



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 83**

**Payment of Witnesses  
in Civil Proceedings**

**REPORT**

**JULY 1989**

The Law Reform Commission of Western Australia was established by the Law Reform Commission Act 1972.

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This report was prepared with the special assistance of Ms Katy Ashforth, Barrister and Solicitor of the Supreme Court of Western Australia. The Commission is much indebted to Ms Ashforth for her valuable work on the reference.

To:

**THE HON J M BERINSON QC MLC**

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on payment of witnesses in civil proceedings.

M E RAYNER  
*Chairman*

25 July 1989

# Contents

Paragraph

## CHAPTER 1 - INTRODUCTION

- |                       |     |
|-----------------------|-----|
| 1. Terms of reference | 1.1 |
| 2. Discussion Paper   | 1.3 |

## CHAPTER 2 - THE PRESENT POSITION

- |   |      |
|---|------|
| 1. Introduction   | 2.1  |
| 2. Compensation for lost time in civil court proceedings  | 2.4  |
| 3. Expenses in civil court proceedings  | 2.9  |
| 4. Expense or loss incurred in complying with a subpoena to produce any document or object in civil court proceedings | 2.11 |
| 5. Other non-criminal legal proceedings   | 2.12 |
| (a) The Workers' Compensation Board   | 2.13 |
| (b) The Industrial Relations Commission   | 2.14 |
| (c) The Liquor Licensing Court  | 2.15 |
| (d) The Warden's Court  | 2.18 |
| (e) The Family Court of Western Australia   | 2.21 |
| (f) Coroners' inquests  | 2.25 |
| (g) Royal Commissions   | 2.26 |
| (h) The Small Claims Tribunal   | 2.28 |
| (i) Land Valuation Tribunals  | 2.29 |
| (j) The Town Planning Appeal Tribunal   | 2.30 |
| (k) The Equal Opportunity Tribunal  | 2.32 |
| (l) The Commercial Tribunal   | 2.33 |
| (m) The supervisory boards  | 2.34 |

## CHAPTER 3 - CONSIDERATION OF SUGGESTED CHANGES

- |                              |      |
|------------------------------|------|
| 1. Introduction              | 3.1  |
| 2. A right to compensation   | 3.2  |
| 3. Compensation of employers | 3.9  |
| 4. Statutory tribunals       | 3.17 |
| 5. Conclusion                | 3.23 |

## APPENDICES

- |   |  |
|---|--|
| I Names of those who commented on Discussion Paper  |  |
| II Effect of the Acts Amendment (Legal Practitioners, Costs & Taxation) Act 1987  |  |
| III List of State Government Departments and Agencies surveyed in relation to employees being required as witnesses in non-criminal legal proceedings |  |

# **Chapter 1**

## **INTRODUCTION**

### **1. TERMS OF REFERENCE**

1.1 The Commission was originally asked to undertake a project on the payment of witnesses in civil proceedings because of the situation that arose where State public servants were called as witnesses in these proceedings. As these public servants are paid by their employer while attending court they do not receive an allowance from a party to the proceedings for attending. The result is that State government departments or agencies bear the costs of this aspect of the proceedings rather than one of the parties. A similar position arises with private employers where staff are paid by their employer when they attend a hearing. Comments were invited and received from a number of individuals and organisations on the issues that needed to be examined and any difficulties that had been encountered in practice. These comments indicated that a wider inquiry was justified and the terms of reference resulted.

1.2 The Commission's terms of reference are:

"To consider and report on the law and practice relating to the payment of compensation in respect of persons who appear, or who are required or undertake to appear, as witnesses in, or who are required or undertake to produce any document or thing in, a civil or other legal proceeding but excluding criminal proceedings."

### **2. DISCUSSION PAPER**

1.3 In February 1988 the Commission issued a Discussion Paper. In that paper the Commission discussed the existing law and practice and tentatively proposed the creation of a statutory entitlement to compensation for losses suffered or expenses incurred in attending as a witness or in producing a document, record or object. Other tentative proposals were also made including that employers should be entitled to reimbursement of salaries or wages paid to employees for time spent attending civil proceedings and that, in all civil proceedings,

persons summoned to produce documents at a hearing should be entitled to their expenses of searching out, collating and copying the documents.

1.4 The names of those who commented on the Discussion Paper are contained in Appendix I and, as will be noted, most of the commentators supported the proposals put forward in that paper. However, after further research and for reasons given in this Report, the Commission has decided not to recommend that the changes proposed in the Discussion Paper, or any major changes at all, be made to the law relating to the payment of witnesses.<sup>1</sup>

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<sup>1</sup> Since the Discussion Paper was issued the *Acts Amendment (Legal Practitioners, Costs and Taxation) Act 1987* has been proclaimed. (Proclamation published in the *Government Gazette* of 12 February 1988.) Amendments made by this Act to the *Supreme Court Act 1935*, the *District Court Act 1969*, the *Local Courts Act 1904* and a number of other Acts have given rise to certain anomalies in the rule-making provisions of these Acts as far as allowances to witnesses are concerned. This issue is examined in Appendix II.

## **Chapter 2**

### **THE PRESENT POSITION**

#### **1. INTRODUCTION**

2.1 A person may undertake or be required to appear as a witness or to produce documents or objects in civil proceedings of the Supreme, District and Local Courts and Courts of Petty Sessions.<sup>1</sup> A person may also undertake or be required to appear as a witness or produce documents or objects at Royal Commissions, coronial inquiries, investigations of the Parliamentary Commissioner for Administrative Investigations, commercial arbitrations and proceedings of tribunals such as the Town Planning Appeal Tribunal and supervisory boards such as the Real Estate and Business Agents Supervisory Board.

2.2 In attending such proceedings to give evidence or to produce a document, record or object loss may be suffered as a result of -

- (1) the time spent in attending the court to give evidence or to produce a document, record or object or, in the case of an expert witness, in qualifying to give evidence;<sup>2</sup> and
- (2) the expense of going to and from the court or of obtaining sustenance during the time he or she is required to remain at the court.

2.3 A business, such as a bank, may also incur expenses, for example, in searching out, collating or copying documents required for a proceeding. The circumstances in which compensation is payable for these losses at present are discussed below.

#### **2. COMPENSATION FOR LOST TIME IN CIVIL COURT PROCEEDINGS**

2.4 Before statutory rules applied, the general rule at common law was that a person who had been subpoenaed to give evidence had no right to compensation for lost time and could

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<sup>1</sup> Although Courts of Petty Sessions deal predominantly with simple offences they also hear civil matters, for example, disputes as to dividing fences.

<sup>2</sup> That is, reading up or otherwise mastering the details of the particular case on which he or she is to give evidence.

not enforce any subsequent agreement with a party to the proceedings for the payment of a sum of money as compensation for simply attending.<sup>3</sup> As the person subpoenaed is under a legal duty to attend there was said to be no consideration for any promise to pay a fee for attendance. Agreements to pay a fee to a person willing to attend voluntarily (without a subpoena) can be made but while such agreements may be enforceable between the witness and the party calling that witness, without statutory authority there is no basis upon which such a fee can be recovered from another party to proceedings.

2.5 In Western Australia, as in other jurisdictions, there is now statutory authority for the payment of allowances to witnesses in the Supreme Court, the District Court and Local Courts. In these courts, a witness is entitled to payment of an allowance for loss of time from the person on whose behalf he or she was called, according to the scales prescribed by the rules of court.<sup>4</sup>

2.6 These scales prescribe a maximum daily fee based on whether the witness is a person carrying on a profession or business as a principal or otherwise.<sup>5</sup> Where costs are to be taxed<sup>6</sup> the amount recoverable against the party liable to pay those costs is fixed by the taxing officer and provisions governing the application of scales of allowances provide that in fixing the allowance the Taxing Officer may<sup>7</sup> have regard to the amount of salary or wages (if any) actually lost by the witness. Also allowable under the rules is such amount as has been reasonably incurred and paid to a witness for qualifying to give skilled evidence and there is provision for the allowances to be increased in the discretion of the Taxing Officer in the case of a person giving evidence as an expert. Except by special order of the trial judge or trial magistrate, however, an allowance may not be made to an expert witness for his attendance at

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<sup>3</sup> *Collins v Godefroy* (1831) 1 B and Ad 950, 956-957; 109 ER 1040. There were exceptions in the case of professional witnesses such as doctors, and in the case of seafaring witnesses. These exceptions were developed in cases in England prior to 1852: *Bank of New South Wales v Withers* (1981) 35 ALR 21, 34 and 37. Scales of fees for witnesses were first promulgated in this year pursuant to the *Common Law Procedure Act 1852* (UK): id 37. It is not clear whether these exceptions extend to fees involved in a witness qualifying to give skilled or expert evidence.

<sup>4</sup> *Rules of the Supreme Court* O 66 r 11 (4). (These rules also apply in the District Court: *District Court of Western Australia Act 1969* s 87); *Local Court Rules* O 37 r 38; *Bank of New South Wales v Withers* (1981) 35 ALR 21, 37.

<sup>5</sup> Currently the fees are \$147 and \$98 respectively in the Supreme and District Courts and \$100 and \$60 in local courts. In local courts, for person under 18 years of age in receipt of salary or wages the maximum fee is \$45 per day.

<sup>6</sup> Taxation of costs is the process whereby the taxing officer of the court examines and allows or disallows the sums claimed by one party in an action from another or by solicitors from their clients.

<sup>7</sup> The discretionary "may" is used in the *Rules of the Supreme Court* but the *Local Court Rules* provide that the Taxing Officer "shall" have regard to the amount of salary or wages actually lost.



court in assisting or advising counsel or the solicitor for a party during a trial or hearing, as opposed to attendance for the purpose of actually giving evidence.

2.7 Fees allowed under the scales of costs are payable whether a witness attends voluntarily or in response to a subpoena or summons<sup>8</sup> and payment does not necessarily depend on whether the witness is actually examined if in all the circumstances of the case the attendance of that witness was reasonably necessary and there was good reason why he or she was not in fact called to give evidence.

2.8 The Law Society of Western Australia and the Western Australian Branch of the Australian Medical Association have agreed on a recommended basis of remuneration of medical practitioners who are required to attend court. This agreement also provides for a late cancellation fee where less than 24 hours' notice is given that the practitioner will not be required and for travel and accommodation expenses. Other professional bodies could make similar agreements, and any individual witness could then adopt the recommended fee in negotiations with the party calling them. Even now there is nothing to prevent any witness attending voluntarily from negotiating what they consider to be an appropriate fee and many expert and professional witnesses do in fact charge an hourly rate based on their normal professional fees. Of course, any such fee in excess of the prescribed maximum, or in the case of expert witnesses, in excess of such greater amount as the taxing officer allows, remains the responsibility of the party calling the witness and cannot be recovered from another party to the proceedings.

### **3. EXPENSES IN CIVIL COURT PROCEEDINGS**

2.9 Before statutory rules applied, at common law, a person subpoenaed to attend a hearing, whether to produce documents or otherwise, was entitled to an adequate indemnity for the expense of going to and from the place at which the hearing was held and for sustenance during the time the person was required to remain there. These expenses could be recovered in an action based upon an implied contract from the party<sup>9</sup> who caused the subpoena to be served. The person could refuse to give evidence until he or she was given a proper assurance that the expenses would be met.<sup>10</sup>

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<sup>8</sup> See *Local Court Rules* O 37 r 41.

<sup>9</sup> Not usually the party's solicitor.

<sup>10</sup> *Bank of New South Wales v Withers* (1981) 35 ALR 21, 37.

2.10 Expenses for travel and sustenance are now allowed under the *Rules of the Supreme Court* and the *Local Court Rules*. The *Rules of the Supreme Court*<sup>11</sup> provide for payment of reasonable travelling expenses actually paid, and a reasonable amount for maintenance or sustenance and the *Local Court Rules* provide for payment in respect of travelling expenses of the sums actually and reasonably paid by the witness and for the payment of a sum not exceeding \$50 where a witness is required to remain away from home overnight.<sup>12</sup>

#### **4. EXPENSE OR LOSS INCURRED IN COMPLYING WITH A SUBPOENA TO PRODUCE ANY DOCUMENT OR OBJECT IN CIVIL COURT PROCEEDINGS**

2.11 At common law, persons subpoenaed to produce documents at a hearing are not entitled to their expenses of searching out, collating and copying documents<sup>13</sup> but some such costs may be recovered in the Supreme and District Courts by virtue of Order 36 rule 19 of the *Rules of the Supreme Court*. Pursuant to this rule, the court may fix an amount, or order that it be taxed, for the cost of complying with a subpoena for the production of any document or object, where the person subpoenaed is not a party to the proceedings, if substantial expense or loss is incurred in complying with the subpoena. A similar rule could be made under the *Local Courts Act 1904*.

#### **5. OTHER NON-CRIMINAL LEGAL PROCEEDINGS**

2.12 In this report, for ease of reference, the Commission refers to proceedings other than proceedings in the Supreme, District and Local Courts as proceedings before a "statutory tribunal".<sup>14</sup> The situation is quite different as far as these are concerned. These tribunals are established by Acts of Parliament for specific purposes. Their powers are limited by those Acts and their procedures are prescribed, with varying degrees of detail, by those Acts and by subsidiary legislation made under those Acts. The Commission's research has revealed that of the various statutes establishing and empowering these tribunals, while not all refer to witness fees, expenses, allowances or costs, as such, all make some provision as to the "costs" of

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<sup>11</sup> Fourth Schedule item 30 (3).

<sup>12</sup> O 37 r 39 and Part III of the Appendix, para (e).

<sup>13</sup> *Bank of New South Wales v Withers* (1981) 35 ALR 21, 39. In this case the Bank received subpoenas, issued on behalf of Withers, to produce documents at a hearing by the Federal Court of Australia. The proceedings involved Withers and other parties but not the Bank. The Bank sought an order that Withers pay its expenses of searching for, and copying, documents. The application was dismissed.

<sup>14</sup> This term includes, therefore, boards, courts, commissions and tribunals so called.

proceedings. The following paragraphs examine some of the more prominent tribunals established under state law.<sup>15</sup>

**(a) The Workers' Compensation Board**

2.13 The *Workers' Compensation and Assistance Act 1981* authorises rules with reference to allowances to witnesses and the *Workers' Compensation Board Rules 1982* prescribe these allowances by reference to the *Rules of the Supreme Court*.<sup>16</sup>

**(b) The Industrial Relations Commission**

2.14 Allowances to witnesses are also authorised by the *Industrial Relations Act 1979*. Section 27(1)(c) of that Act provides that the Commission may, in relation to any matter before it "order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order". Where a person is summoned to appear that person is entitled to receive, from the party at whose instance he was summoned, an allowance for expenses as determined by the Commission<sup>17</sup> and this cost could be recovered from another party on an order under section 27(1)(c). In practice, however, most of the witnesses appearing before the Commission are paid employees of the parties involved in the dispute and each party bears their own cost. Costs may also be awarded in proceedings before Industrial Magistrates (section 83(2)) and before the Industrial Arbitration Court (section 86(2)). Costs, including allowances to witnesses, in proceedings before the Commission, the Industrial Arbitration Court and an Industrial Magistrate may be prescribed by regulation pursuant to section 113 of the Act but no scale of allowances has been so prescribed. (Regulations do provide for payment by the Tribunal or Board of certain out of pocket expenses of appellants, respondents and witnesses in an appeal by a teacher against a promotion decision to the Government School Teachers Tribunal and in proceedings before the Promotions Appeal Board. The Tribunal and the Board are two of the constituent authorities of the Commission.)

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<sup>15</sup> There are others which are not specifically dealt with. Courts and tribunals established under laws of the Commonwealth are outside the Commission's ambit.

<sup>16</sup> These provisions are mentioned in Appendix II paras 7 and 8.

<sup>17</sup> S 33(1)(b).

**(c) The Liquor Licensing Court**

2.15 Under section 21(1) of the *Liquor Licensing Act 1988* the costs of and incidental to all proceedings to be determined by the Liquor Licensing Court are at the discretion of the Court and the Court has power to determine by whom, and in what manner and to what extent costs are to be paid.<sup>18</sup> The Act provides, in section 175(1)(c), that regulations may be made "for or with respect to court fees and the expenses allowable to witnesses" and under section 22, Rules of Court may be made by the Liquor Licensing Court Judge regulating the practice and procedure of the Court and (subject to the regulations) as to the costs and charges payable in relation to proceedings under the Act.

2.16 Rule 15 of the *Liquor Licensing Court Rules 1989* provides that in the absence of any specific provision and at the discretion of the Court or Registrar and subject to section 16 of the Act, the *Rules of the Supreme Court* may apply to matters of practice and procedure. But no rules have been made as to costs payable and no regulations have been made for or with respect to expenses allowable to witnesses.

2.17 The Commission understands that in practice, in proceedings before the Liquor Licensing Court, in the normal course of events the question of costs is not considered by the Court. Parties bear their own costs, including witness fees if any, or come to an agreement between themselves. The Commission believes that since the *Liquor Licensing Act 1988* came into operation (repealing the *Liquor Act 1970*) the question of costs has been raised in the Court only once, and on that occasion did not involve a question of allowances to witnesses.<sup>19</sup>

**(d) The Warden's Court**

2.18 Section 134(2) of the *Mining Act 1978* provides that the costs of all proceedings in the Warden's Court under that Act "shall be in the discretion of the warden and the amount thereof may be determined by the warden or taxed, as the warden may direct but an order for the payment of the costs of another person shall not be made against an applicant or a person

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<sup>18</sup> S 21(3) provides that, subject to the Act, the Liquor Licensing Court Judge has the same power in relation to the payment of costs by any person as a Judge of a Supreme Court has.

<sup>19</sup> The Director of Liquor Licensing, in proceedings determined by him as the Licensing Authority, does not have power to award costs (s 21(6)).

making an objection unless the warden is satisfied that the application or objection so made was frivolous or vexatious." This provision may be slightly misleading. The proviso in relation to applicants and persons making an objection, which was added to section 134(2) in 1985, is a reference to applicants for, and persons objecting to, the grant or forfeiture of a mining tenement under Part IV of the Act. The warden's function in this regard may be seen as administrative in nature when contrasted with the judicial role of a Warden's Court in such actions, suits and other proceedings as are specified in section 132(1) of the Act (Part VIII). Prior to the 1985 amendment there was no provision for orders as to costs in relation to mining tenement applications and the proviso to section 134(2) might have been more appropriately placed in Part IV of the Act.

2.19 Under section 162(2)(r) regulations may regulate allowances to witnesses in Warden's Courts and regulation 127 of the *Mining Regulations 1981* provides that a witness subpoenaed to appear in the Warden's Court is entitled to allowances prescribed in the *Local Court Rules* (and is not bound to attend unless provided with conduct money).

2.20 The Commission understands that in practice, in proceedings in the Warden's Court under Part VIII of the Act, the warden will make an order as to costs in most cases in which an order is sought. Costs allowed pursuant to such an order, whether determined or taxed, may include witness fees where these are sought and allowable under the Local Court scale.

**(e) The Family Court of Western Australia**

2.21 Order 28, rule 9 of the *Family Law Rules*, made under the *Family Law Act 1975* of the Commonwealth, provides for the payment, to a person attending in obedience to a subpoena, of fees and travelling allowances according to the scale of fees and allowances payable to witnesses in the Supreme Court of the State or Territory in which the person is required to attend. These fees and allowances are payable by the party at whose request the subpoena was issued. Pursuant to orders 20, rule 17 and 28, rule 4, costs and expenses reasonably incurred in connection with the production of a document, as required by an order, or the production of any books, documents or things, as required by a subpoena, may also be payable if the court so orders.

2.22 Order 38, rule 17 provides that "an amount paid or to be paid by a solicitor for the attendance of a witness at a hearing of proceedings is a disbursement properly incurred for the proceedings if -

- (a) the attendance was reasonably required for the proceedings; and
- (b) the amount does not exceed the amount that would have been payable if the proceedings had been an action before the Supreme Court of the State or Territory in which the proceedings were heard."

2.23 By virtue of rule 9 of the *Family Court of Western Australia Rules 1988*, these rules apply in the Family Court of Western Australia and in courts of summary jurisdiction in the exercise of their non-federal jurisdiction under the *State Family Court Act 1975*. In proceedings under this Act, the general rule, under section 73A, is that each party bears their own costs but if the court is of the opinion that this is justified in the circumstances it may make such order as to costs and security for costs as it thinks just. In doing so, the court is required to have regard to certain specified considerations.

2.24 The Commission understands that in practice, witnesses appearing in the Family Court do not usually ask for payment for doing so but were they to, they could be paid in accordance with the Supreme Court Scale. As required by section 73A of the *Family Court Act 1975*, costs are rarely awarded against a party to proceedings under that Act but if in any case an order awarding costs was to be made it could include recovery of payments to a witness which were in line with order 38, rule 17 of the *Family Law Rules*.

**(f) Coroners' Inquests**

2.25 In inquests under the *Coroners Act 1920* payments to witnesses - and expert witnesses and interpreters - are governed by regulations made under section 119 (2) of the *Evidence Act 1906*.<sup>20</sup> These fees are not high,<sup>21</sup> are the same as those paid to witnesses for the prosecution in criminal trials, and notably, are not payable to State (or Commonwealth) public servants.

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<sup>20</sup> *Evidence (Witnesses' and Interpreters' Fees and Expenses) Regulations 1976*.

<sup>21</sup> The current maximum fee per day is \$75 with an additional \$15 for medical witnesses. Under reg 15 where the Minister is satisfied that in the circumstances of a particular case the amount of fees and expenses fixed is not appropriate he may fix such higher amount as he thinks reasonable and the amount of fees and expenses so fixed by the Minister is the amount payable under the regulations.

**(g) Royal Commissions**

2.26 The *Royal Commissions Act 1968* provides for payment of expenses to witnesses in section 23. This provides, in subsection (1), that "where a person appears as a witness before a Commission, the Treasurer of the State shall pay to that person a reasonable sum for the expenses of his attendance, certified by the Chairman in accordance with a scale which may be prescribed or, if a scale is not prescribed, such sum as the Chairman certifies as reasonable". Subsection (2) provides that the Consolidated Revenue Fund is, to the necessary extent, appropriated accordingly.

2.27 Some tribunals, such as the Equal Opportunity Tribunal, established under the *Equal Opportunity Act 1984*, have the powers, rights and privileges of a Royal Commission, as does the Ombudsman in conducting investigations under the *Parliamentary Commissioner Act 1971*. Consequently, if expenses were claimed by witnesses appearing before these tribunals, they could be certified and paid. In practice, however, expenses are rarely claimed.

**(h) The Small Claims Tribunal**

2.28 In the Small Claims Tribunal costs are only allowed to a party to a proceeding before a tribunal where "because of exceptional circumstances an injustice would be done" to that party if they were not allowed. Where they are allowed, costs may not exceed the prescribed amount of \$100.<sup>22</sup> In practice, the required "exceptional circumstances" rarely arise and therefore, costs are rarely awarded. No specific provision is made in relation to allowances to witnesses.

**(i) Land Valuation Tribunals**

2.29 A Land Valuation Tribunal, established under the *Land Valuation Tribunals Act 1978*, may, on an appeal to that Tribunal, award "such costs as it thinks fit".<sup>23</sup> Pursuant to regulation 11 of the *Land Valuation Tribunals Act Regulations 1979*, Land Valuation Tribunals adopt the procedure of a Local Court, as far as is appropriate<sup>24</sup> but the Commission

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<sup>22</sup> *Small Claims Tribunals Act 1974* s 35; *Small Claims Tribunals Act Regulations 1975* reg 6.

<sup>23</sup> S 33.

<sup>24</sup> There is reference to this in Appendix II at footnote 6.

understands that costs of any sort are not normally awarded. The Tribunals take the view that allowances to witnesses should not be awarded as they are not specifically authorised by the Act.

**(j) The Town Planning Appeal Tribunal**

2.30 In proceedings on an appeal to the Town Planning Appeal Tribunal under the *Town Planning and Development Act 1928*, the general rule is that each party to the appeal bears his or her own costs<sup>25</sup> although costs may be awarded against a party when that party has behaved unreasonably, vexatiously or frivolously or, if the Tribunal thinks fit, against a party who withdraws an appeal.

2.31 In practice, as in the Small Claims Tribunal, costs are rarely awarded and as far as allowances to witnesses are concerned, the Town Planning Appeal Tribunal takes the same view as the Land Valuation Tribunal and these are never claimed or awarded.

**(k) The Equal Opportunity Tribunal**

2.32 In the Equal Opportunity Tribunal, established under the *Equal Opportunity Act 1984*, the general rule is again that each party shall pay that party's own costs<sup>26</sup> but the Tribunal may make such order as to costs or security for costs as it thinks fit where it is of the opinion in a particular case that there are circumstances that justify it doing so. Costs have been awarded by this tribunal but witness fees have never been claimed.

**(l) The Commercial Tribunal**

2.33 In proceedings before the Commercial Tribunal, established under the *Commercial Tribunal Act 1984*, the Tribunal has power to make such order for costs as it thinks fit. There is no specific reference in the Act to allowances to witnesses and specific authority for regulations prescribing a scale of general costs for proceedings before the Tribunal has now been deleted.<sup>27</sup> The Commission understands that in practice, in most instances, each party to proceedings before the Tribunal bears that party's own costs. Applications for an award of

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<sup>25</sup> S 54C. The same applies on an appeal to the Minister.

<sup>26</sup> S 128.

<sup>27</sup> See Appendix II para 9.



costs in favour of a successful party are rarely made but where such an application is made the Tribunal will consider the application and make an order if it seems justified in all the circumstances of the case. Whether or not an order is made will depend on the type of proceedings involved, the substance of both cases and the behaviour of the parties. Orders in relation to witness fees and expenses are sought even less frequently than orders for general costs. The Commission understands that such orders have been sought only three times, with respect to less than ten witnesses, since the Tribunal commenced operation. When such an application is made, the Tribunal will hear submissions on the amounts claimed and if minded to make an order, will fix the amount to be allowed at what it considers reasonable.

**(m) The supervisory boards**

2.34 Under the various Acts establishing what may be called the supervisory boards<sup>28</sup> these boards have power, upon determination of any proceedings before them, to make such orders for costs as they consider just and reasonable.<sup>29</sup> Regulations prescribing scales of costs for proceedings before these boards are no longer specifically authorised by the relevant Acts<sup>30</sup> but no scales had been prescribed when the power did exist.

2.35 The Commission understands that in practice, these boards are rarely asked to, and rarely use, the power to award costs. Most inquiries before these boards are raised, not by members of the public, but by the Department of Consumer Affairs and costs are never awarded to the Department although on odd occasions costs have been allowed to agents or licensees, the subject of an inquiry. Generally, witness fees are not paid or claimed but where a witness called by the Department incurs travel or accommodation expenses these are met by the Department without the involvement of the boards.

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<sup>28</sup> Such as the Finance Brokers Supervisory Board, the Land Valuers Licensing Board, the Real Estate and Business Agents Supervisory Board, and the Settlement Agents Supervisory Board.

<sup>29</sup> *Finance Brokers Control Act 1975 s 21; Land Valuers Licensing Act 1978 s 14; Real Estate and Business Agents Act 1978 s 21; Settlement Agents Act 1981 s 21.*

<sup>30</sup> See Appendix II para 9.

## **Chapter 3**

### **CONSIDERATION OF SUGGESTED CHANGES**

#### **1. INTRODUCTION**

3.1 In its discussion paper the Commission tentatively proposed that witnesses in all civil proceedings<sup>1</sup> should be entitled to compensation for losses suffered and expenses incurred in attending as a witness and that this entitlement should be set out in generally applicable legislation to replace the existing common law and statutory provisions. This chapter looks at a number of issues relating to the payment of witnesses in civil court and other non-criminal legal proceedings as the system operates at present and as it might be expected to operate under such generally applicable legislation as was proposed in the discussion paper.

#### **2. A RIGHT TO COMPENSATION**

3.2 If witnesses could not receive compensation for lost time or expenses it would mean that they would have to bear any loss involved rather than the parties to the proceedings, proceedings which generally involve a private contest between the parties<sup>2</sup> in which the loser bears the costs involved. This could be unfair to witnesses and it could undermine the effectiveness of civil proceedings as some people would be uncooperative and less than forthcoming because of a sense of grievance at having to give up time to attend court. Witnesses on questions of fact might not come forward, thus possibly depriving the court of their account of the events concerned and expert witnesses might not be prepared to undertake work required prior to a trial or might be less than conscientious in their efforts.

3.3 The present situation, however, is not one in which witnesses do go uncompensated. As has been noted, in the three civil courts (the Local, the District and the Supreme Courts) as well as in some statutory tribunals, provision is already made for some payment to witnesses. And witnesses attending voluntarily can enter into arrangements with the party calling them.<sup>3</sup> It should also be noted that prosecution witnesses in criminal proceedings receive some

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<sup>1</sup> In the discussion paper the term "civil proceedings" was used to include all proceedings within the Commission's terms of reference.

<sup>2</sup> In some cases, such as Royal Commissions and some other tribunal hearings, there will be no parties, or inquiries will be instituted by a government department.

<sup>3</sup> See para 2.8 above.

compensation under regulations made pursuant to section 119 of the *Evidence Act 1906*<sup>4</sup> and that jurors, another group of citizens who participate in the justice system, are entitled to compensation for the performance of a civic duty.<sup>5</sup>

3.4 Since under the present law witnesses in civil court proceedings at least will usually be entitled to some compensation, the arguments for change advanced by most commentators on the Discussion Paper<sup>6</sup> appeared to hinge on three basic propositions:

- (1) that the method for fixing the amount to be paid should be such as to ensure a realistic compensation for losses and expenses in fact incurred, by expert or professional witnesses in particular, and should not just be a nominal or insufficient amount;
- (2) that employers, including the State Government as the employer of State public servants, should be entitled to compensation where they, and not their employees, incur a loss by reason of those employees being required to attend as witnesses; and
- (3) that legislation governing the payment of witness fees should be generally applicable to all courts and tribunals rather than, as currently, made on a case by case basis in relation to particular courts or tribunals.

3.5 Many of the commentators have a particular interest in the question, being professional associations whose members are called as witnesses from time to time or regularly. This is not to suggest that such commentators are motivated by self interest. On the contrary, the Commission believes that few people would disagree with the proposition

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<sup>4</sup> *Evidence (Witnesses' and Interpreters' Fees and Expenses) Regulations 1976.*

<sup>5</sup> *Juries Act 1957 s 62(3); Juries (Allowances to Jurors) Regulations.* Jurors are entitled to a daily attendance fee of \$10, \$15 or \$20 depending on length of attendance. Where a juror satisfies the summoning officer that he has incurred a loss greater than this the summoning officer may allow payment of the actual loss incurred - not exceeding \$75 per day (Reg 2(1)). Travel expenses are also payable. Under reg 8, "in extraordinary circumstances such remuneration may be allowed as shall be decided by the Attorney General after taking the circumstances into consideration".

<sup>6</sup> A notable exception was Sir Clifford Grant, Chief Stipendiary Magistrate. Sir Clifford favoured the approach taken by the Commission in this report and commented that: "The over-riding consideration is to keep down the cost of civil litigation (which is already prejudicing litigants) by praying in aid the common law doctrine that there is an obligation on the part of all members of the community to assist in the due administration of justice". A number of other commentators also favoured particular aspects of the approach now taken by the Commission.

that a person should not be put to a substantial financial loss simply because they happen to be the possessor of information or expertise considered relevant to proceedings in which they have no interest. The Commission considers however, that arguments in favour of extending the presently existing right to be compensated are outweighed by the perceived need to make the legal system more, not less, accessible to the general public and not to exacerbate the problem of the high cost of legal proceedings.

3.6 The Commission is aware of a general public concern about the current cost of litigation and the fact that this cost is effectively preventing people of average means gaining access to the legal system. The perception is that large corporate litigants (such litigants as can afford to bear the increased costs of private agreements with witnesses) are not deterred or impeded from pursuing or defending their rights in the courts. Nor are those whose means are sufficiently limited and whose cases are sufficiently meritorious as to qualify for assistance from the Legal Aid Commission. For many people, however, the cost of legal proceedings is a deterrent or a prohibitive factor.

3.7 The Commission did not receive any submissions or response to its discussion paper from any private individuals and it has seen no evidence of a general public opinion calling for a change in the law relating to the payment of witness fees in civil proceedings. It does not consider that a change is justified at this time.

3.8 The Commission believes that problems relating to the amounts recoverable under the present rules, including what was perceived by commentators as insufficient guidance for taxing officers in fixing allowances to expert witnesses, are best addressed by appropriate amendments to the rules of court and the scales of costs currently applying. Amendments to the current rules could also be made to govern such things as:

- allowances to be payable where a witness is given no, or insufficient, notice that he or she will not be required;
- allowances to be payable in relation to evidence given by affidavit;
- interpreters' fees;

- the giving of clear advice to witnesses as to their obligations and rights in relation to their attendance; and
- the time for payment of allowances to witnesses which could include a system of payment into court of anticipated witness fees.

### **3. COMPENSATION OF EMPLOYERS**

3.9 Under the present law an allowance is payable to a witness for loss suffered by that witness in attending court. No allowance is payable to a person who suffers a loss by reason of another person's attendance at court. Consequently, if a person employed on a salary or wages is required to appear as a witness their employer cannot recover for any wages paid during the time they are at court.

3.10 The Commission did not receive any submissions on this issue from private employers as such<sup>7</sup> and is not aware that it is a matter of great concern to them. This is in keeping with the Commission's understanding of commercial realities. The Commission has no reason to believe that the number of working hours lost through employees' attendance at court would be as great as those lost through compassionate leave for such events as births and deaths in the family or through sick leave or dental appointments.

3.11 In the case of officers employed under the *Public Service Act*, Administrative Instruction 719<sup>8</sup> applies. This provides that where an officer is subpoenaed or called as a witness in an official capacity that officer will be granted leave with pay for such period as is required to enable him or her to give evidence.<sup>9</sup> Leave with pay may also be granted when an officer is required other than in an official capacity. In either case the officer is not entitled to retain any witness fee and must pay any such fee received into the Consolidated Revenue Fund. In practice, because wages are not lost, officers employed in the public service do not usually claim, and are not awarded, an allowance for attending.

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<sup>7</sup> Although the Association of Consulting Surveyors WA noted that as an "employer body" it was concerned with compensation of employers, and the same could no doubt be said of other associations which commented on the Discussion Paper.

<sup>8</sup> Made under the *Public Service Act 1978*.

<sup>9</sup> This instruction also applies when a public servant is required as juror and reg 10 of the *Juries (Allowances to Jurors) Regulations* provides that no fees, other than travelling expenses, shall be paid to State employees who are paid in the normal way while attending as jurors.

3.12 The right to be compensated to some extent for the performance of a civil duty is a right which, where it exists, resides in the witness personally. The Commission considers that the present situation whereby the right to compensation is confined to the direct participants in legal proceedings is in principle correct and that any extension to third parties, such as employers, could only be justified, if at all, if there were evidence of substantial and widespread loss to those parties.

3.13 A number of commentators on the Discussion Paper, including some Government departments, submitted that the State Government, as an employer, should be able to recover costs where an officer of the public service was required to attend court.<sup>10</sup> In view of this, and in view of the manner in which the reference of this matter to the Commission arose, the Commission decided it should survey a number of government departments in order to ascertain their views on the matter and whether there was in fact any widespread difficulty with the present situation. A list of those departments and agencies contacted appears in Appendix III.

3.14 With the exception of the Departments of Agriculture and Main Roads, none of the departments and agencies which responded indicated that employee absences due to attendance at court presented a problem either in terms of working hours lost or the lack of monetary compensation for any such lost working hours. Only nine<sup>11</sup> departments provided any statistics relating to the number of absences or the number of hours involved and in each case, as far as attendances at court which were not related to the department's functions were concerned, these were considered by the departments involved to be negligible or minimal and not a matter of any concern. In most departments, such statistics are not available. All departments confirmed that officers do not lose pay whether they are required in an official capacity or otherwise; that is, that where they are required in a private capacity they are granted leave with pay.<sup>12</sup>

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<sup>10</sup> In the main they did so as a matter of principle, rather than because the current situation was a cause of any great concern in practice.

<sup>11</sup> The WA Fire Brigades Board; the Public Trust Office; the Ministry of Consumer Affairs; the Registrar General's Office; the Valuer General's Office; the Government Employees Superannuation Board; the Department of Marine and Harbours; the Department of Mines; the Main Roads Department.

<sup>12</sup> SECWA advised that where an employee attends as a witness for a private party this is treated as leave without pay and the employee recovers for him/herself. SECWA employees are not State public servants under the *Public Service Act 1978*.

3.15 The Department of Agriculture drew the Commission's attention to the time taken up by officers qualifying to give evidence.<sup>13</sup> The Commission notes, however, that unless such qualification is regarded as part of an officer's duties, the department concerned is under no obligation to allow the officer to take time from his or her normal functions in order to qualify. In other words, the mere fact that an officer has been requested or subpoenaed to give evidence does not oblige the officer, or the department, to provide a party to proceedings with the services they might expect from a professional consultant, engaged for a fee.

3.16 The Commission concluded that there was no widespread difficulty with the present situation and that the contemplated extension of the right to compensation was not justified.

#### **4. STATUTORY TRIBUNALS**

3.17 In the Supreme, District and Local Courts, the costs of and incidental to all proceedings are in the discretion of the court or magistrate but the court or magistrate will generally order that the unsuccessful party to any action or matter recover his costs.<sup>14</sup>

3.18 In the various statutory tribunals considered this does not apply. Each tribunal has some discretion as to costs but as has been seen, where the exercise of this discretion is qualified or directed by the empowering statute, or in practice, the general rule is not usually that the successful party recovers their costs but rather, that each party bears their own costs and that only in unusual circumstances are costs awarded in favour of one party against another. In most cases witnesses are not paid a fee by the party calling them and if they are, this fee is not recovered from another party.

3.19 If witnesses in all such proceedings were given a statutory right to be compensated for their attendance this situation would be fundamentally altered. The Commission sees no justification for this and considers it undesirable and none of the commentators addressed this issue in particular when supporting the proposal of generally applicable legislation.

3.20 In establishing tribunals for particular purposes, to resolve particular types of disputes and grievances and to conduct inquiries into particular matters, court action in relation to

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<sup>13</sup> See Ch 2 footnote 2 above.

<sup>14</sup> *Rules of the Supreme Court* O 66 r 1; *Local Court Rules* O 37 r 1.

these things has been intentionally avoided.<sup>15</sup> While many of the proceedings before the various statutory tribunals are in fact adversarial in nature, in many cases the empowering statutes specifically provide that, to some extent at least, the rules of evidence applying in the courts of general jurisdiction are not binding on the tribunal which, may "inform itself on any matter it thinks fit" and is charged with acting "according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms".<sup>16</sup> Representation by a legal practitioner is not necessarily required, or even allowed, without leave or approval.<sup>17</sup>

3.21 The clear intention is to make proceedings before these tribunals less formal and more accessible than court proceedings and, in order to make them more accessible, to make them generally less costly than court proceedings and to remove as a deterrent factor to prospective parties the threat of two bills of costs to pay at the end. In the Commission's opinion, this is as it should be. If other aspects of the practice and procedure of the courts of general jurisdiction are not necessarily to apply in these tribunals the Commission does not believe that the rules as to costs generally, or witness fees in particular, should do so.

3.22 In the Commission's opinion, the various tribunals have power to authorise the payment of witness fees and expenses where claimed, in an appropriate case. The Commission is not satisfied that changes are required to the practices of these tribunals in relation to this. If any changes are required in the future, the Commission believes that the matter would be best dealt with by appropriate amendments to the relevant empowering statutes or subsidiary legislation.

## 5. CONCLUSION

3.23 The Commission considers that the present situation is satisfactory and recommends that no changes be made to the current law relating to the payment of witnesses. In particular, the Commission recommends that legislation applying to all witnesses in civil and other non-criminal legal proceedings not be introduced.

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<sup>15</sup> Of course, this may not be said in relation to the "courts" which are referred to as "statutory tribunals" in this report.

<sup>16</sup> Eg: *Equal Opportunity Act 1984* s 120; *Town Planning and Development Act 1928* s 52; *Land Valuation Tribunals Act 1978* s 28; and similarly, *Workers' Compensation and Assistance Act 1981* s 118(1).

<sup>17</sup> Eg: *Equal Opportunity Act 1984* s 112; *Town Planning and Development Act* s 49; *Small Claims Tribunals Act 1974* s 32.



M E RAYNER, *Chairman*

R L LE MIERE

C W OGILVIE

G SYROTA

J A THOMSON

25 July 1989

## **Appendix I**

### **NAMES OF THOSE WHO COMMENTED ON DISCUSSION PAPER**

Agriculture, Department of  
Association of Consulting Surveyors, Australia  
Australian Institute of Valuers  
Australian Medical Association (WA Branch)  
The Australian Veterinary Association (WA Division)  
Building Management Authority  
Country Women's Association of Western Australia (Inc.)  
Employment and Training, Department of  
Forensic Engineering Consultants  
Grant, Sir Clifford, Chief Stipendiary Magistrate  
Harding, M J, Registrar, District Court  
Health Department of Western Australia  
The Institute of Arbitrators in Australia  
The Institute of Private Clinical Psychologists of Australia  
Jackson H H, Judge, District Court of Western Australia  
Law Society of Western Australia  
Liquor Licensing Court  
State Planning Commission  
The Royal Australian Institute of Architects (WA Chapter)  
Valuer General  
Western Australian Police Department  
Workers' Compensation Board of Western Australia

**Appendix II**  
**EFFECT OF THE ACTS AMENDMENT (LEGAL PRACTITIONERS,  
COSTS & TAXATION) ACT 1987**

1. The principal purpose of this Act (the "Amendment Act") was to amend the *Legal Practitioners Act 1893* so as to establish the Legal Costs Committee. Under section 58W of that Act that Committee is charged with determining and reviewing the remuneration of legal practitioners in respect of non-contentious business and in respect of contentious business carried out in or for the purpose of proceedings before the Supreme Court, the District Court, a Local Court, a Court of Petty Sessions, the Workers' Compensation Board and such other court (which includes tribunals and arbitrators) as the Attorney General may by declaration declare to be a court to which that section applies.

2. The fees to be charged for contentious business carried out in the courts referred to were previously prescribed in scales of costs contained in the Fourth Schedule to the *Rules of the Supreme Court 1971*, which also apply to the District Court,<sup>1</sup> Part III of the Appendix to the *Local Court Rules 1961* and Appendix C to the *Workers' Compensation Board Rules 1982*. As well as governing the fees to be chargeable by legal practitioners in the various items of contentious business specified, those rules also governed the allowances to be paid to witnesses in the courts concerned.

**1. THE SUPREME, DISTRICT AND LOCAL COURTS**

3. Because practitioners' fees were henceforth to be set by determination of the Legal Costs Committee, rather than by Rules of Court, the relevant provisions of the *Supreme Court Act 1935*, the *District Court Act 1969*, and the *Local Courts Act 1904*, were amended by the *Amendment Act* to limit the power to prescribe the legal costs of proceedings.

4. Prior to the amendments made by the *Amendment Act*, section 167 of the *Supreme Court Act 1935* and section 88 of the *District Court Act 1969* provided that Rules of Court may be made, inter alia, for "regulating any matters relating to the costs of proceedings" in the Court. Those sections now provide that Rules of Court may be made "for regulating any

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<sup>1</sup> *District Court of Western Australia Act 1969* s 87.

matters relating to the costs of proceedings fixed by determinations under section 58W of the *Legal Practitioners Act 1893*". Since costs to be paid to witnesses are not costs "fixed by determinations under section 58W of the *Legal Practitioners Act*" it is arguable that the Supreme and District Courts no longer have power to prescribe or provide for matters relating to the payment of witness fees and consequently, that there is no longer a scale of witness fees in force.<sup>2</sup>

5. This situation appears to be the result of error in the drafting process, as does the amendment made to section 83 of the *Local Courts Act 1904*. That section now provides that "the fees to be allowed to legal practitioners for appearing or acting on behalf of a party to an action or other proceeding, and the expenses to be paid to witnesses, shall be fixed by determinations under section 58W of the *Legal Practitioners Act 1893*". Presumably, it should provide for the fees to be allowed to legal practitioners to be so fixed, but for the expenses to be paid to witnesses to be according to the scale prescribed by the Rules of Court. Here, however, the error would not seem to be of such import as section 158(1), which empowers the making of rules of court, has been appropriately amended to delete provision for rules to be made prescribing the fees to be allowed to legal practitioners, but leave provision for rules to be made prescribing the expenses to be paid to witnesses. Consequently, while there is an inconsistency, it is arguable that only so much of the Local Courts' scale of costs as prescribed the costs to be allowed to legal practitioners has been repealed by the *Amendment Act*, leaving in force the allowances to witnesses.

6. Allowances to witnesses prescribed by the Fourth Schedule to the *Rules of the Supreme Court* may remain in force by virtue of the reference, in section 167(1) of the *Supreme Court Act 1935*, to power to make rules under any enactment repealed by that Act. In any event, the Commission presumes that amendments will be made to clarify the situation and in this Report, a reference to the present or current law or situation in relation to the Supreme, District and Local Courts should be construed as a reference to this situation as it was before the proclamation of the *Amendment Act* and as it was presumably intended to remain.

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<sup>2</sup> S 66 of the *District Court of Western Australia Act 1969* has been appropriately amended so as to provide that while the fees to be paid to legal practitioners shall be according to a determination in force under s 58W of the *Legal Practitioners Act 1893*, "the expenses to be paid to witnesses shall be according to the scale, for the time being in force, in the Supreme Court". However, if the Supreme Court scale is not in force, this cannot operate.

## 2. THE WORKERS' COMPENSATION BOARD

7. Since costs in the Workers' Compensation Board are now to be set by determination under the *Legal Practitioners Act 1893*, amendments made to the *Workers' Compensation and Assistance Act 1981* by the *Amendment Act* delete the power of the Workers' Compensation Board to make rules fixing the scales of costs in respect of any action or proceeding before the Board and replace it with power simply to make rules "regulating matters relating to" these costs as "fixed by a determination under section 58W of the *Legal Practitioners Act 1893*".<sup>3</sup> However, the rule-making provisions of the *Workers' Compensation and Assistance Act 1981* deal separately with allowances to witnesses and power to make rules "with reference to" these remains.<sup>4</sup>

8. Prior to the proclamation of the *Amendment Act* the costs of proceedings in the Workers Compensation Board were prescribed by Appendix C to the *Workers' Compensation Board Rules 1982*. So much of these as related to legal practitioners' costs are now replaced by a determination under section 58W of the *Legal Practitioners Act 1893* but item 19, which prescribes allowances to witnesses by reference to item 30 of the Fourth Schedule to the *Rules of the Supreme Court* remains. It is arguable, however, that there is an inconsistency in the amendments made to the *Workers' Compensation and Assistance Act 1981* by the *Amendment Act* as section 129(3a), inserted by the *Amendment Act*, provides that "costs shall not be allowed unless they are in accordance with a determination in force under section 58W of the *Legal Practitioners Act 1893*" and allowances to witnesses have always been treated as a component part of the "costs" of proceedings.

## 3. OTHER TRIBUNALS

9. The *Amendment Act* also amended a number of Acts<sup>5</sup> so that power to make regulations prescribing the costs of proceedings before the various tribunals and boards established by those Acts was deleted or amended. Apparently it is intended that these tribunals will be the subject of a declaration by the Attorney General under section 58W(3) of

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<sup>3</sup> *Workers' Compensation and Assistance Act 1981* s 176(1)(ba).

<sup>4</sup> Id s 176(1)(h)(vi).

<sup>5</sup> Including the *Commercial Tribunal Act 1984*; the *Finance Brokers Control Act 1975*; the *Land Valuers Licensing Act 1978*; the *Land Valuation Tribunals Act 1978*; the *Mining Act 1978*; the *Real Estate and Business Agents Act 1978*; the *Settlement Agents Act 1981*.

the *Legal Practitioners Act 1893*, but as yet no declaration has been made. Until a declaration is made there can be no prescribed costs applying.

10. The fact is, however, that regulations had not been made prescribing scales of costs of proceedings before the bodies established by those Acts although in two instances prescribed costs were incorporated by reference to the *Local Court Rules*<sup>6</sup> and in one instance solicitor-client costs were incorporated by reference to the *Rules of the Supreme Court*.<sup>7</sup>

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<sup>6</sup> *Mining Regulations 1981* reg 127; *Land Valuation Tribunals Regulations 1979* reg 11. As power under the *Land Valuation Tribunals Act 1978* to make regulations prescribing a scale of costs for proceedings before a tribunal was deleted by the amendment Act it is arguable that this regulation can no longer extend to incorporate costs, including witness fees, prescribed by the *Local Court Rules*.

<sup>7</sup> *Commercial Tribunal Regulations 1986* reg 11. Since the *Amendment Act*, this regulation is no longer specifically authorised by the *Commercial Tribunal Act 1984*, but dealing only with legal practitioners' costs, it does not incorporate witness fees.

## **Appendix III**

### **LIST OF STATE GOVERNMENT DEPARTMENTS AND AGENCIES SURVEYED IN RELATION TO EMPLOYEES BEING REQUIRED AS WITNESSES IN NON-CRIMINAL LEGAL PROCEEDINGS**

Department of Agriculture  
Alcohol and Drug Authority  
Office of the Auditor General  
Building Management Authority of Western Australia  
Department for Community Services  
Department of Conservation and Land Management  
Ministry of Consumer Affairs  
Department of Corrective Services  
Corporate Affairs Department  
Crown Law Department  
Ministry of Education  
Electoral Commission  
Department of Employment and Training  
Environmental Protection Authority  
Department of Executive Personnel  
Fire Brigades Board  
Department of Fisheries  
Health Department of Western Australia  
Homeswest  
Industrial Relations Commission  
Land Titles Office  
Department of Land Administration  
Local Government Department  
Main Roads Department  
Department of Marine and Harbours  
Department of Mines  
Museum - Western Australia  
Department of Occupational Health, Safety and Welfare  
Police Department  
Ministry of the Premier and Cabinet  
Public Trust Office  
Register General's Office  
Ministry of Sport and Recreation  
State Energy Commission  
State Government Insurance Commission  
State Planning Commission  
State Taxation Department  
Department of Transport  
Treasury Department  
Valuer General's Office  
Superannuation Board  
Department of Trade Development

Water Authority of Western Australia

Westrail

Workers' Compensation Board

Workers' Compensation and Rehabilitation Commission