

Legal Costs Committee Review

**Legal Practitioners
(State Administrative Tribunal)
Determination 2012**

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

**Legal Practitioners
(Official Prosecutions) (Accuseds Costs)
Determination 2012**

To
Legal Costs Committee

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Date
26 August 2014

Table of Contents

- 1 Preamble
- 2 Legal Practitioners (State Administrative Tribunal)
Determination 2012
- 3 Legal Practitioners (Family Court of Western Australia)
Determination 2012
- 4 Legal Practitioners (Official Prosecutions) (Accuseds Costs)
Determination 2012.

1 Preamble

- 1.1 The Law Society of Western Australia makes this submission in response to an invitation from the Chair of the Legal Costs Committee, Mr Ted Sharp, dated 25 June 2014, to the review of the following:
 - Legal Practitioners (State Administrative Tribunal) Determination 2012
 - Legal Practitioners (Family Court of Western Australia) Determination 2012
 - Legal Practitioners (Official Prosecutions) (Accuseds Costs) Determination 2012.
- 1.2 In recent years the Society has promoted a simplified system of costing that is uniform and consistent between jurisdictions.
- 1.3 The Society maintains the position stance that a uniform and consistent approach ought to be adopted with respect to maximum allowable hourly rates, as applicable, in the Legal Costs Committee's Determinations.

2 Legal Practitioners (State Administrative Tribunal) Determination 2012

- 2.1 Under section 87(1) of the *State Administrative Tribunal Act 2004* (Act), the Tribunal is stated to be, as a general rule, a no costs jurisdiction in which parties usually bear their own costs.
- 2.2 Under s 87(2) of the Act, the Tribunal is given broad discretion to order a party to pay the costs of another party.
- 2.3 In 2008 the Legal Costs Committee, whilst acknowledging the overriding philosophy of the Tribunal that parties are to bear their own costs of proceedings, recognised that there are many types of matters heard before the Tribunal which are of a substantial nature in respect of which legal advice is sought, but not necessarily made the subject of any costs orders in the Tribunal.
- 2.4 Consequently, in light of the costs disclosure obligations contained in the *Legal Profession Act 2008*, the Legal Costs Committee considered it appropriate to determine a scale of fees on a legal practitioner/client basis.
- 2.5 Because parties generally bear their own costs, there is no prescribed party/party scale of costs. In the circumstance that a costs order is made, the Tribunal will itself assess the amount of costs. The usual practice is to determine the amount of work which was reasonable and necessary to properly prepare and present the case and then to apply, as a useful guide as to the maximum rates which might be allowed on a party/party basis, the hourly or daily rate specified in the Legal Costs Committee's relevant Legal Practitioners (State Administrative Tribunal) Determination.
- 2.6 The hourly and daily rates in the 2008 and subsequent Legal Practitioners (State Administrative Tribunal) Determinations have been the maximum allowable rates in the Magistrates Courts Determinations.
- 2.7 In 2008, the Society's submission to the Legal Costs Committee regarding the introduction of a Legal Practitioners (State Administrative Tribunal) Determination included:

“Assessing costs for the purposes of section 87 of the Act requires a determination as to the reasonableness of the costs claimed.

The SAT must always strive to maintain proportionality between the subject matter of the proceedings and the costs associated with the proceedings.

Given the SAT’s broad jurisdiction and inherent flexibility, it is submitted that costs orders be governed by application of an appropriate scale which has the capacity to reflect the variety of matters litigated in the SAT. To date, the SAT has applied the Supreme Court Scale. See, for example Lakes Action Group Association (Incorporated) v Shire of Northam & Anor [2005] WASAT 185 (S).

It is proposed that the Supreme Court Scale continue to apply in cases of complexity, difficulty or importance, for the following reasons:

- The long term aim of the Society is to promote a simplified system of costing, which is, to the extent possible, uniform and consistent;*
- Many steps in SAT proceedings are analogous to the steps taken in Supreme Court proceedings;*
- It has been suggested that solicitor/client costs will be assessed by the Supreme Court which will have jurisdiction over all solicitor/client costs;*
- The Supreme Court Scale has become a user friendly and workable scale, allowing practitioners to provide relatively accurate estimates of likely costs for the purposes of costs disclosure;*
- It is in the interests of practitioners and the public at large that a uniform approach to costing be adopted, where possible.*

However, it is submitted that the Magistrates Court Scale ought to apply to the many cases of a relatively simple nature before the SAT. Further, it is proposed that the decision as to which scale is to apply to the particular matter, is a decision to be made by SAT having regard to the factors of complexity, difficulty or importance of the case.”

- 2.8 Since its commencement, the Tribunal has delivered a number of judgments which establish the practice as to when it will exercise its discretion under 87(2) of the Act and in which areas of its jurisdiction.
- 2.9 Representation of parties and orders for costs are common in the planning and land compensation, revenue (taxation) and vocational areas of its jurisdiction.
- 2.10 In land compensation proceedings, Justice Barker summarised the practice of the Tribunal in *Clifford and Shire of Busselton [2007] WASAT 89* as follows:
- (1) If a party is successful in a claim for land compensation in proceedings in the Tribunal for compensation, the Tribunal will ordinarily exercise its discretion to award the party the costs of the proceedings;
 - (2) If the party is not successful in getting an award for compensation greater than the original offer, the party will ordinarily be required to pay the resuming authority's costs.
- 2.11 In vocational costs matters, if the complaint against the practitioner is ultimately successful costs are generally awarded against the practitioner. In those cases, the Tribunal has stated that it is preferable to take a broad brush approach as to the work necessary to bring the proceedings to a conclusion rather than the amount charged to the client; see *Medical Board of Australia and Costley [2013] WASAT 2*. If the complaint is unsuccessful, generally no order for costs is made.
- 2.12 In addition, there are other matters that fall within SAT's jurisdiction, such as taxation issues, which are more akin to a commercial dispute involving very significant sums of money between the respective parties rather than matters of an administrative nature.
- 2.12 The Society confirms its views expressed in 2008 regarding costs being assessed at Supreme Court rates and given that costs are awarded by the Tribunal in limited and complex cases the Society is now of the view that the Supreme Court Scale is the appropriate Costs Scale for the Tribunal.

2.13 It is the Society's submission that the maximum allowable rates in Table A of the next Legal Practitioners (State Administrative Tribunal) Determination should be the maximum allowable rates in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014*, as follows:

Fee Earner	Maximum allowable hourly and daily rates
Senior Practitioner (admitted for 5 years or more) hourly rate	\$473
Junior Practitioner (admitted for less than 5 years) hourly rate	\$330
Clerk/Paralegal hourly rate	\$231
Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel –	
Counsel hourly rate	\$385
daily rate	\$3,850
Senior Counsel hourly rate	\$671
daily rate	\$6,710

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

3.1 The maximum allowable rates in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014* from 1 July 2014 are:

Fee Earner	Maximum allowable hourly and daily rates
Senior Practitioner (admitted for 5 years or more) hourly rate	\$473
Junior Practitioner (admitted for less than 5 years) hourly rate	\$330
Clerk/Paralegal hourly rate	\$231
Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel –	
Counsel hourly rate	\$385
daily rate	\$3,850
Senior Counsel hourly rate	\$671
daily rate	\$6,710

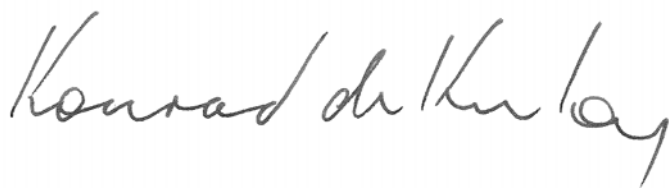
3.2 In accordance with the Society's position that a uniform approach ought to be adopted with respect to hourly and daily rates, it is the Society's submission that the maximum allowable rates in the next *Legal Practitioners (Family Court of Western Australia) Determination* should be the same as those in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014*.

4 Legal Practitioners (Official Prosecutions) (Accuseds Costs) Determination 2012

4.1 The maximum allowable rates in the *Legal Practitioners (Magistrates Court) (Criminal) Determination 2014* from 1 July 2014 are:

Fee Earner	Maximum allowable hourly and daily rates
Senior Practitioner (admitted for 5 years or more) hourly rate	\$396
Junior Practitioner (admitted for less than 5 years) hourly rate	\$297
Clerk/Paralegal hourly rate	\$143
Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel –	\$319
Counsel hourly rate	\$3,190
daily rate	
Senior Counsel hourly rate	\$528
daily rate	\$5,280

4.2 In accordance with the Society's position that a uniform approach ought to be adopted with respect to hourly and daily rates, it is the Society's submission that the maximum allowable rates in the next *Legal Practitioners (Official Prosecutions) (Accuseds Costs) Determination* should be the same as those in the *Legal Practitioners (Magistrates Court) (Criminal) Determination 2014*.



Konrad de Kerloy
President

28 August 2014