

Civil Litigation Committee

Chief Justice's Review of the Costs Assessment Scheme (NSW)

31 October 2011

Chair, Submissions Sub-Committee, NSW Young Lawyers Civil Litigation Committee and Editor-In-Chief: Brenda Tronson

Editor: Christina Kafalias

Authors: Daniel Abrahams, Raymon Anderson, Juliet Eckford, Peter Fagan, Amanda Farmer, Justin Hogan-Doran, Hilary Kincaid, Aaron Sivasothy, Sonya Willis

The Committee

Membership of NSW Young Lawyers is open to young lawyers, either under the age of 36 or in their first five years of practice, and to law students. This submission is made on behalf of the Civil Litigation Committee (**the Committee**).

The Committee consists of members of NSW Young Lawyers who practice or have an interest in civil litigation.

Inquiries may be directed to the President of NSW Young Lawyers, Daniel Petrushnko, on 02 9229 7333 (341) or to the Chair of the Civil Litigation Committee, Elias Yamine, on 02 8281 7961.

Issues addressed in this submission

The Committee has had the opportunity to read and consider the Terms of Reference for the Chief Justice's Review of the Costs Assessment Scheme dated 7 September 2011 (**the Terms of Reference**).

The Committee has responded generally to the Terms of Reference under the following headings:

1. Improving efficiency;
2. Assessments between legal practices;
3. Enforceability of costs assessment outcomes;
4. Achieving consistency;
5. The procedural fairness of the process;
6. The substantive justice of the process;
7. Availability of information;
8. Costs of the process; and
9. Alternative dispute resolution.

Improving efficiency

The Committee is of the view that there is scope for greater efficiency in the process of costs assessment. In order to achieve a faster, simpler and more efficient process, the Committee suggests:

- restricting the time and opportunities allowed to parties for the making of objections and submissions, particularly in relation to 'small value' costs assessments; and
- the setting of general time standards for the completion of the assessment process.

Time and opportunities allowed for objections and submissions

Clause 122 of the *Legal Profession Regulation 2005* (NSW) (**the Regulation**) provides for a period of 21 days from the date of making the application for the respondent to the application to respond with any objections. The applicant then retains a further right of reply (in the case of a practitioner application). Any relevant response or reply is then sent to the appointed costs assessor, together with the material filed with the application. The costs assessor retains a broad discretion to enquire into the matter further, seeking further particulars and submissions.

The Committee is aware that practitioners have experienced significant delays in the process as a result of respondents to practitioner applications seeking to make further objections in addition to those initially made in accordance with clause 122 of the Regulation.

It is the Committee's submission that, once the application is referred to a costs assessor, the parties should not then have the opportunity to raise any further objections or respond to objections already raised, save for what may be addressed in submissions or in direct response to a request for particulars made by the assessor.

It is the view of the Committee that restricting the parties to one opportunity to object and respond is sufficient and also accords with usual civil procedure. Providing the parties with unlimited opportunities to raise objections extends the costs assessment process indefinitely and can prevent the efficient resolution of the matter.

In addition, it is the Committee's submission that a distinction should be drawn between 'small value' costs assessments and 'large value' costs assessments. Small value costs assessments should be determined entirely on the material filed with the application, subject to the respondent having one opportunity to file submissions in response. Such a process is similar to that currently in place for the resolution of certain disputes within strata schemes. It has proven to be both consumer-friendly and efficient.

A determination would need to be made as to what comprises a 'small value' costs assessment. The Committee is of the view that disputed costs of up to \$10,000 would reasonably fall within this definition.

Time standards

At present, costs assessors are not directed to complete assessments within any time frame. Much depends upon the nature of the application – in particular, the quantum of costs in dispute and the extent of the bills requiring assessment.

It is the Committee's submission that a set of time standards should be established and implemented, as a guide to both parties and costs assessors. An approach reflective of that adopted by civil procedure would be appropriate. For example, the Local Court aims to finalise 90% of civil matters within 9 months of commencement of proceedings, and 100% of matters within 12 months. A similar philosophy could be incorporated into the Regulation in relation to costs assessment. For example, applications involving sums of less than \$10,000 should be finalised within 3 months; applications involving sums of more than \$10,000 should be finalised within 6 months.

Costs assessors should be required to explain to the Manager, Costs Assessment why applications are not or cannot be finalised within the periods set out by the time standards. Where failure to comply is a direct result of the parties' conduct, the parties themselves should be called to account.

It is the Committee's submission that the setting of time standards will speed up the process of costs assessment, with an efficient system being particularly important to smaller legal practices and sole practitioners who bear the financial burden of the outstanding account whilst awaiting an assessor's determination.

Assessments between legal practices

Apparent anomaly between sections 351 and 352

Where a legal practice (party A) retains another legal practice (party B), party A may request an assessment of party B's bill pursuant to section 351 of the *Legal Profession Act 2004* (NSW) (**the Act**). Section 351(3) provides that this must be done within 60 days of receipt of the bill. This time limit is to be compared to the 12-month time limit in relation to an application by a client (section 350(4) of the Act), with a real possibility for an extension of time in certain circumstances. Accordingly, the Act draws a clear distinction between the rights of legal practitioners as consumers of legal services, and those of the general public.

The plain policy of section 351(3) of the Act is that party A, as a legal practice, is well able to, and is expected to, raise any objections pursuant to section 363 of the Act and, if necessary, seek assessment, within a reasonable period of time. If it fails to do so, it loses the protections afforded by the costs assessment process.

However, the apparent sanction imposed by section 351(3) is often rendered largely otiose in practice.

If party B's bill remains unpaid after 60 days then, subject to the terms of the costs agreement between parties A and B, party B has the right either to sue for payment of the outstanding fees or seek an assessment pursuant to section 352 of the Act. However, if party B chooses to seek assessment, party A can *then* raise any and all relevant objections which party A could have raised had it sought assessment pursuant to section 351 of the Act, even if party B requests assessment more than 60 days after serving the bill, and even though party A could no longer raise those objections otherwise.

Thus the outcome for party B is either to avail itself of expensive litigation, or use an assessment process in which the '60 day' rule in section 351(3) is entirely otiose. In short, the absence of an extension of the sanction in section 351(3) to the circumstance where party A fails to request an assessment and party B chooses, perhaps to A's benefit, to utilise the costs assessment process, renders entirely nugatory the apparent sanction in section 351(3).

It would be no answer to say that court proceedings do not afford to party A the right to make the same objections of the kind that can be made under section 363 of the Act. It would be open to party A to plead an implied term of reasonableness into any costs agreement so as to raise some or all of the criteria party A imposed by that section.

Party A, in effect, is able to cause an assessment (whether under the Act or by public litigation) of party B's bill, irrespective of the apparent sanction imposed by section 351.

Particular situations where the anomaly might arise

Such a situation might arise in circumstances including:

- where a sole practitioner or firm of solicitors not having specialisation in a particular practice area engages a specialist accredited under the Specialist Accreditation Scheme;
- where a firm engages another firm to act as town agent; or
- where solicitors retain barristers.

The above circumstances most frequently involve a party who is a sole practitioner (solicitor or barrister), and may often involve the circumstance that the materials representing the work done have been returned and are no longer held by party B. By way of example, it is typical for barristers to return briefs and not to retain copies of those briefs or work done, save insofar as that work may be retained in electronic form or where key documents (for example, opinions) are retained.

Accordingly, where the party B requests an assessment, he, she or it is often no longer in possession of the material necessary to fully argue all of the matters that may be raised by party A. The passage of time from when work is done also disadvantages party B in

terms of recollection of events, conversations, instructions and other matters relevant to the criteria for assessment raised by section 363 of the Act.

The Committee's proposal

The Committee submits that clarification, by legislative change, regulation or other instrument, is warranted to ensure that the policy of section 351(3) of the Act is not defeated by the apparent anomaly in the legislation identified above.

In particular, the Committee recommends that, if party A does not request assessment within 60 days, and party B seeks to utilise the provisions of the Act rather than the expense, delay and embarrassment (to both parties) of litigation, party A should be prohibited (except in exceptional circumstances) from making objections or raising issues of the kind that party A could have raised had party A sought an assessment within that period. Alternatively, the criteria for assessment on an application by party B pursuant to section 352 of the Act should be narrowed.

The Committee submits that the sole criteria or grounds for objection that party A be permitted to raise in relation to an application made by party B pursuant to section 352 of the Act should be:

- as a preliminary matter, that the bill of costs was not in fact served more than 60 days before (which the costs assessor must determine at the outset and, if found to be the case, the bill is to be assessed as if party A had sought an assessment within the period stipulated by s 351(3));
- that the work was not in fact done;
- that the work was not done under the costs agreement (that is there was no contractual obligation to pay for that work, for example, because the work was outside of the scope of the retainer);
- that the work has been charged at a rate not agreed in the costs agreement; or
- that the work has already been paid for or is subject to an agreed set off or discount.

However, the Committee submits that the reasonableness of the work as provided for in section 363 of the Act should not be considered. Alternatively, for the purposes of section 363(2)(k), it might be expressly stipulated that:

- a relevant matter in any costs assessment is any failure by party A to have requested an assessment within the period prescribed by section 351(3); and/or
- it be presumed, absolutely (or, alternatively, by way of rebuttable presumption) that in the event of such failure, the work done by party B was reasonable.

The above recommendations are likely to require legislative change. A regulation might perhaps be made under section 356A of the Act, but it is arguable that section 356A applies to the administrative aspects of the processing of assessments under Part 3.2, Division 11, Subdivision 1, and not to the making of a costs assessment under Subdivision 2.

Enforceability of costs assessment outcomes

Current position

The Committee's view is that costs assessment certificates are readily lodged as a judgment in the appropriate court, but once they are lodged, they are then subject to the usual difficulties and costs that attend enforcement of judgments.

The statistics supplied with the discussion paper illustrate that the percentage of costs assessment filings seeking party/party costs has steadily decreased since 2006. Conversely, the proportion of filings seeking assessment of costs between client and practitioner has increased in the same period.

The Committee submits that it is more likely that a 'retail' client (for want of a better description), or a self-represented litigant in a party/party costs application, will face significant difficulties in enforcing a costs assessment certificate in their favour or responding to enforcement of a costs assessment in favour of a law practice in a way that protects their rights and is likely to lead to an equitable and commercial outcome for all concerned. Enforcement of judgments is not particularly legally complex, but can be procedurally intricate.

The Committee's proposal

The Committee suggests that greater use of mediation in costs disputes, particularly between practitioners and their clients, would be likely to result in more commercial outcomes and recovery of a higher proportion of costs outstanding. Mediation is discussed in greater detail below.

In addition, providing more comprehensive information (especially about mediation) on the Supreme Court website is likely to improve the accessibility of enforcement measures for clients.

Achieving consistency

It is the view of the Committee that the process of costs assessment lacks the consistency required to ensure certainty for both practitioners and clients. It is the Committee's submission that such consistency may be achieved through a process of uniform and continuing education and training for costs assessors, as well as the establishment of a set of guidelines for costs assessment, which are published and publicly available.

Uniform training

It is not clear to the Committee what selection criteria a legal practitioner is required to meet in order to become a costs assessor. The Committee is aware that costs assessors are drawn from various parts of the legal community and include solicitors, barristers and ex-judicial officers. Each assessor brings his or her own professional experience and understanding of the process, including his or her interpretation of the Act and Regulations.

In the Committee's view, the combination of the variation in assessors' legal experience and the very broad discretion provided by the Act and Regulations can and does result in inconsistency of approach from one assessor to the next. It is the Committee's submission that costs assessors (as well as those involved in the process generally) would benefit greatly from some uniform training – at the very least, as a prerequisite to the practitioner being appointed as a costs assessor. Further, it is the Committee's submission that ongoing training be provided to costs assessors, dealing in particular with any relevant changes to the Act and Regulations, as well as recent case law highlighting issues arising within the process.

The Committee submits that the suggested training is best co-ordinated by the Costs Assessors' Rules Committee, established under section 394 of the Act. The role of the Rules Committee is referred to further under the next heading.

Guidelines for costs assessment

Section 394 of the Act mandates the establishment of a Costs Assessors' Rules Committee, consisting of those costs assessors appointed to the Rules Committee by the Chief Justice of New South Wales.

The Rules Committee may make rules governing the practice and procedure of the assessment of costs, including matters relating to the appointment of costs assessors.

The rules made by the Rules Committee are required to be published.

The Committee is unaware of any rules published by the Rules Committee.

It is the Committee's submission that the drafting and publicising of rules and/or guidelines governing the practice and procedure of the assessment of costs would greatly assist in correcting identified inconsistencies in the process of costs assessment. Such rules should deal with the following matters (which list is not exhaustive):

- time standards;
- how disbursements are to be dealt with, including copying and travel expenses;
- how administrative work is to be dealt with;
- how GST and interest is to be dealt with;
- what the term 'fair and reasonable' means, giving scenario examples.

Practitioners could also use the guidelines as a 'ready reference' when billing clients. This would greatly assist in preventing costs disputes altogether.

The Committee understands that the Law Society of New South Wales is currently considering various options for such guidelines, and supports this action.

The procedural fairness of the process

Do participants feel that the outcomes are procedurally fair?

Costs assessment are not a curial proceeding and are decided entirely on the papers. Costs assessors are not officers of the Supreme Court. There is also no time limit in which a costs assessor must make their decision. A participant may contact the costs assessor or the Manager, Costs Assessment if they have a concern, but this places the onus upon the participants to manage the process rather than the assessor.

The Committee respectfully submits that the idiosyncratic nature of costs assessment supervision and review, and the fact that assessors make their decision entirely on the papers, does not meet an instinctive definition of procedural fairness.

The Committee's proposal

The tests for reasonableness provided by section 364(1) of the Act in relation to party/party costs, and section 363 of the Act in relation to costs between practitioner and client are realistic and appropriately flexible in their application.

The Committee's view is that a costs assessor's discretion should not be unnecessarily restricted, and the guidance given by section 364(2) of the Act should be retained.

However, the Committee submits that the following actions could improve participants' perceptions of the procedural fairness of the system:

- allowing a limited telephone conference (by consent) in some circumstances between the parties and the costs assessor to assist in clarifying issues in dispute;
- introducing some guidance, such as forms, that participants can use to narrow the issues in dispute;
- trialling a time limit within which an assessment must be given; and
- introducing a more transparent system for costs assessment supervision and review.

The substantive justice of the process

Do participants feel that the outcomes are substantively just?

Costs assessors generally provide clear and concise reasons in support of their costs determinations.

The relatively high cost of costs assessment – which must be paid in order to know the outcome of the process and to be able to benefit from a certificate – means that participants may gain little advantage in dollar terms by seeking an assessment of a bill of costs.

The Committee's proposal

Statistics from the Office of the Legal Services Commissioner show that costs-related complaints – including overcharging, costs disclosure and general costs complaints and queries – comprised 22.4% of written complaints and 28.9% of telephone enquiries received in 2009-2010. A high proportion of written complaints received each year since 2007-2008 have been costs-related¹. Communication (or lack thereof) also remains one of the primary causes for complaint by clients against practitioners.

The Committee submits that client participants seeking assessment of a bill of costs received from a practitioner should be more strongly encouraged to enter mediation. The communicative nature of mediation and the facilitative rather than determinative role of the mediator means that a client and practitioner are more likely to reach agreement on fair and reasonable costs for the work performed.

Mediation is discussed in greater detail below.

¹ 23.4% of all written complaints in 2008-2009, and 23.5% of all written complaints in 2007-2008. See OLSC annual report 2009-2010, available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/l_olsc.nsf/vwFiles/OLSC_2009_2010_AnnRep.pdf/\\$file/OLSC_2009_2010_AnnRep.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/l_olsc.nsf/vwFiles/OLSC_2009_2010_AnnRep.pdf/$file/OLSC_2009_2010_AnnRep.pdf).

Availability of information

Information available online

At the time of making this submission, the information available on the Supreme Court website may present difficulties to clients, particularly those with no legal background.

The website is comprehensive, but needs to be better structured. The appropriate forms are easy to find, but the procedural information would benefit from the use of subheadings and being broken down into smaller sub-categories rather than a long page of fairly legalistic information. Plain English would benefit lawyers as well as clients with no legal background or experience. Timelines and procedures could be readily summarised in a graphical way.

The frequently asked questions section of the website provides much legalistic detail. An inexperienced client, or a litigant in person, is likely to have some difficulty understanding the effect of the multiple legislative provisions to which the page refers on their entitlements and obligations.

Specific information about applications

As noted above, the forms which must be used in the costs assessment regime are easy to find on the Supreme Court website. However, for an inexperienced client, more guidance in relation to completing those forms may assist the client navigate the process.

In relation to specific questions contained in the forms, question 2(b), which requires the grounds for setting aside of costs, may be difficult for an inexperienced client to answer. In particular, the Committee submits that an inexperienced client may find it difficult to apply the terms of section 328 of the Act to his or her response.

Question 4, relating to objections to the bill of costs, could be simplified. An inexperienced client might not be able to articulate his or her objections to the bill of costs in terms that are clear to the costs assessor and to the law practice that issued the bill.

Question 5 relates to providing additional information relevant to the assessment of costs, and makes reference to section 363 of the Act. An inexperienced client may find it difficult, in the absence of other guidance, to apply section 363 to his or her provision of reasons.

The client's response to question 5 is important, and a clear response will facilitate the just resolution of the assessment. The Committee submits that many clients without a legal background would find the question difficult to answer with the necessary clarity and completeness, and would therefore be at a disadvantage. Providing structure and clarity in the way the form is structured would be beneficial, not only to the client, but to all involved in the costs assessment process.

In respect of each of these questions, the Committee suggests that a list of reasons could be included on the form, together with a free text field. This would make the question easier to answer, as the client can simply select the most appropriate reason from the options provided. The Committee suggests that the structure of the complaint form published by the Office of the Legal Services Commissioner may provide a useful example for the Court to follow if it revises the form.

The Committee's proposal

The Committee submits that the costs assessment section of the Supreme Court website would be improved by:

- including simple, graphical information, such as a flowchart explaining timelines and responsibilities (where known);
- providing more prominent information regarding the availability of mediation;
- providing clearer information regarding lodgement of a certificate of costs as a judgment in the Supreme Court – and ideally in other courts;

- including contact information for referral services such as LawAccess;
- hyperlinking all references to legislation, directly to the section or regulation on Austlii. Finding the relevant sections is likely to be a challenge for those without legal training, and in any case is an extra step that is easily avoided by hyperlinks;
- making forms available as downloadable PDF files, consistently with *Uniform Civil Procedure Rules 2005* (NSW) forms;
- ideally, making forms available as fillable PDF files;
- removing or fixing the link to the 'Application by client for assessment of costs (Where client instructed the practitioner BEFORE 1 October 2005)' form;
- inserting a direct link to the costs assessment scheme forms under the 'Quick links' section on the top right hand corner of the screen; and
- linking to the Office of Legal Services Commissioner website, particularly the factsheet on costs disputes between lawyers and clients (which is available here: http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_factsheet9).

The costs of the process

Fairness of costs generally

Bills of cost usually consist of terminology beyond the grasp of a lay person and hence the requirement for specialist assistance. Whilst the costs of assessment may not be unduly burdensome, significant professional costs may arise, which might unfairly inhibit a lay person.

The Committee recognises that the cost of the costs assessment process may be a real impediment to certain clients. There is an obvious imbalance of power, in that a client realistically has to engage new lawyers to challenge the bill, at further expense because of a lack of legal acumen. Consequently there are substantial up-front initial costs payable to engage new lawyers or costs consultants. While these may be a small percentage of the costs of the actual litigation (at least in a larger-value matter), the prospect of incurring further expenditure may constitute a barrier for clients who have reasonable claims where the reduction in the bill is likely to be small.

Accordingly, in circumstances where a client is impecunious, the initial costs of assessment may constitute a total barrier to applying for costs assessment. However, the Committee notes that an application may be made to remit, postpone or waive the application fee and submits that this should be maintained.

Certificate of assessment not released until costs paid

The Committee has significant concerns about the practical effect of the restriction on the availability of the certificate of assessment until costs are paid (pursuant to sections 368(6) and 378(5) of the Act). The current practical effect of these sections is that a client who is successful in relation to the cost assessment (and where the practitioner is ordered to pay the costs of the assessment) may nevertheless be required, in practice, to pay the costs of the assessment and/or of any review in order to obtain the certificate, which the client needs in order to pursue any orders made by the costs assessor against the practitioner.

This is contrary to the well-recognised principle that costs should be borne by the unsuccessful party, and in some circumstances may constitute a grave injustice. The Committee submits that practitioners who are unsuccessful in practitioner/client cost assessments be required to pay for the certificate of determination promptly and, on default, be reprimanded or otherwise professionally accountable.

Alternative dispute resolution

Mediation

Matters proceeding to costs assessment ordinarily arise either from a court order that one party pay the legal costs of another party, or from a dispute between a client and practitioner as to fees.

In an effort to reduce time, cost and complexity of disputes as to costs, the Committee suggests that consideration be given to provision for mediation as an integral part of the costs assessment regime. Providing for mediation as part of the costs assessment process is consistent with the recognition by the legal profession that alternative dispute resolution can assist parties resolve matters other than at a final hearing. It would seem to be of particular utility in the costs assessment process, where in some cases, there may be substantial agreement between the parties. In such cases, mediation may greatly reduce the scope of the dispute (if any) that ultimately goes before a costs assessor.

Mediation in the costs assessment context should be voluntary, and the process ought not involve preparation and service of extensive statements, affidavits, submissions, authorities or a brief to the mediator. The cost of any mediation should be borne upfront and equally by the parties, unless otherwise agreed.

Neutral evaluation

Neutral evaluation is another form of alternative dispute resolution which, in the Committee's view, may be appropriate in the costs assessment process.

A neutral evaluation involves the parties jointly briefing an independent party to advise on a figure or range of prospects of success and reasonable settlement figures. It is common for the fee for such a brief to be capped, thus providing a pre-determined cost. Such an independent evaluation may persuade those who otherwise overvalue their own position and undervalue that of their opponents.

Neutral evaluation might accordingly provide a cost-effective and efficient method of assisting the parties to come to an agreement or to narrow the scope of any dispute.