

LEGAL PROFESSION ACT 2008**LEGAL PROFESSION (MAGISTRATES COURT) (CIVIL)
REPORT 2016**

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

PART 1—PRELIMINARY**1. Citation**

- (a) This Report may be cited as the *Legal Profession (Magistrates Court) (Civil) Report 2016*.
- (b) The Determination set out in the Schedule to this Report is referred to in this Report as the *Legal Profession (Magistrates Court) (Civil) Determination 2016*.

PART 2—NOTICE AND INQUIRIES**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 Profession (Magistrates Court) (Civil) Determination 2016* the Legal Costs Committee—

- (a) reviewed all submissions received as a result of the notice given under section 278 of the Act;
- (b) considered the impact of changes in relevant Australian Bureau of Statistics data for the period;
- (c) consulted with the Magistrates Court and the Chief Magistrate, The Law Society of Western Australia Inc. and the Western Australian Bar Association Inc;
- (d) consulted with a range of people and organisations within the legal profession in respect to the impact of structural changes in the profession;
- (e) reviewed the *Legal Practitioners (Magistrates Court) (Civil) Determination 2014*¹; and
- (f) had regard to relevant provisions of the *Magistrates Court Act 2004* and the *Magistrates Court (Civil Proceedings) Act 2004*, and in particular notes section 13(1) of that Act, which sets out the guiding principles for the conduct of civil proceedings in the Court.

PART 3—REPORT OF LEGAL COSTS 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 having regard to the provisions of the *Magistrates Court Act 2004* and the *Magistrates Court (Civil Proceedings) Act 2004*, it remains appropriate to determine hourly and daily rates and a scale of costs for legal work applicable to civil proceedings in the Magistrates Court.
- (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
 - (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 (Magistrates Court) (Civil) Determination 2014* as the basis for the recommended scale of costs which have generally been rounded up or down to represent various increases of approximately 2% 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 Profession (Magistrates Court) (Civil) Determination 2016*.

¹ Published in Gazette 20 June 2014

- (c) The Legal Costs Committee has concluded that the matters set out in section 13(1) of the *Magistrates Court (Civil Proceedings) Act 2004* properly informs the approach to the recovery of costs recommended in *Legal Profession (Magistrates Court) (Civil) Determination 2016*. In particular the Legal Costs Committee notes—
- (1) the Magistrates Court is not a court of pleadings;
 - (2) there are substantial differences in practice and procedure between the Magistrates Court and other civil courts in this State;
 - (3) it is intended that the Magistrates Court be a low cost jurisdiction;
 - (4) actions where the quantum is less than \$10,000 do not attract an entitlement to party/party costs, without a special costs order; and
 - (5) the monetary jurisdiction of the Magistrates Court is presently \$75,000.
- (d) Having regard to the information gained as a result of the inquiries and submissions described in clause 3, the Legal Costs Committee has concluded it remains appropriate to—
- (1) order the scale to reflect the procedures utilised in the Magistrates Court and the flow of litigation;
 - (2) maintain consistency where practicable with the format of the *Legal Profession (Supreme Court) (Contentious Business) Determination 2016*; and
 - (3) provide for hourly and daily rates applicable to Counsel and Senior Counsel.
- (e) 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 Profession (Magistrates Court) (Civil) Determination 2016*.
- (f) The Legal Costs Committee intends, because the scale sets maximum hourly and daily rates and amounts and allowances that must not be exceeded, that the hourly and daily rates and scale of costs will apply in circumstances requiring the determination of allowable and other costs in the minor cases procedure of the Magistrates Court.
- (g) The Legal Costs Committee intends that the Determination shall apply to all civil proceedings dealt with in the Magistrates Court, including civil jurisdiction conferred on the Court by a written law, including, for example, the *Dividing Fences Act 1961* and the *Restraining Orders Act 1997*.
- (h) It is the recommendation of the Legal Costs Committee, as a result of the consultations described in clause 3, that the new category of Restricted Practitioner should be introduced in the *Legal Profession (Magistrates Court) (Civil) Determination 2016*.
- (i) The recommendations of the Legal Costs Committee are not intended to override any entitlement of a law practice to make a written agreement as to costs with a client under the Act or any similar legislation.

CLARE THOMPSON, Chair.

ANGELA GAFFNEY, Member.

MARCUS COCKER, Member.

JANICE DUDLEY, Member.

MATTHEW CURWOOD, Member.

BRENDAN ASHDOWN, Member.

Schedule

LEGAL PROFESSION ACT 2008

LEGAL PROFESSION (MAGISTRATES COURT) (CIVIL) DETERMINATION 2016

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

1. Citation

This Determination may be cited as the *Legal Profession (Magistrates Court) (Civil) Determination 2016*.

2. Commencement

This Determination comes into operation on 1 July 2016.

3. Application

- (a) This Determination applies to the remuneration of legal practitioners, clerks and paralegals in respect of advice given by legal practitioners in or for the purposes of civil proceedings before the Magistrates Court.
- (b) This Determination does not apply to the remuneration of legal practitioners based on costs incurred in respect of business carried out before the commencement of this Determination.

4. No minimum charge

In no respect is this Determination to be seen as providing a minimum charge for any work other than the items referred to in clause 5. For example, item 2(b) provides for \$3,256 for the work involved. The figure of \$3,256 is a maximum, but on taxation less than \$3,256 might be allowed. Where there is a set cost or time or level of fee earner indicated, the purpose is to indicate to the Assessing Officer what reasonably may be expected in most cases.

5. Fixed items

Some items in this Determination have been fixed without any indication of how these items have been calculated. These items are 1, 2(a), 4(a), 11, 12(c), 17(a)(ii), 17(b), 18(a), 20 and 21(a). These have been fixed because, based on past practices, the Court staff require a fixed figure when completing the form of Entry of Judgment by Default and the like.

6. Time estimates

The reason for stating the number of hours estimated to be necessary to perform each of the items of work described in this Determination is to provide guidance to the Court when dealing with the question of costs so that the Court has some idea how much time is reasonably necessary to perform work in most cases. For example, in item 15(a), which relates to preparation for trial or getting up a case for trial, the time indicated is that which can be expected in most cases. Some items reflect a number of hours that have been estimated so as to include work done with respect to the process of obtaining and considering evidence, interrogatories, documents, disclosures and the like, for example items 2(b), 4(b), 5, 10 and 19. The hours referred to in this Determination will guide the Assessing Officer about the amount which should be allowed in a particular case.

7. Items 14 and 16—Solicitor as counsel

If independent counsel is not retained for the trial, this will be a factor to be considered by the Assessing Officer who might not then permit the full amount in the determination for fee on brief under item 16(b), as well as a full getting up allowance under item 14. This is in line with the decisions of *Commonwealth v Magriplis* (1962) 3 FLR 47 and *Washbourne v SEC* (1992) 8 WAR 188.

8. Settled proceedings

It is intended that item 13 should apply even if there is no trial. Thus, if the case is settled before trial and the law practice can demonstrate that preparation for trial was carried out, costs may be recovered for that work and allowed on an assessment of costs.

9. New item 28—Travel

- (a) This Determination introduces a new item 28 which makes an allowance for travel.
- (b) It is the Committee's view that minor travel, which means incidental travel associated with attendance at court for a hearing where that travel is of a minor duration (minor travel) is properly included in the costs recoverable for the appearance for which it is associated. Item 28 is intended to apply to travel necessary to undertake work other than minor travel) Examples of minor travel include, but are not limited to—
 - (1) a practitioner walking from their usual place of business to a court;
 - (2) a practitioner walking from a carpark to a court; or
 - (3) a practitioner walking or taking public transport from one centrally located court to another centrally located court.
- (c) Item 28, is intended to cover all travel other than minor travel including, but not limited to—
 - (1) travel by car or public transport within metropolitan Perth from a practitioner's usual place of business to a suburban court or a court in the City of Perth, for example, driving from Joondalup to the CBD, or taking the train to Armadale from the CBD;
 - (2) travel by car or public transport from a practitioner's usual place of business to visit a client or witness or to undertake any meeting or view necessary for the purposes of the proceedings, regardless of where the destination is;
 - (3) travel by any means from outside the metropolitan area to Perth, for example, flying from Port Hedland; or
 - (4) travel by any means from Perth to outside the metropolitan area, for example, taking the train to Mandurah.
- (d) Items 28(a) and (b) provide for the circumstances where travel is recoverable as part of the party—party costs in a proceeding. Item 28(b) is intended to cover circumstances where the Court convenes at a location other than its usual location for those proceedings. Examples of the situations covered by item 28(b) include, but are not limited to—
 - (1) travel required to attend at a court ordered mediation scheduled to take place in Geraldton when the proceedings are case managed by the Court in Perth;
 - (2) travel required to attend a site visit or view, with the Court in attendance;
 - (3) travel required to attend a court ordered examination of a witness prior to trial in Esperance, when the proceedings are case managed by the Court in Perth; or
 - (4) travel required to attend the trial of proceedings in Perth when the proceedings were case managed by the Court in Kalgoorlie.
- (e) Travel to attend a location which does not include the Court and the parties attending together at that location falls within item 28(c).

- (f) Travel to attend at a directions hearing or similar in a centrally located court, from a non-centrally located business address of the legal practitioner, other than that component which falls within the definition of minor travel, falls within item 28(c). Examples of this include but are not limited to—
 - (1) travel by car or public transport from Perth to Mandurah to attend any court hearing;
 - (2) travel by car or public transport from Joondalup to Fremantle to attend any court hearing; or
 - (3) travel from interstate to Perth to attend any court hearing.
- (g) In making its decision in this Determination, the Legal Costs Committee has taken note of the Law Society of Western Australia's Standard Costs Agreement, which contains a provision that a law practice will charge travel at 50% of the agreed hourly rates.
- (h) The Legal Costs Committee has also considered an informal policy of the Legal Profession Complaints Committee that travel should not ordinarily be charged at a rate of more than 50% of a law practice's normal hourly charge-out rate.
- (i) Whilst the Legal Costs Committee recognises that during a travel period a law practice may not necessarily utilise legal skill and knowledge, there is a recognition of a loss of opportunity for the time spent travelling.
- (j) The Legal Costs Committee notes that, having regard to the above—
 - (1) it is the responsibility of a law practice to allocate the cost of time spent on travel fairly and reasonably where the travel is necessary to service more than one client on the day of travel; and
 - (2) whilst nothing contained in this Determination prevents a law practice from charging time spent on a client matter or client matters in the course of travel (air travel by way of example), the law practice is not entitled to charge a client or clients for both time spent on a client matter (regardless of whether that time relates to the client for whom the travel is being undertaken) and the amount allowed under item 28.

10. Introduction of new Restricted Practitioner category

- (a) This determination introduces the new category Restricted Practitioner. This category includes all Australian legal practitioners engaging in restricted legal practice pursuant to section 50 of the Act, during the period when that person is undertaking the "required experience", as defined in section 50 of the Act, and whilst an endorsement to that effect remains on their practising certificate.
- (b) A Restricted Practitioner is not intended to include an Australian legal practitioner who has a condition placed on their practising certificate by the Legal Practice Board, State Administrative Tribunal or otherwise, requiring them to practise under supervision for disciplinary, medical or other reasons.
- (c) The Legal Costs Committee consulted the profession regarding the necessity for amendments to the levels of practitioner set out in Table A, in light of the changing nature of legal practice in this State. In particular the Legal Costs Committee was conscious of the changes to admission requirements and pathways to admission, which have resulted in practitioners being admitted to practise without the close supervision of legal practice formerly afforded by articles of clerkship but with a longer period of restricted practice. The effect of this is that practitioners become senior practitioners with less experience than they previously have had, which has the effect of increasing the legal costs to consumers of their services.
- (d) It is the Legal Costs Committee's view, as expressed in this Determination, that the Determination should as far as possible reflect the regulated structure of the profession and thereby provide consumers of legal services with additional transparency as to the experience of the practitioner providing the legal services.
- (e) So as not to adversely affect clients of legal services provided by those practitioners who would, but for this change, have been Junior Practitioners or Senior Practitioners, transitional arrangements apply so that—
 - (1) practitioners admitted after 1 July 2014, but before 1 July 2016, are entitled to recover their legal costs as if they were Junior Practitioners until 30 June 2018, or the date on which they would, but for this clause, become Junior Practitioners under this Determination; and
 - (2) practitioners admitted after 1 July 2011, but before 1 July 2014, are entitled to recover their legal costs as if they were either Junior Practitioners or Senior Practitioners, whichever category would have applied but for this change, until 30 June 2018, or the date on which they would, but for this clause, become Senior Practitioners under this Determination.

11. 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 set out in Table B. Except for certain items, each item in this Determination 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 Profession (Magistrates Court) (Civil) Report 2016*.

- (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 allowed hourly rates
Senior Practitioner ° (permitted to practise on his or her own account for 5 years or more) (SP) α	\$407
Junior Practitioner ° (permitted to practise on his or her own account for less than 5 years) (JP)	\$308
Restricted Practitioner (RP) #, °	\$231
Clerk/Paralegal (C/PL) ##	\$154
Counsel fees charged as a disbursement to law practices or charged by in-house Counsel	
Counsel*	
hourly rate	\$330
daily rate	\$3,300
Senior Counsel**	
hourly rate	\$539
daily rate	\$5,390

° The reference to Restricted Practitioner, Junior Practitioner or 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 practising certificate, the length of unrestricted legal practice in that other jurisdiction is to be counted in assessing that practitioner's years of practice for the purposes of this Determination.

The reference to Restricted Practitioner in this Determination includes practitioners undertaking restricted legal practice for the purposes of obtaining the required experience set out in section 50 of the Act and does not include a reference to an Australian legal practitioner who has a condition placed on their practising certificate by the Legal Practice Board, State Administrative Tribunal or otherwise, requiring them to practise under supervision for disciplinary, medical or other reasons.

The reference to Clerk/Paralegal in this Determination includes a law graduate prior to their admission to practise as an Australian lawyer.

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

** The reference to Senior Counsel in this Determination means a person within the meaning of item 11 or item 12 of Regulation 5(2) of the *Legal Profession Regulations 2009* (WA).

12. 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 25 of Table B).
- (b) Allowances made under item 25 of Table B are only to be awarded as between a law practice and its client, and not between party and party unless the Court otherwise orders. The item is not intended to be used to claim increased allowances for items which should properly fit into another item in the Determination, for example item 10,
- (c) The Legal Costs Committee notes the impact of the decision in *Rodwell v Hutchinson* [2010] WASCA 197, and so no allowance is made in this determination for an award of indemnity costs.
- (d) The Legal Costs Committee notes the comments of the court in *Defendi v Eden Hill Plasterers* [2008] WASCA 269 at [7] as to the importance of the proportionality principle in litigation in this Court, which arises in respect to all costs incurred in the Court.

Table B**Magistrates Court Civil Scale of Costs 2016**

Item	Time	Fee Earner	\$
1.	Letter of demand issued prior to proceedings		77

Item		Time	Fee Earning	\$
2.	Claim— (a) Claim, including instructions, but excluding Statement of Claim (b) For each additional defendant (c) Statement of Claim (including preparation and lodgement of a particulars of claim, where necessary or by order, and statutory declaration and list of documents)	8 hours	SP	407 55 3,256
3.	Appointment of litigation guardian	2 hours	JP	616
4.	Response— (a) Lodgement of a response to a claim (b) Statement of defence (including preparation and lodgement of a statutory declaration) (c) Counterclaim, including instructions and statement of claim in the counterclaim, statutory declaration in support of counterclaim (where required), and all other documents necessary	8 hours 8 hours	SP SP	209 3,256 3,256
5.	Third party claim, including instructions and list of documents	8 hours	SP	3,256
6.	Disclosure— Giving additional disclosure where ordered by the Court or a Registrar	5 hours	RP	1,155
7.	Inspection— Inspection and giving inspection whether by personal attendance or otherwise	per hour	RP	
8.	Interrogatories— (a) Delivery of interrogatories (b) Answers to interrogatories including affidavit	5 hours 5 hours	SP SP	2,035 2,035
9.	Interpleaders— Interpleader proceedings— (a) where uncontested (b) where contested	1 hour	JP	308 An allowance in accordance with item 10
10.	Application to the Court— (a) Applications and responses to applications including under Part 21 of the <i>Magistrates Court Civil Proceedings Rules 2005</i> , including all documentation in preparation for hearing (b) Second or subsequent half day (c) <i>Ex parte</i> applications, including preparation (d) If the hearing on any one day comprises a directions hearing or similar only Note: If the proceedings do not commence and settle or adjourn on the day of the hearing, then the Assessing Officer shall allow such amount as is reasonable in the circumstances	1 day preparation ½ day hearing per hour 1	C C SP SP	4,950 1,650 407
11.	Application for entry of judgment by default (<i>without trial</i>)			154

Item		Time	Fee Earner	\$
17.	Judgments and orders— (a) Settling and extracting judgment or order (i) with appointment (ii) without appointment (b) Request for certified copy of judgment or order	1 hour	RP	231 209 154
18.	Enforcement— (a) Execution (b) If against land, an additional	3 hours	RP	198 693
19.	Proceedings in court pursuant to <i>Civil Judgments Enforcement Act 2004</i> for the following, including preparation— (a) Means Inquiry (b) Default Inquiry (c) Suspension of enforcement order application (d) Application to cancel or amend an order	1.5 hours	JP RP C/PL	462 352 231
20.	Registration of judgments— Registration of judgments including those under <i>Service and Execution of Process Act 1992 (Cwlth)</i>			209
21.	Assessment of costs including drawing bill— (a) Lodgement of bill of costs (b) Drawing bill of costs, copies and service (c) Making an objection to a bill (d) Assessment of costs (including the time spent in preparing for the assessment)	per hour	JP JP JP	55
22.	Appeals— An appeal to a Magistrate from a decision of a Registrar			Allowances calculated in accordance with item 10
23.	Copies— Copies where necessary, including of documents for which allowance is otherwise made in this Determination	per page		0.165
24.	Accounts and inquiries— Attending on taking accounts, inquiries		SP	An amount which is reasonable in the circumstances
25.	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) Note: Allowances under item 25 are only to be awarded as between a law practice and its client, and <i>not</i> between party and party unless the Court otherwise orders.	per hour per hour	SC C SP JP RP C/PL	
26.	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			

Item		Time	Fee Earner	\$
27.	<p>Allowances for witnesses— The amount of any costs to be paid in respect of work done by a legal practitioner in conducting any proceedings in a case may include a reasonable allowance for—</p> <p>(a) witnesses necessary to the case because of their professional, scientific or other special skill or knowledge; and</p> <p>(b) witnesses necessary to the case other than those covered in paragraph (a).</p> <p>In fixing an allowance for witnesses under paragraph (b), including the Claimant and Defendant, the Assessing Officer may have regard to the amount of salary, wages, or income (if any) actually lost by the witness;</p> <p>In fixing an allowance for witnesses under either paragraph (a) or paragraph (b), regard should be given to whether it was reasonable in all the circumstances to call a witness in person when the witness was able to give evidence by use of audio-link, video-link or similar technology.</p>			
28.	<p>Travel—</p> <p>(a) As between party and party, minor travel as defined in this Determination, is to be allowed as part of the costs awarded for an attendance at chambers or Court, without further order.</p> <p>(b) As between party and party, time spent travelling by a law practice which is not minor travel and which is required by reason of an order of the Court requiring the parties to attend at a location other than the location at which the proceedings is case managed, is to be charged at no more than one half of the rates set out in Table A, with a maximum of 8 hours in any one day, without further order.</p> <p>(c) As between a law practice and its own client, time spent travelling by a law practice, other than minor travel, is to be charged at no more than one half of the rates set out in Table A, with a maximum of 8 hours in any one day.</p> <p>Note: Allowances under item 28(c) are only to be awarded as between a law practice and its client, and <i>not</i> between party and party unless the Court otherwise orders.</p>			

Made by the Legal Costs Committee on 15 June 2016.