

Workers' Compensation Panel

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WorkCover scheme 'fundamentally broken', Victorian government says

**Overhaul of WorkCover mental injury claims stirs
industrial unrest**

Reining in the budget of Victoria's 'broken'

WorkCover scheme presents a political dilemma

**Fears about WorkCover changes for bullying,
harassment claims as Victorian government
considers overhaul**

Arbitration is live!

What is Arbitration-

“Arbitration is a service WIC (previously ACCS) offer which provides a final decision for workplace compensation disputes that haven’t been resolved through conciliation. Arbitration was designed for an injured worker with an eligible dispute, to have a quick, informal alternative to going to court.

All arbitrations must be listed within 30 days of the date which the referral is accepted by WIC.

Before you can apply for arbitration or court you’ll need to go through the conciliation process and receive a ‘Genuine Dispute Certificate’.”

WIC have prepared a number of Fact sheets on their website to assist in the referral process.

Lodging a Referral for Arbitration



Workplace Injury Commission

What disputes can be dealt with at arbitration?

We can arbitrate disputes about:

- Weekly payments
- Medical and like expenses, such as surgery, physiotherapy and home help
- Provisional payments
- Superannuation contributions
- Interest on an outstanding amount

If:

- The Worker lodges a referral for arbitration
- Their injury happened on or after 1 September 2022
- We have issued a Genuine Dispute Certificate after conciliation, and
- The Worker has not taken the same dispute to court.

How does arbitration start?

The first step in arbitration is for the Worker to fill out a *Referral for Arbitration Form* and send it to us. We call this lodging a referral for arbitration. We will then confirm if we can accept the referral. You will find this form on our website www.wic.vic.gov.au/resources.

Can someone else lodge a Referral for Arbitration Form for a Worker?

Yes. A person other than the Worker can send in a *Referral for Arbitration Form*, but first:

- The Worker must have agreed to that person lodging the *Referral for Arbitration Form* for them, and
- The person must have the right information from the Worker so the questions in the form can be answered accurately.

When should a Referral for Arbitration Form be lodged?

We should receive a *Referral for Arbitration Form* within 60 days of the Worker receiving a *Genuine Dispute Certificate* from conciliation. The Worker needs to allow enough time for us to receive it within the 60 days.

If a Worker thinks they need more than 60 days to complete the *Referral for Arbitration Form*, they can apply for an extension of time during the 60 days by sending us a *Request to Extend Time to Lodge a Referral for Arbitration Form* found on our website www.wic.vic.gov.au/resources. On that form, they need to tell us why they are requesting more time.

What if it is more than 60 days since the Genuine Dispute Certificate was received by the Worker?

If 60 days have already passed, the Worker can still send us their *Referral for Arbitration Form* and tell us why they are applying late.

Will the WorkSafe Agent or Self-insurer be asked for their views if there is a request to extend time or the Referral for Arbitration Form is sent in after 60 days?

Yes. If the Worker requests an extension of time or sends us the *Referral for Arbitration Form* late, we will ask the WorkSafe Agent or Self-insurer for their views about the extension or late lodgement. We will then decide whether to extend the time or accept the referral for arbitration late.

What happens after a referral is made?

If you are lodging a matter before arbitration it is important you are familiar with **the policies and procedures on the WIC website.**

Multiple disputes

If the worker has referred multiple disputes to arbitration, WIC may decide to hear the disputes together for convenience. In this case, a single Arbitration Book can be produced for documents relating to all relevant disputes.

Referral accepted or rejected

Once WIC accept the referral parties will be provided with the following information-

1. An arbitration reference number;
2. Acceptance letter (similar to that of conciliation);
3. Relevant fact sheets via email;
4. Pre-Hearing Information Form

If the referral is rejected then reasons (such as not meeting the relevant criteria) will be provided.

Shortly after there will be an initial hearing listed. The hearing must be finalised within 60 days of the initial hearing (designed to be time effective)

The initial hearing

Upon being notified of the referral being accepted parties should begin preparing for the initial hearing. These are usually by audio visual link or phone.

This includes arranging any necessary oral evidence or witness statements (including expert witness evidence) to be presented at arbitration.

At the initial hearing the following may occur:

- a. WIC and the parties will discuss what may be needed for them to be ready to present their cases (by way of oral evidence and/or oral submissions) at a subsequent hearing.
- b. Discuss or resolve interim or preliminary issues
- c. Set a timeline for the provision of further documents or information
- d. Decide whether it is appropriate to allow witnesses to be questioned at a further hearing
- e. Set a further hearing date.

Preparation for the arbitration

Reply to the Referral for Arbitration Form

In this form the Agent or Self-insurer: (not the worker or their representatives)

- outlines the issues to be determined by WIC
- explains why they believe their decision is correct, including details of any events, facts, circumstances or dates relevant to the claim that WIC should consider
- outlines their factual and legal argument by reference to the documents upon which they will rely
- state the outcome that they seek at arbitration

Arbitration book

The Arbitration Book provided by the Agent or Self-insurer to WIC must (not the worker or their representatives)

- contain all the documents in their possession, custody or power which relate to the dispute and which are reasonably available to them (including all the documents previously provided at conciliation), regardless of which party provided them or which party they support (section 301H)
- contain a table of contents, which includes the title, date, number of pages of each document
- Prepared in accordance with the Arbitration Book Guide;
- be in electronic form (PDF)



Can a party have a representative at arbitration?

Yes. Parties can be represented by any person they wish. However, we need to give permission if a Worker, WorkSafe Agent or Self-insurer wants a lawyer to represent them at a hearing.

A representative can help guide a party through the arbitration process, as well as communicate with us and the other party.

Parties or their representatives should give us the representative's name and contact details as soon as possible.

An Employer can have any representative they wish at a hearing as an observer.

How does a party ask permission to have a lawyer represent them at a hearing?

A Worker, WorkSafe Agent or Self-insurer or their lawyer can ask us in writing at any time before the hearing for permission. Only a party can ask for our permission at the hearing.

When making the request, we should be told why the party wants the lawyer to represent them.

A request can be made by the Worker in the *Referral for Arbitration Form* and the WorkSafe Agent or Self-Insurer can request permission in the *Reply to the Referral for Arbitration Form*.

How do we decide if a lawyer can represent a party at a hearing?

We first ask the other party for their views. We then consider the following factors before making our decision:

- The fairness of allowing a lawyer to attend
- If being represented will help the party deal with the dispute efficiently
- The complexity of the dispute
- Any other relevant circumstances

We will confirm our decision in writing and explain why we made it.

If we don't allow a lawyer to represent a party at the hearing, can they still help them outside the hearing?

Yes, a lawyer can still assist them with all other aspects of the arbitration, including:

- Giving advice
- Putting arguments in writing
- Communicating with us and the other party

Can a Worker represent themselves at arbitration?

Yes. They may represent themselves at arbitration if they wish.

When deciding whether or not to represent themselves, they should be aware that if they don't have a representative they usually need to:

- Fill in multiple forms
- Present their case at a hearing
- Talk to the WorkSafe Agent or Self-insurer (or their representative) about their case
- Discuss offers to resolve the dispute directly with the WorkSafe Agent or Self-insurer
- Gather evidence

The Arbitration hearing

What to expect

The matter will be heard by an arbitrator. It will be held in an informal manner and not bound by the rules of evidence.

Oral evidence

Oral evidence is given by a person (a witness) verbally answering questions asked by a party to the dispute, their representative or the Arbitration Officer at an arbitration hearing.

Parties are expected to provide a witness statement for any person they wish to give oral evidence and to make a request to WIC for that witness to give oral evidence.

Requesting WIC's permission for a witness to give oral evidence

A party can request WIC's permission for a witness to give oral evidence as soon as practicable either:

- prior to the initial hearing, by completing the Pre-hearing Information Form;
- in writing at anytime throughout the arbitration process; or
- orally at a hearing.

Medical Panel

If the arbitrator or either party are of the view that the matter should be referred then the matter can be referred to the panel through arbitration and still attract costs of arbitration.

The determination

•Possible outcomes-

1. Confirm, vary or revoke a decision of the Authority, employer or Self-insurer in relation to:
 1. liability for the payment of compensation; and/or
 2. the amount of compensation.
2. Order that the Authority, employer or Self-insurer determine in accordance with the Act the amount of compensation to which the claimant is entitled*;
3. Order the Authority, employer or Self-insurer pay the claimant any of the following:
 3. up to 52 weeks of weekly payments;
 4. any consequential superannuation payments; and/or
 5. interest payable;
4. Order the Authority, employer or Self-insurer to pay the claimant's medical and like expenses up to \$20,000;

The determination-

- Within 14 days of the arbitration or can be on the day
- A determination will be in writing
- A person who is entitled to a payment under a determination may seek enforcement of that determination in a Court (s301X). WIC does not have a role in enforcing determinations; and
- A party may appeal a question of law within ***28 days of an arbitration determination to the Supreme Court, with leave of the Trial Division (s301Z). The Supreme Court may make any order it thinks fit, such as to confirm, vary or revoke the determination of WIC, or remit a dispute to WIC for further arbitration.***

Arbitration - Overview of current referrals

WIC have confirmed they are yet to receive any referrals for Arbitration at this stage which they have been able to proceed with.

On their recent stats of matters before WIC which could potentially could be referred to arbitration, that is, date of injury post 1 September 2022 and fall under one of the following- weekly benefits, medical expenses, super, interest payments, PIAWE those sort of disputes –

- 600 cases that have been referred for conciliation in relation to potential eligibility
- 222 have been disposed if you like and there is 387 that are outstanding.
- 72 genuine dispute certificates have been issued.
- out of the 72 GDs issued there is only 8 GDs issued in terms of the weekly payments, other types of disputes like medical and like expenses and 64 have been rejections

WICAS or Arbitration?

- WICAS- you have 30 days from the date of the GD to make a referral to WICAS
 - Currently taking 2-3 months to finalize an outcome
 - Limited to matters with WorkSafe Agents (can't be used for self insured matters)
- Arbitration- you have 60 days from the date of the GD to make a referral for Arbitration
 - Can lodge a late lodgment form and confirm reasons for lodgment post 60 day
 - Referral for Arbitration Policy and Procedure states that a GD 'is considered to be received by the Worker on the day it was emailed or three business days from the date of posting'.
 - The outcome is Binding decision –WICAS is not
- The current indication is that there is no blanket policy however that if a late lodgment form is lodged post WICAS that an Arbitration request can still be considered via the 'late lodgment form' at the discretion of WIC.

Arbitration – Legal Costs

- Notice of Schedule of Fees and Costs For Arbitration (“Costs Schedule”) has been settled and is available online.
- Each party bears their own costs for medical reports or legal fees for an arbitration;
- If Worker is successful, WorkSafe Agent or Self-Insurer will have to pay the worker’s costs; (costs should be sent to the agent to be settled between the parties)
- If Worker is not successful, they do not have to pay the other side’s fee; (unless found to be misleading or malicious)
- If a lawyer completes work however does not appear they are still able to claim costs in accordance with the ‘cost schedule’.

Arbitration – Legal Costs Submissions

The ALA submitted in June 2022:

... the fees proposed are set at an amount that the ALA say is unreasonably and disproportionately low for the work which will be required to be performed by legal practitioners.

The ALA appreciate that the fees need to be at a sustainable level, however, the fees also need to be at a point which is fair for workers and keeps their out of pocket legal fees to a minimum. This will encourage the use of the arbitration service. Workers will be deterred from using the arbitration service if their likely solicitor-client costs are disproportionate to the financial value of their dispute.

Arbitration – Legal Costs Submissions

It was noted that under the legal costs scale for arbitration an arbitration involving a 3 hour hearing, legal costs recovered (not including counsel fees or disbursements) could be as low as about \$1,700 in total (for proposed scale “A”) and up to about \$4,700 (for the top scale “E”).

On our review and from cost consultant data for Magistrates' Court average fee recovery legal costs recoverable in arbitration appear to range between 28% to about 37% of what would be recovered in comparable Magistrates' Court proceedings.

At the high end of the respective scales, it is also noted that scale “E” of the arbitration costs scale appears to allow less than 30% of costs that would be recovered under Magistrates' Court scale “G”.

Legal Costs Order Review

Government and WorkSafe review of:

- Ministerial Directions
- WorkCover (Pre-Litigated) Claims Legal Costs Order 2016, and;
- WorkCover (Litigated) Claims Legal Costs Order 2016, and;

Ministerial Directions

WorkSafe describe the Ministerial Directions as follows:

The Directions provide the framework for the making and service of common law applications to WorkSafe or a self-insurer. They also set out certain matters relevant to the pre-litigation damages settlement procedures in the WIRC Act

The Ministerial Directions have been subject to change over the years, perhaps the most significant change was to part 6.7 some years back regarding extra compulsory details required in an application/affidavit.

WorkCover (Pre-Litigated) Claims Legal Costs Order 2016

WorkSafe explain the PL LCO as follows:

*This Order prescribes the legal costs payable by WorkSafe or the self-insurer for the **pre-litigation** parts of the common law process, being for:*

- The making of the Application – through to the initial decision of WorkSafe or the self-insurer on ‘serious injury’;*
- Work associated with settling damages before commencement of damages proceedings, including (where required) the holding of a ‘statutory conference’, the exchange of ‘statutory offers’ and the accompanying work required to effect the settlement.*

Costs under the PLC LCO are only payable if the worker recovers damages (and if a court damages proceeding is required – where the worker recovers at least 90% of the worker’s pre-litigation ‘Statutory Counter Offer.’)

Pre-Litigated Claims LCO professional costs points have been ‘set in stone’ since their inception.

WorkCover (Litigated) Claims Legal Costs Order 2016

WorkSafe explain the PL LCO as follows:

*This Order prescribes the legal costs payable by WorkSafe or the self-insurer for the **litigation** associated with a worker contesting a decision of WorkSafe or a self-insurer not to grant a Serious Injury certificate (or not to grant a Certificate for the heads of damages claimed by the worker).*

Costs under the LC LCO are only payable if the worker is successful. If the worker fails to establish a serious injury the Court must order the worker to pay the costs of WorkSafe or the self-insurer.

Litigated Claims LCO have been subject to indexation (and some minor tweaks over years such as the insertion of the 'notice' and costs consequences for same.

The Need for Change?

Put simply, they are out of date.

The original commentary from the VWA on the matter (from early 2021) was the review and proposed changes to the instruments sought to:

- a. improve the quality of applications;
- b. encourage the earlier engagement of non-employer parties;
- c. promote earlier and more efficient settlement of disputes;
- d. bring counsel fees within the Litigated Claims LCO;
- e. provide for indexation of fees in the Pre-Litigated LCO.

The PL LCO has always paid a maximum professional fee of \$13,500.

According the RBA 'inflation calculator' a 'basket of goods and services' costing \$13,500 in 2010 costs \$17,882.93 in 2022. (32.5% in total at an average annual inflation rate of 2.4%).

The Consultation Journey...

- Coming up to 2.5 years.
- Slow moving, lots of stops and pauses along the way.
- Early consultation sessions frustrating – a lot of information withheld and no dollar figures noted on changes for a period of time.
- Early proposed dollar increases for the PC LCO were negligible.
- Early proposals looked like they could have been devastating.

Summary of Current (Final) Proposal

The Ministerial Directions

- Documents still understood to be 'in confidence'.
- Various changes to wording and formatting
- New Third Party Direction – will be interesting to see if non employer party's care at all!
- In practice we will have to wait and see how some of the wording changes conduct (if at all), always chance/risk some things might be a bit stricter. VWA has stated the aim is to force better/clearer applications etc.

Pre-Litigated Costs

- Uplift for contemporaneous medical evidence.
- Requirement to serve material within 21 days relied on to recover cost.
- INDEXATION will apply.
- Medical report uplift in meets definition of a "contemporaneous report"
- So a BH settlement with medical report gets increase from current rates of about 8.8%. Even without report allowance it is \$14,020 (\$520 increase – 3.85%)

Litigated Costs

- Adjustment to time categories/points for costs.
- Hard to quickly compare as not comparing 'apples with apples' due to time points moving.
- You get to the new 2nd time point post issue quicker (29 days post appearance as opposed to 120 days). Idea is maybe it will encourage earlier resolutions.
- Notices remain, but suggestion could be introduction for a Plaintiff equivalent resulting in uplift in recoverable fees.
- Uplift if abandon LOE in both heads matter before hearing.
- Conference costs increased and timing to hold conference changed
- Change/addition of MP referral work costs
- Counsel fees payable if within 21 days (down from 28)

Summary and ALA Position of Proposed Costs Order

- Overall, the proposed costs changes seem a slight improvement on current costs orders.
- Hopefully the changes get the 'green light' in near future and comes into play new FY (although perhaps recent public reporting on scheme financial issues push the review /implementation down the road somewhat).
- There are some circumstances where a worker will be worse off under new orders for litigated costs recovery compared to existing LCO – on current data this should be a fairly negligible number.
- The ALA formal response:

The ALA supports the proposed changes to the Ministerial Directions and Pre-Litigated Claims Legal Costs Order.

The ALA does not oppose the proposed changes to the Litigated Claims Legal Costs Order.



Thanks!

Any questions?