



COVERSHEET

Minister	Hon Carmel Sepuloni	Portfolio	ACC
Title of Cabinet paper	Updating the Review Costs Regulations: Approval to Consult	Date to be published	28 February 2022

List of documents that have been proactively released

Date	Title	Author
8 April 2021	Options for updating the Review Costs Regulations	Ministry of Business, Innovation and Employment
21 April 2021	Review Costs Regulations – detailed options for consultation	Ministry of Business, Innovation and Employment
24 November 2021	Updating the Review Costs Regulations: Approval to Consult	Office of the Minister for ACC
29 November 2021	Cabinet Minute of Decision, Updating the Review Costs Regulations: Approval to Consult [SWC-21-MIN-0193 refers]	Cabinet Office

Information redacted

YES / NO

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld to protect confidential advice to Government.



BRIEFING

Review costs regulations: detailed options for consultation

Date:	21 April 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-3297

Action sought		
	Action sought	Deadline
Hon Carmel Sepuloni Minister for ACC	Agree to the options proposed for consultation on updating the review costs regulations	30 April 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Accident Compensation Policy	Privacy of natural persons	Privacy of natural persons	✓
Jessica Lee	Policy Advisor, Accident Compensation Policy	Privacy of natural persons	N/A	

The following departments/agencies have been consulted
ACC, Ministry of Justice

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

Review costs regulations: detailed options for consultation

Date:	21 April 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-3297

Purpose

To seek your approval on the options proposed for inclusion in a public consultation paper to update the *Accident Compensation (Review Costs and Appeals) Regulations 2002*.

Executive Summary

In April 2021, you agreed to the proposed approach to realign ACC review costs categories (currently 14 categories) into four broad categories with set maximum limits (2021-2742 refers), including:

1. Application costs
2. Representation costs
3. Medical and other reports
4. Other expenses

You also directed officials to progress this work on a number of alternative options for setting the maximum limits for the representation costs category. This work has now been completed. Subject to your agreement, we propose to include the following options as part of the consultation process currently scheduled for July 2021:

Option (1): One single set maximum limit of \$1,320 for all representatives (including both advocates and lawyers), with no distinction made for complexity, qualifications, or time, in determining maximum cost awards.

This would increase the maximum amount awardable in this category of costs from \$886.32 to \$1,320.

Option (2): Splitting representation costs into a range dependent on complexity and/or time, and qualifications of the representative. The proposed matrix of maximum costs is provided below.

	<i>Complexity and/or time →</i>		
	<i>A.</i>	<i>B.</i>	<i>C.</i>
<i>1. Advocates</i>	<i>\$742.50</i>	<i>\$990</i>	<i>\$1,320</i>
<i>2. Lawyers</i>	<i>\$1,485</i>	<i>\$1,980</i>	<i>\$2,640</i>

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that you have already agreed the proposed approach to realign ACC review costs categories (currently 14 categories) into four broad categories with set maximum limits (2021-2742 refers), including:
1. Application costs
 2. Representation costs
 3. Medical and other reports
 4. Other expenses

Noted

- b **Agree** that for Representation costs (category 2) the following two options be included in the consultation document:

Option (1): one set maximum limit for all representatives (including both advocates and lawyers)

Agree/Disagree

Option (2): a matrix of maximum costs dependent on complexity and/or time involved and, qualifications

Agree/Disagree

- c **Note** that it is expected that a draft consultation document and authorising Cabinet paper will be provided to you in May 2021 to progress consultation on the *Accident Compensation (Review Costs and Appeals) Regulations 2002*

Noted



Hayden Fenwick
Manager, Accident Compensation Policy
Labour, Science and Enterprise, MBIE

21 / 04 / 2021

Hon Carmel Sepuloni
Minister for ACC

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Background

1. The *Accident Compensation (Review Costs and Appeals) Regulations 2002* (the Regulations) provide maximum cost caps in 14 categories, to provide for a level of reimbursement for claimants who take up an external review of a decision made by ACC.
2. In 2016, the Independent Review of Acclaim Otago's report into Accident Compensation Dispute Resolution Processes (the Dean Review) recommended the maximum rates under the Regulations be increased – and “by more than just inflation”. The proposed updates to the Regulations are the final step in implementing this Dean Review recommendation.
3. The Dean Review and a subsequent MBIE review indicated that cost caps in the Regulations are not fit for purpose. The current maximum limits provided in the Regulations do not provide a meaningful contribution to costs, for some claimants. The structure of the Regulations is also too prescriptive, making some categories unfit for purpose.
4. In April 2021, you agreed to the proposed approach to realign review costs categories into four broad categories with set maximum limits (2021-2742 refers), including:
 1. Application costs
 2. Representation costs
 3. Medical and other reports
 4. Other expenses
5. You also directed officials to progress work on two options for the representation costs category:

Option (1): one set maximum limit for all representatives (including both advocates and lawyers)

Option (2): splitting representation costs into a range dependent on complexity and/or time involved, and qualifications of the representative
6. There are significant complexities involved with representation costs, as both lawyers (whose practice is governed by the New Zealand Law Society (NZLS)) and advocates (not governed by a professional body and can range from very experienced to not experienced) can represent claimants during a review. Given this we used the following objectives to analyse the two options:
 - ensure adequate access to justice for claimants
 - be transparent and consistent
 - discourage frivolous and excessive litigation, and
 - support an efficient and effective review process.
7. We see option (2) as the most likely to ensure adequate access to justice for claimants, while option (1) provides a high level of transparency and is likely to lead to more consistent outcomes, at least in the short term. Consultation will provide the necessary information to help determine which option will be the most suitable, or if there are other options that have not yet been considered.
8. Subject to your agreement, it is proposed to include the two following options in the consultation currently scheduled for July 2021.

Option (1): Representation costs

9. Option (1) proposes one maximum limit on costs for all representatives, inclusive of both lawyers and advocates, with no distinction made for complexity, qualifications, or time, in determining maximum cost awards. It provides a simple, less prescriptive approach, for reviewers to award costs which may allow for greater efficiency in awarding costs.
10. The proposal would increase the maximum amount awardable for representation costs from \$886.32 to \$1,320.
11. Option (1) may promote a more active market, which would allow claimants greater ease in finding an advocate or lawyer who is able to access and, if required, present at the review, thereby improving access to justice. However, using a single maximum cap for representation costs could create incentives for representatives who are not experienced in the AC jurisdiction and may lead to an increase in unmeritorious reviews.
12. Through consultation we are looking to gain a greater understanding of the factors leading to decision making around representation for claimants. This will help us to determine the actual and real risks associated with option (1).
13. Table 1 shows option (1) alongside the full set of proposed changes to the Regulations.

Table 1: Proposed categories, option (1)

Current cost categories under the Regulations				Proposed new categories (option 1)		
Category		Max Award	Rate (\$)	Category	Proposed Max (\$)	
1	Preparation and lodging of application for review	\$136.35	n/a	1	Application costs	\$150.00
2	Participation in case conference before review hearing	\$68.18	n/a	2	Representation costs (inclusive of both lawyers and advocates)	\$1,320.00
3	Other preparation of case for review	\$409.07	n/a			
4	Appearance at hearing	\$409.07	n/a			
5	<i>First hour of hearing</i>	n/a	\$204.53			
6	<i>Second hour of hearing (per 15 minutes)</i>	n/a	\$34.08			
7	<i>Later hours of hearing (per 15 minutes)</i>	n/a	\$17.05			
8	Medical specialist report(s)	\$1,090.84	n/a			
9	Other report – one report	\$545.42	n/a			
10	Other report – two or more	\$818.12	n/a			
11	<i>First hour of preparation</i>	\$204.53	\$204.53			
12	<i>Second hour of preparation (per 15 minutes)</i>	n/a	\$51.13			
13	<i>Third hour of preparation (per 15 minutes)</i>	n/a	\$34.08	4	Other expenses	\$1,500.00
14	Other expenses	\$681.77	n/a			
	Within this category, travel costs	\$178.78	n/a			

Option (2): Representation costs

14. Option (2) proposes a sliding scale of maximum costs based on complexity and/or time, and qualifications of the representatives. This recognises that lawyers charge higher fees and are held to the standards of Te Kāhui Ture o Aotearoa (New Zealand Law Society (NZLS)).
15. We have looked at similar systems overseas to determine the structure of option (2), alongside precedent set for ACC review cases within the courts. An overview of the Western Australian (WA) WorkCover scheme is provided in Annex 1.

We propose a matrix that increases costs caps with increased complexity

16. Given the important professional distinction between advocates and lawyers, we propose a matrix which takes into account the differences in costs associated with lawyers and advocates, and a case's complexity and/or time. **Table 3** shows the proposed matrix.

Table 3: Proposed matrix

	<i>Complexity and/or time →</i>		
	<i>A.</i>	<i>B.</i>	<i>C.</i>
<i>1. Advocates</i>	<i>\$742.50</i>	<i>\$990</i>	<i>\$1,320</i>
<i>2. Lawyers</i>	<i>\$1,485</i>	<i>\$1,980</i>	<i>\$2,640</i>

17. The proposed matrix is designed to be relatively simple, to allow for consistent outcomes amongst reviewers, although it is expected that it will take some time to formulate guidance around the categories. We have determined that Category (C), the highest complexity, is to cover cases where there are questions of law or where difficult medical questions arise, such as some treatment injury cases. Category (A), the lowest complexity, is meant to cover straightforward cases where a decision made by ACC is either clearly correct or incorrect, such as in some cases where cover is concerned. We will work with ACC and the reviewers to prepare appropriate guidelines for implementing the matrix, should you choose to progress option (2) following consultation.
18. The use of a scale largely takes the costs exercise away from assessing the skill of a particular representative. It provides a framework for an objective assessment of the skill and experience required due to the nature or complexity of the review as well as an objective assessment of the time that each step should reasonably take. Through consultation we are looking to understand what would be considered as both appropriate maximum limits for each category and how reviewers could determine which cases sit in which category (ie how should a reviewer determine the complexity and/or time for each case in order to assign it to a category).
19. Reimbursing claimants for the complexity of the case and the level of representation they sought should ensure adequate access to justice while discouraging frivolous and excessive litigation. There is a risk that representatives will try to prolong cases or purposely take them to review, when there is already pre-agreement to settle, in order to recoup higher costs. However, it is expected that reviewers and ACC will challenge unmeritorious claims where representatives are attempting to recoup costs above the appropriate maximum.
20. By placing maximum limits on costs, within a matrix, it is hoped that those with experience and a high level of understanding of the AC jurisdiction will be adequately reimbursed. While also ensuring that frivolous cases are not encouraged by setting costs too high within a single limit.

The matrix is designed to ensure ease of use by claimants and reviewers

21. It is proposed that costs increase by 25% as complexity increases (i.e there is a 25% increase between category A and B, and a 25% increase between categories B and C).
22. Advocate rates (starting at 1A) are set at 50% of the maximum rates for lawyers. This is based on a High Court ruling (*ACC v Carey* [2021] NZHC 748) that determined the full rate available to lawyers through the District Court rules would not generally be appropriate for non-lawyer advocates. Justice Grice noted that “non-lawyer advocates will vary in their expertise and experience. The judge [in reference to the district court judgement where costs were previously awarded and then challenged by ACC] should not have to go into detail in each case analysing expertise and experience and then move on to consider the assistance, which has or has not been provided. Instead, a judge should be entitled to start with a percentage based on the scale of costs. If the Judge has been assisted by the non-lawyer representative in a straightforward case, it would, as a guideline, generally be appropriate to set a daily rate at 50 per cent of the daily lawyer rate.”
23. There is an important professional distinction between advocates and lawyers. Advocates are not subject to review and oversight by NZLS and do not have the additional costs or professional responsibilities borne by a lawyer. Option (2) addresses this distinction, it is also hoped that claimants will seek out lawyers due to more appropriate reimbursement levels for their expertise, which will increase demand and encourage more lawyers into the AC area, increasing access to justice for claimants.

Risks

24. As stated above in paragraph 10, option (1) may encourage a new market of non-lawyer representatives who do not have the experience or expertise to adequately represent claimants. This could increase frivolous cases, lowering the effectiveness of the review process.
25. Risks associated with option (2) include, operational risks in implementation and potential discrepancies in awarding of costs among reviewers in the short term (this is expected to decrease after the initial implementation period). We will work with ACC and reviewers to prepare guidance material on the implementation of option (2).

Next steps

26. We are available to discuss this paper with you, and will liaise with your Office to incorporate any comments/feedback into the draft consultation document and Cabinet paper.
27. Confidential advice to Government
[Redacted]
28. Agency consultation and the Regulatory Impact Analysis Panel review is expected to be completed by May 2021.
29. Subject to your approval, it is anticipated that a Cabinet Paper and draft consultation will be lodged with the Cabinet Office by the end of May 2021. This will allow the paper to be considered by SWC in Early June 2021.

30. Subject to Cabinet agreement, we will undertake the consultation according to the following timeline:

Milestone	Date
Consultation paper published on MBIE website	June/July
Consultation starts	Start of July
Consultation ends	End of July
Briefing on analysis of submissions and next steps	August

Annexes

Annex One: Western Australia WorkCover dispute resolution

Annex One: Western Australian WorkCover dispute resolution

31. Western Australia's (WA) workers compensation scheme, WorkCover, uses a two tiered dispute resolution system, where a worker is unable to resolve a dispute.

1. Conciliation Service

If a worker would like to resolve a dispute to a claim they must first apply to the Workers' Compensation Conciliation Service.

2. Arbitration Service

An application to the Workers' Compensation Arbitration Service can only be made after a certificate of outcome has been issued by a conciliation officer at the end of the conciliation process.

Representatives who are not a legal practitioner must be registered

32. Under the WA system, parties to a disputed workers' compensation claim are entitled to have a legal practitioner or registered agent represent them when resolving a dispute via conciliation or arbitration.

33. Registered agents are approved and regulated by WorkCover WA, and are required to adhere to a code of conduct. In order to make an application to be a registered agent, the following information must be provided:

- a criminal check
- statement of qualifications and experience demonstrating sufficient knowledge of the jurisdiction to enable the agents to represent a party effectively.

34. WorkCover provides claimants with an up to date list of all registered agents¹. This allows a claimant to see relevant information, including:

- how long a registered agent has been registered
- whether they are independent
- who their employer is.

35. These requirements ensure that representatives are suitably qualified with sufficient experience to participate in the dispute resolution processes, and that disputes are brought based on points of law (rather than frivolous claims).

Costs are awarded through a costs determination

36. Under the WA system, costs are awarded in accordance with the *Workers' Compensation (Legal Profession and Registered Agents) Costs Determination 2018* (Costs Determination). The Costs Determination applies to both legal practitioners and registered agents for the amount that they are entitled to (up to a prescribed maximum) for work carried out for the purposes of proceedings before a WorkCover WA dispute resolution authority. **Table 1** shows the rates for fee earners set by the Costs Determination.

¹ <https://online.workcover.wa.gov.au/service-providers/registered-agents>

Table 1 – Costs determination levels for fee earners

Fee Earner	Maximum Allowable Hourly Rate	Maximum allowable hourly rate
Senior Practitioner (permitted to practise on his or her own account for 5 years or more)*	The hourly rate applicable to Senior Practitioners under the Magistrates Court costs scale	\$418
Junior Practitioner (permitted to practise on his or her own account for less than 5 years)*	The hourly rate applicable to Junior Practitioners under the Magistrates Court costs scale	\$319
Restricted Practitioner*	The hourly rate applicable to Restricted Practitioners under the Magistrates Court costs scale	\$231
Registered Agent	50 per cent of the hourly rate applicable to Senior Practitioners under the Magistrates Court costs scale	50% of Senior (\$209)

* Where a local legal practitioner has held an interstate practice certificate, the length of admission in that other jurisdiction is to be counted in assessing that practitioner's years of admission for the purposes of this Determination.