



21 May 2014

CHIEF JUSTICE'S REVIEW OF THE COSTS ASSESSMENT SCHEME

Introduction

On 7 September 2011, I announced that I was instigating a comprehensive review ("the Review") of the Costs Assessment Scheme provided for by Chapter 3, Part 3.2, Division 11 of the *Legal Profession Act 2004* ("the Scheme").

I instigated the Review of the Scheme, as it appeared there were strong grounds to examine whether the legislation, principles and procedures underpinning the Scheme's operations continued to support the just, quick and cheap resolution of costs disputes.

The Review was undertaken by the Honourable Justice Paul Brereton AM RFD, with the support of a committee of representative stakeholders. Following the receipt and review by his Honour and the Committee of 39 responses from peak professional bodies, current and retired costs assessors, costs consultants, commercial and government lawyers and self-represented litigants, his Honour prepared a report, which detailed the Committee's Recommendations for proposed reforms to the Scheme and the reasons for the proposed reforms ("the Report").

On 12 March 2013, I published the Report in order to give the legal and broader community a final opportunity to comment on the proposed future structure and operation of the Scheme. Comments in relation to the Recommendations were invited. The Court received further comments from stakeholders, which I have examined with the assistance of Justice Brereton, the Principal Registrar of the Court and the Manager, Costs Assessment.

Outcome of the Review

I have decided to accept the Recommendations made by the Committee for the reform of the costs assessment process, subject to the comments I make below concerning particular Recommendations and other relevant matters.

Recommendation 3

- The Committee recommended that the 60-day limit in which a law practice can apply (under current *Legal Profession Act*, s 351) for assessment of a bill from another law practice retained by it should apply also to objections by a law practice to such a bill in an application under s 352. This recommendation will be superseded by the Legal Profession Uniform Law, which does not preserve the 60-day limit for such assessments.

Recommendation 8

- The Committee recommended an amendment to the structure of filing fees in line with Recommendations 12, 13 and 14 with regard to the facilitation of early estimates. Recommendation 8 proposed that an initial filing fee of \$250 would be payable by the costs applicant on lodgement of an application for assessment, and an *ad valorem* fee of 1% of the costs in dispute be payable on objection to an early estimate, by the objecting party.
- I have decided not to accept this Recommendation due to the adverse financial impact caused to the Court in reducing the current filing fee. Such a reduction would inevitably have an adverse bearing on the resources made available to the Court for the administration of the Scheme. I am of the view that the current structure of filing fees should remain the same, namely, that the fee on filing an application for costs assessment is the greater of \$100, or 1% of the unpaid bill, or 1% of the total costs in dispute.
- I observe in deciding not to accept this Recommendation that the Manager, Costs Assessment, currently has the discretion to waive or postpone in whole or in part the fee on filing an application for costs assessment if satisfied of serious hardship.

Recommendation 27

- Given the terms of Recommendation 15, that a party who objects to an early estimate be required to pay, or re-pay, or give acceptable security for, the amount of the early estimate as a condition of objection, it is apparent that Recommendation 27.2 (dealing with issue of interim certificates after an early estimate) is redundant.
- In those circumstances, I do not accept Recommendation 27.2

Recommendation 28

- The Committee recommended that costs assessors be given the discretion to conduct an oral hearing in appropriate cases, and the appropriate and ancillary powers in accordance with Recommendation 13.3. A number of stakeholders who provided comments in relation to the Report, including the Law Society of New South Wales, did not support this Recommendation. Stakeholders posed questions, such as

whether the rules of evidence would apply, whether transcript would be required, and whether oral hearings would be conducted in the normal course.

- I have accepted this recommendation on the basis that what is proposed is the discretion, for use by costs assessors in appropriate cases, to conduct oral hearings, not a mandatory procedure. Barrister/ Solicitor Arbitrators have for many years conducted hearings, in their offices or boardrooms, under the Civil Arbitration provisions. Some issues in costs assessments involve disputed questions of fact. In other cases, it may be quicker and cheaper for a costs assessor to conduct an oral hearing rather than receive lengthy exchanges of written submissions.
- I make the observation in relation to this Recommendation that I consider oral hearings will be conducted by costs assessors in exceptional circumstances, not in the normal course. I also observe that oral hearings are not to be conducted for the purpose of resolving mere questions of quantum, and that a costs assessor may require a party requesting an oral hearing to pay the costs of such hearing in the first instance.

Recommendation 29

- In comments received following the publication of the Report, concerns were raised that the reforms proposed by Recommendation 29 conferred greater powers on costs assessors than is currently the position. Those comments included that costs assessors should have no power to determine points of law on documents or facts, other than whether parties had entered into a costs agreement.
- It is my view that Recommendation 29 clarifies the existing position to put it beyond argument, and that costs assessors should determine all questions that arise in a costs assessment. I observe that the intent of this recommendation is to ensure that such decisions do not found an issue estoppel.

Recommendation 55

- While I accept in principle the recommendation for establishing an on-line forum for costs assessors, implementation of this recommendation will be deferred pending the availability of resources.

Legal Profession Uniform Law Application Bill 2014 (NSW)

- All of the Recommendations that I have accepted must now be considered in light of the recent introduction in NSW of the Legal Profession Uniform Law Bill, and integrated as necessary.
- Part 4.3 of the Legal Profession Uniform Law contains the uniform provisions in respect of costs assessment. These are confined to assessments between law practices and clients (and any third parties), and are supplemented in Part 7 of the NSW

Uniform Law Application Bill. Part 7 of the Application Bill also makes provision in respect of party/party assessments, including by applying Part 4.3 of the Uniform Law to party/party assessments. Under this Bill, many costs assessment procedures are to be covered by Rules, rather than contained in the Act.

- The Court has provided very detailed comments, and drafted changes which should be made to the current structure and arrangement of Part 7, in order that Part 7 of the NSW Application Bill may reflect the important reforms set out in the Recommendations.

It is apparent that in accepting the Recommendations (subject to the comments made above) considerable law reform and new regulations and rules will be required to give effect to and implement the reforms set out in the Recommendations. I propose to bring these proposals for reform to the attention of the New South Wales Attorney General.

I take this opportunity to extend my sincere thanks and gratitude to the Honourable Justice Brereton for the considerable undertaking in analysing the submissions put forward for the Review and in preparing the Report. Without his Honour's tireless work and dedication to the undertaking, the Review could not have achieved the many and important reforms that have been proposed.

I also extend my thanks to the Committee for their important contribution to the Review and for the considerable time they spent in reviewing the material and discussing their views and opinions with Justice Brereton. The comments from stakeholders at all stages of this process have all been considered and their contribution is greatly appreciated.



The Hon T F Bathurst
Chief Justice