



THE LAW SOCIETY
OF NEW SOUTH WALES

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27 October 2011

Ms Linda Murphy
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Costs Assessment Review
Supreme Court of New South Wales
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Dear Ms Murphy

Chief Justice's Review of the Costs Assessment Scheme

The Law Society's Costs Committee (Committee) welcomes the opportunity to contribute to the Review of the Costs Assessment Scheme.

The Committee has reviewed the Terms of Reference and its submission to the Review is enclosed.

Please do not hesitate to contact Ms Lana Nadj, Policy Lawyer, Costs Committee on telephone (02) 9926 0375 by email to lane.nadj@lawsociety.com.au, should you require any further information.

Yours sincerely

Stuart Westgarth
President

Encl.



Costs Committee

27 October 2011

Chief Justice's Review of the Costs Assessment Scheme

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Executive Summary

- i. The Costs Committee of the Law Society of New South Wales ('Committee') supports the Costs Assessment Scheme ('Scheme') and the stated objectives.
- ii. The Committee considers that the Scheme presently affords parties a satisfactory degree of procedural fairness subject to the proposal set out in paragraph 2.2.
- iii. Speed and simplicity in the assessment process would be improved by the reforms suggested in paragraph 3.3. The current system can be cumbersome and creates opportunity for delay. It is entirely paper-driven.
- iv. The adequacy of the process would be enhanced by the provision of facilities for pre-assessment conferencing. A court-endorsed statement of the costs orders being assessed would greatly assist the process in determining disputed costs of parties to litigation. These matters are discussed in further detail in paragraph 4 of this submission.
- v. The transparency of the process would be augmented by clear and precise reasons why items of costs have been varied. Further, the publication of all District Court decisions as to costs would be of great assistance in understanding the assessment process. These matters are set out in greater detail in paragraph 5.
- vi. The provision of estimates of costs without full notice of objections would also encourage early resolution of disputes. These matters are discussed in paragraph 6.
- vii. A costs assessor should hold a full practising certificate and have ten years' post-admission experience. The Committee has made a number of recommendations with respect to this professional group, as set out in paragraph 8.
- viii. The publication of guidelines or rules for costs assessors is supported by the Committee. As outlined in paragraph 9, this would aid transparency and the early resolution of disputes, and prevent many disputes from arising.
- ix. Some of the proposals recommended in the submissions require legislative reform. The Committee would welcome an opportunity to make further submissions in relation to necessary legislative amendments once the outcomes of this Review have been established.
- x. The Committee's recommendations are those of the Costs Committee of the Law Society of NSW. A summary of the Committee's recommendations follows.

Summary of Recommendations

Procedural fairness

Recommendation One – That a statutory right for parties to make submissions to the Review Panel should be created.

Speed and simplicity

Recommendation Two – At early stages in both party/party and solicitor/client assessments, costs assessors should be required to notify the parties of an estimate perhaps expressed in terms of a range between \$X and \$Y of the total costs likely to be allowed.

Recommendation Three – Pre-assessment conferencing should be introduced in respect of both party/party and solicitor/client costs assessments to facilitate the early settlement of applications.

Recommendation Four – Where the total quantum claimed is small, costs assessors should be empowered to determine party/party and solicitor/client applications on the basis of the application alone. Parties would retain their rights to review.

Recommendation Five – A mechanism for default assessments should be introduced.

Recommendation Six – A standard filing fee should be introduced.

Supporting and enabling costs assessors to determine applications

Recommendation Seven – Guidelines for costs assessments should be developed and published.

Recommendation Eight – In party/party matters, a court-endorsed record of the relevant costs order should be placed on the costs assessment file.

Recommendation Nine – Strict timelines should be introduced to help costs assessors reduce unjustifiable delay.

Recommendation Ten – Access to the courts and consequential judicial oversight.

Transparency and consistency

Recommendation Eleven – Costs assessors should give reasons which set out why the solicitor's costs claimed have been varied.

Recommendation Twelve – Consideration should be given to the publication of all District Court costs decisions and costs review panel decisions, and some costs assessment decisions.

Promoting the efficient resolution of disputes

Recommendation Thirteen – The greater use of alternative dispute resolution should be encouraged together with the provision of an estimate at an early stage in proceedings, in accordance with Recommendation Two.

Qualifications and experience for the role of costs assessor

Recommendation Fourteen – A costs assessor should be a solicitor or a barrister holding a full practising certificate with at least 10 years' post admission experience in litigation, conveyancing, or another recognised area of practice. Costs assessors should undertake education and training to achieve continuing professional development.

Recommendation Fifteen – A costs assessor should demonstrate a commitment to be accessible and available to complete assessments within prescribed time limits, and to adhere to a Code of Conduct. He or she should show a commitment to meeting performance standards.

Recommendation Sixteen – A requirement should be introduced to ensure costs assessors meet at least quarterly and share reports of such meetings with the Council of the Law Society of New South Wales for review and comment.

Response to Matters Listed in the Terms of Reference

1. Producing outcomes that are substantively just in the context of the realities and costs of modern litigation and the current costs of legal services

- 1.1 The central objective of the Review should be to arrive at solutions which are just and cost effective in the context of modern litigation.

2. Providing parties an appropriate measure of procedural fairness

- 2.1 Subject to the issues set out in paragraph 2.2, below, the current Scheme adequately protects parties' rights to procedural fairness.

- 2.2 At present, while it appears that an applicant for a review of a determination of a costs assessor does not have a right to make representations to the review panel as to how the costs assessor has erred in his or her decision, some panels do invite submissions. Indeed, some panels appear to invite parties to provide further factual information. For clarity, the Committee believes that parties should have a right to make further submissions before the review panel makes a determination; however, there should not be an opportunity to provide further factual information for review.

3. The speed and simplicity of the process

- 3.1 A description of the usual procedures for assessments of party/party costs and solicitor/client costs are set out at Appendix 1. Where there are no unusual delays, each process takes approximately 4 to 5 months. However, it is not unusual for the process to take one year and on occasion it can take two years. As interest is usually not payable by an opposing party, there is no incentive for a respondent to proceed expeditiously. As discussed in paragraph 3.5 below, where large amounts are involved the system is extremely expensive, as the filing fee is 1% of the amount disputed.

- 3.2 There are reports of delays in the appointment of assessors and review panels. Delays in the appointment of review panels cause arguments to arise over the enforcement of the prior judgment as there is no suspension of the right to enforce the judgment until the review panel has been appointed. Consequently, parties have been known to take steps to enforce the judgment, or threaten to take such steps, during the period before the review panel has been appointed. This causes the party seeking review to expend unnecessary time and expense in an effort to expedite the appointment of the review panel while resisting enforcement proceedings.

- 3.3 To reduce delay in party/party assessments, the Committee suggests the following:

3.3.1 Introduction of early estimates – The system may benefit from an early assessment made in global terms by the assessor. It is suggested that the costs assessor should make an estimate of fair and reasonable costs based on the application alone. Submissions from the respondent at this stage would be limited to the scope of costs orders made in the proceedings.

3.3.2 Introduction of pre-assessment conferencing – Pre-assessment conferencing would be likely to narrow the issues and encourage negotiation before the process is formally commenced, significantly enhancing the prospects of achieving early settlement.

3.3.3 Default assessments – It is suggested that in line with other jurisdictions, a default assessment system should be introduced, conditional on proof of service. Extracts from legislative provisions in two Australian jurisdictions are reproduced at Appendix 2 for ease of reference.

3.3.4 A fast-track for small matters – In matters where costs are less than \$10,000.00 costs assessors should be able to either issue an estimate (see paragraph 3.3.1 above) or determine the costs based on the application alone, with parties retaining a right to object to the determination if they are unsatisfied with the outcome. Rights to review should not be diminished, as smaller assessments can be the most contentious.

3.4 The proposals in paragraph 3.3 above apply equally to solicitor/client assessments.

3.5 The Committee considers that a standard filing fee should be introduced. The present filing fee of the greater of 1% of the costs in dispute or \$100 is excessive and can lead to unreasonable expenses where disputed costs are high. The fee is higher in New South Wales than in other jurisdictions. To illustrate, a comparison with Queensland, the ACT and Victoria is set out at Appendix 3.

4. The adequacy of the process in supporting and enabling costs assessors to determine applications

4.1 There are, at present, no published guidelines or benchmarks which costs assessors could use in making their determinations and which parties could rely on. Guidelines would assist parties to predict outcomes to enable settlement. Further consideration is given to this issue in paragraph 9.

4.2 In addition, costs assessors would be assisted by:

4.2.1 A process which establishes pre-assessment conferencing, as set out in paragraph 3.3.2;

4.2.2 In party/party matters, a court-endorsed record or statement of the costs order to which the application relates;

4.2.3 Strict timelines to give assessors confidence to proceed in the face of delays by one or other of the parties and ensure assessors complete assessments in a timely manner.

4.3 It is also considered that costs assessors and the parties would be assisted by having easier access to the courts for the purposes of achieving judicial oversight of problems or issues that may arise during the assessment or review process. For example, if an assessor should unreasonably refuse to allow a party to tender material or make a further submission or act contrary to guidelines, a party should have the right to approach a Registrar for directions.

5. The transparency and consistency of the process and outcomes

5.1 There is at present no requirement for assessors to explain, in reasons or certificates of determination, how the solicitor's costs have been varied. Practitioners report that substantial differences exist between assessors in respect of deciding identical issues. The failure to give reasons makes it difficult to check that decisions made by costs assessors have been carried through into amounts allowed for solicitor's costs in the certificate of determination. Although regulation 128 of the *Legal Profession Regulation 2005* provides that each disbursement varied by a determination must be set out, there is no analogous provision dealing with items of solicitor's costs which have been varied.

5.2 Some District Court costs decisions are not reported. The District Court is the forum for appeals both directly from decisions of costs assessors and costs review panels. Reporting District Court decisions on costs would enhance the transparency of the costs assessment system and potentially lead to a greater consistency in outcomes. Likewise, decisions of costs assessors and costs review panels are not disseminated, as they should be, to costs assessors, costs review panel members, the profession and the parties.

6. The promotion of the efficient resolution of costs disputes

- 6.1 Although there are legislative mechanisms in place which are designed to promote the use of alternative dispute resolution ('ADR') in costs assessments, frequent, early settlement is not a feature of the Scheme. The effective resolution of disputes would be assisted by concerted encouragement of mediation and other ADR processes. In addition, the provision of estimates, as set out in paragraph 3.3.1, could provide parties with an opportunity to make a realistic appraisal of their claim before they incur further, significant costs.

7. The costs of the process

- 7.1 The costs of the assessment process, in the case of party/party and solicitor/client assessments, are set out in tabular form at Appendix 4.

8. The qualification, selection, appointment, education and remuneration of costs assessors

- 8.1 The Committee suggests that the qualifications for appointment as a costs assessor should include the following:
- 8.1.1 The costs assessor should be a solicitor or barrister in good standing with at least 10 years' post admission experience in litigation, conveyancing, probate or other recognised area of practice.
 - 8.1.2 The costs assessor is to hold a full practising certificate.
 - 8.1.3 The costs assessor must demonstrate a commitment to be accessible and available to take on the work and to complete it within fair and reasonable time.
- 8.2 Costs assessors should commit to undertaking continuing professional development by participating in education and training which is relevant to their field of expertise. Appropriate training could be developed and delivered in conjunction with the Law Society of New South Wales.
- 8.3 To facilitate efficiency and consistency, the Committee recommends the introduction of a requirement that costs assessors meet regularly, whether quarterly or more frequently, to share their decisions and discuss issues as they arise. The Committee recommends that an agenda should be prepared for these meetings and that minutes be taken, and that these documents should be shared with the Council of the Law Society of New South Wales for review and comment.
- 8.4 The Committee does not consider there to be any need to impose any requirement of qualification of specialist accreditation.

9. Whether it would be desirable for guidelines to be established and published, for example, as to items and rates generally

- 9.1 As set out earlier in paragraph 4.1, the Committee would welcome the introduction and publication of guidelines. Practitioners have long reported their concerns to the Law Society that the results of assessments vary considerably, and appear to depend on the individual assessor's view of the costs. Earlier this year, the Law Society held a Symposium on Billing Practices, which attracted the participation of senior solicitors with wide-ranging backgrounds and experience. Participants expressed overwhelming support for the introduction of guidelines. The Law Society would be prepared to work with the Court in preparing and updating such guidelines.

- 9.2 The term 'guidelines' is capable of different meanings, and has caused some confusion. The Committee does not support the introduction of prescriptive rules. Instead, guidelines would provide clarity on points such as:
- 9.2.1 any items of costs that would be generally excluded;
 - 9.2.2 when agreed hourly rates disclosed in costs agreements might be discounted or disallowed upon assessment. In particular, whether costs assessors will apply the hourly rate as specified in a costs agreement by the parties as fair and reasonable, or reserve the right to modify the hourly rate for example, for travelling;
 - 9.2.3 in what circumstances is it fair and reasonable to charge a fee for re-reading and for researching;
 - 9.2.4 in what circumstances is it fair and reasonable to charge for individual solicitors' simultaneous attendances, for example, in conference and when briefing counsel and at court;
 - 9.2.5 how photocopying charges will be dealt with.
- 9.3 As these examples illustrate, direction as to the practical aspects of costs assessments would be welcomed; that is, guidance on how a costs assessor will deal with the various items in a bill of costs. The Committee considers that such guidelines would be broadly similar to a Practice Note, but without the prescriptive aspect. To prevent any misunderstanding, the Costs Committee is not seeking the re-introduction of scales of costs.

10. In light of the above, whether enabling legislation and regulations should be amended

- 10.1 Finally, this question is difficult to answer at this stage. The guidelines discussed in paragraph 9, above, will not need legislative support, as the *Legal Profession Act 2004* already mandates that costs must be fair and reasonable. However, it is acknowledged that some of the suggestions made in this submission, if adopted, may require legislative change. The Committee would welcome the opportunity to make further representations on this point once the chief outcomes of the Review have been settled.

Appendix 1

The Process for Party/Party Costs Assessments

The usual procedure for party/party costs assessments is as follows:

1. An applicant is required to deliver the initiating application with the itemisation of costs and wait 21 days before the application can be filed. The objection can be delivered within this 21-day period.
2. The application will usually be referred to a costs assessor within 30 days.
3. It is usual for a costs assessor to give the respondent a period of 21 days to file an objection and for any submissions to be made.
4. Not infrequently, a respondent will seek an extension of time. Accordingly, a further 21 days is not unusual.
5. An applicant then takes 14 to 21 days to respond.
6. Assessment can now be made and is likely to take anything from 14 days to 42 days or longer. It is not unusual for the time to be one year and a two year delay occurs on occasion.
7. On payment of the fees of the costs assessor to the Manager, Costs Assessment, the determination is issued.

The Process for Solicitor/Client Costs Assessments

The usual procedure for solicitor/client and client/solicitor costs assessments is as follows:

1. The law practice serves a bill of costs on the client.
2. An Application for Assessment can be lodged by the law practice or client.
3. The Manager notifies the parties of the filing of the application and requests submissions within 21 days – there is no penalty if a party does not respond to this notice nor is there any incentive for a party to make submission in a timely manner.
4. The application is usually referred to a costs assessor within 30 days.
5. The costs assessor will generally allow the parties further opportunity to make submissions.
6. Costs are assessed by the assessor. The parties are unable to obtain details of the outcome of the assessment without paying for the issue of the certificates.

Appendix 2

Default Assessment

Queensland

Uniform Civil Procedure Rules 1999 – Section 708

708 Default assessment if no objection to costs statement

- (1) This rule applies if –
 - (a) a party served with a costs statement does not serve a notice of objection under rule 706 (within 21 days of service); and
 - (b) the party who served the costs statement files an application for a costs assessment under rule 710 (after the expiration of 21 days and with an affidavit of service).
- (2) On the filing of the application, the registrar must appoint a costs assessor to assess costs under this rule.
- (3) The costs assessor must, on proof that the costs statement was served on the party liable for the costs –
 - (a) assess the costs without considering each item and by allowing the costs claimed in the costs statement; and
 - (b) issue a certificate of assessment.
- (4) However –
 - (a) despite subrule (3)(a), the costs of attending the assessment of costs are not allowable; and
 - (b) subrule (3)(a) does not prevent the costs assessor correcting an obvious error in the costs statement.
- (5) Rules 711, 712 and 721 do not apply to an assessment of costs under this rule.

Appendix 2

Default Assessment

Australian Capital Territory

Court Procedure Rules 2006 – Regulation 1809

Costs—default assessment if no objection to bill of costs

- (1) This rule applies if the party liable for costs does not file a notice of objection to the bill of costs.
- (2) On proof that the bill of costs was served on the party liable for the costs, the registrar must—
 - (a) assess the costs without considering each item and by allowing the costs claimed in the bill of costs; and
 - (b) issue a certificate of assessment for the amount of the assessed costs.
- (3) However—
 - (a) despite subrule (2) (a)—
 - (i) the costs must be assessed subject to rule 1804 (Costs—payment of disbursements); and
 - (ii) the costs of attending the assessment of costs (other than attendances the registrar considers necessary) , and any other anticipated costs included in the bill, are not allowable; and
 - (b) subrule (2) (a) does not prevent the registrar correcting an obvious error in the bill of costs or assessing the costs differently in exceptional circumstances.

Appendix 3

Filing Fees

Queensland, Australian Capital Territory, Victoria

In **Queensland**, the filing fee for an application for assessment of costs in the Supreme Court of Queensland is the same as for filing other originating process set out in set out in the Uniform Civil Procedure (Fees) Regulation 2001 – Schedule 1, and in summary is:

- \$1,500 for a corporation and
- \$750 for an individual

Additional fees are also payable in accordance with the Appeals Costs Fund Regulation 2010, currently \$22 for documents filed in the Supreme Court of Queensland.

In the **ACT**, the fee to file a bill of costs for assessment in the Supreme Court is:

- zero if the costs claimed are less than \$2,000; and
- a flat fee of \$327 if the costs claimed exceed \$2,000

In **Victoria**, the filing fees in the Costs Court as set out in the Supreme Court – Prothonotary's Office Fees, effective from 1 July 2011, as follows.

Costs Court

The filing fees when commencing a proceeding in the Costs Court:

- | | | |
|-----|--|----------|
| (a) | Where the costs relate to a proceeding in the Supreme Court | \$333.60 |
| (b) | Where the costs relate to a proceeding in the County Court | \$244.40 |
| (c) | Where the costs relate to a proceeding in the Magistrate's Court | \$244.40 |
| (d) | Where the costs relate to a proceeding in the Victorian Civil and Administrative Tribunal. | \$157.60 |

Appendix 4 – The Costs of the Process

Assessments *inter partes*

	Claimant	Respondent
Preparation of application for assessment – based on a claim for professional costs of \$150,000, say a 60-page itemisation <i>The actual charge would depend on whether the basis of charge is a percentage of the professional cost component of the claim or an hourly rate</i>	\$7,000 – \$14,250	
Preparation of objections		\$2,500 – \$3,000
Preparation of response	\$1,500 – \$3,500	
Filing fee – based on total claim of \$250,000	\$2,500	
Responding to requisitions	\$1,000	\$500
Assessor's fee	\$4,000 – \$6,000	
Total for each	\$16,000 – \$28,250	\$3,000 – \$3,500
<i>The respondent would usually be required to reimburse the claimant for the costs of the assessment so the final cost to the respondent would be:</i>		\$19,500 – \$31,750

Assessments *practitioner client or client practitioner*

	Claimant	Respondent
Preparation of application for assessment – assuming 4-5 invoices	\$2,500 – \$5,000	
Preparation of response/objections	\$2,500 – \$5,000	\$2,500 – \$5,000
Filing fee based on \$50,000	\$500	
Responding to requisitions	\$1,500	\$1,500
Assessor's fee – assuming no order against practitioner this is paid by the revenue	\$4,000	
Total for each	\$7,500 – \$12,500	\$4,000 – \$6,500