4.1 UNIFORM LAW AND COSTS ASSESSMENTS
4.2 INTRODUCTION
4.3 THE SCHEME
4.4 ASSESSMENT BETWEEN LAW PRACTICES AND CLIENTS
4.5 PARTY/PARTY ASSESSMENTS
4.6 COSTS OF ASSESSMENTS
4.7 ENFORCEMENT OF CERTIFICATES OF DETERMINATION
4.8 REASONS FOR DETERMINATION
4.9 MISCELLANEOUS
4.10 REVIEWS
4.11 APPEALS

The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR”]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 (LPUL Schedule 4 clause 18). The Uniform Law applies for proceedings commenced on or after 1 July 2015 (LPULAR clause 59).

THIS CHAPTER WILL BE UPDATED WHEN THE UNIFORM LAW COSTS ASSESSMENT RULES ARE PUBLISHED
4.1 UNIFORM LAW AND COSTS ASSESSMENTS

The transitional provisions of the Uniform Law include the following:

Schedule 4 clause 18 of the LPUL states that the prior legislation relating to legal costs continues to apply to a matter if the client first instructed the law practice in the matter before 1 July 2015. Accordingly, the costs assessment scheme in effect under the LPA 2004 and the LPR continue to apply.

Clause 59 of the LPULAR provides that the LPA 2004 and the LPR apply to a matter if the proceedings to which the costs relate commenced before 1 July 2015.

For law practice/client costs and client/law practice costs (now Uniform Law costs), in applications for assessment where instructions were first received after 1 July 2015, the Uniform Law applies. For party/party costs (now Ordered costs), where proceedings commenced after 1 July 2015, the Uniform Law applies. The relevant procedures are found in clauses 31–58 of the LPULAR and sections 66–81 of the LPULAA.

New rules will apply to applications for assessment; however, these have not been determined. Accordingly, for the present time, the procedures set out below continue to apply, subject to changes including the following:

APPLICABLE TEST

The tests for the Uniform Law and LPA 2004 share similarities. However, one difference is that under the Uniform Law, ordered costs must be “proportionately and reasonably incurred”, whereas under the LPA 2004, consideration of proportionality resided in section 60 of the Civil Procedure Act 2005 (“CPA 2005”). However, by virtue of section 364(2)(f) of the LPA 2004, proportionality is a matter to which a costs assessor “may” (not “must”) have regard when considering what is a fair and reasonable amount of legal costs as that section refers to “the outcome of the matter”.

INTEREST

Uniform Law costs: a costs assessor “may” determine interest is payable on Uniform Law costs.

Ordered costs: interest is to be included in a determination of ordered costs in accordance with section 101 of the CPA 2005, provided the proceedings were commenced after 24 November 2015. Section 70 (1) (c) of the LPULAA states that a costs assessor “is to” issue a certificate that sets out the determination and includes any interest payable under section 101 of the CPA 2005.

REVIEWS

Uniform Law costs: an application for review must be lodged within 30 days after the relevant certificate of determination was sent to the parties. No prior notice is required where instructions were first received on or after 1 July 2015.

Ordered costs: an application for review must be lodged within 30 days after the relevant certificate of determination was sent to the parties. No prior notice is required where proceedings were commenced on or after 1 July 2015.

For reviews under LPA 2004 (as opposed to those under the LPULAA), notice of the application must have been given to the other party not less than seven (7) days before the application is filed.
4.2 INTRODUCTION
The costs assessment scheme is conducted in accordance with the LPA 2004 and the LPR.

The process for assessment is found in Division 11 of the LPA 2004 and Division 5 of the LPR.

The forms for the assessment process can be found on the Supreme Court’s website under “Cost assessments”. (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 per cent of the amount in dispute or unpaid, whichever is the greater.

Further information is provided below.

4.3 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), or by clients and the extended definitions of clients against their practices (s. 350(1) and 350(2)), or by parties to proceedings in state courts or tribunals who have the benefit of costs orders in their favour (s. 353).

The prerequisites for the costs assessment process are set out in section 354 of the LPA 2004, clause 122 of the LPR for assessments between law practices and clients, and regulation 125 for assessments for inter partes costs.

In applications for assessment, other than for party/party applications, the filing fee is based on the amount in dispute, which can be determined by the amount that is the subject of the objection 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 (Master Malpass, unreported). In this case, Master Malpass identified the difference between the provisions (in the 1987 act) in relation to applications for a bill of costs (law practice/client), which required identification of the disputed costs and an assessment inter partes. In the latter assessment, an assessor must assess the total costs claimed to determine the fair and reasonable costs.

The costs assessor is not restricted to those items of work that are the subject of the objection. (See also O’Connor v Fitti (2000) NSWSC 540 (Master Malpass, unreported)).

Law practices cannot contract out of the assessment scheme, except in relation to “sophisticated clients” (ss. 322(5) and 395A). (See s. 32(1)(c) for the definition of a “sophisticated client” or refer to Chapter 3 Disclosure, Costs Agreements and Billing, 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 LPA 2004).

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 they are acting as costs assessors.

A costs assessor has wide powers to request further information and documents from the parties to an assessment, or from 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 that fails (without good reason) to comply with a notice issued by a costs assessor may be guilty of professional misconduct (s. 358(4)). In such a case, the costs assessor must refer the law practice to the Office of the Legal Services Commissioner (s. 393(2)).

Section 393 of LPA 2004 gives costs assessors or review panels the power to refer a matter to the Office of 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 that the costs assessor considers may amount to unsatisfactory professional conduct or professional misconduct (including failure by a practitioner to disclose (s. 317(7)).

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

Law practices should also be aware of section 369, 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 per cent. 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 apply for a review of costs assessor’s fees on assessments.

4.4 ASSESSMENT BETWEEN LAW PRACTICES AND CLIENTS

4.4.1 APPLICATIONS BY LAW PRACTICES SEEKING TO RECOVER UNPAID COSTS

A law practice that has not complied with the obligations to disclose costs (see Chapter 3 Disclosure, Costs Agreements and Billing) cannot recover their costs until they have been assessed. The assessment is at the law practice’s expense.

A law practice that has complied with the obligation to disclose may still choose to have unpaid costs assessed, rather than commence an action in 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 for an application for assessment and attaches the unpaid bill of costs.

Care must be taken to correctly identify the cost respondent. 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 a response. The cost respondent has 21 days to provide a response. The Manager has no power to extend the 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 each (s. 359).

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

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

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:

- whether or not disclosure has been made in accordance with Division 3 of the (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 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 section 328 (setting aside costs agreements) (see section 4.4.2 below), unless the costs assessor is satisfied:
   i. that the agreement does not comply in a material respect with any applicable disclosure requirements of Division 3 (costs disclosure); or 
   ii. that Division 5 (costs agreements) precludes the law practice concerned from recovering the amount of the costs; or 
   iii. that the parties otherwise agree.

The costs assessor is not required to initiate an examination of the matters referred to in subsections i and ii above.

Section 319 provides the bases upon which legal costs are recoverable, which are:

a. if they are 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 following matters set out in section 363(1) of LPA 2004:

- 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 section 361 or section 362 apply to the disputed costs.

The costs assessor may also consider the following matters set out in section 363(2) of LPA 2004:

- 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 skills, 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 location and circumstances in which the legal services were provided
- the time within which the work was required to be done (s. 363(2)).

4.4.2 APPLICATIONS BY CLIENT TO SET ASIDE COSTS AGREEMENTS (S. 328)

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 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 the changed circumstances that might foreseeably arise, and how this might affect the extent and nature of legal services provided under the agreement
- whether and how billing under the agreement addresses the changed circumstances affecting the extent and nature of legal services provided under the agreement.

A client can make an application under section 317(2) 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 under Division 3.

### 4.4.3 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 a non-associated third party payer, the assessor is not bound to determine the application with reference to the terms of the fee agreement between the law practice and the original client (see Boyce v McIntyre [(2009)] NSW CA 185).

Under LPA 2004, a client has 12 months after being given a bill (or, if costs have been paid without a bill, 12 months 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 for such an assessment (s. 350(5)).

A law practice that 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 counsel.

An application by a law practice that 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)).

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 respond. 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.
4.5 PARTY/PARTY ASSESSMENTS

A summary of the steps for applying for a costs assessment is located at the end of this chapter.

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

Practitioners are reminded that 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 Legal Profession Act 2004 does not require the provision of a bill of costs in an application for a party/party assessment because the process is not a “taxation” (see Attorney General of New South Wales v Kennedy Miller [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; for example, partner, associate etc.)
- the basis on which the costs have been calculated and charged (lump sum, hourly rate, item of work, as part of a proceeding or other)
- the facts relied upon to justify the costs charged as fair and reasonable by reference to the above; the practitioner’s skills, labour and responsibility; the complexity, novelty or difficulty of the matter; the quality of the work; or any other relevant factor.

The note to paragraph 5 of Form A3 (for applications for party/party or ordered 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.

Section 125 of the LPR outlines the process for applications for party/party assessments, which includes:

- The application should be completed (with sufficiently detailed information on the nature of the proceedings giving rise to the costs orders) and sent to the paying party. At this stage, it is not lodged with the Manager.
- The paying party has 21 days to respond. This time limit does not act as a default period that gives the claiming party the right to lodge 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 assessment inter partes 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 that acted for the unsuccessful litigant is still instructed in relation to the assessment process (see Dicemasters 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, in circumstances where no objection has been received, the applicant can satisfy the costs assessor that the respondent had notice of the application.
- 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 a law practice/client application, which is $100 or 1 per cent of the amount in dispute or the amount remaining unpaid, whichever is greater.

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 (s. 364).

The “outcome of the matter” (which 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).

In deciding what is a fair and reasonable amount of costs, a costs assessor may consider:

- 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
- the location and 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)).

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 fair and reasonable cost (s. 365). 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 rules of the relevant court or tribunal that made the order for costs (s. 364(3)). This section applies to the rules regarding indemnity costs and the limits on costs capped under legislation.

Assessors have no jurisdiction under LPA 2004 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.

Under LPA 2004, separate certificates of assessment of costs must be issued in respect of each order – see Wende v Horwath (NSW) Pty Limited [2014] NSWCA 170.

4.6. COSTS OF ASSESSMENTS

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

In a party/party assessment, 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, section 369 enables the costs assessor to determine which of the parties should be liable for the costs of the assessment when the costs claimed are reduced on assessment by 15 per cent or more.
In a party/party assessment, clause 126 of the LPR provides the costs assessor with other criteria to determine which of the parties should pay the costs of the assessment, including:

- 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 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 complete and that certificates of determination of costs will be released upon payment of the fees (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 them from the liable party.

4.7.. 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. Without further action, it will be taken to be a judgment of that court for the purposes of enforcement.

The claimant prepares the approved form for a certificate of judgment, accompanied by an affidavit annexing the certificate of determination and deposing that the debt has not been paid. Separate applications must be made for the certificate of determination and the certificate of determination of the costs of the assessment.

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 2005 and Uniform Civil Procedure Rules 2005.

4.8.. 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).

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

- 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
- an explanation of disputed costs, including:
  - the basis on which the costs were assessed, and
  - how the submissions made by the parties were dealt with
- the basis for a costs assessor declining to assess a bill of costs
- a statement of any determination under section 363A of the LPA 2004 that interest is not payable on the amount of the costs assessed or, if payable, 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 [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 reached 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 LPA 2004, 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 Jerard & 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). 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.

4.9. MISCELLANEOUS

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

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

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 LPA 2004 under s. 372.

4.10 REVIEWS

A party that 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 of the certificate of determination being forwarded by the Manager, Costs Assessment. The 30-day review period 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). The Manager, Costs Assessment, has the discretion to extend the time (s. 373) and the initial determination is suspended pending the review (s. 377).

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 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 that 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 regulation 128.

If the review panel affirms the determination of the costs assessor, it must require the party that applied for the review to pay the costs of the review (s. 379(2)).

If the review panel sets aside the original determination, and makes a determination in favour of the party that applied for the review, it must require the party that applied for the review to pay the costs of the review, if that party has not improved their position by more than 15 per cent.

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)).

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)). The review panel also has the 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. To view the procedure, see http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_costsassessment/SCO2_register_costsassessment.html.

4.11. APPEALS

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

The 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 that it considers the costs assessor should have made, or remit the decision to the costs assessor and order the costs assessor to determine the application again.

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

These are appeals on matters other than questions of law and usually relate to the manner in which the costs assessor exercised their discretion. They 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 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):** A 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 it for all 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 Ordered costs (using form A3) you will need to complete the application, including an index, 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) 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 per cent 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 or 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 that an assessment is complete and advise the amount of costs of the costs assessor to be paid before release of the costs assessment certificates. The assessor will also determine which party is liable for these costs and that party will receive an invoice from the Manager, Costs Assessment. 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 that 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 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. 353–371 of the Legal Profession Act 2004 and in particular, cls. 123–126 of the Legal Profession Regulation 2005. Assessment application forms can be found on the Supreme Court’s website under “Costs assessments.”
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 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 advise the amount of the costs of the Costs Assessor to be paid before release of the costs assessment certificates. The Costs Assessor will also determine which party is liable for these costs and that party will receive an invoice from the Manager, Costs Assessment. 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 that is not actually liable, then they can 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. 353–371 of the Legal Profession Act 2004, and, in particular, cls. 123–126 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:

1. **Costs disclosure:** 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 (s. 369 LPA 2004).

2. **Negotiations:** 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?

3. **Timing:** 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.

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 s. 302 LPA 2004: Definitions and s. 350 (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.

4. **Costs assessment process:** 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 with the Supreme Court within 21 days of issue of the notice. The Manager, Costs Assessment has no power to extend the time to respond.

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.

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 it has not already received by the costs assessor, and final submissions.

5. **Determination of the costs assessor and statement of reasons:** After the costs assessor has completed the assessment, the Manager, Costs Assessment will send the parties a letter advising of the costs assessor’s fee. This fee must be paid to the Manager, Costs Assessment before the determination 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 that 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.

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 354–371 of the Legal Profession Act 2004, and, in particular, cls. 119–122 and 127–130 of the Legal Profession Regulation 2005. Assessment application forms can be found on the Supreme Court’s website under “Cost assessments.”
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 (s. 317 LPA 2004) and you are generally held liable for the costs of the costs assessment (s. 369 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.

Under the Uniform Law, where instructions are received on or after 1 July 2015, Applications for Assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – see ss. 198 (3) and (4) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an Application for Assessment to have costs assessed.

1. **Costs assessment process**: To prepare an application for assessment of law practice costs (using the approved form), you will need to complete the relevant parts of the application (and delete/strike through the parts that do not apply), prepare an index 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 per cent of the total costs claimed.
   (b) **Lodge three copies** of the completed application for assessment and supporting documents at the Supreme Court.
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. **On receipt of the response:** On receipt of the response, or in default of any response from the client, the Manager, Costs Assessment 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 advise the amount of costs of the costs assessor to be paid before release of the costs assessment certificates. The assessor will also determine which party, if any, is liable for these costs and that party will receive an invoice from the Manager, Costs Assessment. 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 that 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 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.

6. **File the certificates:** 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 354–371 of the Legal Profession Act 2004, and, in particular, cls. 119–122 and 127–130 of the Legal Profession Regulation 2005. Assessment application forms can be found on the Supreme Court’s website under “Costs assessment.”