THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDEBOOK

6TH EDITION (REVISED)

THE LAW SOCIETY
OF NEW SOUTH WALES

CONTENTS

Costs Guidebook 6th Edition (revised) – Foreword

August 2014

The *Costs Guidebook* is a practical introduction to costs and includes a suite of customisable precedents for compulsory costs disclosure and for costs agreements. It is intended to be a high level roadmap of the laws affecting costs.
First published in 1994, this popular publication is produced by the Costs Committee and has been regularly revised ever since.
This edition has been updated and the precedents incorporate the revised costs disclosure and costs agreements.
The Law Society thanks Neil Oakes and FMRC for their kind permission to reference FMRC material in this practitioner' guide.
As always, the Law Society advises practitioners to read the relevant legislation and regulations to satisfy themselves of compliance with the law, and to seek advice where needed.

John Dobson
Chair, Costs Committee
Law Society of NSW

THE LAW SOCIETY
OF NEW SOUTH WALES

CHAPTER 1

MANAGING THE ENGAGEMENT WITH THE CLIENT

Costs Guidebook 6th Edition (revised) - Chapter 1

Managing the Engagement with the Client

1.1 Introduction

The purpose of this chapter is to guide law practices on how to initiate and manage a client engagement. In this sense, 'engagement' has a far wider meaning than a practitioner's retainer. A law practice entering into an engagement with a client triggers a range of rights and responsibilities for both parties which, once embraced, may be difficult to alter or terminate. Merely supplying a written costs disclosure which may comply with the requirements of the *Legal Profession Act 2004 (NSW)* (the Act), and completing a costs agreement, is not sufficient. There should also be clear and plain language communication with the client.

The focus in this chapter is on the engagement process, rather than the legal product itself. It is primarily the law practice's responsibility to manage the engagement process, and the issues which need to be considered are:

1.2 Assessing the suitability of the engagement

Difficulties arise when law practices do not manage client engagement properly from the outset. This does not mean immediately signing a costs agreement or providing a written disclosure. It might, for instance, mean refusing the work, not because of any lack of technical competence, but because accepting the engagement is not appropriate for the firm at that time. The law practice should attempt to answer these questions before embarking on a new engagement:

- Is the matter suitable, given the workload in the law practice and on the practitioner?
- Is there sufficient time available to undertake the matter and also manage proper communication with the client?
- Is the client committed to the task, and specifically what will be expected of them?
- Does the law practice have the technical expertise and resources to undertake the matter?
- Does the matter or the client pose any risk to the law practice, for example, would accepting instructions give rise to a conflict of interest?
- Can the law practice meet the client's objectives and expectations?
- Does the client agree to the terms of engagement, including payment?

The law practice should also consider the client's likely expectations of the engagement, such as:

- the law practice is going to solve their problems
- the service will be delivered in a timely fashion
- the fee will reflect true value to the client
- the law practice is there to serve them and to solve their problems
- there will be a high level of lawyer-client communication.

There are situations in which it is reasonable and prudent to decline to undertake work for a client. If you are unable to handle a matter, it is far better to refer the client to another law practice, rather than risk the possibility of a matter being handled badly. An analysis of LawCover claims indicates that an inability to decline work is not uncommon and is a source of complaints and claims. Check the Solicitors' Rules on the Law Society's website about accepting work: www.lawsociety.com.au/solicitorsrules

If you decide to decline a matter, explain to the client why you have made that decision. It may be because of existing work pressures, or a possible conflict, or because it is outside the law practice's expertise. A client may well recognise the logic in what you say and be happy to return for subsequent work.

If you do enter into an engagement then you should serve the client competently and diligently. You should be acutely aware of the fiduciary nature of the relationship with your clients, and always deal with them fairly, free of the influence of any interest which may conflict with their best interests. You should maintain the confidentiality of your clients' affairs, but give them the benefit of all the information that you have, relevant to their affairs. You should not engage in, or assist conduct that is calculated to, circumvent justice or otherwise be in breach of the law.

1.3 The importance of communication

The Act dictates the way that law practices establish client engagement, manage client expectations, vary or terminate the engagement, and communicate with their client.

If the requirements under the Act about disclosure and costs agreements are carefully and sensibly implemented then they can dramatically improve the standard of practice and the level of professionalism. In doing so, it should reduce the number of complaints and claims from clients.

The cornerstone of a successful engagement process is good communication between the law practice and the client, for the duration of their association. The agreement which the law practice enters into with the client is a two-way communication. It should spell out what the law practice will do for the client and expectations of the client. It should also spell out what the client can expect from the law practice, the likely duration of the matter, the likely cost, and how progress on the matter will be communicated to the client.

The genesis of many complaints or claims stems from the start of an engagement. They may arise because the client:

- misunderstands what is likely to happen in the matter, and has unreal and/or unjustified expectations
- feels that the practitioner is not readily available to speak to them or is not advising them of progress at reasonable intervals
- does not know why there is a delay
- feels 'shunted' about the law practice from one practitioner to another
- is not given adequate information about costs
- is not informed that he or she may be entitled to legal aid
- does not understand what has happened to money given to the law practice and does not understand the law practice's bill or statement of account
- feels there is a long delay in recovering costs from the other party
- does not understand why some of the law practice's costs must be paid by them and not the other side, when the case has been won
- does not know that a barrister has been briefed and objects to paying the barrister's fee
- is not given genuine estimates of legal costs to be or being incurred. Always ensure the client understands the difference between an estimate and a quotation and always update estimates provided, where appropriate.

The Law Society finds that giving adequate information to clients at an early stage in, or during, a matter can prevent such complaints arising.

1.4 Identifying the client

It is important to establish at the outset who is the client, particularly when acting for a business entity rather than an individual or individuals. It is essential that the costs agreement or disclosure document properly lists the correct client.

Attention is drawn to the Married Persons (Equality of Status) Act 1996, which became operational on 1 March 1997. Under this Act, spouses have legal capacity as if they were not married.

When acting for both spouses in any transaction it is advisable to make it clear in writing, preferably in the costs agreement or disclosure document, that:

- each spouse is considered the agent for the other for the purposes of giving instructions binding on both (if that is appropriate for the clients)
- if a conflict of interest arises at any time between the spouses, you will terminate the retainer, and the parties will be liable to pay your costs up to that time.

1.5 Defining and documenting the engagement

A client's expectations of the legal system need to be realistic. If they are not, the client will be dissatisfied and a complaint or a claim may follow. The law practice must take the time to properly determine the client's expectations, to make sure they do not have an inflated idea of the law practice's ability to make some event occur or to win a case. By properly communicating what is possible, the client can make an informed decision about whether to proceed with a matter. Once a decision is taken to proceed with a matter then it should be clearly documented in writing.

The use of a costs agreement, either following one of the precedents referred to in appendices of precedents and forms, or in some other practical form that complies with the Act, is sound professional practice, and good business sense. Disclosure of costs is a requirement under the Act.

An agreement distinguishes the legal issues from the management of the matter. An agreement should document the shared understanding between the law practice and client about objectives, scope, timing and costs. It should also identify how and when variation and/or termination might occur. It can provide a reminder to clients to seek changes to the terms of engagement when necessary. Without such a written document, it is difficult to defend a complaint or a claim.

An agreement can also be a useful management tool for the legal practice. It can be used to review progress, and by partners of the law practice who are supervising matters being handled by employed practitioners.

Probably the greatest advantage of an agreement is that it can prevent problems before they arise. It can be used as an early warning device by either the client or the law practice, so that if a matter is not progressing according to plan, or a substantial increase in costs appears likely, this can be dealt with at an early stage. Remedial action, such as a review of the costs estimate, or a revision of the scope of the instructions, can then be carried out.

Law practices which customarily use costs agreements report an increase in client satisfaction. This is often described as 'customer comfort' and obviously has tremendous potential for improving the client base, and the overall goodwill value, of any practice.

1.5.1 Costs

The requirements of the Act place the onus on law practices to hone their skills at estimating the value of their professional work (s.309 of the Act). Charging based on court scales has disappeared in most areas of practice. Law practices have no alternative, except to develop appropriate and financially sound bases for charging, and to make disclosure, and in some cases make ongoing disclosure, as provided under the Act.

Although disclosure is mandatory, except in specific circumstances (see 3.2.8), a law practice 'may' enter into a costs agreement (s.322 of the Act). However, if the law practice wishes to contract out of any relevant regulated costs imposed, there are additional legislative requirements related to motor accident, work injury damages and civil liability matters that make it mandatory to enter into a costs agreement. These areas of practice require additional disclosure (see Chapter 8 and Chapter 9). Failure to comply with these requirements will mean any agreement to contract out of the regulated costs in these matters will be unenforceable and the regulated costs will apply.

If the retainer is accepted on the basis that some or all of the legal costs payable are conditional on the successful outcome of the matter to which the costs relate, then the costs agreement must comply with the requirements of ss.323 - 324 of the Act. A conditional costs agreement must be signed by the client. Conditional costs agreements are not permitted in relation to a matter that involves criminal proceedings or proceedings under the *Family Law Act 1975*.

It is essential, if a law practice is seeking to recover the cost of paralegal and secretarial services from the client, that these services are specified in any disclosure document and costs agreement provided to the client. Similarly, if it is intended to seek the cost of miscellaneous items which cannot be correctly classified as disbursements, such as charges for telephone, facsimile transmissions, photocopying and postage, then this should be specified in any disclosure document/costs agreement, and the rate should also be specified.

Law practices should also ensure that records are maintained that identify the charges raised so that if there is a challenge, the records will verify claims.

1.5.2 Pro bono work

Party/party costs, if awarded by an order to one of the parties, indemnify that party (in part) against the payment of their law practice's costs. If there was never, under any circumstances, a liability to pay costs to that party's law practice, then, as no costs have been incurred, they cannot recover costs on a party/party basis, even if there was an award of a court or tribunal.

If a law practice wishes to preserve the client's entitlement to an indemnity for costs, the law practice should issue a conditional costs agreement – see section 3.3.3.

1.6 Managing variations and termination

An agreement should make it clear under what circumstances the engagement may be varied or terminated. It should also include a clear statement that the client will be liable for the law practice's costs in those circumstances.

Also s.316 of the Act requires that the law practice must notify the client of any substantial changes.

The *Solicitors' Rules* deal with some of the issues which can arise when a retainer is terminated, for example, when it can be terminated, providing appropriate notice and the retention of documents. It is important, that the client understands at the outset that they need to assist the law practice to resolve their matter.

1.6.1 Varying the engagement

Legal matters frequently change as they progress. A range of factors may lead to a need to vary an engagement, for example:

- the scope or character of a matter may change, in which case the client should be informed of the changes and the impact of those changes on costs
- there may be a subtle but definite change in the matter, such that it becomes an entirely new engagement, for example, a failed mediation which leads to litigation or a contract settlement leading to rescission.

If there is good, ongoing communication between the law practice and the client, then variations in the engagement which would change the client's expectations or understanding of the work to be done will be handled as a matter of course. It would still be useful to pause at this point to re-address the matters which were raised by both the client and the law practice, at the outset of the engagement.

Professional obligations and risk management issues must be kept in mind. Hurried, undocumented and uncommunicated changes could easily turn into a contested bill of costs, a complaint or a claim on LawCover.

1.6.2 Terminating the engagement

Risk management issues arise when a law practice seeks to withdraw from a matter before it is concluded. Law practices are advised to read the *Solicitors' Rules* and, in litigation matters, be aware of the relevant court rules and practice notes which have specific notice and documentary requirements. It is important for law practices to recognise and react to signals which indicate that the law practice should disengage. These might include that:

- the client refuses to take advice given
- the client fails to answer letters
- the matter extends beyond the competence of the law practice
- the law practice's position is being compromised by a conflict of interest.

When situations of this sort occur, it is important to communicate with the client and discuss options.

If a decision is taken to terminate the matter, then a law practice must establish a clear and reasonable basis for doing so, and confirm this in writing for the client.

Once again, the grounds for termination should have been spelt out in the agreement, and include a provision for payment of costs up to the termination.

Potential causes for termination may include that:

- the client fails to pay any fee or other monies requested by the law practice, in accordance with the agreement
- the client fails to provide the law practice with proper instructions (including information) as requested by the law practice within a specified reasonable time-frame
- the client refuses to accept, contrary to the law practice's advice, an offer of settlement which the law practice considers reasonable
- a conflict of interest arises or is discovered which prejudices the performance of the law practice and their obligations to the client
- the client requires the law practice to conduct the matter in an improper or unreasonable manner
- the client gives the law practice misleading information relating to the matter
- the client fails to co-operate with the law practice, to appear for any medical or other expert examination, or to attend a court hearing without good reason
- the client changes representation, or decides to act as a litigant in person - particularly important in conditional costs agreements.

If the client believed that more work was to be done, a letter from the law practice closing the matter and enclosing a final bill may rectify this misunderstanding. Even if the client sees the law practice for a brief consultation, it may be appropriate for the law practice to write to the client documenting the matters discussed, perhaps by sending a letter with a précis of the discussion and making sure that nothing more is expected by the client.

1.7 Conclusion

Entering into an engagement with a client triggers responsibilities and rights for both parties. These should be documented in an agreement as soon as a mutual understanding of the matter is reached, so that the parties understand what is required of each of them.

The existence of an agreement gives the law practice authority to carry out the terms of the agreement, and implied authority to do all things incidental to achieving the objective of the agreement. The existence and terms of the agreement and the appearance of the agreement to third parties will dictate the extent to which a law practice is able to bind the client.

Finally, it is the existence of the agreement that leads the law to superimpose fiduciary duties on the law practice, and the terms of that agreement dictate the extent or scope of those duties.

1.8 Further information

Law practices are becoming increasingly aware of risk management issues. The Risk Management Education Program (RMEP) conducted by LawCover has helped to bring engagement issues into sharp focus, and law practices are encouraged to use the opportunity offered by RMEP and similar facilities to develop their skills and knowledge in this area. Further information is available from LawCover at:
http://www.lawcover.com.au/about/default.asp?ContentItemID=49

The Ethics Committee of the Law Society is available to consider general ethical issues and concerns relating to the practice of law and the Solicitors' Rules. The Ethics Committee includes the Law Society's Senior Ethics Solicitor and members of the profession who are committed to upholding high ethical standards within the profession. Further information is available from the Ethics Section of the Law Society's website: www.lawsociety.com.au/ethics

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CHAPTER 2

SUGGESTIONS FOR SETTING COSTS IN A DEREGULATED ENVIRONMENT

Costs Guidebook 6th Edition (revised) - Chapter 2

Suggestions for Setting Costs in a Deregulated Environment

2.1 Introduction

The purpose of this chapter is to give law practices a convenient basis for determining what costs to charge in relation to legal work under the *Legal Profession Act 2004 (NSW)* (the Act).

Much of the information in this chapter is based upon the experience of others, and recommendations for setting charge out rates provided by FMRC Legal.

Whatever means you arrive at for determining an appropriate charge out rate, the fundamental prerequisite is that you comply with the requirements for disclosure in the Act. Failure to comply with the Act (Division 3 part 3.2) may effectively negate any fees raised, however 'reasonable' they may be. Provided there is disclosure in accordance with the Act, the method of charging is effectively a matter for you to negotiate directly with the client.

Time billing is still the most effective means of invoicing clients for legal services. Setting an appropriate hourly rate, which provides a reasonable return, will be a function of the costs of running a legal practice. These are individual matters and will vary widely from practice to practice.

If you do not have the requisite accounting skills or expertise, it is important to consult your accountant to obtain independent advice about the costs of your business, likely expenses and profitability.

Similar principles apply whether you are trading as a sole practitioner, corporation or partnership. It is essential to understand the administrative costs of running a practice, and any additional burden imposed by regulatory compliance.

The following issues are canvassed in this chapter:

2.2 Deregulation does not mean no regulation

Apart from the mandatory disclosure requirements under the Act (see Chapter 3), fees and charges are deregulated in most areas of practice. Regulated costs remain in areas such as workers compensation; personal injury actions under the MAA legislation, probate fees, and some litigation matters (see Chapter 6).

Under the Act, clients can ask for an assessment of a law practice's bill. Assessors are obliged to apply a 'fair and reasonable' test to determine the charges which should apply (see *Bouras v Grandelis* (2005) NSWCA 463.

It is important for law practices to price their fees effectively, correctly budget for revenue and expenses, and control debtors, so that they comply with the estimates given and their disclosure to clients.

Law practices should note that if charges are to be levied on a minimum unit of time basis, this should be made clear to the client in the disclosure document or costs agreement. If this has not been done, then the law practice will only be able to charge for the actual time spent. The Act now allows for electronic communications, therefore updating estimates and communicating with clients about costs is relatively quick and efficient.

As stages of the work are performed, cost estimates may need to be amended so as to meet the law practice's ongoing obligation to disclose (s.316 of the Act).

Clients other than another law practice have 12 months after the bill is given to the client to apply for assessment, even if the bill has been paid (s.350(4) of the Act). A law practice which retains another law practice has only 60 days to apply for assessment. So, for example, if you wish to challenge a barrister's invoice you must do so within 60 days. Therefore, it is important that the practitioner checks that they comply with the estimates provided for the barrister, and the billing procedures they disclosed.

2.3 GST

Law practices will be aware that GST is not part of the 'costs' rendered for legal services. As such, if GST is to be recovered, it must be specifically identified in the costs agreement provided to the client i.e. GST will be added both to fees and applicable disbursements.

In relation to costs fixed by regulation, cl.115 of the *Legal Profession Regulation 2005* sets out that GST may be added to costs, including fixed costs payable for the legal service to which they relate. This does not apply to personal injury costs capped pursuant to s.338 (1) of the Act.

If you fail to note in writing that GST is payable then you cannot recover it.

2.4 The process of setting charge out rates

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2.4.1 Costing and pricing legal services

Knowing the cost of production for each fee earner in the law practice is an essential component of determining how you set your fees. This applies equally to hourly rates and fixed fee matters.

If your law practice operates with a profit motive, you need to know what your cost of production is and add an appropriate profit margin. The components of the cost of production are:

- staff salaries (support and fee earners)
- the non-salary overheads of the practice
- notional salary of the principals in the practice.

This is illustrated below:

$150	Profit
$130	Staff salaries Non-salary overheads Principals' notional salaries

The average profit margin of a law practice after notional salaries of principals are included is between 10 - 15%. This example shows the cost of production for a blended chargeable hour in the practice is $130, and the firm sells its time at a blended rate of $150.

Based on the above example, there are two implications for the law practice:

- To generate the desired profit, the law practice must charge and recover $150 for every chargeable hour it produces.
- The cost of producing fixed fee work will be entirely dependent on the time it takes to conduct the matter. For example, if it takes five hours to complete a conveyance it will cost the law practice $650 (5 hrs x $130). If the law practice were to take 10 hours to complete the conveyance it would cost $1,300.

The above example is based on a law practice wide cost of production; however, cost of production attaches itself to an individual, not an activity. When determining the cost of production in the law practice it is appropriate that the fee earners absorb all of the practice costs - their own salaries, support staff salaries and non-salary overheads. Some people will have a higher cost of production than others by virtue of their higher salaries, or their longer working hours (full-time vs. part-time).

The following information provides a methodology for calculating the cost of production for each fee earner in your practice. This information can be used for setting fixed fee work, as well as being a tool for determining individual fee budgets.

Sample Practice

Step 1: Determine fees required to return a profit and to break even

	Retail		Break even	
Profit	$300,000			
Salaries	$450,000*		$450,000*	
Overheads	$300,000		$300,000	
Principal salary	$200,000		$200,000	
Total Fees Required	$1,250,000	1	$950,000	2

Notes:

- Profit: Insert the amount of profit you wish to earn in excess of notional salaries paid to principals.
- *Salaries: Include salaries for all employees (support and fee earners) in the practice. For the above example: Practitioner salaries: $150,000, Paralegal salaries: $30,000, Support staff salaries: $270,000. Total employee salaries: $450,000.
- Overheads: Total non-salary overheads.
- Principals' salary: Provide a notional salary for all equity principals in the practice.

Step 2: Determine Base Cost of Chargeable Hours

Fee earners only Do not include support	A Salary ($)	B Work. Hours	C = A/B Cost per WH	D Chg Hours	E = CxD Cost Chg Hrs
Partner	100,000	2,000	50.00	1,200	60,000
Partner	100,000	2,000	50.00	1,200	60,000
Practitioner	60,000	1,800	33.33	1,100	36,667
Practitioner	50,000	1,800	27.78	1,100	30,556
Practitioner	40,000	1,600	25.00	1,100	27,500
Paralegal	30,000	1,500	20.00	1,000	20,000
			Base Cost Chargeable Hours		234,722

(3)

Notes:

- Fee earners: List the fee earners only.
- Salary: Salary of the particular fee earner.
- Working hours: This is the annual hours spent at work. Multiply the hours per day by number of days per week by 46 weeks of the year, e.g. 9 hours x 5 days x 46 weeks = 2070 hours.
- Cost per working hour: Divide column A by column B (salary divided by working hours).
- Chargeable hours: Budgeted annual chargeable hours. Calculate as per working hours above, e.g.: 5.5 hours x 5 days x 46 weeks = 1265 hours.
- Cost per chargeable hour: Multiply column C by column D.
- Base cost of chargeable hours: Sum all of column E.

Step 3: Determine the Overhead Factor (OHF)

	Retail		Break even	
Fees Required	$1,250,000	(1)	$950,000	(2)
Base Cost of Chargeable Hours	$ 234,722	(3)	$234,722	(3)
Overhead Factor (OHF)	5.33	(1/3)	4.05	(2/3)

Notes:

- Fees required: As per calculated fees for retail and break even in Step 1. Note the references to items 1 & 2.
- Base cost of chargeable hours: As calculated in Step 2 at item 3.
- Overhead factor: Divide fees required (1 & 2) by the base cost of chargeable hours (3).

Step 4: Determine Rates and Budgets

Fee earners only	Charge Rates Column C x OHF Retail	Column C x OHF Break even	Fees budget Column D x rate Retail	Column D x rate Break even
Partner	$266	$202	$319,527	$242,840
Partner	$266	$202	$319,527	$242,840
Practitioner	$178	$135	$195,266	$148,402
Practitioner	$148	$112	$162,722	$123,669
Practitioner	$133	$101	$146,450	$111,302
Paralegal	$107	$81	$106,509	$80,947
			$1,250,000	$950,000

Notes:

- Charge rates: For each fee earner multiply their result in column C at Step 2 by the retail or break even overhead factor calculated at Step 3.
- The retail rate will show the rate that needs to be charged at the number of budgeted chargeable hours (column D, Step 2) to generate the desired total practice income.
- The break even rate is the cost of production for each fee earner.
- Fees budget: For each fee earner, multiply their result in column D at Step 2 by the retail or break even charge rates you have just calculated. This will provide an indicator of the fees to be generated by each fee earner.

Now complete the details for your practice

Step 1: Determine fees required to return a profit and to break even

	Retail	Break even
Profit	$ _____	
Salaries	$ _____	$ _____
Overheads	$ _____	$ _____
Principal salary	$ _____	$ _____
Total Fees Required	$ _____ (1)	$ _____ (2)

Notes:

- Profit: Insert the amount of profit you wish to earn in excess of notional salaries paid to principals
- Salaries: Include salaries for all employees (support and fee earners) in the practice.
- Overheads: Total non-salary overheads.
- Principals' salary: Provide a notional salary for all equity principals in the practice.

Step 2: Determine Base Cost of Chargeable Hours

Fee earners only Do not include support	A Salary ($)	B Work. Hours	C = A/B Cost per WH	D Chg Hours	E = CxD Cost Chg Hrs
			Base Cost of Chargeable Hours		(3)

Notes:

- Fee earners: List the fee earners only.
- Salary: Salary of the particular fee earner.
- Working hours: This is the annual hours spent at work. Multiply the hours per day by number of days per week by 46 weeks of the year e.g., 9 hours x 5 days x 46 weeks = 2,070 hours
- Cost per working hour: Divide column A by column B (salary divided by working hours).
- Chargeable hours: Budgeted annual chargeable hours. Calculate as per working hours above, e.g.: 5.5 hours x 5 days x 46 weeks = 1,265 hours.
- Cost per chargeable hour: Multiply column C by column D.
- Base cost of chargeable hours: Sum all of column E.

Step 3: Determine the Overhead Factor (OHF)

	Retail		Break even	
Fees Required	$	(1)	$	(2)
Base Cost of Chargeable Hours	$	(3)	$	(3)
Overhead Factor (OHF)	$	(1/3)	$	(2/3)

Notes:

- Fees required: As per calculated fees for retail and break even in Step 1. Note the references to items 1 & 2.
- Base cost of chargeable hours: As calculated in Step 2 at item 3.
- Overhead factor: Divide fees required (1 & 2) by the base cost of chargeable hours (3).

Step 4: Determine Rates and Budgets

Fee earners	Charge Rates Column C x OHF Retail	Column C x OHF Break even	Fees budget Column D x rate Retail	Column D x rate Break even

Notes:

- Charge rates: For each fee earner multiply their result in column C at Step 2 by the retail or break even overhead factor calculated at Step 3.
- The retail rate will show the rate that needs to be charged at the number of budgeted chargeable hours (column D, Step 2) to generate the desired total practice income.
- The break even rate is the cost of production for each fee earner.
- Fees budget: For each fee earner multiply their result in column D at Step 2 by the retail or break even charge rates you have just calculated. This will provide an indicator of the fees to be generated by each fee earner.

2.5 Alternatives to time billing

The 'billable hour' is facing a challenge from fixed fees, project costing and negotiated budgets, as a basis for determining the fee to a client. This is because charging by the hour may not be the best way for a practice to charge costs to a client. It is only one of the factors which will determine a fee. For example, it may be that the time spent in completing a matter is excessive, or the total costs are excessive in relation to the value of the matter. Ultimately, there is discretion over the fee and it will depend on the circumstances of the retainer.

The fundamental issue is to know and understand the hourly expense and charge out rate of each fee earner in your practice. This is crucial management information that will contribute to your decision on a billing option.

In any one year, the vast majority of bills rendered annually by legal practices in New South Wales use time billing. Research supports the view that this form of billing is preferred in this state. Very few of these bills result in practitioner-client assessment or referral to the Legal Services Commissioner.This suggests that time billing is 'working'.

Sophisticated clients prefer time billing to other methods, because it gives them a means of assessing both the time spent on a matter and the hourly rate charged for the service. The definition of 'sophisticated client' in the Act should be carefully considered under s.312(c) and (d), which provide exceptions for disclosure, and in those circumstances allow virtually any form of costing and estimating to apply.

Time billing depends upon accurate time recording. There are several time recording software packages available, but all of them depend upon accurate input. There is always going to be 'leakage' where legal work performed is not accurately recorded or is omitted. The aim of the practice should be to minimise this 'leakage'.

On average, approximately 15% of time is never recorded. This should be taken into account in setting the appropriate hourly rate for the practice. For this reason it may be useful to analyse the type of work in your practice and 'average' the costs of doing a particular style of legal work. It may give you some indication of the time 'usually' taken for a particular matter to be completed.

This approach may not work so well for litigation, where uncertainties of time and preparation can lead to a variation in costs. In the case of litigation, you will have to conduct a continual review of the costs, as a matter progresses. The Act makes it a necessity for a review to occur where estimates initially provided are exceeded (s.316).

Hourly rates and time billing should not be confused with the client's (and the law practice's) determination of 'value' in the billing process. This is clearly a very discretionary matter and can be resolved by a discussion between both parties.

It is no longer practical to refer to a 'common price' for certain work. The 'price' will very much depend upon the size, style and location of the practice, and its clientele.

In order to help you to think about how you might 'package' your fees, some alternatives are described below.

2.5.1 Hourly rate

Definition: A fee charged for every hour worked by a law practice in relation to a matter. The charge out rate might be for practitioners only, and include all overheads and support staff, or rates might be established for every person who works on the matter, including clerks and paralegals. Discounts might be offered for high volume or regular clients. It is important to ensure that only actual time spent is charged according to the work done. The unit of time should be small enough to record actual time spent accurately. The unit of time can vary from one minute up to six minutes or pro rata. Software packages can be adjusted accordingly. As suggested above, care should be taken in the input process and some training required for new time recorders, particularly having regard to the common 'leakage' rate experienced across practices.

Suitable for: Depends on the client's relationship with the law practice. With this proviso, it will be more suitable for firms in matters where the extent of work required is unknown at the outset of the retainer (e.g. complex litigation).

Advantages: Recovery of expenses with a profit margin for all work performed, provided the set hourly rate reflects adequately the costs of the practice.

Disadvantages: Possibility of disputes over the number of hours worked. Focus on charging rather than value for the client. It may breed inefficiency and lead to the perception that a legal service is not value for money. Using hourly rates needs to be carefully managed and transparent from the client's perspective. Emphasis may need to be spent on aspects other than 'time', such as results and outcomes, to broaden the client's focus.

2.5.2. Fixed fees

Definition: Standard fee for common defined services; may be collected in a lump sum in transactional matters, upfront or upon completion.

Suitable for: Any matter where the steps in the transaction are well understood by the law practice (e.g. Local Court appearances) or where the transaction consists of standard steps (e.g. conveyancing, incorporation, wills). Consequently, it is useful where the law practice specialises and is able to estimate the work involved in a type of matter with some certainty.

Advantages: High level of consumer acceptance. Low potential for client disputes if the fee and the service to be provided are adequately communicated. The profitability for the law practice is defined for each service. It rewards efficiency.

Disadvantages: Reduced profitability for law practice if the service subsequently becomes complex. This may become apparent in litigation, where a fixed fee may not take account of all contingencies, some of which may be unknown.

2.5.3 Project rate

Definition: Similar to a fixed fee, but an agreed fee for a particular service. Fee established and agreed on each occasion. It may be more suitable for commercial work.

Suitable for: Any matter where the steps and work are able to be defined at the outset of the matter (e.g. drafting contracts).

Advantages: See fixed fee.

Disadvantages: See fixed fee. It may prove inaccurate if contingencies are unknown when the rate is set.

2.5.4. Hourly rate with cap

Definition: As for hourly rates, but with the client and law practice agreeing to a maximum total bill.

Suitable for: As with hourly rate, but where the work required is capable of being estimated with some certainty. Requires a careful definition and disclosure of what work is to be done so that a charge can be levied for any additional work, outside of the original retainer.

Advantages: Client costs disputes less likely than with a straight hourly rate. It rewards efficiency.

Disadvantages: Requires that the law practice estimate the maximum work required or builds in a margin for uncertainty. Any inefficiency reduces profit.

2.5.5 Blended hourly rate

Definition: A uniform hourly rate averaged amongst the staff associated with a project; depending on the time each is likely to be involved. It may result in a reduced recovered hourly rate for litigation work where, following assessment of a party/party bill, there is a reduction for items such as supervision and attendances where multiple staff have been involved.

Suitable for: See hourly rate.

Advantages: Possible marketing perception that lower hourly rates will apply when 'averaged' and simplification of billing.

Disadvantages: See hourly rate. Also, the overall quality of work could be affected if assigned to less qualified staff, without senior supervision. There may be decreased profitability if senior staff members are required for longer than estimated. Upon review, a test of what is 'fair and reasonable' may result in disallowance of multiple attendances by multiple staff, so careful management is required.

2.5.6. Conditional fees

Definition: A fixed fee, established at the start of a matter, payable only on 'successful completion', which must be defined. The Act specifies the basis on which conditional arrangements are not permitted, that is, claims for damages, criminal proceedings or family law proceedings. It should be remembered that the maximum premium the law practice can charge, in litigation matters only, is 25% on the professional costs otherwise billable (s.324). The limitation does not apply in non-litigious matters.

It is important in the costs agreement to clearly define what will be regarded as 'success', for the purpose of the conditional costs agreement, and also to decide and agree with the client whether disbursements are to be paid by the client, even if fees are not to be charged.

Suitable for: Litigation; certain insurance matters.

Advantages: For the client if there is no win, there is no payment to the client's practitioner. It allows deserving cases to be heard, with less risk for the client. For the law practice it develops business which might not otherwise have been generated. Results are rewarded.

Disadvantages: There is no certainty of income or recovery of expenses in a case. The law practice bears a proportion of the risk. There may be a significant delay between the time when work is performed and payment is received. Careful management is required to ensure that large amounts of work in progress are ultimately recoverable, with a premium for interest, to reflect cost and managing the practice. These considerations should undoubtedly be reflected in the hourly rate where time billing is the preferred option.

2.6 Debtor control

Remember you cannot claim interest on your outstanding unpaid fees and disbursements unless:

- your disclosure document or costs agreement provides for the charging of interest
- your bill refers to the right to charge interest and the rate of interest

GST makes it vital that law practices introduce an effective mechanism of debtor control. Possible ways to achieve this include:

- billing quickly after the work has been done
- billing on an interim basis (e.g. monthly) rather than at the end of the transaction
- obtaining money in advance on account of disbursements and barrister's fees
- if bills remain unpaid for an unacceptable period of time, quickly taking steps to apply for assessment of costs or issuing debt recovery proceedings,.

2.7 Conclusion

As already indicated, the hourly rate is being challenged by other forms of billing. You need to exercise care when considering alternatives to hourly rates, to ensure that you have accurately assessed the likely outcomes and associated expenses, and included the potential for variation or further negotiation in your agreement.

Setting appropriate hourly rates is relatively straightforward, once your cost structure is understood. No one has so far provided a consistently better means of costing work, especially for litigation.

Whatever method you ultimately adopt your agreement should accurately reflect the costs to operate your own business. It should comply if it is not covered by the exceptions, and it should clearly state the method for determining the fee.

Note that under the Act (s.312(1)(b)) the client may agree in writing to waive their right to disclosure. If you are contemplating negotiating an agreement which does not involve formal costs disclosure and may involve a novel costing methodology, ensure you obtain a written waiver from the client and that the client has been properly identified before committing to this approach. If necessary, do searches for name checks and businesses to ensure accurate identification of the client (although clients should always be properly identified).

Whatever method you adopt for setting fees, it is important to review your operating costs annually. This enables you to take into account any increases in fixed overheads, such as wages and rent, as well as any increases in operating expenses occasioned by growth of the practice or changes in the commercial environment. For smaller practices, it may be useful to do this in conjunction with your accountant. Together you can review the recent history of the practice, to ensure that billing rates are accurate and that they reflect the costs of running the practice and providing a return to the proprietors.

THE LAW SOCIETY
OF NEW SOUTH WALES

CHAPTER 3

DISCLOSURE, COSTS AGREEMENTS AND BILLING

Costs Guidebook 6th Edition (revised) - Chapter 3

Disclosure, Costs Agreements and Billing

3.1 Introduction

This chapter outlines the regulation of practitioners' costs under the *Legal Profession Act 2004 (NSW)* (the Act). Regulation of practitioners' costs may be grouped into three main areas:

3.2 Disclosure

Firstly, and most importantly, disclosure is mandatory. The Act imposes significant obligations to disclose information to the client, and failure to comply with these obligations carries serious consequences, including disciplinary action (s.317).

The Act stipulates five categories of information which must be disclosed (s.309(1) (see section 3.2.4 below).

The obligation to disclose is ongoing: the practitioner has to notify the client in writing of any substantial change to anything included in a disclosure (s.316 of the Act). There are some exceptions, particularly related to the 'sophisticated client' (s.312 of the Act).

A disclosure is not automatically a costs agreement. Costs agreements are not mandatory.

It is important to consider the obligations for disclosure and costs recovery/assessment in conjunction with the legislation in effect at the relevant time, that is, at the time of the retainer.

As this is a guide to the legislation only, please read the relevant legislation and regulations carefully.

Additional information on disclosure is provided under the following headings:

3.2.1 Does disclosure create an offer?

Under current legislation, a written disclosure does not constitute an offer which a client can accept as a binding costs agreement. The disclosure merely permits the client to 'negotiate a costs agreement (s.309 (1)(b)(i) of the Act).

The Costs Committee has prepared a single document which includes the requirements for disclosure and also enables the practitioner and the client to create a binding agreement.

3.2.2 Who is the recipient of the disclosure?

Disclosure must be made to 'a client' and to an 'associated third party payer'.

The 'client' is defined as including 'a person to whom or for whom legal services are provided' (s.4 of the Act).

The 'third party payer' is defined as a person who is 'under a legal obligation to pay all or any part of the legal costs for legal services provided to a client' (s.302A (1)(a) of the Act).

A third party payer is 'associated' if the legal obligation is owed to the legal practice (s.302A (1)(b) of the Act). By way of contrast, a 'non-associated' third party payer is one who is obliged to indemnify another for legal costs, i.e. by a contractual obligation, such as a lease or mortgage (s.302(1)(c) of the Act).

Section 318A of the Act provides that where a legal practice is required to make disclosure to a client, there is an obligation to make the same disclosure to an associated third party payer. This disclosure, however, only relates to the details or matters which are relevant to the associated third party payer, and to the costs they are obliged to pay.

A legal practice is not obliged to disclose to a non-associated third party payer, but is obliged to provide certain information to them, in the event that there is a dispute about the costs (s.350 of the Act).

Please see Appendix 1.

3.2.3 What information do you have to disclose?

The following information must be disclosed by the practitioner or legal practice to the client (and any associated third party payer):

- the basis on which legal costs will be calculated, including whether a fixed costs component applies to any of the legal costs (s.309(1)(a) of the Act)
- an estimate of the total legal costs or, if that is not reasonably practicable, a range of estimates of the total legal costs, and an explanation of the major variables that will affect the calculation of those costs (s.309(1)(c) of the Act)
- the client's right to:
    - negotiate a costs agreement with the legal practice (s.309(1)(b)(i) of the Act)
    - receive a bill from the legal practice (s.309(1)(b)(ii) of the Act)
    - request an itemised bill after receipt of a lump sum bill (s.309(1)(b)(iii) of the Act)
    - be notified of any substantial change to the matters disclosed (s.309 of the Act)
- progress reports (s.318 of the Act)
- details of the billing intervals (s.309(1)(d) of the Act)
- the rate of interest on overdue costs (s.309(1)(e) of the Act)

If the matter is litigious, the following information must be provided:

- an estimate of the range of costs that may be recovered if the client is successful in the litigation (s.309(1)(f)(i) of the Act)
- an estimate of the range of costs the client may be ordered to pay if the client is unsuccessful (s.309(1)(f)(ii) of the Act)
- a statement that a party/party order for costs in favour of the client will not necessarily cover the whole of the client's legal costs (s. 309(2)(a) of the Act)
- where the legal practice negotiates a settlement on behalf of a client, the legal practice must disclose to the client, before the settlement is executed:
    - a reasonable estimate of the client's legal costs, if the matter is settled (including any legal costs of another party that the client has to pay(s. 313(1)(a) of the Act)
    - a reasonable estimate of any contributions towards those costs likely to be received from another party (s.313(1)(b) of the Act)
- if a legal practice proposes to enter into a conditional costs agreement that involves an uplift fee, it should disclose to the client, before entering into the agreement: the legal practice's legal costs, the uplift fee, or the basis of calculation of the uplift fee, and reasons why the uplift is warranted (s.314 of the Act)
- details of the person whom the client may contact to discuss costs (s.309(1)(h) of the Act)
- the following avenues that are open to the client in the event of a dispute about legal costs:
    - costs assessment (s.309(i)(i) of the Act)
    - the setting aside of a costs agreement or part of a costs agreement
    - (s.309(i)(ii) of the Act)
    - mediation (s.309(i)(iii) of the Act)

    - the time limits that apply to those avenues (s.309(1)(j) of the Act)
- NSW law applies to legal costs in relation to the matter (s.309(1)(k) of the Act)
- the client's right to have the law of another jurisdiction apply to the legal costs for the matter (s.309(1)(l) of the Act)

As the Act defines costs to include fees, charges, disbursements and expenses, they must also be disclosed (s.302(1) of the Act). It is particularly important to disclose whether the fees are inclusive or exclusive of GST. If they are exclusive of GST, the legal practice must disclose that there will be an additional amount for GST.

Additional disclosure is required if a legal practice proposes to charge more than the regulated costs for matters associated with motor accidents, work injury damages, and personal injury, which may be affected by cost caps (see 3.2.6 below).

3.2.4 What do you disclose if another legal practice is to be retained?

If a legal practice intends to retain another legal practice (for example, a barrister or a practitioner agent) on behalf of the client, then it must disclose the costs associated with this to the client, including:

- the basis on which legal costs will be calculated, including whether there is a fixed costs component to the legal costs (s.310 of the Act)
- an estimate of the total legal costs or, if that is not reasonably practicable, a range of estimates of the total legal costs, and an explanation of the major variables that will affect the calculation of those costs (s.310(1) of the Act)
- details of the billing intervals (s.310(1) of the Act).

The other legal practice is obliged to provide this information (s.310(2) of the Act).

3.2.5 What is the form and timing of disclosure?

Disclosure of costs to clients (s.309 of the Act) and disclosure if another legal practice is retained (s.310 of the Act) must be made 'in writing before, or as soon as practicable after, the other law practice is retained' (s.311(2) of the Act). It must be expressed in clear plain language (s.315(1)(b) of the Act).

A substantial change to anything already included in a disclosure (e.g. a change in the estimate of costs) is to be made 'as soon as is reasonably practicable after the law practice becomes aware of that change' (s.316 of the Act).

Disclosure concerning associated third party payers (s.318A of the Act) must be made in the same form as for clients, and must be made at the time disclosure to the client is required, or, if the legal practice only becomes aware of the obligation of the associated third party payer at a later time, as soon as practicable thereafter (s.318A(2) of the Act).

3.2.6 What disclosure is required for personal injury damages matters under s.339?

There are special requirements for disclosure in relation to legal services provided for personal injury damages claims, where the amount recovered does not exceed $100,000 (cl.116 of the *Legal Profession Regulation 2005* (NSW) (the Regulations) and ss.337-343 of the Act), (see also Chapter 7).

In addition to the general disclosure required, a legal practice must also disclose information about the effect of a costs agreement on limited maximum costs for personal injury damages claims, where the judgment or settlement is less than $100,000.

The additional disclosure (cl.116(3)) must include:

- a statement that maximum costs in personal injury damages matters under Division 9 of the Act would, but for the costs agreement, limit the maximum costs for legal services provided to the client
- how those maximum costs are calculated
- a statement that the costs agreement excludes the operation of that Division
- how the costs will be calculated under the costs agreement
- a statement that the costs agreement relates only to the costs payable between the legal practice and the client. In the event that costs are recoverable against the other party, the maximum costs recoverable are determined under Division 9 of the Act.

The effect of this additional disclosure is the transparency of the difference between the recovery from another party and the costs which the client will have to pay.

The consequence of failure to disclose the information required by cl.116, of the Regulations, is serious: the practitioner is no longer entitled to the benefit of s.339 of the Act, which means the practitioner cannot contract out of the maximum costs cap.

Please see Appendix 1.

3.2.7 When is disclosure not required?

Disclosure is not required in the following circumstances:

- if the total legal costs, excluding disbursements, are not likely to exceed $750 ($825 inclusive of GST) (s.312(1)(a) of the Act)
- if the client or prospective client will never be required to pay the legal costs (s.312(1)(e) of the Act).

This subsection does not refer to a workers compensation matter or to a conditional costs agreement, but only to circumstances where the practitioner has agreed with the client not to charge fees for the work performed.

Disclosure is not required where the client is a 'sophisticated client' as defined in s.312(1) of the Act as follows:

- a legal practice or an Australian legal practitioner (s.312(1)(c)(i))
- an overseas-registered foreign lawyer or a foreign legal practice (cl.110(a)of the Regulations, made under s.312(1)(f))
- a public or foreign company, or its subsidiary, or a registered Australian body (s.312(1)(c)(ii))
- a financial services licensee (s.312(1)(c)(iii))
- a Minister of the Crown, or a government department or public authority (s.312(1)(c)(iv))
- if the legal costs or the basis upon which they have been calculated, has or have been agreed as a result of a tender process (s. 312(1)(d))
- a corporation that has a share capital, and whose shares or the majority of them are held beneficially for the Commonwealth, a State or a Territory (cl.110(b) made under s.312(1)(f))
- if the client has received one or more written disclosures under s.309 or 310(1) in the last 12 months, and has agreed in writing to waive further disclosure, and a principal of the legal practice decides on reasonable grounds that further disclosure is not warranted (s.312(1)(b)).

3.2.8 What are the consequences of failure to disclose?

If a legal practice fails to disclose to a client or an associated third party payer ANYTHING, which is required to be disclosed by Division 3 of Part 3.2 of the Act, the following consequences apply:

- the client does not have to pay the costs until the costs have been assessed by the practitioner at his/her cost (s.317(1) of the Act)
- if a legal practice does not disclose to a client EVERYTHING required to be disclosed, and the client has entered into a costs agreement with the legal practice, the client may also apply for the costs agreement to be set aside (s.317(2) of the Act)
- the legal practice may not maintain proceedings for the recovery of costs until they have been assessed (s.317(3) of the Act)
- on assessment, the amount of costs may be reduced by an amount considered to be proportionate to the seriousness of the failure to disclose (s.317(4) of the Act)
- the failure to disclose may be regarded as unsatisfactory professional conduct.

Nevertheless, no provision in the Act makes enforcement of costs agreements, the entitlement to costs, or a practitioner's right to be paid for his or her work, dependent on that practitioner's compliance with the provisions of Division 2 relating to disclosure (*Hogarth & Ors v Gye* (2002) NSWSC 32).

3.3 Costs agreements

Information on costs agreements is provided, as follows:

3.3.1 What is a costs agreement?

This is an offer to enter into a costs agreement that must be written or evidenced in writing (s.322(2) of the Act). The offer can be accepted in writing or by 'other conduct', provided that the agreement clearly states whichever is the case. If the acceptance is by 'other conduct', the type of conduct that will constitute acceptance must also be stated (s.322(4)(b) and (c) of the Act).

It is best practice to have the client sign the costs agreement as evidence of their receipt of it. Even if invoices have been paid by the client this is not sufficient to protect the practitioner from an allegation that the costs agreement is unenforceable.

Practitioners might also wish to consider rule 16 of the Solicitors' Rules as to whether to have the client sign.

3.3.2 Who can make a costs agreement?

A costs agreement may be made between:

- a client and a legal practice (s.322(1)(a) of the Act)
- a client and a legal practice retained on behalf of the client by another legal practice (s.322(1)(b) of the Act)
- a legal practice and another legal practice (s.322(1)(c) of the Act)
- a legal practice and an associated third party payer (s.322(1)(d) of the Act).

3.3.3 What types of costs agreements are there?

The Act provides for two types of costs agreements:

- a costs agreement
- a conditional costs agreement.

In some instances, the term 'costs agreement' refers to both standard costs agreements and conditional costs agreements (for example, ss.322, 326, 327 and 328) and in other cases, the term 'costs agreement' is used in contradistinction to the term 'conditional costs agreement' (for example, s.322(3) and (4)). As a result, some provisions of the Act apply to both types of agreements, while some apply to only one.

Under the Act, a legal practice is permitted to enter into a conditional costs agreement, which provides that 'the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate' (s.323(1)).

3.3.4 What are uplift fees?

A conditional costs agreement may provide for the payment of an 'uplift fee' on the successful outcome of the matter (s.324(2) of the Act (excluding unpaid disbursements). The basis for the calculation of the uplift fee must be separately identified in the agreement (s.324(3) of the Act).

An uplift fee cannot be charged for a matter which involves a claim for damages (s.324(1) of the Act).

The agreement must contain an estimate of the uplift fee or, if that is not reasonably practicable, a range of estimates, and an explanation of the major variables affecting the calculation of the fee (s.324(4) of the Act). Where a conditional costs agreement relates to a litigious matter, the uplift fee must not exceed 25% (s.324(5) of the Act).

A legal practice that enters into a conditional costs agreement in contravention of s.324 of the Act is not entitled to recover any costs for legal services in the matter and must repay any amount received (s.327(4) of the Act).

3.3.5 What about conditional costs agreements in motor accident and work injury damages matters?

Practitioners should be aware that regulations contained in both the *Motor Accidents Compensation Regulation 2005* (NSW) and the *Workers Compensation Regulation 2003* (NSW) that relate to conditional costs agreements for these matters were enacted before the Act commenced. The regulations, especially cl.88 of the *Workers Compensation Regulation*, which permits an uplift fee of up to 10%, should be read carefully.

There are different ways of dealing with agreements for motor accident and work injury damages matters, depending on whether they were entered into prior to, or after 1 October 2005, as follows:

Agreements entered into prior to 1 October 2005

Conditional costs agreements, entered into prior to 1 October 2005 in motor accident matters are only enforceable if they do not charge a success premium. The scale will continue to apply if the costs agreement provides for the payment of a premium on the successful outcome of the matter, (see *Motor Accidents Compensation Regulation*, 2005 (Chapter 7)).

Similarly, in work injury damages matters, a success premium must not exceed 10% if a conditional costs agreement was entered into prior to 1 October 2005 (cl.88(b) of the *Workers Compensation Regulation 2003*).

Agreements entered into after 1 October 2005

While practitioners can still enter into conditional costs agreements for these matters, you cannot charge an uplift fee (s.324 of the Act).

In order to form a valid and enforceable agreement, there must be a written disclosure, which is separate to the costs agreement. This should advise the client that even if costs are awarded by the Court, the client will still be liable to pay the amount of costs provided for in the agreement, if they exceed the regulated costs that would apply in the absence of an agreement. (See Chapter 8 .)

3.3.6 Formal requirements of conditional costs agreements

The Costs Committee has prepared a pro forma conditional costs agreement with provision for an uplift if required and allowed.

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There are several variations of conditional costs agreements, depending on whether they are between a legal practice and a client; two legal practices or a legal practice and a 'sophisticated client', as follows:

Between legal practice and client

In order to be valid and enforceable, a conditional costs agreement:

- must set out the circumstances that constitute the successful outcome of the matter (s.323(3)(a) of the Act)
- may provide for disbursements to be paid irrespective of the outcome of the matter (s.323(3)(b) of the Act)
- must be:
  - in writing (s.323(c)(i) of the Act)
  - in clear plain language (s.323(3)(c)(ii) of the Act)
  - signed by the client (s.323(3)(c)(iii) of the Act)
  - contain a statement that the client has been informed of the right to seek independent legal advice (s.323(3)(d) of the Act)
  - must contain a cooling-off period of not less than five clear business days, during which time the client, by written notice, may terminate the agreement (s.323(3)(e) of the Act). If the client does terminate the agreement during the cooling-off period, the legal practice may only recover legal costs that were reasonably necessary to preserve the client's rights (s.323(5) of the Act).

Between legal practice and legal practice or legal practice and sophisticated client

Where a legal practice enters into a conditional costs agreement with another legal practice, or with a sophisticated client, the requirements are less onerous. In these instances, the conditional costs agreement:

- must set out the circumstances that constitute the successful outcome of the matter (s.323(3)(a) of the Act)
- may provide for disbursements to be paid irrespective of the outcome of the matter (s.323(3)(b) of the Act)
- must be in writing (s.323(3)(c)(i) of the Act) and in clear plain language (s.323(3)(c)(ii) of the Act).

Costs agreements generally

In either standard costs agreements or conditional costs agreements:

- it is generally not possible to provide that the legal costs to which the costs agreement relates are not subject to costs assessment (s.322 (5) of the Act), although sophisticated clients may contract out of the right to have costs assessed (s.395A of the Act)
- the charging of contingency fees, where the amount payable to the legal practice is calculated by reference to the amount of any award or settlement, or the value of any property that may be recovered in any proceedings, is prohibited (s.325(1) of the Act)
- an agreement which contravenes any provision of Division 5 (costs agreements) is void (s.327(1) of the Act), (not just void to the extent of the inconsistency).
- where the agreement is void, a legal practice is still entitled to recover fees(s.327(2) of the Act) unless the contravention involves uplift fees (s.324 of the Act) or contingency fees (s.325 of the Act). In the event of a costs agreement being void, legal costs are recoverable either:
    - in accordance with any fixed costs provision (s.319(1)(a) of the Act) or
    - according to the fair and reasonable value of the legal services provided (s.319(1)(c) of the Act).

A conditional costs agreement cannot relate to a matter that involves criminal proceedings or proceedings under the *Family Law Act 1975* (s.323(2) of the Act).

3.3.7 Is stamp duty payable on costs agreements?

Following representations made by the Law Society, the Government has waived stamp duties on costs agreements (Revenue Ruling SD 256).

3.3.8 Can you charge interest on costs?

A term, entitling the legal practice to charge interest, should be included in the costs agreement.

The Act allows a legal practice to charge the client interest on unpaid legal costs, if the costs are unpaid 30 days or more after the client was given a bill (s.321(1)). The bill must have included a statement that interest was payable, and the rate of interest (s.321(3)).

The rate of interest charged, whether under the Act or under a costs agreement must not exceed the rate prescribed under cl.110A of the Regulations. The maximum prescribed rate of interest is:

- 9% from 1 October 2005 to 30 June 2006 and
- thereafter the Cash Target Rate (specified by the Reserve Bank of Australia and available at www.rba.gov.au) + 2%

3.3.9 Can you request security for costs from the client?

A legal practice may take reasonable security from a client for legal costs (s.320 of the Act).

3.3.10 Money up front

Under the Act, there is no obligation on a legal practice to provide a 'bill' before seeking money on account.

3.4 Billing

In accordance with Australia's taxation legislation, practitioners generally provide their clients with a tax invoice. The terms, 'bill' and 'bill of costs' (referring to the formal documentation required if there is a dispute between a practitioner and a client), have been incorporated into the Act.

A legal practice cannot commence proceedings to recover legal costs from a person, until at least 30 days after they have provided a bill to the client (s.331(1)).

Under the Act, there are two types of bill:

- a 'lump sum bill', which specifies the total amount of the legal costs and describes the legal services provided in general terms
- an 'itemised bill', which specifies the legal costs in sufficient detail that they can be assessed under Division 11 of the Act.

If a 'lump sum bill' is provided, then any person who is entitled to apply for an assessment, may request that the legal practice provide them with an itemised bill (s.332A of the Act).

The Act does not stipulate a time limit on when this request can be made. Where such a bill is requested, a legal practice must comply with the request within 21 days (s.332A(b)).

Additional information is provided on the following:

3.4.1 Form of a bill of costs

For a bill of costs to be valid it must be signed on behalf of a legal practice by a legal practitioner or an employee of the legal practice. It is sufficient if the letter accompanying the bill is signed by the legal practitioner. In the case of an incorporated legal practice, the bill or letter accompanying it must be signed by a legal practitioner.

The bill must include, or be accompanied by, a written notification of the client's rights; setting out the avenues that are open to the client if there is a dispute over costs (s.333 of the Act) as follows:

- costs assessment under Division 11 of the Act (including the time limit in which to make application for assessment)
- the entitlement to apply to have a costs agreement set aside (s.328 of the Act)
- mediation under Division 8 of the Act.

Inclusion of Form 3 in Schedule 5 of the Regulations satisfies the requirement; the form is an appendix to the guidebook.

This notification is not required for a 'sophisticated client'.

The reasons for the decision of the Court of Appeal in *Leon Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 contain important commentary on the responsibility of a practitioner for bills of costs, prepared by employed staff.

Clients cannot be charged for providing a bill of costs or a subsequent itemised bill of costs (s.319(2) of the Act).

Clause 111B of the Regulations states the information that must be included in itemised bills, provided as a result of a request from a client.

3.4.2 Presenting the bill to the client

A bill of costs may be given in a number of ways:

- personal delivery to the person or an agent (s.332(5)(a) of the Act)
- sending by post to the person or agent (s.332(5)(b) of the Act)
- leaving it for the person or agent at the usual or last known business address, with a person who is at least 16 years old and is employed or residing there(s.332(5)(c) of the Act)
- facsimile transmission (s.332(5)(d) of the Act)
- document exchange (s.332(5)(e) of the Act)
- electronically, where the client is a 'sophisticated client' and requested the bill be given electronically (s.332(5)(6A) of the Act)
- via e-mail by virtue of cl.111 of the Regulations.

Note that the term 'bill' is used in the Act only in a practitioner/client context.

The manner in which costs should be presented in applications for assessment of costs ordered by a court or Tribunal is summarised in the Appendices (Notice to Filing Party: Application for Party/Party Assessment).

3.4.3 Content of a bill

Now that many legal practices use computer time recording systems, it is tempting to simply transform this information into 'bills'.

While some clients require substantial detail in their invoices, others may be disconcerted by a 'laundry list' of telephone calls and attendances, all shown in six minute units, and often without very much detail to justify the entry.

It may be preferable to issue invoices which do the following:

- describe the tasks undertaken in the period
- identify the practitioners who undertook the tasks
- identify the duration of the tasks
- identify the rate charged for the tasks.

An example of this type of invoice follows:

"To our costs for work conducted between 1 July 2014 and 30 July 2014, as follows:

Correspondence with the defendant's practitioners (20 letters and 10 telephone calls); preparing for and attending call over; drafting affidavits of Joe Bloggs and Bill Smith; briefing barrister to settle affidavits; and reports to you.

Partner - 4 hours @ $350 per hour 1,400

Associate - 25 hours @ $300 per hour 7,500

Practitioner - 20 hours @ $250 per hour 5,000

Total 13,900

Disbursements

GST"

The client has the right to request an itemised bill and the computerised time recording can be provided for this purpose.

If you use a computer time recording system to generate bills then take care that the entries are correct and sufficiently detailed. This is to avoid the possibility of having to reconstruct the itemisation, should the client request an itemised bill (cl.111B of the Regulations).

The most important issue in billing the client is the value of the work performed, not the fact that time was spent.

3.4.4 Timing of a bill

If the costs agreement allows for interim billing, you can issue invoices throughout a matter.

You can also issue a client with a report as to costs which will not generate a tax invoice and thus a liability for GST, but will keep the client informed of total costs incurred.

If a client requests a report on costs then you must provide it at no cost to the client (s.318 of the Act).

A client has 12 months in which to apply for assessment of a bill, or longer if the client applies successfully to the Supreme Court for an extension of time (s.350(4) of the Act). A 'sophisticated client' cannot apply for an extension of the 12 month period (s.350(5) of the Act).

Section 334 of the Act has a curious effect - a client who receives and pays an interim bill may apply for an assessment of that bill at the conclusion of the matter. In this case, the 12 month period commences with the date of delivery of the last bill.

3.4.5 Withdrawal/replacement of a bill

Where a lump sum or short form bill is delivered, and a client requires an itemised bill, it is generally agreed that the practitioner is not bound by the quantum in the earlier bill. See *Bowen & Ors t/as Duffield & Duffield Practitioners v Campbell and Anor* [1997] NSWSC 597, a decision of Master Malpass, and *Gorczynski v Beilby* (2005) NSWSC 884, a decision of Kirby J.

Please note that these decisions relate to earlier versions of the Act and should be applied carefully in relation to the current Act.

It would be prudent to include a warning on any lump sum bill that if an itemised bill is requested, the earlier bill may be withdrawn and the itemised bill may be for a larger amount.

THE LAW SOCIETY
OF NEW SOUTH WALES

CHAPTER 4

COSTS ASSESSMENT

Costs Guidebook 6th Edition (revised) - Chapter 4

Costs Assessment

4.1 Introduction

The Costs Assessment scheme is conducted in accordance with the *Legal Profession Act 2004* (the Act) and the *Legal Profession Regulation 2005* (the Regulations).

The process for assessment is found in Division 11 of the Act and Division 5 of the Regulations.

The forms for the assessment process can be found on the Supreme Court website under 'Cost Assessment'. (Care should be taken to choose the appropriate form.) The forms must be lodged in triplicate together with the fee, which is $100 or 1% of the amount in dispute or unpaid, whichever is the greater.

Further information is provided below:

4.2 The scheme

The costs assessment process is administrative in nature. Assessments between law practices and their clients or those between parties to litigation are not 'proceedings' in the Supreme Court (see *Diemasters Pty Ltd v Meadowcorp* (Supreme Court NSW Unreported Judgment 16 July 2003, BC200306928) and *Brierley v Anthony Charles Reeves T/as Kaplan Reeves and Co and Ors* [2000] NSWSC 305.)

Assessments can be lodged by law practices seeking to recover monies from their clients (s.352 of the Act), or by clients and the extended definitions of clients against their practices (s.350(1) and (2) of the Act), or by parties to proceedings in State courts or tribunals who have the benefit of costs orders in their favour (s.353 of the Act).

The prerequisites for the costs assessment process are set out in s.354 of the Act, and cl.122 of the Regulations, for assessments between law practices and clients, or cl.125 for assessments for party/party costs.

In applications for assessment, other than party/party, the filing fee is based on the amount in dispute, which can be determined by the amount to which objection has been taken, or the balance of a partly paid tax invoice.

The amount in dispute in a party/party application for assessment is the whole of the amount claimed, regardless of concessions in a notice of objection. (See *Turner v Pride* [1999] NSWSC 850. In this case, Master Malpass identified the difference between the provisions (in the 1987 Act) in relation to applications for a law practice/client assessment, which required identification of the disputed costs, and a party/party assessment. In the latter assessment, an assessor must assess the total costs claimed in order to determine the fair and reasonable costs.

The costs assessor is not restricted to those items of work which are the subject of the objection. (See also *O'Connor v Fitti* [2000] NSWSC 540).

Law practices cannot contract out of the assessment scheme, except in relation to 'sophisticated clients' (ss.322(5) and 395A of the Act). (See s.312(1)(c) of the Act for the definition of a 'sophisticated client' or refer to section 3.2.8.)

Costs assessors are appointed by the Chief Justice from the practising profession (solicitors and barristers). Australian legal practitioners of at least five years' standing are eligible for appointment (see Schedule 5 of the Act).

A costs assessor holds office for a period not exceeding three years, but can be reappointed for further terms. Costs assessors are not officers of the Supreme Court when acting as costs assessors.

A costs assessor has wide powers to request further information and documents from the parties to an assessment, or any other party. If the particulars or documents are not provided, the assessment can be dealt with either on the information available, or by the costs assessor

declining to deal with the application. A law practice which fails (without good reason) to comply with a notice issued by a costs assessor, may be guilty of professional misconduct (s.358(4) of the Act). In such a case, the costs assessor must refer the law practice to the Legal Services Commissioner (s.393(2) of the Act).

Section 393 of the Act gives costs assessors or Review Panels the power to refer a matter to the Legal Services Commissioner, if the costs assessor considers the costs charged by a law practice are grossly excessive, or if any other matter has been raised in the course of a costs assessment which the costs assessor considers may amount to unsatisfactory professional conduct or professional misconduct, including failure by a practitioner to disclose (s.317(7) of the Act).

Thus, even on a party/party assessment a law practice may be referred to the Legal Services Commissioner in relation to the law practice/client relationship.

Law practices should also be aware of s.369 of the Act, which enables a costs assessor to determine that the law practice should pay the costs of the assessment, if the costs claimed are reduced by more than 15%. This section overrides the general principle that (unless there has been no disclosure) the costs assessor has no jurisdiction to order a law practice or client to pay the costs of the assessment.

The Manager, Costs Assessment manages the process of assessments by costs assessors, and reviews by Review Panels.

The Manager has powers to waive fees in certain cases, extend time for certain actions, and also to apply for a review of a costs assessor's fees on assessments.

4.3 Assessment between law practices and clients

4.3.1 Applications by law practices seeking to recover unpaid costs

A law practice which has not complied with the obligations to disclose costs (see Chapter 3) cannot recover their costs, until they have been assessed. The assessment is at the law practice's expense.

A law practice which has complied with the obligation to disclose may still choose to have unpaid costs assessed, rather than commence an action in a court for recovery. The benefit of the assessment process is that the certificate of determination can be lodged in a court for enforcement as a judgment. It will be necessary to lodge the certificate of judgment with the approved form before enforcement.

A law practice cannot commence proceedings for the recovery of costs, or file an application for assessment of costs, until 30 days after the delivery of a Bill of Costs. (See Chapter 3 for a discussion on billing.)

The law practice completes the form of application for assessment and attaches the unpaid Bills of Costs.

Care must be taken to correctly identify the parties, both the correct name/entity for the law practice and the correct name/entity of the costs respondent.

The application is lodged with the Manager, who sends it to the cost respondent for response. The cost respondent has 21 days to provide a response. The Manager has no power to extend time for a response. Upon receipt of the response, or in default of any response from the client, the Manager refers the application to a costs assessor, and notifies the parties of the costs assessor's appointment.

The costs assessor will write separately to the parties confirming their appointment and setting out the requirements of the process (s.359 of the Act).

A costs assessor must not determine an application for assessment unless the costs assessor:

- has given both the applicant and any law practice, client or other person concerned a reasonable opportunity to make written submissions to the costs assessor in relation to the application, and
- has given due consideration to any submissions made (s.359 of the Act).

In considering an application, a costs assessor is not bound by rules of evidence and may consider any matter they think fit.

For the purposes of determining an application for assessment, or exercising any other function, a costs assessor may determine any of the following:

- whether or not disclosure has been made in accordance with Division 3 of the Act (Costs disclosure) and whether or not it was reasonably practicable to disclose any matter that should be disclosed under Division 3
- whether a costs agreement exists, and its terms.

Section 361 of the act states that a costs assessor must assess the amount of any disputed costs in a costs agreement, if:

a. a relevant provision of the costs agreement specifies the amount, or a rate, or other means for calculating the amount of the costs, and
b. the agreement has not been set aside under s.328 of the Act (setting aside costs agreements) (see 4.3.2 below)

unless the costs assessor is satisfied:

c. that the agreement does not comply in a material respect with any applicable disclosure requirements of Division 3 (Costs disclosure), or
d. that Division 5 (Costs agreements) precludes the law practice concerned from recovering the amount of the costs, or
e. that the parties otherwise agree.

The costs assessor is not required to initiate an examination of the matters referred to in paragraph (c) and (d) above.

Section 319 of the Act provides the bases upon which legal costs are recoverable, as follows:

a. in accordance with an applicable fixed costs provision, or
b. if paragraph(a) does not apply, under a costs agreement made in accordance with Division 5, or the corresponding provisions of a corresponding law, or
c. if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.

The costs assessor must consider the matters set out in s.363(1) of the Act, as follows:

- whether or not it was reasonable to carry out the work to which the costs relate
- whether or not the work was carried out in a reasonable manner
- the fairness and reasonableness of the amount of legal costs in relation to the work, to the extent that s.361 or s.362 apply to the disputed costs.

The costs assessor may also consider the matters set out in s.363(2) of the Act, as follows:

- whether the law practice complied with any relevant legislation or legal profession rules
- any disclosures made by the law practice under Division 3
- any relevant advertisement relating to the law practice's costs or skills
- the skill, labour and responsibility displayed on the part of the law practice
- the retainer, and whether the work done was within the scope of the retainer
- the complexity, novelty or difficulty of the matters
- the quality of the work done
- the place where, and the circumstances in which the legal services were provided
- the time within which the work was required to be done.

4.3.2 Applications by clients to set aside costs agreements (s.328 of the Act)

A costs assessor has wide ranging powers to set aside the terms of a costs agreement, if they are satisfied that the agreement is not fair or reasonable.

The costs assessor may:

- set aside merely a provision of the costs agreement, even if the client applied for the whole agreement to be set aside, or
- set aside the whole costs agreement, even if the client applied merely for a provision of the agreement to be set aside.

There are no limits to the matters a costs assessor can consider when determining whether or not a costs agreement is fair or reasonable. They can consider any or all of the following matters:

- whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice, or of any representative of the law practice
- whether any Australian legal practitioner or Australian-registered foreign lawyer acting on behalf of the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in relation to the provision of legal services to which the agreement relates
- whether the law practice failed to make any of the disclosures required under Division 3
- the circumstances and the conduct of the parties before and when the agreement was made
- the circumstances and the conduct of the parties in the matters after the agreement was made
- whether and how the agreement addresses the effect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement
- whether, and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement

A client can make an application under s.317(3) of the Act for an order setting aside a costs agreement, or a provision of a costs agreement, where the law practice concerned has failed to make the disclosures concerning costs required by Division 3 of the Act.

4.3.3 Applications by clients seeking to assess costs rendered by their law practice

The process for applications by clients is similar to the process for applications by law practices seeking to recover costs. An application may be made by a client or an associated or non-associated third party payer. (See Chapter 3 for explanations of these terms.)

In an application by non-associated third party payers, the assessor is not bound to determine the application with reference to the terms of the costs agreement between the law practice and the original client (see *Boyce v McIntyre* (2009) NSW CA 185).

Under the Act, a client has 12 months after being given a bill (or, if costs have been paid without a bill, after the request for payment) to make application for assessment.

An application for assessment out of time can only be accepted if approved by the Supreme Court on application by the client or third party payer. Sophisticated clients cannot apply out of time (s.350(5) of the Act).

A law practice, which has retained another law practice on behalf of a client, may apply for assessment of that practice's legal costs. The obvious example is the retaining of a barrister.

An application by a law practice, which has retained another law practice, must be made within 60 days after the bill has been given, or the request for payment made (s.351(3) of the Act).

Thus, the first law practice has only 60 days to apply for assessment of the costs rendered by another law practice, but the client of the first law practice can challenge those costs for up to 12 months from the date of the tax invoice (if they are included in a later tax invoice issued by the first law practice). For example, a solicitor has only 60 days to apply to assess a barrister's fees, but the client of the solicitor has up to 12 months to query those fees after they appear in the solicitor's invoice to the client.

A client wishing to assess a law practice's costs must lodge an application in the appropriate form annexing the tax invoices or requests for payment received and indicating any objections. The Manager then sends the application to the law practice for response. The law practice has 21 days to provide a response. Upon receipt of this, or in default of any response from the law practice, the Manager refers the application to a costs assessor. The procedure set out above in relation to practitioner/client assessments is then undertaken.

4.4 Party/party assessments

A summary of the steps to costs assessment is located at the conclusion of this chapter.

A party who has the benefit of an order of a court or tribunal, or who must pay another party's costs, may apply for an assessment (s.353 of the Act).

Practitioners are reminded that in order to recover the costs of litigation, the successful party must have an obligation to pay the costs of their law practice, otherwise the right to recover costs from another party will be hollow. This general principle was reviewed and confirmed by Barrett J in *Wentworth v Rogers* [2002] NSWSC 1198.

Section 353 of the Actdoes not require provision of a bill of costs in an application for party/party assessment. This is because the process is not a 'taxation' (see *Attorney General of New South Wales v Kennedy Miller Television Limited* [1999] NSWCA 158 and *Turner v Pride* [1999] NSWSC 850). However, an application must provide the following details:

- the proceedings for which the costs are payable, including the identities of the parties to the proceedings and their legal representatives
- the total amount of costs payable
- the relevant work done in those proceedings and the period over which the work was done
- the identity of the person/s who did the work (including the position of the person e.g. partner, associate etc.)
- the basis upon which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, a part of a proceedings basis or any other basis)
- the facts relied upon to justify the costs charged as fair and reasonable by reference to the above; the practitioner's skill, labour and responsibility; the complexity, novelty or difficulty of the matter; the quality of the work done; or any other relevant factor.

The note to paragraph 5 of Form 3 (which is the appropriate form for applications for party/party assessments) states that the information may be given in the law practice /client bill of costs, however, it will be a matter of fact in each case as to whether such a document provides sufficient information for a third party, or a costs assessor, to understand the nature of the claim.

Clause 125 of the Regulations outlines the process for applications for party/party assessments, as follows:

The application should be completed (with sufficiently detailed information on the nature of the proceedings giving rise to the costs orders) and is then sent to the paying party. At this stage it is not lodged with the Manager.

The paying party has 21 days in which to provide a response. This time limit does not act as a default period, giving the claiming party the right to object to any late objections; it is merely

the time period that the claiming party must wait, before lodging the application with the Manager, Costs Assessment. It is not prudent upon receipt of an application for party/party assessment to ignore the time specified for objections because the costs assessor has discretion to add more time to objections.

It is important that the cost respondent is identified correctly on the application, and that the application is brought to the attention of the costs respondent. A costs assessor has no power to amend an application for assessment (see *Flexible Manufacturing Systems v Alter* [2004] NSWSC 29). As assessment is an administrative process outside the jurisdiction in which the costs were ordered, it is not safe to assume that the law practice who acted for the unsuccessful litigant is still instructed in relation to the assessment process (see *Diemasters Pty Ltd v Meadowcorp* (Supreme Court NSW Unreported Judgment 16 July 2003, BC200306928).

It may be necessary to arrange delivery of the application to the respondent by registered post or even by process server. This will ensure that the applicant can satisfy the costs assessor that the respondent had notice of the application, in circumstances where no objection has been received.

Once an objection is received (or the 21 day period has elapsed) the applicant may prepare a response and then lodge the application with the Manager, Costs Assessment.

The fee for the application is the same as for law practice /client applications - $100 or 1% of the amount in dispute or the amount remaining unpaid, whichever is greater. As noted above, in party/party applications, regardless of what objections/concessions have been made, the lodging fee is calculated on the amount claimed in the application.

When dealing with an application relating to costs payable as a result of an order made by a court or tribunal, the costs assessor must consider:

- whether or not it was reasonable to carry out the work to which the costs relate
- whether or not the work was carried out in a reasonable manner
- what is a fair and reasonable amount of costs for the work concerned (s.364 of the Act).

The 'outcome of the matter' (which is a factor the costs assessor may consider) appears to be the only avenue available to an assessor on the issue of proportionality.

A costs assessor is to determine the costs payable as a result of the order, by making a determination on the fair and reasonable amount of costs (s.367A of the Act).

In assessing what is a fair and reasonable amount of costs, a costs assessor may consider any or all of the following matters:

- the skill, labour and responsibility displayed on the part of the legal practitioner
- the complexity, novelty or difficulty of the matter
- the quality of the work done and whether the level of expertise was appropriate to the nature of the work done

- the place where, and the circumstances in which, the legal services were provided
- the time within which the work was required to be done
- the outcome of the matter (s.364(2) of the Act).

A costs assessor may obtain and consider a costs agreement when assessing costs, but must not apply the terms of the costs agreement for the purposes of determining an appropriate fair and reasonable cost (s.365 of the Act). This simply means that the costs assessor is not bound by the terms of the agreement between the successful party and their law practice.

An assessment must also be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs (s.364(3) of the Act). This section applies to the rules regarding indemnity costs and also the limits on costs capped under legislation.

Assessors have no jurisdiction in party/party costs assessments to award interest nor do they have the power to determine an amount representing interest where an order for interest has been made by the court.

4.5 Costs of assessments

In law practice/client assessments, unless the provisions of s.369 of the Act apply, the costs assessor will not issue a separate certificate for the costs of the assessment.

In party/party assessments, the costs assessor must issue a separate certificate for the costs of the assessment.

The costs include the fees of the costs assessor and the filing fee on the application for assessment and might include the costs of the parties to the assessment (s.369).

As noted above, s.369 enables the costs assessor to determine which of the parties should be liable for the costs of the assessment, in circumstances where the costs claimed are reduced on assessment by 15% or more.

In party/party assessments, cl.126 of the Regulations provides the costs assessor with other criteria to determine which of the parties should pay the costs of the assessment, as follows:

- the extent to which the determination of the amount of fair and reasonable party/party costs differs from the amount of those costs claimed in the application for assessment
- whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned
- whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

The certificate of determination will identify which of the parties is liable for the costs of the assessment and/or the proportions.

The costs assessor sends their determination to the Manager and advises the parties that the assessment is completed and that certificates of determination of costs will be released upon the payment of the fees (being the costs of the costs assessor). The Manager will send an invoice to the party that the costs assessor has notified is liable for these fees, but will accept payment of the amount of the costs assessor's fees from any party. If the party that is not liable pays the costs assessor's fees they would usually seek to recover from the liable party.

4.6 Enforcement of certificates of determination

The certificate/s of determination can be lodged with a court with jurisdiction to order the payment of that amount of money. Without further action, it will be taken to be a judgment of that court for the purposes of enforcement.

Information on the procedure for registering the certificate as a judgment is available on the Supreme Court website under the tab for Costs Assessments.

Even if interest is payable because of an order of the court, interest cannot be included in the calculation of the amount for which the judgment is sought.

Once the certificate is registered, interest will run on the amount in the judgment under the provisions of the *Civil Procedure Act* and *Uniform Civil Procedure Rules*.

4.7 Reasons for determination

A costs assessor must ensure that the certificate of determination and the certificate of determination of the costs of the assessment are accompanied by a statement of reasons (s.370 of the Act).

The adequacy of reasons is frequently given for challenging determinations. Clause 128 of the Regulations states that the reasons include the following:

- the total amount of costs for providing legal services determined to be fair and reasonable
- the total amount of disbursements determined to be fair and reasonable
- each disbursement varied by the determination
- in respect of any disputed costs, an explanation of:
    - the basis on which the costs were assessed, and
    - how the submissions made by the parties were dealt with
- if the costs assessor declines to assess a bill of costs - the basis for doing so
- a statement of any determination under s.363A of the Act that interest is not payable on the amount of the costs assessed or, if payable, of the rate of interest payable. Note: Interest only applies to costs assessments between law practices and their clients.

In the early decision of *Attorney General of New South Wales v Kennedy Miller Television Limited* [1999] NSWCA 158, the Court held that the right of a party to appeal (as the process then was) the decision of a costs assessor could not be rendered illusory by the absence of an explanation as to how the costs assessor came to their conclusions.

In *Frumar v the Owners Strata Plan 36957* [2006] NSWCA 278 Giles J stated:

> **[61]** The relatively precise amount suggests a calculation or an addition of items, but this is not explained. The assessment may or may not have been by adjustment of the bill of costs, but if it was, the adjustments were not identified, and if it was not, there was no more than an end figure. The panel stated a figure as the result of its assessment and asserted that it was 'in all the circumstances' a fair and reasonable amount of costs, but the content cannot be seen.
>
> **[62]** In my opinion, this fell short of providing a statement of reasons for the panel's determination as required by s.208 KG of the Act, and fell short of providing the explanation required by r.68(1)(d). If either the claimant or the opponent wished to appeal to the Supreme Court, he or it could not do so when he or it did not know:
>
> a. whether the panel's assessment had been by taking the itemised bill of costs and allowing, disallowing or adjusting items, or by coming to its own view about how reasonable the work was that was carried out
> b. if the former, what items had been allowed, disallowed or adjusted and whether as to hourly rate or reasonable times or for some other reason, or
> c. if the latter, what work the panel thought reasonable and how it costed the carrying out of the work.

Since that decision there have been many cases where the adequacy or inadequacy of the statement of the reasoning process has been discussed. Recent decisions include *Randall Pty Limited v Willoughby City Council* [2009] NSWDC 118 and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 681.

These cases concerned appeals about decisions of Review Panels, but the principles discussed are relevant to the reasons given by costs assessors. In both matters, the Court held that failure to give adequate reasons is a matter of law allowing an appeal as of right (s.384 of the Act). In both matters, there was a discussion of what constitutes adequate reasons. In brief, the reasons must address the issues raised by the parties without descending into a taxation process.

4.8 Miscellaneous

A costs assessor can issue an interim certificate (s.368(2) of the Act).

A costs assessor can correct an error in a certificate (s.371 of the Act).

A costs assessor's determination is final and binding on the parties. There is no other appeal or assessment of the determination, except as provided by the Act under s.372.

4.9 Reviews

A party who is dissatisfied with a determination of a costs assessor can apply for a review of the determination by a Review Panel. The Review Panel will comprise two costs assessors. The application must be made within 30 days after the forwarding of the certificate of determination by the Manager, Costs Assessment. The 30 days for review does not run from the date the certificates are received. A party applying for review must give the other party at least seven days' notice before the application is made (s.373 of the Act). The Manager, Costs Assessment has the discretion to extend time (s.373). The initial determination is suspended pending the review (s.377 of the Act).

A helpful decision on the review process, decided under the *Legal Profession Act 1987* is *Kells v Mulligan & Anor* [2002] NSWSC 769 in which Master Malpass spelt out the functions of the Review Panel. He said that the Review Panel must conduct a review as opposed to entertaining an appeal. It has all the functions of the costs assessor and must determine the application in the manner that a costs assessor would be required to determine an application. The review is to be conducted on the evidence that was before the costs assessor. Most importantly, the Review Panel must ensure it has examined the costs assessor's file before publishing its determination.

It is important to note that a review is not an appellate process, but a fresh review which is limited to all the material that was before the costs assessor at first instance. Note, however, that the Review Panel can determine that it is appropriate to call for further submissions and/or fresh evidence from the parties.

The Review Panel may affirm the determination or set it aside and substitute a new determination. The Review Panel must give reasons for its decision covering the same matters as set out in cl.128 of the Regulations.

If the Review Panel affirms the determination of the cost assessor, it must require the party who applied for the review to pay the costs of the review (s.379(2) of the Act).

If the Review Panel sets aside the original determination, and makes a determination in favour of the party who applied for the review, it must require the party who applied for the review to pay the costs of the review, if that party has not improved his or her position by more than 15%.

In other circumstances, the Review Panel has the discretion to order how the costs of the review are to be paid.

It is important to note that the definition of the costs of the review process covers only the fees payable to the review panellists; it does not cover the costs incurred by the parties to the review (s.379(10) of the Act).

The filing of a certificate of determination in the registry of the relevant court becomes a judgment of that court, and the original costs assessor's certificate and any judgment based on

that certificate cease to have effect (s.378(3)(c) of the Act). The Review Panel also has power to correct an inadvertent error and issue a certificate that sets out the new determination. Such a certificate replaces any certificate setting out the previous determination of the Review Panel. For procedure see:
http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_costsassessment/SCO2_register_costsassessment.html

4.10 Appeals

In accordance with the rules of the District Court, a party who is dissatisfied with a decision of a costs assessor may appeal to the District Court against the decision (s.384 of the Act). The Court has made it clear in hearing such appeals that it is a very limited avenue of approach, and is confined to a question of law arising in the proceedings to determine the application.

The two decisions in *Randall Pty Limited v Willoughby City Council* [2009] NSWDC 118 and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 681 provide useful commentary on the process of appeals and the manner in which the review/appeal processes work. Note, however, that the decision of Johnstone DCJ in Randall related to the provisions of the 2004 Act and the decision of Davies J in Dunn concerned the provisions of the 1987 Act.

Unless the Court affirms the costs assessor's determination, it may make a determination which it considers the costs assessor should have made, or remit the decision on the question to the costs assessor, and order the costs assessor to re-determine the application.

A party to an application for a costs assessment may seek leave of the Court to appeal against the determination of a costs assessor (s.385(1) and (2) of the Act).

These are appeals on matters other than questions of law and these usually relate to the manner in which the costs assessor has exercised his or her discretion. These are often difficult to conduct because they rely on identifying whether the costs assessor clearly stated their reasoning process, and the manner in which they have exercised their discretion.

Unless the Court affirms the costs assessor's/Review Panel's decision, the Court is required to make its own determination. That is, it does not remit the matter back to the costs assessor.

The issue of appeals applies equally to decisions and determinations of a Review Panel.

10 STEPS TO A PARTY/PARTY COSTS ASSESSMENT

1. **Costs order(s):** Party/party costs assessment quantifies costs that can be recovered when a costs order has been obtained in a court or tribunal. You should check the details of the order(s) - is the order for all of the costs or part only; are the costs to be paid on an ordinary basis or the indemnity basis?

2. **Estimate of costs and negotiation:** Review the accounts file to calculate total professional costs, disbursements and counsel's fees incurred. Is your client registered for GST? If yes, then they cannot claim GST from the other side on assessment as they are entitled to an input tax credit. Prepare a letter to the other side providing a summary breakdown of the costs and disbursements and obtain instructions on making an offer to settle the costs. The efforts made to settle the costs will have an impact on who will pay the costs of the assessment.

3. **Preparation of Application:** To prepare an Application for Assessment of party/party costs (using the approved form) you will need to complete paragraphs 2, 5 and 8 of the Application and annex a consecutively numbered itemisation of the professional costs, disbursements and counsel's fees incurred. Also annex a copy of the court order(s) if available or the paragraphs from the judgment setting out the costs orders.

4. **Delivery (Service) of Application:** The Application for Assessment must be given to the Costs Respondent; the Costs Applicant must be able to establish the giving of the Application. Giving to the solicitor, on the record in the substantive proceedings in which the costs order was made is not considered adequate unless the solicitor advises they have instructions to accept the Application.

5. **Timing for Lodgement:** The Costs Respondent has 21 days to provide Objections. You cannot lodge the Application until after the expiration of 21 days from the date when the Application for Assessment was given or on receipt of Objections from the Costs Respondent, whichever happens first.

6. **Objections and Response:** If you receive Objections from the Costs Respondent consider whether you need to prepare a Response to the individual or general objections made. The Response can be filed with the Application or forwarded directly to the Costs Assessor when appointed.

7. **Lodging the Application with the Manager, Costs Assessment at the Supreme Court:**

   (a) Before lodgement, complete paragraphs 3, 4, 6 and 7 and certify paragraphs 9 and 10 of the Application.
   (b) The filing fee is payable to the Supreme Court of NSW and is the greater of $100 or 1% of the total costs claimed.
   (c) Lodge three copies of the completed Application, any Objections and any Response and a copy of the relevant costs Order at the Supreme Court Registry of by post (GPO Box 3, Sydney NSW 2001 or DX 829 Sydney).

8. **Costs Assessment Process:** The Manager, Costs Assessment notifies the parties of the appointment of a Costs Assessor. Both parties will then receive a letter from the Costs Assessor setting out the requirements for the Costs Assessment, inviting objections, if not already received by the Costs Assessor, and final submissions.

9. **Determination of the Costs Assessor:** The Costs Assessor will notify the parties an assessment is complete and determine which party is liable for these costs. The Manager Costs Assessment will issue a Tax Invoice for the charges of the costs assessor. These costs must be paid to the Manager, Costs Assessment before the Determinations of the Costs Assessor and Statement of Reasons will be forwarded. Either party can pay the costs of the assessment to secure the release of the certificates. If payment is made by the party who is not actually liable, they can then seek to recover these costs from the liable party. Both parties will be sent two Certificates of Determination: the first dealing with the costs payable as a result of the court order, the other dealing with the costs payable in relation to the costs of the Costs Assessment.

10. **Filing of the Certificates:** The Certificates of Determination are filed in a court of competent jurisdiction and they are taken to be a judgment and any enforcement action can be undertaken - see guide to registering a certificate of determination.

Assessment of party/party costs is conducted pursuant to ss 353 to 371 of the Legal Profession Act 2004 and in particular, cl 123 to 126 of the Legal Profession Regulation 2005. Assessment application forms can be found on the Supreme Court website under "Costs Assessment".

7 STEPS FOR OBJECTING TO A PARTY/PARTY COSTS ASSESSMENT

1. **Costs order(s)**: Party/party costs assessments quantify costs which are payable when a costs order has been obtained in a court or tribunal. You should check the details of the order(s) including the names of the parties - is the order for all of the costs or part only; are the costs to be paid on an ordinary basis or the indemnity basis? Ensure you consider the exact terms of the costs order(s), so that negotiations and any assessment proceed on the correct terms.

2. **Negotiation:** When you receive an offer of settlement from a Costs Applicant, discuss it with your client, the Costs Respondent, and consider how your client's own costs compare with the claim by the Costs Applicant. Costs Respondents may see the assessment process as a way to delay payment of the costs they have been ordered to pay. However, it may be better to agree on the costs at an early stage and discuss terms for payment rather than have a dispute that your client is unlikely to win. If interest has been ordered, delaying resolution may be costly, especially if a Costs Assessor finds that your client rejected a reasonable offer. Consider whether the Costs Applicant is claiming GST but is also entitled to an input tax credit for GST incurred. The efforts made to settle the costs will have an impact on who pays the costs of assessment.

3. **Application for Assessment**: If costs are not settled by negotiation, the Costs Applicant will prepare an Application for Assessment of party/party costs with an itemisation of the professional costs, disbursements and counsel's fees incurred. This will be given to the Costs Respondent by the Costs Applicant.

4. **Time for drawing objections:** The Costs Respondent has 21 days to provide objections to the Costs Applicant. The Costs Applicant cannot lodge the Application for Assessment until after the expiration of 21 days from the date the Application was given to the Costs Respondent or on receipt of the objections from the Costs Respondent, whichever happens first. Although it is usual for the Costs Assessor to allow a short additional time to provide objections after the Application for Assessment is filed, you should not presume that you can wait until the Costs Assessor is assigned to the costs assessment before starting work on the objections. On receipt of the Application for Assessment start preparing the objections (and before it has been lodged) as many assessors give very little time once the application has been assigned.

5. **Costs Assessment Process:** The Manager, Costs Assessment notifies the parties of the appointment of a Costs Assessor. Both parties will then receive a letter from the Costs Assessor setting out the requirements for the Costs Assessment, inviting objections, if not already received by the Costs Assessor, and final submissions.

6. **Determination of the Costs Assessor:** The Costs Assessor will notify the parties an assessment is complete and determine which party is liable for these costs. The Manager Costs Assessment will issue a Tax Invoice for the charges of the costs assessor. These costs must be paid to the Manager, Costs Assessment before the Determinations of the Costs Assessor and Statement of Reasons will be forwarded. Either party can pay the costs of the assessment to secure the release of the certificates. If payment is made by the party who is not actually liable, they can then seek to recover these costs from the liable party. Both parties will be sent two Certificates of Determination: the first dealing with the costs payable as a result of the court order, the other dealing with the costs payable in relation to the costs of the Costs Assessment.

7. **Filing of the Certificates:** The Certificates of Determination are filed in a court of competent jurisdiction and they are taken to be a judgment and any enforcement action can be undertaken - see guide to registering a certificate of determination.

Assessment of party/party costs is conducted pursuant to ss 353 to 371 of the Legal Profession Act 2004 and in particular, cl 123 to 126 of the Legal Profession Regulation 2005.

CONSIDERATIONS IF YOUR CLIENT OBJECTS TO YOUR COSTS

One of the avenues open to an unhappy client is to lodge an Application for Assessment objecting formally to your costs. This can be a costly process and it is worth considering the following issues:

A. **Costs Disclosure:**

1.1 Check your Costs Agreement/Retainer to see if there are any requirements of costs disclosure that have been missed. You may decide to make a commercial decision to settle the issue of costs with the client rather than continue with the assessment. If you have omitted to disclose one of the required elements, you are generally held liable for the costs of the costs assessment (s369 LPA 2004).

B. **Negotiations:**

2.1 Consider how to respond to the client's objections. Are any of them valid? Should a commercial resolution be achieved at this stage to avoid further costs?

C. **Timing:**

3.1 An Application for Assessment by a client (or third party payer) must be made within 12 months after:

- the Bill of Costs was given or the request for payment was made to the client or third party payer, or
- the costs were paid, if neither a Bill of Costs was given nor a request was made.

3.2 A client can make an Application to the Supreme Court that the Application be dealt with out of time, unless the client is considered to be a sophisticated client (see s302 LPA 2004: Definitions and s350 (5)). If the Supreme Court determines that it is just and fair for the Application for Assessment to be dealt with after the 12-month period then it may be dealt with by a Costs Assessor.

D. **Costs Assessment Process:**

4.1 If an Application for Assessment of a Bill of Costs is lodged by your client the Manager, Costs Assessment will forward a notice to you attaching a copy of the Bill of Costs and Objections advising you to lodge any Response at the Supreme Court within 21 days of issue of the notice. The Manager, Costs Assessment has no power to extend the time to respond.

4.2 At the expiry of this time, all documents are sent to the Costs Assessor by the Manager, Costs Assessment who will inform the parties of the Costs Assessor's details.

4.3 Both parties will then receive a letter from the Costs Assessor setting out the requirements for the Costs Assessment, inviting objections or a response, if not already received by the Costs Assessor, and final submissions.

E. **Determination of the Costs Assessor and Statement of Reasons:**

5.1 After the Costs Assessor had completed the assessment, the Manager, Costs Assessment will send the parties a letter advising of the fee of the Costs Assessor. This fee must be paid to the Manager, Costs Assessment before the Determination of the Costs Assessor and Statement of Reasons will be forwarded.

5.2 Either party can pay the costs of the assessment to secure the release of the certificates. If payment is made by the party who is not actually liable, they can then seek to recover these costs from the liable party. Both parties will be sent Certificates of Determination: the primary one dealing with the assessed costs of the legal practice and the other dealing with any costs payable in relation to the costs of the Costs Assessment.

5.3 Click on this link for a guide to registering a certificate of determination.

Assessment of legal practice costs is conducted pursuant to ss 350 and 354 to 371 of the Legal Profession Act 2004 and in particular, cl 119 to 122 and 127 to 130 of the Legal Profession Regulation 2005. Assessment application forms can be found on the Supreme Court website under "Costs Assessment".

STEPS TO ASSESSMENT OF COSTS OF A LEGAL PRACTICE

If a client fails to pay your Tax Invoice/Bill of Costs, you can have the costs assessed. Before you proceed you should consider the following:

A. **Costs Disclosure:** Check your Costs Disclosure and Costs Agreement to see if there are any requirements of costs disclosure that have been missed. You may decide to make a commercial decision to settle the issue of costs with the client rather than continue with the assessment. If you have omitted to disclose one of the required elements, you cannot recover legal costs until they are assessed (s317 LPA 2004) and you are generally held liable for the costs of the costs assessment (s369 LPA 2004).

B. **Tax Invoice/Bill of Costs:** Consider if your Tax Invoice provides the best information for you to proceed to assessment or if more information should be provided in the Application for Assessment.

C. **Negotiations:** Consider how best to respond to the client's reluctance to pay or objections. Are any of them valid? Should a commercial resolution be achieved at this stage to avoid further costs? Could a claim of negligence be commenced causing damage to your or your firm's reputation?

D. **Timing:** An Application for Assessment by a legal practice cannot be made until 30 days after the Tax Invoice/Bill of Costs is given to the client. Although a client must lodge an Application for Assessment within 12 months after the Tax Invoice/Bill of Costs was given, at present no time limit applies to an application by a legal practice. However, there is no point in proceeding to assessment after the expiration of the limitation period for recovery of a debt (*Coshott v Barry [2012] NSWSC 850*).

1. **Costs Assessment Process:**
   To prepare an Application for Assessment of costs of a legal practice (using the approved form) you will need to complete the relevant parts of paragraphs 2, 3, 4 and 5 of the Application (and delete/strike through the parts which do not apply) and annex a copy of the Bill of Costs and Costs Agreement.
2. **Lodging the Application for Assessment with the Manager, Costs Assessment at the Supreme Court:**

   (a) The filing fee is payable to the Supreme Court of NSW and is the greater of $100 or 1% of the total costs claimed.
   (b) Lodge three copies of the completed Application for Assessment and supporting documents at the Supreme Court Registry or by post (GPO Box 3, Sydney NSW 2001 or DX 829 Sydney).

3. **Costs Assessment Process:** The Manager Costs Assessment sends the Application for Assessment and supporting documents to the client/cost respondent for response/objections. The cost respondent has 21 days to provide a response. The Manager has no power to extend time for a response.

4. Upon receipt of the response, or in default of any response from the client, the Manager refers the application to a costs assessor, and notifies the parties of the costs assessor's appointment. Both parties will then receive a letter from the Costs Assessor setting out the requirements for the Costs Assessment, inviting objections, if not already received by the Costs Assessor, and final submissions.

5. **Determination of the Costs Assessor:** The Costs Assessor will notify the parties an assessment is complete and determine which party is liable for these costs. The Manager Costs Assessment will issue a Tax Invoice for the charges of the costs assessor. These costs must be paid to the Manager, Costs Assessment before the Determinations of the Costs Assessor and Statement of Reasons will be forwarded. Either party can pay the costs of the assessment to secure the release of the certificates. If payment is made by the party who is not actually liable, they can then seek to recover these costs from the liable party. Both parties will be sent two Certificates of Determination: the first dealing with the costs payable as a result of the court order, the other dealing with the costs payable in relation to the costs of the Costs Assessment.

6. **File the Certificates** of Determination in a court of competent jurisdiction and they are taken to be a judgment and any enforcement action can be undertaken - see guide to registering a certificate of determination.

Assessment of legal practice costs is conducted pursuant to ss 352 and 354 to 371 of the Legal Profession Act 2004 and in particular, cl 119 to 122 and 127 to 130 of the Legal Profession Regulation 2005. Assessment application forms can be found on the Supreme Court website under "Costs Assessment".

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CHAPTER 5

GOODS & SERVICES TAX

Costs Guidebook 6th Edition (revised) - Chapter 5

Goods & Services Tax

5.1 Introduction

Costs and disbursements are generally liable to GST.

Practitioners must satisfy themselves as to the correct legal position on GST and are advised to obtain further information, including rulings and practice statements by the Australian Taxation Office (ATO).

For ease of reference this chapter includes a summary (5.2) and additional information as follows:

5.2 Summary

Damages: Party/party costs are part of the damages claim.

Supply: Damages do not constitute a supply.

Consideration: Payment of damages (including party/party costs) does not constitute consideration for a supply.

Tax invoice: As party/party costs are not a taxable supply, it is incorrect for the successful party or the law practice instructed by the successful party to issue a tax invoice to the unsuccessful party or the unsuccessful party's law practice.

Input tax credit: As there is no taxable supply, payment of party/party costs does not give rise to an entitlement to an input credit for the benefit of the paying party.

Reimbursement: Party/party costs are merely a reimbursement. However, as part of this, the successful party may seek reimbursement for any GST paid on the successful party's legal fees (if they are not entitled to an input tax credit).

A successful party registered for GST claims GST exclusive amount for party/party costs: This is because they are entitled to an input tax credit and accordingly already have reimbursement for the GST they have paid to their instructed law practice.

A successful party unregistered for GST claims GST inclusive amount for party/party costs: As they are not able to claim any input tax credit, they claim a GST inclusive cost (the actual expense borne by the party) from the unsuccessful party.

Workers compensation: This is subject to the general principles outlined above.

Apportionment: Where party/party costs and other damages are rolled up into a settlement/judgment with supplies, there must be apportionment between the same on a reasonable basis to determine the correct GST liability. This is because GST is payable on taxable supplies provided certain conditions are met, whereas no GST is payable on damages, as there is no supply and no consideration.

5.3 Law practice and own client

5.3.1 Disclosure and costs agreements

Rates, charges and other costs disclosed by a law practice may be stated on either a GST exclusive or GST inclusive basis, provided it is clear whether or not GST is to be added to the price (see s.48 of the Australian Consumer Law).

It is recommended that:

- where individual rates, charges, expenses or disbursements are GST exclusive, it be clearly stated that GST of currently 10% will be added and any total should be a GST inclusive amount
- where a single price is quoted it must be a GST inclusive amount
- where an estimate is based on GST exclusive rates, it must set out the GST exclusive component, and the GST component with the total GST inclusive costs, (taking into account disbursements that are GST free, such as stamp duty).

5.3.2 Tax invoices

For tax invoices and bills/itemisations of costs, itemised charges and sub-totals can all be GST exclusive, however the GST component must be clearly shown and the final total must be a GST inclusive sum (i.e. the GST exclusive sub-total plus 10% GST on the costs subject to GST).

5.4 Disbursements

Generally, disbursements, which fall within the definition of 'taxable supply', paid by the law practice on behalf of the client are subject to the same GST Rules. However, some payments have been exempted from the application of GST e.g. court filing fees. A comprehensive list of these payments is found in A New Tax System (Goods & Services Tax) (Exempt Taxes, Fees & Charges) Determination 2000 (No. 2) issued by the Minister for Revenue and Assistant Treasurer.

5.5 Applications for assessment of law practice/client costs

GST payable for legal services is taken into account in determining legal costs that are payable in relation to the provision of those services.

5.6 Party/party costs

GSTR 2001/4 (GST consequences of court orders and out-of-court settlements) addresses the issues that arise in relation to GST and party/party costs.

The primary rule on GST is:

- that GST can be recovered by a successful party (i.e. a party which has the benefit of a costs order) from an opposing party, if the successful party is not registered for GST (and therefore cannot recover GST from the ATO as an input tax credit);
- Section s.302B of the *Legal Profession Act 2004* makes it clear a costs assessor is to take into account GST in a determination.

5.7 GST and leases

The law practice of the lessor issues the tax invoice to the lessor for payment of the legal services, inclusive of, or plus, GST. The lessor will have to recoup the expenses from the lessee as part of the lessor's expenses under the contract.

5.8 GST and mortgages

Similar principles regarding the GST treatment of leases apply to mortgages.

5.9 GST on fixed costs

Clause 115, Legal Profession Regulation 2005 provides that a cost fixed by Division 2 of the Regulation may be increased by up to 10% for the amount payable for GST.

These costs include costs of enforcement of a lump sum debt or liquidated damages, enforcement of a judgment, worker's compensation matters and obtaining a grant of probate or letters of administration (see cl.112 to 114 of the Regulations).

GST cannot be claimed on personal injury capped costs as cl.115 of the Regulations specifically refers to Division 6 of the Regulations and costs capping is found in Division 9 of the Regulations.

5.10 Rulings and determinations

The following determinations, advices and practice statements may also be of assistance to practitioners:

a. *GSTD 2000/3 Goods and Services Tax: transitional arrangements: to what extent is the supply of services made on or after 1 July 2000, where the supply spans that date?*
b. *GSTR 2000/37 re: disbursements*
c. *GSTR 2001/4 Goods and Services Tax treatment of a court order*
d. *GSTD 2003/1 Goods and Services Tax: Is the payment of judgment interest consideration for a supply?*
e. *GSTA TPP 042: Goods and services tax: Is a payment to a lawyer by a client to reimburse the lawyer for a payment of a tax, fee, or charge (tax) that is excluded from the GST by a determination of the Treasurer consideration for a taxable supply by the lawyers if the lawyer paid the tax in their own right?*
f. *GSTA TPP 043: Goods and services tax: Is a client's reimbursement to a lawyer for a payment of a tax, fee or charge (tax) that is not subject to GST consideration for a taxable supply by the lawyer if the lawyer paid the tax as an agent for the client?*
g. *PS LA 2008/16: Goods and services tax: recovery of legal costs.*

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CHAPTER 6

COSTS ORDERS AGAINST PRACTITIONERS

Costs Guidebook 6th Edition (revised) - Chapter 6

Costs Orders Against Practitioners

6.1 Introduction

Costs orders can be made against practitioners in a number of circumstances. Such orders are within the discretion of the court.

This chapter considers a range of matters related to costs orders, as follows:

6.2 Reasonable prospects of success

Division 10 of Part 3.2 of the *Legal Profession Act 2004* (NSW) (the Act) headed Costs in civil claims where no reasonable prospects of success, applies to all proceedings with a damages component. It is, therefore, not restricted to personal injury damages and is applicable both to plaintiffs and defendants.

In addition, a practitioner or barrister is not to act for a client, aside from preliminary legal work (s.346 of the Act), unless there are reasonable prospects of success. To do otherwise, makes a practitioner liable to costs orders.

Practitioners are required to certify that:

'... a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success' (*s.345 (1)* of the Act).

The Uniform Civil Procedure Rules (UCPR) forms must be signed prior to filing the initiating or defending process.

Practitioners should be aware of the following decisions dealing with the principles governing the application of the phrase 'reasonable prospects of success':

- *Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt [2004] NSWCA 45*
- *Degiorgio v Dunn (No 2) [2005] NSWSC 3*
- *Lemoto v Able Technical Pty Ltd & 2 Ors [2005] NSWCA 153*
- *Eurobodalla Shire Council v Wells & 2 Ors [2006] NSWCA 5*
- *Groth v Audet [2006] NSWCA 48*
- *Firth v Latham & Ors [2007] NSWCA 40*
- *Haydon Fowler Corbett Jessop v Toro Constructions Pty Ltd [2008] NSWCA 178*
- *Bon Appetit Family Restaurant Pty Ltd v Patricia Mongey [2009] NSWCA 14*
- *European Hire Cars Pty Ltd v Poulden [2009] NSWSC 526*.

6.3 Obligation of practitioner

The legislative intention of the requirement to file a certificate for reasonable prospects was to regulate the conduct of the legal profession, not that of the client. In *Groth v Audet (2006)*, the Court of Appeal held that a breach of s.198L (2) of the 1987 Act (s.345 of the 2004 Act) did not invalidate or nullify proceedings. However, the Court went on to say that it may still have power to strike out proceedings, if the default is not rectified by the defaulting practitioner.

Practitioners should note that an application filed to commence a matter in the Federal Circuit Court was determined not to be a pleading, nor court documentation, and therefore, s.198L of the *Legal Profession Act 1987* (s.345 of the 2004 Act) did not apply. It should be noted that the Court did not decide whether s.198L applied to matters in the Federal Circuit Court, if pleadings were filed (Fuller v Baptist Union of NSW [2004] FMCA 789).

In *Lemoto v Able Technical Pty Ltd (2005)*, the Court of Appeal discussed the discretionary nature of s.198M of the *Legal Profession Act 1987* (s.348 of the 2004 Act) and the fact that a practitioner who is facing a claim for indemnity of costs must be given procedural fairness to rebut the presumption in s.198M.

6.4 What are reasonable prospects?

The definition of 'no reasonable prospects of success' was seen in *Degiorgio v Dunn (No. 2)* to be akin to a case 'so lacking in merit or substance as to not be fairly arguable'. The Supreme Court followed the five elements set out in Momibo Pty Ltd v Adam (unreported, 31 August 2004) that would be necessary to satisfy the obligation under s.198M of the 1987 Act (s.348 of the 2004 Act). These elements were:

- a practitioner's subjective reasonable belief includes the four other elements, and a proposition that there is a logically arguable case
- the reasonable belief must be based on an objective opinion, formed from material at the time of commencement of proceedings
- the available material must form a basis for alleging each relevant fact
- the claim must be managed according to a reasonably arguable view of the law
- there must be reasonable prospects as to the recovery of some damages.

In *Lemoto v Able Technical Pty Ltd (2005)*, the Court of Appeal stated that the question for the practitioner is whether they hold a reasonable belief that the provable facts, and a reasonably arguable view of the law, means that the prospects of recovering damages or defeating a claim are 'fairly arguable'.

In *Haydon Fowler Corbett Jessop v Toro Constructions Pty Ltd*, the Court of Appeal held that a fact is provable if the practitioner reasonably believes that the available material provides a proper basis for alleging that fact.

In *Eurobodalla Shire Council v Wells & 2 Ors*, the Court of Appeal ordered that the plaintiff's practitioner and counsel indemnify their client for the defendant's costs for their practitioners, in relation to the plaintiff's application for leave to appeal and the appeal. The Court held that s.198M of the 1987 Act (s.348 of the 2004 Act) applied to appeal proceedings against 'an award of damages'.

The Court of Appeal held, in *Bon Appetit Family Restaurant Pty Ltd* v Patricia Mongey that the obligation pursuant to s.345 exists in appeal cases (in accordance with s.344 (1)). The Court also provided a warning to practitioners that the obligations as to certification remained, despite the wishes or instructions of the client (in accordance with s.345(3)).

That decision should be read with European Hire Cars Pty Ltd v Beilby Poulden Costello, where Bryson J found that the respondent practitioners had breached their statutory obligation, however, no adverse finding was made against them because the plaintiff client had significantly contributed to the 'disastrous outcome of the litigation'.

6.5 Continuing obligation

In *Firth v Latham & Ors*, the NSW Court of Appeal upheld the trial judge's finding that the plaintiff's practitioner properly held a reasonable belief, based on provable facts and the law, that his client's claim, against the second defendant, had reasonable prospects of success at the commencement of proceedings. The Court of Appeal also upheld the trial judge's finding that, at the time of the commencement of the trial, there was a lack of evidence against the second defendant and that the plaintiff's case was 'without reasonable prospects of success' against the second defendant. The obligation, therefore, imposed by s.345 is a continuing one, meaning that there is an ongoing need by plaintiff and defendant practitioners to ensure that on the 'basis of provable facts and a reasonably arguable view of the law' their client's claim of defence has reasonable prospects of success.

In *Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt*, Palmer J noted that the responsibility for 'changing the culture of litigation' rests with the profession and the courts. Although these comments were obiter, they underpin the practice of civil litigation in NSW, namely 'to facilitate the just, quick and cheap resolution of the issues' (as set out in s.56 Civil Procedure Act 2005). Practitioners may, therefore, need to revise their view and the merits of their client's case during the conduct of the proceedings.

The Courts have regularly stated that the power to make personal costs orders is not to be used by practitioners as a tool of intimidation against opponents. In Degiorgio v Dunn (No 2) Barrett J held that the legislation should not be seen as 'an instrument of intimidation'.

The concern that practitioners will use the threat of a personal costs order against opponents has been expressed by the President of the Law Society of New South Wales in a message to the legal profession: Practitioners Making Threats to Seek Personal Costs Orders against Other Practitioners pursuant to Part 11 Division 5c *Legal Profession Act 1987* (August 2004 at http://www.lawsociety.com.au/resources/journal/archives/Issue/029251)

6.6 Liability of a practitioner for unnecessary costs

New South Wales courts are empowered by the provisions of section 99 of the *Civil Procedure Act 2005* to disallow costs to a party, or direct a practitioner to pay costs, if it appears to the court that costs have been incurred by the serious neglect, serious incompetence or serious misconduct of the practitioner, or improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.

This section was considered by the Supreme Court in *Karwala v Skrzypczak Re Estate of Ratajczak* [2007] NSWSC 931, where at 9, Windeyer J found that when dealing with an application for costs pursuant to section 99 of the Civil Procedure Act 2005:

'... the proper approach is that determined by Sully J in *Ideal Waterproofing Pty Limited v Buildcorp Australia Pty Limited & Ors* [2006] NSWSC 155, namely that:

- the onus of proof is on the applicant
- the standard of proof is the civil standard understood in the terms set out in *Briginshaw v Briginshaw* (1938) HCA 34, so that reasonable satisfaction as to proof of an issue is not produced by inexact evidence
- facts must be proved to establish serious neglect, serious incompetence or serious misconduct in the handling of the case which caused costs to be incurred which ought not to have been incurred
- these facts justify the making of an order.

Practitioners should also be aware of the following decisions:

- *Lemery Holdings Pty Limited v Reliance Financial Services Pty Ltd*; *School Holdings Pty Ltd v Dayroll Pty Ltd* [2008] NSWSC 1114
- *Puruse Pty Limited v Council of the City of Sydney* [2009] NSWLEC 163
- *Kelly v Jowett* [2009] NSWCA 278

6.7 Federal Jurisdiction

Rule 40.07 of the Federal Court Rules 2011 also allows the Federal Court to order a practitioner to pay costs or disallow costs to that practitioner, if those costs were incurred improperly, without reasonable cause, or were wasted by undue delay or other misconduct, and it appears to the Court that the practitioner is responsible for the same.

The Federal Court Rules 2011state that, for the commencement of certain migration litigation (r.31.22), a certificate certifying 'that there are reasonable grounds for believing that this migration litigation has a reasonable prospect of success, in accordance with Form 70, must be signed by the applicant's lawyer' and filed. Interestingly, the certificate requires the applicant's practitioner to sign, however legislation provides that a person must not encourage a litigant to commence proceedings which do not have reasonable prospects of success.

In applications for summary judgment, the Federal Court legislation provides that a proceeding does not have to be 'hopeless or bound to fail' for it to have no reasonable prospects of success (see s.31A (3) *Federal Court of Australia Act 1976* (Cth), s.25A(3) *Judiciary Act 1903* (Cth) and s.17A(3) *Federal Circuit Court of Australia Act 1999* (Cth)). The federal courts have interpreted this definition as 'lowering the bar' (*White Industries Aust. Ltd v Commissioner of Taxation [2007] FCA 511*) and 'softening the test' (*J F Keir Pty Limited v Sparks [2008] FCA 611*) for the making of summary judgment and dismissal orders.

6.8 Recent decisions

There have been a number of recent decisions regarding the costs incurred in the preparation of materials for 'judge's bundles' and disproportionate costs.

In *SDW v Church of Jesus of Letter-Day Saints* [2008] NSWSC 1249, Simpson J excluded from the general costs orders any costs associated with the preparation and photocopying and presentation of seven lever arch folders of documents.

Her Honour concluded:

> **[35]** To my observation, it has become too common a practice for legal practitioners to produce to the court copies of every document that has come into existence associated with the facts the subject matter of the litigation. It denotes, at best, the exercise of no clinical legal judgment and the abdication of the responsibility that lies upon legal practitioners to apply thought and judgment in the selection of the material to be presented to the court. A common example is the photocopying and presentation of hospital files, from which every page is reproduced, and copied multiple times - documents such as histology reports, x-ray reports, nursing notes, and quite irrelevant charts and print outs of complex investigations. This case is no different. The costs to the parties are astronomical. The practice casts immense burdens on the legal representatives of the opposing party, who are obliged to read all of the material, further increasing the costs.

> **[36]** The practice must cease. If legal representatives will not voluntarily accept the responsibility of making appropriate selections of the material to be put before the court, then judicial officers must act to ensure that they do. One appropriate sanction, in cases of excess, is an order that, no matter what the outcome of the proceedings, no costs be recoverable from the losing party in respect of the excess, and, further, no costs be recoverable by the practitioner from the client for the excessive copying. I propose to make such an order.

In *Tobin v Ezekiel - Ezekiel Estate* [2008] NSWSC 1108, Palmer J expressed his concern that the time of the trial and the number of witnesses were disproportionate to the subject matter. He noted:

> **[39]** Unrestrained and prolific issuing of subpoenas by a litigant may constitute an abuse of the Court's process. The terms of the subpoenas, considered individually, may not be too wide or oppressive in themselves, but if the number of subpoenas is large and the issues to which they relate are peripheral to the decisive issues for trial, not only are many non-parties to the litigation unnecessarily inconvenienced and put to expense, but a great deal of unnecessary costs will be incurred in the proceedings, bringing the proceedings to trial will be delayed, and the time for trial will be unnecessarily expanded by the raising of false or peripheral issues. All of these mischiefs the Court must be astute to prevent, in accordance with s.56 *Civil Procedure Act 2005* (NSW) (CPA). It has ample power to do so, both in its inherent jurisdiction to control its own process and under the *Uniform Civil Procedure Rules 2005 (NSW)* (UCPR): see e.g. *Southern Pacific Hotel Services Inc v Southern Pacific Hotel Corporation Ltd* (1984) 1 NSWLR 710, at 719; *Compsyd Pty Ltd v Streamline Travel Service Pty Ltd* (1987) 10 NSWLR 648; *Botany Bay Instrumentation & Control Pty Ltd v Stewart* (1984) 3 NSWLR 98.
>
> **[40]** None of the propositions I have enunciated is revolutionary. All are enshrined in the *Civil Procedure Act 2005 (NSW)* and in the *Uniform Civil Procedure Rules*. The obligation to ensure that litigation is conducted justly, quickly and cheaply is placed equally upon the Court, the litigant and the legal profession (see CPA Pt 6 Div 1, s.56(2), (3) and (4). The Court must ensure that issues in litigation are resolved in such a way that the cost to parties is proportionate to the importance and complexity of the subject matter (CPA s.60). Amongst the objects which the Court must achieve is the efficient use of available judicial and administrative resources to ensure the timely disposal of all proceedings in the Court (CPA s.57(1)(c) and (d). The Court is given ample power to ensure that a trial is conducted, with due regard to these principles (CPA s.62).

Practitioners should be aware that specific costs orders may be made against them for the costs of preparation of materials, or that their clients may be deprived of costs. This opens an avenue for a dispute between the practitioner and client for the recovery of that component of the costs.

THE LAW SOCIETY
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CHAPTER 7
REGULATED COSTS

Costs Guidebook 6th Edition (revised) - Chapter 7

Regulated Costs

7.1 Introduction

Costs are unregulated in NSW, except for those provided under the *Legal Profession Act 2004* (the Act) as regulated by *Legal Profession Regulation 2005* (the Regulations). Regulated costs, which are outlined in this chapter, fall into 2 categories:

7.2 Personal injury matters (excluding motor vehicle accident and work injury claims)

7.2.1 General application

Under the Act (Part 3.2, Division 9), if the amount recovered on a claim for personal injury damages does not exceed $100,000 (excluding interest), costs for legal services are capped.

You can contract out of the fixed costs on a solicitor/client basis, but only by complying with s.339 of the Act and cl.116 of the Regulations i.e. the solicitor must ensure that the costs agreement specifies that the client has contracted out of the regulated costs regime (see Chapter 3 on compliance and Appendix for the precedent letter to the client).

7.2.2 Commencement of the cap

Costs have been capped in personal injury damages claims since 7 May 2002.

7.2.3 Specific provisions

If the amount recovered on a claim for personal injury damages does not exceed $100,000, the maximum costs for legal services are as follows:

- for legal services provided to a plaintiff: 20% of the amount recovered or $10,000, whichever is the greater (plus an additional amount of 7.5% of the amount recovered or $7,500 - whichever is greater - in cases where a District Court matter that was referred to arbitration is referred to rehearing, and/or where a decision of the District Court is subject to appeal) (ss.338 & 338A of the Act)
- for legal services provided to a defendant: 20% of the amount sought to be recovered by the plaintiff or $10,000, whichever is the greater (plus an additional amount of 7.5% of the amount sought to be recovered or $7,500 - whichever is greater - in cases where a District Court matter that was referred to arbitration is referred to rehearing, and/or where a decision of the District Court is subject to appeal) (ss. 338 & 338A of the Act)
- maximum costs do not include disbursements e.g. medical reports, experts reports, filing fees and photocopying (s.338(5)(b) of the Act)
- if more than one practitioner (solicitor or barrister) provides legal services to a party regarding the claim, the maximum costs applies to the costs of both practitioners. Apportionment may be either by agreement or, failing that, as ordered by the Court hearing proceedings on the claim (s.342 of the Act)
- the 'amount recovered' for the purposes of calculating the $100,000 limit does not include any amount attributed to costs or interest (s.343(2) of the Act)
- 'recovered' includes any amount paid under a compromise or settlement of a claim (whether or not any legal proceedings have been instituted) (s.343(1) of the Act)
- GST cannot be added to these costs as they come under Division 9 (and not Division 6 to which cl.115 of the Regulations applies).

7.2.4 Exceptions

The maximum fixed costs apply on a party/party basis unless:

- costs are awarded on an indemnity basis for costs incurred after failure to accept an offer of compromise (s.340 of the Act)
- the court orders certain legal services to be excluded from the maximum costs limitation, due to costs being increased by unreasonable action by the other side (s.341 of the Act).

Practitioners are cautioned that offers of compromise will constitute an important part of the litigation process in personal injury matters, in view of the provisions of s.340 of the Act (see Chapter 11 Offers of compromise). Furthermore, there is additional disclosure required where a client receives an offer of compromise (cl.117 of the Regulations).

7.2.5 Verdict for the defendant

If a plaintiff is unsuccessful in a claim for personal injury damages, there is no "amount recovered" for the purposes of s198D(1) of the Act. As such, the costs cap in s198D will not apply to any party to the proceedings if there is a verdict for the defendant: (*Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty* [2006] NSWCA 100).

7.3 Costs fixed by statutory scheme or practice note

7.3.1 Motor accident costs

See Chapter 9

7.3.2 Workers compensation costs

See Chapter 8

7.3.3 Probate and letters of administration

Section 329 of the Act and cl.114 of the Regulation regulate costs for probate matters. Schedule 4 of the Regulation provides the scale of costs for obtaining probate or letters of administration. This sets a scale of fixed costs for the various stages of probate, dependent upon the value of assets remaining at the time of the application.

The fixed costs in Part 1 of Schedule 4 refer only to professional services rendered by a law practice for the obtaining for the first time of a grant of probate or administration or the resealing of probate or letters of administration including the obtaining of any grant and resealing after the first from the receipt of instructions to the uplifting of any documents issued by the Court. They include:

- instructions on obtaining a grant of probate or letters of administration;
- attendance to verify details of assets as supplied by executor/administrator (where required);
- preparation of all Court documents;
- attendance on executor/administrator to sign;
- lodging and uplifting documents;
- answering requisitions;
- perusing grant and advising executor/administrator.

It is not possible to contract out of these fixed costs.

Under Part 3 of Schedule 4 to the Regulations extra costs are allowed in relation to obtaining for the first time of a grant of administration or of the resealing of letters of administration. The extra costs which are additional to the fixed costs in Part 1 of Schedule 4 are allowed if a law practice is required to perform any work in addition to that for which Part 1 makes provision. The additional amount is as allowed under Table 1 in Schedule G to the Supreme Court Rules 1970.

Disbursements such as advertising fees, filing fees, valuation fees and fees paid to any law stationer for lodging and uplifting documents are excluded and may be charged in addition to the fixed costs.

All other professional costs for services rendered by a law practice can be charged at the normal rates of the law practice. The law practice should disclose to the client both the scale charge and the charges for all other professional costs. All other professional costs include but are not limited to the following:

- sorting through estate papers and items;
- advising on taxation and meeting the requirements of the Australian Taxation Office including preparation of returns;
- obtaining valuations/appraisals of assets/debts;
- ascertaining whether certain assets form part of the estate (e.g. considering relationships, superannuation, insurance etc);
- advising on the rights of other parties to challenge the will;
- advising on complex questions of interpretation of the will;
- advising on questions of informal wills, rectification, capacity, duress, undue influence and forgery;
- advising on renunciation or reservations of right to apply;
- transmission applications and all transfers and realisation of assets;
- enquiries and research to ascertain the existence of assets;
- preparation and publication of Notice of Intended Distribution.

It would be prudent for the law practice to enquire of the executor/administrator if a claim for commission is to be made by the executor/administrator. If so it would be prudent for the law practice to inform the executor/administrator that additional professional services other than advising can in fact be carried out by the executor/administrator and should be carried out by the executor/administrator if that executor/administrator intends to apply for commission.

GST may be added to all the costs in accordance with cl.115 of the Regulations.

7.3.4 Default judgments and enforcement of judgments

Section 329 of the *Legal Profession Act* and cl.112 of the Regulations regulate the plaintiff's costs for obtaining default judgments and the enforcement of default judgments. The scales of costs are contained in Schedule 2 of the Regulations. These costs are dependent upon the court in which proceedings are brought, and are based upon the stage at which a matter reaches. For example, costs are fixed for the work involved in preparing and serving the originating process, obtaining a default judgment, and preparing and serving a Writ of Execution.

GST and disbursements may be added to these costs (see cl.115 of the Regulations).

7.3.5 Victim's Compensation Tribunal

The Victims Rights and Support Act 2013 (NSW) provides for the allocation of a support co-ordinator by Victims Services to assist with a claim; solicitors will no longer be paid for new claims by Victims Services. The Act commenced on 30 May 2013 and is retrospective. Existing claims, including those already listed, are automatically transferred to the new scheme and assessed under the new criteria.

If a claim was lodged prior to 7 May 2013 and the victim is being represented by a solicitor, Victims Services will pay the legal costs for lodging the claim at the current rate which is

> "up to" $825.00 where an application for compensation is awarded; and
>
> "up to" $400.00 where an application is dismissed.

On an appeal to the Victims Compensation Tribunal, costs of "up to" $500 plus GST may be awarded in cases without a hearing and "up to" $1500 plus GST for hearings.

In cases where there is more than one legal practitioner acting for the applicant, costs are to be apportioned as determined by the Compensation Assessor or the Tribunal.

Additional to the professional costs, disbursements "up to" $1,100 may be awarded, excluding counsel's fees and witness expenses.

A law practice is prohibited from recovering costs in excess of those awarded by the Assessor or Tribunal.

7.3.6 Public Notaries

Fees for services carried out by public notaries are set by the Society of Notaries in accordance with s.12 of the *Public Notaries Act 1997 (NSW)*. The recommended scale is published from time to time in the NSW Government Gazette and is available at: www.notarynsw.org.au/fees_scale.

7.3.7 Local Court: Small Claims Division

Costs awarded on a party/party basis in the Small Claims Division are governed by rule 14(4) of the *Local Courts (Civil Procedure) Rules 2005*. The maximum costs that may be awarded are those allowed upon entry of default judgment under Schedule 2 of the Regulation. Disbursements are excluded.

Solicitor/client costs are unregulated.

7.3.8 Local Court: General Division

The Local Court Practice Note CIV 1 (PN CIV 1) provides limitations on costs (UCPR 42.4) on a party/party basis, applicable to:

- amounts claimed of $20,000 or less
- claims transferred from the Small Claims Division to the General Division.

Where the amount claimed is $20,000 or less, costs are subject to para.36 of Practice Note CIV 1, which provides discretion to order costs, as follows:

- of the plaintiff, up to 25% of damages awarded
- of the defendant, up to 25% of damages sought.

This includes the costs of both solicitor and barrister.

Matters transferred from the Small Claims Division to the General Division are subject to the limitation of para.36.2 of CIV 1. This states that the maximum cost recoverable by either party is $2,500, including GST and disbursements. Under para.36.3 of CIV 1, a party may apply to vary this amount.

Indemnity costs may still be awarded at the Court's discretion (para.35.6 of CIV 1; see Chapter 11).

Under para.36.9 of CIV 1, the costs of a cross claim apply as if proceedings have been separately commenced.

These limitations do not apply to solicitor and own client costs, which are unregulated.

7.3.9 Jurisdictions outside New South Wales

Professional costs on a party/party basis are regulated in Commonwealth courts and tribunals. These include the:

- High Court of Australia
- Federal Court of Australia
- Family Court
- Federal Circuit Court (in part)
- Administrative Appeals Tribunal

It is possible to contract out of the scales of costs set by the rules for each of the above courts on a solicitor/client basis, but not on a party/party basis.

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CHAPTER 8

WORKERS COMPENSATION

Costs Guidebook 6th Edition (revised) - Chapter 8

Workers Compensation

8.1 Introduction

There have been significant reforms to Workers Compensation costs since 2001. The Compensation Court, and the system of costs that existed under it, was abolished in December 2001. On 1 January 2002, the Workers Compensation Commission commenced operation and a new system of costs regulation was introduced, alongside the very significant reforms to the system of resolution of compensation disputes. In late 2006, the costs regime under the Workers Compensation Commission was substantially altered.

In June 2012, further significant changes were introduced to the Workers Compensation Scheme in NSW. These amendments also changed the costs provisions, prohibiting the making of any costs order in Commission proceedings.

A new office of the WorkCover Independent Review Officer (WIRO) was established. WIRO may make recommendations that are binding on insurers and WorkCover. WIRO may also investigate complaints regarding insurers and make non-binding recommendations.

A new Independent Legal Assistance and Review Service (ILARS) was established in the office of WIRO. This service deals with applications for funding for injured workers to seek resolution of their dispute and provides grants of legal assistance to approved legal service providers to pursue meritorious claims for injured workers.

WIRO's role is to ensure that funding is made available for approved legal service providers at an early stage of the process to enable supporting material to be obtained. Application to

become an approved legal service provider can be made through completion of application forms available at www.wiro.nsw.gov.au.

8.2 Statutory compensation claims

For claims lodged from 1 January 2002, costs were regulated under the Workers Compensation (General) Amendment (Costs) Regulation 2001. The Workers Compensation (General) Amendment (Costs in Compensation Matters) Regulation 2003, effective from 28 February 2003, increased some of the items in the scales in Schedule 6, and also permitted the recovery of certain travelling and accommodation expenses. A few extra items of costs were also introduced.

For claims lodged (or matters resolved without recourse to the Commission) from 1 November 2006, a new costs regime was introduced by the Workers Compensation Amendment (Costs) Regulation 2006 (and then incorporated into the Workers Compensation Regulation 2003).

The Workers Compensation Regulation 2010 took effect from 1 February 2011 replacing the Workers Compensation Regulation 2003).

Reference to clauses, unless otherwise stated, refer to the Workers Compensation Regulation 2010.

On 1 October 2012, Division 3 of Part 8 of the Workers Injury Management and Workers Compensation Act 1998 (NSW) (WIM Act) was significantly amended with respect to party/party costs. Section 341 of that Act now provides:

> **341 Costs**
>
> (1) Each party is to bear the party's own costs in or in relation to a claim for compensation.
>
> (2) The Commission has no power to order the payment of costs to which this Division applies, or to determine by whom, to whom or to what extent costs to which this Division applies are to be paid.

This section applies to matters commenced in the Commission after 31 March 2013.

An injured worker's legal costs for work done in respect of a claim for compensation are now paid by WIRO to the worker's practitioner as outlined above. These costs are not paid by the insurer as party/party costs.

8.3 Structure of the Regulations

The structure of the regulations assists in understanding how costs are regulated. Costs are dealt with in **Part 17**, as follows:

Division 1 – Preliminary deals with definitions and costs that are not regulated by Part 19.

Division 2 – Costs recoverable in compensation matters indicates the maximum costs recoverable in 'compensation matters' for legal services or costs that are related to a claim (see Schedule 6). This Division also deals with maximum costs recoverable for medical or related treatment or health services fees.

Division 3 – Costs recoverable in work injury damages matters indicates the maximum costs recoverable in 'work injury damages matters' for legal services or costs that are related to a claim (see Schedule 7), 'except as otherwise provided by this Part'. Clause 103 allows a legal practitioner to contract out of the maximum costs on a practitioner/client basis (i.e. a practitioner cannot contract out of the application of Schedule 7 to party/party costs). Clauses 104 – 109 set out certain restrictions on the awarding of costs.

Division 4 – Assessment of costs applies to assessment of costs, both in compensation matters and work injury damages matters. It explains how application is made, what test is applied to the determination of costs, and avenues of appeal in relation to the registrar's determinations.

Division 5 – Goods and services tax provides that GST may be added to fixed costs.

Division 6 – Miscellaneous provides that bills of costs must be in approved form; and permits a Registrar to make a costs order in connection with certain events.

Schedule 6 sets out **maximum costs in compensation matters**. Schedule 6 contains Parts 1, 2 and 3, as follows:

Part 1 contains definitions and describes the application and the operation of the tables in the Schedule.

Part 2 contains four tables:

- **Table 1**, which sets out the phases during which claims and disputes may be resolved, and the costs that apply for the resolution at each phase.
- **Table 2**, which sets out the types of resolutions that apply to Table 1, and indicates the level of costs (i.e. 75% or 100%) that will apply to that resolution type.
- **Table 3**, which sets out alternate or 'special' resolution types and the applicable costs for each party. Tables 1 and 2 do not apply to these 'special' resolution types.
- **Table 4**, which sets out additional legal services and other factors that may result in an increase to the costs claimable under Table 1.

Part 3 lists regulated disbursements.

8.4 Methodology for determining costs

Part 1 of Schedule 6 explains the methodology for determining costs, as follows:

- When a claim or dispute is resolved, legal practitioners or agents representing the parties will need to determine what type of resolution has been reached and when. By applying these factors to this schedule, the legal practitioners or agents will be able to ascertain the costs to be recovered.
- If a claim or dispute involves a number of resolution types that are resolved concurrently, or within a specified time frame, the costs to be recovered are restricted to the resolution for the highest amount of costs payable.
- The costs to be recovered will be either:
    - a maximum flat, predetermined figure, or
    - in the case of certain 'special resolutions', a maximum amount establishing a range within which the parties may negotiate their costs entitlement.
- If a claim or dispute (other than a claim or dispute resolved by special resolution) includes 'additional legal services' or involves 'factors' as referred to in Table 4, there may be an additional allowance that can be added to the entitlement to costs.

8.5 General comments on costs regulated under Part 17

Application

The regulated amounts cover costs for legal services or agent services provided in, or in relation to, a claim for 'compensation' or 'work injury damages', and costs for 'matters that are not legal or agent services, but are related to a claim for compensation': (cls. 98 and 102). The amounts set out in Schedules 6 and 7 are the 'maximum' costs.

Schedule 6 applies both on a party/party and practitioner or agent and client basis. This means all practitioners practising in this area are affected.

Contracting out

It is not possible to contract out of the regulated costs provisions in compensation claims. You can contract out in work injury damages claims.

Costs

Costs are dealt with under Part 8 of the WIM Act and Schedule 7 of the Regulation. Under the Regulation the meaning of 'costs' is as per the Legal Profession Act 2004. This means 'costs' also include practitioner's and barrister's expenses and disbursements, as well as their fees.

This means the lump sum amounts allowed for practitioners' 'costs' include previous add-ons such as agent's fees or practitioner's travel costs. Faxes and copying can no longer be separately claimable. They are now rolled up into the lump sums for individual activities/events.

Unregulated costs

Costs that are not regulated for statutory compensation are listed in cl. 96 as follows:

- for an appeal under s.353 (appeal against decision of the Commission constituted by a Presidential Member) of the WIM Act
- fees for investigators' reports or for other material produced or obtained by investigators (such as witnesses' statements or other evidence)
- fees for accident reconstruction reports
- fees for accountants' reports
- fees for reports from health service providers (Note: under s.339 of the WIM Act, the WorkCover Authority has, from 4 November 2003, fixed maximum fees for reports and appearances of health service providers before the Commission)
- fees for other professional reports relating to treatment or rehabilitation (e.g. architects' reports concerning house modifications)
- fees for interpreter or translation services
- fees imposed by a court or the Commission
- travel costs and expenses of the claimant in the matter for attendance at medical examinations, a court or the Commission
- witnesses' expenses at a court or the Commission.

GST

GST may be added to compensation costs as well as work injury costs (cl.139).

8.6 Compensation claims

WIRO will pay costs based on the amounts prescribed in Schedule 6 for approved work done (not dependent on success). WIRO will also consider paying for disbursements for medical reports of the kind identified in the original Application for Grant of Assistance. WIRO will not reimburse for GST paid on a medical report requested by the practitioner.

A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in Schedule 6, cl.98. The maximum costs that can be recovered are set out in this Schedule.

If a party changes legal representation, the relevant costs under Schedule 6 are to be apportioned (cl.98).

No legal costs for work capacity decision review process for worker or insurer

Section 44(6) of the *Workers Compensation Act 1987* provides:

> *"A legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer."*

Clause 9, Schedule 8 *Workers Compensation Regulation 2010* provides:

> *"A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to an insurer in connection with an internal or other review in relation to a work capacity decision of the insurer."*

Costs allowed by Schedule 6

The *Workers Compensation Amendment (Further Transitional) Regulation 2012* inserted a new rates schedule in Schedule 6 of the *Workers Compensation Regulation 2010*. The new rates apply to all resolutions on or after 1 October 2012.

Under Schedule 6 for this period, practitioner's costs are based on a type of banding, which allows lump sums for categories of tasks which are grouped in stages, as follows:

a) **Maximum amount for an individual activity/event:** Rather than claiming, for example, separate phone calls and letters to an examining specialist, the legal practitioner is allowed a maximum amount for this category of work (activity/event).

   Although there is a maximum amount for an individual activity/event, there is also a cap on the amount for a type of activity/event. The amounts for an 'activity/event' are set out in the Compensation Costs Table in Schedule 6.

b) **No fee unless included in the Schedule:** If work does not fall within a description of an activity/event in the Table, it does not attract a fee, unless it is not regulated (see above).

c) **Hourly rates:** While certain work is stated to be at an hourly rate, the table places caps which limit cost recovery, regardless of the amount of work done. In the limited situations where a separate allowance is made to instruct a barrister, the practitioner's hourly rate is lower.

d) **The Table is divided into parts or stages:** Part 1 relates to making a claim for permanent impairment or pain and suffering, while Part 2 relates to activities undertaken until the dispute is referred or an order is sought. Part 4 covers the filing of an application/response to the determination of the dispute by the Commission constituted as an arbitrator. Certain parts are subdivided into activities/events undertaken exclusively on behalf of either a claimant or an insurer.

e) **Barrister's fees:** There is no separate provision for a barrister's fees until Part 6 (referral of a question of law to President). An allowance is also made under Part 8 (appeals to Presidential member). Under these parts, various allowances are made for obtaining a barrister's advice and on hearing when an amount is allowed for a practitioner instructing a barrister and also for a barrister.

f) **Multiple claims or disputes for an injury treated as a single claim or dispute:** This means that unless there is a 12 month gap between claims or disputes, or the Commission or Registrar orders otherwise, the maximum costs for a type of activity or event for an injury, is the maximum set out in the Table 'regardless of how many times the activity or event is carried out' (Schedule 6 para.2).

g) **Multiple insurers party to claim:** In this instance, the costs as per the Table are increased by 50% per party (other than the party who made the claim). Payment is shared equally amongst the insurers who are parties (Schedule 6 paragraph 4).

h) **Minimum costs for medical disputes and disputes about weekly payments of compensation where award or agreement is for less than $1,000:** The maximum costs are $200 'despite any other provision of this Schedule' (Schedule 6 paragraph 7).

i) **Certain agents not entitled to costs:** An agent who does not fall within the definition of agent in s.356 (6) of the WIM Act 'is not entitled to be paid or recover any costs' (Schedule 6 para. 8). Legal practitioners who are agents can recover costs.

Travel costs & other miscellaneous costs

Certain travel and accommodation costs, and a few extra items of costs, are permitted by Schedule 6 of the Workers Compensation Regulation 2010. Barristers' fees are not allowed in addition to the lump sums, other than in limited circumstances. This means if a barrister is retained outside the specific allowed attendances, their fees must be met out of the lump sum.

Complex matters

The Regulation allows additional costs for complexity. See Part 2 Table 4, items 4 & 5 of Schedule 6.

Disclosure

The notes to the clauses which relate to maximum costs remind practitioners that they have to disclose (cl.98).

8.7 Work injury damages claims

The objective of the Regulation was to fix 'maximum costs and disbursements recoverable by a legal practitioner'. Accordingly, the regulated costs act as a ceiling on what can be obtained.

An important difference between work injury damages and statutory compensation claims is the ability to contract out of the scale for work injury damages claims. The Regulation also provides for the assessment of costs by the Registrar of the Workers Compensation Commission. In addition, it places restrictions on the awarding of party/party costs in court proceedings for work injury damages.

Application

The regulated amounts cover costs for legal services or agent services, provided in, or in relation to, a claim for 'work injury damages', and costs for 'matters that are not legal or agent services, but are related to a claim for compensation' (cl.102.)

Skill, care and responsibility

There is no separate discretionary allowance for complexity. The only relevant discretion is whether a practitioner is entitled to a maximum total or part thereof, for a type of activity. The only relevant discretion is to allow less, not more.

Costs schedule

A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in Schedule 7, cl.102 of the Regulations. The maximum costs that can be recovered are set out in the Schedule.

If a party changes legal representation, the relevant costs under Schedule 7 are to be apportioned (cl.102(2).

Disclosure

The Notes to the clauses remind practitioners of their obligation to disclose under the Legal Profession Act 2004 (cl.102).

Application

The Schedule 7 regulated amounts apply on a party/party and on a practitioner or agent and client basis, 'or on any other basis' (cl.101). This means all practitioners practising in this area are affected. Whilst it is possible to contract out of the scale, there are strict formal requirements which, if not met, mean the regulated amounts will continue to apply (see below).

Schedule 7

Costs are set out in Schedule 7. A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in Schedule 7 (cl.102). The maximum costs that can be recovered are set out in Schedule 7.

If a party changes legal representation, the relevant costs under Schedule 7 are to be apportioned (cl.102(2)).

The tables in Schedule 7 use banding and stages to set costs. Lump sums for costs are calculated depending on the stage reached and amount obtained. Where settlement amounts to more than $20,000, costs are based, in part, on a sliding percentage of the settlement amount.

GST may be added to the costs to be recovered in work injury damages matters (cl.139).

Barristers' fees

Barristers' fees are not allowed in addition to the lump sums, other than in limited circumstances. This means if a barrister is retained outside the specific allowed attendances, their fees must be met out of the lump sum.

Barristers' fees are only separately allowed under the *Other Work Injury Costs Table* in Schedule 7. Fees are only allowed for advice on settlement ($500) and representation in court ($1,500/day for junior counsel and $2,200/day for senior counsel). Senior counsel's fees or fees for more than one advocate will not be included, unless the court so orders (cl.2, Schedule 7).

Contracting out of the regulated costs between solicitor and client

This is modelled on the Motor Accidents Compensation Regulation. To contract out of Schedule 7 the legal practitioner must follow the steps set out in cl.103:

- give prior separate, written advice that the party (even if awarded costs) will be liable to pay the 'gap' between the costs, as per the agreement, and 'the amount that would be payable under the 1998 Act'; and
- disclose, as required under the Legal Profession Act 2004. If disclosure has not been properly made, the agreement to contract out is likely to have no effect. Practitioners should be particularly careful to disclose barristers' fees, as these are often overlooked because they are usually incurred some time after the initial retainer; and
- enter into a costs agreement. In contracting out, the practitioner cannot enter into a conditional costs agreement which charges a success premium of more than 10% (cl.103(1)(b). This provision ceased to be valid after 1 October 2005, when s.324(1) of the Legal Profession Act 2004 came into force.

If you fail to contract out correctly, you will be limited to claiming the regulated costs set out in Schedule 7 and not what might be regarded as 'fair and reasonable'.

Restrictions on awarding party/party costs

The worker obtains party/party costs if they obtain an order or judgment that is 'no less favourable' than the terms of the claimant's final offer of settlement in mediation under the Act (cl.104).

The worker must pay the insurer's costs, if the former is less successful than the insurer's final offer, or the insurer is found not liable (cl.105).

There are provisions for a deemed offer, when the worker obtains an order or judgment, where the insurer has denied liability and there is consequently no mediation (cl.107).

Except as provided above, the parties 'to court proceedings for work injury damages are to bear their own costs' (cl.106).

These limitations do not apply to ancillary proceedings, where the costs are to be awarded in accordance with the rules of the court (cl.108).

8.8 Assessment of costs

Costs disputes (practitioner or agent and client basis or party/party) are dealt with by the Registrar of the Workers Compensation Commission. This relates to both work injury damages and statutory compensation claims.

Division 4 of the Regulation effectively adopts the model for assessment under the Legal Profession Act 2004. The tests of fairness and reasonableness remain the same, as do the discretionary factors.

Similarly, assessment appears to remain paper driven. The Registrar must give reasons and a certificate of determination becomes, on filing in a court of competent jurisdiction, a judgment of that court for the amount of unpaid costs.

Appeals are only allowed for a matter of law. Such appeals are made to the Commission constituted by a Presidential member (cl.135).

The main elements are:

- Practitioner or agent own client: Bills must include a description of the legal or agent services and an identification of each activity, event or stage specified in Schedule 6 or 7, 'by reference to the item number of the activity, event or stage, that was carried out' and the amount sought: cl.113.
- The parties are to be given a reasonable opportunity to make written submissions for an application for assessment. The Registrar is not bound by the rules of evidence. The Registrar may determine whether proper disclosure has been made, and if a costs agreement exists and its terms (cl.119).

- Practitioner own client: If a practitioner has failed to disclose and so would be liable to pay the costs of the costs assessment (s.317, Legal Profession Act 2004), the Registrar must determine the amount of those costs and deduct them from the costs payable under the bill of costs. The practitioner must also pay the costs of the Registrar (cl.121(4)).
- Under the Legal Profession Act 2004, costs cannot be assessed if there is a costs agreement that complies with that Act and that agreement is for a lump sum, or the dispute only relates to the rate specified for calculating costs (unless the rate is found to be unjust). (cls.123 – 124).
- Party/party: There are no formal requirements for a 'bill' and an application for assessment is to be made in the form approved by the Commission: cl.126.
- In party/party assessments the Registrar may obtain and have regard to a copy of the costs agreement. However, the costs agreement must not be applied in determining appropriate fair and reasonable party/party costs (cl.128).

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CHAPTER 9

MOTOR ACCIDENTS

Costs Guidebook 6th Edition (revised) - Chapter 9

Motor Accidents

9.1 Introduction

This chapter outlines the two statutes governing costs for motor accident claims in NSW and the effects of the *Motor Accidents Compensation Regulation 2005*. Information is provided as follows:

9.2 *Motor Accidents Act 1988 (NSW)* (MAA)

This Act governs motor accidents which occurred before 5 October 1999. Costs relating to these claims are not regulated. Practitioner/client costs will depend on written disclosure statements or costs agreements. In accordance with the relevant provisions of the *Legal Profession Act 1987* (NSW), party/party costs must be based on the concept of fairness and reasonableness.

9.3 *Motor Accidents Compensation Act 1999 (NSW)* (MACA)

This Act, which commenced on 5 October 1999, governs accidents occurring on or after 5 October 1999.

The latest regulation is the *Motor Accidents Compensation Regulation* (MACR) 2005 (the Regulation), which was amended in 2006, 2008 and 2010.

The Regulation applies to all assessments of costs undertaken after 1 September 2005. The Regulation was amended by the *Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2008* and the *Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010* and it is the amended regulation which applies to the assessment of costs undertaken after 1 October 2008.

The Regulation has not been updated to take account of the enactment of the *Legal Profession Act 2004* so it refers to sections of the *Legal Profession Act 1987*, some of which do not have equivalents in the current Act (e.g. s.180).

The MACA and its regulations prevail over the *Legal Profession Act 2004* and its regulations, to the extent that there is any inconsistency (s.149(4) of the MACA).

Reference to clauses, unless otherwise stated, refer to the MACR.

Practitioners instructed in motor accident claims, where the accident occurred on or after 5 October 1999, are governed by the scale. The scale relates back to the MACA (ss.149 and 150) and cl.9 of the Regulation, which provide for the fixing of maximum costs recoverable by legal and medical practitioners. A scale has also been introduced for medical witnesses and medical reports in Schedule 2. Section 150 of the MACA forbids medical practitioners from charging above scale for medico-legal services.

The maximum costs recoverable do not apply to practitioner/client costs (cl.11). The scale applies to party/party costs. In accordance with cl.10(1) of the MACR, the scale does not apply to a claim which is exempt from assessment under s.92 of the MACA.

The scale does not extend to any costs incurred before the matter became exempt (cl.10(2)).

To allow for the GST, practitioners may increase the fees allowed under the scale by an amount up the amount of GST payable on the supply of the service to which the fee relates. (cl.16 of the MACR and cl.115 *Legal Profession Regulation 2005*).

For all claims, apart from exempt claims under s.92 of the MACA, costs may be calculated using the costs calculator provided by the MAA. The current costs calculator is as at December 2012 and is available on the MAA website at: www.maa.nsw.gov.au. From the home page hover over the green MAAS tab, a drop down pane will then appear. Then hover over the Claims Assessment & Resolution Service (CARS) and CARS Assessors link. Click the link to "Assessment at CARS". Scroll down the page until the heading "Assessment of Costs". Here you will find a little Excel icon next to the words "Damages and Costs Calculator (December 2012). When you hover over this it should turn green. Click the link to upload the calculator. Please note the calculator is revised when necessary. The scale does extend to costs incurred on a further assessment referred by the court under s.111 of the MACA, after the issue of a certificate under s.94 (cl.15(2).

The main features of the costs provisions relevant to the Claims Assessment and Resolution Service (CARS) are as follows:

Cl.7 - certain fees are unregulated, e.g. accident investigation reports, court fees, witnesses expenses

Cl.9 - fixes the maximum costs recoverable by legal practitioners listed at Schedule 1

Cl.10 - excludes matters exempted from the maximum costs set out in Schedule 1, (but Schedule 2 applies)

Cl.11 - the maximum costs recoverable do not apply to practitioner/client costs

Cl.12 - maximum fees recoverable by medical practitioners for medical reports and appearance as witnesses

Cl.14 - limits the costs of expert witnesses recoverable by medical practitioners for medical reports and appearance as witnesses

Cl.15 - contains the power for a CARS Assessor to assess costs

Cl.16 - GST may be added

Sch.1 - the maximum costs for legal services to be determined by reference to certain stages, depending on whether the practitioner was retained before the assessment was conducted (Table A), or after the assessment was finalised (Table B), and provides for country and interstate loadings

Sch.2 - the maximum fees for medico-legal services.

9.4 Effects of the regulation

The MACR has the following effects:

a) For accidents which occurred on or after 5 October 1999:

- it applies a scale, which limits recoverable costs and disbursements
- it allows a grace period from 5 October 1999 to 17 December 1999, where costs were not affected by the scale, if they were already paid or billed (cl.8 of the MACR).

b) Rolls up expenses usually separately claimed

The scale regulates the maximum amounts for both practitioner costs and barrister fees. It also affects medico-legal and expert fees (see below).

The MACR expressly provides that the meaning of 'costs' is in accordance with the *Legal Profession Act*. This means 'costs' is an inclusive term to include practitioner costs and barrister fees (cl.8(2) of the MACR).

This is very important as it means that the lump sum amounts allowed for the costs of practitioners and barristers include expenses that are usually separately charged such as copying, faxes, phone and travel.

c) Allows practitioner's costs based on banding

Practitioner's costs based on banding lump sums are allowed, depending on the stage of the matter reached and the verdict (regardless of variables such as hearing time or other expenses such as copying, faxes, etc).

If the claimant changes practitioners, the lump sum amount is apportioned between them (cl.9(2) of the MACR).

d) (i) Restricts advocate's costs at CARS

A conference directly related to a CARS assessment of the claim or a court hearing is allowed at a maximum amount of $170 per hour (or part of an hour).

The cost of representation at a CARS assessment conference under s.104 of the MACA is a flat fee of $530 plus up to $170 per hour in excess of two hours.

There are country loadings allowed in accordance with Schedule 1.

There is no allowance for drafting of documents or preparation time.

(ii) Restricts advocate's costs in Court

The cost of representation in court is $2,110 per day for an advocate, other than senior counsel, and $2,950 per day for senior counsel.

An amount for the fees for senior counsel, or for more than one advocate, are not to be included unless the court so orders.

e) Fixes medico-legal fees

The scale fixes maximum amounts for medico-legal services (for reports and attending as witnesses). Section 150 of the MACA also provides that a medical practitioner is not entitled to be paid or to recover more than any maximum fee fixed under this section.

This part of the scale (Schedule 2) applies even if the matter is otherwise exempt from the scale under s.92 of the MACA, as cl.10(1) of the Regulation only refers to Schedule 1 and not to both Schedules 1 and 2.

f) Sets lump sum costs associated with medical disputes and special assessments

Costs associated with MAS disputes are allowed at up to $670 for each medical dispute under Part 3.4 of the MACA, but not exceeding $1,600 for any one claim, regardless of the number or kind of disputes.

Costs associated with a dispute (special assessment) referred to in s.96 of the MACA, as allowed by the claims assessor, are up to $800 for any one claim, regardless of the number or kind of disputes.

g) Limits expert witnesses fees

The MACR limits costs of expert witnesses, both by limiting their number and the amounts paid to them. The costs of only one medical expert in each specialty will be allowed, unless there is a 'substantial issue' as to a matter referred to in s.58 (1)(d) of the MACA. In that case, two experts will be allowed (cl.14).

The claims assessor, or court, retains discretion to allow a greater number of expert witnesses. The costs of only two experts of any other kind will be allowed. This part of the scale (schedule 2) appears to apply even if the matter is otherwise generally exempt from the scale under s.92 of the MACA (cl.10(1) of the Regulation).

h) Identifies unregulated costs

Costs not regulated in accordance with cl.7 of the MACR (cl.15 excepted, which relates to assessment of costs by claims assessor) are:

- fees for accident investigators' reports or accident reconstruction reports
- fees for accountants' reports
- fees for reports from health professionals
- fees for other professional reports relating to treatment or rehabilitation (for example architects' reports concerning house modifications)
- fees for interpreter or translation services
- court fees
- travel costs and expenses of the claimant in the matter for attendance at medical examinations, the Claims Assessment and Resolution Service or a court
- witnesses' expenses at the Claims Assessment and Resolution Service or a court.

i) Establishes requirements for contracting out of the scale

While it is possible to contract out of the scale, requirements still need to be met as set out below: in particular, cl.11 of the Regulation, which provides that conditional agreements are only enforceable if they do not charge a success premium. Under the *Legal Profession Act 2004*, conditional agreements for matters involving claims for damages are prohibited in any event.

The maximum amounts apply to both practitioner and own client and party/party, unless the practitioner contracts out of the scale (cl.11 of the MACR). Accordingly, practitioners will be limited to the scale unless they properly contract out of it.

To contract out, the practitioner must give prior, separate, written advice that the claimant will be liable for the 'gap' between party/party recovery and practitioner own client costs (see Appendix).

The advice must be in a separate document to the costs agreement (cl.11(1)(c) of the MACR). To allow clients time to fully consider its contents, the letter should be forwarded some time before the costs agreement. Special care should be taken in giving the advice, because in borderline s.92 exempt matters, it is likely that the 'gap' will be substantial and could significantly affect the client's 'in hand' result.

The MACR expressly provides that the practitioner must also disclose as required under the *Legal Profession Act 1987*, (ss. 180 and 181 excepted) and enter into a costs agreement (cl.11(1)(a)). Practitioners are advised to disclose costs as required under Part 3.2 of the *Legal Profession Act 2004*.

A similar provision to s.180 is not available under the *Legal Profession Act 2004*. Exceptions to disclosure are contained in s.312. The effect of the MACR means that there are now no exemptions to the need to give disclosure in motor accident matters.

Practitioners are reminded that disclosure under the *Legal Profession Act 2004* also requires that an estimate be given and be updated.

The practitioner must enter into a costs agreement within the meaning of the *Legal Profession Act 2004*. This means the agreement must be in writing.

In contracting out, the practitioner cannot enter into a conditional costs agreement which charges a success premium. The scale will apply if the costs agreement provides for the payment of a premium on the successful outcome of the matter, (cl.11(1)(b)).

See the Appendix for a model costs agreement complying with cl.11 of the Regulation.

j) Sets out exemptions

The scale in relation to practitioner costs and barrister fees does not apply to any matter exempted under s.92 of the MACA. However, the scale continues to apply to regulated maximum fees for medical reports.

A claim is exempt from assessment if it is exempt under the MACA Claims Assessment Guidelines or the MACR. Section 92(1)(a) exemptions are mandatory exemptions. Similarly, a claims assessor can determine that the matter is not suitable for assessment pursuant to s.92(1)(b) (with the approval of the Principal Claims Assessor). Section 92(1)(b) exemptions are discretionary.

Section 92 must be read in conjunction with the MACA Claims Assessment Guidelines.

For the purpose of s.92(1)(a), the Principal Claims Assessor (PCA) shall issue a certificate of exemption if the PCA is satisfied that, at the time of the consideration of the application, the claim involves one or more of the following circumstances:

- the insurer denies fault of its owner or driver of a motor vehicle in the s.81 notice
- the insurer makes an allegation in its s.81 notice that the claimant was at fault or partly at fault, and claims a reduction of damages of more than 25%
- the claimant is a 'person under legal incapacity'
- the insurer alleges that the claim is fraudulent e.g. it is alleged that the accident may have been staged, or where a person claiming to have been a passenger in the vehicle is alleged to have been the driver of the vehicle.

(See MACA Claims Assessment Guidelines 1 October 2008 in relation to s.92(1)(a) at 8.11)

Matters to be considered when applying for a discretionary exemption under s.92(1)(b) include, but are not limited to the following:

- complex legal issues
- complex factual issues
- complex issues of quantum (including but not limited to major or catastrophic spinal or brain injury claims)
- entitlement to non-economic loss and the claim involves other issues of complexity
- complex issues of causation
- whether injuries are likely to stabilise within three years of the accident
- whether there are issues of indemnity or insurance
- whether a material witness resides out of the jurisdiction
- whether the matter involves non CTP parties
- whether the insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident giving rise to the claim.

NOTES:

1. If an insurer makes an allegation of 'fraud' in terms of the circumstances of the accident, the matter will be exempt under s.92(1)(a) and cl.8.11.6.
2. If an insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident, the insurer may be required to provide particulars in writing of the general nature of any such allegation under cl.17.13, and an Assessor may then consider whether a matter is not suitable for assessment under cls.14.11 to 14.16, particularly in light of cl.14.16.11.

   (See MACA Claims Assessment Guidelines 1 October 2008 in relation to s.92(1)(b) at 14.16.1 to 14.16.11).

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CHAPTER 10

COSTS IN FAMILY LAW MATTERS

Costs Guidebook 6th Edition (revised) - Chapter 10

Costs in Family Law Matters

10.1 Introduction

The Family Court is fundamentally different to almost all other courts and tribunals in Australia, because costs do not follow the event. Rather, section 117(1) of the *Family Law Act 1975 (Cth)* (FLA), sets out the general principle that each party to proceedings bears their own costs. This is intended to make access to the Family Court as easy as possible, and to forestall parties being put off by the possibility of having to bear another party's costs.

While the general rule is adhered to, the Court does have the power to award costs if the circumstances warrant such an order. Section 117(2A) of the FLA sets out the criteria which the Family Court should consider when deciding whether such an order should be made. As a general rule, an order that one party pay another party's costs will only be made where the conduct of one of the parties has led to an increase in costs for the other party, or an unreasonable prolongation of the proceedings, or where a party has been wholly unsuccessful or an offer of settlement was unreasonably refused.

The *Family Law Amendment Rules 2008* were proclaimed on 23 April 2008 and the relevant parts amending chapter 19 of the *Family Law Rules 2004* (FLR) came into effect on 1 July 2008.

The amendments to the FLR transferred all practitioner/client costs assessments from the Family Court to the different State systems. Chapter 19 of the FLR outlines the rules governing costs, for two circumstances: where the initial instructions were received OR a fresh application was made (for party/party costs) **before 1 July 2008** and then **after 1 July 2008**. Information is provided on the following:

10.2 Costs for matters where instructions were given or the application was made before 1 July 2008

The Family Court assesses and taxes solicitor/client costs disputes for those matters which do not fall into the new categories (see paragraph 10.3.1 below), and particularly where instructions were first taken on or before 30 June 2008.

10.2.1 How costs are calculated

Party/party costs

Unless the Court orders otherwise, these costs are calculated in accordance with Schedule 3 of the FLR. The Court can also order that a party is entitled to costs of a specific amount; that they be assessed on a practitioner and client basis or an indemnity basis; or be calculated in accordance with the method stated in the order.

Practitioner/client costs

These costs are calculated in accordance with any valid costs agreement between the lawyer and the client for the work, or if there is no costs agreement, in accordance with the scale of costs at Schedule 3 of the FLR.

Indemnity Costs

While neither ss.117(2) or 117(2A) of the FLA expressly state that the Court can order payment of costs on an indemnity basis, the Court is empowered to make 'such orders as to costs ... as the Court considers just'.

Schedule 6 Rule 6.20(1)(b) of the FLR provides that the Court may make an order that a party is entitled to costs assessed on a practitioner and client basis, or an indemnity basis. In either case, the costs set out in Schedule 3 to the Rules may not apply, and such costs are usually allowed in accordance with any costs agreement between the practitioner and client.

10.2.2 Form of an Itemised Costs Account

Bills of Costs in the Family Court are known as Itemised Costs Accounts. The form of an Itemised Costs Account is the same for practitioner/client and party/party costs.

An Itemised Costs Account is a court document and must specify each item of costs and disbursements claimed. The profit costs and disbursements are claimed together in chronological order, rather than disbursements appearing at the end of the bill. The summary to the account appears at the front of the Itemised Costs Account.

Schedule 6 Rule 6.23 sets out the requirements for an Itemised Costs Account. A lawyer must give a Costs Notice to a client when serving an account or an Itemised Costs Account (Schedule 6 Rule 6.03(2)).

10.2.3 Procedure for costs assessment

The procedure for assessing costs where the retainer pre-dates 1 July 2008 is basically the same, regardless of whether the costs to be assessed are party/party costs or practitioner/client costs.

10.2.4 Serving an Itemised Costs Account

An Itemised Costs Account is served, together with a Family Court Costs Notice, on the person liable to pay the costs **within 28 days** after:

- receiving a request for an Itemised Costs Account for practitioner/client costs
- the order requiring payment of costs was made, or the date when the entitlement to costs arose for party/party costs (Schedule 6 Rule 6.22).

Time is therefore of the essence when preparing a Family Court Itemised Costs Account.

For practitioner/client costs, the practitioner does not have to wait for a request for an Itemised Costs Account before serving one.

10.2.5 Disputing an Itemised Costs Account

If the paying party disputes the costs, they have 28 days from receipt of the Itemised Costs Account to serve a Form 15 Notice Disputing Itemised Costs Account (Schedule 6 Rule 6.24). If no Form 15 is received, and the costs are not paid, the person entitled to the costs can seek a costs assessment order (Schedule 6 Rule 6.38).

The parties disputing the costs must make a reasonable and genuine attempt to resolve the dispute. If this fails, then either party may file the Form 15 within 42 days after the Form 15 was served. The notice must be served on each person claiming the costs (Rule 7.04 FLR).

Under Rule 1.14 of the FLR, a party may apply to the Court for an extension of time to request an Itemised Costs Account, to dispute an Itemised Costs Account, or to request that the Court determine the dispute.

Once the notice is filed, the Court will usually appoint a time for a preliminary assessment. The date fixed must be at least 21 days after the filing of the Form 15 (Schedule 6 Rule 6.27).

10.2.6 Preliminary assessment of costs

At the preliminary assessment, the Registrar will, in the absence of the parties, calculate the likely cost of the costs assessment order. The parties are notified in writing of the preliminary assessment amount. If there is no objection to the amount assessed, the Registrar will make a costs assessment order for this amount (Schedule 6 Rule 6.32).

10.2.7 Disputing preliminary assessment amount and assessment hearing

If either party is unhappy with the preliminary assessment amount, they can object in writing, to the Registrar and to the other party. They have 21 days after receiving written notice of the preliminary assessment amount to do so. An amount equalling 5% of the amount claimed must be paid to the Court as security for the cost of the assessment. On receiving the objection and the payment of security, the Registrar will fix a date for the assessment hearing (Schedule 6 Rule 6.31).

An assessment hearing is heard before the Registrar (Schedule 6 Rule 6.33). The Registrar must:

- determine the amount (if any) to be deducted from each item included in the Form 15
- determine the total amount payable for the costs of the assessment (if any)
- calculate the total amount payable for the costs allowed
- deduct the total amount (if any) of costs paid or credited, and
- calculate the total amount payable for costs.

At the end of the assessment hearing, the Registrar must:

- make a costs assessment order; and
- give a copy of the order to each party.

Note under Schedule 6 Rule 6.33:

> 'At an assessment hearing, the onus of proof is on the person entitled to costs. That person should bring to the hearing all documents supporting the items claimed.'

10.2.8 Review

A party may seek a review of a costs assessment order by filing, within 14 days of the costs assessment order, a Form 2 Application in a Case. The form must be supported by an Affidavit stating the item number of the Itemised Costs Account which the party objects to, the reason for the objection and the decision sought from the Court (Schedule 6 Rules 6.53 and 6.54).

10.2.9 Assessment principles in family law matters

Principles applicable to both practitioner/client and party/party costs

Schedule 6 Rule 6.35 of the FLR sets out the assessment principles that the Registrar must apply when assessing costs, whether they are party/party or practitioner/client costs. The Registrar must not allow costs that:

- are not reasonably necessary for the attainment of justice; or
- are not proportionate to the issues in the case.

Principles applicable only to practitioner/client costs

In practitioner/client assessments, if there is a costs agreement then the Itemised Costs Account must be assessed in accordance with it (Schedule 6 Rule 6.35(2)). If there is no enforceable costs agreement, or the costs agreement has been set aside, costs will be assessed in accordance with the scale of costs contained in Schedule 3 of the FLR.

The FLR has some specific provisions regarding costs that must not be charged (Schedule 6 Rule 6.13). A practitioner must not charge:

- an amount for costs improperly, unreasonably or negligently incurred by the practitioner; or
- for work done for the administration of the practitioner's office.

A costs agreement cannot avoid the operation of Rule 6.13(1)(a). Nevertheless, if the client instructs the practitioner in writing, to do work for a case, or incur an expense of a particular kind or amount, and the practitioner advises the client that the work or expenses would be unreasonable and unlikely to be recovered on a party and party basis; and the practitioner does the work, or incurs the expense, at the client's instruction, the practitioner may charge an amount for the costs incurred (Schedule 6 Rule 6.13(3)).

This rule introduces the common law concept of the Re Blyth warning: Re Blyth and Fanshawe; Ex Parte Wells (1882) 10 QBD 207. At common law, unusual costs will not be allowed between a practitioner and client, unless the practitioner shows that:

- the costs were reasonably incurred; or
- before the costs were incurred the solicitor expressly warned the client that the costs are unusual and will not be allowed on a party/party basis; and
- the client approved the specific costs.

Principles applicable only to party/party

In party/party assessments, unless the Court otherwise orders, costs are calculated in accordance with Schedule 3 of the FLR (Schedule 6 Rule 6.20).

In accordance with Schedule 6 Rule 6.35(4), when assessing costs between party and party, a Registrar must not allow:

- costs incurred because of improper, unnecessary or unreasonable conduct by a party or a party's practitioner
- costs for work (in type or amount) that was not reasonably required to be done for the case; or
- unusual expenses.

In accordance with Schedule 6 Rule 6.35(3), if the Court has ordered costs on an indemnity basis, the Registrar must allow all costs reasonably incurred, and of a reasonable amount, after considering among other things:

- the scale of costs in Schedule 3
- any costs agreement between the party to whom costs are payable and the party's practitioner; and
- charges ordinarily payable by a client to a practitioner for the work.

Costs of costs assessment

Registrars have the power at an assessment hearing to make an order for costs (Schedule 6 Rule 6.34).

The party objecting to a preliminary assessment may be ordered to pay the other party's costs of the assessment from the date of their objection, unless the Itemised Costs Account is assessed with a variation in the objecting party's favour of at least 20% of the preliminary assessment amount. This Rule applies to both party/party and practitioner/client assessments (Schedule 6 Rule 6.31(3)).

10.3 Costs in matters where instructions were given or a fresh application was made after 1 July 2008

10.3.1 Costs between practitioner and client

Law practices are required to disclose costs issues to their clients in accordance with the relevant state legislation. In New South Wales, this will require mandatory disclosure under s.309 of the Legal Profession Act 2004) and a costs agreement which complies with this Act (see Chapter 3.) A precedent for costs disclosure and costs agreement can be found in the Appendices.

Practitioners are also required to inform the client of the costs incurred to date, and anticipated costs to complete the case, should a settlement offer be made by the other side (Rule 19.03).

A dispute between a practitioner and a client, about costs charged by the practitioner in a family law matter, will be dealt with in accordance with the State or Territory legislation governing the legal profession in the state or territory where the practitioner practises. The following circumstances apply:

- For a fresh application commenced after 30 June 2008.
- Under a new agreement between the practitioner and client entered into after 30 June 2008.
- Under a retainer entered into by a new practitioner after 30 June 2008.

10.3.2 Schedule 6 of the FLR

As outlined above, the former provisions of Chapter 19 are now contained in a new Schedule 6 to the FLR, entitled Costs - Rules before 1 July 2008, which regulates:

- party/party costs not covered by the new Chapter 19
- charges of practitioners in family law cases that commenced before 1 July 2008, except for those matters referred to above, and any part of a case in which a Family Court is exercising its bankruptcy jurisdiction.

Provisions for dealing with matters falling under the new arrangements are contained in the reworked Chapter 19 of the FLR.

10.3.3 Schedule 3 - Scale of costs no longer applies to practitioner/client costs

Rule 19.18 of the former Rules have been amended so that the scales of costs set out in Schedule 3 only apply if:

- the court orders that costs are to be paid and does not fix the amount
- if a person is entitled to costs under these Rules.

If a practitioner does not disclose as required in a matter in New South Wales, costs will be assessed in accordance with the provisions of section 319(1)(c) of the Legal Profession Act 2004, according to the fair and reasonable value of the legal services provided.

10.3.4 Chapter 19 of the Family Law Rules - party/party costs

Disputes between party and party about costs continue to be dealt with by the Family Court Taxing Registrars, in accordance with Chapter 19 Party/Party Costs.

The procedure for quantification and assessment of party/party costs, ordered by the Family Court is set out in Chapter 19 to the Rules, and is the same as that set out above in section 10.2.3 - Procedure for Costs Assessment.

10.4 Costs in Federal Circuit Court (formerly the Federal Magistrates Court) - family law proceedings

The Federal Circuit Court was established with the aim of handling less complex matters in family law and general federal law. It shares jurisdiction with the Family Court and the Federal Court.

The Federal Circuit Court can hear most family law matters, with the exception of applications for adoption, nullity or validity of marriage.

The Family Law Rules do not apply to family law matters in the Federal Circuit Court, unless a judge makes a costs order which specifically adopts the Rules (although s.117 of the FLA does apply to proceedings in the Federal Circuit Court).

Unless the Court orders otherwise, party/party costs are determined according to the event-based scale in Schedule 1 of the Federal Circuit Court Rules.

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OF NEW SOUTH WALES

CHAPTER 11

SECURITY FOR COSTS, OFFERS OF COMPROMISE, COSTS ON DISCONTINUANCE

Costs Guidebook 6th Edition (revised) - Chapter 11

Security for Costs, Offers of Compromise, Costs on Discontinuance

Security for Costs

Offers of Compromise

Discontinuance

Security for Costs

11.1 Introduction

Courts are given a wide discretion to order security for costs, after considering all the circumstances of a particular case. In *King v Commercial Bank of Aust [1920] HCA 62* at 292, Rich J. said, with respect to s.35 of the High Court Procedure Act:

> 'No rules can be formulated in advance by any Judge as to how the discretion shall be exercised. It depends entirely on the circumstances of each particular case.'

If the plaintiff fails to provide security, the proceedings will be stayed (Uniform Civil Procedure Rules (UCPR r.42.21(3)) or stayed or dismissed (Federal Court Rules (FCR) o.28 r.5)).

This chapter provides guidance on the following:

11.2 Principles for determining when security will be ordered

Under the UCPR r. 42.21 the court may, but need not, order security for costs if:

- the plaintiff is ordinarily resident outside New South Wales. However, s.117 of the Constitution precludes an order for security for costs being made against a plaintiff who is ordinarily resident in another state of Australia
- the address of a plaintiff is not stated or is misstated in their originating process, and there is reason to believe that the failure to state an address, or the misstatement of the address, was made with the intention to deceive
- the plaintiff has changed addresses, and there is reason to believe that the change was made with a view to avoiding the consequences of the proceedings
- the plaintiff is a corporation and there is reason to believe that it will be unable to pay the costs of the defendant if ordered to do so *KP Cable Investments Pty Ltd v Meltglow Pty Ltd [1995] FCA 1093*
- the plaintiff is suing for the benefit of someone else and there is reason to believe that they will be unable to pay the costs of the defendant if ordered to do so.

Under the FCR o.28 r.3 the court may order security in any case but, in deciding whether to do so, the court may consider the following matters:

- that the applicant is ordinarily resident outside Australia
- that the address of the applicant is not stated or is misstated in his or her originating process, unless the failure was made without intention to deceive
- that the applicant has changed addresses in an attempt to avoid the consequences of the proceedings
- that the applicant is suing for the benefit of someone else, and there is reason to believe that they will be unable to pay the costs of the respondent if ordered to do so.

In *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*, Beazley J. (as Her Honour then was) set out what she described as well established guidelines which the Court typically takes into account in determining any such application. They are:

- that such applications should be brought promptly
- that the strength and bona fides of the applicant's case should be considered
- whether the applicant's impecuniosity was caused by the respondent's conduct, which is the subject of the claim
- whether the respondent's application for security is oppressive, in the sense that it is being used merely to deny an impecunious applicant a right to litigate. (See also *Singer v Berghouse* [1993] HCA 35; *Cowell v Taylor* (1885) 31 Ch D34, 38; *Chen v Keddie* [2009] NSWSC 762; *Fiduciary Limited v Morningstar Research Pty Ltd* [2004] NSWSC 664.)
- in the case of a company, whether there are any persons standing behind the company who are likely to benefit from the litigation, and who are willing to provide the necessary security. If so, whether that person has offered any personal undertaking to be liable for the costs, and if so, the form of any such undertaking

- that security will only ordinarily be ordered against a party who is in substance the plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate.

See *Equity Access Limited v Westpac Banking Corporation (1989) ATPR 40-972*.

A plaintiff resident outside the jurisdiction, with no assets within the jurisdiction, is likely to face great difficulty in avoiding an order for security for costs: *PS Chellaram & Co Limited v China Ocean Shipping Co [1991] HCA 36*.

11.3 Amount and application of security

The court does not set out to indemnify a defendant against its costs. It is up to the defendant to provide evidence to the court as to the costs and disbursements to be incurred in preparing the action for hearing, so that the court can determine a reasonable amount to fix for security.

Where the plaintiff is resident overseas, the defendant may only be able to obtain (by way of security) the costs of enforcing any judgment in the place where the plaintiff resides.

Security is to be given on the terms directed by the court (UCPR r.42.21(2); FCR o.28 r.4).

11.4 Appeals

An order for security for the costs of proceedings in the Court of Appeal may be made in special circumstances, as follows:

- where an appeal involves an apparent abuse of process
- where the appeal is manifestly groundless
- where there is a risk the appeal will involve unnecessary costs
- where there has been great delay in prosecuting the appeal
- where the appellant is a foreigner with few resources in Australia or elsewhere, whose general impecuniosity is of his own making, but who has been able to fund legal services to conduct litigation.

UCPR r51.50; *Mazzei v Industrial Relations Commission of New South Wales [2000] NSWCA 104*

Offers of Compromise

11.5 Offers of Compromise in New South Wales and Federal jurisdictions

New South Wales amended the rules (effective 7 June 2013) relating to Offers of Compromise under the Uniform Civil Procedure Rules (Amendment No 59) (NSW) 2013. The amendments provide that an offer of compromise now must not include an amount for costs and is not to be expressed to be inclusive of costs - see UCPR 20.26. The Rules enshrine the effect of remaining silent as to costs.

An offer may propose (UCPR 20.26(3)):

- a judgment in favour of the defendant with no order as to costs or an order that the defendant will pay the plaintiff a specified sum in respect of the plaintiff's costs;

- that the costs as agreed or assessed up to the time the offer was made will be paid by the offeror;

- that the costs as agreed or assessed on the ordinary basis or on the indemnity basis will be met out of a specified estate, notional estate or fund.

Therefore, from 7 June 2013, offers of compromise can use words to the effect of "plus costs as agreed or assessed".

Offers of compromise made prior to 7 June 2013 are subject to the rules current prior to that date. The Court of Appeal in *Whitney v Dream Developments Pty Limited* [2013] NSWCA 188 confirmed that *Old v McInnes* [2011] NSWCA 410 was correctly decided. The rules prior to 7 June 2013 were that offers of compromise which were expressed to be 'plus costs agreed or assessed' are not valid under those rules, and cannot be treated as a Calderbank offer.

Offers of compromise in other jurisdictions are governed pursuant to the following rules:

- Federal Court of Australia - Part 25 of the Federal Court Rules 2011
- Family Court of Australia - Part 10.1 of the Family Court Rules 2004.

Discontinuance

11.6 Introduction

What costs, if any, apply from discontinuance?

11.7 When and how a party may discontinue

Under the UCPR 12.1, a party may only discontinue with the consent of all of the parties involved or with the leave of the court. The notice of discontinuance must bear a certificate to the effect that the discontinuing party does not represent any other person. Unless it is filed with the leave of the court, it must be accompanied by a notice (which is normally endorsed on the notice of discontinuance), which record's each party's consent to the discontinuance. If the discontinuance is on terms, for example, as to costs, those terms must be incorporated in the notice. If the originating process has not been served, the plaintiff must also file an affidavit to that effect.

Similar principles apply under the Federal Court Rules (FCR), except that a party has a right to file a notice of discontinuance up until the first directions hearing or, if the case proceeds on pleadings, up until the time pleadings are closed. If the discontinuing party represents another party, the discontinuing party may only discontinue with the leave of the court. Similarly, a winding up application may only be discontinued with the leave of the court.

11.8 Who pays the costs for discontinuance

Normally a party who discontinues must pay the other party's costs, unless the parties agree otherwise, or the discontinuance is with the leave of the court, or the court makes some other order in relation to costs (UCPR r. 42.19; FCR cl.26.12 (7); Inground Constructions Pty Ltd v FCT (1994) ATR 513).

The Court may make a different costs order where:

- the discontinuance is a consequence of having achieved practical success in relation to the claim
- the costs have been significantly increased by the unreasonable conduct of the opposing party
- both parties have acted reasonably but the proceedings have been rendered futile by circumstances beyond their control.

Another exception exists, in the case of an appeal to the District Court under section 91 of the Children and Young Persons (Care and Protection) Act 1998 (NSW). In this case, the plaintiff is not liable to pay the costs of discontinuance, unless there are special circumstances justifying such an order (UCPR r.42.19(3)).

11.9 Exercise of the court's discretion

A number of cases have considered the issue of costs, where the leave of the Court is sought to discontinue, and the proceedings have been resolved without a hearing on the merits. The starting point is often taken to be the judgment of McHugh J. in Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia: Ex Parte Lai Qin [1997] HCA 6. In this case, His Honour pointed out:

> 'The power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule (whether under the general law or by statute) the successful party is entitled to his or her costs ... When there has been no hearing on the merits, however, a Court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.'

His Honour continued:

> 'The Court cannot [(assess costs where there has been no hearing on the merits by trying] a hypothetical action.'

His Honour continued:

> 'In some cases … the Court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.'

His Honour continued:

> 'In some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried.'

By way of caution, His Honour noted that such cases were likely to be rare.

His Honour also stated that if the parties had both acted reasonably in commencing and defending the proceedings, and in conducting them until resolution, the proper exercise of the costs discretion would usually mean that the court would make no order as to the costs of the proceedings.

In Chapman v Luminis Pty Ltd [2003] FCAFC 162, the Full Court of the Federal Court of Australia, repeating the proposition that there should not be something in the nature of a hypothetical trial, noted that sometimes the Court could make an order for costs without engaging in that exercise. The Court instanced two ways in which that could happen: one way involved an examination of the reasonableness of the conduct of the parties, and the other involved the Court's being confident that one party was almost certain to have succeeded if a matter had been fully tried (see also the Owner's Strata Plan 63094 v Council of the City of Sydney [2009] NSWSC 141; Owners Strata Plan 62327 v Vero [2009] NSWSC 908; Newcastle Wallsend Coal Pty Ltd v Industrial Relations Commissions (NSW) [2006] NSWCA 129 (in this last case, both parties had acted reasonably, but the proceedings had been rendered futile by circumstances beyond their control) and Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2009] NSWCA 32).

Subject to the terms of any consent to discontinuance, or any leave to discontinue, in accordance with the relevant rules, a discontinuance of proceedings associated with a plaintiff's claim for relief does not prevent the plaintiff from claiming the same relief in fresh proceedings.

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