

LEGAL PROFESSION ACT 2008

LEGAL PROFESSION (MAGISTRATES COURT) (CIVIL) REPORT (No. 2) 2020

Made by the Legal Costs Committee under Division 5 of Part 10 of the *Legal Profession Act 2008* (LP Act).

PART 1 – PRELIMINARY

1 Citation

- (a) This Report may be cited as the *Legal Profession (Magistrates Court) (Civil) Report (No. 2) 2020*.
- (b) The Determination set out in the Schedule to this Report is referred to in this Report as the *Legal Profession (Magistrates Court) (Civil) Determination (No. 2) 2020*.

PART 2 – NOTICE AND INQUIRIES

2 Notice under section 278 of the Act

The Legal Costs Committee (**Committee**) has complied with the notice provisions of section 278 of the Act.

3 Inquiries and submissions under section 277 of the Act

Before making the *Legal Profession (Magistrates Court) (Civil) Determination (No. 2) 2020* the Committee:

- (a) reviewed the submissions received as a result of the notice given under section 278 of the Act including those made by The Law Society of Western Australia (Inc);
- (b) consulted with the Magistrates Court of Western Australia;
- (c) considered the changes made to civil procedure in the Magistrates Court by reason of the *Magistrates Court (Civil Proceedings) Amendment Rules 2020* and the *Magistrates Court (Civil Proceedings) Amendment Rules (No. 2) 2020*;
- (d) reviewed the *Legal Practitioners (Magistrates Court) (Civil) Determination 2020*¹; and
- (e) had regard to relevant provisions of the *Magistrates Court Act 2004* and the *Magistrates Court (Civil Proceedings) Act 2004*, and in particular notes section 13(1) of that Act, which sets out the guiding principles for the conduct of civil proceedings in the Court.

PART 3 – REPORT OF LEGAL COSTS COMMITTEE'S CONCLUSIONS

4 Maximum hourly and daily rates unchanged – scale of costs amended

- (a) This review has arisen because of changes to civil procedure brought about by the *Magistrates Court (Civil Proceedings) Amendment Rules 2020* and the *Magistrates Court (Civil Proceedings) Amendment Rules (No. 2) 2020*.
- (b) The matters set out in clause 4 of the *Legal Practitioners (Magistrates Court) (Civil) Determination 2020* remain in force and continue to inform the manner in which the Committee has undertaken this review.

¹ Published in Gazette 18 June 2020

CLARE THOMPSON, Chair

ANGELA GAFFNEY, Member

MARCUS COCKER, Member

JANICE DUDLEY, Member

MATTHEW CURWOOD, Member

BRENDAN ASHDOWN, Member

Schedule

LEGAL PROFESSION ACT 2008

LEGAL PROFESSION (MAGISTRATES COURT) (CIVIL) DETERMINATION (No. 2) 2020

Made by the Legal Costs Committee under section 275 of the *Legal Profession Act 2008 (LP Act)*.

1 Citation

This Determination may be cited as the *Legal Profession (Magistrates Court) (Civil) Determination (No. 2) 2020*.

2 Commencement

This Determination comes into operation on 1 November 2020.

3 Application

- (a) This Determination applies to the remuneration of legal practitioners, clerks and paralegals in respect of advice given by legal practitioners in or for the purposes of civil proceedings before the Magistrates Court.
- (b) Subject to paragraph (c) below, this Determination does not apply to the remuneration of legal practitioners based on costs incurred in respect of business carried out before the commencement of this Determination.
- (c) In taxing a bill of costs which includes events which occurred before the commencement of this Determination but after the commencement of the *Magistrates Court (Civil Proceedings) Amendment Rules 2020* or the *Magistrates Court (Civil Proceedings) Amendment Rules (No. 2) 2020*, an Assessing Officer may consider it appropriate to allow an item on taxation by analogy using this Determination, despite there being no relevant item in the Determination which was in place at the time the business was carried out.

4 Definitions

In this Determination:

Act means the *Magistrates Court (Civil Proceedings) Act 2004*, as amended from time to time; and

Rules means the *Magistrates Court (Civil Proceedings) Rules 2005*, as amended from time to time.

5 No minimum charge

In no respect is this Determination to be seen as providing a minimum charge for any work other than the items referred to in clause 5. For example, item 2(c) provides for \$3,344 for the work involved. The figure of \$3,344 is a maximum, but on taxation less than \$3,344 might be allowed. Where there is a set cost or time or level of fee earner indicated, the purpose is to indicate to the Assessing Officer what reasonably may be expected in most cases.

6 Fixed items

Some items in this Determination have been fixed without any indication of how these items have been calculated. These items are 1, 2(a), 2(b), 4(a), 11(a), 12(c), 17(a)(2), 17(b), 18(a), 20 and

21. These have been fixed because, based on past practices, the Court staff require a fixed figure when completing the form of Entry of Judgment by Default and the like.

7 Changes arising from the *Magistrates Court (Civil Proceedings) Amendment Rules (No. 2) 2020*

- (a) This review has become necessary by reason of the changes to civil procedure in the Magistrates Court brought about by the *Magistrates Court (Civil Proceedings) Amendment Rules (No. 2) 2020* which commenced on 1 June 2020.
- (b) As a result of the changes in procedure, some new items have been included in the scale of costs in Table B and some items which were previously contained in Table B have been deleted.
- (c) For those items which have been deleted but which may still be undertaken in the conduct of any particular matter, for example the administration of interrogatories, an appropriate allowance may be awarded on taxation as part of the preparation of a case for trial, under item 13.
- (d) The Committee is particularly mindful of the jurisdictional limitation of the Magistrates Court and is concerned to ensure that the principle of proportionality is foremost in practitioners minds when incurring and claiming costs in this Court. With this in mind, the Committee has made amendments to items 10, 21 and 22 which more properly reflect the work undertaken under those items and which are designed to limit the costs incurred in matters which are generally separate from the final resolution of the proceedings.

8 Time estimates

The reason for stating the number of hours estimated to be necessary to perform each of the items of work described in this Determination is to provide guidance to the Court when dealing with the question of costs so that the Court has some idea how much time is reasonably necessary to perform work in most cases. For example, in item 15(a), which relates to preparation for trial or getting up a case for trial by Counsel, the time indicated is that which can be expected in most cases. Some items reflect a number of hours that have been estimated so as to include work done with respect to the process of obtaining and considering evidence, documents, disclosures and the like, for example items 2(c), 4(b)-(d), 5, 7, 10 and 13. The hours referred to in this Determination will guide the Assessing Officer about the amount which should be allowed in a particular case.

9 Counsel

- (a) In items 14 and 15 of Table B, if independent counsel is not retained for the trial, this will be a factor to be considered by the Assessing Officer who might not then permit the full amount in the Determination for fee on brief under item 15(a), as well as a full getting up allowance under item 13. This is in line with the decisions of *Commonwealth v Magriplis* (1962) 3 FLR 47 and *Washbourne v SEC* (1992) 8 WAR 188.
- (b) All appearances allowed for in items 10, 15 and 22 of Table B are intended to be charged at the applicable counsel rate, and not at any higher rate that may be applicable to the actual practitioner by reason of the person undertaking the appearance otherwise being entitled to charge as a Senior Practitioner.
- (c) In this Determination a change has been made to item 15(i) of Table B to correct the anomaly in previous Determinations by which Senior Practitioner rates were recoverable for attendance on a reserved judgment.
- (d) Fees charged by practitioners who practise solely as barristers in accordance with Supreme Court Practice Direction 10.5 are only to be charged at the rates provided for

counsel of their seniority in Table A and are not to be charged at rates applicable to a Senior Practitioner.

- (e) Recovery of daily fees for counsel on the taxation or assessment of a Bill of Costs is intended to apply only when a full day has been worked, either in Court or in Court and in preparation for a subsequent hearing day.

10 Settled proceedings

It is intended that item 13 should apply even if there is no trial. Therefore, if the case is settled before trial and the law practice can demonstrate that preparation for trial was carried out, costs may be recovered for that work and allowed on an assessment of costs.

11 Restricted Practitioner category

The amendments brought in by the *Legal Profession (Magistrates Court) (Civil) Determination 2016* remain in effect, other than clause 10(e) of that Determination.

12 Maximum hourly and daily rates

- (a) The hourly and daily rates set out in Table A are the maximum hourly and daily rates, inclusive of GST, which the Committee determines shall be used to calculate the dollar amounts set out in Table B. Except for certain items, each item in this Determination specifies a dollar amount with reference to the fee earner.
- (b) The rates referred to in paragraph (a) were ascertained in the manner set out in clause 4 of the *Legal Profession (Magistrates Court) (Civil) Report 2020*.
- (c) The daily rates set out in Table A are intended to cover all work done on a hearing or trial day whether in or out of court including preparation of written submissions and are not intended to be supplemented in any way by additional hourly charges given that the maximum number of hours allowed for the daily rate is 10 hours per day.
- (d) The items in Table B are not intended to be calculated on the basis of a minimum 6 minute unit.

Table A

Fee Earner	Maximum allowed hourly rates
Senior Practitioner ^o (permitted to practise on his or her own account for 5 years or more) (SP) ^α	\$418
Junior Practitioner ^o (permitted to practise on his or her own account for less than 5 years) (JP)	\$319
Restricted Practitioner (RP) ^{#, °}	\$231
Clerk/Paralegal (C/PL) ^{##}	\$154
Counsel fees charged as a disbursement to law practices or charged by in-house Counsel	Maximum allowed rates
Counsel [*]	
hourly rate	\$363
daily rate	\$3,630
Senior Counsel ^{**}	

hourly rate	\$539
daily rate	\$5,390

- ° The reference to Restricted Practitioner, Junior Practitioner or Senior Practitioner in this Determination includes all legal practitioners even if the services were rendered in another State or Territory. Where a local practitioner has held an interstate practising certificate, the length of unrestricted legal practice in that other jurisdiction is to be counted in assessing that practitioner's years of practice for the purposes of this Determination.
- # The reference to Restricted Practitioner in this Determination includes practitioners undertaking restricted legal practice for the purposes of obtaining the required experience set out in section 50 of the LP Act and does not include a reference to an Australian legal practitioner who has a condition placed on their practising certificate by the Legal Practice Board, State Administrative Tribunal or otherwise, requiring them to practise under supervision for disciplinary, medical or other reasons.
- ## The reference to Clerk/Paralegal in this Determination includes a law graduate prior to their admission to practise as an Australian lawyer.
- * The reference to Counsel in this Determination means a practitioner acting as a barrister other than a Senior Counsel, including for the purposes of items 10, 15 and 22, a practitioner appearing in court who does not practise in accordance with Supreme Court Practice Direction 10.5.
- ** The reference to Senior Counsel in this Determination means a person within the meaning of item 11 or item 12 of Regulation 5(2) of the *Legal Profession Regulations 2009* (WA).

13 Costs

- (a) Subject to the provisions of the LP Act permitting a law practice to make a written agreement as to costs with a client, the costs of or in relation to a party to an action or other proceeding (inclusive of GST and counsel fees, but exclusive of other disbursements):
 - (1) recoverable by one party from another party; or
 - (2) payable by a party to that party's own law practice,
 shall not exceed the amounts set out in Table B except as otherwise provided in item 25 of Table B.
- (b) Allowances made under item 25 of Table B are only to be awarded as between a law practice and its client, and not between party and party unless the Court otherwise orders. The item is not intended to be used to claim increased allowances for items which should properly fit into another item in the Determination, for example item 10.
- (c) The Committee notes the impact of the decision in *Rodwell v Hutchinson* [2010] WASCA 197, and so no allowance is made in this Determination for an award of indemnity costs.
- (d) The Committee notes the comments of the court in *Defendi v Eden Hill Plasterers* [2008] WASCA 269 at [7] as to the importance of the proportionality principle in litigation in this Court, which arises in respect to all costs incurred in the Magistrates Court.

Table B
Magistrates Court Civil Scale of Costs (No. 2) 2020

Item		Time	Fee Earner	\$
1.	Letter of demand issued prior to proceedings			77
2.	Claim: (a) Claim, including instructions, but excluding Statement of Claim (b) For each additional defendant (c) Statement of Claim including preparation and lodgement	8 hours	SP	418 55 3,344
3.	Appointment of litigation guardian	2 hours	RP	462
4.	Response: (a) Lodgement of a response to a claim (b) Statement of defence (c) Reply to defence (d) Defence and counterclaim, including instructions and statement of claim in the counterclaim and all other necessary documents (e) Defence to counterclaim	8 hours 1.5 hours 8 hours 2 hours	SP SP SP SP	209 3,344 627 3,344 836
5.	Third party claim, including instructions and list of documents	8 hours	SP	3,344
6.	Particulars: (a) requesting particulars (b) providing particulars	1 hour 2 hours	JP JP	319 638
7.	Disclosure: (a) Providing informal disclosure under Rule 30A (b) Giving additional disclosure where ordered by the Court or a Registrar	2 hours 5 hours	RP RP	462 1,155
8.	Status conference: Status conference conducted under rule 46 of the Rules, including preparation, attendance and reporting to client	1.5 hours	SP	627

Item		Time	Fee Earner	\$
9.	Interpleaders: Interpleader proceedings: (a) where uncontested (b) where contested	1 hour	JP	319 An allowance in accordance with item 10
10.	Application to the Court: (a) Applications and responses to applications including under Part 21 of the Rules, including all documentation in preparation for hearing, and hearing (b) Application for substituted service	2 hours	JP	3,000 638
11.	(a) Application for entry of judgment of a liquidated sum by default without trial (b) Application for and entry for judgment for an unliquidated sum by default, including preparation of Form 13 application and affidavits and attendance at hearing if required	3 hours	JP	154 957
12.	Offers of settlement, notices, practice directions, applications, declarations, memoranda, affidavits, certificates: (a) Offers of settlement (b) Acceptance of offer of settlement (c) Other notices and certificates referred to or required by the Act, Rules or procedures of the Court, including practice directions, not otherwise specified in this Determination (d) Preparation, lodgement and service of affidavits and statutory declarations not otherwise provided for	2 hours 2 hours per hour	SP SP SP	836 836 154 418
13.	Preparation of case: Preparation for trial, includes work reasonably and necessarily undertaken prior to commencement of proceedings	50 hours	SP	20,900
14.	Examination of witness before trial by a legal practitioner, pursuant to an order			An allowance in accordance with item 15(e) or (f)

Item		Time	Fee Earner	\$
15.	<p>Trial:</p> <p>(a) Fee on brief for Counsel, i.e. half day trial and preparation</p> <p>(b) Allowance for second half day of trial</p> <p>(c) Fee on brief for Senior Counsel, i.e. half day trial and preparation (where two or more Counsel are certified for)</p> <p>(d) Allowance for second half day of trial for Senior Counsel</p> <p>(e) Counsel fee for the second and each successive day of hearing</p> <p>(f) Counsel fee for Senior Counsel for second and each successive day of hearing</p> <p>(g) Instructing legal practitioner attending trial</p> <p>(h) Clerk attending trial</p> <p>Note: Subject to paragraphs (a) - (h) if:</p> <p>(1) the trial lasts less than 2 hours; or</p> <p>(2) the trial does not commence and settles or adjourns on the day of the trial,</p> <p>the Assessing Officer shall allow an amount which is reasonable in the circumstances.</p> <p>(i) Attending on reserved judgment, including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders</p>	<p>2 days preparation ½ day of trial</p> <p>2 days preparation ½ day of trial</p> <p>per hour</p> <p>per hour</p> <p>per hour</p>	<p>C</p> <p>C</p> <p>SC</p> <p>SC</p> <p>C</p> <p>SC</p> <p>JP/RP</p> <p>C/PL</p> <p>C</p>	<p>9,075</p> <p>1,815</p> <p>13,475</p> <p>2,695</p> <p>3,630</p> <p>5,390</p>
16.	<p>Pre-trial, mediation, conferrals, or other conferences</p> <p>(a) where required by the Rules, practice direction, order of the Court or legislation;</p> <p>(b) including informal conferences where reasonably held after commencement of proceedings; and</p> <p>(c) preparation reasonably undertaken for the conferences described in paragraphs (a) and (b) of this item.</p>	<p>per hour</p>	<p>SP</p>	

Item		Time	Fee Earner	\$
17.	Judgments and orders: (a) Settling and extracting judgment or order (1) with appointment (2) without appointment (b) Request for certified copy of judgment or order	1 hour	RP	231 209 154
18.	Enforcement: (a) Execution (b) If against land, an additional	3 hours	RP	198 693
19.	Proceedings in court pursuant to <i>Civil Judgments Enforcement Act 2004</i> for the following, including preparation: (a) Means Inquiry (b) Default Inquiry (c) Suspension of enforcement order application (d) Application to cancel or amend an order	1.5 hours	JP RP C/PL	484 352 231
20.	Registration of judgments: Registration of judgments including those under <i>Service and Execution of Process Act 1992 (Cth)</i>			209
21.	Assessment of costs including drawing bill: (a) Lodgement of bill of costs (b) Drawing bill of costs, copies and service (c) Making an objection to a bill (d) Assessment of costs (including the time spent in preparing for the assessment)		JP JP JP JP	55 638 319 638
22.	Appeals: An appeal to a Magistrate from a decision of a Registrar			An amount calculated in accordance with item 10
23.	Copies: Copies where necessary, including of documents for which allowance is otherwise made in this Determination	per page		0.165

Item		Time	Fee Earner	\$
24.	<p>Accounts and inquiries: Attending on taking accounts, inquiries</p>		SP	An amount which is reasonable in the circumstances
25.	<p>Other work: (a) Time reasonably spent by a legal practitioner on work requiring the skill of a legal practitioner (of the standing indicated) but not covered by any other item or (b) Time reasonably spent by a legal practitioner, or by a clerk or paralegal of a legal practitioner, on work not covered by any other item or by paragraph (a)</p> <p>Note: Allowances under item 25 are only to be awarded as between a law practice and its client, and <i>not</i> between party and party unless the Court otherwise orders.</p>	per hour per hour	SC C SP JP RP C/PL	
26.	<p>Disbursements: In addition to the fees and charges allowed under this Determination:</p> <p>(a) As between a law practice and client, a law practice may charge and be allowed disbursements necessarily or reasonably incurred; and</p> <p>(b) As between party and party, a party may be allowed disbursements incurred by that party except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that subject to the above exceptions, that party is fully reimbursed for its disbursements</p>			
27.	<p>Allowances for witnesses: The amount of any costs to be paid in respect of work done by a legal practitioner in conducting any proceedings in a case may include a reasonable allowance for:</p> <p>(a) witnesses necessary to the case because of their professional, scientific or other special skill or knowledge; and</p> <p>(b) witnesses necessary to the case other than those covered in paragraph (a).</p> <p>In fixing an allowance for witnesses under paragraph (b), including the Claimant and Defendant, the Assessing Officer may have regard to the amount of salary, wages, or income (if any) actually lost by the witness;</p> <p>In fixing an allowance for witnesses under either paragraph (a) or paragraph (b), regard should be given to whether it was reasonable in all the circumstances to call a witness in person when the witness was able to give evidence by use of audio-link, video-link or similar technology.</p>			

28.	<p>Travel:</p> <p>(a) As between party and party, minor travel as defined in the <i>Legal Profession (Magistrates Court) (Civil) Determination 2016</i>, is to be allowed as part of the costs awarded for an attendance at chambers or Court, without further order.</p> <p>(b) As between party and party, time spent travelling by a law practice which is not minor travel and which is required by reason of an order of the Court requiring the parties to attend at a location other than the location at which the proceedings is case managed, is to be charged at no more than one half of the rates set out in Table A, with a maximum of 8 hours in any one day, without further order.</p> <p>(c) As between a law practice and its own client, time spent travelling by a law practice, other than minor travel, is to be charged at no more than one half of the rates set out in Table A, with a maximum of 8 hours in any one day.</p> <p>Note: Allowances under item 28(c) are only to be awarded as between a law practice and its client, and <i>not</i> between party and party unless the Court otherwise orders.</p>
-----	---

Made by the Legal Costs Committee on 21 October 2020.