



THE LAW SOCIETY
OF NEW SOUTH WALES

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NCAT Project Team
Department of Attorney General and Justice
Level 14, 10 Spring Street
SYDNEY NSW 2000

By email: ncat@agd.nsw.gov.au

Dear Sir/Madam

Discussion paper 3(b) - Costs

Following consultation with the relevant Policy Committees, the Law Society of New South Wales is pleased to provide the comments below regarding discussion paper 3(b) which relates to costs.

1. Does the Act need to contain any other clauses in relation to costs?

The suggestion by the Bar Association that section 88 of the *Administrative Decisions Tribunal Act 1997* (the ADT Act) be adopted in the NCAT legislation is supported. In addition, the NCAT Act should include section 98(4)(c) of the *Civil Procedure Act 2005* which is set out below for ease of reference:

98 Courts power as to costs

(4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:

(c) a specified gross sum instead of assessed costs.

The Law Society has previously made a submission to the NSW Attorney General that the ADT Act should be amended to allow costs orders to be made by the Tribunal against the NSW Chief Commissioner of State Revenue ("CCSR") where a taxpayer is successful. A copy of that submission is enclosed for your information. Given the proposed objects of the NCAT Act, it is considered inappropriate that a taxpayer should be left:

- out of pocket for costs incurred when the taxpayer is successful in a review by the NCAT of an incorrect decision of the CCSR; and
- in a more costly position than had the review of the CCSR's decision been undertaken in the Supreme Court.

It is submitted that in the interests of justice, the NCAT Act should make it clear that where a taxpayer is successful in the NCAT against the CCSR, a costs order should

be made by the Tribunal against the CCSR and that where a taxpayer is successful and the CCSR appeals against the decision, that a costs order be made against the CCSR, irrespective of the outcome of the appeal.

2. Should a scale of costs be included in the Regulations or Tribunal Rules?

The proposal to include a scale of costs in the Regulations or Tribunal Rules is not supported. On 16 September 1993, when the *Legal Reform Bill* was introduced and read for the first time in the Legislative Council, the then Attorney General Mr Hannaford said that the purpose of the reforms "is to create a more competitive market for legal services...". Scale rates, even if they are not strictly binding, can present problems where the nature of the proceedings and the legal representation of the parties varies widely. Experience shows that scale rates are inevitably set too low and the process for review and increase of those rates is too slow.

3. Are there any other costs mechanisms that should be considered?

The NSW Costs Assessment Scheme, under Part 3.2 of the *Legal Profession Act 2004* and administered by the Supreme Court, provides an efficient mechanism for determining what are fair and reasonable costs. There should be a provision in the NCAT Act that costs are to be as agreed or assessed under Part 3.2 of the *Legal Profession Act 2004*.

If you have any questions in relation to this letter please contact Chelly Milliken, Legal Policy Advisor, on 9926 0218 or chelly.milliken@lawsociety.com.au

Yours sincerely



John Dobson
President