The Law Society of Western Australia
The voice of the legal profession in Western Australia

5 April 2018

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

Dear Ms Thompson

LEGAL PROFESSION ACT REVIEW OF CONTENTIOUS BUSINESS DETERMINATIONS

Thank you for your letter dated 15 February 2018 and thank you for agreeing to extend the time period to respond.

In response to that letter, the Law Society of Western Australia submits the following:

1. The grandfathering should be continued for a further two years for the following reasons:

   (a) In order for a practitioner to 'graduate' from a Restricted Practitioner to a Junior Practitioner, they must become entitled to practise on their own account;

   (b) For the vast majority of practitioners, this requires two years of full-time supervised legal practice (s 50(1)(b), *Legal Profession Act 2008 (WA)* (the Act)).

   (c) The 2016 determination will, as of July this year, have been in place for nearly two years—as a result, most of the practitioners who were affected by the change would have already become eligible to practise on their own account or be eligible to attain that status.

   (d) However, the required two years of full-time supervised legal practice may require a longer period than two years to complete when completed on a part-time basis (see *Supervised Legal Practice Guidelines (Legal Profession Act 2008)* available at https://www.lpbwa.org.au/Documents/Legal-Profession/Restricted-Practice-and-Supervised-Legal-Practice/Supervised-Legal-Practice-Guidelines-(Legal-Profes/Supervised-Legal-Practice-Guidelines.aspx).

   (e) Further, retaining the grandfathering provisions for a further two years would also ensure that persons who have taken parental leave, and the firms that employ them, are not disadvantaged by the changes if the grandfathering provisions were removed.

Level 4, 160 St Georges Terrace, Perth WA 6000, DX 173 Perth
Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699
Email: info@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au
Please address all correspondence to The Law Society of Western Australia PO Box Z5345, Perth WA 6831

(f) To avoid any doubt, the Legal Costs Committee could indicate that it proposes to remove the grandfathering provisions commencing with the 2020 determination.

2. The Law Society did not make a submission in relation to the issue raised by the *Family Provision Act 1972 (WA)*, other than to oppose the suggested amendment, for the following reasons:

(a) The Law Society does not consider that amendment is required for the reasons already given.

(b) The Law Society does not consider that it is the function of the Legal Costs Committee to provide that in particular circumstances (such as a low value estate) a law practice cannot charge a fee for the following reasons:

(i) the function of the Legal Costs Committee is to publish a costs determination 'regulating the costs that may be charged by law practices' (section 275(1) of the Act);

(ii) a costs determination 'may provide that law practices may charge – according to a scale of rates of commission or percentages; or a specified amount; or a maximum amount; or in any other way or combination of ways' (section 275(2)(a) – (d) of the Act);

(iii) there are already suitable remedies to address issues of the charging of unreasonable costs in relation to low value estates provided by the Act (see Part 10, Division 8 of the Act); and

(iv) based on the express wording of section 275(1) of the Act the promulgation of a costs determination which provided that in the case of low value estates no costs would be payable would, arguably, be an invalid exercise of power by the Legal Costs Committee.

(c) Section 280 of the Act contemplates the determination providing an amount which, in order to obtain a special costs order, must be demonstrated to be inadequate because of the unusual difficulty, complexity or importance of the matter. It is unclear how section 280 would operate if a 'nil' scale item was provided. It is likely to only encourage applications for special costs orders, increasing both the costs for the parties and workload for the Court.

(d) There appears to be adequate ability for the Court to deal with issues of the charging of inappropriate costs in an appropriate case: see *Miller v Taylor* [2018] WASC 75 from [423] onwards.

However, notwithstanding the reservations set out above, if the Legal Costs Committee is committed to introducing a scale item to deal with so-called 'low value estates' then the item should be expressed as '*such amount as is reasonable in the circumstances*' such that the amount of costs that would be chargeable by a law practice (or payable on a party and party basis either by a party or from the estate) would then be at the discretion of a taxing officer rather than nil. This proposal would:

(i) limit the prejudice arising for practitioners who chose to act without a costs agreement or who have had their costs agreement set aside; and

(ii) enable the executor of a low value estate faced with a low merit claim to recover party and party costs for the period up to and including mediation from an unsuccessful claimant (noting that an executor is still likely to incur the costs of representation by way of a costs agreement).

3. In practice, the experience of our members is that Senior Practitioners will almost invariably claim their time for an appearance at the maximum rate specified for a Senior Practitioner and not for Counsel. It is also the collective experience of members of the Costs Committee of the Law Society that taxing officers will allow those charges. It would appear that the contrary view is accurate. In the Law Society's view that should be clarified as indicated in your correspondence so as to resolve any doubt in relation to the scale item.

4. Please see the enclosed annexure in relation to the issue of section 92(f) of the *Workers' Compensation and Injury Management Act 1981 (WA).* If the view of the Legal Costs Committee is that the present scale adequately covers this work, perhaps that can be made clear in the report.

5. The Law Society's submission in respect to the Group A determinations proposes an increase to the maximum rates for particular categories of practitioner to:

(a) reflect the increase in seniority required of Senior Practitioners and Junior Practitioners;

(b) reduce the gap between the rates for Counsel and Senior Practitioners; and

(c) increase the gap between Senior Counsel and the other categories.

The Law Society's submission in respect to the Group B determinations proposes an increase to the maximum rates for all of the categories of practitioner to reflect increases in the Consumer Price Index (CPI) and the costs associated with running a practice. That submission includes information regarding the increased costs of legal practice.

Following further consideration of these two proposals for increases to the maximum rates, the Law Society submits that:

(a) the maximum rates for all categories of practitioner in each of the Group A, Group B and Group C determinations ought to be increased to reflect increases in CPI and the costs associated with running a practice as set out in the Law Society's Group B submission (i.e 3% increase rounded off to $11 so as to be divisible by 11); and

(b) in the alternative, the maximum rates for Senior Practitioners, Junior Practitioners, Counsel and Senior Counsel in each of the Group A, Group B and Group C determinations ought to be increased by the specified amounts set out in the Law Society's Group B submission (i.e. $11 increase to the hourly rate for Senior Practitioners and Junior Practitioners, $22 increase for Counsel and $33 increase for Senior Counsel).

I note that the Law Society's Group C submission dated 5 April 2018 sets out the two proposals as alternatives. The Group C submission also provides updated information in respect to the increase of the national Wage Price Index from September 2017 to December 2017 and the CPI increases in Perth for the period

June 2015 to December 2017 (the Group B submission recorded CPI increases Australia-wide).

Should you have any queries or would like to discuss this further, please contact Mary Woodford, General Manager Advocacy, on 9324 8646 or email mwoodford@lawsocietywa.asn.au.

Yours sincerely

Hayley Cormann
President

Section 92(f) of the *Workers' Compensation and Injury Management Act*

1. Legislation

A workers' compensation claim can be settled pursuant to section 92(f) of the *Workers' Compensation and Injury Management Act 1981* (WA) (the Act):

(f) *if a worker's claim for damages against the employer or the defendant is settled by agreement otherwise than by a judgment, an acceptance of an offer to consent to judgment, or an acceptance of money paid into court —*

(i) *the employer or the defendant shall file a memorandum of the terms of the settlement with the Director within 3 months of the date of its execution by the worker;*

(ii) *the worker shall not commence or continue a claim for compensation under this Act in respect of the same injury unless the Director disapproves of the settlement within 6 weeks of the agreement for settlement being filed with the Director;*

(iii) *the Director shall not disapprove of the agreement unless he is satisfied the agreement was induced by fraud or misrepresentation or that it would clearly be for the worker's benefit to disapprove of it;*

(iv) *the Director if he disapproves of the settlement shall serve notice in writing of his disapproval on each of the parties to the settlement of his decision and of the reasons for his disapproval by pre-paid post to the address of the party set out in the settlement or the last known address of a party, within 14 days of the making of his decision;*

A settlement would be effected under the mechanism of section 92(f) in the following circumstances:

1. a denial of liability for the claim;
2. potential common law claim resulting in a settlement that is greater than the statutory entitlements under the Act, meaning that a Memorandum of Agreement cannot be used;
3. confidential settlement;
4. where there are multiple injuries or secondary conditions over which liability is denied/not accepted;
5. where weekly payments have been made for a period of less than 6 months;
6. where a worker/plaintiff brings an action against a third party for an injury occurring in the course of employment but which was caused by the third party.

2. Work conducted

The work conducted in relation to a section 92(f) settlement involves:

For the worker	For the employer
Preparation for and attending a settlement conference and negotiating resolution of the claim as opposed to a discrete 'dispute', which may include briefing counsel to provide an advice on quantum.	
Review the documents prepared by the employer including advising on legal consequences of a section 92(f) resolution	Draft the Deed of Release, Writ of Summons, Memorandum of Appearance, Consent Minute
Meet with the worker and explain the documents	
Correspondence and communications with the worker/employer to effect the settlement and in relation to payment of the monies.	

It is estimated that the amount of time taken by each party for this work is between 5-10 hours.

3. Issue

A concern has been raised by Law Society members acting on behalf of workers that no allowance is made for the work performed in relation to effecting a settlement by way of a section 92(f) deed.

4. Relevant scales

Work involved in a section 92(f) settlement is specifically excluded by item 8 of the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2015*:

> ***Stand Alone Items—Applicable to conciliation or arbitration service as appropriate***
>
> | | | |
> |---|---|---|
> | *8* | *Settlement of the claim by agreement under Schedule 2 or redemption and filing a section 76 memorandum of agreement (excluding disbursements which are to be paid in accordance with item 10).* ***Excludes agreements made pursuant to section 92(f)****. (emphasis added)* | *10 (hours)* |

The Law Society understands that, as the mechanism of a section 92(f) settlement is via the District Court, the Workers' Compensation Costs Committee formed a view that this work more properly lies under the *Supreme Court (Contentious Business) Determination 2016*.

However, there is no specific item under the *Supreme Court (Contentious Business) Determination 2016* which applies. The most likely items would be:

- Item 17 – Preparation of case – however this more appropriately applies to the work conducted preparing a matter for trial, whereas the work done for a s92(f) deed is in relation to settlement of the claim;
- Item 32 – Other work – except this applies only between a solicitor and client or on an indemnity basis;
- Item 10(c) – Consent orders – however this only allows for the consent minute and not the other work completed.

None of these items make an allowance, or a complete allowance, for the settlement of a claim under section 92(f).

5. Proposal

It is proposed that an additional item be added to the *Supreme Court (Contentious Business) Determination 2016*, namely:

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