

LEGAL PRACTITIONERS ACT 1893

**LEGAL PRACTITIONERS (SUPREME COURT) (CONTENTIOUS BUSINESS)
DETERMINATION 1996**

Made by the Legal Costs Committee under section 58W of the Act.

PART 1 - PRELIMINARY

Citation

1. This determination may be cited as the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996*.

Commencement

2. This determination comes into operation on 1 February 1997.

Application

3. (1) Subject to subclause (2) this determination applies to -
 - (a) contentious business in the Supreme Court of Western Australia (ASupreme Court@); and
 - (b) pursuant to sections 64(1), 66 and 67(2) of the *District Court of Western Australia Act 1969*, to contentious business in the District Court.
- (2) This determination does not apply to -
 - (a) the costs of appeals to the District Court of Western Australia (ADistrict Court@) (which are covered by a separate determination); or
 - (b) costs incurred before 1 February 1997.

Notice under section 58Y of the Act

4. The Committee has complied with section 58Y of the Act.

PART 2 - INVESTIGATIONS CARRIED OUT BY THE COMMITTEE

5. (1) Before making this determination the Committee took the following steps -
 - (a) obtained information from the Supreme Court and District Court about the number of solicitors conducting Supreme Court and District Court litigation;
 - (b) reviewed all submissions received following notice given under Section 58Y of the Act;
 - (c) conducted oral hearings with interested parties;

- (d) prepared and circulated to relevant parties drafts of the scales with descriptive items covering the work performed by solicitors in the conduct of litigation in the Supreme Court and District Court;
 - (e) obtained information as a result of a survey of solicitors about the amount of time which had been spent and the charges which had been made for the last Supreme Court case conducted in the respondent's office;
 - (f) conducted a survey of solicitors to ascertain hourly rates charged by them for work performed by senior practitioners, junior practitioners and paralegals and clerks, and
 - (g) conducted a survey of members of the Western Australian Bar Association (Inc) to ascertain the hourly and daily rates charged by members of that Association.
- (2) The information obtained satisfied the Committee that the existence of competition for the supply of services to parties involved in litigation made it safe to adopt the rates charged by practitioners as a guide to the rates to be used in this determination.

PART 3 - AMENDMENT TO BASIS FOR FIXING COSTS

6. (1) The Committee has decided to alter the basis used for fixing the scale of costs.
- (2) The underlying basis for the previous scales of costs was adopted in 1953 and was described *inter alia* by the Full Court of the Supreme Court of Western Australia in *Cruickshank v Producers Markets Co-operative Ltd* [1960] WAR 184 -

A... the 1953 amendments to the costs rules ... have introduced a novel basis for the fixing of costs, as a result of which, broadly speaking, the remuneration allowable to the profession in litigious works is to be based not on work done but on the value of the subject-matter of the *lis* - a value to be fixed by the court where the claim is not for a liquidated sum. Formerly the costs recoverable in a civil action were fixed by the Taxing Master after a painstaking and sometimes protracted consideration of the many items contained in elaborate bills of costs culled from diary entries and cost sheets ... Under the new scale the costs allowable are by no means measured by the work actually done. ... The effect is that under the new scale the taxation of profit costs becomes a mere formality; the discretion of the Taxing Master is reduced to a minimum and the real discretion becomes that of the trial judge. His discretion is to fix the value of the subject-matter of the litigation where the claim is other than a liquidated sum ...@.

- (3) It is the view of the Committee that it is no longer possible to support a scale based on an *ad valorem* charge for the main item of getting up case for trial. The scale of litigation and the way it is conducted has changed immeasurably since 1953. A survey of costs charged, time spent, and the amount in issue shows that the scale does not reflect the basis on which many solicitors actually charge for the provision of legal services. This has the consequence that solicitors may enter into agreements under section 59 of the Act in order to avoid the constraints of the scale. On the other hand, the Committee considers that there should not be a return to a scale which produces a bill containing numerous small items.

- (4) The new scale of costs set out in the Schedule reflects the fact that the costs of legal services provided in relation to Supreme Court and District Court actions are in the main calculated by reference to the time reasonably spent in the provision of those services and by applying to that time a reasonable hourly rate, that rate varying according to the seniority and experience of the practitioner and the complexity of the work.

PART 4 - O.66,R.12 RULES OF THE SUPREME COURT

Order under O.66,R.12 of the *Rules of the Supreme Court*

7. (1) Another matter also had to be addressed by the Committee. This relates to the circumstances in which a special costs order should be made under O.66,R.12 of the *Rules of the Supreme Court*. The Committee's determinations have never prevented the Court from making special costs orders and such orders are often made. However, the lack of information about how the maximum amounts in former determinations were calculated has made the task of the Court a difficult one. The result is that there is an uncertainty about the likely outcome in relation to special costs order applications.
- (2) The new scale of costs shows the time and the fee earner whose hourly rates have been used to calculate the dollar amount in the scale. Set out in the **table** are the average maxima of hourly and daily rates revealed by the survey. Each item in the scale of costs specifies a dollar amount by reference to a fee earner.

Table

Fee Earner	Average Maximum Rates
Senior Practitioner (admitted for more than 5 years) (SP) - hourly rate	\$270
Junior Practitioner (admitted for less than 5 years) (JP) - hourly rate	\$180
Clerk/Paralegal (C/PL) - hourly rate	\$130
Counsel Fees charged as a disbursement to practitioners or charged by in-house counsel:	
Junior Counsel (JC) - hourly rate	\$210
- daily rate	\$2,300
Queen=s Counsel (QC) - hourly rate	\$370
- daily rate	\$3,500

The reference to Queen=s Counsel in this determination (which includes the scale in the schedule) includes reference to Senior Counsel appointed in any State or Territory in Australia and whose appointment is afforded recognition by the Chief Justice of the Supreme Court.

- (3) Thus, for example, item 6(a) of the Schedule which relates to the drawing and settling of a statement of claim, provides for a maximum of 10 hours for the preparation of this document to be performed by a senior practitioner charging at a rate of \$270 per hour. In fact, in a particular matter, the time reasonably spent in drawing and settling a statement of claim may be only 2 hours and it may be performed by a practitioner who is relatively junior. By reason of the lack of complexity of the case, it may be that such practitioner should only reasonably charge at the rate of \$180 per hour. If that be the case, then \$360 would be a reasonable charge. Alternatively, if the statement of claim were drawn in complex litigation and 30 hours were reasonably spent on the task by a senior practitioner who might reasonably charge \$280 per hour, then it would be appropriate for that party, if it were successful in the litigation to ask for a special costs order to be made by the Court to increase the maximum amount in item 6(a). This flexibility applies to each item in the scale other than the amounts set out in the items referred in Part 4.
- (4) Thus, by way of further example, it can be seen that item 2 of the Schedule applies a maximum of \$540. It has been calculated on the basis of a junior practitioner taking 3 hours to perform the work and charging at a rate of \$180 per hour. However, if in a particular case a senior practitioner performed the work and took 2.45 hours at a reasonable hourly rate of \$220 per hour, the result would still be within the maximum amount allowed by the scale. It would then be a matter for the Taxing Officer to decide whether the time spent in performance of the work was reasonably spent by a practitioner of that seniority.
- (5) It will be noted from items 13 and 14 of the Schedule that if more than 100 hours must reasonably be spent on getting up the case for trial and if more than 3 days must reasonably be spent by counsel in mastering the brief and preparing for the trial, then the Committee considers that to be a basis to seek a special order for costs under O.66,R.12 of the *Rules of the Supreme Court*.

PART 5 - MISCELLANEOUS

Fixed amounts in certain items in Schedule

8. Items 1(a) and (b), 3 and 28(a) and (b) of the Schedule are fixed maximum amounts to provide the Court staff with a fixed figure when completing the form of a writ of summons, a writ of execution or when entering judgment by default.

PART 6

9. The above text and the Schedule hereto constitutes a determination made by the Legal Costs Committee under section 58W of the Act.

SCHEDULE

Subject to the provisions of the *Rules of the Supreme Court* and to the provisions of the *Legal Practitioners Act 1893* permitting a solicitor 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 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 solicitor,

shall not exceed the maximum amounts set out in the scale of costs in the Schedule.

SUPREME COURT SCALE OF COSTS

Item	Time	Fee Earner	\$
1.	(a) Writ of summons, whether generally or specially indorsed, including instructions but excluding statement of claim.		400
	(b) For each additional defendant		50
2.	Next friend or guardian <i>ad litem</i>	3 hours	JP
3.	Entry of judgment without trial		130
4.	(a) Payment into or out of Court	2 hours	JP
	(b) Offer of compromise under O.24A	2 hours	SP
	(c) Acknowledgment of offer under O.24A		30
	(d) Acceptance of offer of compromise under O.24A	2 hours	SP
	(e) Notice of offer to consent to judgment	2 hours	SP
	(f) Other notices referred to or required by the Rules or procedures of the Court (including practice directions)		30
5.	Memorandum of Appearance	0.5 hours	C/PL
6.	<i>Pleadings</i>		
	(a) Statement of Claim	10 hours	SP
	(b) Defence	10 hours	SP
	(c) Counterclaim	10 hours	SP
	(d) Reply (if necessary), defence to counterclaim, or any other pleading	10 hours	SP

7.	(a) Third party notice	2 hours	SP	540
	(b) Pleadings in third party proceedings	6 hours	SP	1,620
8.	(a) Requesting particulars of a pleading (<i>where and to the extent necessary</i>)	3 hours	JP	540
	(b) Giving particulars of a pleading	5 hours	JP	900
9.	(a) Notice requiring discovery	0.33 hours	C/PL	30
	(b) Giving discovery of documents	10 hours	JP	1,800
	(c) Inspection and giving inspection - per hour		JP	180
10.	(a) Delivery of interrogatories	5 hours	SP	1,350
	(b) Answers to interrogatories	10 hours	JP	1,800
11.	Examination of witness before trial by counsel or solicitor, pursuant to order			An allowance in accordance with item 14(c) or (d)
12.	Application for and striking jury	1 hour	JP	180
13.	Getting up case for trial (subject to item 14(f) (<i>includes work reasonably and necessarily undertaken prior to commencement of proceedings</i>))	100 hours	SP	27,000
14.	<i>Counsel fees:</i>			
	(a) Fee on brief, i.e. first day of trial and preparation	3 days preparation; 1st day of trial	JC	9,200
	(b) Fee on brief for Queen=s Counsel, i.e. first day of trial and preparation (where two or more counsel are certified for)	3 days preparation; 1st day of trial	QC	14,000
	(c) Counsel fee for the second and each successive day of hearing		JC	2,300
	(d) Counsel fee for Queen=s Counsel for second and each successive day of hearing (where two or more counsel are certified for)		QC	3,500
	(e) Solicitor attending trial, per hour		SP	270
	(f) Clerk attending trial, per hour		C/PL	130
	(g) Attending on a reserved judgment or at a callover, per hour		SP	270
(h) Where the only issue tried is the assessment of damages, three quarters of the amounts prescribed by items 13, 14(a), 14(b), 14(c) and 14(d) shall be allowable, unless otherwise directed by the Court				
15.	Settling and extracting judgment after trial:			
	(a) With appointment	2 hours	JP	360

	(b) Without appointment	0.75 hours	C/PL	100
16.	Drawing bill of costs, copies and service	3 hours	C/PL	390
17.	Taking accounts; inquiries; taxation of costs; and other proceedings not covered by any other item, per hour		C/PL	130
18.	<i>Re-trial or Re-hearing</i> (a) Getting up case for re-trial or re-hearing (b) Re-trial or re-hearing			Such amounts as are reasonable in the circumstances
19.	(a) Special case, case stated (otherwise than by way of appeal) or trial of an issue (not covered by item 14(h)) (b) For the second and each successive day of the trial or hearing			Such amounts as are reasonable in the circumstances
20.	<i>Appeals to a member of the Court or to the Full Court (including appeals by way of case stated):</i> (a) Notice of appeal, motion for order nisi to review, and the like (b) Settling index (c) Getting up appeal for hearing (d) Counsel fee on hearing including preparation (e) Counsel fee for Queen=s Counsel including preparation (where two or more counsel are certified for) (f) Counsel fee for the second and each successive day of hearing (g) Counsel fee for Queen=s Counsel for second and each successive day of hearing (where two or more counsel are certified for) (h) Attending on reserved decision (i) Settling and extracting order disposing of the appeal - (i) with appointment (ii) without appointment	15 hours 2 hours 10 hours 2 days preparation; 1 day hearing 2 days preparation; 1 day hearing 2 hours 2 hours 0.75 hours	SP JP SP JC QC JC QC JC JP JP	4,050 360 2,700 6,900 10,500 2,300 3,500 360 360 135
21.	Originating motion or originating summons or petition	2 days preparation; 1 day hearing	JC	6,900
22.	Motions in Court not otherwise provided for	8 hours	JP	1,450
23.	Proceedings in Chambers other than proceedings to	2 days preparation;	JC	6,900

	which item 21 applies	1 day hearing		
24.	Pretrial, mediation or other conferences - required by order of the Court, by the <i>Rules of the Supreme Court</i> or by Practice Direction - per hour		SP	270
25.	Arbitration proceedings			The same costs as in an action.
26.	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 sum as is reasonable in the circumstances
27.	Proceedings by way of prerogative writ			Allowances calculated in accordance with item 20
28.	(a) Execution (b) If against land, an additional			200 200
29.	Photocopies where necessary, per page			0.80

Dated at Perth 3 December 1996.

Ted Sharp, Chairman
Chris Pullin QC, Deputy Chairman
Angela Gaffney, Member
Jill Vander Wal, Member
Jason Berry, Member
Patrick Coward, Member