

14 March 2024

Chair  
Legal Costs Committee  
Level 12 Golden Square  
32 St George's Terrace  
PERTH WA 6000

By email: [lcc@justice.wa.gov.au](mailto:lcc@justice.wa.gov.au)

Dear Chair

## **LEGAL PROFESSION UNIFORM LAW APPLICATION ACT 2022 – CONTENTIOUS BUSINESS DETERMINATIONS REVIEW**

I refer to the Legal Costs Committee's letter dated 15 November 2023 and on behalf of the Law Society of Western Australia, express our appreciation for the opportunity to provide input in relation to the Contentious Business Determinations review.

The Law Society has reviewed the following business determinations:

- Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2022;
- Legal Profession (Supreme and District Courts) (Criminal) Determination 2022;
- Legal Profession (Magistrates Court) (Civil) Determination 2022;
- Legal Profession (Magistrates Court) (Criminal) Determination 2022;
- Legal Profession (Official Prosecutions) (Accused's Costs) Determination 2022;
- Legal Profession (Family Court of Western Australia) Determination 2022;
- Legal Profession (Magistrates Court) (Family Law) Determination 2022; and
- Legal Profession (State Administrative Tribunal) Determination 2022.

The Law Society sets out its submissions below.

### **1) *Maximum hourly and daily rates***

For most law firms in Western Australia there is a substantial gap between the hourly rates charged to clients and those allowable under the relevant Determination (or 'scale'). That gap will continue to increase if scale rates remain unchanged.

The recent inflationary environment across the economy (particularly in service industries) is well documented. Inflation might be coming down (early indications only), but it is coming down from heights not seen for decades, and it is coming down slowly. The Reserve Bank of Australia (RBA) considers the risk of inflation remaining high or going up to remain significant. This cannot be overstated as an economic and business impact.<sup>1</sup> Hourly rates

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<sup>1</sup> <https://www.rba.gov.au/publications/smp/2024/feb/>

need to be adjusted upwards to take account not only of the past few years of inflation, but also the fact that inflation continues to rise on most if not all input costs.

Our Costs Committee has consulted with an informal group of approximately 20 legal practices of varying size and areas of practice, the vast majority of which indicate that charge out rates will be raised this year in all, and in some by quite significant amounts. Most of these law firms increased their charge out rates significantly last year as well, many in the order of 10% or more.

Wages across all mid to senior lawyer levels have increased and there is ongoing wage pressure for lawyers in Western Australia, both to attract and to retain. Hays Salary Guide 23/24 reports that 88% of legal employers surveyed intended to increase salaries, with 65% set to boost them by at least 3%. This trend is driven by four main factors: the skills gap crisis; the ripple effect of declining real wages; pay transparency, and greater confidence in employees to negotiate for their salary.<sup>2</sup>

The Australian Bureau of Statistics indicates that, in Western Australia, over the last year, the Wage Price Index (WPI) increase was:

- Across public and private sectors: 4.6%.
- Across private sector: 4.4%
- Across public sector: 4.7%

Other operating expenses of legal practices have also increased. Since the last scale revision, the superannuation guarantee rate has increased by 1% and currently sits at 11% with further incremental increases to occur in the near future.

Enhanced legislative employee entitlements, and changing workplace norms and employee expectations following the COVID-19 pandemic, as well as a competitive job market, have resulted in many law firms providing additional employee benefits in order to attract and retain staff, including:

- paid parental leave;
- paid extended special leave for other significant life events,
- bringing forward or increasing access to long service leave;
- flexible work arrangements;
- co-working;
- working from home and hybrid arrangements;
- enhanced staff amenities;
- transport and parking bays; and
- Increased usage of electronic devices including tablets and mobile phones.

These changing workplace norms have also resulted in substantial on-costs including payroll tax and fringe benefits tax.

Insurance premiums have significantly increased – workers compensation, building insurance, professional indemnity, and owner insurances like life and trauma coverage. All of these are outpacing inflation, by more than 15% annually for the past few years. According to the March 2022 APRA General Insurance Performance Statistics, the average premium for Professional Indemnity has increased by 76% between March 2019 and March 2022.

Cyber-crime is a risk to legal practices of all sizes as lawyers and the legal profession are increasingly the targets of cyber-criminals. It is essential that legal practices have strategies,

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<sup>2</sup> <https://www.hays.com.au/salary-guide>

policies and processes to boost cyber-security as part of their practice management activities. This is significantly increasing Information Technology (I.T.) and cybersecurity costs, with the implementation of enhanced cyber security measures including device encryption software, re-training and enforcement of I.T. security behaviours, vulnerability testing and enhanced monitoring.

Cyber security experts advise that legal practices are in the same high-risk category as hospitals, telecommunications service providers, government departments and the military. There are already lawsuits against service providers for not having the latest industry benchmark cybersecurity. Such claims are often not insured against.

While there is some downward pressure on commercial rents, the majority of legal practices have long-term lease arrangements, and are subject to annual rent increases.

**Recommendation 1: Increase the maximum hourly and daily rates to reflect the increase in the Wages Price Index.**

**2) *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2022***

a) Table B, Item 10(b) - Attending on Judgment in Chambers

It is unnecessary to specify \$506 in the \$ column given that Table A of the scale specifies the maximum hourly rates for various fee earners. Further, it may create the impression that \$506 is intended to be a scale limit for this item.

**Recommendation 2: Delete the sum ‘\$506’ in the \$ column of Table B, Item 10(b) Attending on Judgment in Chambers.**

b) Table B, Item 11 – Motion and Originating Process

For consistency with other scale items such as items 10, 22 and 25, a specific allowance for attending on a reserved judgment should be included in item 11.

**Recommendation 3: A specific allowance for attending on a reserved judgment be included in Item 11, per hour at the Senior Practice rate.**

c) Table B, Item 16 (b) and (d) refer to an offer of compromise made specifically under Order 24A.

It is submitted that these allowances should be extended to include Calderbank offers. While item 16(b) and (d) may by analogy extend to Calderbank offers, the position should be made plain.

**Recommendation 4: The allowances in Table B, Item 16 (b) and (d) be extended to include Calderbank offers.**

d) Table B, Item 25 (f) – Preparation of Case for Appeal.

It has been observed that the allowance of 10 hours does not provide reasonable remuneration for the work reasonably required by solicitors to prepare a case for appeal. This work will often include briefing counsel, advising the client, and conferral with the client, Court and other legal representatives. It is submitted that the allowance does not sufficiently remunerate the solicitor for undertaking these tasks.

**Recommendation 5: The allowance under Table B, Item 25(f) - Preparation of Case for Appeal – be increased from 10 hours to 20 hours.**

- e) Table B, Disbursements item 36 misstates the tests for recoverability of disbursements on a party and party basis and solicitor and own client basis.

In item 36(a) the phrase ‘as between a law practice and client’ should be amended to ‘as between party and party’ and in item 36(b) the phrase ‘as between party and party’ should be amended to ‘as between a law practice and client’.

**Recommendation 6: Table B, Disbursements item 36 (a) the phrase ‘as between a law practice and client’ should be amended to ‘as between party and party’ and in item 36(b) the phrase ‘as between party and party’ should be amended to ‘as between a law practice and client’.**

**3) *Legal Profession (Family Court of Western Australia) Determination 2022*  
*Legal Profession (Magistrates Court) (Family Law) Determination 2022***

It has been observed that these Determinations do not apply to the legal remuneration of legal practitioners on a solicitor and own client basis in relation to appeals to the Federal Circuit and Family Court of Australia from the Family Court of Western Australia or Magistrates Court of WA, when a Magistrate is exercising powers under the *Family Court Act 1997 (WA)*. Nor does such work appear to be covered by any other costs scale.

Given the requirement on law practices to disclose whether a costs determination applies under the *Legal Profession Uniform Law (WA)* and the significant consequences that may flow from non-compliance with the disclosure obligations, this matter requires further consideration.

**Recommendation 7: The Legal Costs Committee clarify whether the *Legal Profession (Family Court of Western Australia) Determination 2022* and the *Legal Profession (Magistrates Court) (Family Law) Determination 2022* apply to the legal remuneration of legal practitioners on a solicitor and own client basis in relation to appeals to the Federal Circuit and Family Court of Australia from the Family Court of Western Australia or Magistrates Court of WA, when a Magistrate is exercising powers under the *Family Court Act 1997 (WA)*.**

Consideration should also be given to including a specific allowance in these Determinations for preparing binding financial agreements (BFA). While drafting a BFA requires an understanding of the family law legislation it is ‘non-contentious work’. Where a dispute arises in respect of the application of a BFA agreement, it will become contentious work to which the scales apply. Because the preparation of a BFA is ‘non-contentious work’ the applicable legal costs determination is the *Legal Profession (Non-Contentious) Business Determination*. It is not apparent whether there was a clear intention for this to be the case. However, it does produce the unusual situation where a family lawyer engaged in non-contentious work will be remunerated differently to a family lawyer engaged in contentious work.

**Recommendation 8: Include a specific allowance in these Determinations for preparing binding financial agreements that aligns with the *Legal Profession (Non-Contentious) Business Determination*.**

**4) Other matters: *The Workers’ Compensation (Legal Profession and Registered Agents) Costs Determination 2018***

The Law Society has previously expressed and remains of the view that a separate Costs Committee for Workers Compensation Determinations should not exist. Review of these Determinations should be the responsibility of the Legal Costs Committee, with membership including at least one practitioner with a significant understanding of this practice area.

**Recommendation 9:**

**(a) The Workers Compensation Costs Committee be disbanded.**

**(b) The Legal Costs Committee include at least one practitioner with a significant understanding of workers compensation law.**

The Determination fails to cover activities such as pre-arbitration conferences and has not been updated since 2018.

**Recommendation 10: The Determination be updated to include pre-arbitration conferences.**

If you have any queries please contact Susie Moir, General Manager Advocacy and Professional Development on [smoir@lawsocietywa.asn.au](mailto:smoir@lawsocietywa.asn.au) or telephone 9324 8646.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Paula Wilkinson', written in a cursive style.

Paula Wilkinson  
**President**