

**Legal Profession (Supreme Court)
(Contentious Business) Determination 2016**

**Legal Profession (District Court Appeals)
(Contentious Business) Determination 2016**

**Legal Profession (Supreme Court and District
Court) (Criminal) Determination 2016**

To

Legal Costs Committee
Level 12, International House
26 St Georges Terrace
PERTH WA 6000

Law Society Contact

Mary Woodford
General Manager Advocacy
Direct line: 08 9324 8646
Email: mwoodford@lawsocietywa.asn.au

Date

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1. Introduction

- 1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to an invitation by letter dated 28 September 2017 from the Chair of the Legal Costs Committee, Ms Clare Thompson, to submit any comments or suggestions by 2 February 2018 to a review of the following:
 - *Legal Profession (Supreme Court) (Contentious Business) Determination 2016 which commenced on 1 July 2016*
 - *Legal Profession (District Court Appeals) (Contentious Business) Determination 2016 which commenced on 1 July 2016*
 - *Legal Profession (Supreme Court and District Court) (Criminal) Determination 2016 which commenced on 1 July 2016*
- 1.3 The Legal Costs Committee has resolved to review these Determinations with a view to the commencement date of each new Determination being 1 July 2018.

2. Legal Costs Committee proposal to introduce a 'no cost' scale up to mediation in *Family Provision Act 1972 (WA)* claims where the estate is modest to the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2016*

- 2.1 The Law Society does not support such an amendment.
- 2.2 Whilst the Law Society is conscious of the significant impact that legal costs in *Family Provision Act* claims entail and the overall effect on the value of the estate, the Law Society's view is that the imposition of a no-costs scale up to the point of mediation (unless the case management registrar orders otherwise) should be avoided for the following reasons:
 - 2.2.1 First, it will increase the number of practitioners who will require a costs agreement to be in place, rather than rely on the amounts prescribed for by the scale.
 - 2.2.2 Second, it could work an injustice against a genuine applicant. A genuine applicant for family provision is usually a person who is vulnerable either by virtue of their needs or their limited financial position.
 - 2.2.3 Third, whether legal costs are paid by each individual party or by the estate is a matter which is able to be negotiated by the parties. The parties can, for example, agree that each bears their own costs; agree that each has their costs paid out of the estate; or make some other arrangement.
 - 2.2.4 Fourth, an executor will ordinarily be entitled to be indemnified in respect of their costs from the estate, unless they agree otherwise. The proposed amendment will disproportionately affect applicants.
 - 2.2.5 Fifth, the prospect of being able to take proceedings to mediation at least with no real risk of an adverse costs order could potentially encourage unmeritorious claims.

- 2.2.6 Sixth, the ability of a case management registrar to ‘order otherwise’ in this type of case may carry with it the potential of pre-judgment about the merits of the claim.
- 2.2.7 Seventh, in any case the Court retains a discretion in relation to costs. In an appropriate case a party can apply to the Court to exercise that discretion appropriately. Given that orders for family provision are in the control of the master or judge, it may be an inappropriate fetter on that general discretion for a case management registrar to make an order that ‘costs be allowed’ or to refuse to make that order.

3. ***Hart v JGC Accounting and Financial Services Pty Ltd [No 2] [2016] WASCA 168***

- 3.1 Whilst perhaps unnecessary, the Determinations could be amended to make clear that the Determinations set the maximum amounts recoverable and that the reference to fee earner and the number of hours have been included only to demonstrate how the maximum allowance has been calculated.

4. **Increase to hourly and daily rates in each of the Determinations under review**

- 4.1 The hourly and daily rates in the *Legal Profession (Supreme Court) (Contentious Business) Determination 2016*, *Legal Profession (District Court Appeals) (Contentious Business) Determination 2016* and *Legal Profession (Supreme and District Court) (Criminal) Determination 2016* are as follows:

Fee earner	Maximum allowable Hourly and daily rates
Senior Practitioner (permitted to practice on his or her own account for 5 years or more) (SP) hourly rate	\$484
Junior Practitioner (permitted to practice on his or her own account for less than 5 years) (JP) hourly rate	\$384
Restricted Practitioner (RP) hourly rate	\$297
Clerk/paralegal (CPL) 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

- 4.2 It is submitted that the maximum hourly and daily rates in all of the Determinations under review should be increased as follows:

Fee Earner	Current Maximum	Proposed Maximum
Senior Practitioner	\$484	\$495 (\$11 increase)
Junior Practitioner	\$341	\$352 (\$11 increase)
Restricted Practitioner	\$297	\$297 (no increase)
Clerk	\$231	\$231 (no increase)
Counsel	\$396	\$418 (\$22 increase)
Senior Counsel	\$682	\$715 (\$33 increase)

- 4.3 The Law Society submits that the fee increases in relation to Senior Practitioners and Junior Practitioners are justified on the basis of the increases in seniority now required to attain that status. The proposed increases are fairly modest.
- 4.4 Previously, a Senior Practitioner and Junior Practitioner were required to have held a practising certificate for 5 and 2 years respectfully. The amendments to introduce the Restricted Practitioner category during the last review had the effect that:
- 4.4.1 a practitioner had to complete their 2 years of restricted practice to qualify as a Junior Practitioner, whereas previously they attained that status upon admission to practice; and
- 4.4.2 a practitioner does not 'graduate' to the status of a Senior Practitioner until 5 years after becoming a Junior Practitioner; the result being that the minimum amount of experience for a practitioner to be designated a Senior Practitioner has increased from 5 years to 7 years.
- 4.5 In relation to Counsel, the Law Society submits that maximum amounts should be increased to bring Counsel closer to the amounts charged by Senior Practitioners. The maximum recoverable in relation to Counsel is 81.8% of that recoverable by a Senior Practitioner. There is, it is submitted, no sound reason existing for such a gap remaining.
- 4.6 It is not uncommon for Senior Practitioners to practice on their own account. There is, it is submitted, no appreciable difference between the overhead costs of a Senior Practitioner who practices on their own account and those of Counsel, save for the reduced insurance premiums which is outside of the control of Counsel.
- 4.7 Practitioners acting as Counsel would almost invariably qualify as Senior Practitioners if they were practicing in the amalgam. In a State with a fused profession there is no justifiable reason why if a Senior Practitioner appears for one party and Counsel for the other that the party instructing the Senior Practitioner should recover more than the party for whom Counsel appears, particularly where they charge the same or similar hourly rates both exceeding the scale.
- 4.8 The increase to the maximum recoverable for Senior Counsel is intended to be a once-off increase to increase 'the gap' between Senior Counsel and the other categories. The increase can be justified on the basis of the significant experience both in number of years but also in the recognised eminence in law of Senior Counsel.

5. Proposed amendment in relation to deeds settling workers' compensation actions pursuant to section 92(f) of the *Workers' Compensation and Injury Management Act 1981 (WA)*

- 5.1 A claim under the *Workers Compensation and Injury Management Act 1981 (WA)* (Act) can be settled by a deed pursuant to section 92(f) of the Act. This usually occurs in the following circumstances:
- 5.1.1 where there is a denial of liability for the claim;
 - 5.1.2 where there is a potential common law claim resulting in a settlement that is greater than the statutory entitlements under the Act, meaning that a Memorandum of Agreement cannot be used;
 - 5.1.3 where there is a confidential settlement;
 - 5.1.4 where there are multiple injuries or secondary conditions over which liability is denied/not accepted;
 - 5.1.5 where weekly payments have been made for a period of less than 6 months; and
 - 5.1.6 where a worker/plaintiff brings an action against a third party for an injury occurring in the course of employment but which was caused by the third party.
- 5.2 The process of a section 92(f) deed also requires a writ of summons to be filed by the putative plaintiff, a memorandum of appearance and a consent minute finalising the action in the District Court. These are usually filed contemporaneously.
- 5.3 The work involved in relation to a section 92(f) deed is about 5 to 10 hours but can involve more work, particularly where a common law claim is involved. It can be necessary for a worker to brief counsel to provide advice in relation to the quantum of a common law claim.
- 5.4 It is proposed that an item be added to the *Legal Profession (Supreme Court) (Contentious Business) Determination 2016*, namely:

Settlement of a claim pursuant to section 92(f) of the *Workers Compensation and Injury Management Act*. Allowance: 10 hours (SP).

6. Recommendations

6.1 Recommendation 1

There be no amendment in relation to claims brought under the *Family Provision Act 1972* (WA).

6.2 Recommendation 2

There be an amendment to clarify that the maximum amounts contained in the Determination are maximum amounts recoverable and that the maximum number of hours are not a limit on the number of hours that may be claimed and recovered, subject to the proviso that the maximum allowable does not exceed the amount specified in the Determination.

6.3 Recommendation 3

The allowances in relation to hourly and daily rates be as follows:

Fee earner	Maximum allowable Hourly and daily rates
Senior Practitioner (permitted to practice on his or her own account for 5 years or more) (SP) hourly rate	\$495
Junior Practitioner (permitted to practice on his or her own account for less than 5 years) (JP) hourly rate	\$395
Restricted Practitioner (RP) hourly rate	\$297
Clerk/paralegal (CPL) hourly rate	\$231
Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel:	
Counsel (C) hourly rate	\$418
daily rate	\$4,180
Senior Counsel (SC) hourly rate	\$715
daily rate	\$7,150

6.4 Recommendation 4

The following item be inserted:

<u>Settlement of a claim pursuant to section 92(f) of the <i>Workers Compensation and Injury Management Act</i></u>	10 hours	SP	4,950.00
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