

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : THE PILBARA INFRASTRUCTURE PTY LTD -v-  
BROCKMAN IRON PTY LTD  
[No 2] [2014] WASC 345 (S)

**CORAM** : EDELMAN J

**HEARD** : 28 JANUARY 2015

**DELIVERED** : 28 JANUARY 2015

**PUBLISHED** : 28 JANUARY 2015

**FILE NO/S** : CIV 2512 of 2013

**BETWEEN** : THE PILBARA INFRASTRUCTURE PTY LTD  
Plaintiff

AND

BROCKMAN IRON PTY LTD  
First Defendant

ECONOMIC REGULATION AUTHORITY  
Second Defendant

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*Catchwords:*

Practice and procedure - Special costs orders - Need for sufficient evidence justifying uplift in practitioner rates - Overall assessment of whether the Scale limits are inadequate and whether the inadequacy is due to the complexity and importance of the case

*Legislation:*

*Legal Practitioners (Supreme Court)(Contentious Business) Determination 2012 (WA)*

*Legal Practitioners (Supreme Court)(Contentious Business) Determination 2014 (WA)*

*Legal Profession Act 2008 (WA), s 280(2)*

*Result:*

Special costs orders made

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	Mr C P K Russell
First Defendant	:	Ms M L Coulson
Second Defendant	:	No appearance

*Solicitors:*

Plaintiff	:	Allen & Overy
First Defendant	:	Herbert Smith Freehills
Second Defendant	:	State Solicitor for Western Australia

**Cases referred to in judgment:**

*Australian Federal Police v Razzi (1991) 30 FCR 64*

*Crawley Investments Pty Ltd v Elman [2014] WASC 233 (S)*

*Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2011] WASC 268 (S2)*

*Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122 (S); (2003) 28 WAR 95*

*Mineralogy Pty Ltd v Chief Executive Officer, Department of Environment Regulation [2015] WASC 21 (S)*

*O'Rourke v P & B Corporation [2008] WASC 36*

*Red Hill Iron Pty Ltd v API Management Pty Ltd [2012] WASC 323 (S)*

The Owners of 'Kintail', 17 The Coombe, Mosman Park, Strata Plan 21483 v  
Camm (Unreported, WASC, Commissioner Pringle QC, Library No  
950558, 13 October 1995)

The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [2014] WASC 286  
The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [No 2] [2014]  
WASC 345

Verdell Pty Ltd v F & G Nominees Pty Ltd [2002] WASC 58 (S2)

**EDELMAN J:****Introduction**

- 1           On 26 September 2014, I delivered reasons dismissing the action brought by the plaintiff, TPI.<sup>1</sup> I made orders including that TPI pay the costs of Brockman Iron. I observed in my reasons for decision that the overarching question was whether a railways access 'proposal' was a valid proposal within the meaning of the *Railways (Access) Code 2000* (WA). This question, although short, was not simple.
- 2           TPI spared no expense in its presentation of the case. TPI was represented by senior counsel and two counsel. It filed thousands of pages of evidence, and 84 pages of submissions, raising numerous factual and legal issues. Discovery was extensive. TPI sought to rely on five expert reports. TPI's written submissions were extremely detailed. TPI's approach to the case was to ensure that no stone was left unturned. No point was unexplored.
- 3           The detail of TPI's case to which I have referred is not mentioned as a criticism. The case, and the submissions, were extremely thorough and detailed. They were of much assistance. But it was a case to which Brockman Iron was required to respond. Occasionally forensic decisions were made not to contest points that had been developed by TPI in great detail. But, as counsel for TPI properly accepted, those decisions could only have been taken after careful assessment of TPI's evidence, submissions, and authorities.
- 4           The parties' approach also reflected the novelty of the issue involved; it was common ground that no Court had previously considered the issue. It was plainly one which had very significant commercial consequence to the parties.
- 5           Brockman Iron now applies for special costs orders. It seeks the uplift of numerous items in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 and 2014* (WA) (the Scales). Some special costs orders should be made. In relation to others, they should not be allowed for reasons involving a matter of impression, or due to lack of evidence on this application, or both.

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<sup>1</sup> *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [No 2]* [2014] WASC 345.

**Legal principles concerning uplift of the costs limits in the Scale**

6        These principles concerning the uplift of the costs limits in the Scale are well known. They are governed in s 280(2) of the *Legal Profession Act 2008* (WA). I have summarised them, by reference to the authorities in support, on a number of occasions.<sup>2</sup> They are as follows.

- (i)        The court must form an opinion which has two components. First, the court must determine that the amount of costs allowable in respect of a matter under a legal costs determination is inadequate. Second, the court must conclude that the inadequacy arises because of the 'unusual difficulty, complexity or importance of the matter'.
- (ii)        Having heard the matter and being familiar with the way in which the case was conducted and the issues which were litigated, the court is in a position to form the opinions required under the section as matters of impression rather than 'detailed evaluation', 'precision', 'science' or 'mathematics'.
- (iii)        As to the first question (inadequacy) the court must form the view that the maximum amount allowable under the relevant scale item is inadequate in the sense that there is a fairly arguable case that the bill to be presented to the taxing officer may properly tax at an amount which is greater than the limit which would be imposed by the relevant costs determination. Until that threshold is crossed, the power will not ordinarily be exercised.
- (iv)        A conclusion that it is fairly arguable that the taxing officer might properly allow costs at an amount greater than the amount allowable under the Scale does not always require evidence of the costs actually incurred.
- (v)        As to the second question (the cause of the inadequacy being unusual difficulty, complexity or importance), the word 'unusual' qualifies only the 'difficulty' of the matter and not its complexity or importance. The word 'unusual' in this context means unusual having regard to what one might describe as the usual run of civil cases determined in the Supreme and District Courts. That essentially involves the making of a value judgment by the court, having regard to the court's experience of the particular case when compared with the usual run of cases. And the word 'importance'

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<sup>2</sup> *Crawley Investments Pty Ltd v Elman* [2014] WASC 233 (S) [5]; *Mineralogy Pty Ltd v Chief Executive Officer, Department of Environment Regulation* [2015] WASC 21 (S) [4].

in s 280(2) encompasses importance to the parties; it does not require broader importance to the public or a sector of the public.

- (vi) Although replacing the amount of the Scale item with a different ceiling may be appropriate where sufficient information exists to make that assessment, it is not uncommon for an order to be made removing the limit for the Scale item without replacing that limit with a different ceiling.
- (vii) One of the principles that should guide a court in addressing an issue under s 280(2) is that the court should not usurp the role of the taxing officer.

**The Items of the Scale that Brockman Iron seeks to uplift**

7 Brockman Iron's application seeks to uplift the maximum costs allowable under the following Items of the 2014 Scale (and corresponding items in the 2012 Scale where relevant):

(i)	Defence	10 hours	SP	\$4,730
(ii)	Giving discovery	10 hours	SP	\$4,510
(iii)	Preparation of case	120 hours	SP	\$56,760
(iv)	Senior Counsel	3.5 days prep and 1st day trial		\$30,195
(v)	Counsel	3.5 days prep and 1st day trial		\$17,325
(vi)	Senior Counsel per day	2nd and 3rd day trial		\$6,710
(vii)	Counsel per day	2nd and 3rd day trial		\$3,850
(viii)	Pre-trial matters	per hour rate		unlimited
(ix)	Cost of obtaining trial transcript provision			No
(x)	Strike out application	2 days prep; 1 day hearing		\$11,550

8 I deal with each of these matters in turn below. The first point I consider concerns the Scale limits that applies to many of these items. The issue is the limit provided in the Scale for the rates of Senior Counsel,

Counsel and Senior Practitioners. Brockman Iron says that these rates should also be lifted.

### Uplift of hourly rates

9 An assumption underlying Brockman Iron's submissions for uplift of the limits contained in many of the Items above was that the limit upon hourly rates for Senior Counsel, Counsel, or Senior Practitioner should be uplifted. In relation to the 2014 Scale, those amounts are as follows:

(i)	Senior Counsel	\$671 per hour	\$6,710 per day
(ii)	Counsel	\$385 per hour	\$3,850 per day
(iii)	Senior Practitioner (>5 years)	\$473 per hour	
(iv)	Junior Practitioner (<5 years)	\$330 per hour	
(v)	Clerk/Paralegal	\$231 per hour	

10 In *Crawley Investments Pty Ltd v Elman*,<sup>3</sup> I explained that the Court does not lift the limit on hourly rates merely because a party's counsel has charged at a rate higher than the Scale.<sup>4</sup> As Pullin J said, of a costs agreement that charged rates above Scale, in *Flotilla Nominees Pty Ltd v Western Australian Land Authority*,<sup>5</sup>

there should be no expectation that, as a matter of course, rates in the costs agreement which are above scale will be ordered to be the rates to apply in taxation as between party and party. There would have to be evidence justifying the higher rate. The whole point of the existing scale is that the rates are struck by reference to what is being charged within the profession. It is true that the hourly rates can only be an average or mean of the upper rates determined in the survey, and there will be some cases where the unusual complexity or importance of the case warrants the special expertise of the practitioner involved and warrants an increase in the hourly rate. In some cases not involving unusual complexity or importance, the higher rates paid will not be recoverable. A party is always entitled to the luxury of retaining the highest paid practitioners in the conduct of their case, but they cannot always expect to recover these costs from the other party. If the hourly rates in the scale are thought by parties or practitioners to be too low for work which is not of unusual complexity

<sup>3</sup> *Crawley Investments Pty Ltd v Elman* [2014] WASC 233 (S) [5].

<sup>4</sup> *Red Hill Iron Pty Ltd v API Management Pty Ltd* [2012] WASC 323 (S) [30] (Beech J); *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 (S2) [7] (Le Miere J).

<sup>5</sup> *Flotilla Nominees Pty Ltd v Western Australian Land Authority* [2003] WASC 122 (S); (2003) 28 WAR 95, 101 [22].

or importance, then submissions should be made to the Legal Costs Committee to increase the rates in the scale.

11 The affidavit evidence filed on behalf of Brockman Iron provided a schedule of the approximate cost incurred by Brockman Iron in relation to each Scale Item.<sup>6</sup> As I explain below, that is sufficient in relation to some Items. But it did not provide any breakdown of which type of practitioner or practitioners performed the work in relation to each particular item. Nor did it provide for the rates charged by its Senior Counsel, Counsel, Senior Practitioners, Practitioners, or Paralegals.

12 This was partly rectified when, in response to submissions by TPI which pointed out these deficiencies, Brockman Iron filed another affidavit (without leave).<sup>7</sup> In the second affidavit, a solicitor for Brockman Iron explained that:

- (i) The rates charged by the solicitors included the following:<sup>8</sup> Senior Practitioners (\$436 - \$782), Junior Practitioners (\$287 - \$505), Clerk/Paralegal (\$317), Counsel (\$693 - \$772), Senior Counsel (\$1,100).
- (ii) To the best of her knowledge Counsel and Senior Counsel of the equivalent seniority to those instructed in this case charge rates higher than those in the Scale.<sup>9</sup>

13 Counsel for TPI argued that the evidence from Brockman Iron was still inadequate for the Scale to be uplifted in relation to these rates. I do not consider that an application of this nature needs to descend into a great level of detail. If it were to do so then the rough, discretionary exercise of deciding whether limits should be uplifted could turn into something approximating a taxation. Although some evidence should be provided, it is important that, as Wheeler J said more than a decade ago, the court 'should not encourage unnecessary work in this area'<sup>10</sup> where much depends on impression.

14 It is clear from the evidence now provided that Senior Counsel and Counsel performed work at rates above Scale. In this case the work they performed did not need to be the subject of evidence beyond that provided. For example, their signatures appear on the defence, and on the submissions. They appeared at the trial. Nevertheless, I accept the

<sup>6</sup> Affidavit of Ms Di Russo, sworn 31 October 2014, CDR 5, pages 17 -18.

<sup>7</sup> Affidavit of Ms Di Russo, sworn 18 December 2014.

<sup>8</sup> Affidavit of Ms Di Russo, sworn 18 December 2014 [7].

<sup>9</sup> Affidavit of Ms Di Russo, sworn 18 December 2014 [15].

<sup>10</sup> *Verdell Pty Ltd v F & G Nominees Pty Ltd* [2002] WASC 58 (S2) [6].



submission by counsel for TPI that the evidence was limited in one significant respect. There was not even a sentence to suggest that any of the work done by other practitioners on any particular item was performed above Scale rates. It was not said, for instance, that the Senior Practitioners, Junior Practitioners, or Paralegals who performed any work on the defence, discovery, or preparation of case, were those whose rates were above the Scale. Nor was there any explanation provided for why it was said to be fairly arguable that the rates of any of these practitioners (if they performed such work) should be taxed at rates above Scale, such as because they reasonably performed work that others within the Scale limits could not.

15 I consider that the case was of such a nature that the rates for Counsel and Senior Counsel might fairly arguably be taxed above Scale rates. But the same conclusion does not apply to the other legal practitioners on the evidence before me.

16 Overall, my assessment is that based on the evidence and on my assessment of the nature of this case, I am satisfied that there is a fairly arguable case that a taxing officer might properly allow costs for the rates of a Counsel or Senior Counsel at an amount greater than the amount allowable under the Scale for preparation of the defence, preparation of the case, preparation before trial and required conferrals, and appearing at trial. I reiterate that this does not suggest in any way that such an allowance *will* be made or that the allowance will approximate the amount charged.

17 In relation to each of these matters, the fairly arguable case that rates of a Counsel or Senior Counsel would be allowed at an amount greater than the amount allowable under the Scale is due to the importance of the case to the parties which, in turn, reflected the complex manner in which the case was run, particularly having regard to the usual run of cases. Although this issue is one which is essentially a value judgment to be made by the court and is not 'a question that I think is usually assisted by elaborate or detailed argument',<sup>11</sup> in the introduction to these reasons I have outlined some of the reasons for my impression concerning the fair arguability of a need for counsel of a level of seniority requiring rates beyond Scale rates.

18 It is necessary, however, to emphasise one point. At various points in submissions and evidence, TPI argued that Brockman Iron's case had been presented with economy. For instance, counsel relied on affidavit

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<sup>11</sup> *O'Rourke v P & B Corporation* [2008] WASC 36 [25] (Martin CJ).

evidence that during the 2.5 day hearing, Senior Counsel for Brockman Iron spoke for only 2.6 hours.<sup>12</sup> But, as counsel for TPI acknowledged orally on this application, an economy of oral presentation time, or an economy of written submissions, is not the same as an economy of effort. Indeed, the two can sometimes be inversely related. Nor does an economy of oral or written submissions suggest that counsel of less seniority might have been appropriate. Often it will take considerable time and consideration, and the experience and judgement of very experienced counsel, for a decision to be made *not* to oppose a particular point or *not* to make a particular submission.

*(i) Defence*

19       The Scale makes provision in Item 3(b) for 10 hours preparation of a defence by a Senior Practitioner. The total ceiling cost is \$4,510. The approximate cost initially said in affidavit evidence to have been incurred by Brockman Iron is almost ten times the Scale limit, \$43,000.<sup>13</sup> Then, in subsequent affidavit evidence, a draft bill of costs was included which substantially increased this amount. That draft bill, prepared by counsel who appeared for Brockman Iron on this application, suggested that the cost of preparation of the defence was \$56,295.20.<sup>14</sup> This was said to include the defence, amended defence, further amended defence, further re-amended defence, and second further re-amended defence.

20       I am satisfied based upon my knowledge and impression of the case that there is a fairly arguable case that a taxing officer might properly allow costs for more than 10 hours of preparation of a defence. Although the defence was brief, consisting of around 17 paragraphs, the legal and factual issues raised by TPI needed to be understood and considered as part of the process of pleading the defence. Those legal and factual issues were not simple, the core issue was important and had never been previously decided, and the matter was of significant commercial significance to the parties. The defences were signed by Senior Counsel and Counsel for Brockman Iron. Senior Counsel for Brockman Iron spent 3.75 hours working on the defence and, as counsel for TPI properly conceded, an uplift of the rates for Senior Counsel would require an uplift of the limit on costs allowed for the Defence.

21       As for the number of hours required for the preparation of the defence, I take into account that a substantial amount of the cost, perhaps

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<sup>12</sup> Affidavit of Mr Van Brakel, sworn 3 December 2014 [7(c)].

<sup>13</sup> Affidavit of Ms Di Russo, sworn 31 October 2014, CDR 5, page 17.

<sup>14</sup> Affidavit of Ms Di Russo, sworn 18 December 2014, page 17.

a majority of it, will have been incurred as a consequence of four different versions of TPI's statement of claim, including a re-amended defence which prompted a strike out application by TPI.<sup>15</sup> These are costs that O 66 r 3 the *Rules of the Supreme Court 1971* (WA) require TPI to bear, in the absence of a contrary order. Counsel for TPI submitted that the costs of these amendments that TPI will be required to bear are costs that stand outside the Scale for the purposes of a taxation. Counsel for Brockman Iron said that these costs fell within the Scale Item for a defence. Neither counsel made any detailed submissions concerning the proper construction of the *Rules* on this point. My tentative view is that there is nothing in O 66 r 3 that would take the costs of amendment outside the Scale, although there may be an issue whether the reference to a 'defence' in the Scale includes an 'amended defence'. Counsel for Brockman Iron only sought the increase in the Scale for work done on both the defence *and* amendments to the defence. If the Scale were to include both, counsel for TPI conceded that the Scale limit on hours for a defence should also be raised. Since there is common ground between the parties that the limit for hours of work for a defence should be increased if the Scale included both the defence and amendments to the defence, and since a taxation will need to consider the costs of amendments to the defence in any event, it is sufficient to increase the limit on this basis. It is not necessary to determine the construction of O 66 r 3 or issues concerning costs of amendments to a defence that are not 'occasioned by' the amendment.

- 22           The limits for the rate for preparation of the defence, the time limit of 10 hours for preparation of the defence, and the corresponding total amount of costs that can be claimed for this item should be lifted.

***(ii) Giving discovery***

- 23           The 2012 Scale relevant to discovery in this case provides in Item 7(b) for 'giving discovery' of up to 10 hours of the time of a Senior Practitioner for a total limit of \$4,510.

- 24           The discovery sought by TPI was wide ranging. Counsel initially submitted that Brockman Iron's costs incurred in relation to discovery was in excess of \$53,000. But the draft bill of costs now seeks \$19,492.

- 25           TPI properly conceded that the limit on hours spent for giving discovery, and the corresponding total amount that could be claimed, should be removed. That order is appropriate. But there is no sufficient

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<sup>15</sup> *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd* [2014] WASC 286.

basis to suggest, and I do not accept that it is fairly arguable, that the ceiling rate for a Senior Practitioner for discovery should be uplifted. As I have explained, it was not even apparent from the evidence that discovery was performed by a Senior Practitioner, still less a Senior Practitioner who charged about Scale rates. Nor do I consider it fairly arguable that the nature of the work reasonably required this.

***(iii) Preparation of case***

26           The Scale item for preparation of the case, Item 17, provides for a limit of 120 hours by a Senior Practitioner, which is a limit of \$54,120 under the 2012 Scale and \$56,760 under the 2014 Scale.

27           Brockman Iron initially said that it incurred \$98,000 of costs.<sup>16</sup> In its subsequently prepared draft bill of costs this became \$117,761.<sup>17</sup> There was no evidence of the seniority of any person or persons involved with the preparation of the case, other than evidence concerning preparation done by Senior Counsel.

28           Brockman Iron did not provide any evidence concerning the rates charged by the particular practitioners who were involved in preparation of the case or the number of hours that those practitioners had worked. As I explained during an exchange with counsel, it would only have taken a sentence to say that some of the practitioners involved in preparation of the case were those who charged at rates above the Scale, and that the overall hours spent by practitioners in preparation of the case was beyond the 120 hour limit.

29           In any event, as a matter of my impression of the case and based upon the material before me, I do not consider that it is fairly arguable that the costs for preparation by a Senior Practitioner would be taxed at a rate above the Scale, or that more than 120 hours of work would be allowed on a taxation.

30           A number of points about this impression should be explained.

31           First, I assume that none of the time charged for preparation of Brockman Iron's case would include time spent for preparation by Senior Counsel or Counsel which is included in the items discussed below. Otherwise there would be double counting. So all of the time that is included in the limit of up to 3.5 days of preparation pre-trial by Senior Counsel and Counsel falls outside this Item.

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<sup>16</sup> Affidavit of Ms Di Russo, sworn 31 October 2014, CDR 5, page 17.

<sup>17</sup> Affidavit of Ms Di Russo, sworn 18 December 2014, page 18.

32 Secondly, Brockman Iron did not tender any lay or expert witness statements. Nor did it cross examine any of the witnesses for TPI. And although there was a considerable amount of evidence provided by TPI which Brockman Iron had to consider, Brockman Iron's objections to this evidence were generally expressed on a global relevance basis.

33 Thirdly, I accept that some of the preparation of the case might have been done by Counsel or Senior Counsel in place of a Senior Practitioner, apart from the immediate pre-trial preparation limit of 3.5 days. This is not uncommon and it appears to be the case from the bills provided by Senior Counsel. To the extent that such preparation of the case was done by Counsel or Senior Counsel, then those limits should be lifted for the reasons I have already explained.

***(iv), (v) Preparation and first day of trial (Senior Counsel and Counsel)***

34 Item 20(a) and 20(b) of the Scale provide for 3.5 days of preparation and for the first day of trial, to a limit of \$30,195 (Senior Counsel) and \$17,325 (Counsel). For the reasons I have explained above, the limit for the rates for Senior Counsel and Counsel provided in the Scale should be lifted. This has the consequence, for the same reasons, that the \$30,195 and \$17,325 limits should also be lifted.

35 As counsel for Brockman Iron conceded orally, although not in written submissions, the time periods of 3.5 days of preparation and the first day of trial should not be lifted. These time periods equate to 45 hours. Based on the invoices of Senior Counsel which were annexed to the affidavit evidence on this application, Senior Counsel spent just over 32 hours in preparation and first day of hearing and Counsel spent fewer than 40 hours in preparation and first day of hearing. There is no fairly arguable case that the number of hours will be taxed at more than 45 hours of preparation and hearing by Senior Counsel or Counsel.

***(vi), (vii) Second and third day of trial (Senior Counsel and Counsel)***

36 Items 20(c) and 20(d) of the Scale provide for a second and subsequent day of trial to a limit of \$3,850 (Counsel) and \$6,710 (Senior Counsel). For the reasons I have explained above, the limit for the rates for Senior Counsel and Counsel provided in the Scale should be lifted. In this case, I consider that this should have the consequence, for the same reasons, that the \$3,850 and \$6,710 limits should also be lifted for the second day of trial.

37 As counsel for Brockman Iron conceded orally (although not in written submissions), the limit for the total amount does not need to be lifted for the third day of trial. The trial concluded before lunch on the third day. I do not consider that it is fairly arguable that the taxed cost for the third day could exceed \$3,850 and \$6,710 even if rates for Counsel or Senior Counsel were used above Scale. The cost for fewer than 5 hours of work (including significant time before and after the hearing) would not exceed \$6,710 for Senior Counsel (ie \$1342 per hour for 5 hours) or \$3,850 for Counsel (ie \$770 per hour for 5 hours).

38 I note in passing that although Senior Counsel charged a 'fee on brief' of \$10,000 for the third day of hearing, which included a conference after Court, it is not clear whether this amount effectively included a cancellation fee. As counsel for TPI submitted, such fees have been held in this Court to require strong grounds before they are borne by the other party.<sup>18</sup> As Wilcox J said in *Australian Federal Police v Razzi*:<sup>19</sup>

The practice of demanding 'cancellation fees' can rest only on the premise that, if a case does not proceed or finishes early, the barrister will be left without remunerative work. But, except perhaps for beginners at the Bar who are unlikely in any event to be able to command a 'cancellation fee', the premise is rarely well-founded in point of fact. Most established barristers find that their problem is over-employment, not under-employment. For most, some unexpected time out of court is a welcome opportunity to catch up with chamber work. At a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and the legally-aided, any new practice which further increases costs requires meticulous justification. I am not aware of any attempted justification of 'cancellation fees'. It seems to me that it would be desirable for Bar Councils and Law Societies to examine such fees, and perhaps issue a ruling or some guidelines, before the practice becomes firmly entrenched.

39 That was said more than two decades ago. It appears that it is not as uncommon today for a party to agree to pay a cancellation fee for a senior barrister. But whether that fee should be borne by the other party to the litigation is a different matter. The Scale of costs has not yet included in it the recoverability of costs for work which was not done. In the absence of any evidence concerning practice or the reasonable need for such a fee or even that such a fee was charged in this case, I do not consider that it is fairly arguable that this could be recovered on a taxation of the costs in

<sup>18</sup> *The Owners of 'Kintail', 17 The Coombe, Mosman Park, Strata Plan 21483 v Camm* (Unreported, WASC, Commissioner Pringle QC, Library No 950558, 13 October 1995) 9.

<sup>19</sup> *Australian Federal Police v Razzi* (1991) 30 FCR 64, 66 - 67.

this case. In oral submissions, counsel for Brockman Iron did not submit the contrary.

- 40           Ultimately, and in any event, I do not consider it fairly arguable that the cost for a final day of hearing would exceed \$6,710 for Senior Counsel or \$3,850 for Counsel.

***(viii) Pre-trial matters***

- 41           Item 24(a) of the Scale provides for pre-trial, mediation, conferrals or other conferences where required by the Court or by practice direction. There is no limit to the number of hours that can be claimed for this item. For the reasons expressed above, I consider that to the extent that Senior Counsel or Counsel were involved with these matters, the hourly rates for Senior Counsel and Counsel should be lifted. In the circumstances I have described concerning the involvement of Senior Counsel and Counsel at rates above Scale, it is fairly arguable that a taxing officer would allow rates above Scale for the involvement of those counsel in pre-trial matters required by the court.

- 42           Counsel for Brockman Iron submitted that there was doubt concerning whether Item 24(a) would apply to the conference between counsel on 28 May 2014 in relation to Brockman Iron's objections to TPI's evidence. I do not understand why this would not be included in Item 24(a). But counsel for TPI properly conceded that any doubt that existed could be removed by an order that TPI pay Brockman Iron's costs of that conference within Item 24(a).

***(ix) Cost of trial transcript***

- 43           No provision is made in the Scale for the cost to Brockman Iron of obtaining the trial transcript. The conduct of modern litigation makes that cost almost essential in any substantial Supreme Court litigation that lasts for more than a day where there are ongoing issues and questions raised by the trial judge. The parties agree that an order should be made that TPI pay Brockman Iron's cost of obtaining a copy of the trial transcript.

***(x) Strike out application***

- 44           Item 10(a) of the Scale provides for a limit of \$11,550 for a chamber summons with 2 days' preparation and one day of hearing. Brockman Iron's draft bill of costs provides for \$21,811 for the cost of this chamber summons.

45           An uplift of this item was not sought in the chamber summons for special costs. It was not sought in Brockman Iron's initial submissions. It was raised in fresh supplementary submissions filed 'in reply'.

46           The strike out application was discussed briefly at a directions hearing. The applicant initially sought a one hour hearing. But both parties were content for the application to be decided on the papers. The one day hearing provided for in the Scale was not required. The point would not have taken two days of preparation. Brockman Iron filed eight pages of submissions on 7 August 2014. They were signed by Senior Counsel and Counsel. Based on my impression of the case, there is no fairly arguable case that the amount of the bill for the chamber summons to strike out could tax at an amount higher than the Scale. However, the limit on the rates for Counsel and Senior Counsel in preparing for this strike out application should be lifted for the reasons I have explained.

### **Conclusion**

47           Orders should be made as follows:

- (1) Any taxation of the first defendant's costs on the basis that the limits on costs allowable under the *Legal Practitioners (Supreme Court)(Contentious Business) Determination 2012* (WA) and the *Legal Practitioners (Supreme Court)(Contentious Business) Determination 2014* (WA) (the Scales) be varied pursuant to s 280(2) of the *Legal Profession Act 2008* (WA) in respect of
  - (a) Items 3(b) (defence) and 7(b) (giving discovery)
    - (i) by removing the limits on the hours allowed;
    - (ii) by removing the limit for recoverable costs; and
    - (iii) in relation to Item 3(b) only, by removing the limit on rates in so far as work was done by Counsel or Senior Counsel;
  - (b) Items 20(a), 20(c) (first, second day of trial, Counsel), 20(b), 20(d) (first, second day of trial, Senior Counsel)
    - (i) by removing the limit for recoverable costs; and
    - (ii) by removing the maximum allowance for rates for both Senior Counsel and Counsel; and



- (c) Items 10(a) (strike out), 17 (preparation of case), 20(c) (third day of trial, Counsel), 20(d) (third day of trial, Senior Counsel), 24(a) (pre-trial)
    - (i) by removing the maximum allowance for rates for work performed on these Items by Senior Counsel and Counsel only.
- (2) The plaintiff pay the first defendant's costs of the conference between Counsel on 28 May 2014 within Item 24(a).
- (3) The plaintiff pay the first defendant's cost of obtaining the transcript of the trial of the action.