

LEGAL PROFESSION ACT 2008

LEGAL PRACTITIONERS (SUPREME COURT) (CONTENTIOUS BUSINESS) REPORT 2012

Made by the Legal Costs Committee under Division 5 of Part 10 of the *Legal Profession Act 2008* ("the Act")

PART 1 – PRELIMINARY

1 Citation

- (a) This Report may be cited as the *Legal Practitioners (Supreme Court) (Contentious Business) Report 2012*.
- (b) The Determination set out in the Schedule to this Report is referred to in this report as the *Legal Practitioners (Supreme Court) (Contentious Business) Costs Determination 2012*.

PART 2 – NOTICE AND ENQUIRIES

2 Notice under section 278 of the Act

The Legal Costs Committee has complied with the notice provisions of section 278 of the Act.

3 Inquiries and submissions under section 277 of the Act

Before making the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*, the Legal Costs Committee:

- (a) reviewed all submissions received as a result of the notice given under section 278 of the Act including those made by The Law Society of Western Australia (Inc) and The Western Australian Bar Association (Inc);
- (b) reviewed the impact of movements in the Consumer Price and Labour Price Indices for the financial year ending June 2011, and for the September 2011, December 2011 and March 2012 quarters; and
- (c) conferred with other legal practitioners.

PART 3 – REPORT OF COMMITTEE'S CONCLUSIONS

4 Maximum hourly and daily rates changed – scale of costs amended

- (a) The information gained as a result of the inquiries and submissions described in clause 3 satisfied the Legal Costs Committee that the manner in which legal services are provided made it appropriate to continue to adopt the hourly and daily rates charged by law practices as the basis for the rates used in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*.
- (b) It is the recommendation of the Legal Costs Committee that:
- (1) as a result of the inquiries and submissions described in clause 3;
 - (2) having considered the impact of relevant Australian Bureau of Statistics data;
 - (3) having considered submissions and data from The Law Society of Western Australia and the Western Australian Bar Association; and
 - (4) taking into account the incidental administrative implications of the calculation of the Goods and Services Tax,
- the hourly and daily rates referred to in subclause 4(a) be varied from the hourly and daily rates used in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010*¹ as the basis for the recommended scale of costs which have been generally rounded up or down to represent various, increases of between 5.13% and 7.41% inclusive of the Goods and Services Tax and for administrative convenience, divisible by 11. Those rates are set out in Table A of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*.
- (c) It is the recommendation of the Legal Costs Committee, as a result of the inquiries and submissions described in clause 3, the scale of costs be varied in the manner set out in Table B of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*.
- (d) The recommendations of the Legal Costs Committee are not intended to override the entitlement of a law practice to make a written agreement as to costs with a client under the Act or any successor legislation.

TED SHARP, Chairman

ANGELA GAFFNEY, Member

CLARE THOMPSON, Member

MARCUS COCKER, Member

JANICE DUDLEY, Member

MATTHEW CURWOOD, Member

¹ Published in Gazette 29 June 2010

Schedule

LEGAL PROFESSION ACT 2008**LEGAL PRACTITIONERS (SUPREME COURT) (CONTENTIOUS BUSINESS)
DETERMINATION 2012**

Made by the Legal Costs Committee under section 275 of the *Legal Profession Act 2008* ("the Act")

1 Citation

This Determination may be cited as the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*.

2 Commencement

This Determination comes into operation on 1 November 2012.

3 Application

- (a) This Determination applies to the remuneration of law practices in respect of contentious business carried out by law practices in or for the purposes of proceedings before:
- (1) The Supreme Court; and
 - (2) The District Court other than contentious business to which the *Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2012* applies.
- (b) This Determination does not apply to the remuneration of law practices based on a written agreement as to costs under the *Legal Profession Act 2008* or any successor legislation.
- (c) This Determination does not apply to the remuneration of law practices based on costs incurred before 1 November 2012.

4 Application of 0.66, r11(3), r13, r18, r19, r20(3), r21 and r23 of the Rules of the Supreme Court

In the circumstances set out in Order 66, rules 11(3), 13, 18, 19, 20(3), 21 and 23 of the *Rules of the Supreme Court*, the Committee determines that the Court or the Taxing Officer, as the case may be, has the power to make the orders and allowances referred to in those rules.

5 Fixed amounts

Based upon the Committee's enquiries, it has determined that items 1(b), 3(a), 7(a), 14, 23(a), 25(b), 29(a) and 35 in Table B should be fixed amounts.

6 New item 35 for negotiated motor vehicle personal injury claims

The Committee resolved to introduce a category within the Determination relating to claims under the Motor Vehicle (Third Party Insurance) Act 1943 (WA) ("Motor Vehicle Act") which are settled by negotiation between the parties at a pre trial conference.

The allowance set out in the new item 35 is intended to apply to claims for personal injury under the Motor Vehicle Act which follow a standard procedural pathway.

The Committee conferred widely about the introduction of such an item within the Determination. A variety of views and opinions was expressed to the Committee.

When should item 35 apply?

Item 35 is not a "one-size fits all" intended to apply to claims under the Motor Vehicle Act. The Committee recognises that:

- No two legal cases are the same;
- Every claim has different circumstances which form part of the factual and legal matrix which practitioners and clients must deal with;
- In some cases, liability is admitted but contributory negligence is pleaded by a defendant; and
- In some cases causation issues arise.

Notwithstanding the variables that apply to every legal case, the District Court Rules 2005 provide that claims under the Motor Vehicle Act follow a standard procedural pathway. The rules provide a timetable for discovery and interrogatories and are designed to minimise the need for the parties to make chambers applications. The 2011 Annual Review of the District Court of Western Australia makes clear that an overwhelming majority of claims settle without going to trial. The Committee considers, in these circumstances, it is appropriate to adopt a short form scale item.

It is the Committee's view that certain procedures (for example, contested interlocutory applications of substance or formal mediation conferences which take place after failed attempts to settle the matter at a pre trial conference) are indicative that the proceedings fall outside item 35.

Further, item 35 is not intended to apply to a claim which proceeds to a listing conference for the allocation of trial dates where significant preparation of the case for trial has occurred.

Item 35 cannot be used by a defendant to fix a defendant's costs.

Who decides whether item 35 applies?

If either a plaintiff or a defendant (or on a practitioner/client basis either the practitioner or the client) considers that the allowance under item 35 either exceeds a reasonable allowance for the work carried out, or is insufficient remuneration for the work carried out, then any party may require the plaintiff (or in the event of a practitioner and client, the plaintiff's practitioner) to prepare a bill of costs in the usual manner and have those costs assessed by the Court under other items of this Determination.

When will it be decided whether item 35 applies?

At the time when a settlement of the quantum of a claim (exclusive of legal costs) has been agreed, the parties may agree to have costs awarded/determined in accordance with item 35.

Is item 35 inclusive of disbursements?

The amount in item 35 does not include disbursements. It is the Committee's view that disbursements incurred for any claim under the Motor Vehicle Act should be added to item 35 on the same basis as under item 34.

7 Catastrophic personal injury claims

The Committee has resolved that the costs associated with preparation of catastrophic personal injury claims for trial should be taxed or fixed without limit to the number of hours fixed under item 17 where the Court has declared a claim to be one for a catastrophic injury.

The Committee conferred with the Chief Justice of Western Australia and the Principal Registrar of the District Court of Western Australia, and anticipates that the Courts will develop their own procedures for determination of whether a case is a catastrophic personal injury claim.

The Committee is of the view that a determination of whether a case is a catastrophic personal injury claim for the purposes of item 17 would involve the assessment of two criteria:

- (a) The injury or injuries sustained by the plaintiff that are at issue in the proceedings; and
- (b) By virtue of the injury or injuries, whether an extra burden is placed upon the practitioners involved in the case for the preparation of the case for trial.

It is intended that the increase to the scale limit could apply to any or all parties not solely the plaintiff.

8 Maximum hourly and daily rates

- (a) The hourly and daily rates set out in Table A are the maximum hourly and daily rates, inclusive of GST, which the Legal Costs Committee determines shall be used to calculate the dollar amounts in the scale of costs set out in Table B.

Each item in the scale of costs specifies a dollar amount with reference to the fee earner.

- (b) The rates referred to in paragraph (a) were ascertained in the manner set out in clause 4 of the *Legal Practitioners (Supreme Court) (Contentious Business) Report 2012*.
- (c) The daily rates set out in Table A are intended to cover all work done on a hearing or trial day, whether in or out of court, including preparation of written submissions and are not intended to be supplemented in any way by additional hourly charges given that the maximum number of hours allowed for the daily rate is 10 hours per day.
- (d) The items in Table B are not intended to be calculated on the basis of a minimum 6 minute unit.

Table A

Fee Earner	Maximum allowable hourly and daily rates
Senior Practitioner (admitted for 5 years or more) (SP) ^o hourly rate	\$451
Junior Practitioner (admitted for less than 5 years) (JP) ^o hourly rate	\$319
Clerk/Paralegal (CPL) hourly rate	\$220
Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel:	
Counsel (C)* hourly rate	\$363
	\$3,630
Senior Counsel (SC)** hourly rate	\$638
	\$6,380

^o The reference to Junior Practitioner or to Senior Practitioner in this Determination includes all legal practitioners even if the services were rendered in another State or Territory. Where a local 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.

* The reference to Counsel in this Determination means a practitioner acting as a barrister other than as Senior Counsel.

** The reference to Senior Counsel in this Determination includes reference to Queens Counsel or Senior Counsel appointed in Western Australia, or appointed in any State or Territory in Australia and whose appointment is afforded recognition by the Chief Justice of Western Australia.

9 Costs

- (a) Subject to the provisions of the Act permitting a law practice to make a written agreement as to costs with a client, the costs of or in relation to a party to an action or other proceeding (inclusive of GST and counsel fees, but exclusive of other disbursements):

- (1) recoverable by one party from another party; or
- (2) payable by a party to that party's own law practice,

shall not exceed the amounts set out in Table B (except as otherwise provided in item 33 of Table B).

- (b) Allowances made under item 33 of Table B are only to be awarded as between a law practice and its client, or if costs are awarded on an indemnity basis and not between party and party unless the Court otherwise orders.

TABLE B
SUPREME COURT SCALE OF COSTS 2012

Item		Time	Fee earner	\$
1	Writ:			
	(a) Writ of summons, whether specially or generally endorsed, including instructions, but excluding statement of Claim	1.5 hours	SP	671
	(b) For each additional defendant			77
	(c) Statement of Claim	10 hours	SP	4,510
2	Next friend or guardian <i>ad litem</i>	3 hours	JP	957
3	Defence:			
	(a) Memorandum of appearance			99
	(b) Defence	10 hours	SP	4,510
	(c) Counterclaim	10 hours	SP	4,510
4	Reply and other pleadings:			
	Reply (if necessary), defence to counterclaim, or any other pleading	10 hours	SP	4,510
5	(a) Third party notice	2 hours	SP	902
	(b) Pleadings in third party proceedings	6 hours	SP	2,706
6	(a) Requesting particulars of a pleading (where and to the extent necessary)	3 hours	JP	957
	(b) Giving particulars of a pleading	5 hours	JP	1,595
7	Discovery:			
	(a) Notice requiring discovery			66
	(b) Giving discovery of documents	10 hours	SP	4,510
8	Inspection:			
	Inspection and giving inspection of discovered documents whether by personal attendance or otherwise	per hour	SP	451
9	Interrogatories:			
	(a) Delivery of interrogatories	5 hours	SP	2,255
	(b) Answers to interrogatories	10 hours	SP	4,510
10	Chambers:			
	(a) Proceedings in Chambers other than proceedings to which item 11 applies	2 days preparation, 1 day hearing;	C	10,560
	(b) Attending on a reserved judgment in Chambers (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)	per hour	SP	451
	(c) Consent Orders including conferral but excluding extraction	1.5 hours	JP	473

11	Motions and originating process:			
	(a) Originating motion, originating summons or originating application	2 days preparation; 1 day hearing and preparation of case – 50 hours	C SP	33,110
	(b) For 2nd and each successive day of hearing		C	3,630
	(c) Attendance at hearing by instructing legal practitioner	per hour	SP	
12	Proceedings in Court not otherwise provided for, including appeals from a Registrar	2 days preparation; ½ day hearing	C	9,075
13	Listing Conference: Attending at a Listing Conference (convened pursuant to Order 29 Rule 8 of the Rules of the Supreme Court or Rule 43 of the District Court Rules) and all necessary preparation	per hour	SP	
14	Entry of judgment without trial			220
15	Offers of compromise, notices, practice directions, etc:			
	(a) Payment into or out of Court	2 hours	JP	638
	(b) Offer of compromise under O.24A	4 hours	SP	1,804
	(c) Acknowledgment of offer under O.24A			66
	(d) Acceptance of offer of compromise under O.24A	4 hours	SP	1,804
	(e) Notice of offer to consent to judgment	2 hours	SP	902
	(f) Other notices and certificates referred to or required by the Rules or procedures of the court (including practice directions)			66
16	Entry for trial/Entry for hearing:			
	(a) Advising on, and preparing, documents required to be filed by the Rules of the Supreme Court or the Rules of the District Court	2 hours	SP	902
	(b) Preparation of Schedules (if any) required by District Court Rules 45C and 45D	8 hours	SP	3,608
	(c) Advice on evidence	per hour	C/SC	
17	Preparation of case: Preparation of case for trial (includes work reasonably and necessarily undertaken prior to commencement of proceedings) * If the claim is one declared by the Court, to be a catastrophic personal injury claim, the time reasonably spent by a legal practitioner, or by a clerk or paralegal of a legal practitioner in preparation of case for trial shall not be limited to 120 hours but shall be such amount that is reasonable in all of the circumstances	120 hours*	SP	54,120

18	Examination of witness before trial by counsel or practitioner, pursuant to order			An allowance in accordance with item 20(c) or (d)
19	Application for and striking jury	1 hour	JP	319
20	Trial: Counsel fees			
	(a) Fee on brief, i.e. first day of trial and preparation (including submissions)	3.5 days preparation; 1st day of trial	C	16,335
	(b) Fee on brief for Senior Counsel, i.e. first day of trial and preparation (including submissions)	3.5 days preparation; 1st day of trial	SC	28,710
	(c) Counsel fee for the second and each successive day of hearing		C	3,630
	(d) Counsel fee for Senior Counsel for second and each successive day of hearing		SC	6,380
	(e) Instructing Legal Practitioner attending trial	per hour	SP	451
	(f) Clerk attending trial	per hour	C/PL	220
	(g) Attending on reserved judgment (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)	per hour	SP	451
	(h) for each five hearing days after the first five, additional fee on brief	1 day	SC/C	
21	Re-trial or Re-hearing			
	(a) Preparation of case for re-trial or re-hearing			Such amounts as are reasonable in the circumstances
	(b) Re-trial or re-hearing			
22	(a) Special case, case stated (otherwise than by way of appeal) or trial of an issue			Such amounts as are reasonable in the circumstances
	(b) For the second and each successive day of the trial or hearing			

23	<p>Appeals to the Court of Appeal and Single Judge appeals (including appeals by way of case stated) and applications for leave to appeal</p> <p>(a) Appeal Notice, Service Certificate, Notice of Respondent's Intention</p> <p>(b) Appellant's Case, Respondent's Answer including relevant forms and all annexures</p> <p>(c) Appellant's Reply to Notice of Contention, when required</p> <p>(d) Settling appeal book indexes (including drafting and settling appeal book index)</p> <p>(e) An application in an appeal, an interlocutory or directions hearing before a single Judge or Registrar</p> <p>(f) Preparation of case appeal for hearing</p> <p>(g) Counsel fee on hearing (including preparation)</p> <p>(h) Counsel fee for Senior Counsel (including preparation)</p> <p>(i) Counsel fee for the second and each successive day of hearing</p> <p>(j) Counsel fee for Senior Counsel for the second and each successive day of hearing</p> <p>(k) Instructing Legal Practitioner attending appeal</p> <p>(l) Attending on reserved decision (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)</p>			<p>451</p> <p>25,520</p> <p>6,380</p> <p>3,608</p> <p>3,630</p> <p>4,510</p> <p>10,890</p> <p>19,140</p> <p>3,630</p> <p>6,380</p> <p>451</p> <p>451</p>
24	<p>Pretrial, mediation, conferrals, or other conferences</p> <p>(a) Where required by order of the Court, by the <i>Rules of the Supreme Court</i> or by practice direction;</p> <p>(b) including informal conferences where reasonably held before or after commencement of proceedings;</p> <p>(c) attendances by Counsel and instructing legal practitioners at the conferrals and conferences set out in paragraphs (a) and (b) of this item;</p> <p>(d) preparation reasonably undertaken for the conferrals and conferences described in paragraphs (a), (b) and (c) of this item; and</p> <p>(e) conferences between Counsel and own instructing Legal Practitioner where reasonably necessary.</p>	<p>per hour</p> <p>per hour</p> <p>per hour</p> <p>per hour</p> <p>per hour</p>	<p>SP/SC/ C</p> <p>SP/SC/ C</p> <p>SP/SC/ C</p> <p>C</p> <p>SP/SC/ C</p>	

25	Orders: Settling and extracting judgment or order (a) With appointment (b) Without appointment	2 hours	JP	638 220
26	Arbitration proceedings			The same costs as in an action
27	Proceedings, whether by action or otherwise, for the recovery of compensation for the taking or resumption of land or any other property by the Crown in right of the State or of the Commonwealth or by any other person, body or instrumentality pursuant to any statutory power			Such amounts as are reasonable in the circumstances
28	Proceedings by way of prerogative writ: (a) Motion for order to show cause (including preparation and hearing) (b) Preparation of case for hearing (c) Counsel fee on hearing of application for order absolute (including preparation) (d) Counsel fee for Senior Counsel (including preparation) (e) Counsel fee for Counsel on the second and each successive day of hearing (including preparation) (f) Counsel fee for Senior Counsel on the second and each successive day of hearing (including preparation) (g) Instructing Legal Practitioner attending hearing (h) Attending on reserved decision (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)	20 hours 10 hours 2 days preparation; 1 day hearing 2 days preparation; 1 day hearing per hour per hour	SP SP C SC C SC SP SP	9,020 4510 10,890 19,140 3,630 6,380 451 451
29	(a) Execution (b) If against land, an additional	3 hours	JP	319 957
30	Taxing including drawing: (a) Drawing bill of costs and service; and (b) Taxation of costs (including the time spent in preparing for the taxation)		SP	Such amounts as are reasonable in the circumstances
31	Copying: Copies where reasonably necessary, including of documents for which allowance is otherwise made in this Determination.	per page		0.165

	This item covers all forms of electronic reproduction and copying.			
32	Accounts and inquiries: Taking accounts, inquiries		SP	Such amounts as are reasonable in the circumstances
33	Other work: (a) Time reasonably spent by a legal practitioner on work requiring the skill of a legal practitioner (of the standing indicated) but not covered by any other item or (b) Time reasonably spent by a legal practitioner, or by a clerk or paralegal of a legal practitioner, on work not covered by any other item or by paragraph (a)	per hour per hour	SC SP C JP C/PL	
34	Disbursements: In addition to the fees and charges allowed under this Determination: (a) As between a law practice and client, a law practice may charge and be allowed disbursements necessarily or reasonably incurred; and (b) As between party and party, a party may be allowed disbursements incurred by that party except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that subject to the above exceptions, that party is fully reimbursed for its disbursements.			
35	Claims under the Motor Vehicle (Third Party Insurance) Act 1943 (WA) including: (a) Writ of Summons; (b) Statement of Claim; (c) Giving discovery (whether formally or informally); (d) Inspection and giving inspection of discovered documents; (e) Preparation of Entry for Trial, Papers, including Schedules of Damages; (f) Applications for Subpoena to produce documents prior to pre-trial conference; (g) Preparation for and attendance at pre-trial conference or, if appropriate, pre-trial conferences; and (h) Copying. If Counsel is engaged for and attends pre-trial conference, an additional			12,375 C 3,630

Made by the Legal Costs Committee on 19 September 2012.