



Western Australia

Legal Profession Act 2008

**Legal Profession (Supreme Court) (Contentious  
Business) Determination 2014**



# Legal Profession (Supreme Court) (Contentious Business) Determination 2014

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## **Legal Profession (Supreme Court) (Contentious Business) Determination 2014**

### **Part 1 — Preliminary**

#### **1. Citation**

- (a) This Report may be cited as the *Legal Profession (Supreme Court) (Contentious Business) Report 2014*.
- (b) The Determination set out in the Schedule to this Report is referred to in this Report as the *Legal Profession (Supreme Court) (Contentious Business) Costs Determination 2014*.
- (c) The citation for this Report (compared to previous Reports) has been amended to be consistent with the title of the Act.

## **Part 2 — Notice and Enquiries**

### **2. Notice under section 278 of the Act**

The Legal Costs 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 (Supreme Court) (Contentious Business) Determination 2014*, the Legal Costs Committee —

- (1)(a) reviewed all 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) and The Western Australian Bar Association (Inc);
  - (b) reviewed the impact of movements in the Consumer Price and Wage Price Indices for the financial year ending June 2013, and for the September 2013, December 2013 and March 2014 quarters;
  - (c) conferred with the Hon. Chief Justice of Western Australia; and
  - (d) conferred with other legal practitioners.
- (2)(a) In the submissions referred to in paragraph 3(1)(a) above, the lack of parity between the hourly rates allowed for Senior Practitioners practising in the amalgam and those Counsel who are of considerable experience but who have not been appointed as Queens Counsel or Senior Counsel, is noted.
  - (b) The Legal Costs Committee has given serious consideration to whether a distinction between practitioners acting as barristers of more than 10 years post admission experience and those of less than 10 years post admission experience should be made. Having consulted with the profession and with the Chief Justice, the Legal Costs Committee has determined that a structural change of this nature to the Determination is not presently justified.

- (c) The difference in rates between Senior Practitioners practising in the amalgam and Counsel practising at the independent bar has historically been attributable to the substantially lower costs of practice for those at the independent bar, as compared with practitioners in the amalgam, who generally offer clients a wider range of services.
- (d) The Legal Costs Committee has not been provided with sufficient evidence that suggests this historical differential has altered so that the costs incurred by members of the independent bar are now proportionally equivalent to those incurred by law practices in the amalgam.
- (e) Furthermore, to make a structural change to the Determination of the nature identified above, even if the necessary information were made available, it would be necessary for the Legal Costs Committee to consider what would be a likely substantial increase in Counsel rates in light of the consumer protection and access to justice objectives of the Determination. This in turn would include giving consideration to the fact that many practitioners, including those at the independent bar, already enter into written agreements under the Act at rates which are in excess of those provided for in the Determination.

### **Part 3 — Report of Legal Costs Committee's Conclusions**

**4. Maximum hourly and daily rates changed—scale of costs amended**

- (a) The information gained as a result of the inquiries and submissions described in clause 3 satisfied the Legal Costs Committee that the manner in which legal services are provided made it appropriate to continue to adopt the hourly and daily rates charged by law practices as the basis for the rates used in the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014*.
- (b) It is the recommendation of the Legal Costs Committee that —
- (1) as a result of the inquiries and submissions described in clause 3;
  - (2) having considered the impact of relevant Australian Bureau of Statistics data;
  - (3) having considered submissions and data from The Law Society of Western Australia and the Western Australian Bar Association; and
  - (4) taking into account the incidental administrative implications of the calculation of the Goods and Services Tax,

the hourly and daily rates referred to in subclause 4(a) be varied from the hourly and daily rates used in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* as the basis for the recommended scale of costs which have been generally rounded up or down to represent various, increases of approximately 6% inclusive of the Goods and Services Tax and for administrative convenience, divisible by 11. Those rates are set out in Table A of the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014*.



- (c) It is the recommendation of the Legal Costs Committee, as a result of the inquiries and submissions described in clause 3, the scale of costs be varied in the manner set out in Table B of the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014*.
- (d) The recommendations of the Legal Costs Committee are not intended to override any entitlement of a law practice to make a written agreement as to costs with a client under the Act or any successor legislation.

## **Schedule**

### *Legal Profession Act 2008*

#### *Legal Profession (Supreme Court) (Contentious Business) Determination 2014*

**1. Citation**

This Determination may be cited as the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014*.

**2. Commencement**

This Determination comes into operation on 1 July 2014.

**3. Application**

- (a) This Determination applies to the remuneration of law practices in respect of contentious business carried out by law practices in or for the purposes of proceedings before —
- (1) The Supreme Court; and
  - (2) The District Court other than contentious business to which the *Legal Profession (District Court Appeals) (Contentious Business) Determination 2014* applies.
- (b) This Determination does not apply to the remuneration of law practices based on a written agreement as to costs under the *Legal Profession Act 2008* or any successor legislation.
- (c) This Determination does not apply to the remuneration of law practices based on costs incurred before 1 July 2014.

**4. Application of 0.66, r. 11(3), r. 13, r. 18, r. 19, r. 20(3), r. 21 and r. 23 of the *Rules of the Supreme Court***

In the circumstances set out in Order 66, rules 11(3), 13, 18, 19, 20(3), 21 and 23 of the Rules of the Supreme Court, the Legal Costs Committee determines that the Court or the Taxing Officer, as the case may be, has the power to make the orders and allowances referred to in those rules.

**5. Item 35 for negotiated motor vehicle personal injury claims**

The Legal Costs Committee notes that it has previously resolved to introduce a category in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* relating to claims under the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) (“Motor Vehicle Act”) which are settled by negotiation between the parties at a pre trial conference.

The allowance set out in item 35 is intended to apply to claims for personal injury under the Motor Vehicle Act which follow a standard procedural pathway.

The Legal Costs Committee then conferred widely about the introduction of such an item within the Determination. A variety of views and opinions was expressed to the Legal Costs Committee.

**When should item 35 apply?**

Item 35 is not a “one-size fits all” intended to apply to claims under the Motor Vehicle Act. The Legal Costs Committee recognises that —

- No two legal cases are the same;
- Every claim has different circumstances which form part of the factual and legal matrix which practitioners and clients must deal with;
- In some cases, liability is admitted but contributory negligence is pleaded by a defendant; and
- In some cases causation issues arise.

Notwithstanding the variables that apply to every legal case, the *District Court Rules 2005* provide that claims under the Motor Vehicle Act follow a standard procedural pathway. The rules provide a timetable for discovery and interrogatories and are designed to minimise the need for the parties to make chambers applications. The 2011 Annual Review of the District Court of Western Australia makes clear that an overwhelming majority of claims settle without going to trial. The Legal Costs Committee considered, in these circumstances, it was appropriate to adopt a short form scale item.

It was, and remains the Legal Costs Committee's view, that certain procedures (for example, contested interlocutory applications of substance or formal mediation conferences which take place after failed attempts to settle the matter at a pre trial conference) are indicative that the proceedings fall outside item 35.

Further, item 35 is not intended to apply to a claim which proceeds to a listing conference for the allocation of trial dates where significant preparation of the case for trial has occurred.

Item 35 cannot be used by a defendant to fix a defendant's costs.

**Who decides whether item 35 applies?**

If either a plaintiff or a defendant (or on a practitioner/client basis either the practitioner or the client) considers that the allowance under item 35 either exceeds a reasonable allowance for the work carried out, or is insufficient remuneration for the work carried out, then any party may require the plaintiff (or in the event of a practitioner and client, the plaintiff's practitioner) to prepare a bill of costs in the usual manner and have those costs assessed by the Court under other items of this Determination.

**When will it be decided whether item 35 applies?**

At the time when a settlement of the quantum of a claim (exclusive of legal costs) has been agreed, the parties may agree to have costs awarded/determined in accordance with item 35.

**Is item 35 inclusive of disbursements?**

The amount in item 35 does not include disbursements other than copying covered by item 31. It was and remains the Legal Costs Committee's view that disbursements incurred for any claim under the Motor Vehicle Act should be added to item 35 on the same basis as under item 34.

**6. Catastrophic personal injury claims**

As noted in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*, the Legal Costs Committee then resolved that the costs associated with preparation of catastrophic personal injury claims for trial should be taxed or fixed without limit

to the number of hours fixed under item 17 where the Court has declared a claim to be one for a catastrophic injury.

The Legal Costs Committee conferred with the Chief Justice of Western Australia and the then Principal Registrar of the District Court of Western Australia, and anticipated that the Courts would develop their own procedures for determination of whether a case is a catastrophic personal injury claim.

The Legal Costs Committee was, and remains of the view, that a determination of whether a case is a catastrophic personal injury claim for the purposes of item 17 would involve the assessment of two criteria —

- (a) The injury or injuries sustained by the plaintiff that are at issue in the proceedings; and
- (b) By virtue of the injury or injuries, whether an extra burden is placed upon the practitioners involved in the case for the preparation of the case for trial.

It is intended that the increase to the scale limit could apply to any or all parties not solely the plaintiff.

In making this Determination, the Legal Costs Committee has considered and accepted the submission by The Law Society of Western Australia (Inc) that if a claim is declared by the Court to be a catastrophic personal injury claim, the limit on the number of hours and days in item 16(b), 20(a) and 20(b) in Table B should be removed.

Despite the lack of procedural rules for making such a declaration and the decision of the District Court of Western Australia in *McGlenn as administrator for Jeffrey Craig McGlenn v Joondalup Hospital Pty Ltd* [No 2] [2014] WADC 3, the Legal Costs Committee has resolved to maintain the scope to remove the limits in this Determination to catastrophic personal injury claims so that the cap on costs can be removed, regardless of when that declaration may be made by the Court during the course of any proceedings.

The Legal Costs Committee remains of the view that determination as to whether a matter is a catastrophic personal injury should be made as early as possible in proceedings.

The Legal Costs Committee has noted that rules of Court incorporating procedures for declaring whether a case is a catastrophic personal injury claim have not yet been implemented.

**7. New item 20(g)**

This Determination introduces a new item 20(g) which makes an allowance for the preparation of written closing submissions following trial. The Committee has included this item following its consideration of a submission made by the Law Society in light of changing practice, particularly (but not exclusively), in longer cases in the Commercial and Managed Cases List in the Supreme Court.

The item is not intended to be utilised to recover costs associated with any part of written submissions which are otherwise written, or able to be written, on a trial day, as to which the commentary in paragraph 8(c) below applies.

The item is intended to apply only when the trial judge adjourns a trial after the closing of evidence and makes orders for the filing and service of written submissions and later oral addresses, or for the filing and service of written submissions in substitution of oral addresses. In all cases, it requires an order to that effect to be made.

**8. 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 Legal Costs Committee determines shall be used to calculate the dollar amounts in the scale of costs set out in Table B. Each item in the scale of costs specifies a dollar amount with reference to the practitioner.
- (b) The rates referred to in paragraph (a) were ascertained in the manner set out in clause 4 of the *Legal Profession (Supreme Court) (Contentious Business) Report 2014*.
- (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 allowable hourly and daily rates
Senior Practitioner (admitted for 5 years or more) (SP) <sup>o</sup> hourly rate	\$473
Junior Practitioner (admitted for less than 5 years) (JP) <sup>o</sup> hourly rate	\$330
Clerk/Paralegal (CPL) hourly rate	\$231
Counsel fees charged as a disbursement to practitioners or charged by in-house Counsel—	
Counsel (C)* hourly rate	\$385
daily rate	\$3,850
Senior Counsel (SC)** hourly rate	\$671
daily rate	\$6,710

- <sup>o</sup> The reference to Junior Practitioner or to 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 practice certificate, the length of admission in that other jurisdiction is to be counted in assessing that practitioner's years of admission for the purposes of this Determination.
- \* The reference to Counsel in this Determination means a practitioner acting as a barrister other than a Senior Counsel.
- \*\* 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).

**9. Costs**

- (a) Subject to the provisions of the 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,

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shall not exceed the amounts set out in Table B (except as otherwise provided in item 33 of Table B).

- (b) Allowances made under item 33 of Table B are only to be awarded as between a law practice and its client, or if costs are awarded on an indemnity basis and not between party and party unless the Court otherwise orders.

**Table B**

**SUPREME COURT SCALE OF COSTS 2012**

Item		Time	Fee Earner	\$
1.	<b>Writ —</b> (a) Writ of summons, whether specially or generally endorsed, including instructions, but excluding statement of Claim (b) For each additional defendant (c) Statement of Claim	1.5 hours  10 hours	SP  SP	715  4,730
2.	Next friend or guardian <i>ad litem</i>	3 hours	JP	990
3.	<b>Defence —</b> (a) Memorandum of appearance (b) Defence (c) Counterclaim	 10 hours 10 hours	 SP SP	99 4,730 4,730
4.	<b>Reply and other pleadings</b> Reply (if necessary), defence to counterclaim, or any other pleading	10 hours	SP	4,730
5.	(a) Third party notice (b) Pleadings in third party proceedings	2 hours 6 hours	SP SP	946 2,838
6.	(a) Requesting particulars of a pleading (where and to the extent necessary) (b) Giving particulars of a pleading	3 hours 5 hours	JP JP	990 1,650
7.	<b>Discovery —</b> (a) Notice requiring discovery (b) Giving discovery of documents	 10 hours	 SP	66 4,730



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Item		Time	Fee Earner	\$
8.	<b>Inspection</b> Inspection and giving inspection of discovered documents whether by personal attendance or otherwise	per hour	SP	473
9.	<b>Interrogatories —</b> (a) Delivery of interrogatories (b) Answers to interrogatories	5 hours 10 hours	SP SP	2,365 4,730
10.	<b>Chambers —</b> (a) Proceedings in Chambers other than proceedings to which item 11 applies (b) Attending on a reserved judgment in Chambers (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders) (c) Consent Orders including conferral but excluding extraction	2 days preparation, 1 day hearing; per hour  1.5 hours	C  SP  JP	11,550  473  495
11.	<b>Motions and originating process —</b> (a) Originating motion, originating summons or originating application  (b) For 2nd and each successive day of hearing (c) Attendance at hearing by instructing legal practitioner	2 days preparation; 1 day hearing and preparation of case— 50 hours  per hour	C  SP  C  SP	  35,200  3,850
12.	Proceedings in Court not otherwise provided for, including appeals from a Registrar	2 days preparation; ½ day hearing	C	9,625

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Item		Time	Fee Earner	\$
13.	<b>Listing Conference</b> Attending at a Listing Conference (convened pursuant to Order 29 Rule 8 of the Rules of the Supreme Court or Rule 43 of the District Court Rules) and all necessary preparation	per hour	SP	
14.	Entry of judgment without trial			231
15.	<b>Offers of compromise, notices, practice directions, etc —</b>			
	(a) Payment into or out of Court	2 hours	JP	660
	(b) Offer of compromise under O.24A	4 hours	SP	1,892
	(c) Acknowledgment of offer under O.24A			66
	(d) Acceptance of offer of compromise under O.24A	4 hours	SP	1,892
	(e) Notice of offer to consent to judgment	2 hours	SP	946
	(f) Other notices and certificates referred to or required by the Rules or procedures of the court (including practice directions)			77
16.	<b>Entry for trial/Entry for hearing —</b>			
	(a) Advising on, and preparing, documents required to be filed by the Rules of the Supreme Court or the Rules of the District Court	2 hours	SP	946
	(b) Preparation of Schedules (if any) required by District Court Rules 45C and 45D	8 hours	SP	3,784
	(c) Advice on evidence * In relation to particulars of damages under District Court Rule 45C, if the claim is one declared by the Court to be a catastrophic personal injury claim, the time reasonably spent by a legal practitioner, or by a clerk or	per hour	C/SC	

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Item		Time	Fee Earner	\$
	paralegal of a legal practitioner in preparation of case for trial, shall not be limited to 8 hours but shall be such amount that is reasonable in all of the circumstances.			
17.	<b>Preparation of case</b> Preparation of case for trial (includes work reasonably and necessarily undertaken prior to commencement of proceedings) * If the claim is one declared by the Court, to be a catastrophic personal injury claim, the time reasonably spent by a legal practitioner, or by a clerk or paralegal of a legal practitioner in preparation of case for trial shall not be limited to 120 hours but shall be such amount that is reasonable in all of the circumstances	120 hours*	SP	56,760
18.	Examination of witness before trial by counsel or practitioner, pursuant to order			An allowance in accordance with item 20(c) or (d)
19.	Application for and striking jury	1 hour	JP	319
20.	<b>Trial —</b> Counsel fees			
	(a) Fee on brief, i.e. first day of trial and preparation (including submissions)	3.5 days preparation; 1st day of trial	C	17,325
	(b) Fee on brief for Senior Counsel, i.e. first day of trial and preparation (including submissions)	3.5 days preparation; 1st day of trial	SC	30,195
	(c) Counsel fee for the second and each successive day of hearing		C	3,850
	(d) Counsel fee for Senior Counsel for second and each successive day of hearing	per hour	SC	6,710

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Item		Time	Fee Earner	\$
	(e) Instructing Legal Practitioner attending trial	per hour	SP	473
	(f) Clerk attending trial		C/PL	231
	(g) Preparation of written closing submissions—		SC/C	Such amounts as are reasonable in the circumstances
	(1) when ordered by the trial judge;			
	(2) for filing and service prior to an adjourned date for oral addresses, or in substitution of oral addresses; and	per hour	SP	
	(3) which could not reasonably have been undertaken during the course of the trial			
	(h) Attending on reserved judgment (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)	per hour	SP	451
	(i) for each five hearing days after the first five, additional fee on brief	1 day	SC/C	
	* If the claim is one declared by the Court to be a catastrophic personal injury claim, the time reasonably spent by Counsel or Senior Counsel in preparation of case for trial shall not be limited to 3.5 days but shall be such amount that is reasonable in all of the circumstances.			
21.	<b>Re-trial or Re-hearing —</b>			
	(a) Preparation of case for re-trial or re-hearing			Such amounts as are reasonable in the circumstances
	(b) Re-trial or re-hearing			

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Item		Time	Fee Earner	\$
22.	(a) Special case, case stated (otherwise than by way of appeal) or trial of an issue (b) For the second and each successive day of the trial or hearing			Such amounts as are reasonable in the circumstances
23.	<b>Appeals to the Court of Appeal and Single Judge appeals (including appeals by way of case stated) and applications for leave to appeal</b>			
	(a) Appeal Notice, Service Certificate, Notice of Respondent's Intention			473
	(b) Appellant's Case, Respondent's Answer including relevant forms and all annexures	40 hours	SC	26,850
	(c) Appellant's Reply to Notice of Contention, when required	10 hours	SC	6,710
	(d) Settling appeal book indexes (including drafting and settling appeal book index)	8 hours	SP	3,784
	(e) An application in an appeal, an interlocutory or directions hearing before a single Judge or Registrar	10 hours	C	3,850
	(f) Preparation of case appeal for hearing	10 hours	SP	4,730
	(g) Counsel fee on hearing (including preparation)	2 days preparation; 1 day hearing	C	11,550
	(h) Counsel fee for Senior Counsel (including preparation)	2 days preparation; 1 day hearing	SC	20,130
	(i) Counsel fee for the second and each successive day of hearing		C	3,850

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Item		Time	Fee Earner	\$
	(j) Counsel fee for Senior Counsel for the second and each successive day of hearing		SC	6,710
	(k) Instructing Legal Practitioner attending appeal	per hour	SP	473
	(l) Attending on reserved decision (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)	per hour	SP	473
24.	<b>Pretrial, mediation, conferrals, or other conferences —</b>			
	(a) Where required by order of the Court, by the <i>Rules of the Supreme Court</i> or by practice direction;	per hour	SP/SC/C	
	(b) including informal conferences where reasonably held before or after commencement of proceedings;	per hour	SP/SC/C	
	(c) attendances by Counsel and instructing legal practitioners at the conferrals and conferences set out in paragraphs (a) and (b) of this item;	per hour	SP/SC/C	
	(d) preparation reasonably undertaken for the conferrals and conferences described in paragraphs (a), (b) and (c) of this item; and	per hour	C	

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Item		Time	Fee Earner	\$
	(e) conferences between Counsel and own instructing Legal Practitioner where reasonably necessary.	per hour	SP/SC/C	
25.	<b>Orders</b> Settling and extracting judgment or order— (a) With appointment (b) Without appointment	2 hours	JP	660 231
26.	Arbitration proceedings			The same costs as in an action
27.	Proceedings, whether by action or otherwise, for the recovery of compensation for the taking or resumption of land or any other property by the Crown in right of the State or of the Commonwealth or by any other person, body or instrumentality pursuant to any statutory power			Such amounts as are reasonable in the circumstances
28.	<b>Proceedings by way of prerogative writ —</b> (a) Motion for order to show cause (including preparation and hearing) (b) Preparation of case for hearing (c) Counsel fee on hearing of application for order absolute (including preparation) (d) Counsel fee for Senior Counsel (including preparation) (e) Counsel fee for Counsel on the second and each successive day of hearing (including preparation) (f) Counsel fee for Senior Counsel on the second and each successive day of hearing (including preparation)	20 hours  10 hours  2 days preparation; 1 day hearing  2 days preparation; 1 day hearing	SP  SP  C  SC  C  SC	9,460  4730  11,550  20,130  3,850  6,7100

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Item		Time	Fee Earner	\$
	(g) Instructing Legal Practitioner attending hearing	per hour	SP	473
	(h) Attending on reserved decision (including preparation, consideration of reasons for decision and all necessary work and attendances to obtain final orders)	per hour	SP	473
29.	(a) Execution (b) If against land, an additional	3 hours	JP	341 990
30.	<b>Taxing including drawing</b> (a) Drawing bill of costs and service; and (b) Taxation of costs (including the time spent in preparing for the taxation)		SP	Such amounts as are reasonable in the circumstances
31.	<b>Copying</b> Copies where reasonably necessary, including of documents for which allowance is otherwise made in this Determination. This item covers all forms of electronic reproduction and copying.	per page		0.165
32.	<b>Accounts and inquiries</b> Taking accounts, inquiries		SP	Such amounts as are reasonable in the circumstances
33.	<b>Other work —</b> (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	per hour  per hour	SC SP C JP  C/PL	





**Notes**

- <sup>1</sup> This is a compilation of the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014*. The following table contains information about that determination.

**Compilation table**

<b>Citation</b>	<b>Gazettal</b>	<b>Commencement</b>
<i>Legal Profession (Supreme Court) (Contentious Business) Determination 2014</i>	20 Jun 2014 p. 2063-71 (Correction 1 Jul 2014 p. 2347)	1 Jul 2014 (see cl. 2)