure to comply with these Directions**
- 20. Costs**

Statutory Offer Form

Statutory Counter Offer Form

1. Preamble

These are Directions for or with respect to procedures under section 134AB of the **Accident Compensation Act 1985** ('AC Act') and Division 2 of Part 7 of the **Workplace Injury Rehabilitation and Compensation Act 2013** ('WIRC Act') (together, 'the damages legislation') and are made pursuant to section 134AF of the AC Act and section 352 of the WIRC Act.

Pursuant to the provisions of the AC Act and the WIRC Act, employers, the Authority, self-insurers, workers and any person on whom an application for damages is served or against whom an entitlement to damages is asserted, and the legal representatives of each, must comply with these Directions.

These Directions encompass directions for or with respect to:

- a) procedures set out in the damages legislation for the making and resolution of claims for common law damages to which the damages legislation applies;
- b) the provision of information by affidavit;
- c) the attending of conferences.

2. Objectives of these Directions

The objectives of these Directions are to ensure that:

- a) procedures under the damages legislation facilitate the just, efficient, timely and cost effective resolution of common law applications by injured workers;
- b) injured workers receive appropriate and timely damages where employers or other persons are at fault in respect of a compensable injury;
- c) all applications under the AC Act and the WIRC Act are managed consistently and are the subject of quality decision making by the Authority and self-insurers; and
- d) the Authority, self-insurers, the worker and any person (including an employer) alleged to be at fault and all legal representatives act in a manner consistent with the obligations imposed by the **Civil Procedure Act 2010** and co-operate so as to settle or compromise claims for the appropriate amount of damages, without unnecessary resort to legal processes.

3. Definitions

Unless the context otherwise requires, or the contrary intention appears, terms defined in section 5 of the AC Act and in section 3 of the WIRC Act have the same meaning.

In these Directions:

'**AC Act**' means the **Accident Compensation Act 1985**;

'**advice**' means the advice of the Authority or self-insurer referred to in section 134AB(7) of the AC Act or section 330(1) of the WIRC Act;

'**application**' means an application in the form referred to in section 134AB(5)(a) of the AC Act or section 328(4)(a) of the WIRC Act;

'**application and supporting documents**' means an application in the form referred to in section 134AB(5)(a) of the AC Act or section 328(4)(a) of the WIRC Act, and the accompanying documents referred to in section 134AB(5)(b) and (c) of the AC Act or section 328(4)(b) and (c) of the WIRC Act;

'**the Authority**' means the Victorian WorkCover Authority continued in existence by section 491 of the WIRC Act;

'**claim**' means the proposed claim for damages at common law, in respect of each cause of action which the worker seeks to maintain;

'**claim for non-economic loss**' means a claim for compensation for non-economic loss made under section 98C or section 98E of the AC Act or Part 5, Division 5 of the WIRC Act;

'**consent and authority**' means the form of authority to release medical information approved by the Authority for the purpose of section 134AB(5)(b) of the AC Act and section 328(4)(b) of the WIRC Act;

‘**County Court Rules**’ means the County Court Civil Procedure Rules 2018 or such further Rules as may replace them from time to time;

‘**damages proceeding**’ means a proceeding for the recovery of damages commenced in accordance with the provisions of the AC Act or the WIRC Act;

‘**medical information**’ includes any notes, records, correspondence and/or medical reports held by or of any medical practitioner, hospital, health service provider, or any other person concerning any medical treatment provided to the worker;

‘**medical report**’ means a medical report as defined in section 134AB(37) of the AC Act or section 325 of the WIRC Act;

‘**response date**’ means the response date as defined in section 134AB(37) of the AC Act or section 325 of the WIRC Act;

‘**statutory conference**’ means a meeting, discussion or series of meetings or discussions commenced in accordance with section 134AB(12) of the AC Act or section 333 of the WIRC Act;

‘**statutory offer**’ and ‘**statutory counter offer**’ mean the offers referred to in section 134AB(12) of the AC Act or section 333 of the WIRC Act;

‘**WIRC Act**’ means the **Workplace Injury Rehabilitation and Compensation Act 2013**.

4. **Calculation of time limits**

Consistent with section 329A of the WIRC Act, in calculating a period of time provided for in these Directions the period from 24 December to 9 January next following must be disregarded.

5. **Application of these Directions**

These Directions apply to an application made to the Authority or self-insurer on or after 1 November 2024.

6. **Timing of application**

An application cannot be made by a worker prior to completion of the requirements in section 134AB(4) of the AC Act or section 328(2) of the WIRC Act.

7. **Contents of application and supporting documents**

7.1 The form approved by the Authority pursuant to section 134AB(5)(a) of the AC Act or section 328(4)(a) of the WIRC Act is to be published on a Government internet website and made available for inspection by members of the public without charge at the office of the Authority during normal business hours.

7.2 The details required by these Directions to be specified in or included in or attached to an application must be specified in or included in or attached to the application itself. Any documents referred to in the application must accompany the application. Failure to provide the details or documents required to be specified or included or attached shall constitute a failure to comply with these Directions.

7.3 An application must in respect of each claim:

- (a) specify the injury or injuries relied upon in the application for damages;
- (b) specify whether, in respect of any injury relied upon, a claim for non-economic loss has been made and, if such a claim has been made, the impairment determinations that have been accepted by the worker and whether the worker has accepted the entitlement to compensation;
- (c) where the worker does not have a deemed serious injury within the meaning of section 134AB(15) of the AC Act or section 335(1) of the WIRC Act, specify:
 - (i) the sub-paragraph or sub-paragraphs of the definition of ‘serious injury’ in section 134AB(37) of the AC Act or section 325 of the WIRC Act the worker relies upon to constitute each serious injury contended for; and

- (ii) any body function or body functions alleged to be impaired or lost, on which reliance is placed for the purpose of establishing a serious injury; and
 - (iii) whether, for the purposes of section 134AB(38)(b) of the AC Act or section 325(2)(b) of the WIRC Act, the worker relies upon consequences with respect to pain and suffering and/or loss of earning capacity;
 - (d) in as much detail as is known or reasonably can be ascertained by the worker or their legal representative, specify each legal person against whom the worker claims to have a cause of action, their address for service that will be used to comply with section 328(6) of the WIRC Act and any address relevant to the cause of action (such as the address at which the injury occurred, if at the premises of the other person);
 - (e) specify the proper name of each employer of the worker during the period commencing three years prior to the injury relied upon in the application and ending on the date of the application, together with the address of the employer at the time of the employment and the period of the employment with each employer;
 - (f) have attached to it a proposed Statement of Claim naming each person against whom the worker claims to have a cause of action, which states each cause of action in a manner in compliance with Order 13 of the County Court Rules and which contains the particulars required by Rule 13.10 of the County Court Rules.
- 7.4 Where a worker seeks to rely upon an injury occurring both before and after 1 July 2014, whether or not section 5(2) of the WIRC Act applies, the worker may include all allegations of injury in one application regardless of whether the application or any subsequent proceeding is governed by section 134AB of the AC Act or Division 2 of Part 7 of the WIRC Act.
- 7.5 An application must be accompanied by:
- (a) a copy of all medical reports; and
 - (b) affidavits attesting to such other material;
existing when the application is made and of which the worker or his or her legal representative is aware and on which the worker intends to rely, or the substance of which the worker intends to adduce in evidence, whether for the purpose of establishing the worker has a serious injury (unless the worker has a deemed serious injury) or for establishing an entitlement to damages at common law; together with an affidavit attesting to information contained in a report (other than a medical report) or document that is within the worker's possession, custody or power, a copy of that report or document (but not necessarily as an exhibit to the affidavit); and
 - (c) a consent and authority;
- 7.6 Where a worker or a worker's legal representative has obtained medical information, which is relevant to the application, such medical information should be provided with the application or promptly when received. Where medical information has been obtained and is not provided, the Authority or a self-insurer will not be liable to reimburse the worker or the worker's solicitors for the costs of obtaining or copying the medical information.
- 7.7 The affidavit of the applicant must contain the following information, in respect of each claim:
- (a) a description of the applicant's
 - (i) background, employment history, prior state of health and any relevant pre-existing injuries;

- (ii) hobbies, recreations, sporting pursuits, social and domestic activities (recreational activities) including the nature, extent and frequency of the applicant's participation in such recreational activities, prior to the injury or injuries;
- (b) a description of the injury or injuries relied upon (including the date or dates the injury or injuries occurred);
- (c) a description of how each injury relied upon in the application occurred, whether on a specific date, or over a period of time;
- (d) when and from whom the applicant has received treatment in relation to the injury or injuries;
- (e) a summary of the treatment obtained, including medical, physiotherapy, surgery, medication and the like, from the date of each injury relied upon until the making of the application;
- (f) a description of the treatment and the medication the applicant is receiving/ taking as at the date of the application and what treatment is expected to continue into the future;
- (g) separately in respect of each body function alleged to be impaired, or disfigurement or behavioral disturbance or disorder on which reliance is placed, a description of the nature and extent of all the pain and suffering consequences suffered by the applicant resulting from the impairment, disfigurement, disturbance or disorder (including an explanation of the impact on the worker's ability to engage in hobbies, recreation, sporting pursuits, social and domestic activities, the nature and extent of any alleged pain, and the effect of each injury upon relationships and sleep);
- (h) in respect of any disfigurement on which reliance is placed, photographs which show the extent of the disfigurement at the time of the making of the application;
- (i) for the period of three years prior to each injury or injuries relied upon in the application to the date of the application –
 - (i) the name and address of each employer of the applicant, the period of employment with each employer and the applicant's gross earnings with each employer in respect of each period referred to;
 - (ii) particulars of any other employment (whether voluntary or paid and including any self-employment) in which the applicant has engaged, the period of each such employment and the applicant's gross earnings in respect of each period referred to;
- (j) where the applicant relies upon consequences with respect to loss of earning capacity for the purpose of establishing an injury is serious –
 - (i) the calculations as to loss of earning capacity, having regard to the provisions of section 134AB(38)(f) and (g) of the AC Act or section 325(2)(f) and (g) of the WIRC Act;
 - (ii) particulars of the applicant's past and future economic loss, and loss of earning capacity, for the purpose of any entitlement to damages;
 - (iii) complete copies of the applicant's taxation returns (along with returns of each partnership, corporation or trust in which the applicant has a material interest), or other proof of income where such returns are unavailable and cannot be obtained, for the period of three years prior to each injury or injuries relied upon in the application to the date of the application. For clarity, taxation documents or other proof of income documents are not required where a worker relies only on consequences for pain and suffering only, and where the consequences relied upon do not, directly or indirectly, include any reference to loss of income;

- (k) particulars of all absences from employment or periods of alternate or modified duties as a consequence of the injury or injuries;
 - (l) details of all rehabilitation and/or retraining which the applicant has attempted or undertaken or which has been offered to the applicant;
 - (m) details of all attempts by the applicant to obtain alternative employment, further or additional employment or voluntary employment.
- 7.8 Affidavits or reports from non-medical expert witnesses must state, specify or provide the opinion of the expert and (with any necessary modification) comply with the requirements in Form 44A-Expert Witness Code of Conduct and Order 44.03 (4) of the County Court Rules.
- 7.9 Any affidavits from other witnesses must contain the substance of any evidence of the deponent which the worker intends to adduce in evidence in support of the application.
- 8. Access to employer's premises prior to making an application**
- 8.1 Subject to 8.3, if for the purposes of preparing an affidavit or a report from a non-medical expert witness in accordance with this Direction, the worker's legal representative and the expert witness require access to the premises of that worker's employer at the time of the injury or injuries (the 'injury premises'), access on reasonable terms to that part of the employer's premises where the injury or injuries occurred should be granted by the employer.
- 8.2 Where the injury premises remain in the possession or control of the employer, a request for such access must be made in writing addressed to the Authority or self-insurer (as appropriate) at the address for service referred to in Direction 9.
- 8.3 This Direction applies only where the injury premises are, at the time of the request referred to in 8.1, in the possession or control of the employer with whom the worker was employed at the time of the relevant injury or injuries.
- 9. Service of the application and supporting documents**
- 9.1 Where the injury or injuries the subject of the application were sustained by the worker in his or her employment with an employer who is not a self-insurer, the application and supporting documents must be:
- (a) addressed to the Director, Dispute Management Division, Victorian WorkCover Authority, at the address of the head office of the Authority as published on a Government internet website from time to time; and
 - (b) served either –
 - (i) by registered mail; or
 - (ii) by hand delivery during normal business hours to the head office of the Authority; or
 - (iii) in accordance with Direction 9.6.
- 9.2 Where the injury or injuries the subject of the application were sustained by the worker in his or her employment with an employer who is a self-insurer, the application and supporting documents must be:
- (a) addressed to the self-insurer at the address the self-insurer has notified to the Authority as its address for service in the State of Victoria; and
 - (b) served either
 - (i) by registered mail; or
 - (ii) by hand delivery during normal business hours to the self-insurer at that address; or
 - (iii) in accordance with paragraph 9.6.

- 9.3 The Authority must keep an up to date register of the address for service of each self-insurer and provide details of that address to the worker or the worker's legal representative on request.
- 9.4 In the event that a self-insurer wishes to alter its address for service such alteration will be effectively made upon receipt by the Authority of written notification addressed to the Director, Dispute Management Division, at the address of the head office of the Authority as published on a Government internet website from time to time.
- 9.5 For the purpose of section 134AB(5A) of the AC Act and section 328(6) of the WIRC Act which require that a copy of the application and supporting documents must also be served on each person against whom the worker claims to have a cause of action, the worker or the worker's legal representative must:
- (a) forthwith serve the documents, after service of the application on the Authority or self-insurer; and
 - (b) forthwith provide to the Authority or self-insurer (or their legal representative in the matter if one is known) details of the date on which such documents were served and the address at which such documents were served.
- 9.6 For the purpose of Directions 9.1 and 9.2, where the Authority (in respect of applications addressed to it) or a self-insurer (in respect of applications addressed to that self-insurer) gives notice that for the purpose of these Directions it will accept service of applications through an electronic communication, and where the published requirements of the Authority or that self-insurer are complied with, the application will be taken to have been properly served in accordance with these Directions.
- 9.7 The Authority or self-insurer will acknowledge receipt of the application and supporting documents, in writing, and will record the date on which they were received and the date by which the advice is to be provided.

10. The advice

- 10.1 The advice of the Authority or self-insurer which is required by section 134AB(8) of the AC Act or section 330(2) of the WIRC Act must be accompanied by¹:
- (a) a copy of all medical reports; and
 - (b) affidavits attesting to such other material; existing when the advice is given and of which the employer, Authority or self-insurer (or the legal representative of any of them) is aware and on which they intend to rely or the substance of which they intend to adduce in evidence, together with:
 - (c) a proposed Defence to the Statement of Claim attached to the worker's application and supporting documents which complies with Order 13 of the County Court Rules;
 - (d) copies of the documents referred to in paragraph 9.2(d);
 - (e) a copy of all documents obtained by the Authority or self-insurer or their legal representative pursuant to the Consent and Authority, unless they have already been provided to the worker's solicitors.
- 10.2 For the purpose of Direction 10.1, the advice or an affidavit of the employer, Authority, self-insurer or the legal representative of them, must include the following information in respect of each claim relied upon by the worker:
- (a) particulars of all absences of the worker as a consequence of the injury or injuries from employment with the employer or self-insurer or periods on alternate or modified duties with the employer or self-insurer including a description of such duties;

¹ The Authority and self-insurers should, as a matter of practice, provide the medical reports, affidavits and documents referred to in 9.1(a)–(e) in all applications pursuant to section 134AB of the AC Act or Division 2 of Part 7 of the WIRC Act.

- (b) details of rehabilitation and/or retraining the worker has attempted or undertaken, or refused to attempt or undertaken, and details of attempts by the worker to obtain alternative employment or further or additional employment;
 - (c) details of all requests made by or on behalf of the worker concerning retraining or the obtaining of alternative employment;
 - (d) a list of documents which the employer, Authority or self-insurer has in their possession and on which they intend to rely;
 - (e) where the Authority, an employer or self-insurer (or their legal representative) has information (the rebuttal information) which rebuts material relied upon by the worker in the application or the material supporting the application, the rebuttal information, unless it is already in the possession of the worker or a legal representative of the worker prior to the time of service of the advice.
- 10.3 Affidavits or reports from non-medical expert witnesses must state, specify or provide the opinion of the expert and (with any necessary modification) comply with the requirements in Form 44A – Expert Witness Code of Conduct and Order 44.03(4) of the County Court Rules.
- 10.4 Any affidavits from other witnesses must contain the substance of any evidence of the deponent which the Authority, employer or self-insurer intends to adduce in evidence, including the substance of any surveillance reports and exhibits of any surveillance film on which they intend to rely or the substance of which they intend to adduce in evidence in any proceedings related to the application.

11. Service of the advice

- 11.1 The advice is to be served:
- (a) in the event that the worker is legally represented, at the address of the legal representative as specified in the application;
 - (b) otherwise, by:
 - (i) registered mail forwarded to the worker at the residential address of the worker as specified in the application; or
 - (ii) being left at the residential address of the worker as specified in the application; or
 - (iii) personal service on the worker.
- 11.2 For the purpose of Direction 11.1(a), where a worker's legal representative gives notice to the Authority or a self-insurer that for the purpose of these Directions it will accept service of an advice in relation to an application through an electronic communication, and where any published requirements of that legal representative are complied with, the advice will be taken to have been properly served in accordance with these Directions.

12. Rebuttal affidavit of the worker

- 12.1 Section 134AB(10) of the AC Act or section 331 of the WIRC Act provides that, within 28 days of receiving the advice (the required period), the worker may serve an affidavit attesting to further material (whether or not existing before the worker made the application) in rebuttal of material (other than medical reports) attested to in affidavits accompanying the advice.
- 12.2 Where a worker (or a worker's legal representative) has further material which rebuts material relied upon by the employer, Authority or self-insurer, and which was not included in or with the worker's application and was not otherwise in the possession of the employer, Authority or self-insurer at the time of service of the advice, the worker must provide the further material within the required period.

13. Involvement of a party other than the Worker, Employer and (where relevant) the Authority ('the third party')

- 13.1 To facilitate the just, efficient, timely and cost effective resolution of applications involving third parties, and in addition to the requirements of Direction 9.5:
- (a) where the worker has not identified the third party as a person against whom the worker alleges a cause of action, and the Authority or self-insurer proposes to seek contribution or indemnity from the third party, the Authority or self-insurer must, forthwith upon determining to seek such contribution or indemnity, take steps to identify and serve notice on the third party of its intention to do so.
 - (b) subject to Direction 13.3, the worker and the Authority or self-insurer shall each ensure that the third party is provided with the information on which they each rely (other than information that has been provided to the third party by another party) in relation to the application and any claim for contribution or indemnity by them against the third party, and information about any settlement conference in relation to resolution of the worker's application.
- 13.2 Where, for the purpose of 13.1(a), the Authority or a self-insurer serves notice on a third party, the Authority or self-insurer must also forthwith give notice to the worker that the Authority or self-insurer has done so and provide the name and address of the third party and details of any legal representation of the third party of which it becomes aware.
- 13.3 Notwithstanding Direction 13.1(b), any report, note or record of a medical practitioner, hospital, health service provider or allied health practitioner is to be provided only to an insurer or lawyer of the third party. If there is no insurer or legal representative of the third party, the information may be provided to the third party directly with the consent of the worker or the worker's legal representative.

14. Conferences

- 14.1 The parties and their legal representatives shall cooperate so as to arrange a statutory conference to commence within 21 days after the response date.
- 14.2 Whenever practicable, a statutory conference shall be attended by the worker, a representative of the Authority or self-insurer able to give instructions in relation to the claim and the legal representatives of each.

15. Offers

- 15.1 A statutory offer by the Authority or self-insurer must be recorded by the Authority or self-insurer's legal representative in accordance with the Statutory Offer Form attached to these Directions and is to be open for acceptance for 21 days after it is made.
- 15.2 A statutory counter offer must be recorded by the worker or worker's legal representative in accordance with Statutory Counter Offer Form attached to these Directions and is open for acceptance within 21 days after it is made.

16. Settlements

- 16.1 Where a claim or proceeding under section 134AB of the AC Act or Division 2 of Part 7 of the WIRC Act is settled or compromised, whether before or after the commencement of a damages proceeding and whether by acceptance of a statutory offer or statutory counter offer or otherwise, the worker must execute a release if and when called upon to do so by the employer, Authority, self-insurer or other party (or their legal representatives). Such a release must be forwarded to the worker or the worker's legal representative within two business days of such settlement or compromise.
- 16.2 The requirements of paragraph 16.1 do not apply where, by reason of a worker being a person under a disability, approval of the court is required.

17. Employer's responsibilities²

Employers who are not self-insurers and who are respondents to an application or a proceeding under section 134AB of the AC Act or Division 2 of Part 7 of the WIRC Act must:

- (a) make available to the Authority (or its legal representative) all documents and information reasonably required for the purposes of such application or proceeding;
- (b) upon request, forward to the Authority (or its legal representative) any documents relevant to the application or proceeding received from the worker or his or her legal representative;
- (c) co-operate with and assist the Authority (and its legal representative) in the defence of the application or proceeding.

18. Responsibilities of third parties

Where a party ('the third party') other than the worker, employer or Authority has been given notice of a claim against it, whether for damages, indemnity or contribution and whether given by the worker, employer or the Authority, the third party and any insurer liable to indemnify that party should:

- (a) make available to the worker and to the Authority or self-insurer (or their legal representatives) on reasonable terms all documents and information on which they reasonably are aware and on which they intend to rely should the worker bring a proceeding for the recovery of damages;
- (b) make every reasonable effort to cooperate with the worker and with the Authority or self-insurer in order to reach a just, efficient and timely resolution of all issues in the application, including attending and participating in any conference of which the third party is given reasonable notice.

19. Failure to comply with these Directions

19.1 Where, within 21 days of receiving the application and supporting documents, the Authority or self-insurer (or their legal representatives) gives notice to the worker or worker's legal representative ('the non-compliance notice') that any part of the application and supporting documents do not comply with Direction 6 above, the period referred to in section 134AB(7) of the AC Act or section 330(1) of the WIRC Act is altered so that time ceases to run until the Direction has been complied with.

19.2 A notice served under Direction 19.1 above must:

- (i) specify why that part of the application and supporting documents do not comply with Direction 7; and
- (ii) state that the period within which the application is to be dealt with ceases to run from the date of the notice, and that time under section 134AB(7) of the AC Act or section 330(1) of the WIRC Act will commence to run from the date the Authority or self-insurer (or their legal representative) gives notice in writing ('the satisfaction notice') that is satisfied that Direction 7 above has been complied with.

19.3 Where the Authority or self-insurer (or their legal representative) gives a non-compliance notice, the worker (or the worker's legal representative) must give written acknowledgement of receipt of the notice, and specify the date on which the notice was received. Such acknowledgement must be given forthwith upon receipt on a non-compliance notice.

20. Costs

Costs on applications or proceedings under section 134AB of the AC Act or Division 2 of Part 7 of the WIRC Act may be the subject of a legal costs order made pursuant to sections 134AG, 134AGA and 134AGB of the AC Act and sections 354, 355 and 356 of the WIRC Act.

THE HON. DANNY PEARSON MP
Minister for WorkSafe and the TAC

² These responsibilities are in addition to the responsibilities an employer has whether under the AC Act, the WIRC Act, any policy or statutory contract of insurance, the **Civil Procedure Act 2010** or otherwise.

Statutory Offer Form

SECTION 134AB(12)(b) Accident Compensation Act 1985

SECTION 333(b) Workplace Injury Rehabilitation and Compensation Act 2013

STATUTORY OFFER

Worker: _____

Employer: _____

Self-Insurer: _____

Date of Worker’s Application under Section 134AB / Section 328:

Statutory offer for the purposes of Section 134AB(12)(b) / Section 333(b)

(Amount in words)

(\$ _____)

(Figure)

Legal Representative of the Authority

or Self Insurer:

Date:

* References in this document to s134AB are to section 134AB of the **Accident Compensation Act 1985**, and other section references are to the **Workplace Injury Rehabilitation and Compensation Act 2013**

Statutory Counter Offer Form

**SECTION 134AB(12)(c) Accident Compensation Act 1985
SECTION 333(c) Workplace Injury Rehabilitation and Compensation Act 2013**

STATUTORY COUNTER OFFER

Worker:

Employer: _____

Self-Insurer: _____

Date of Worker’s Application under Section 134AB / Section 328:

Statutory counter offer for the purposes of Section 134AB(12)(c) / Section 333(c)

(Amount in words)

(\$ _____)

(Figure)

Worker’s legal representative:

or

Worker:

Date:

* References in this document to s134AB are to section 134AB of the **Accident Compensation Act 1985**, and other section references are to the **Workplace Injury Rehabilitation and Compensation Act 2013**

Workplace Injury Rehabilitation and Compensation Act 2013**Accident Compensation Act 1985****WORKCOVER (PRE-LITIGATED CLAIMS) LEGAL COSTS ORDER 2024**

Order in Council

The Governor in Council under section 354(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** and section 134AG(1) of the **Accident Compensation Act 1985** makes the following Order:

1. Citation

This Order may be cited as the WorkCover (pre-ligated claims) Legal Costs Order 2024.

2. Application

- 2.1. This Order applies to claims and applications made by a worker in accordance with section 134AB of the **Accident Compensation Act 1985** (AC Act) or Division 2 of Part 7 of the **Workplace Injury Rehabilitation and Compensation Act 2013** (WIRC Act) brought or made on or after 1 November 2024 pursuant to section 134AG of the AC Act 1985 and section 354 of the WIRC Act 2013.
- 2.2. This Order specifies the professional costs that may be paid by the Authority or a self-insurer to a legal practitioner acting on behalf of a worker and the disbursements that may be paid to a worker or a legal practitioner acting on behalf of a worker in respect of any claim, or application under section 134AB of the AC Act or Division 2 of Part 7 of the WIRC Act.
- 2.3. The entitlement to professional costs and disbursements under this Order replaces any other entitlement of a worker or a legal practitioner to be awarded legal practitioners' professional costs and disbursements payable by the Authority or a self-insurer for and incidental to any claim, application, or statutory conference and has full force and effect notwithstanding anything to the contrary in the **Legal Profession Uniform Law Application Act 2014**, the **Supreme Court Act 1986** or the **County Court Act 1958** or in any regulations, rules, order or other document made under any of those Acts.
- 2.4. To the extent that any agreement, terms of settlement, release, order or other document purports to require the Authority or a self-insurer to pay costs or disbursements on any basis inconsistent with the provisions of this Order, the provisions of this Order have full force and effect notwithstanding anything to the contrary in such agreement, terms of settlement, release, order or document.

3. Definitions

Unless the context otherwise requires, or the contrary intention appears, terms defined by the AC Act or WIRC Act have the same meaning.

In this Order:

'**AC Act**' means the **Accident Compensation Act 1985**;

'**advice**' means the advice of the Authority or self-insurer referred to in section 134AB(7) of the AC Act or section 330(1) of the WIRC Act;

'**application**' means an application in the form referred to in section 134AB(5)(a) of the AC Act or 328(4)(a) of the WIRC Act;

'**application for pecuniary loss and pain and suffering damages**' means for the purposes of section 134AB(38)(b) of the AC Act or section 325(2)(b) of the WIRC Act the worker relies on consequences with respect to pain and suffering and loss of earning capacity;

'**application for pain and suffering damages only**' means for the purposes of section 134AB(38)(b) of the AC Act or section 325(2)(b) of the WIRC Act the worker relies on consequences with respect to pain and suffering only;

'**certificate**' means a certificate in writing as referred to in section 134AB(16)(a)(ii) of the AC Act or 335(2)(c)(ii) of the WIRC Act;

‘**claim**’ means the proposed claim at common law, in respect of each cause of action which the worker seeks to maintain;

‘**contemporaneous medical evidence**’ means one or more medical reports, each based upon an examination of the worker by the reporting examiner occurring not more than 6 months before the lodgement of the application, which together address (insofar as is relevant to the claim) the causation, prognosis, symptoms and restrictions, and work capacity consequences of the alleged serious injury.

‘**County Court Rules**’ means the County Court Civil Procedure Rules 2018 made under the **County Court Act 1958** or such further Rules as may replace them from time to time;

‘**damages proceeding**’ means a proceeding referred to in section 134AB(1) of the AC Act or section 326 of the WIRC Act for the recovery of damages;

‘**legal practitioner**’ includes any solicitor or barrister;

‘**medical report**’ means a medical report as defined in section 134AB(37) of the AC Act or section 325(1) of the WIRC Act;

‘**professional costs**’ means the costs recoverable by a worker in respect of the work undertaken by a legal practitioner;

‘**serious injury proceeding**’ means an application to the court referred to in section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act;

‘**statutory conference**’ means a meeting, discussion or series of meetings or discussions commenced in accordance with section 134AB(12) of the AC Act or section 333 of the WIRC Act;

‘**statutory offer**’ and ‘**statutory counter offer**’ means the statutory offer and statutory counter offer respectively referred to in section 134AB(12) of the AC Act and section 333 of the WIRC Act;

‘**treater’s notes and records**’ means any notes, records, correspondence and/or medical reports held by or of any medical practitioner, hospital, health service provider, or any other person concerning any medical treatment provided to the worker;

‘**WIRC Act**’ means **Workplace Injury Rehabilitation and Compensation Act 2013**.

4. **Calculation of time limits**

Consistent with section 329A of the WIRC Act, in calculating a period of time the period from 24 December to 9 January next following must be disregarded.

5. **Professional costs**

5.1. Where a worker settles or compromises a claim or application and recovers damages, the worker’s legal practitioner shall be entitled to be paid professional costs by the Authority or self-insurer, in respect of all work associated with the claim or application (other than work performed after the commencement of a court proceeding in connection with that proceeding and before the conclusion of such proceeding) as follows:

5.1.1. in the case where an application has been made and the worker recovers damages before instituting a damages proceeding, in accordance with Clause 6;

5.1.2. in the case where an application has been made, and the worker recovers damages after instituting a damages proceeding, in accordance with Clause 7;

5.1.3. In the case where an application has not been made, in accordance with Clause 8.

6. **Professional Costs where the worker made an application, and damages are recovered before commencement of a damages proceeding**

6.1. The worker’s legal representative is entitled to be paid:

6.1.1. A base amount in accordance with Table A (which amount is inclusive of all professional work whether performed by a barrister or solicitor, other than work described in Table B). Column A applies where no serious injury proceeding has been commenced and served; and Column B applies where a serious injury proceeding has been commenced and served;

6.1.2. An additional amount of professional costs for any work described in Table B.

Table A – Professional costs – base amounts

	Column A amount (where serious injury resolved w/o service of a serious injury proceeding; damages recovered w/o service of a damages proceeding)	Column B amount (where serious injury resolved after service of a serious injury proceeding; damages recovered w/o service of a damages proceeding)
Application for both heads; damages recovered for both heads	\$15,140	\$10,770
Application for both heads; damages recovered for pain and suffering only	\$13,460	\$9,020
Application is for pain and suffering only	\$15,140	\$9,020
Application, with a 30%+ impairment determination and deemed serious injury	\$15,140	N/A

6.1.3. Notes to Table A:

6.1.3.1. Column A applies where a serious injury proceeding has been filed and issued by the Court but has not been served. For clarity, where a worker recovers costs in accordance with Column A, the Litigated Claims Legal Costs Order 2024 (and any other Costs Order applying to applications to a Court for the determination of whether a worker has a serious injury) has no application.

6.1.3.2. The amounts in Table A apply regardless of whether the recovery of damages occurs as a result of an agreement reached before, at or after a statutory conference. For clarity, where a statutory conference takes place, the costs associated with that conference are included in Table A.

Table B – Professional costs – additional amounts payable

	Additional work description	Additional amount
B1	Where the worker is a person under disability, and as a consequence additional work is required either to obtain the appointment of an administrator or guardian by the Victorian Civil and Administrative Tribunal or to obtain approval of a compromise by a court without commencement of a damages proceeding, in respect of all additional work including making application, concluding settlement or obtaining approval	An amount agreed with WorkSafe or a self-insurer up to \$6,230 plus reasonable disbursements including for counsel
B2	Where an application is accompanied by contemporaneous medical evidence	\$719

7. Professional Costs where the worker made an application for damages, and damages are recovered after commencement of a damages proceeding

If section 344(2)(b) of the WIRC Act or section 134AB(28)(b) of the AC Act applies, the worker's legal practitioner is entitled to be paid the amounts set out in Clause 6. (Such amounts include any amount in respect of attendances or disbursements incurred prior to rejection of the statutory counter offer by the Authority or self-insurer or before the expiration of 21 days from receipt of the statutory counter offer, whichever is earlier.)

8. Professional costs where the worker recovers damages without making a common law application

Where a worker settles or compromises a claim and recovers damages prior to making an application (excluding claims made pursuant to sections 135BA and 135BBA of the AC Act and sections 357 and 358 of the WIRC Act), the worker's legal practitioner shall be entitled to professional costs to be paid by the Authority or a self-insurer in the amount of \$4,550 (inclusive of counsel's fees).

9. Disbursements

9.1. In addition to the items referred to in Clause 6 or Clause 7 or Clause 8 above, the worker or the worker's legal practitioner is entitled to be paid as a disbursement:

Table C – Disbursements

	Description	What is allowed
C1	Relevant and necessary non-medical expert reports relied upon and exchanged	Reasonable fees
C2	Interpreters' fees, providing: (i) they are reasonably incurred; and (ii) if the fees and allowances relate to an attendance resulting in a report, the report having been relied upon and exchanged	Such fees as are payable in accordance with Schedule 2 of the County Court Rules
C3	Medical reports and treaters' reports, notes and records relied upon and exchanged	<p>Unless the Note to this item applies, the reasonable cost of:</p> <p>(a) obtaining a copy of all treaters' reports, notes and records (excluding medico legal reports).</p> <p>(b) one medico legal report per specialty relevant to the injury or injuries alleged to be and accepted as or determined to be serious injury or serious injuries. The Authority or self-insurer may allow the cost of more than one medico legal report per specialty. Payment for medico legal reports shall only be made where a worker settles or compromises a claim and recovers damages prior to commencing proceedings in accordance with section 134AB(12) of the AC Act or section 333 of the WIRC Act.</p> <p>Note: Save for any reports, notes or records given to the Authority or self-insurer under section 331 of the WIRC Act (which remain payable in accordance with this Order), no reports, notes or records are payable under this item where, in any Serious Injury proceeding, the cost of any reports, notes or reports obtained prior to litigation have been claimed and paid under a Litigated Claims Legal Costs Order.</p>
C4	Court and related fees where a Serious Injury proceeding is commenced, and the proceeding is not served	The court fee and any related CITEC fee incurred on commencing the proceeding

9.2. Notes to Table C:

9.2.1. For the purpose of the Table, a report, notes or records will be considered to have been 'relied upon and exchanged' only where it was provided with the application (where the examination or inspection to which it relates occurred before lodging the application), or served before the earlier of:

- 9.2.1.1. the expiry of 21 days from its receipt by the worker or the worker's solicitor;
 - 9.2.1.2. any conference occurring after receipt of the report;
 - 9.2.1.3 settlement of the worker's entitlement to damages.
- 9.2.2. For clarity, where a report, note or record is from a health practitioner and a report, note or record of that practitioner has previously been given to the Authority or the self-insurer whether as part of the application or subsequently, the further report, note or record should be exchanged forthwith.

10. Indexation

- 10.1 The amounts in dollars specified in this Order will be varied in respect of the financial year beginning on 1 July 2024 and each subsequent financial year in accordance with the formula –

$$A \times \frac{B}{C}$$

where –

- A is the amount in dollars specified in this Order or, if that amount has been varied in accordance with this paragraph, that amount as last so varied.
 - B is the all groups consumer price index for Melbourne in original terms for the most recent reference period in the preceding calendar year most recently published by the Australian Bureau of Statistics as at 15 June immediately preceding the date on which the variation is made.
 - C is the all groups consumer price index for Melbourne in original terms for the corresponding reference period one year earlier than the reference period referred to in B published by the Australia Bureau of Statistics as at 15 June immediately preceding the date on which the variation is made.
- 10.2 The amounts varied on 1 July 2024 in accordance with this clause will apply to claims and applications brought or made on or after 1 July 2024 and before 1 July 2025. The amounts varied each subsequent financial year in accordance with this clause will apply to claims and applications during that subsequent financial year.

Dated: 3 September 2024

Responsible Minister:

THE HON. DANNY PEARSON

Minister for WorkSafe and the TAC

SAMUAL WALLACE
Clerk of the Executive Council

Workplace Injury Rehabilitation and Compensation Act 2013
2013 Accident Compensation Act 1985

WORKCOVER (LITIGATED CLAIMS) LEGAL COSTS ORDER 2024

Order in Council

The Governor in Council under section 355(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** and section 134AGA(1) of the **Accident Compensation Act 1985** makes the following Order:

1. Citation

This Order may be cited as the WorkCover (litigated claims) Legal Costs Order 2024

2. Application

- 2.1. This Order applies to proceedings issued by a worker in accordance with section 134AB(16)(b) of the **Accident Compensation Act 1985** or section 335(2)(d) of the **Workplace Injury Rehabilitation and Compensation Act 2013**, following a section 134AB(4) of the **Accident Compensation Act 1985** or section 328(2) of the **Workplace Injury Rehabilitation and Compensation Act 2013** application where that application was made on or after 1 November 2024 pursuant to section 134AGA of the **Accident Compensation Act 1985** or section 355 of the **Workplace Injury Rehabilitation and Compensation Act 2013**.
- 2.2. This Order specifies the professional costs that may be paid by the Authority or a self-insurer to a legal practitioner acting on behalf of a worker and the disbursements that may be paid to a worker or a legal practitioner acting on behalf of a worker in respect of any claim, or proceedings pursuant to section 134AB(16)(b) of the **Accident Compensation Act 1985** or section 335(2)(d) of the **Workplace Injury Rehabilitation and Compensation Act 2013**.
- 2.3. The entitlement to professional costs and disbursements under this Order replaces any other entitlement of a worker or a legal practitioner to be awarded legal practitioners' professional costs and disbursements payable by the Authority or a self-insurer for and incidental to a proceeding under section 134AB(16)(b) of the **Accident Compensation Act 1985** and section 335(2)(d) of the **Workplace Injury Rehabilitation and Compensation Act 2013**, and has full force and effect notwithstanding anything to the contrary in the **Legal Profession Uniform Law Application Act 2014**, the **Supreme Court Act 1986** or the **County Court Act 1958** or in any regulation, rules, order or other document made under any of those Acts.
- 2.4. To the extent that any agreement, terms of settlement, release, order or other document purports to require the Authority or a self-insurer to pay costs or disbursements on any basis inconsistent with the provisions of this Order, the provisions of this Order have full force and effect notwithstanding anything to the contrary in such agreement, terms of settlement, release, order or document.

3. Definitions

Unless the context otherwise requires, or the contrary intention appears, terms defined by **Accident Compensation Act 1985** or **Workplace Injury Rehabilitation and Compensation Act 2013** have the same meaning.

In this Order:

'**AC Act**' means the **Accident Compensation Act 1985**;

'**application**' means an application in the form referred to in section 134AB(5)(a) of the AC Act and section 328(4)(a) of the WIRC Act;

'**application for pecuniary loss and pain and suffering damages**' means an application in which the worker relies on consequences with respect to pain and suffering and loss of earning capacity for the purposes of section 134AB(38)(b) of the AC Act and section 325(2)(b) of the WIRC Act;

'**application for pain and suffering damages only**' means an application in which the worker relies on consequences with respect to pain and suffering only for the purposes of section 134AB(38)(b) of the AC Act and section 325(2)(b) of the WIRC Act;

‘certificate’ means a certificate in writing as referred to in section 134AB(16)(a)(ii) of the AC Act or 335(2)(c)(ii) of the WIRC Act;

‘claim’ means the proposed claim at common law, in respect of each cause of action which the worker seeks to maintain;

‘conference’ means a conference attended by the worker either in person or by the use of audio-visual technology, and/or a legal practitioner acting on behalf of the worker (including counsel), and by the Authority or self-insurer where all parties are in a position to discuss the proceeding including the entitlement of the worker to damages;

‘County Court Rules’ means the County Court Civil Procedure Rules 2018 made under the **County Court Act 1958** or such further Rules as may replace them from time to time;

‘damages proceeding’ means a proceeding for the recovery of damages commenced in accordance with the provisions of the AC Act or the WIRC Act;

‘day 1 of hearing’ means –

- (i) unless sub-paragraph (ii) applies, the day on which the application for leave referred to in section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act is listed to be heard before the Court, or
- (ii) where a proceeding is listed for hearing in a rolling list (in which multiple matters are listed on the first day of a period, for hearing during that period (‘the period’) subject to the availability of a judge to do so), ‘Day 1’ is the first day of the period.
- (iii) Unless sub-paragraph (iv) applies, where a hearing date lapses due to an adjournment or the case is not reached, ‘Day 1’ is the day when the application for leave referred to in section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act is next listed to be heard before the Court.
- (iv) Sub-paragraph (iii) does not apply where the case is not reached and the time of resolution is within 14 days of the date on which the case was not reached.

‘legal practitioner’ includes any solicitor or barrister;

‘medical report’ means a medical report as defined in section 134AB(37) of the AC Act and section 325(1) of the WIRC Act;

‘professional costs’ means the costs recoverable by a worker in respect of the work undertaken by a legal practitioner;

‘Scale of Costs’ means the County Court costs scale as defined in the County Court Rules. In the Event the Scale is abolished and should Guidelines be published which provides for the assessment of costs (including Counsel fees) payable as between party and party, ‘Scale of Costs’ in this Order means those Guidelines;

‘time of resolution’ means that point in time, at which the issue as to whether the injury suffered by the worker constitutes a ‘serious injury’ within the meaning of section 134AB(37) of the AC Act and section 325(1) of the WIRC Act is certified by the Authority or a self-insurer or determined by the Court;

‘treater’s notes and records’ means any notes, records, correspondence and/or medical reports held by or of any medical practitioner, hospital, health service provider, or any other person concerning any medical treatment provided to the worker;

‘WIRC Act’ means the **Workplace Injury Rehabilitation and Compensation Act 2013**.

4. Professional Costs and Disbursements

Where a proceeding is instituted by a worker pursuant to section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act and the proceeding is served on the Authority or a self-insurer or their legal representative before the time of resolution¹, and the costs of such proceedings are awarded to the worker:

- 4.1. the worker's legal practitioner shall be entitled to be paid:
 - 4.1.1. The professional costs assessed in accordance with clause 5, according to whether the application was for pecuniary loss and pain and suffering damages (clause 5.1) or for pain and suffering damages only (clause 5.2), and for whichever time of resolution category A, B or C in the Tables applies; and
 - 4.1.2. Any additional applicable professional costs assessed in accordance with clause 6; and
- 4.2. the worker or the worker's legal practitioner shall be entitled to be paid as a disbursement the applicable amounts assessed in accordance with clause 7.

5. Professional Costs

5.1. Serious injury granted, or determined by the court, where the worker has made an application for pecuniary loss and pain and suffering damages

Subject to clauses 5.3 to 5.9 of this Order, for a proceeding following an application for pecuniary loss and pain and suffering damages:

Table A – Professional costs: pecuniary loss and pain and suffering

Time of resolution		Costs payable based on the type of serious injury granted or determined by the court, where the grant or determination is for:	
		Column 1 – Pain and suffering and pecuniary loss	Column 2 – Pain and suffering only
A.	Before, or within 28 days after, the filing of an Appearance	\$4,320	\$4,320
B.	From 29 days after the filing of an Appearance until (and including) 15 days before any trial date given by the Court	\$19,440	\$7,020
C.	From 14 days before trial up to and including Day 1 of hearing	\$29,160	\$11,610
D.	Every subsequent day or part day after day 1 of hearing	Additional \$2,760	Additional \$1,080

¹ This provision is complementary to the operation of the pre-litigated Claims Legal Costs Order. Where service has not occurred, increased costs are payable under that Order.

5.2. Serious injury granted or determined by the court on application for pain and suffering damages only

Subject to clauses 5.3 to 5.9 of this Order, for a proceeding following an application for pain and suffering damages only:

Table B – Professional costs: pain and suffering only

Time of resolution		Costs payable after serious injury granted or determined by the court
A.	Before, or within 28 days after, the filing of an Appearance	\$4,320
B.	From 29 days after the filing of an Appearance until (and including) 15 days before any trial date given by the Court	\$15,120
C.	From 14 days before trial up to and including Day 1 of hearing	\$23,220
D.	Every subsequent day or part day after day 1 of hearing	Additional \$2,250

5.3. Effect of Certain Offers to Resolve Proceedings on Terms (other than damages)

5.3.1. This clause applies where in a proceeding in which the worker seeks leave of the court to commence proceedings for both pecuniary loss and pain and suffering damages, either:

- 5.3.1.1 the Authority or self-insurer gives notice in writing to the worker or the worker's legal practitioner that it is satisfied that a worker's injury satisfies the requirements of section 325(2)(b)(i) of the WIRC Act or section 134AB(38)(b)(i) of the AC Act but not the requirements of section 325(2)(b)(ii) of the WIRC Act or section 134AB(38)(b)(ii) of the AC Act, and that subject to the worker abandoning that part of the proceedings for pecuniary loss damages it will issue a certificate (the defendant's offer); or
- 5.3.1.2. the worker gives notice in writing to the Authority or self-insurer or their legal practitioner that the worker will resolve the proceeding on the basis that the Authority provides a certificate consenting to the bringing of proceedings for the recovery of pain and suffering damages only (the worker's offer).

5.3.2. Providing

- 5.3.2.1. Subject to clause 5.8, the notice in writing is given more than 28 days before day 1 of hearing;
- 5.3.2.2. the notice is open for a period of at least 28 days if given more than 42 days before a listed hearing date, or otherwise is open for at least 14 days;
- 5.3.2.3. at the time or before the notice was given, the party giving the notice advises the other party that it does not intend to rely upon any further affidavit material or expert opinion other than:
- 5.3.2.3.1. supplementary medical or other expert witness material from an expert whose opinion has already been given to the other party either in the pre-litigated common law process or after commencement of the proceeding;

- 5.3.2.3.2 . medical or other expert opinion to rebut or address new affidavit evidence or expert opinion subsequently served by the other party;
- 5.3.2.3.3 . in the case of a defendant – surveillance that was obtained after giving the advice of the Authority or a self-insurer under section 330 of the WIRC Act or section 134AB(7) of the AC Act;
- 5.3.2.4. the party seeking to rely upon an offer made in a notice did not, after giving the notice in writing, thereafter rely upon any further such affidavit material or expert opinion;
- 5.3.2.5. the offer is not accepted during the period the offer is open for acceptance; and
- 5.3.2.6. at the time of resolution, whether as a result of a Certificate provided by the Authority or the self-insurer or as a result of leave being given by the Court, the worker is entitled to bring a damages proceeding for pain and suffering damages only;
 - the following costs are payable:
- 5.3.3. In the case of a defendant’s offer:
 - 5.3.3.1. any professional costs payable at the time the Notice is given together with fees in accordance with clause 6 that are incurred before the expiry of the offer; and
 - 5.3.3.2. disbursements in clause 7 (subject to and in accordance with that Part) save that counsel fees incurred after the giving of the Notice are only payable as agreed by the parties or as determined by a court.
- 5.3.4. In the case of a worker’s offer:
 - 5.3.4.1. the amount of costs calculated in accordance with clause 5 and clause 6 increased by 10%; and
 - 5.3.4.2. disbursements in clause 7 (subject to and in accordance with that Part).
- 5.4. **Offer in Notice made without prejudice, unless specified otherwise**

An offer referred to in a Notice for the purpose of clause 5.3 is made without prejudice, unless the Notice otherwise provides. No statement of the fact that an offer has been made, or of the offer, shall be communicated to the court on the trial of the proceeding until after all questions of liability and the relief to be granted have been agreed to, or determined.
- 5.5. **Application of Notice where damages resolved**

Where the question of damages is also resolved at the time of resolving the question of serious injury, and a notice had earlier been given by either party for the purpose of clause 5.3, clause 5.3 applies as to costs unless the parties otherwise agree.
- 5.6. **A party can give more than one notice**

Where a party has given a Notice, and that party gives a second or subsequent Notice, only the Notice served last in time is to be taken in to account for the purpose of clause 5.3.
- 5.7. **Where conflicting Notices**

Where at the time of resolution –

 - 5.7.1. each of the Authority or the self-insurer and the worker has served a Notice for the purpose of clause 5.3 offering to resolve the proceeding on the basis that a Certificate is granted for leave to commence proceedings for the recovery of pain and suffering damages but not for pecuniary loss damages; and

- 5.7.2. in the absence of any other Notice each party would be entitled seek orders for costs in accordance with clause 5.3 on the basis of their Notice;
– the Notice given earlier in time is to apply.

5.8. Effect of adjournment or proceeding being not reached

Where a hearing date lapses due to an adjournment or the case is not reached, and as a result ‘day 1’ of hearing for the purpose of this Order is changed to the day when the proceeding is next listed to be heard before the Court, any Notice is not invalid only by reason that it was open only for 14 days (where the Notice was given within 42 days of the lapsed or adjourned date).

5.9. Amended applications

- 5.9.1. Where within 14 days of serving the application on the Authority or the self-insurer, the worker advises the Authority or self-insurer that the application is amended either:

5.9.1.1. from one for pain and suffering only to one for both pain and suffering and pecuniary loss damages; or

5.9.1.2. from both pain and suffering and pecuniary loss damages to one for pain and suffering only,

for the purposes of determining the costs payable the application will be treated as having been made in accordance with the amendment.

- 5.9.2. The amounts in Table B apply to an application which is made for pain and suffering damages only which is amended to claim pecuniary loss damages more than 14 days after service of the application.

- 5.9.3. The amounts in Table A apply to an application which is made for pain and suffering and pecuniary loss damages which is amended to an application for pain and suffering damages only more than 14 days after the service of the application.

5.10. Uplift where pecuniary loss abandoned before commencement

Where:

- 5.10.1. the application of the worker was for pecuniary loss and pain and suffering damages; and

- 5.10.2. serious injury is granted or determined for pain and suffering only; and

- 5.10.3. prior to the commencement of the court proceeding the worker irrevocably elected to confine the application to pain and suffering only and advised WorkSafe or the self-insurer (or their legal representative) accordingly;

– the amounts in Column 2 of Table A are increased by 50%.

6. Additional fees based on specific work undertaken

In addition to the fees payable under Clause 5 of these Orders, the following fees may be payable:

6.1. Conference

- 6.1.1. Subject to the requirements of clause 6.1.2 of this Order, if a conference is held between the parties more than 21 days before day 1 of hearing, the appropriate fees set out in the Table C are payable.

- 6.1.2. The costs are payable only where:

6.1.2.1. the conference has actually taken place or if the serious injury question is determined within 14 days before the agreed date for the conference; and

6.1.2.2. the conference is the first conference in the proceeding. The fees in Table C are payable only once in relation to an application.

Table C – Conferences

	Resolution* is for pain and suffering only	Resolution* is for pain and suffering and pecuniary loss
Solicitor arranging and preparing for settlement conference (including preparation of any brief to counsel, attendance to instruct advocate and all incidental work before and after the conference) –	\$540	\$648
Solicitor or barrister attending settlement conference as advocate (only 1 fee payable per conference) –	\$1,890	\$2,320

*Resolution refers to resolution of the issue of serious injury.

6.2. **Adjournments**

If a court orders the defendant to pay the plaintiff's professional costs of an adjournment of the hearing of a proceeding under section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act, the professional costs of the worker's legal practitioners are fixed in the sum of \$2,760 plus any sum for counsel fees calculated in accordance with the Scale of Costs or any other sum which is agreed or ordered by the Court.

6.3. **Re-Hearings**

Where the Court of Appeal orders a re-hearing of a proceeding under section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act, and the worker receives a costs order in the worker's favour from a Court in respect of such a re-hearing, in respect of the re-hearing the worker's legal practitioner is entitled to be paid by the Authority or self-insurer the professional costs of the re-hearing of such proceeding at 50% of the applicable fee under clause 5 plus any additional sum payable under clause 6 together with reasonable disbursements as described in clause 7.

6.4. **Interlocutory Proceedings (other than where medical questions are referred to a Medical Panel)**

In addition to the fees payable under clause 5 of these Orders, where the Court orders the defendant to pay the plaintiff's costs of any interlocutory proceeding the following fees are payable:

6.4.1. for a contested objection hearing in relation to subpoenaed records, a fee of \$558;

6.4.2. for any other interlocutory application made to a judge or other judicial officer, a fee of \$907;

together with reasonable disbursements as described in clause 7.

6.5. **Referral of Questions to a Medical Panel**

Where medical questions are referred by the Court to a Medical Panel (with or without an attendance before a judge or other judicial officer), and where the worker recovers costs of the proceeding, the worker's legal practitioner is entitled to be paid by the Authority or self-insurer a fee of \$1,660 (inclusive of any fees to counsel and inclusive of all work required to give notice of referral, preparation of questions, preparation of statement of agreed facts, list of documents and appearances to facilitate referral by the court), together with the following additional fees where applicable:

6.5.1. where the court considers there was a dispute reasonably warranting the attendance of counsel, a fee calculated in accordance with the Scale of Costs or other sum as is agreed or ordered by the court;

6.5.2. in respect of a submission to the Medical Panel in relation to the referred questions, a fee calculated in accordance with the Scale of Costs or other sum which is agreed or ordered by the court.

6.6. Hearing Judgment

Where judgment is reserved and the court requires the attendance of the worker's legal representative on a subsequent date to hear judgment, and where the costs of hearing judgment are awarded by the court to the worker, the worker's legal representative is entitled to be paid by the Authority or the self-insurer the professional costs of the attendance to hear judgment and any work in connection thereto in the sum of \$907 inclusive of any fees to counsel.

7. Disbursements

In addition to the sums specified in clause 5 and clause 6 above, the worker or worker's legal practitioner shall be entitled to be paid as a disbursement, where reasonably incurred:

- 7.1. Reasonable fees for relevant and necessary non-medical expert reports relied upon and exchanged prior to the resolution of the proceeding, exchanged in compliance with any Order or Practice Direction of the Court and/or admitted into evidence;
- 7.2. Reasonable witnesses' expenses and interpreters' fees payable in accordance Schedule 2 of the County Court Rules (save that interpreters' fees and allowances which relate to an attendance resulting in a report are payable only where the report is payable under item 1 or 4 of this clause 7);
- 7.3. Reasonable allowances for the costs of reasonable and necessary travel including any reasonable and necessary meals and/or accommodation;
- 7.4. In respect to medical reports and treater's notes, reports and records obtained after the commencement of the proceeding which were:
 - 7.4.1. reasonable to be obtained on behalf of the worker; and
 - 7.4.2. obtained after service of the advice referred to in section 330 of the WIRC Act or section 134AB(7) of the AC Act; and
 - 7.4.3. relied upon and exchanged prior to the resolution of the proceeding; and
 - 7.4.4. exchanged in compliance with any Order or Practice Direction of the Court and/or admitted into evidence;the reasonable costs of:
 - 7.4.5. obtaining a copy of all treater's notes, reports and records (excluding medico- legal reports);
 - 7.4.6. medico-legal reports relevant to the claim. The Authority or self-insurer may allow the cost of more than one medico-legal report per specialty.For the purpose of this provision, a report or record is 'obtained' when the report is received by the worker or the worker's legal representative.
- 7.5. In respect of medical reports and treater's notes, reports and records relied upon and exchanged as part of the pre-litigated application, the reasonable costs of such reports, notes or records, providing –
 - 7.5.1. at the time of resolution the worker is entitled to bring a damages proceeding for the same head/s of damages as were the subject of the application, and
 - 7.5.2. the claimed reports, notes or records were included in the application given to the Authority or self-insurer.
- 7.6. The reasonable cost of any court fees payable.
- 7.7. Unless otherwise provided for in this Order, the reasonable cost of counsel's fees (including any brief fee) calculated in accordance with the Scale of Costs, provided that:
 - 7.7.1. Other than for interlocutory proceedings and medical panel referrals where payable under clauses 6.4 and 6.5 of this Order, no costs of counsel fees (including brief fee to appear) are payable where the time of resolution is more than 21 days before day 1 of hearing.

7.7.2. Where Senior Counsel and/or two counsel have been engaged by the Plaintiff, the Authority or a self-insurer is only liable to pay the costs of Senior Counsel and/or of two counsel where it is agreed, certified by a judge (where provided for in clause 8 of this Order) or determined by the Costs Court that such use of Senior Counsel and/or two counsel was reasonable.

7.7.3. The reasonableness of using counsel, Senior Counsel and/or two counsel is to be determined having regard to the issues in dispute and the complexity of the matter judged at the time of retaining the counsel whose fee is being considered (or 21 days before day 1 of hearing, where counsel was retained earlier than that date).

8. Cost disputes

In respect of an item in clause 5, clause 6 or clause 7, if a dispute arises in relation to the allowance of an item claimed or the reasonable cost of the item the County Court Rules will apply to the dispute resolution process.

9. Indexation

The amounts in dollars specified in this Order will be varied in respect of the financial year beginning on 1 July 2024 and each subsequent financial year in accordance with the formula –

$$A \times \frac{B}{C}$$

where –

- A. is the amount in dollars specified in this Order or, if that amount has been varied in accordance with this paragraph, that amount as last so varied.
- B. is the all groups consumer price index for Melbourne in original terms for the most recent reference period in the preceding calendar year most recently published by the Australian Bureau of Statistics as at 15 June immediately preceding the date on which the variation is made.
- C. is the all groups consumer price index for Melbourne in original terms for the corresponding reference period one year earlier than the reference period referred to in B published by the Australia Bureau of Statistics as at 15 June immediately preceding the date on which the variation is made.

The amounts varied on 1 July 2024 in accordance with this clause will apply to proceedings issued pursuant to section 134AB(16)(b) of the AC Act or section 335(2)(d) of the WIRC Act on or after 1 July 2024 and before 1 July 2025.

Dated: 3 September 2024

Responsible Minister:

THE HON. DANNY PEARSON

Minister for WorkSafe and the TAC

SAMUAL WALLACE
Clerk of the Executive Council

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