



THE LAW SOCIETY  
OF NEW SOUTH WALES

# **COSTS GUIDE 7TH EDITION**

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CHAPTER 4

## **UNIFORM LAW AND COSTS ASSESSMENTS**

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**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 sections 198-201 of the LPUL, sections 63-80 of the LPULAA and clauses 31-58 of the LPULAR.

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.

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.

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”.

**Section 172 LPUL** provides that costs must be proportionately and reasonably incurred and proportionate and reasonable in amount. Factors in a costs assessment are found in **section 200 LPUL** which states that in considering whether legal costs for legal work are fair and reasonable, the costs assessor must apply the principles in **section 172** so far as they are applicable.

### INTEREST

Uniform Law costs: a costs assessor “may” determine interest is payable on Uniform Law costs (**section 81 LPULAA**). It should be noted the term Uniform Law costs applies to law practice/client costs and not party/party or ordered 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 ([section 205 LPUL](#)) must be lodged within 30 days (**section 83 LPULAA**) 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 ([section 83 LPULAA](#)). No prior notice is required where proceedings were commenced on or after 1 July 2015.

## 4.2 INTRODUCTION

The costs assessment scheme is conducted in accordance with the LPUL, LPULAA, LPULAR and LPUGR. The process for assessment is found in [sections 198-201](#) of the LPUL, [sections 63–80](#) of the LPULAA and [clauses 32–58](#) of the LPULAR.

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 (Uniform Law costs) or those between parties to litigation (Ordered costs) 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, or by clients and the extended definitions of clients against their practices ([section 198](#) LPUL, Uniform Law costs), or by parties to proceedings in state courts or tribunals who have the benefit of costs orders in their favour ([section 74](#) LPULAA, Ordered costs).

The prerequisites for the costs assessment process are set out in [sections 66-68](#) LPULAA and [clause 32](#) LPULAR and the costs assessment rules (yet to be published) for assessments of Uniform Law costs and Ordered costs.

In applications for assessment (see [clause 33](#) LPULAR), other than for Ordered costs 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 an Ordered costs 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. There was an exception in relation to “sophisticated clients in the LPA 2004 (section 322(5)) however this has no equivalent in [section 180](#) LPUL.

Costs assessors are appointed by the Chief Justice from the practicing profession (solicitors and barristers). Australian legal practitioners of at least five years’ standing are eligible for appointment ([Schedule 6 LPULAA](#)).

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 is guilty of an offence ([clause 37 LPULAR](#)). Under [section 298 LPUL](#) and [section 165B LPULAA](#) the failure may be regarded as unsatisfactory professional conduct or professional misconduct. Charging more than what is considered fair and reasonable costs may also be regarded as unsatisfactory professional conduct or professional misconduct.

[Section 202](#) of the LPUL gives costs assessors the power to refer a matter to a designated local regulatory authority (currently the Office of the Legal Services Commissioner) if the costs assessor considers the costs charged by a law practice are not fair and reasonable, 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 [section 178\(1\)\(d\) LPUL](#)).

Thus, even on an Ordered costs 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 204](#) of the LPUL, 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 or there is a failure to disclose. 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 (Part 4.3, Division 3 Costs Disclosure LPUL) cannot recover their costs until they have been assessed ([section 178 LPUL](#)). The assessment is usually at the law practice's expense ([section 204 LPUL](#)) however note that if the costs assessor believes that it is not fair and reasonable for the law practice to pay the costs of a costs assessment they can order otherwise including that the client pay the costs of the assessment.

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 ([section 70 LPULAA](#)). 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 until 30 days after the delivery of a bill of costs ([section 194 LPUL](#) and Chapter 3 for a discussion on billing). As highlighted above, 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.

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 ([clause 34 LPULAR](#)).

The costs assessor will write separately to the parties confirming their appointment and setting out the requirements of each. A costs assessor must not determine an application for assessment unless ([section 69 of LPULAA](#)) 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.

In considering an application, a costs assessor is not bound by rules of evidence and may consider any matter they think fit ([section 69 of LPULAA](#)).

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 and whether or not it was reasonably practicable to disclose any matter that should be disclosed ([section 200 LPUL](#)).
- whether a costs agreement exists, and its terms ([section 199 LPUL](#)).

Under [section 172\(4\) LPUL](#) a costs agreement is prima facie evidence of disclosed costs being fair and reasonable if there is compliance with provisions as to disclosure and the costs agreement in the LPUL. The assessor must determine if a valid costs agreement exists ([section 199 LPUL](#)) and may have regard to disclosures made in the assessment ([section 200 LPUL](#)).

The costs assessor must apply the principles in [section 172 LPUL](#) when considering whether legal costs for legal work are fair and reasonable ([section 200 LPUL](#)). The costs assessor may also have regard to:

- (a) whether the law practice and any legal practitioner associate or foreign lawyer associate involved in the work complied with this Law and the Uniform Rules;
- (b) any disclosures made, including whether it would have been reasonably practicable for the law practice to disclose the total costs of the work at the outset (rather than simply disclosing charging rates);
- (c) any relevant advertisement as to the law practice's costs or the skills of the law practice or any legal practitioner associate or foreign lawyer associate involved in the work;
- (d) any other relevant matter.

The costs assessor must take into account the incidence of GST in a costs assessment.

[Section 200\(4\) LPUL](#) provides that in conducting an assessment of legal costs payable by a non-associated third party payer, the costs assessor must also consider whether it is fair and reasonable in the circumstances for the

non-associated third party payer to be charged the amount claimed.

Importantly [section 197 LPUL](#) provides that a Law Practice may file for assessment (within the 12-month period after the last invoice is sent) even if a complaint has been made to the Office of the Legal Services Commissioner. Once the process has been completed (Application, Objection and Response) the Manager, Costs Assessment will pause the process until the OLSC complaint is resolved.

#### 4.4.2 APPLICATIONS BY CLIENT TO SET ASIDE COSTS AGREEMENTS

Under the LPA 2004 a costs assessor had wide-ranging powers to set aside a provision of the costs agreement or the whole costs agreement if they were satisfied that the agreement was not fair or reasonable or there was a failure to disclose (see sections 317(3) and 328). Wide ranging matters could be taken into consideration, some of which were listed in section 328.

Pursuant to [section 178 LPUL](#) any failure to disclose renders the entire costs agreement void and no payment of costs is required until those costs have been assessed. The contravention of disclosure obligations is capable of constituting unsatisfactory professional conduct or professional misconduct.

#### 4.4.3 APPLICATIONS BY CLIENTS SEEKING TO ASSESS COSTS RENDERED BY THEIR LAW PRACTICE

Who can have costs assessed?

Any client which is a Commercial or Government client is unable to have costs assessed.

[Section 170 LPUL](#) provides that Part 4.3 LPUL (NSW) (Legal Costs) [which includes all of the disclosure and assessment sections] does not apply to Commercial or Government clients. A “Commercial or Government client” is defined as

- “(a) a law practice; or
- (b) one of the following entities defined or referred to in the [Corporations Act](#)
  - (i) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body;
  - (ii) a liquidator, administrator or receiver;
  - (iii) a financial services licensee;
  - (iv) a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required;
  - (v) a subsidiary of a large proprietary company, but only if the composition of the subsidiary’s board is taken to be controlled by the large proprietary company as provided by subsection (3); or
- (c) an unincorporated group of participants in a joint venture, if one or more members of the group are persons to whom disclosure of costs is not required and one or more members of the group are not any such persons and if all of the members of the group who are not such persons have indicated that they waive their right to disclosure; or
- (d) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company (within the meaning of the [Corporations Act](#)) if it were a company; or
- (e) a body or person incorporated in a place outside Australia; or
- (f) a person who has agreed to the payment of costs on a basis that is the result of a tender process; or
- (g) a government authority in Australia or in a foreign country; or

(h) a person specified in, or of a class specified in, the Uniform Rules.”

The definition of a large proprietary company is found in [section 45A](#) Corporations Act 2001.

### Assessment Process

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 ([section 171 LPUL](#) 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 costs agreement between the law practice and the original client (see [Boyce v McIntyre \[\(2009\) NSW CA 185\]](#)).

Under [section 198 LPUL](#), a client has 12 months after being given a bill or after the request for payment is made, to make application for assessment. If there is no bill or request, the client has 12 months after payment to make an application.

An application for assessment out of time can only be dealt with by the costs assessor if there is an application by the client, third party or costs assessor to the “designated tribunal”, who determines it is just and fair for the application to be dealt with out of time. Third party payers who would be commercial or government clients cannot apply for such an assessment ([section 198 LPUL](#)).

A law practice that has retained another law practice on behalf of a client may apply for assessment of that practice’s legal costs ([section 198\(1\) LPUL](#)). The obvious example is the retaining of counsel.

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. A list of common objections is provided by on the Supreme Court Costs Assessment website.

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 ([clause 34 LPULAR](#)). The procedure set out above in relation to practitioner/ client assessments is then undertaken.

[Section 81](#) of the LPULAA gives a costs assessor discretion on whether to include interest in a law practice/client assessment. A party claiming interest is required to calculate the interest from the date the bill is given to a convenient date and also include a daily rate in the Application for Assessment.

The provisions for when a law practice may charge interest is held in [section 195 LPUL](#). A law practice may charge interest if the bill contains information as to interest but not if the bill of costs is given more than 6 months after completion of a matter. For the rate of interest see [rule 75 LPULGR](#).

Interest will be calculated at a maximum rate equal to 2% per annum plus the Cash Rate Target specified by the Reserve Bank of Australia. Interest is charged on legal costs which remain unpaid 30 days after giving the client the bill ([section 195 LPUL](#)).

## 4.5 ORDERED COSTS (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 ([section 74 LPULAA](#)). There is no time limit in the Uniform Law for filing of an Application for Assessment of ordered costs; however, the assessment process is a mechanism for quantification of costs only and see [Coshott v Barry & Anor \[2012\] NSWSC 850](#).

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 Patten AJ in [Wentworth v Rogers \[2004\] NSWSC 1273](#).

[Section 74 LPULAA](#) does not require the provision of a bill of costs in an application for an ordered costs 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 be in the approved form ([clause 32 LPULAR](#)) and provide the following details (as set by Form A3):

- The proceedings for which the costs are payable, including the identities of the parties to the proceedings and their legal representatives
- The amount claimed by the party to whom the costs are payable.
- The work done and all other items for which costs are claimed.
- When the work was done or the thing acquired, as the case may be.
- Who did the work (including the professional position of that person and relevant information about his or her experience and expertise).
- The basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, on a part of proceedings basis or other basis).
- The facts relied on by the party to whom the costs are payable to justify the costs claimed as fair and reasonable.

This information may be given in the law practice/client bill of costs; however, it will be a matter of fact in each case as to whether such a document provides sufficient information for a third party, or a costs assessor, to understand the nature of the claim.

- [Clause 35](#) of LPULAR outlines the process for applications for Ordered costs 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 [Diemasters Pty Ltd v Meadowcorp \(Supreme Court NSW Unreported Judgment 16 July 2003, BC200306928\)](#)).
- It may be necessary to arrange delivery of the application to the respondent by registered post or even by process

server. This will ensure that, 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 ([clause 33 LPULAR](#)).

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 determine the fair and reasonable amount of costs for the work and may have regard to the factors in section 172 (1) and (2) LPUL (section 76 LPULAA). [Section 172 LPUL](#) states costs must be proportionately and reasonably incurred and proportionate and reasonable in amount.

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

- the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
- the labour and responsibility involved; and
- the circumstances in acting on the matter, including (for example) any or all of the following:
  - the urgency of the matter;
  - the time spent on the matter;
  - the time when business was transacted in the matter;
  - the place where business was transacted in the matter;
  - the number and importance of any documents involved; and
  - the quality of the work done; and
  - the retainer and the instructions (express or implied) given in the matter ([section 172\(2\) LPUL](#)).

A costs assessor may obtain and consider a costs agreement when assessing costs, but the terms of the costs agreement are not conclusive for the purposes of determining fair and reasonable costs ([section 77 LPULAA](#)). 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 ([section 75 LPULAA](#)). This section applies to the rules regarding indemnity costs and the limits on costs capped under legislation.

[Section 70 LPULAA](#) requires that a certificate of assessment of costs may be issued in relation to a single application for costs payable under multiple orders, rules or awards between the same parties in one or related proceedings provided that the certificate specifies the amount in respect of each order – [section 70\(3\) LPULAA](#).

In an ordered costs assessment, a Costs Assessor in determining costs is to issue a certificate including interest and in the

determination of ordered costs [section 70\(1\)\(c\) LPULAA](#). Interest is payable under [section 101](#) of the Civil Procedure Act 2005 (“CPA 2005”).

For proceedings commenced after 1 July 2015 and prior to 24 November 2015, for interest on costs to be payable, an application for interest had to be made to the Court which heard the matter, before a Certificate of Determination was entered as a Judgment (see section [101\(4\) CPA 2005](#) prior to 24 November 2015 and the transitional provisions in [Schedule 6](#) to the CPA 2005). If such an order was made, then a costs assessor is to include interest in a determination.

However, interest is payable on costs from the date of judgment in proceedings commenced after 24 November 2015 - [section 101\(4\) CPA 2005](#). This applies unless the court “otherwise orders”.

Interest is calculated at the prescribed rate as from the date the order was made or any other date ordered by the Court [section 101\(4\) CPA 2005](#). The Application for Assessment (Form A3) requires a party to calculate interest to a convenient date. The prescribed rate of interest is found in [clause 36.7 UCPR 2005](#).

## 4.6 COSTS OF ASSESSMENTS

Under section 71 LPULAA costs of the assessor and of the Manager Costs Assessment, together with who is to pay them must be determined by the assessor and a certificate issued setting out those costs.

For Uniform Law costs unless the assessor believes it is not fair and reasonable for costs to be paid, the costs of assessment are to be paid by the law practice if there is a failure in relation to disclosure or the costs of the law practice are reduced by 15% or more (section 204 LPUL). This means that either a client or a law practice can be ordered to pay the costs of a Uniform Law assessment.

In an ordered costs assessment, clause 40 of LPULAR 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 ordered costs differs from the amount of those costs claimed in the application for assessment,
- whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned,
- whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

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

The costs assessor sends their determination to the Manager and advises the parties that the assessment is complete and that certificates of determination of costs will be released upon payment of the fees (of the costs assessor) ([clause 42 LPULAR](#)). The Manager will send an invoice to the parties requiring payment of the amount of the costs assessor’s fees; this can be done by 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 (sections 70 and 71 LPULAA).

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.

[Section 101](#) (6) CPA 2005 provides:

*This section does not authorise the giving of interest on any interest payable under this section.*

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*.

See link below in Step 10 of “10 Steps to an Ordered (Party/Party) Costs Assessment” to “Guide to registering a certificate of determination”.

## 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 (section 201 LPUL regarding Uniform Law costs and clause 41 LPULAR for assessment generally).

The adequacy of reasons is frequently given for challenging determinations. Clause 41(2) LPULAR 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,
- in respect of any disputed costs, an explanation of:
- the basis on which the costs were assessed, and
- how the submissions made by the parties were dealt with,
- if the costs assessor declines to assess a bill of costs-the basis for doing so,
- a statement of any determination that interest is payable at a rate specified by the assessor or that no interest is payable.

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.

[1] “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

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

- a. 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.- see [Randall Pty Limited v Willoughby City Council \[2009\] NSWDC 118](#) and [Dunn v Jerrard & Stuk Lawyers \[2009\] NSWSC 681](#).

These cases concerned appeals about decisions of review panels, but the principles discussed are relevant to the reasons given by costs assessors. In both matters, the court held that failure to give adequate reasons is a matter of law allowing an appeal as of right (section 384 LPA 2004). Current provisions for appeal in section 89 LPULAA are from review panels and are as of right regardless of issues if the dispute reaches threshold requirements, otherwise leave is required; section 205 LPUL allows appeals in relation to Uniform Law costs from a decision of an assessor or panel). 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 (section 70(2) LPULAA). A costs assessor can correct an error in a certificate (clause 43 LPULAR).

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 LPULAA under section 73.

## 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; see Part 7, Division 5 of LPULAA and Part 6, Division 3 LPULAR. The review panel will comprise two costs assessors (section 82 LPULAA). The application must be made within 30 days of the certificate of determination being forwarded by the Manager, Costs Assessment (section 83 LPULAA). The 30-day review period does not run from the date the certificates are received. A party applying for review files an Affidavit confirming the application has been given to the other party (clause 45 LPULAR). The Manager, Costs Assessment, has the discretion to extend the time (section 83 LPULAA) and the initial determination is suspended pending the review (section 86 LPULAA). Four copies of applications for review (with annexures) must be filed.

A decision on the review process, decided by Master Malpass under the Legal Profession Act 1987 is [Kells v Mulligan & Anor \[2002\] NSWSC 769](#) 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. Most importantly, the review panel must ensure it has examined the costs assessor's file before publishing its determination.

Section 85 LPULAA sets out the functions of the review panel; it has all functions of the costs assessor and is to determine the application in a manner that the assessor would. 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 including all details referred to in clause 51 LPULAR.

The restriction which existed under section 375 LPA 2004 that the review was to be conducted on the evidence received by the costs assessor and was not to receive Submissions or fresh evidence unless the panel determined otherwise is not found in the LPULAA.

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. Further, 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 (clause 53 LPULAR).

In other circumstances, the review panel has the discretion to order how the costs of the review are to be paid (clause 53 LPULAR).

If a decision of the assessor is affirmed a certificate must issue to this effect (clause 50 of LPULAR). The filing of a certificate of substituted determination or costs of the review panel in the registry of the relevant court becomes a judgment of that court (see sections 87 and 88 of LPULAA).

Pursuant to section 88 LPULAA the costs included in the certificate as to the costs of the review panel are the amount incurred by the review panel or the Manager, Costs Assessment in the course of the review, and costs related to the remuneration of the costs assessors who constitute the review panel. The certificate must specify who is to pay the costs. The panel must notify the parties the certificate is available on payment of costs (clause 54 LPULAR), this does not apply if costs are waived.

The review panel also has the power to correct an inadvertent error and issue a certificate that sets out the new determination (clause 55 LPULAR). Such a certificate replaces any certificate setting out the previous determination of the review panel. To view the procedure, see the [Supreme Court website](#).

## 4.11 APPEALS

In accordance with the rules of the District Court and Supreme Court, a party dissatisfied with a review panel's decision may appeal to the court against the decision under section 89 LPULAA. Where the amount in dispute is less than \$25,000, leave is required for an appeal to the District Court. Any appeal to the Supreme Court requires leave if the amount in dispute is less than \$100,000.00.

Where an appeal against a decision of the review panel under section 89 or an Application for leave is pending in the District Court either the review panel or the District Court may suspend the operation of the determination or the decision. (section 90 LPULAA). The review panel or the District Court may end the suspension or it ends when the appeal is determined or Application for leave dismissed, discontinued or is struck out or lapses. There is currently no provision for the Supreme Court to suspend the operation of the determination.

Section 205 LPUL allows appeals in relation to Uniform Law costs from a decision of an assessor or panel.

The decisions in [Randall Pty Limited v Willoughby City Council \[2009\] NSWDC 118](#) and [Dunn v Jerrard & Stuk Lawyers \[2009\] NSWSC 68](#) 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.

The courts have all the functions of a review panel. The Supreme Court can remit matters to the District Court or remove matters from the District Court to be heard by it. The appeal is by way of rehearing and fresh evidence may be given with the leave of the court (section 89 LPULAA).

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 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.

## 10 STEPS TO AN ORDERED (PARTY/PARTY) COSTS ASSESSMENT

1. **Costs order(s):** An Ordered 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).
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 lodgment:** 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 lodgment, complete paragraphs 2, 3, 4, (5 if applicable), 6 and 7 and certify 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 Costs Assessor will also determine which party is liable for these costs and an invoice will be sent to the parties requiring payment of the amount of the costs assessor's fees. 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 Ordered Costs is conducted pursuant to sections 63 to 80 LPULAA and in particular, clauses 32 to 34, 36 to 43 LPULAR. Assessment application forms can be found on the Supreme Court's website under "Costs assessments".*



## 7 STEPS FOR OBJECTING TO AN ORDERED (PARTY/PARTY) COSTS ASSESSMENT

1. **Costs order(s):** Ordered (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.
1. **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. Also note that interest is payable on costs from the date of judgment in proceedings commenced after 24 November 2015 - [section 101\(4\) CPA 2005](#). As set out above this applies unless the court "otherwise orders". Interest is calculated at the prescribed rate as from the date the order was made or any other date ordered by the Court [section 101\(4\) CPA 2005](#). The Application for Assessment (Form A3) requires a party to calculate interest to a convenient date. The prescribed rate of interest is found in clause 36.7 UCPR 2005.
2. **Application for Assessment:** If costs are not settled by negotiation, the Costs Applicant will prepare an Application for Assessment of ordered 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.
3. **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. A list of Common Objections is available on the Supreme Court website.
4. **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.
5. **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 Costs Assessor will also determine which party is liable for these costs and an invoice will be sent to the parties requiring payment of the amount of the costs assessor's fees. 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.
6. **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

*Assessment of Ordered Costs is conducted pursuant to sections 63 to 80 LPULAA and in particular, clauses 32 to 34, 36 to 43 LPULAR.*

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