

**Legal Practitioners (Supreme Court)
(Contentious Business) Determination 2012**

**Legal Practitioners (District Court Appeals)
(Contentious Business) Determination 2012**

**Legal Practitioners (Supreme and District Court)
(Criminal) Determination 2012**

**Legal Practitioners (Magistrates Court) (Civil)
Determination 2012**

**Legal Practitioners (Magistrates Court)
(Criminal) Determination 2012**

**Legal Practitioners (Family Court of Western
Australia) Determination 2012**

To
Legal Costs Committee

Society Contact
Andrea Lace
Direct line: 9324 8646
Email: alace@lawsocietywa.asn.au

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1 Introduction

- 1.1 This submission is made in response to an invitation by letter dated 2 October 2013 from the Chair of the Legal Costs Committee, Mr Ted Sharp, to make comments or suggestions to a review of the following:
- *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* which commenced on 1 November 2012;
 - *Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2012* which commenced in 1 January 2013;
 - *Legal Practitioners (Supreme and District Court) (Criminal) Determination 2012* which commenced on 1 November 2012.
- 1.2 The Legal Costs Committee requested submissions by 13 December 2013. The Law Society of Western Australia has been granted an extension until 18 December 2013.
- 1.3 In his letter of 2 October 2013, the Chair of the Legal Costs Committee foreshadowed that the Legal Costs Committee expects to call for submissions in early 2014 in relation to a review of the following:
- *Legal Practitioners (Magistrates Court) (Civil) Determination 2012* which commenced on 1 November 2012; and
 - *Legal Practitioners (Magistrates Court) (Criminal) Determination 2012* which commenced on 1 November 2012.
- 1.4 The Chair of the Legal Costs Committee also advised that the Legal Costs Committee has resolved to review each of these Determinations with a view to the commencement date of each new Determination being 1 July 2014.
- 1.5 The *Legal Practitioners (Family Court of Western Australia) Determination 2012* commenced from 1 January 2013. Although it is not known if a new Family Court of Western Australia Determination is to commence from 1 July 2014, this Submission makes recommendations in relation to the hourly and daily rates in this Determination which are the same as those in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*.

2 Recommended amendments to Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 – Table B Supreme Court Scale of Costs 2012

2.1 Catastrophic injuries

The *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* removed the limit on the number of hours for trial preparation in item 17 of the Supreme Court Scale of Costs 2012 if a claim is declared by the Court to be a catastrophic personal injury claim.

Item 17 Preparation of case

Preparation of case for trial (includes work reasonably and necessarily undertaken prior to commencement of proceedings)	120 hours*	SP	54,120
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*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.

It is the Society's recommendation that the limit on the number of hours, and days, should also be removed from items 16(b) and 20(a) respectively if a claim is declared by the Court to be a catastrophic personal injury claim.

The removal of the limits in items 16(b) and 20(a) avoids the need for special costs orders. The litigation that arises from special cost applications would not be necessary.

Item 16(b): Preparation of Schedules (if any) required by District Court Rules 45C and 45D

Rule 45C applies to any party to a case who claims damages in the case. The party must file and serve particulars of damages within 60 days after the day the defence (or if there is more than one defendant, the first defence) is filed.

Rule 45C provides that *"If the case is a personal injuries action, the particulars of damages must set out in detail the amount of money claimed for any of the following, the justification for claiming it, and how it is calculated —*

- (a) *loss of earning capacity —*
 - (i) *past; and*
 - (ii) *future;*
- (b) *loss of superannuation due to —*
 - (i) *past loss of earning capacity; and*
 - (ii) *future loss of earning capacity;*
- (c) *special damages;*
- (d) *past gratuitous services;*
- (e) *interest on past loss and expenditure;*
- (f) *future need —*
 - (i) *for medical service*
 - (ii) *for nursing and other care and assistance services, whether paid*

- or gratuitous; and*
 (iii) *for appliances, and modifications to equipment and environment;*
 (g) *any other discrete item of damages.”*

In catastrophic personal injury claims the schedule of damages is invariably settled by counsel and is usually far more complex than in other matters. The schedule of damages usually includes a number of variables depending on life expectancy. As a consequence the current limit of 8 hours (at senior practitioner rate) is invariably inadequate.

Item 20 Trial: Counsel fee – item 20(a) Fee on brief, i.e first day of trial and preparation (including submission)

The nature and complexity of a catastrophic personal injury claim inevitably results in substantially more than 3.5 days preparation being required by counsel to master the brief, to prepare opening written submissions and properly prepare for the first day of trial.

RECOMMENDATION 1

That items 16(b) and 20(a) of the Supreme Court Scale of Costs be amended as underlined below.

Item 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	

* In relation to particulars of damages under District Court Rule 45C, 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 8 hours but shall be such amount that is reasonable in all of the circumstances.

Item 20(a) Trial:

Counsel fees

(a) Fee on brief, i.e. first day of trial and Preparation (including submissions)	3.5 days* preparation 1 st day of trial	C	16,335
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*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 3.5 days but shall be such amount that is reasonable in all of the circumstances.

2.2 Written closing submissions

Written closing submissions, ordered by the Court, are not uncommon.

Currently there is no separate provision in the Supreme Court Scale of Costs for preparation of written closing submissions. They are included in getting up or under items 20(c) (Counsel fee of the second and each successive day of hearing) and 20(d) (Counsel fee of Senior Counsel for second and each successive day of hearing).

Getting up relates to work leading up to trial. Items 20(c) and (d) relate to the conduct of the trial.

The preparation of written closing submissions requires specific additional work, often requiring transcript references, which should not be included in getting up or as part of the trial.

It is recommended that a new item 20(i) be inserted to provide for written closing submissions when court ordered.

RECOMMENDATION 2

That a new item 20(i) be inserted as follows:

Item 20 Trial

Counsel fees

20(i)	Preparation of written closing submissions when ordered by the trial judge	per hour	C
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3 Recommended amendments to hourly and daily rates in the following Determinations:

- **Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012**
- **Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2012**
- **Legal Practitioners (Supreme and District Court) (Criminal) Determination 2012**
- **Legal Practitioners (Magistrates Court) (Civil) Determination 2012**
- **Legal Practitioners (Magistrates Court) (Criminal) Determination 2012**
- **Legal Practitioners (Family Court of Western Australia) Determination 2012**

3.1 Maximum allowable hourly and daily rates for Counsel

The hourly and daily rates in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*, the *Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2012*, the *Legal Practitioners (Supreme and District Court) (Criminal) Determination 2012* and the *Legal Practitioners (Family Court of Western Australia) Determination 2012* are as follows:

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

The hourly and daily rates in the *Legal Practitioners (Magistrates Court) (Civil) Determination 2012* and the *Legal Practitioners (Magistrates Court) (Criminal) Determination 2012* are:

Fee earner			Maximum allowable Hourly and daily rates
Senior Practitioner (admitted for more than 5 years) (SP) hourly rate			\$374
Junior Practitioner (admitted for less than 5 years) (JP) hourly rate			\$275
Clerk/paralegal (CPL) hourly rate			\$132
<i>Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel:</i>			
Counsel (C) hourly rate			\$297
		daily rate	\$2,970
Senior Counsel (SC) hourly rate			\$495
		daily rate	\$4,950

Each of these Determinations expressly provides that “*the reference to Counsel in this Determination means a practitioner acting as a barrister other than as Senior Counsel*”.

The hourly rate for Counsel in all of these Determinations (other than for the Magistrates Court) is significantly lower than the hourly rate for Senior Practitioners.

The differential rate applicable for advocacy work depends on whether the practitioner practices within the amalgam or only as a barrister. As a consequence, the maximum allowable hourly rate for, say, a restricted practitioner instructing Counsel is only \$44 less than what is recoverable with respect to the work done by Counsel.

In the Magistrates Court Determination the hourly rate for Counsel is only \$22 higher than the hourly rate for a Junior Practitioner but is \$77 less than the hourly rate for a Senior Practitioner.

There is no explanation in any of the above listed Determinations as to why the hourly and daily rates for Counsel are different than the hourly and daily rates for Junior Practitioners and Senior Practitioners.

If the rationale for differentiation in amounts charged is seniority, this supports a three tiered approach where differentiation is based on years of experience rather than an arbitrary and anomalous assessment of the value that each role brings to the case.

If the purported rationale behind lower rates for a Senior Practitioner acting as Counsel is that the overheads of a barrister are deemed to be lower than the overheads of a solicitor, it is submitted that the overhead structures for barristers are, in many instances, little different from those of sole practitioners.

A survey was conducted by the Law Society in November 2013 in order to identify whether or not there is a significant difference between the expenses of sole practitioners/small firms and barristers.

The results of the survey are at **Annexure 1**.

100% of the barristers who participated in the survey have practised for more than 5 years and 45.5% have practised for more than 20 years.

The results of the survey show that:

- (a) The total of law practice expenses per annum of solicitors and barristers is very similar (see results to question 7).
- (b) Rent and salaries are the most significant items of expenditure of both barristers and solicitors. While solicitors' costs in relation to salaries are slightly higher than barristers, barristers costs in relation to rent and outgoings are generally higher than those of solicitors (see results of questions 12).

The preamble to the 1996 Supreme Court Costs Scale stated that the relevant Counsel fee was based upon a survey of members of the Western Australian Bar Association (WABA).

A survey conducted by WABA in October/November 2013 has found that the median hourly rate charged by junior counsel members of WABA is \$440 which demonstrates an appropriate existing benchmark (before CPI adjustment) that the hourly rates for Senior Practitioners and Counsel should be uniform.

Other jurisdictions

The Victorian Supreme Court (Chapter 1 New Scale of Costs and Other Costs Amendments) Rules 2012¹

The hourly rate for a solicitor is \$360 (+GST) plus an additional amount may be allowed, having regard to the circumstances of the case (paragraph 17). Counsel's fee per hour is \$500 (+GST) for Junior Counsel and \$750 (+GST) for Senior Counsel.

Federal Court Rules 2011 Schedule 3²

The maximum hourly rate for a solicitor is \$560 (GST incl). Counsel fees are treated as a disbursement by reference to the National Guide to Counsel fees.³

RECOMMENDATION 3

In all six above listed Determinations:

- 1 The classifications (excepting Clerk/paralegal) should be simplified by creating a three tiered scale comprising:
 - (i) Junior Practitioners (solicitors and counsel);
 - (ii) Senior Practitioners (solicitors and counsel); and
 - (iii) Senior Counsel.

AND

- 2 The hourly and daily rates for Junior Practitioners when acting as Counsel should be the same as the hourly and daily rates for Junior Practitioners.

AND

- 3 The hourly and daily rates for Senior Practitioners when acting as Counsel (with the exception of Senior Counsel) should be the same as the hourly and daily rates for Senior Practitioners.

3.2 Percentage increase to maximum hourly and daily rates

It is recommended that the maximum hourly and daily rates in all of the above listed Determinations should be increased to reflect increases in the CPI and costs associated with the running of a law practice. The following information supports this recommendation.

It is relevant that the new Costs Determinations will not commence until 1 July 2014.

Costs associated with the running of a law practice

In the 2007/2008 the Australian Bureau of Statistics survey of the legal services industry (the most recent survey) the expenses of law practices (other than barristers) were calculated as follows:

¹ <http://www.the-civil-lawyer.net/2013/03/new-costs-regime-for-victoria-supreme.html>

² <http://www.fedcourt.gov.au/forms-and-fees/legal-costs/allowable>

³ <http://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees>

Expense	% of total expenses
Labour costs	44%
Rent, leasing and hiring	6.5%
Payment for legal services	5%
Payments for legal support services	15%
Disbursements not already reported	2.5%
Insurance premiums	2.7%
Professional expenses	2.3%
Other	22%

- **Labour costs**

The results of the Law Society's Annual Salary Surveys for 2011, 2012 and 2013 demonstrate an average increase between 2011 and 2013 of 4.16%.

Staff member	2011 Survey Average Annual salary \$	2012 Survey Average Annual salary \$	2013 Survey Average Annual salary \$	Variation in \$ 2011 to 2013	% Variation 2011 to 2013
Office/ Administration Manager	72,529	77,360	77,500	+4,971	+6.85%
Financial Controller	107,174	108,861	117,500	+10,326	+9.63%
Secretary intermediate	50,563	56,534	53,750	+3187	+6.30%
Secretary senior	59,622	64,230	66,250	+6,628	+11.12%
Law Clerk/ paralegal	57,230	58,595	57,500	+270	+0.47%
Law graduates	51,053	55,622	52,500	+1,447	+2.83%
1 st year Solicitor	64,582	64,827	67,500	+2,918	+4.52%
2 nd year Solicitor	70,101	75,219	75,000	+4,899	+6.99%
3 rd year Solicitor	88,308	84,164	82,500	-5,808	-6.58%
4 th year Solicitor	86,360	93,743	92,500	+6,140	+7.11%
5 th year + Solicitor	106,224	117,672	102,500	-3,724	-3.51%
				Average increase	+4.16%

- **National Wage Price Index (Private Sector All Industries) – Perth**

The National Wage Price Index (Private Sector All Industries Perth / WA – total hourly rates excluding bonuses) increased from September 2011 (109.9) to September 2013 (118.3) by 7.64%.

Source: Australian Bureau of Statistics⁴

- **Rents**

Available information suggests that office rents have not changed significantly in the past two years, but the Perth “CPD office market remains resilient”.

Source: Research and Forecast report Colliers⁵

- **Professional Indemnity insurance premiums**

Between 2011/12 and 2012/13 the Law Mutual Insurance premium increased by 4.7%. There was no increase in the premium in 2013/2014.

Between 2011/12 and 2013/14 the administration fee increased by 7.86%.

- **Consumer Price Index (CPI) - Perth**

From September 2012 all index numbers were calculated on a new index reference period of 2011-2102. The index numbers for each index series were reset to 100.0 for the financial year 2011-12.

CPI changes between September 2011 and September 2013 were as follows:

	Index number	% change
September 2011 to December 2011	179.1	0.2%
December 2011 to March 2012	179.5	0.2%
March 2012 to June 2012	180.4	0.5%
June 2012 to September 2012	101.6	1.1%
September 2012 to December 2012	101.9	0.3%
December 2012 to March 2013	102.4	0.5%
March 2013 to June 2013	103.0	0.6%
June 2013 to September 2013	104.2	1.2%

September 2011 to September 2013 the percentage increase in the CPI for Perth was 4.6%.

The CPI impacts on “Other” expenses for a law practice which include stationery and office supplies, telecommunication expenses, power, technology equipment and services etc.,

Source: Australian Bureau of Statistics⁶

⁴ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0>

⁵ http://www.colliersvideo.com.au/eMag/Research/CBDOffice_Property_Research_SecondHalf2013/1/

⁶ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6401.0>

Other increases since 2011

- ***Increases in court filing fees***

In 2012 the Department of the Attorney General increased Court filing fees by 2.8% “to reflect the 2012-2013 CPI movement rate”.

Effective from 1 November 2013, Court fees were increased by a further 13.6% “to match the movement in costs determined by the Department.”

Compounded, the increase in Court fees was close to 17% during the period 2011 to 2013.

Source:

Letters to the Law Society of Western Australia from the Department of the Attorney General at **Annexure B**.

Government Gazette 30 Nov 2012 (which includes fees set in 2011 before the increase).⁷

Government Gazette 15 November 2013.⁸

- ***Increases in judicial salaries***

Judicial salaries increased by 5.6% between 1 January 2012 and 1 July 2013.

Source: Reports and Recommendations Salary and Allowances Tribunal.⁹

- **Solicitors Costs Determination 2013**

The Solicitors Costs Determination is reviewed every 2 years, in those years where the litigious or contentious scales are not reviewed. The current maximum hourly rates reflected by the Solicitors Costs Determination 2013 as set out in items 701 and 702 are:

- Senior Practitioner (admitted more than 5 years) \$462.00 per hour
- Junior Practitioner (admitted less than 5 years) \$330.00 per hour.

The relative percentage increase necessary in the litigious or contentious scales to match these rates is 2.44% (senior practitioners) and 3.45% (junior practitioners).

Such percentages with respect to a relative time gap of 12 months provides further support for a general increase of 5% in the maximum hourly and daily rates for the litigious or contentious scales for the 2 years which will have elapsed by the time of the new determination taking effect.

RECOMMENDATION 4

That the maximum hourly and daily rates in all six of the above listed Determinations should be increased by 5% rounded off so as to be divisible by 11.

⁷ [http://www.slp.wa.gov.au/gazette/gazette.nsf/gazlist/9F132941394850B848257AC500103427/\\$file/gg219.pdf](http://www.slp.wa.gov.au/gazette/gazette.nsf/gazlist/9F132941394850B848257AC500103427/$file/gg219.pdf)

⁸ [http://www.slp.wa.gov.au/gazette/gazette.nsf/gazlist/EE81BA418EB4581A48257C2300068626/\\$file/gg204.pdf](http://www.slp.wa.gov.au/gazette/gazette.nsf/gazlist/EE81BA418EB4581A48257C2300068626/$file/gg204.pdf)

⁹ <http://www.sat.wa.gov.au/JudgesMastersAndMagistrates/Pages/November2011.aspx>

<http://www.sat.wa.gov.au/JudgesMastersAndMagistrates/Pages/June2013.aspx>

A handwritten signature in black ink, appearing to read 'C Slater', with a long horizontal flourish extending to the right.

Craig Slater
President

17 December 2013