

LEGAL PROFESSION ACT 2008
LEGAL PROFESSION (DISTRICT COURT APPEALS) (CONTENTIOUS BUSINESS)
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 (District Court Appeals) (Contentious Business) Report 2016*.
- (b) The Determination set out in the Schedule to this Report is referred to in this Report as the *Legal Profession (District Court Appeals) (Contentious Business) 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 (District Court Appeals) (Contentious Business) Determination 2016*, 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) considered the impact of changes in relevant Australian Bureau of Statistics data for the period; and
- (c) consulted with a range of people and organisations within the legal profession in respect to the impact of structural changes in the profession.

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 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 rates used in the *Legal Profession (District Court Appeals) (Contentious Business) Determination 2016*.
- (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 sub-clause 4(a) be varied from the hourly and daily rates used in the *Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2014*¹ as the basis for the recommended scale of costs which have been generally rounded up or down to represent various increases of approximately 2%, inclusive of the Goods and Services Tax and for administrative convenience, are divisible by 11. Those rates are set out in Table A of the *Legal Profession (District Court Appeals) (Contentious Business) Determination 2016*.

- (c) As a result of the information gained from the inquiries and submissions described in clause 3, it is the recommendation of the Legal Costs Committee that the scale of costs as set out in Table B of the *Legal Profession (District Court Appeals) (Contentious Business) Determination 2016* be adopted for appeals in the District Court.
- (d) 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 (District Court Appeals) (Contentious Business) Determination 2016*.
- (e) 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 successor legislation.

CLARE THOMPSON, Chair

ANGELA GAFFNEY, Member

MARCUS COCKER, Member

JANICE DUDLEY, Member

MATTHEW CURWOOD, Member

BRENDAN ASHDOWN, Member

¹ Published in Gazette 20 June 2014

Schedule

LEGAL PROFESSION ACT 2008

LEGAL PROFESSION (DISTRICT COURT APPEALS) (CONTENTIOUS BUSINESS) 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 (District Court Appeals) (Contentious Business) Determination 2016.

2. Commencement

This Determination comes into operation on 1 July 2016.

3. Application

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 appeals to a Judge of the District Court of Western Australia, whether from a Registrar of that Court or from another Court or Tribunal.

4. New item 13 - Travel

- (a) This Determination introduces a new item 13 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, and notes paragraph 4.7.1.1 of the Supreme Court's Consolidated Practice Directions, which provides standard allowances for chambers appearances for amounts which include preparation and attendance at the hearing. Item 13 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; or
 - (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 13, 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) Item 13(a) and (b) provide for the circumstances where travel is recoverable as part of the party - party costs in a proceeding. Item 34(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 34(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 13(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 34(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 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 13.

5. 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 practice 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 practice 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.

6. 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.
- (b) The rates referred to in paragraph (a) were ascertained in the manner set out in clause 4 of the *Legal Profession (District Court Appeals) (Contentious Business) 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 allowable hourly and daily rates | |
|---------------------------------------------------------------------------------------------------------------|---------------------------------------------|---------|
| Senior Practitioner (permitted to practise on his or her own account for 5 years or more) (SP) [°] | hourly rate | \$484 |
| Junior Practitioner (permitted to practise on his or her own account for less than 5 years) (JP) [°] | hourly rate | \$341 |
| Restricted Practitioner (RP) ^{°, #} | hourly rate | \$297 |
| Clerk/Paralegal (C/PL) ^{##} | hourly rate | \$231 |
| Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel: | | |
| Counsel (C) [*] | hourly rate | \$396 |
| | daily rate | \$3,960 |
| Senior Counsel (SC) ^{**} | hourly rate | \$682 |
| | daily rate | \$6,820 |

[°] 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 practice 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 practice as an Australian lawyer.

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

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

7. Costs

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):

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

shall not exceed the amounts set out in Table B.

Table B

District Court Appeals Scale of Costs 2016

| Item | | Time | Fee Earner | \$ |
|------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|------------|----------------------------------------------------|
| 1. | Notice of appeal or Notice of Contention | | | |
| | (a) Appeal notice (pursuant to Rule 15 of District Court Rules 2005) | 1 hour | SP | 484 |
| | (b) Other appeals | 5 hours | SP | 2,420 |
| 2. | Interlocutory hearings – as required (including preparation) | per hour | SP C | |
| 3. | Preparation of appeal for hearing (including preparation of appeal documents and submissions) | 10 hours | SP | 4,840 |
| 4. | Counsel fee on hearing (including preparation) | 2 days preparation; | C | 11,880 |
| | | 1 day hearing | SC | 20,460 |
| 5. | Counsel fee for second and each successive day of hearing | | C | 3,960 |
| | | | SC | 6,820 |
| 6. | Attendance at appeal by instructing legal practitioner | per hour | SP | |
| 7. | Attending on reserved decision (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders) | per hour | SP | |
| 8. | Settling and extracting order disposing of appeal | | | |
| | (a) With appointment | | | 627 |
| | (b) Without appointment | | | 242 |
| 9. | Other notices and certificates referred to or required by the Rules or procedures of the Court (including practice directions) | | | 66 |
| 10. | Taxing including drawing | | | |
| | (a) Drawing bill of costs and service (b) Taxation of costs (including time spent preparing for the taxation) | | SP | An amount which is reasonable in the circumstances |

| Item | | Time | Fee Earner | \$ |
|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|------------|-------|
| 11. | Copies where reasonably necessary, including of documents for which allowance is otherwise made in this Determination | per page | | 0.165 |
| 12. | <p>Disbursements</p> <p>In addition to the fees and charges allowed under this Determination:</p> <p>(a) As between a law practice and client, a law practice may charge and be allowed disbursements necessarily or reasonably incurred; and</p> <p>(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.</p> | | | |
| 13 | <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 13(c) are only to be awarded as between a law practice and its client, or if costs are awarded on an indemnity basis and <i>not</i> between party and party unless the Court otherwise orders.</p> | | | |

Made by the Legal Costs Committee on 15 June 2016.