Supreme Court
of New South Wales

REPORT

OF THE

CHIEF JUSTICE'S

REVIEW

OF THE

COSTS ASSESSMENT SCHEME

7 September 2011

CHIEF JUSTICE'S REVIEW OF THE COSTS ASSESSMENT SCHEME

Introduction

In response to longstanding and growing concerns about the complexity and inefficiency of the traditional system of taxation of costs, the Legal *Profession Reform Act 1993*, established the Costs Assessment Scheme, now provided for by Chapter 3, Part 3.2, Division 11 of the *Legal Profession Act* 2004. The Scheme was the first of its type in Australia.

The Costs Assessment Scheme was intended to provide parties and legal practitioners with a more just, quick and cheap system for resolving costs disputes by: substituting "fair and reasonable costs" for "necessary and proper costs" as the applicable test; having legal practitioners with experience in the commercial conduct of a legal practice act as Costs Assessors; and by reducing the formality and detail of procedures in favour of a less adversarial and more "broad-brush" approach.

Because the Scheme was set up to resolve disputes involving legal practitioners and their clients, it has the unique potential to influence both professional behaviour and consumer expectations about the fairness and reasonableness of legal costs. However, despite the passage of nearly twenty years, it is apparent that the opinion of both the profession and the public about what constitutes fair and reasonable legal costs remain as strong and varied today as when the Scheme commenced.

Against that background, there would appear to be strong grounds to examine – for the first time – whether the legislation, principles and procedures underpinning the Scheme's operations, which have remained virtually unchanged since 1993, support the just, quick and cheap resolution of costs disputes.

I am therefore instigating a comprehensive review of the Costs Assessment Scheme as defined by Chapter 3, Part 3.2, Division 11 of the *Legal Profession Act* 2004, to be undertaken by a Judge of the Court, with appropriate advice from other sources including the Bar Association, the Law Society and the Legal Services Commissioner, to report in the first instance to me.

Terms of Reference

The Review will examine and report how effectively the Scheme is achieving the aims of providing a just, quick and cheap resolution of costs disputes. Without limiting the generality of its inquiry, the review will consider how the Scheme is performing and how it might be enhanced in the following respects:

- producing outcomes that are substantively just, in the context of the realities and costs of modern litigation and the current costs of legal services;
- providing parties an appropriate measure of procedural fairness;
- the speed and simplicity of the process;
- the adequacy of the process in supporting and enabling Costs Assessors to determine applications;
- the transparency and consistency of the process and outcomes;
- the promotion of the efficient resolution of costs disputes;
- the cost of the process;
- the qualifications, selection, appointment, education and remuneration of Costs Assessors;
- whether it would be desirable for guidelines to be established and published, for example as to items and rates generally allowed or disallowed; and
- in light of the above, whether enabling legislation and regulations should be amended.

Suggested reference material

The following resources may assist those interested in providing a comprehensive response to the Terms of Reference:

- Division 11 of the Legal Profession Act 2004 and its associated Regulations;
- the Costs Assessment section of the Court's website, and
- the statistics set out in the Annexure on filings and current average waiting times.

These are suggested resources only. There is no need to feel limited to these information sources, nor compelled to refer to them in any submission.

Making a submission to the Review

The Court invites written submissions in response to these Terms of Reference from any interested person. Responses may be expressed in the form of opinion, observation and/or recommendation, and can address one, multiple, or all of the Terms of Reference. Although it is not at this stage proposed to receive oral submissions, the Review may decide to convene a symposium at which relevant issues may be raised and discussed.

The Review may incorporate submissions received by it into proposed Rules governing the operation of the Scheme, or proposed amendments to the enabling legislation for consideration by the Attorney General. If it is desired that a submission be treated confidentially, that should be clearly stated.

Written submissions can be provided by:

Email (preferred):	supreme_court@courts.nsw.gov.au (include "Attn: CEO & Principal Registrar- Costs Assessment Review" in the subject line)
Post:	Costs Assessment Review Ms Linda Murphy CEO & Principal Registrar Supreme Court of New South Wales GPO Box 3 SYDNEY NSW 2001

The closing date for submissions is 31 October 2011

Chief Justice

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LIST OF ABBREVIATIONS

LPA	Legal Profession Act 2004
LPR	Legal Profession Regulation 2005
DAGJ	Department of Attorney General and Justice
MCA	Manager, Costs Assessment
ADR	Alternative Dispute Resolution
FCR	Federal Court Rules 2011
CPA	Civil Procedure Act 2005
BASIL	Brothers and Sisters in Law Incorporated
OLSC	Office of the Legal Services Commissioner
CARC	Costs Assessment Rules Committee
NSWYL	New South Wales Young Lawyers
NLSC	National Legal Services Commissioner

EXECUTIVE SUMMARY

1. In the second decade of the twenty-first century, neither the administration of justice generally, nor litigants or consumers of legal services individually, can afford the time and expense involved in approaches to the resolution of costs disputes that involve detailed examination akin to traditional taxation. A more robust approach to the assessment of costs is required, albeit at the cost of precision and perfection in the process. This has been one of the objects of the Costs Assessment Scheme, from its introduction in 1993. While the Scheme has achieved its objects in part, there remain concerns, fundamentally about the time the process takes, and consistency and predictability of outcomes. As it is inherent in the costs context that there will always be a party liable to pay another, it is almost invariably in the interest of the liable party to protract the process, thereby keeping the other party out-of-pocket. Accordingly, the costs assessment process should promote the early resolution of costs disputes, by removing incentives for delay, and providing incentives for early resolution, even at a discount.

2. This Review therefore makes a number of recommendations for reform of the costs assessment process. These include reforms to:

2.1. the process for instituting an assessment proceeding,

2.2. the conduct of the assessment process,

2.3. the effect and consequences of determinations, and

2.4. the review and appeal process.

3. The most significant reforms will rearrange the assessment process, in an attempt to ensure that the real issues in dispute are identified and resolved at an early stage, more efficiently and at the least cost to the parties and the court system, and to provide effective incentives for expeditious resolution and compromise. The revised process that the Review recommends can be summarised as involving the following steps:

3.1. The costs applicant must file an application for assessment with the Manager, Costs Assessment (MCA), at which time only a nominal filing fee (say $250) is payable.

3.1.1. In the case of a party/party application, the application must be accompanied by an account of the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to be assessed, although not necessarily in the itemised detail that would formerly have been required for taxation.

3.1.2. In the case of a practitioner/client application, the application must be accompanied by a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to be assessed, although not necessarily in the itemised detail that would formerly have been required for taxation.

3.1.3. In the case of a client/practitioner application, the application must be accompanied by any bill for the costs that the client has been given, and a statement setting out, so far as reasonably practicable given the form of such bill, the client's objections, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, and dealing with the items compendiously rather than re-iterating the same objection item-by-item.

3.1.4. Where the application does not comply with these requirements, the MCA must reject it.

3.2. The costs respondent must, within 28 days (or such further time as the MCA may allow), file a response with the MCA.

3.2.1. In the case of a party/party application, the response must set out the respondent's objections to the account, identifying each component of the account that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the account as distinct from the detailed items, and dealing with the items compendiously rather than re-iterating the same objection item-by-item.

3.2.2. In the case of a practitioner/client application, the response must set out the respondent's objections to the bill, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, and dealing with the items compendiously rather than re-iterating the same objection item-by-item.

3.2.3. In the case of a client/practitioner application, the response must (to the extent any bill referred to in the application does not do so) be accompanied by a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation.

3.3. Upon a response being filed (or time to do so having expired), the MCA must:

3.3.1. Issue an interim certificate for any amount that is not in dispute; and

3.3.2. Refer the matter to an assessor. In a case where a response has been filed, the reference is for "contested assessment"; where no response has been filed, it is for "default assessment".

3.4. On a default assessment, the assessor must review the application and, except to

the extent they appear manifestly unreasonable:

3.4.1. In a party/party application, allow the costs in the sum claimed in the application;

3.4.2. In a practitioner/client application, allow the costs in the sum claimed in the application;

3.4.3. In a client/practitioner application, uphold the objections made in the application (and thus allow the costs claimed in the bill(s) referred to in the application at the difference between the amount claimed in the bill(s) and the amount of the objections).

3.5. On a contested assessment:

3.5.1. The assessor must convene a conference (by telephone or in person) to clarify the issues in dispute between the parties and determine the manner of proceeding.

3.5.2. Ordinarily at this point (but at the assessor's discretion at any later point before embarking on a full assessment), the assessor must make an "early estimate" of the amount of costs likely to be assessed, and communicate it to the parties. In the absence of objection within time to the early estimate, the assessor must make a determination that gives effect to it.

3.5.3. Either party may object to the early estimate, by notice to the assessor specifying the amount which the objecting party contends should be allowed in substitution for the early estimate, and which must be accompanied by a confidential offer of settlement to the other party. The objecting party must then pay the full filing fee (say 1% of the costs in dispute).

3.5.4. The assessor must then make directions for the further conduct of the assessment (which may involve written and/or oral evidence and submissions), as the nature of the matter requires.

3.5.5. After conducting the full assessment, the assessor must make a determination.

3.5.6. A party who objects to an early estimate and betters its offer of compromise is entitled to the costs of the assessment from the point of the early estimate. A party who objects to an early estimate and does not better its offer of compromise must, unless the Assessor otherwise determines, pay the costs of the assessment from that point (as it is conceivable that both parties may object but fail to better their respective offers, which necessitates the retention of an element of discretion).

3.6. Any party aggrieved by an Assessor's determination may apply to a Review Panel

for a review of the Assessor's determination.

3.7. An appeal (on any question) lies from a decision of a Review Panel (not direct from an Assessor) to the District Court (but only by leave if the amount of costs in dispute on the appeal does not exceed $25,000) or the Supreme Court (but only by leave if the amount of costs in dispute on the appeal do not exceed $100,000), with Supreme Court having power to remove and remit appeals from and to the District Court.

4. The intent of this process is to:

4.1. reduce delay by requiring that the "pleading" stage be closed, identifying the quantum and issues in dispute, prior to reference to an assessor;

4.2. providing for early payment of any amount not in dispute and removing it from the scope of the assessment;

4.3. enabling an approximate "early estimate" to be made;

4.4. providing powerful costs incentives for parties to make realistic offers of compromise; and

4.5. simplifying the review and appellate structure.

5. At the same time, recognising the protective function of the assessment process, it preserves the assessment of uncontested bills, but on a robust "default" basis in which the assessor's function is limited to a review of the application and the allowance of the costs claimed (or, in the case of a client/practitioner proceeding, the objections made) in the application, except to the extent that they are manifestly unreasonable.

6. In addition, the Review proposes a number of measures to increase the consistency and predictability of the assessment process. These include:

6.1. Establishing guidelines as to lump sum amounts that may ordinarily be allowed for routine or common applications (such as, but not limited, to uncontested windings-up, application under *Corporations Act,* s 459G; applications under *Conveyancing Act,* s 66G; and short appeals);

6.2. Establishing guidelines as to the circumstances and amounts in which commonly recurring items (such as hourly rates, senior counsel and photocopying charges) may ordinarily be allowed; and

6.3. Providing for publication of assessors' reasons for decision.

7. Other recommendations aim to resolve controversies and differences in interpretation and application of the current legislation.

8. Together, it is intended that this package of reforms will inculcate cultural change in the

manner in which parties approach the assessment process, increase the speed of resolution of costs disputes, increase consistency and predictability in decision-making, and facilitate the just, quick and cheap resolution of costs disputes.

SUMMARY OF RECOMMENDATIONS

The Review recommends that:

Applications for assessment

1. The current 12 month limitation period in which a client of a practice may object as of right to a practitioner/client bill be retained, except where a client has paid a bill, in which case it be limited to a period of 60 days after final payment.

2. Jurisdiction to extend time for objecting to a bill, where it is just and fair to do so, having regard to the delay, the reasons for the delay, and the prima facie merits of the dispute, be conferred on the MCA, whose decision should be reviewable as if it were a decision of a Registrar of the Supreme Court.

3. LPA s 352 be amended such that in an application under s 352, where the costs respondent is a law practice that could have applied under s 351, the costs respondent may object to the bill only with leave, such leave to be granted or withheld having regard to the reason for the failure to apply under s 351, any delay in raising objection, and the prima facie merits of the dispute. Jurisdiction to grant leave should be conferred on the MCA, whose decision should be reviewable as if it were a decision of a Registrar of the Supreme Court.

4. To remove doubt, the LPA be amended to clarify that an application for assessment of an interim bill can be made at any time until the time for application in respect of the final bill has expired.

5. LPR be amended to provide that, in party/party assessments, an application may be served at the address for service of a party in the proceedings in which the costs order was made.

6. LPR be amended to provide that in practitioner assessments, an application may be served (a) in any manner that has been agreed between the parties to a costs agreement; and (b) in any manner reasonably calculated to bring the application to the notice of the costs respondent authorized by the MCA, where the MCA is satisfied that personal service is not reasonably practicable.

7. LPA s 302A be amended to clarify that a beneficiary (other than a contingent or discretionary beneficiary) of a trustee client is within the definition of third party payer.

8. The structure of filing fees be amended in line with the recommendations to facilitate early estimates, as set out below in Recommendations 12, 13 and 14, such that an initial filing fee of say $250 (to cover the costs of the process up to early assessment) be payable by the costs applicant on lodging an application for assessment, and an *ad valorem* full fee of say 1% of the costs in dispute (to cover the costs of full assessment) be payable on objection to an early estimate, by the objecting party.

9. LPA s 317 be amended to provide that where a law practice has made disclosure in accordance with Division 3 of Part 3.2, such disclosure is to be considered disclosure on the part of any successor law practice, notwithstanding any subsequent changes in the constitution of the practice; and the Costs Assessment Rules Committee (CARC) make rules under LPA s 394 authorising Assessors to allow amendment of an application for assessment so as correctly to identify the parties, including where there is a change in constitution of a law practice.

The Assessment process

10. The current requirement of LPR cl 125 in party/party assessments that an application be served 21 days before it is filed be removed.

11. The CARC (in consultation with relevant stakeholders) make standard procedural rules governing the process of assessment, with discretion to vary or depart from them, and sanctions for default.

12. LPR be amended to provide that:

    12.1. A costs applicant must lodge with an application for costs assessment the initial filing fee (say $250) and:

        12.1.1. In the case of a party/party application, an account of the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation;

        12.1.2. In the case of a practitioner/client application, a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation; and

        12.1.3. In the case of a client/practitioner application, any bill for the costs that the client has been given, and a statement setting out, so far as reasonably practicable given the form of such bill, the client's objections, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item.

    12.2. Within 28 days after service of the application (or such further time as the MCA may allow), the costs respondent must file a response with the MCA, which:

        12.2.1. In the case of a party/party application, must set out the respondent's objections to the account, identifying each component of the account that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the account as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item;

12.2.2. In the case of a practitioner/client application, must set out the respondent's objections to the bill, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item;

12.2.3. In the case of a client/practitioner application, must (to the extent any bill referred to in the application does not do so) be accompanied by a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation.

12.3. Upon expiration of the time limited for filing a response, the MCA must:

12.3.1. Issue an interim certificate for any amount that is not in dispute; and

12.3.2. Refer the matter to an assessor, in a case where a response has been filed, for "contested assessment"; and where no response has been filed, for "default assessment".

12.4. On a default assessment, the assessor must review the application and, except to the extent they appear manifestly unreasonable:

12.4.1. In a party/party application, allow the costs in the sum claimed in the application;

12.4.2. In a practitioner/client application, allow the costs in the sum claimed in the application;

12.4.3. In a client/practitioner application, uphold the objections made in the application (and thus allow the costs claimed in the bill(s) referred to in the application at the difference between the amount claimed in the bill(s) and the amount of the objections).

13. LPR be amended to provide that, upon reference of an application to an Assessor for contested assessment, the Assessor may:

13.1. direct the parties to attend for a confidential conference to identify the real issues in dispute and reach a resolution of the dispute; and/or

13.2. before or after conducting a conference, make and issue an estimate ("early estimate") of the approximate total that is likely to be allowed on assessment, which will stand as the assessment unless objected to by either party; and/or

13.3. direct that the matter proceed to full assessment either on the papers or with attendance by the parties, in connection with which the Assessor may direct that the parties file submissions, summons and examine witnesses either orally or on affidavit, direct or require the production of books papers and documents, and issue subpoenas.

14. The greater part of the filing fee for assessment (being the difference between the initial filing fee and (say) 1% of the costs in dispute) be payable only when the matter is to proceed

to full assessment and (where there has been an early estimate) be payable by the party that has objected to the early estimate.

15. Unless the Assessor otherwise orders, and upon such terms as the Assessor may impose, a party who objects to the 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.

16. A party who objects to an early estimate be required as a condition of doing so to make a confidential offer to the other. A party who objects to an early estimate and betters its offer of compromise should be entitled to the costs of the assessment from the point of the early estimate. A party that objects to an early estimate and does not better its offer of compromise should, unless the Assessor otherwise determines, pay the costs of the assessment from that point.

17. The CARC make rules to the effect that where a detailed account or bill is required for the purposes of assessment, it must set out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed (although not necessarily in the itemised detail that would formerly have been required for taxation), with items so far as practicable grouped under heads of work.

18. The CARC (in consultation with relevant stakeholders) develop a standard list of objections, to be incorporated into standard forms of application and response.

19. The Supreme Court Registry develop a portal for the electronic lodgment and exchange of applications and responses in assessments.

20. The LPA be amended to make explicit that, where appropriate, global assessment of costs is permissible, including in particular (a) where the costs order is referable to legal services that have been provided on a fixed fee, or other non-time based, basis; and (b) where the matter is one of a type for which the CARC has promulgated a guideline amount.

21. The CARC (in consultation with relevant stakeholders) develop and promulgate guidelines specifying appropriate lump sum amounts to be allowed in routine matters (such as but not limited to uncontested windings-up, applications under *Corporations Act,* s 459G; applications under *Conveyancing Act,* s 66G; and short appeals), with Assessors having discretion to depart from them in a particular case for sufficient reason.

22. In addition to the power proposed under recommendation 13.1, the MCA be empowered, at an early stage or any stage, and on application of a party, or on the Manager's own motion, or upon request from an Assessor, to direct that the parties to an assessment participate in an ADR procedure, which may include mediation.

23. The MCA maintain a panel of suitably qualified persons for that purpose, which could include the OLSC and persons also appointed as assessors for that purpose.

24. The CARC (in consultation with relevant stakeholders) develop and promulgate time standards, that can be communicated to parties, for completion of assessments and reviews. It is suggested that these standards should provide for completion of an assessment by an

Assessor (and a review by a Review Panel):

24.1. where the disputed costs are less than $100,000, within three months of referral; and

24.2. where the disputed costs exceed $100,000, within six months of referral.

25. The CARC make rules providing for:

25.1. summary assessment, on application by a receiving party where the Assessor is satisfied that there is no genuine dispute as to the whole or part of the costs; and

25.2. default assessment, where a paying party defaults in compliance with a rule or direction.

26. LPA s 368 be amended to clarify that interim certificates create a payment obligation without prejudice to the final determination, and can be varied by subsequent certificates.

27. The CARC make rules to the effect that interim certificates will be issued (so as to require early payment, but without prejudice to the final determination) as follows:

27.1. Where at the expiration of time for filing a response, the difference between the bill and the objections exceeds the amount paid (if any) – that excess;

27.2. Where an early estimate has been made – an amount reflecting the estimate (unless the Assessor otherwise determines);

27.3. Where a party has obtained the setting-aside of a regularly obtained default assessment – the amount that would have been due in accordance with the default assessment but for its being set aside (unless the Assessor otherwise determines);

27.4. At any stage of the assessment process, on the application of the receiving party, where the costs assessor considers, without actually assessing the costs or determining particular items or objections, that an amount is likely to be due – that amount or any lesser amount.

28. Costs assessors be given the discretion to conduct an oral hearing in appropriate cases, and the appropriate ancillary powers in accordance with recommendation 13.3.

29. LPA s 359 be amended to provide explicitly that Costs Assessors are authorised to determine all anterior and ancillary questions necessary to resolve the application, but not so as to preclude the parties, by estoppel, from arguing such questions in subsequent litigation.

30. The facility afforded by LPA s 366 for the relevant Court or Tribunal itself to determine questions of party/party costs be preserved.

31. Judicial education programs and continuing legal education programs give emphasis to the power of courts to order lump sum costs, and to the potential public and private benefits of lump sum costs orders.

32. LPA s 317(4) be amended to provide that where there is a failure to disclose, the amount of the costs may be reduced on assessment to an amount considered by the costs assessor to be fair and reasonable in all the circumstances, having regard to the work done, the significance of the non-disclosure, the quantum of the costs, and the recoverability of those costs under any party/party order.

33. LPA s 317 be amended to provide explicitly that nothing in the section has the effect of postponing, deferring, diminishing or otherwise affecting the client's entitlement to recover the legal costs under a party/party costs order.

34. The CARC (in consultation with relevant stakeholders) develop and promulgate guidelines for assessors on whether, when and in what circumstances, and/or at what rate frequently occurring items would ordinarily be allowed on party/party assessments, including:

    34.1. hourly and daily rates for practitioners of varying seniority and in varying locations;

    34.2. office overheads such as copying, scanning, telephone, faxes, travel expenses, and administrative work,

    34.3. agency search fees and filing fees;

    34.4. research time;

    34.5. reviewing time;

    34.6. conferences between lawyers for the client;

    34.7. briefing senior counsel;

    34.8. retaining experts; and

    34.9. retaining agents.

35. The CARC (in consultation with relevant stakeholders) develop and promulgate recommended formats for reasons for determination.

36. Selected decisions of costs assessors be published on the Scheme website, with appropriate pseudonyms or other anonymisation.

Determinations

37. LPA s 363A be amended so that the interest to which a receiving party in practitioner/client or party/party assessment is entitled be included in the assessors' determination, and the certificate should contain the requisite particulars to enable the amount to be included in the deemed judgment arising from filing of a certificate of determination.

38. CPA s 101 be amended to the effect that interest accrues in respect of party/party costs from such dates and at such rate as the court in question may order and, in the absence of any

other order, from the date of the costs order at the rate applicable to a judgment debt.

39. LPA s 369 be amended to confer on costs assessors wider discretion in relation to costs of assessment of practitioner costs, including power to award such costs against the paying party.

40. LPA s 369 be amended so that default of the kind mentioned in s 317 should not automatically subject a receiving party law practice to liability for the full costs of assessment.

41. A regulation be made pursuant to LPA s 368(7) and 378(6) prescribing as circumstances in which a party is entitled to receive a certificate without payment of the costs of the assessor or panel as the case may be, where the law practice has been ordered to pay those costs and has failed to do so; and that failure to pay such costs so ordered within a prescribed time may amount to unsatisfactory professional conduct by the law practice concerned.

42. LPR cl 128 be amended by inserting new paragraphs in or to the following effect:
    (3) if the assessment has been conducted by taking an itemised account or bill of costs and allowing, disallowing or adjusting items, then what items have been allowed, disallowed or adjusted and how such items have been adjusted;
    (4) if the assessment has been conducted by the costs assessor coming to his or her own view of work reasonable to be carried out what work was thought reasonable to be carried out and how that work was costed.

43. LPR cl 134 be amended by inserting new paragraphs in or to the following effect:
    (3) if the review has been conducted by taking an itemised account or bill of costs and allowing, disallowing or adjusting items, then what items have been allowed, disallowed or adjusted and how such items have been adjusted;
    (4) if the review has been conducted by the panel coming to its own view of work reasonable to be carried out, what work was thought reasonable to be carried out and how that work was costed.

44. LPA s 370 be amended to clarify that an assessor need not give reasons for allowing costs that are not objected to; and should not disallow costs that are not objected to, except to the extent that they are manifestly unreasonable.

45. The MCA continue to monitor the information provided to the public to ensure that it is appropriate.

Reviews and appeals

46. The LPA be amended so that:

    46.1. in the first instance, a cost assessor's determination is only subject to review by a Review Panel (and not to appeal to the court);

46.2. the scope of the Review be limited to the part of the assessment and the grounds raised by the review application.

47. The CARC make rules requiring that:

47.1. a review applicant be required to lodge, with the review application, submissions identifying those parts of the assessment that are challenged, the grounds of the challenge, and any supporting argument;

47.2. the review respondent be permitted to respond; and

47.3. the applicant be permitted a reply.

48. The LPA and LPR be amended to create a simplified integrated appeal structure, with an overall supervisory jurisdiction reserved to the Supreme Court, such that:

48.1. An appeal lies only from a decision of a Review Panel (and not from an assessor at first instance);

48.2. Such an appeal lies (on questions of fact and of law):

48.2.1. to the District Court, but only by leave if the amount of costs in dispute in the appeal is less than $25,000;

48.2.2. to the Supreme Court, but only by leave if the amount of costs in dispute in the appeal is less than $100,000;

48.3. The Supreme Court may remit any appeal and/or application for leave to appeal to the District Court, and remove such proceedings in the District Court into the Supreme Court.

48.4. Such an appeal be by way of rehearing (not *de novo*), with further evidence receivable by leave.

Other matters

49. The office of the Manager, Costs Assessment be transferred into the Registry of the Supreme Court, such that the MCA be an officer of the Supreme Court, whose decisions as such are subject to Review as decisions of a Registrar of the Court.

50. LPA, s 394, be amended to extend the membership of the Costs Assessors Rules Committee to include a Judge of the Supreme Court nominated by the Chief Justice, and a Judge of the District Court nominated by the Chief Judge.

51. Proof of an adequate understanding of the LPA and LPR, legal practice and costs practice, be a mandatory requirement of applicants in the selection process.

52. In the selection process, applicants for appointment as Assessors be required to provide

referees who can attest to their relevant knowledge and competence in respect of legal practice, costs practice, and the LPA and LPR.

53. A program of continuing education for assessors be maintained through an induction session and an annual seminar, and should address, where appropriate and relevant, not only the role of the costs assessor and the costs assessment process, but also the philosophy and purpose of the scheme and how it complements the disciplinary regime, the role of the OLSC, the role of the professional associations and new practice issues. To accommodate this, the annual seminar could be extended to two days if and when the amount of subject matter warrants it. The CARC, the OLSC and the Costs Users Group should be consulted in the development of the content of the induction session and annual seminar.

54. The MCA, in consultation with the CARC, issue updating circulars to Costs Assessors on recent developments as and when appropriate.

55. The MCA establish an on-line forum for costs assessors.

56. The hourly remuneration rate for assessors be reviewed and increased to at least $250 per hour.

1 INTRODUCTION

1.1 History and Background

1.1.1 In 1993, the long-standing procedure of taxation of disputed costs, by taxing officers of the court (both as between party and party, and as between solicitor and client) was replaced by a new process of assessment of costs by part-time costs assessors, appointed from the ranks of the profession.[1] Prior to the (NSW) *Legal Profession Reform Act 1993*, disputed costs – both those payable as between party and party pursuant to a court order, and those between solicitor and client – were resolved by taxation by a taxing officer, who was a court officer – typically a deputy registrar – often with limited experience of private legal practice. The process was time-consuming and laborious. Considerable delays, during which parties were kept out of funds to which they were entitled, were encountered. The taxing officers were guided by fixed scales of costs, both for contentious and for non-contentious business.

1.1.2 The 1993 Reform Act substituted for taxation by taxing officers the procedure of assessment by costs assessors, being lawyers appointed by the Chief Justice, who were required to assess what were the "fair and reasonable" costs – as distinct from the former concept of "necessary and proper" costs – in the context that the scales were abolished. It is apparent from the Second Reading Speech upon introduction of the Bill, by the then Attorney General and Minister for Justice, the Honourable J.P. Hannaford, that the intention underlying the substitution of assessment for taxation included the reduction of complexity and time; the use of assessors with experience in the commercial world of running a legal practice; and the adoption of a "faster, easier and cheaper system of review of bills of costs", including a less adversarial approach. The key element was seen to be the "assessment of the fair and reasonable costs having regard to all the circumstances of the legal service":[2]

> *Division 6 introduces a new system of assessment to replace taxation of costs. There are a number of problems with the system of taxation. The taxation process in New South Wales is overly formal, legalistic and complex. The name of the process lends itself to considerable confusion. It is unlikely that any but the most sophisticated consumers of legal services understand the term "taxation" in this obscure usage.*

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[1] This was first effected by the (NSW) *Legal Profession Reform Act 1993*, which enacted a new Part 11 of the *Legal Profession Act 1987* (1987 Act) with respect to legal fees. The costs assessment scheme in Part11 of the 1987 Act was re-enacted with relatively little change in LPA, Part 3.2.

[2] The Hon J.P. Hannaford, NSW Legislative Council Parliamentary Debates, Hansard, NSW Legislative Council, 16 September 1993, 3269ff. See also *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, 731 (Priestley JA).

The system is also adversarial, requiring an application to the court and often representation by a solicitor to seek taxation of costs. The system is unnecessarily complex and artificial with court officials spending lengthy periods going through piles of documents to determine a "winner" and "loser" on the issue of what is a fair bill for service. The Legal Fees and Costs Board recently drew attention to problems with the system of taxation. The board noted that the decision-making process in taxation is unnecessarily complex and time consuming. The board also noted that taxation is carried out by court officers who often occupy the position of a taxing officer in a transitory capacity, have little or no experience in the commercial world of running a legal practice and little or no knowledge of the intricacies of the day-to-day activities of legal practice.

All of these criticisms relate to taxation of both party-party matters and solicitor-client matters. In addition, in solicitor-client matters there are also severe cost risks in seeking taxation of a solicitor's account. Section 203 of the Legal Profession Act provides that unless the taxation officer reduces the bill by at least one-sixth the applicant, being the client, must bear the full costs of the taxation process. Though there may be scope to improve the taxation system by making it more accessible, less formal and less costly, it is my view that a system reliant upon taxation by court officers will always suffer from the problems identified by the Legal Fees and Costs Board. These problems will be exacerbated when fees are deregulated. If retained, the taxation officers would have less guidance as there will not be any set scale rates to apply and they would therefore have a greater discretion in determining what is a reasonable fee. Clearly, what is needed is a faster, easier and cheaper system of review of bills of costs. It may not be possible to achieve this by reform of the taxation process which is heavily based on an adversarial approach.

The Legal Fees and Costs Board suggested that the system of taxation be replaced by a system of assessment of costs by practitioners well versed in the running of a legal practice. Such persons would be part-time assessors appointed by the Supreme Court. The Chief Justice has indicated his support for this proposal. In commenting on the recommendation of the legal fees and costs board the Chief Justice noted "I would support the proposal that, subject to appropriate rights of appeal to a judge, taxation of costs be undertaken in the first instance by assessors taken from the ranks of legal practitioners, rather than by court officials who are public servants. I think it is fair to say that legal practitioners would be far more in touch with current rates payable in the market for legal services".

The key element of the proposed assessment scheme is assessment of the fair and reasonable costs having regard to all the circumstances of the legal service. The matters for assessors to consider in determining the fair and reasonable costs are set out at new sections 208A and 208B. Assessment is available to a client as against a practitioner and, by operation of new section 200, as between practitioners. The assessor will deal mainly with documents, determining whether they show that the amounts charged are commensurate with the services received.

The assessor may require the parties to lodge additional information or to appear in person to explain any matters which are not readily available, or are not clear, from the documents.

.... The assessment system will also replace taxation in relation to party-party costs.

1.1.3 In the United Kingdom also, the terminology was changed from that of taxation to assessment; however, in practice that change appears to have been nominal only, with the process of "detailed assessment" not differing from a traditional taxation, while "summary assessment" involved the court making a lump sum order. In New South Wales, however, it is tolerably clear that it was intended that the change in name be reflected by a change in the approach and process.

1.1.4 There have been many amendments to the legislation since 1993, but the underlying structure and intent has not significantly changed. The three central reforms made by the 1993 legislation were (1) the deregulation of practitioner/client costs; (2) the adoption of a new system, broadly described as a 'user pays' scheme, whereby the quantification of practitioner and party/party costs was contracted out to private practitioners holding statutory appointments as costs assessors in lieu of centralised determination by court officials; and (3) the adoption of 'fair and reasonable' as the criteria for assessment of party/party costs as well as of practitioner costs (LPA s 364). The evident goal of adopting common 'fair and reasonable' criteria for party/party as well as for practitioner costs was that a successful litigant who conducts litigation in the manner of a hypothetical reasonably prudent person and who has the expectation of meeting their own costs from their own resources and has adequate but not extravagant means should be fully compensated for costs by an ordinary party/party costs order.[3] In his second reading speech on the *Legal Profession Reform Bill (No 2) 1993*, which was enacted as the *Legal Profession Reform Act 1993*, the Attorney General said:[4]

The current system of taxation of party-party costs creates injustice and confusion. It means that even though a successful litigant is awarded costs against the other party he or she may be out of pocket for a significant amount. This is because party-party costs are those "necessary and proper" while solicitor-client costs are "all costs save those which are of an unreasonable amount or have been unreasonably incurred". It is proposed to abolish this distinction and that, subject to the judicial discretion to vary the basis of awarding costs, the criterion for awarding costs should be those reasonably incurred. The client would then recover the full costs which he or she is required

[3] The 'fair and reasonable' criteria are subject to fixed costs provisions and, in the case of practitioner costs, subject to contract unless varied: see LPA ss 319, 328.

[4] Hon J.P. Hannaford MLC, NSW Legislative Council Parliamentary Debates, Hansard, 16 September 1993, at 3278.

to pay other than any unreasonable costs. There is significant support for this proposal. The current system of taxation has been criticised by a number of judges over recent years. In Singleton v Macquarie Broadcasting Holding Ltd *[(1991) 24 NSWLR 103] Justice Rogers, as he then was, noted: "It seems to me wholly inappropriate that a party, forced to take legal proceedings entirely through the wrongful and inappropriate conduct of the other party, be left badly out of pocket at the successful conclusion of the proceedings, simply by reason of an inappropriate method of taxation of costs".*

His Honour has made similar critical statements in other judgments. The need for reform in this area is very clear. Recently, the Legal Fees and Costs Board in a report on the system of taxation of party-party costs also drew attention to this problem. The board noted that because of the restrictive tests used in assessing party-party costs a successful litigant may recover only a limited proportion of the actual costs incurred. The board noted: "In large commercial cases, the party-party costs may well amount to only 40% of the whole of the costs; often even less. In ordinary personal injury cases, the party-party percentage is often less than 60%. This means that the successful litigant is subsidising his or her unsuccessful adversary.

These problems have been rectified in the bill at new sections 208F and 208G by providing that the costs in proceedings will be dealt with under the assessment process and on the same basis as in practitioner-client matters, being the fair and reasonable costs. Thus successful litigants should expect to receive all the legal costs they have incurred, except in the clear instances where costs in excess of that which may be determined as reasonable have been incurred with the express consent of the client.

1.2 Legislative authority and framework

1.2.1 The Costs Assessment Scheme is established by LPA, Part 3.2, Division 11 (Costs assessment), the content of which is as follows:

Subdivision 1 – Applications

349A	Definition
350	Application by client or third party payers for costs assessment
351	Application for costs assessment by law practice retaining another law practice
352	Application for costs assessment by law practice giving bill
353	Application for assessment of party/party costs
354	How to make an application for costs assessment
355	Consequences of application
356	Persons to be notified of application
356A	Regulations

Subdivision 2 – Assessment

Subdivision 3 – Party/party costs

Subdivision 4 – Determinations

Subdivision 5 – Review of determination by panel

Subdivision 6 – Appeals

384 Appeal against decision of costs assessor as to matter of law
385 Appeal against decision of costs assessor by leave
386 Effect of appeal on application
387 Assessor can be party to appeal
388 Notices of appeal
389 Court may refer unreviewed determination to review panel

Subdivision 7 – General

390 Costs assessors
391 Protection from liability
392 Confidentiality
393 Referral for disciplinary action
394 Rules of procedure for applications
395 Division not to apply to interest on judgment debt
395A Contracting out of Division by sophisticated clients

1.2.2 The relevant content of the LPR is contained in Division 5 (Costs assessment—Division 11 of Part 3.2 of the Act), as follows:

Subdivision 1 – Assessments (other than party/party costs)

119 Application of Subdivision
120 Approved forms
121 How to make an application for costs assessment—section 354(1) of the Act
122 Procedure before application for assessment of bill referred to assessor

Subdivision 2 – Assessments (party/party costs)

123 Application of Subdivision
124 How to make an application for assessment of party/party costs—section 354 (1) of the Act
125 Procedure before application for assessment of party/party costs
126 Determination of costs of party/party costs assessment—section 369(3)(b) of the Act

Subdivision 3 – Assessments (general)

127 Information relating to assessment of costs
128 Certificate of determination of costs and statement of reasons—section 370 of the Act
129 Circumstances in which assessor may not refuse to issue certificate—section 368 of the Act
130 Reference of applications to assessors

Subdivision 4 – Reviews

131 Application for review of determination—section 373(2) of the Act
132 Delivery of application for review and related documents
133 Copy of certificate of determination to be given to Manager, Costs Assessment
134 Statement of reasons—section 380 of the Act
135 Circumstances in which panel may not refuse to issue certificate in respect of determination of review—section 378 of the Act
136 Determination of costs of review—section 379(1) of the Act
137 Qualifications for membership of panels
138 Reference of applications to costs review panels

1.2.3 In conducting an assessment of legal costs payable as a result of an order made by a court or tribunal, the costs assessor must consider (a) whether or not it was reasonable to carry out the work to which the costs relate, (b) whether or not the work was carried out in a reasonable manner, and (c) what is a fair and reasonable amount of costs for the work concerned.[5]

1.2.4 Assessment based on criteria of what is fair and reasonable necessarily leaves significant room for discretion.[6] As Giles JA said in *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278, the assessment process requires costs assessors to bring to bear their experience and judgment as legal practitioners and evaluate what work was reasonable and what is a fair and reasonable amount of costs for it.

1.2.5 The present costs assessment scheme has a slender preliminary stage, which is controlled by the MCA, who is nominally an officer in the Department of Attorney General and Justice (DAGJ), though in practice has also been a Deputy Registrar of the Supreme Court. The Manager's functions in this stage are limited to the receipt of applications (ss 350 – 353), receipt of filing fees – or the waiver or postponement of such fees (s 354), notification of persons 'concerned' (s 356), and referral of applications to assessors (s 357). The substantive assessment process is entirely outsourced to costs assessors. The Manager only becomes involved again after a determination is made (ss 328(10), 368, 369, 373, 373A, 374, 388), or if it becomes necessary to revoke a referral or re-assign it (s 357).

1.2.6 The legislation specifies criteria for costs assessment in very broad terms (ss 361 – 365), and excludes the rules of evidence (s 359(2)), but says almost nothing about the process of assessment itself beyond ss 358 and 359, mentioned above, and 365, which empowers an assessor to obtain and have regard to a costs agreement, but not 'apply' its terms in a party/party assessment. There is no provision let alone requirement for a costs assessor to conduct an oral hearing, and in practice the assessment process is conducted entirely

[5] (NSW) *Legal Profession Act 2004*, s 363(1) (practitioner), 364(1) (party/party).

[6] *Bouras v Grandelis* [2005] NSWCA 463, [130].

on paper, without a personal attendance before the assessor. An assessor has no power to take sworn evidence.[7]

1.2.7 There is no standard procedure. There is no standard form for any document by way of an account or bill in assessable form, objections, or replies to objections. No rule limits the number of submissions a party may lodge, or the content of submissions in reply. It is not unusual for parties to engage in numerous rounds of written submissions, or for new factual claims to be introduced in later rounds. Nor is there any clear distinction between the process of receiving evidence and finding primary facts, so far as those facts may be in dispute, and the process of receiving submissions. There is no real facility to test assertions of fact.

1.2.8 The use of telephone or electronic communication between assessors and parties to assessment is rare. Costs assessors are (correctly) reluctant to engage in undocumented communications with one party in the absence of the other, and are wary of being swamped by uncontrolled volumes of documentation arriving unbidden by fax or email.

1.3 Current Operation of the Scheme

1.3.1 Currently, there are 62 Assessors appointed by the Chief Justice, of whom 56 are active, the balance not taking further assignments due to ill health or other reasons. There are a further four assessors are appointed by the President of the Dust Diseases Tribunal to conduct assessments pursuant to orders of that Tribunal. Twenty-three assessors are appointed as Review Panelists.

1.3.2 Of the assessors, seventeen are barristers; the remainder are solicitors and include sole practitioners and partners in small to large firms. Some assessors are retired and/or semi-retired. One is a retired Family Court judge. Assessors are assigned matters having regard to their specialist fields of practice and expertise.

1.3.3 In 2008, 1,556 applications for costs assessment were lodged, comprising:

- Party/Party: 931 (60 %)
- Client/Practitioner: 169 (11 %)
- Practitioner/Client: 331 (21 %)
- Reviews: 125 (8 %).

1.3.4 In 2009, 1,991 applications were lodged (an increase of about 25%), comprising:

- Party/Party: 1081 (54 %)
- Client/Practitioner: 253 (13 %)
- Practitioner/Client: 502 (25 %)
- Reviews: 155 (8 %)

1.3.5 In 2010, 1,862 applications were lodged (a decrease of about 6%), comprising:

- Party/Party: 1005 (54 %)

[7] *Ryan v Hansen* (2000) 49 NSWLR 184, 191, 193 (Kirby J).

- Client/Practitioner: 209 (11 %)
- Practitioner/Client: 461 (25 %)
- Reviews: 187 (10 %).

1.3.6 In 2011, 1917 applications were lodged (an increase of 3%), comprising:

- Party/Party 915 (48%)
- Client/Practitioner 192 (10%)
- Practitioner/Client 590 (30%)
- Reviews 220 (12%).

1.3.7 In the eleven months to November 2012, 1626 applications were lodged, comprising:

- Party/Party 734 (45%)
- Client/Practitioner 220 (14%)
- Practitioner/Client 515 (32%)
- Reviews 157 (9%).

1.3.8 As at the end of August 2010, there were 678 applications pending (down from 860 in May), comprising 400 party/party, 181 practitioner/client, and 97 client/practitioner. The average age of the pending workload was 4.3 months from assignment to present date (down from 5.7 months in May). In the seven months from 9 February 2010, 717 assessments were completed. The amounts in dispute averaged $59,650. The average costs of the costs assessment were $1,164 (down from $1,200 in May 2010), indicative of about 6 hours work by an assessor. The average time from assignment to completion was about 5.7 months (maximum 20 months, minimum 3 days) (up from 4.1 months three months ago, reflecting the clearance of outstanding matters and producing the reduction in the age of the pending workload). One pending practitioner/client application involved a bill for $4 million (requiring a $40,000 filing fee). Another practitioner/client assessment involved 38 related applications in respect of a total of about $4 million. The smallest application was for $378; it cost $385 to process. There were approximately 70 reviews assigned to Review Panels.

1.4 Some emergent issues for the Review

1.4.1 The primary goal of the costs assessment scheme is relatively simple: to provide a just and efficient mechanism by which persons who are entitled to payment of or indemnity for legal costs can prove and recover those entitlements, and by which persons with a corresponding liability can have the extent of their liability fairly determined. Delay in the recovery of legal costs to which a person is entitled is widely recognised as an endemic problem. Whether in the context of practitioner or party/party costs, delay in recovery causes the greatest harm to those least able to bear it. This is so, whether the person entitled to costs is a litigant or a practitioner. Many litigants are individuals or small businesses for whom the costs of litigation would be crippling, but for the right to recover costs from an adverse party or insurer. Many practitioners are individuals – in commercial terms, small businesses or micro-businesses – and may be commercially weaker than their client, or an adverse party or insurer who is liable to pay their client's party/party costs.

1.4.2 It seems to have been an underlying assumption of the Scheme when introduced that experienced practitioners would be able to make a global determination of what a particular piece of legal work should reasonably cost, having regard to its characteristics and history, without the need for the kind of detail and itemisation that had been customary in the taxation of bills of costs, and therefore more quickly and efficiently than under the former regime. However, the practice of costs assessment has largely proceeded by reference to itemised bills, very similar in form to those previously presented for taxation. The itemised bill is usually accompanied by a general chronicle or justification, to which a paying party responds by general and itemised objections, which the receiving party answers by general and itemised responses. This procedure is not mandated by the legislation, which sets out no standard procedure at all, but gives the costs assessor power to require documents and information (s 358)[8] and an obligation to receive and consider written submissions (s 359).

1.4.3 This apparent assumption of the legislature, that global assessment would become the norm, has not been realised. That may be because the underlying assumption was unsound. It is also understandable that, in the absence of any other framework, lawyers and litigants (particularly paying parties) would continue to press for itemised assessment, and that costs assessors would be reluctant, given the obligation in s 359 to give 'due consideration to any [written] submission so made', to embark on a radically different course. To some extent, this approach has been encouraged by judicial decisions.[9] One significant question for consideration is whether and to what extent global assessment should be a feature of the assessment process, and if so how it can be promoted.

1.4.4 The relatively amorphous character of the assessment process has been criticised as a cause of delay in many of the submissions received by the Review. The challenge is to reduce delay while retaining such of the elements of the present system as are considered to be fundamental or beyond reconsideration by the present Review, and without unduly truncating the rights of parties, nor removing the important protective role of the assessment process. For the purposes of this Review, it has been assumed that the deregulation of practitioner costs, the 'fair and reasonable' criteria for party/party costs, and the 'user pays' funding model for the assessment process are not open to general reconsideration.

1.4.5 A number of impediments to the early resolution of costs disputes have been identified in the submissions received by the Review. These include the (inadequacy of) interest provisions, the (under) utilisation of ADR, and the absence from the process of clear, enforceable, procedural steps. These problems can be addressed in a number of ways. One strategy is to remove incentives for delay, and to create incentives for early resolution and payment. Another is to streamline the procedural features of assessment by providing a faster track to assessment and/or payment, or to limit the steps that can be

[8] Unless otherwise indicated, references are to sections of the LPA.

[9] The cases are summarized and discussed by White J in *Cassegrain v CTK Engineering* [2008] NSWSC 457, [76]–[92] (Unreported judgment of White J, 15 May 2008).

taken in the assessment process or the time in which they can be taken. The Review considers that a combination of these strategies is appropriate.

1.4.6 This Report will consider the issues raised in the Terms of Reference as they relate to each of the steps in the costs assessment process, taking those steps as they appear in the structure of Division 11 of the LPA, namely: Applications (Subdivision 1), Assessment (Subdivision 2-3), Determinations (Subdivision 4), Reviews (Subdivision 5), Appeals (Subdivision 6) and General matters (Subdivision 7).

1.5 Terminology and distinctions

1.5.1 This Review draws a number of important distinctions.

1.5.2 The first is between practitioner assessments, and party/party assessments. The first category, practitioner assessments, itself comprises two sub-categories. The first of these comprises claims by a law practice on its client, on another law practice that has retained the first on behalf of the client, or on an 'associated third party payer' that has promised payment to the law practice for professional fees for legal services rendered to the client and reimbursement of or indemnification for disbursements incurred on the client's behalf. Alternatively, the client may initiate a client/practitioner assessment, for assessment of a bill of costs rendered by a law practice; in such cases, the client may have paid, and be seeking a refund of some money (in which case it is the client that has an interest in quick resolution), or the client may not have paid the full amount or anything at all. In this report, these subcategories are described compendiously as practitioner assessments, and separately as practitioner/client and client/practitioner assessments respectively.

1.5.3 The second category, party/party assessments, comprises claims by a person who has incurred liability for legal costs, as litigant or client, on another person who, by order of a court or tribunal, is obliged to indemnify the first in respect of the costs that he or she has incurred.

1.5.4 Although there are similarities and overlaps, there are also significant differences between the function of the Scheme in respect of practitioner and party/party costs. A party/party costs order is an aspect of the judicial resolution of an *inter-partes* dispute, and is an element of attaining justice between the parties, normally in order to ensure that one who has to resort to litigation to vindicate or defend its rights and does so successfully is not out-of-pocket as a result. In this way, party/party costs are an important aspect of substantive justice, and of access to justice. The role of the administration of justice in connection with practitioner costs is different. Recognising that the lawyer-client relationship is an unequal one in which there is scope for misuse of the lawyer's stronger position (as reflected in the presumptive status of such relationships as ones of undue influence), courts have for centuries exercised such jurisdiction for a protective purpose, to ensure that clients are not entirely at the mercy of their lawyers in respect of fees and costs. The purpose of this jurisdiction is fundamentally to protect the client. The Scheme involved partial withdrawal from that position, through the adoption of costs disclosure and agreements, and, in the case of sophisticated clients, exemptions from disclosure; however, the capacity of the court to intervene is preserved.

1.5.5 The second distinction is between costs applicants and costs respondents. The costs applicant is the party who initiates an application for costs assessment, and the costs respondent is the other party.

1.5.6 The third distinction is between a receiving party and a paying party. In any costs dispute, one party will owe another party money; the party that owes the money is the paying party, and the party that is owed the money is the receiving party. While the receiving party is usually the costs applicant, and the paying party the costs respondent, that is not always so: in client/practitioner applications, the client (costs applicant) is often the paying party, whereas in a practitioner/client assessment, the law practice is the receiving party, and the client (or other law practice or third party payer) is the paying party. In a party/party assessment, the person in whose favour a costs order has been made, and the person against whom it has been made, are respectively the receiving party and the paying party. (It is useful to remember, however, that the receiving party in a party/party assessment is usually a paying party under a costs agreement with a legal practice, whether that is disputed or not, and so timely resolution of the party/party costs dispute may assist them in paying their costs and avoiding a dispute in the former category.)

1.5.7 These distinctions have implications for some terminology. Thus the LPA uses the term "bill" only in respect of practitioner costs, and not in respect of party/party costs. This report seeks to maintain this distinction, one difficulty with which is that there is no statutory description of the form of a statement of the claim of a receiving party on a paying party in the party/party context. To address this, while maintaining the distinction, the Review has chosen the word "account" to describe such a statement of the claim of a receiving party in the party/party context.

2 APPLICATIONS

2.1 Application by client or third party payers for practitioner assessment

2.1.1 Section 350 provides that clients, or third party payers (i.e. a third party who is paying the legal costs of a client to a legal practitioner), may apply for assessment of the whole or any part of legal costs. An application can be made whether or not the costs, or any part of them, have been paid. An application must be made within 12 months of the bill being given or the costs being paid (s 350(4)), provided that an application may be made out of time (other than by a sophisticated client/third party payer) if the Supreme Court, on application by the costs assessor or client or third party payer who made the application for assessment, determines, after having regard to the delay and the reasons for the delay, that it is just and fair for the application for assessment to be dealt with after the 12-month period: s 350(5). In practice, it is the client or third party payer, rather than the costs assessor, who makes an application. A number of submissions addressed the 12-month time limit imposed by s 350(4), and the provision for out-of-time applications in s 350(5).

Submissions

2.1.2 Mr Charles Hockey, Solicitor & Barrister, and Brothers and Sisters in Law Incorporated (BASIL), submitted that the 12-month period in which a client or third party payer may apply for costs assessment is too long. BASIL suggested that the right to apply for costs assessment at any time up to 12 months after a bill is rendered may give rise to practical difficulties and commercial uncertainty for small practices in particular, and cause substantial distress to a practitioner, especially in matters where the practitioner has rendered bills and they have been paid without any issue being taken by the client. BASIL suggested that the period should be reduced to 60 days (the time limit in s 351 for applications by a law practice retaining another law practice).

2.1.3 The Office of the Legal Services Commissioner (OLSC) submitted that either the costs assessor to whom the application is referred or the MCA should have the power to determine whether an application made out of time should be dealt with. Similarly, the CARC suggested that a Registrar or Deputy Registrar should have the power to make such a determination on the papers. CARC also proposed that if the determination is to remain with a court, it should be the District Court rather than the Supreme Court.

Discussion

2.1.4 While the submissions as to the injustice that can arise from belated client/practitioner assessment applications are not without force, they are significantly more compelling where the bill has been paid than otherwise. The allowance of a period of 12 months generally seeks to balance the injustice arising from belated applications with the realisation that, in the context of the special nature of the lawyer/client relationship, it may be some time before a client recognises that he or she may have been overcharged, or be emancipated from the lawyer's influence. On balance, it is considered that a case

has not been made for a change to the 12-month period, except where the bill has been paid, in which case a 60-day limit from the date of final payment (subject to extension for sufficient cause) should apply.

2.1.5 Extension of time applications are made to the Court by way of Summons, which incurs further costs. In the context of a scheme in which applications are lodged with and allocated by the MCA, and assessors are the principal decision makers, it does not seem logical that jurisdiction in respect of an ancillary application, to extend time for filing an application, be reserved to the Supreme Court. Such jurisdiction would more logically be conferred on the MCA and/or Costs Assessors than on the Court, at least primarily. In the scheme proposed by the Review, such applications would logically be dealt with before reference of the assessment to a costs assessor, by the MCA, whose decisions should be reviewable as decisions of a Registrar of the Court.

Recommendations

1. The current 12 month limitation period in which a client of a practice may object as of right to a practitioner/client bill be retained, except where a client has paid a bill, in which case it be limited to a period of 60 days after final payment.

2. Jurisdiction to extend time for objecting to a bill, where it is just and fair to do so, having regard to the delay, the reasons for the delay, and the prima facie merits of the dispute, be conferred on the MCA, whose decision should be reviewable as if it were a decision of a Registrar of the Supreme Court.

2.2 Application by law practice retaining another law practice

2.2.1 Section 351 provides that a law practice that retains another law practice to act on behalf of a client (e.g. solicitor retaining a barrister, or a country practice retaining city agents) may apply for assessment of the whole or any part of the legal costs within 60 days of either a bill being given, or the costs being paid if there was no bill.

Submissions

2.2.2 The NSW Young Lawyers (NSWYL) submitted that the 60-day time limit for assessment of costs between law practices on the application of the paying party (s 351) provides illusory protection to an unpaid receiving party, because that party cannot recover payment without legal action or his or her own assessment application under s 352 (Application by law practice giving bill). The consequence of this is that if the 60 days provided for in s 351 elapses without an application for assessment by the paying party, but payment is not forthcoming, the receiving party is forced to make its own application under s 352, at which time the paying party can raise all the objections to the bill that could have been raised under s 351. NSWYL have advocated that, in such a case, the paying party's objection rights in an assessment initiated by the receiving party should, save in exceptional circumstances, be limited to grounds that the claimed work was not done, was outside the retainer, was not billed at the agreed or disclosed rate, or had

already been paid or compromised.

Discussion

2.2.3 The paying party in the situation identified by NSWYL is the law practice with principal conduct of the matter for a client, and the receiving party is typically a barrister (and therefore a sole practitioner) or a solicitor law practice acting as agent. It is reasonable to expect the retaining law practice, being legally sophisticated and having principal conduct of the matter in question, properly to scrutinise a bill from counsel or a solicitor agent upon receipt, and to raise any objection promptly. If, for some unusual reason, a proper ground for objection was not apparent within the 60 day period, that may be reason to seek an extension of time. The "exceptional" grounds referred to by the submitters – that the claimed work was not done, was outside the retainer, was not billed at the agreed or disclosed rate, or had already been paid or compromised – do not seem sufficiently exceptional to justify being dealt with on a special basis, and a preferable approach is to preclude objection in such a case without leave.

2.2.4 It is noted that where solicitors have paid counsel's fees, and their client then applies for assessment, outside the time limit prescribed by s 351, and achieves a reduction in the disbursement for counsel's fees, the result may be that the solicitor cannot recover from the client the full amount they paid out to counsel. However, discretion to raise additional objections would accommodate such a situation where appropriate. For reasons analogous to those pertaining to extension of time applications, jurisdiction to grant leave should be conferred on the MCA, whose decisions should be reviewable as decisions of a Registrar of the Court.

Recommendations

3. LPA s 352 be amended such that in an application under s 352, where the costs respondent is a law practice that could have applied under s 351, the costs respondent may object to the bill only with leave, such leave to be granted or withheld having regard to the reason for the failure to apply under s 351, any delay in raising objection, and the prima facie merits of the dispute. Jurisdiction to grant leave should be conferred on the MCA, whose decision should be reviewable as if it were a decision of a Registrar of the Supreme Court.

2.3 Application in respect of interim bills

Submissions

2.3.1 The CARC suggests that the 12-month limitation period in s 350(4) should apply to interim bills under s 334, so that an interim bill that is older than 12 months could only be assessed if an extension of time were granted under s 350(5).

Discussion

2.3.2 Under s 334(1), a law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide. Section 334(2) provides that legal costs that are the subject of an interim bill may be assessed either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid.

2.3.3 In *Retemu Pty Ltd v Joe Ryan*,[10] Coorey DCJ found that s 334(2) allows all interim bills to be assessed either at the time of the interim bill or at the time of the final bill, whether or not 12 months has passed since the interim bill was given, so long as the application for assessment of the final bill is within the 12-month period allowed by s 350(4). However, in *Dromana Estate Ltd v Wilmoth Field Warne* [2010] VSC 308, Wood AsJ, sitting in Victoria's Costs Court, doubted the conclusion of Coorey DCJ, and held that the 12-month time limit under the equivalent provisions of the *Legal Profession Act 2004* (Vic), which are similar to the NSW provisions, applied to each bill, whether interim or final. In *Challen v Golder Associates Pty Ltd* [2012] QCA 307, the Queensland Court of Appeal approved the approach taken in *Retemu* (and by McGill DCJ in *Turner v Mitchells Solicitors* [2011] QDC 61) and declined to follow *Dromana*. While the view in *Retemu* is to be preferred as the law in NSW, the issue should be clarified by amendment of the LPA.

2.3.4 Mr Westgarth, representing the Law Society, argued that to permit interim bills to be the subject of objection long after they had issued could create hardship for practitioners, for example where work was being performed under the retainer in the absence of any apparent dispute or dissatisfaction, and that the problem that a client might not appreciate the cumulative impact of time-based billing until the conclusion of a matter could be addressed by requiring that retainers explicitly state that the time for objection, including in respect of an interim bill, is limited to twelve months without leave.

2.3.5 While recognizing that those arguments have merit, on balance the Review considers that, in accordance with the long-standing rule that a retainer is an entire contract, it is preferable that an interim bill be assessable up to the time of the final bill. First, clients may well be reluctant to dispute costs while a matter remains on foot, and the risk of an interruption to their litigation may well deter them from raising an issue about costs until it is concluded. Secondly, clients may not fully appreciate the cumulative impact of time-based billing until the conclusion of the matter. Importantly, this is in the context of what is conventionally recognized as an unequal relationship, in which the client's dependence on and/or trust in the lawyer may operate to deter prompt objection. In those circumstances, the Review favours preserving the entitlement to object to an interim bill until time for objection to the final bill has expired.

[10] NSWDC, Coorey DCJ, 16 April 2010, unreported.

Recommendation

4. To remove doubt, the LPA be amended to clarify that an application for assessment of an interim bill can be made at any time until the time for application in respect of the final bill has expired.

2.4 Service of applications

2.4.1 LPA, s 356, requires that *the MCA* cause a copy of an application for costs assessment to be *given* to any law practice or client concerned or any other person whom the Manager thinks it appropriate to notify.

2.4.2 In *Diemasters Pty Ltd v Meadowcorp Pty Ltd*, (NSWSC, 16 July 2003, Macready M, unreported), the Court discussed the responsibilities of the MCA to notify the respondent of the application. The reasons for decision in that case confirmed that the assessment process is not part of the substantive proceedings in which the costs order was made, but a separate process, so that a receiving party cannot rely on delivery to the cost respondent's solicitor in the substantive proceedings as sufficient "delivery". Assessors have interpreted the decision in *Diemasters* as requiring "service" of the application in an equivalent manner to the delivery of a bill of costs between a practitioner and client, and many assessors require "proof" of service. While LPA, s 332, makes provision in respect of the service of bills (but not of applications), it does not directly authorise substituted service (although it authorizes service in any manner authorised by the regulations – which make no provision).

Submissions

2.4.3 Mr John Eades and Mr John Dobson, Solicitors, observed that there is no provision for substituted service of an application for costs assessment, even when service is obviously being avoided. Mr Valentino Musico, solicitor, submitted that applications for assessment should be able to be served on a party's solicitor, circumventing the decision in *Diemasters*.

2.4.4 On the other hand, Legal Aid NSW (Legal Aid) observed that on completion of a costs assessment, a certificate of determination may be registered in a court of competent jurisdiction and then take effect as a judgment, able to be enforced in the usual way, including by way of bankruptcy proceedings. Yet, in their view, there is no provision to ensure that a paying party (focusing here on clients rather than law practices) has in fact received an application for assessment. Legal Aid offers an example where a client changed address in the period between the practitioner issuing a bill and making an application for assessment, and first became aware of the costs assessment when served with a bankruptcy notice. Legal Aid suggested that there should be a requirement for clients to be personally served, and that consideration should be given to providing a notice about where they may be able to get advice, similar to the notice in possession matters.

2.4.5 Legal Aid further noted the current practice of the costs assessment scheme is to notify all respondents to an application of the assessment in a single letter if they live at the same address, when they may be jointly and severally liable for the costs. Legal Aid suggested separate letters for each respondent.

Discussion

2.4.6 In party/party assessments, the assessment procedure is in reality a continuation of the litigious dispute. There seems no good reason why service at the address for service in the substantive should not be good service for the purposes of the assessment proceeding.

2.4.7 In some cases, an application for assessment – more typically practitioner/client, but also party/party – cannot readily be served on the costs respondent, for example if the party is not present in Australia or is actively avoiding dealing with the payment of costs.

2.4.8 In addition, a costs agreement may provide for the place and/or mode of service of a practitioner bill or assessment application. Such agreements ought to be recognised and given effect.

Recommendations

5. LPR be amended to provide that, in party/party assessments, an application may be served at the address for service of a party in the proceedings in which the costs order was made.

6. LPR be amended to provide that in practitioner assessments, an application may be served (a) in any manner that has been agreed between the parties to a costs agreement; and (b) in any manner reasonably calculated to bring the application to the notice of the costs respondent authorized by the MCA, where the MCA is satisfied that personal service is not reasonably practicable.

2.5 Who may apply – beneficiaries?

Submissions

2.5.1 The OLSC and CARC noted that there is uncertainty as to whether a beneficiary may apply for costs assessment, as it is not clear whether a beneficiary falls within the definition of a (non-associated) third party payer. Both OLSC and CARC suggested that beneficiaries should be included in the definition of "client" for the purposes of costs assessment. The OLSC notes that LPA, s 350(6)(f) – prior to its amendment by the *Legal Profession Further Amendment Bill 2006* – included within the meaning of "client" "a person interested in any property out of which a trustee, executor or administrator who is liable to pay legal costs has paid, or is entitled to pay, those costs".

2.5.2 Against that, it is said that there are a number of difficulties with the former provision – for example, that a beneficiary entitled to a specific legacy may arguably have an interest in property out of which legal costs are to be paid, but the payment will not affect their entitlement. The trustee or executor is subject to fiduciary and general equitable obligations in respect of decision-making about expenditure on legal costs, and it is submitted that they are the appropriate applicants for costs assessment. It is also noted that (NSW) *Probate and Administration Act 1898*, s 86A, gives beneficiaries a right to seek review of legal costs charged to an estate.

Discussion

2.5.3 It is in any event at least strongly arguable that a beneficiary (who is liable to indemnify a trustee in respect of trust expenses) is within the extant definition of "non-associated third party payer". The recent amendment of s 350(9), to define *client* as "(a) an executor or administrator of a client", or "(b) a trustee of the estate of a client", is an inclusive and not an exclusive definition, and does not detract from this; to the contrary, by so defining *client* in the context of that section, which differentiates between the position of a *client* and a *non-associated third party payer,* it tends to reinforce that a beneficiary is a non-associated third party payer. It is preferable that this be clarified. However, this would not apply to a discretionary or contingent beneficiary, who has no vested interest in the trust fund and from whom the trustee is not entitled to recover indemnity.

2.5.4 Not all the supposed difficulties with the former provision sustain examination: for example, a specific legatee does not have an interest in the estate assets. While it is true that a trustee or executor is subject to fiduciary obligations, a beneficiary dissatisfied with the legal expenses incurred by a trustee would otherwise have to bring proceedings against the trustee without direct recourse against the lawyer. While this may be the "pure" approach, it would require two proceedings instead of one.

2.5.5 Treating beneficiaries as non-associated third party payers provides them with a remedy in the not uncommon scenario that they are concerned that the trustee or executor has incurred excessive costs. Perhaps more importantly, it serves the protective purpose of imposing on lawyers the discipline of bearing in mind the interests of beneficiaries and not acting without regard to them just because the trustee may so instruct. A typical instance of where this may be important is in Family Provision litigation, in which it is not unknown for executors to seek to uphold the will regardless of the cost to the residuary estate.

2.5.6 The Review also considered whether this right (of beneficiaries) should be limited to the context of deceased estates (so that in respect of other trusts, the beneficiary's rights would lie exclusively against the trustee). In favour of such a view is that it reflects the pure legal position, and it leaves the lawyer safe to act on the instructions of the trustee client in the context of complicated trusts established for business purposes, where there might otherwise be a wide class of persons entitled to seek assessment. However, these considerations are outweighed by the circumstances that it would involve excluding from the protection afforded to non-associated third party payers by the current legislation part of the class currently entitled to that protection; and that the considerations applicable to estate cases apply equally in-principle to other trust cases.

Recommendation

7. LPA s 302A be amended to clarify that a beneficiary (other than a contingent or discretionary beneficiary) of a trustee client is within the definition of third party payer.

2.6 Filing fees

2.6.1 Section 354 specifies that an application is to be in the form specified by the regulations, and accompanied by the fee prescribed by the regulations. Section 356A provides for regulations to be made with respect to the making and processing of applications for assessment. LPR cl 124 provides 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.

Submissions

2.6.2 The OLSC submission noted that there is no sliding scale, nor any cap on the filing fee for lodging an application for assessment.

2.6.3 Both the Law Society and DG Thompson suggested that there should be a standard, fixed filing fee, as the present method of calculating the filing fee by reference to the costs in dispute can be unreasonable when disputed costs are high. Both point to the fees charged by comparable jurisdictions.

Discussion

2.6.4 While the Review considers that a departure from the present user-pays principle is outside its terms of reference, a change to the structure of filing fees is a different matter.

2.6.5 A revised filing fee structure would support the process of "early estimates" in facilitating swift resolution of assessments, as was advocated in a number of submissions and discussed elsewhere in this report. If more streamlined procedures lead to quicker determinations requiring less work by costs assessors, the gross cost of the assessment scheme will be reduced.

2.6.6 The Review considers that a relatively small initial fee should be payable on filing an application for assessment, and that a substantial *ad valorem* fee reflecting the user-pays principle should be payable only when a case is to proceed to full assessment. Quantification of the initial fee will ultimately have to be determined administratively. The intent is that it should cover the costs of the process up to and including the early estimate. The Review proposes as a starting point for consideration $250 (as compared to the current $100 or 1%), which corresponds to 1% of a $25,000 costs dispute. The *ad valorem* fee – currently 1% of the costs in dispute – to the extent that it exceeds the initial fee, would become payable on lodgment of an objection to the early estimate, and as the requirement for full assessment is a consequence of a party's objection to an "early estimate", that party should bear the fee.

Recommendation

8. The structure of filing fees be amended in line with the recommendations to facilitate early estimates, as set out below in Recommendations 12, 13 and 14, such that an initial filing fee of say $250 (to cover the costs of the process up to early assessment) be payable by the costs applicant on lodging an application for assessment, and an *ad valorem* full fee of say 1% of the costs in dispute (to cover the costs of full assessment) be payable on objection to an early estimate, by the objecting party.

2.7 Amendment

Submissions

2.7.1 The New South Wales Bar Association (Bar Association) observes that there are no rules to deal with changes in the membership of an unincorporated law practice. The Bar Association suggests that changes in membership that occur during the course of a matter might produce complications, as the legal persons thereafter constituting the law practice would differ from those who made statutory disclosure and entered into any costs agreement at the outset of the matter.

2.7.2 A related issue, identified by CARC, is that costs assessors presently have no power to allow amendment of an application for assessment, and proposes that they be given limited power to allow amendment of applications so as to identify correctly the parties to an assessment.

Discussion

2.7.3 The Review agrees that changes in the constitution of law firms should not affect the rights or liabilities of the firm vis-a-vis their clients in respect of costs, and that assessors should have the power to amend an application for costs assessment to identify the parties correctly.

Recommendation

9. LPA s 317 be amended to provide that where a law practice has made disclosure in accordance with Division 3 of Part 3.2, such disclosure is to be considered disclosure on the part of any successor law practice, notwithstanding any subsequent changes in the constitution of the practice; and the CARC make rules under LPA s 394 authorising Assessors to allow amendment of an application for assessment so as correctly to identify the parties, including where there is a change in constitution of a law practice.

3 ASSESSMENT

3.1 Overview

3.1.1 The process of assessment is the core of the Scheme, and where most of the issues identified by the submissions arise. It is useful to set out the typical process in practitioner assessments and party/party assessments.

3.1.2 In practitioner assessments:

- The law practice serves a bill of costs on the client;
- An application for assessment is lodged by the law practice or client (the client will do so if they object to the amount claimed; the law practice will do so if the bill remains unpaid in order to obtain a certificate that can be filed in court as a judgment);
- The MCA notifies the parties of the filing of the application, and requests submissions within 21 days. However, there is no penalty for failing to respond within this time limit, and there are no incentives to do so;
- The application is usually referred to a costs assessor within 30 days;
- The costs assessor will generally allow the parties a further opportunity to make submissions;
- The assessor considers the submissions and prepares the determination;
- Once the costs of the assessment are paid, a certificate is issued that can then be filed in a court of competent jurisdiction to take effect as a judgment.

3.1.3 In party/party assessments:

- A court or tribunal makes an order in proceedings that one party must pay another's costs incurred in connection with the proceedings;
- The receiving party applies for their costs by delivering an application to the paying party, and waiting 21 days before filing the application;
- The matter is then referred to an assessor, usually within 30 days;
- The assessor usually allows 21 days for the paying party to file its objections and submissions; it is not unusual for this period to be extended by another 21 days;
- The receiving party is usually given 14 to 21 days to respond to the objections and submissions of the paying party;
- The assessment then proceeds, which is likely to take from 14 to 42 days (or longer in very complex matters: the Review understands periods of up to a year are not exceptional);
- On payment of the fees of the assessor to the MCA, the certificate of determination is issued.

3.1.4 From lodging an application to the delivery of reasons ordinarily takes between three and twelve months, however it can be more than a year and the Review understands it has taken up to two years in some cases. A number of submitters raised concerns as to the time taken to complete costs assessments, and the absence of a timetable system with sanctions for non-compliance similar to that used by the courts for case management

purposes.

3.1.5 The Law Society suggests that strict timelines will give assessors the confidence to proceed in the face of delays by one or other of the parties, and facilitate completion of assessments in a timely manner.

3.1.6 NSWYL observe that LPR cl 122 affords clients or third party payers the opportunity to make objections, and for practitioners to provide their responses, prior to the allocation of an application to a costs assessor. NSWYL suggest that practitioners often experience significant delays as a result of clients or third party payers seeking to make further objections after the application has been allocated to a costs assessor, and that parties should be restricted to one opportunity to object or respond, particularly in "small value" assessments.

3.1.7 Valerie Higginbotham of Costacomp Pty Ltd, and Deborah Vine-Hall of DSA Legal Costs Consultants Pty Ltd, question the utility of the 21 days required to expire between delivering an application for assessment of party/party costs to the respondent party and filing it with the MCA.[11] If the time is designed to give the parties a chance to negotiate, it may be, given they are likely already to have negotiated, that it is better to use the time to direct them to mediation or at least a conference with the assessor to narrow the issues in dispute.

3.1.8 The OLSC points to the experience in England and Wales and a proposal made by Jackson LJ, in his review of the costs of civil litigation, as an approach that might be considered.[12] In England and Wales, parties to a detailed assessment serve points in dispute. While the relevant Costs Practice Direction states that points of dispute should be short and to the point, it goes on to say that the points of dispute should identify each item in the bill of costs which is disputed, and in each case state concisely the nature and grounds of the dispute. Lord Justice Jackson was of the opinion that both points in dispute and points of reply needed to be shorter and more focused. His Lordship concluded that it would be better if both the points of dispute and the points of reply concentrated on the reasoning of the bill, not the detailed items; that points of dispute should focus on matters of substance in a bill; and that they should, where practical, deal with items compendiously, rather than repeat the same objection time and again.[13] His Lordship proposed that the relevant Costs Practice Direction should be amended, and that a new format should be used for points in dispute, allowing matters to be dealt with compendiously and in short form.[14]

3.1.9 CARC submits that the paying party should initially provide general objections (rather

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[11] LPR, cl 125, requires that in a party/party assessment, a copy of the application (and notice to notify objections) be sent to the costs respondent at least 21 days before it is lodged with the MCA.

[12] The Right Hon Lord Justice Jackson, Review of Civil Litigation Costs: Final Report, TSO December 2009, 453.

[13] Ibid.

[14] Ibid, Appendix 10.

than specific objections) and submissions, and that the receiving party should respond to those general objections and submissions. The costs assessor should then rule on the issues raised by the general objections, submissions and responses. Opportunity should then be provided for specific objections, taking into account the Costs Assessor's rulings, with the receiving party allowed a final opportunity to respond before the final determination.

3.1.10 NSWYL also suggest that a distinction should be drawn between "small value" costs assessments and "large value" costs assessments, and that "small value" matters should be determined entirely on the material filed with the application, subject to the respondent having a single opportunity to file submissions in response. NSWYL say that a similar process is currently in place for the resolution of certain disputes within strata schemes, and that it has proved to be consumer-friendly and efficient. NSWYL suggest that disputed costs of up to $10,000 would reasonably fall within the definition of "small value".

Discussion

3.1.11 While the submissions have identified a number of issues in the assessment process that could be improved, of central importance is facilitating quicker assessments in cases where that is possible, while affording fairness to the parties. A number of procedural reforms are recommended in this Chapter, focusing on incentivising early resolution and supporting assessors to deal with matters in a manner consistent with the objects of the Scheme.

3.1.12 Division 40.2 of the (Cth) *Federal Court Rules 2011* (FCR) is a contemporary, tightly drafted regime for resolution of party/party costs disputes. It applies to scale-based taxation of party/party costs on the conventional party/party basis by taxing officers of the Federal Court. By contrast, New South Wales has a deregulated practitioner/client costs environment, applies 'fair and reasonable' criteria for party/party assessment, and employs external costs assessors funded by a combination of filing fees and awarded costs of assessment. Division 40.2 could not be adapted wholesale to the assessment of practitioner/client costs in New South Wales, or to State jurisdiction party/party costs, but the Review considers that it provides a useful starting point for consideration. One notable feature of Division 40.2 is the active supervision of the process by the Registrar.

3.1.13 As a general proposition, the Review considers that more centralised control of the assessment process at an early stage can contribute to reduction of delay. This contemplates a greater role for the MCA than under the present regime. Requiring (as distinct from permitting) the parties to file and serve objections and submissions before an application is referred to a costs assessor for assessment would be one aspect of this. This would define the issues at an early stage, and enable the MCA to exercise greater administrative control, divert appropriate cases to mediation, and grant remedies for default. What should be required before allocation to an Assessor is the receiving party's bill, and a sufficient statement of the paying party's objections to enable the real issues in dispute to be identified.

3.1.14 The Review generally agrees that the objection process would benefit from greater

emphasis on generality and principle, particularly at the earlier stages, but does not support a multi-step approach, as it would generally protract the assessment. Accordingly, a process is favoured that sees objections and submissions, reflecting Jackson LJ's recommendation, that focus on matters of substance in, and the reasoning of, the bill, as distinct from the detailed items, and where practical, deal with items compendiously, rather than reiterate the same objection.

3.1.15 Accordingly, the Review proposes a procedure whereby, under the control of the MCA, the costs applicant lodges an application that, in the case of a party/party or practitioner/client assessment, is accompanied by a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in itemised "taxable" form. In the case of a client/practitioner assessment, the application would be accompanied by any bill for the costs that the client has been given, and a statement setting out, so far as reasonably practicable given the form of such bill, the client's objections, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item.

3.1.16 Within 28 days after service of the application (or such further time as the MCA may allow), the costs respondent must file a response with the MCA, which in the case of a party/party or practitioner/client application, must set out the respondent's objections to the bill, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item. In the case of a client/practitioner assessment, the response must (to the extent any bill referred to in the application does not do so) be accompanied by a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in itemised "taxable" form.

3.1.17 At the conclusion of this process, the scope of the dispute, the amount in issue, and the issues would have been defined. At this point, the MCA would ordinarily refer the matter to an Assessor for assessment. Often, there would remain an amount not in dispute, and there is no reason why the receiving party should any longer be kept out of that amount; accordingly the MCA should be able to issue an interim certificate for the undisputed amount.

3.1.18 It is recognized that there are many cases in which no response will be filed. At present, these must still be assessed. This serves an important protective function in that it ensures that excessive costs are not visited on parties unable to oppose the process. However, it is proposed that this function can be fulfilled without insisting on the rigours, costs and delay of full assessment, by introducing a process of "default assessment" under which the assessor is required only to review the application and, except to the extent they appear manifestly unreasonable, in a party/party or practitioner/client

application, allow the costs in the sum claimed in the application. In a client/practitioner application, the assessor would be required to uphold the objections made in the application except to the extent they appear manifestly unreasonable (and thus allow the costs claimed in the bill(s) referred to in the application at the difference between the amount claimed in the bill(s) and the amount of the objections).

Recommendations

10. The current requirement of LPR cl 125 that in party/party assessments an application be served 21 days before it is lodged be removed.

11. The CARC (in consultation with relevant stakeholders) make standard procedural rules governing the assessment process, with discretion to vary or depart from them, and sanctions for default.

12. LPR be amended to provide that:

    a. A costs applicant must lodge with an application for costs assessment the initial filing fee (say $250) and:

        i. In the case of a party/party application, an account of the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation;

        ii. In the case of a practitioner/client application, a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation; and

        iii. In the case of a client/practitioner application, any bill for the costs that the client has been given, and a statement setting out, so far as reasonably practicable given the form of such bill, the client's objections, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item.

    b. Within 28 days after service of the application (or such further time as the MCA may allow), the costs respondent must file a response with the MCA, which:

        i. In the case of a party/party application, must set out the respondent's objections to the account, identifying each component of the account that is disputed and the amount that is disputed, and stating concisely

the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the account as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item;

ii. In the case of a practitioner/client application, must set out the respondent's objections to the bill, identifying each component of the bill that is disputed and the amount that is disputed, and stating concisely the nature and grounds of the dispute, so far as practicable by reference to the substance and reasoning of the bill as distinct from the detailed items, dealing with the items compendiously rather than re-iterating the same objection item-by-item; and,

iii. In the case of a client/practitioner application, must (to the extent any bill referred to in the application does not do so) be accompanied by a bill setting out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed, although not necessarily in the itemised detail that would formerly have been required for taxation.

c. Upon expiration of the time limited for filing a response, the MCA must:

i. Issue an interim certificate for any amount that is not in dispute; and

ii. Refer the matter to an assessor, in a case where a response has been filed, for "contested assessment"; and where no response has been filed, for "default assessment".

d. On a default assessment, the assessor must review the application and, except to the extent they appear manifestly unreasonable:

i. In a party/party application, allow the costs in the sum claimed in the application;

ii. In a practitioner/client application, allow the costs in the sum claimed in the application; and,

iii. In a client/practitioner application, uphold the objections made in the application (and thus allow the costs claimed in the bill(s) referred to in the application at the difference between the amount claimed in the bill(s) and the amount of the objections).

3.2 Early estimates

Submissions

3.2.1 There is strong support in the submissions received by the Review for a system of early estimates, with frequent reference to the practice in the Federal Court of Australia. Many submissions advocate the introduction of some form of early evaluation in the assessment

process, for example by way of an estimate or provisional assessment procedure, and/or for global assessments in certain matters. As the OLSC submission observes, under Rule 40.20 of the FCR, once a party/party account has been filed and served, a taxing officer is to make an estimate of the approximate total at which it is likely to tax. The estimate is made in the absence of the parties, before objections, and without making any determination on the individual items in the account. If a party wishes to object to the estimate, they must file a notice of objection. Rule 40.21 then gives the Registrar three courses:

- to direct the parties to attend before a designated Registrar for a confidential conference to identify the real issues in dispute and reach a resolution of the dispute;
- to direct that there be a provisional taxation, which involves the account being provisionally taxed in the absence of the parties. The taxing officer may, before completing the provisional taxation, require the parties to file submissions identifying the issues in dispute; or
- to direct that the full taxation of the account proceed, which involves an attendance by the parties and an opportunity to make oral submissions (with the leave of the taxing officer). The taxing officer may summons and examine witnesses, either orally or on affidavit, direct or require the production of books, papers and documents, and issue subpoenas.

3.2.2 A similar model is used in Victoria, where the recently created Costs Court handles all taxations of costs, including practitioner/client assessments. Like the Federal Court, the Costs Court in Victoria has power to give an estimate of the amount at which a bill is likely to tax on the papers, and may conduct a taxation hearing.

3.2.3 This procedure has recently been considered in England and Wales. In his review of civil litigation costs, Jackson LJ considered and discussed a proposal for provisional assessment along the lines of the estimate procedure used in the Federal Court. While concerns were expressed that this would add to the workload of costs judges and costs officers, the majority view (supported by the Senior Costs Judge) was that the reform would be beneficial.[15]

3.2.4 BASIL submitted that, as both sides will likely already have an idea in their minds of the costs that are recoverable, a process of early estimates ought to be adopted, as it may assist speedy resolution of the matter.

3.2.5 The Law Society suggests that the costs assessor should be able to make an estimate, in global terms, of fair and reasonable costs based on the application alone. For relatively small matters, where costs are less than $10,000, the Law Society suggests that assessors should be able to either issue an estimate or determine the costs based on the application alone, with the parties retaining a right to object to the determination if they are not satisfied with the outcome. The Law Society considers that rights of review should not be diminished, as smaller assessments can be the most contentious.

[15] Ibid, 453.

Discussion

3.2.6 A procedure that uses "early estimates" would offer a number of practical advantages. First, it would provide the parties, whether in the context of practitioner/client or party/party assessments, with useful information about the opinion of an independent and neutral person with relevant expertise and experience, which would likely facilitate settlement. Secondly, absent objection, it would provide a fast-track method of resolution. Thirdly, if the filing fee for assessment (or the greater part of it) is deferred until reference for full assessment, early resolution is rewarded.

3.2.7 At present, assessors usually consider and determine each disputed item, which could be the majority of items in the bill, solely on the papers. It seems that few costs assessors seek to identify at an early stage the true nature of the dispute, and the material required in relation to the matters in dispute. There seems little attempt to hive off and deal with preliminary issues, such as whether a costs agreement should be set aside, or issues that will practically dispose of the dispute, such as where the main issue is the hourly rate charged.

3.2.8 It is true that referral for early estimate adds an extra layer of procedure. If an early estimate is not accepted, and one of the parties requires full assessment, obtaining the estimate may be expected to increase the time required to achieve a final determination. Early estimates may not be helpful in every case. Nonetheless, so far as the Review has been able to ascertain, the Federal Court procedure appears to have been well received by litigants and practitioners in a party/party context.

3.2.9 The making of an early estimate should require much less time and work of a costs assessor than a full assessment. It would be appropriate to prescribe a relatively short time frame within which an assessor is required to produce an estimate.

3.2.10 In the Federal Court model, a taxing officer makes a preliminary estimate of party/party costs in all cases (FCR, r 40.20) and, if any party does not accept the estimate, the Registrar decides case by case whether to send the parties to confidential conference, to refer the bill for provisional taxation, or to direct full taxation (FCR, r 40.21(2)). In the New South Wales context, in light of the deregulated practitioner costs and 'fair and reasonable' party/party costs that are features of the State system, it may be useful for the assessor who is to make the estimate to have the benefit of objections from the paying party. The pre-reference procedure proposed above addresses this. The Federal Court model contemplates initial real-time contact between the parties and the Registrar. Adapting that to New South Wales, the MCA or the Assessor could confer with the parties in person or by telephone.

3.2.11 Funding also needs to be considered. An "early estimate" procedure seeks not only to reduce delay, but also to reduce the overall cost of the assessment process by reducing the number of cases that go to full assessment. The early estimate procedure will be most effective if that saving is reflected in the filing fee structure. The greater part of the filing fee for assessment should not be payable until a matter is referred for full assessment – whether by direction of the Assessor without an early estimate, or by one of the parties objecting to the early estimate and requiring full assessment.

3.2.12 In the latter situation, the party who requires full assessment should ordinarily be required to pay the substantive fee, and to pay or re-pay (as the case may be) the difference between the estimate and the amount of costs already paid, as a condition of obtaining full assessment. This would incentivise acceptance of the early estimate, while preserving the right of a party to dispute it, but at its own (initial) cost; it would also remove the paying party's incentive to delay.

3.2.13 In addition, a party objecting to an early estimate (so as to require that the matter proceed to full assessment) should be required to make a compulsory confidential offer of settlement. A party who objects to an early estimate and betters its offer of compromise should be entitled to the costs of the assessment from the point of the early estimate. A party that objects to an early estimate and does not better its offer of compromise should, unless the Assessor otherwise determines, pay the costs of the assessment from that point. (It is of course conceivable that both parties may object but fail to better their respective offers, which necessitates the retention of an element of discretion.)

3.2.14 While the recommended procedure preserves flexibility, it is envisaged that the "early estimate" procedure would be the rule and not the exception.

Recommendations

13. LPR be amended to provide that, upon reference of an application to an Assessor for contested assessment, the Assessor may:
    a. direct the parties to attend for a confidential conference to identify the real issues in dispute and reach a resolution of the dispute; and/or
    b. before or after conducting a conference, make and issue an estimate ("early estimate") of the approximate total that is likely to be allowed on assessment, which will stand as the assessment unless objected to by either party; and/or
    c. direct that the matter proceed to full assessment either on the papers or with attendance by the parties, in connection with which the Assessor may direct that the parties file submissions, summons and examine witnesses either orally or on affidavit, direct or require the production of books papers and documents, and issue subpoenas.
14. The greater part of the fee for assessment (being the difference between the initial filing fee and (say) 1% of the costs in dispute) be payable only when the matter is to proceed to full assessment and, where there has been an early estimate, be payable by the party that has objected to the early estimate.
15. Unless the Assessor otherwise orders, and upon such terms as the Assessor may impose, the party who objects to the 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.
16. A party who objects to an early estimate be required as a condition of doing so to make a confidential offer to the other. A party who objects to an early estimate and betters its offer of compromise should be entitled to the costs of the assessment from

the point of the early estimate. A party that objects to an early estimate and does not better its offer of compromise should, unless the Assessor otherwise determines, pay the costs of the assessment from that point.

3.3 Standardised and electronic forms for Bills and Objections

3.3.1 A recurring theme in submissions to the Review has been the absence of standard forms.

Submissions

3.3.2 The OLSC suggested changing the form of bills submitted for costs assessment. The OLSC recommended reforms be considered along the lines advocated by Jackson LJ in his review of civil litigation costs.[16] Submissions from costs consultants supported grouping items to make the process quicker, and suggested that poor record keeping of solicitors can contribute to delays in the process.

3.3.3 Helen Rebbeck, solicitor and costs consultant, submitted that a move from a paper-based to an electronic-based system would be both practicable and beneficial to the costs assessment scheme: practicable because of the relatively standardised nature of the information that is required for an assessment, and beneficial because of the costs savings to the parties and simplification of the task for the assessor. The scheme proposed by Ms Rebbeck would involve the Supreme Court making available to parties an online "portal" through which the information for an assessment could be lodged by both parties.

3.3.4 The submissions also suggest that consideration should be given to shortening objections.

3.3.5 NSWYL suggest introducing guidance, such as forms, that participants can use to narrow the issues in dispute. They suggest questions 2(b) (setting aside of costs agreements), 4 (objections to the bill of costs) and 5 (additional relevant information) of the existing application form may be difficult for inexperienced clients/litigants to complete, and that a list of reasons (objections) could be included on the form for each question, together with a free text field. The client could then simply select the most appropriate reason from the options provided. NSWYL suggest that the structure of the OLSC's Complaint Form provides a useful example.

3.3.6 Mr Nicholas Pidcock proposes the use of prescribed forms. In the electronic system envisaged by Ms Helen Rebbeck, items objected to on the same basis could be tagged and hyperlinked to a general objection detailing the basis of the objection.

Discussion

3.3.7 In a typical costs assessment application, a receiving party will submit a lengthy itemised bill for assessment, to which equally lengthy item-by-item objections are prepared. These, in turn, generate lengthy responses. The objections and responses are often repetitive and formulaic. In practitioner/client matters, lay clients or third party payers

[16] Ibid, 457.

often find it difficult to articulate their objections and to understand what may be valid objections. Little guidance is available through the costs assessment scheme, and legal representation is often necessary; it is particularly daunting for those with poor English or of a lower socio-economic background. The traditional, time-costed itemised bill usually submitted for costs assessment lists items of work chronologically without further categorisation.

3.3.8 This problem is not unique to NSW, as is evidence from the above references to the report of Jackson LJ in respect of the position in England and Wales, where his Lordship questioned the form and layout of detailed time costed bills, and recommended that a new, more informative format for detailed bills of costs be devised, which should be able to yield information at different levels of generality. His Lordship also proposed developing software, in collaboration with costs consultants, which can generate bills that present the work done by phase and/or task and/or activity.[17]

3.3.9 While the form and layout of time-costed bills in England and Wales is similar to that that in NSW, one difference is that in England and Wales items are grouped under heads of work. This level of specificity is not required in New South Wales. Thus it can be difficult to ascertain the total costs for particular tasks or categories of work. For example, items relating to the preparation of a single affidavit (such as taking instructions, drafting, engrossing, collating and copying annexures, execution and filing and service) may be scattered throughout an itemised bill, making it difficult to ascertain the total cost involved in producing the document.

3.3.10 In the case of bills, it is necessary to balance the desire for uniformity and consistency with the importance of avoiding increasing the overall cost of the process by insisting on additional bills. Nowadays, the initial bill is usually produced by a solicitor's office management system, and requiring all bills to be prepared in a prescribed form would increase costs. Moreover, flexibility is required, particularly as a result of deregulated practitioner costs (lawyers and their clients have contractual freedom to specify the basis of charging) and the 'fair and reasonable' criteria for party/party costs (what is 'fair and reasonable' may not always be best determined by itemised time-costing methods, particularly if that is not the basis on which the receiving party has incurred practitioner costs). It is not considered realistic to prescribe a single standard form for bills, beyond the requirement that the bill set out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to be assessed (although not necessarily in itemised "taxable" form), with items so far as practicable grouped under heads of work.

3.3.11 Recommendations already made seek to give effect to the proposals of Jackson LJ as to the general form of objections.

3.3.12 The Review considers that the process would be facilitated by providing (non-exclusive) standard form objections that may be taken to a bill or items in it. Objections are in any event often repetitive and formulaic. They usually fall within a number of well-

[17] Ibid, 457.

recognised classes, and lend themselves to standardisation. A list of standard objections in the form of response and objection would assist parties – particularly self-represented parties – to identify and focus on the real issues.

3.3.13 There is a contrary view, to the effect that offering a standardised list of objections may have a tendency to obscure the real issues in dispute as parties, especially those without legal representation, will tend to adopt the standard objections – quite likely, a good many of them – to cover all possibilities, rather than to focus on their real complaint. There is force in this. Nonetheless, on balance, it is considered that providing parties with a menu of objections may assist to guide them into a more manageable form and process, than leaving the matter at large. If necessary, the real issues can be identified at the conferencing stage.

3.3.14 The Review considers that electronic exchange of documents should be encouraged or required as the norm, and commends for further consideration the suggestion that software for electronic lodgment and assessment be developed.

Recommendations

17. The CARC make rules to the effect that where a detailed account or bill is required for the purposes of assessment, it must set out the work done and the costs claimed and the basis on which they have been calculated in a manner sufficient to enable them to assessed (although not necessarily in the itemised detail that would formerly have been required for taxation), with items so far as practicable grouped under heads of work.

18. The CARC (in consultation with relevant stakeholders) develop a standard list of objections, to be incorporated into standard forms of application and response.

19. The Supreme Court Registry develop a portal for the electronic lodgment and exchange of applications and responses in assessments.

3.4 Facilitating global assessments

Submissions

3.4.1 As discussed above, what appears to have been an early expectation that assessments could be undertaken in a global manner has not been realised. Submissions to the Review have, however, advocated provision for assessment without resort to detailed itemisation. The issue arises in both party/party and practitioner/client assessments; the former being essentially damages claims, and the latter claims in contract. In relation to the assessment of party/party costs, submissions to the Review indicate that where the receiving party has been charged by its own lawyers on a non-itemised basis, assessors, faced with a claim for costs that is not itemised in the 'usual' way, generally still call for the same kind of detailed information that would be required for an itemised assessment of a time-costed bill. If the receiving party's solicitor has not kept detailed time records – having no need to do so for the purpose of calculating practitioner/client costs – this

creates a considerable burden, and defeats part of the purpose of the solicitor and client agreeing to a non-time costed (or other itemized) basis of charging.

3.4.2 The OLSC submitted that the scheme should be flexible enough to embrace forms of billing other than time-based billing. FLAG Legal Services submitted that upfront, fixed fee or value pricing is not supported, and is discriminated against, by the current regime. Likewise, Mr Maurie Stack of Stacks - The Law Firm, pointed to difficulties his practice has encountered on costs assessment where costs were charged in accordance with a costs agreement based on a value billing approach. Broadly speaking, Stacks' costs are normally charged within an estimated range of costs set out in the costs agreement, the position within that range depending on various factors, also identified in the costs agreement. However, costs assessors invariably expect the law practice to prepare a bill based on the time spent on the matter, notwithstanding that the agreement was not based on the amount of time expended.

3.4.3 The Bar Association raises the question whether a global approach to assessment is feasible and, if so, whether it is desirable in any particular class or sub-class of practitioner/client assessments.[18] The Bar Association suggests that a global approach might quantify costs by reference to relevant characteristics of the matter, including its procedural history, but without a detailed bill setting out particulars of each individual task.

3.4.4 Mr Chris Wall, costs assessor and solicitor, also suggests that some thought needs to be given to whether, and in what circumstances, global assessment might be appropriate. He suggests a "guideline" starting point amount for certain types of matters, such as uncontested winding up applications in the Supreme Court and certain types of workers compensation or dust diseases matters.[19] Costs assessors would have discretion to depart from the guidelines, but would have to give reasons for any such departure.

Discussion

3.4.5 Given the shortcomings of the 'billable hour' as a basis of lawyers' billing, and that it incentivises inefficiency, the Review agrees that alternatives to itemised bills – that do not incentivise inefficiency – should not only be capable of being dealt with by the Scheme, but should be encouraged. For example, in a case where the receiving party has procured its legal services on a global (or non-time based) basis, it should be possible for a party/party assessment to proceed on a global basis, provided that sufficient information is available to enable the costs assessor to make a reliable determination and to enable the paying party fairly to test and verify the claimed costs. That qualification is, of course, the difficult point, and requires further consideration in the context of the proposals concerning guidelines for assessment, considered elsewhere in this Review.

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[18] Barristers may be involved in a practitioner/client assessment, but not a party/party assessment.

[19] This could be extended to other commonplace applications, such as applications to set aside a creditor's statutory demand under *Corporations Act*, s 459G; and applications for appointment of trustees for sale, under *Conveyancing Act*, s 66G.

3.4.6 The broader question of whether global assessment should be a permissible approach for a costs assessor without the agreement of the parties raises a difficult and fundamental question: is objective global assessment feasible, without unduly compromising fairness? The jurisprudence surrounding lump sum costs orders under CPA, s 98, provides some guidance. At least in matters that are relatively commonplace, of the type described above, it should be possible for an experienced practitioner to form a fair global view of what are reasonable costs of a party in such proceedings. Further, it should be possible for an experienced practitioner to form a fair global view of the reasonable costs of a party in an ordinary one-day application with one affidavit on each side and junior counsel briefed. This is capable of some extension, but becomes progressively more difficult as the matter becomes more complex. However, it has the potential to expedite resolution of an extensive number of applications in routine matters, and the desirability of attainment of perfection in this field must yield to the disproportionate cost and expense of doing so. On balance, the Review considers that global assessment by a costs assessor should be permissible, and as the point is not clear under present legislation, and there is some judicial guidance to the contrary,[20] it should be made explicit.

Recommendations

20. The LPA be amended to make explicit that, where appropriate, global assessment of costs is permissible, including in particular (a) where the costs order is referable to legal services that have been provided on a fixed fee, or other non-time based, basis; and (b) where the matter is one of a type for which the CARC has promulgated a guideline amount.

21. The CARC (in consultation with relevant stakeholders) develop and promulgate guidelines specifying appropriate lump sum amounts to be allowed in routine matters (such as but not limited to uncontested windings-up, applications under *Corporations Act,* s 459G; applications under *Conveyancing Act,* s 66G; and short appeals), with Assessors having discretion to depart from them in a particular case for sufficient reason.

3.5 ADR

Submissions

3.5.1 Submissions to the Review strongly favour greater use of early mediation and other ADR processes. The present legislation empowers the MCA to direct mediation in small cases, involving less than $10,000: s 336. In practice, the Review understands that directed mediation rarely occurs.

3.5.2 The Law Society suggests that there should be concerted encouragement of mediation and other ADR processes. The Law Society suggests the introduction of pre-assessment conferencing to narrow the issues and encourage negotiation before the assessment

[20] *Cassegrain v CTK Engineering* [2008] NSWSC 457, [90] – [92] (Unreported judgment of White J, 15 May 2008).

process is formally commenced, which it considers would significantly enhance the prospects of achieving early settlement.

3.5.3 NSWYL suggest that clients seeking assessment of a law practice's costs should be more strongly encouraged to enter into mediation and that mediation should be provided as an integral part of the costs assessment regime. They suggest that the communicative nature of the process and the facilitative rather than determinative role of the mediator mean that a client and practitioner are more likely to reach agreement on the fair and reasonable costs for the work performed. They suggest that mediation in the costs assessment context should be voluntary, and that the process ought not involve preparation and service of extensive statements, affidavits, submissions, authorities or a brief to the mediator. They suggest that the cost of mediation should be borne upfront and equally by the parties, unless otherwise agreed.

3.5.4 Mr John McGruther, a costs assessor, notes that in his experience a mediation process rarely takes place or is ever canvassed, despite the requirement in s 354(3) that an application must contain a statement by the applicant that there is no reasonable prospect of settlement of the matter by mediation. Mr McGruther suggests that consideration should be given to how mediation might be better implemented or more stridently encouraged, particularly in bills of smaller quantum. He queries whether the monetary limits in s 336 are too low, and puts forward other areas for further deliberation:

- Should an Applicant be required more exhaustively to "declare" as to the measures taken for negotiation/mediation upon which the "statement" as to "no reasonable prospects" is founded?
- Should there be a Panel of selected Senior Costs Assessors (e.g. over 5 years experience say) who are also Nationally Accredited Mediators as potential Mediators at the instance of the Manager?
- Should there be a "stay" (e.g. 21 days) of the assessment process (say, in bills under $20,000) by the Assessor to provide the parties with a final opportunity to negotiate/mediate costs – but this may directly run against the already tight time constraints in conducting an assessment generally?

3.5.5 DG Thompson Legal Costs Lawyers + Consultants advise that mediation rarely happens; they suggest more information needs to be widely available to the profession and the community as to the mediation options to resolve costs disputes, and the costs of the different options.

3.5.6 BASIL submits that costs disputes might be more reasonably and less expensively resolved if there were provision for the parties to a costs dispute to nominate their own costs assessor and have that person temporarily, for the purpose of that particular dispute only, vested with all of the discretions and powers of a formally appointed costs assessor.

3.5.7 NSWYL suggest neutral evaluation as another form of ADR that might be appropriate in the costs assessment context. They envisage neutral evaluation involving the parties jointly briefing an independent party to advise on a figure, or prospects of success and reasonable settlement figures; they note fees for such a brief are commonly capped, thus providing a pre-determined cost.

3.5.8 OLSC suggests that the costs resolution process that operates in Victoria is a model that provides a good example of how ADR can operate. The Victorian Legal Services Commissioner may accept complaints involving a dispute in relation to legal costs not exceeding $25,000 in respect of any one matter. The role of the Legal Services Commissioner is to assist the parties to resolve their dispute. Usually this will involve negotiations by letter or telephone, but may also include referring the dispute to a formal mediation or arranging for a non-binding assessment of legal costs. If the Legal Services Commissioner is unable to resolve the costs dispute, the Commissioner must give written notice to each party stating that the dispute could not be resolved and setting out the party's right to apply to Victorian Civil and Administrative Tribunal; the application must be made within 60 days of receiving the notice. A feature of the process is that the complainant must lodge the unpaid amount of legal costs with the Commissioner, which seems to provide an incentive to reach agreement. The OLSC submits that the process instituted in Victoria clearly assists in identifying and limiting the issues in dispute and assists early resolution, where appropriate. The requirement for upfront payment removes the incentive to raise spurious issues in order to delay. The OLSC submits that as it presently facilitates the mediation of costs disputes, it has the capacity to take on such a role.

3.5.9 The OLSC submission also notes that the latest draft of the Legal Profession National Law (National Law) contains provisions giving the National Legal Services Commissioner (NLSC) a substantial role in dealing with costs disputes. The draft National Law provides, in section 5.3.7, that the NLSC is to deal with costs disputes where the total bill for legal costs is less than $100,000 payable in respect of any one matter, or the total bill for legal costs equals or is more than $100,000 payable in respect of any one matter but the total amount in dispute is less than $10,000. The NLSC can attempt to resolve a costs dispute but, if unable to do so, may make a binding determination about costs where the total amount of costs still in dispute is less than $10,000. If a costs dispute falls outside the parameters of the National Law, or if the NLSC is unable to resolve the dispute, the parties may apply for costs assessment. Legal costs that have been, or are being, dealt with by the NLSC may not be the subject of a costs assessment, unless NLSC is unable to resolve the dispute and refers the parties to costs assessment. It is envisaged that all solicitor-client costs disputes falling within the parameters of the National Law will, in the first instance, be dealt with by the NLSC. However, there is no provision in the National Law for referral of costs disputes lodged for costs assessment to the NLSC.

3.5.10 The OLSC submitted that consideration should be given to establishing a means of using ADR for all costs disputes, not just those falling within the parameters of the LPA and the draft National Law. OLSC submits that the use of a dispute resolution model allows disputes to be resolved at an early stage without recourse to a formal costs assessment, and that many matters for which dispute resolution would be difficult or unlikely due to complexity or intransigence of the parties could benefit from this process by limiting or reducing the issues in dispute for a substantial formal assessment process.

Discussion

3.5.11 An early mediation can save the parties considerable cost and expense related to the detailed expression of their case on assessment of costs – but only if it is successful, otherwise it increases costs. The extent of the saving is dependent on the stage at which mediation occurs. Early mediation also involves a trade-off, in that one or both of the parties must consider settlement on the basis of incomplete information about the other's case. An important question is therefore, how much information should be required, and in what form, before mediation? If that decision is made on a case-by-case basis, it requires an exercise of discretion by a decision maker. It seems more appropriate for a Costs Assessor familiar with the matter to make that decision. However, empowering Assessors to refer matters to mediation may well serve to extend the time taken for the entire process.

3.5.12 It is also relevant that by the time a party/party matter reaches costs assessment, it will typically have a long litigious history, which together with the interest of the paying party in delaying or deferring payment reduces the prospects of compromise. Often, the best incentive for compromise in this context is relentless progress towards completion of the assessment. The Review would not support the automatic referral of all costs disputes to ADR, or of all disputes above or below a certain value. Experience in other fields suggests, however, that there can be benefits from a system of directed ADR.

3.5.13 Recommendation 12(a) above endeavours to address this by providing a procedure that avoids the cost and delay of the introduction of a new participant in the form of a separate mediator, and empowers assessors to conduct settlement conferences. This involves preferring the expedition and economy achieved by such a course over the purity of reference to a separate qualified mediator, having regard to the administrative nature of the assessment process and the general familiarity of experienced practitioners nowadays with negotiation processes, including mediation. Further, the exploration of prospects of resolution will be enhanced by requiring a party who objects to an early estimate to make a confidential offer as a condition of doing so, with costs consequences. The proposed regime of early estimate and compulsory offers of compromise is intended to incentivise early settlement without introducing the cost of additional ADR procedures into the process.

3.5.14 However, the Review considers that in addition, there should be power at an early stage or any stage to direct mediation or other ADR in practitioner and party/party costs assessments. In order to avoid mediation becoming a cause of delay, it is proposed that the MCA be given this power, which could be exercised upon application by an assessor. Placing this function with the MCA (located, as proposed later, in the Supreme Court Registry), would minimize the duplication and delay that would be inherent in establishing a separate ADR agency, under, for example, the OLSC.

3.5.15 The LSC suggested that this approach did not adequately reflect or address the submissions of a number of submitters, summarised above, to the effect that mediation should be more strongly encouraged, and pointed out that OLSC operates a *de facto* mediation service, and that the proposed increase in the initial filing fee might result in more small matters going to OLSC than to assessment. The Review considers that the

proposed increase in the initial filing fee from $100 to $250 would operate as a disincentive to assessment only in the smallest cases. There is no reason why OLSC could not be included in the proposed panel. However, as discussed above, the Review favours an approach to ADR whereby in every case the assessor will, at the post-referral conference, endeavor to conciliate the dispute without a formal reference to mediation, on the basis that this will involve least cost and delay, bearing in mind the view that relentless progress towards resolution with minimal opportunities for delay is likely to be the best incentive for settlement.

Recommendations

22. In addition to the power proposed under recommendation 13(a), the MCA be empowered, at an early stage or any stage, and on application of a party, or on the Manager's own motion, or upon request from an Assessor, to direct that the parties to an assessment participate in an ADR procedure, which may include mediation.

23. The MCA maintain a panel of suitably qualified persons, which could include the OLSC and persons also appointed as assessors, for that purpose.

3.6 Time standards

Submissions

3.6.1 A number of submissions also raised the need for time-standards for the steps in the process undertaken by the costs assessor, noting that the time taken for assessors to complete aspects of the process varied, often without clear explanation.

3.6.2 NSWYL proposes that applications involving sums of less than $10,000 should be finalised within 3 months, and applications involving sums of more than $10,000 within 6 months.

3.6.3 Mr Beaven submits that the assessor should provide the following information at the commencement of the process:

- The date at which information will be requested;
- The date by which parties must provide information required;
- The date by which the assessment will begin; and
- The target date for completion of the assessment.

Discussion

3.6.4 A number of other decision-making bodies prescribe time standards for their members. For example, members of the Administrative Appeals Tribunal are required by the internal administrative arrangements of the Tribunal to report on cases that remain undetermined 72 days after the close of the relevant hearing, setting out any unusual features of the case or causes of delay and giving an estimate of the time required to finalise a decision. The population of costs assessors is considerably more isolated from each other and from the central management of the costs assessment scheme than are

Administrative Appeals Tribunal members in relation to that Tribunal, and there is a correspondingly stronger case for the central administration to keep track of the progress of matters remitted to them for decision.

3.6.5 The Review supports the development of time standards for the work of costs assessors, and related reporting requirements, in consultation with the MCA. Such standards should be seen and treated, with appropriate sensitivity, as a management tool. The fact that a particular case takes longer than usual does not by itself imply dilatoriness by the decision maker – some cases are just long and difficult. Some classes of cases may be more complex than others. And sight must not be lost of the fact that Assessors are effectively engaged on a casual case-by-case basis, often while contemporaneously engaged in a law practice, and at remuneration markedly inferior to that generated in private practice. But if a particular assessor consistently has difficulty in completing assigned work in the same time frame as comparable work performed by his or her peers, it is better that the fact be identified. If a particular case is taking an unusually long time, it is appropriate for the Manager to be aware of the circumstances.

Recommendation

24. The CARC (in consultation with relevant stakeholders) develop and promulgate time standards, that can be communicated to parties, for completion of assessments and reviews. It is suggested that these standards should provide for completion of an assessment by an Assessor (and a review by a Review Panel):

    a. where the disputed costs are less than $100,000, within three months of referral; and

    b. where the disputed costs exceed $100,000, within six months of referral.

3.7 Summary and default assessments

Submissions

3.7.1 The NSW Bar Association has suggested that a summary procedure should be available to identify whether any real dispute exists about practitioner/client costs claimed and, if not, to issue a certificate of determination without further assessment. The proposal is made specifically in the context of costs between law practices (one of which may be a barrister), but with recognition that it may have wider application. The proposal includes support for the issue of interim certificates of determination, if a dispute is found to exist.

3.7.2 Submissions also identified the need for a procedure for default determination, where a party (typically the paying party) failed to comply with directions so as to delay the assessment process.

Discussion

3.7.3 The Review considers that, on an application by a receiving party for assessment of practitioner costs, it should be open to a costs assessor to issue a certificate of determination without further assessment if it appears that no real or substantial dispute exists (e.g. where the only objection is that the paying party has not been put in funds by a client, but the payment obligation is not contingent on that event). The Review would not in principle limit such a provision to costs between law practices.

3.7.4 Where a paying party has been served with notice of a costs claim, whether for practitioner or party/party costs, and does not take the opportunity to respond (for example, as proposed above, by filing a response including objections within 28 days) – or, having responded, does not comply with further directions within time – there is no practical utility in subjecting the costs to full assessment by a costs assessor, although the protective role of assessment requires that there remain some limited oversight, in the nature of the "default assessment" procedure described above. In addition, a procedure for default assessment would support the enforcement of compliance with procedural directions made by assessors, where a paying party fails to comply with a direction in a timely manner.

3.7.5 Accordingly, in such circumstances, the assessment should proceed on the default basis, so that the assessor must review the application and, except to the extent they appear manifestly unreasonable, in a party/party or practitioner/client application, allow the costs in the sum claimed in the application; and in a client/practitioner application, uphold the objections made in the application (and thus allow the costs claimed in the bill(s) referred to in the application at the difference between the amount claimed in the bill(s) and the amount of the objections).

3.7.6 Where the default occurs before reference to an assessor, the MCA should be able to issue an interim certificate and refer the matter for default assessment. If the matter is before a costs assessor when the circumstances justifying default determination arise, the assessor should have power to issue an interim certificate pending default assessment.

3.7.7 Where a receiving party has been served with an application for assessment of practitioner costs and does not file a bill or responses to objections within a prescribed time, there is likewise good justification for default determination in a nominal or nil amount, or on a basis reflecting the objections of the paying party, as the case may be.

3.7.8 It would then be necessary to enact rules for applications to set aside default determinations, analogous to the rules relating to default judgments. A paying party wishing to challenge a regularly obtained default determination should normally be required to pay the amount in question as a condition of setting aside the default determination (see Recommendation 27(c)). Other Australian jurisdictions have developed default determination procedures that could be used as a basis for a similar

process in NSW.[21]

Recommendations

25. The CARC make rules providing for (a) summary assessment, on application by a receiving party where the Assessor is satisfied that there is no genuine dispute as to the whole or part of the costs; and (b) default assessment, where a party defaults in compliance with a rule or direction, including for setting aside such determinations.

3.8 Early payment & interim certificates

Discussion

3.8.1 Quantification of costs is only one aspect of the costs assessment scheme, which is also concerned with recovery. Incentives to delay are ultimately bound up with the advantages to a paying party of delayed payment. The present system contains a number of disincentives to efficient determination and prompt payment of costs. So long as a receiving party is held out of money properly due, that party suffers an economic disadvantage, while the paying party enjoys a corresponding advantage from the retention and use of money. This generally creates an incentive for the paying party to delay resolution of the assessment process or, at all events, to delay payment. Conversely, the detriment of delay is suffered by the receiving party in the form of reduced cash flow and delayed payment. While the prospect of subsequently recovering interest might be expected to mitigate those effects to a degree, the present system makes it difficult for receiving parties to recover interest on costs from paying parties. This is so for both practitioner/client costs and party/party costs. Further, the simple detriment of non-payment or delayed payment is not adequately compensated by interest. The prospect of recovering interest does not answer the cash flow problems of a receiving party or assuage the risk of non-payment by a determined or insolvent paying party. Nor does the prescribed rate of interest (simple interest at the RBA cash target rate plus two percentage points) adequately reflect either the risk borne by the receiving party, or the advantage derived by the paying party in retaining the disputed amount.

3.8.2 Where it appears clear, or objectively likely, that money is due, there is a strong case for requiring early payment, even if the ultimate determination of quantum may take longer to complete. Early payment of a substantial sum largely negates the incentive for a paying party to protract the assessment process and to take every point, and redresses the disadvantage to the receiving party of being held out of his or her money.

3.8.3 Arguments against early payment are: (1) that the paying party is disadvantaged if it turns out that the amount due is less than the payment; and, (2) that another layer of procedure directed to early payment adds to the cost and time of the assessment process.

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[21] See, for example, *Uniform Civil Procedure Rules 1999* (Qld), s 708, and *Court Procedure Rules 2006* (ACT), Reg. 1809.

3.8.4 However, the Review considers that there is a strong case for early payments without prejudice to final assessment, subject to appropriate safeguards. In the case of unpaid practitioner/client costs and party/party costs, the real issue is usually not whether anything is due, but how much. It is better that the disadvantage of being out of money be borne by the party who is prima facie liable than by the party who is prima facie entitled, and that disadvantage can be largely be compensated by interest and, if appropriate, security. If there is a demonstrable and significant risk that a payment that turns out to include an element of overpayment may not be recoverable in fact, the solution lies in provision of security in lieu of cash payment.

3.8.5 The Review has identified the following as appropriate occasions for requiring early payment, in the amounts indicated:

- Where at the expiration of time for filing a response, the difference between the bill and the objections exceeds the amount paid (if any) – that excess. This is addressed by the proposal that the MCA issue an interim certificate for the amount not in dispute at the time of referring a matter to an assessor;
- Where an early estimate has been made but objected to – an amount reflecting the estimate, unless the Assessor otherwise determines (consistently with the recommendations above regarding early estimates);
- Where a party has obtained the setting-aside of a regularly obtained default assessment – the amount that would have been due in accordance with the default assessment but for its being set aside (unless the Assessor otherwise determines);
- At any stage of the assessment process, on the application of the receiving party, where the costs assessor considers, without actually assessing the costs or determining particular items or objections, that an amount is likely to be due – that amount or any lesser amount.

3.8.6 The mechanism for giving effect to early payment is the issue of interim certificates. The present legislation empowers an assessor to issue multiple certificates of determination successively or simultaneously in a costs assessment (s 368(2)). In practice, assessors sometimes agree to issue an 'interim' certificate for an amount that is clearly undisputed but unpaid.[22] However, the Review understands that the decision in *Turner v Pride* [1999] NSWSC 850, (Malpass M, as he then was) has been interpreted by assessors as requiring, in party/party assessments, that they assess every part of the claim, including matters not in dispute by the parties as evidenced by the objections, and this has led to reluctance to issue interim certificates representing the minimum amount not in dispute.

3.8.7 The Act does not specify the relationship between multiple or successive certificates issued in the same assessment, nor whether a later certificate can include or reduce an earlier one, and the point does not appear to have been determined or considered judicially. This uncertainty increases reluctance to issue interim certificates, and a number of submissions received by the Review have suggested that, in one way or another, the existing provisions for interim certificates and corresponding payment should be clarified, strengthened and expanded.

[22] The term 'interim certificate' is used in practice but not in the Act.

3.8.8 The legal character of such a certificate affects the criteria for quantification and issue of such a certificate. If the certificate represents a final determination that the paying party is liable to the receiving party in at least the amount certified, the assessor would have to reach a level of satisfaction appropriate to a final determination. However, if it merely creates a payment obligation without prejudice to the final determination of the whole of the costs in dispute, which is the preferred position of the Review, a lower standard of satisfaction and/or more peremptory criteria are justifiable, and any rights of appeal from a decision to issue an interim certificate may be more closely constrained.

Recommendations

26. LPA s 368 be amended to clarify that interim certificates create a payment obligation without prejudice to the final determination, and can be varied by subsequent certificates.

27. The CARC make rules to the effect that interim certificates will be issued (so as to require early payment, but without prejudice to the final determination) as follows:

    a. Where at the expiration of time for filing a response, the difference between the bill and the objections exceeds the amount paid (if any) – that excess;

    b. Where an early estimate has been made – an amount reflecting the estimate (unless the Assessor otherwise determines);

    c. Where a party has obtained the setting-aside of a regularly obtained default assessment – the amount that would have been due in accordance with the default assessment but for its being set aside (unless the Assessor otherwise determines);

    d. At any stage of the assessment process, on the application of the receiving party, where the costs assessor considers, without actually assessing the costs or determining particular items or objections, that an amount is likely to be due – that amount or any lesser amount.

3.9 Giving parties an opportunity to be heard

Submissions

3.9.1 The OLSC notes that parties frequently complain that they are unable to communicate with costs assessors by telephone, and suggests that giving parties the opportunity to present their case and communicate effectively with costs assessors would enhance procedural fairness. The OLSC submits that introducing an early intervention/mediation model, similar to the processes it uses in dealing with complaints, would provide an opportunity for the parties to be heard.

3.9.2 The Bar Association suggests that oral hearings, with a sequence of oral submissions followed by a quick decision, may allow some issues to be determined with greater speed and less cost than an exchange of a series of detailed written submissions which, unless

tightly controlled, can go back and forth for months and may create difficulties for the assessor when they write their decision. The Bar Association also observes, however, that the decentralised system of assessment by private practitioners is not conducive to oral hearings. Further, they note that many competent assessors have no experience or training in the conduct of hearings and do not have access to suitable premises or facilities to accommodate them.

3.9.3 BASIL suggest that a face-to-face meeting should be available during the costs assessment process if the costs assessor considers it may be helpful. BASIL further suggest that it would be preferable if the costs assessor published draft assessment reasons to all parties with an opportunity then given to the parties to put oral submissions, perhaps limited in time, to the costs assessor before a final determination issues.

3.9.4 Similarly, other submissions raise concerns as to inability of costs assessors to take oral and affidavit evidence, and the inability of parties to compel the production of documentary material, including a practitioner's file. Federal Court taxing officers have such powers when conducting a party/party assessment: FCR, r 40.21.

3.9.5 Of particular concern is that matters that cannot be determined on the papers and require oral testimony and cross-examination must be referred to a court. OLSC provides as examples disputes over terms of a retainer verbally agreed, and disputes as to the existence, validity and interpretation of a costs agreement. Likewise, applications to set aside costs agreements must at present be dealt with on the papers, unless referred to the Court, which is most unsatisfactory. The difficulties in referring matters to a court are discussed below.

Discussion

3.9.6 The premise that oral hearings may reduce comparative delay in some cases appears to be sound, but a general return to oral hearings would be difficult to reconcile with the outsourcing model that is fundamental to the present Scheme. However, some cases are particularly ill-suited to determination on the papers,[23] and others may benefit considerably from an oral hearing. Although some individual assessors lack the physical facilities that would be necessary to conduct conventional hearings, many law practices have conference rooms and, where necessary, the Court could provide facilities in the ADR rooms. Under the former civil arbitration scheme, many practitioners conducted hearings in the premises occupied by their practices. The Review considers that Assessors should be empowered to conduct oral hearings in an appropriate case, and have appropriate ancillary powers. These are addressed in recommendation 12(d) above.

Recommendations

28. Costs assessors be given the discretion to conduct an oral hearing in appropriate cases, and the appropriate ancillary powers in accordance with recommendation

[23] See, for example, *Wentworth v Rogers* (2006) 66 NSWLR 474, 519; [2006] NSWCA 145, [202].

13(c).

3.10 Judicial oversight

3.10.1 The LPA does not limit the power of a court or tribunal to order and determine costs itself (s 366), including under CPA, s 98.[24]

Submissions

3.10.2 Mr Chris Wall, costs assessor and solicitor, suggested that it would assist assessors and review panellists if, after they had received submissions from the parties and any other person concerned as to whether they should do so, they could refer an issue to a court if it was one that the assessor could not, or ought not, determine.

3.10.3 Mr P Rosier, costs assessor and solicitor, suggested there may be a case to remove certain applications from the mainstream of matters referred to costs assessors and to refer such matters to costs assessors with a broader range of inquisitive and other powers.

3.10.4 The Law Society suggested that costs assessors and 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 a costs 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.

3.10.5 Legal Aid noted that whilst costs assessors have power under s 328 to set aside a costs agreement or provision of a costs agreement, their ability to determine whether the terms of a costs agreement are unjust is limited. Clients may have a remedy under, for example, the *Contracts Review Act 1980* (NSW), but must pursue that remedy in another forum. Legal Aid suggest that there should be provision to suspend a costs assessment where unjustness is raised in a forum other than costs assessment, so as to enable a determination in relation to unjustness to be made in the other forum. Legal Aid further suggest that provision should be made for costs assessors to make a preliminary determination as to whether a term of a costs agreement is unjust and to stay the costs assessment process so a client can seek a remedy in another forum.

3.10.6 In addition, submissions referred to the power of the court to determine costs independently of the assessment process.

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[24] At least so far as the Supreme Court is concerned, such a power exists independently of its statutory power: see *Woolf v Snipe* (1933) 48 CLR 677 at 678 (Dixon J).

Discussion

3.10.7 There has been some controversy as to the extent of the jurisdiction of a Costs Assessor, and in particular whether an Assessor is able to determine whether or not a Costs Agreement exists, or to construe a Costs Agreement. The above submissions reflect that controversy. Sometimes assessors have taken the view that they are authorised only to decide what are the fair and reasonable costs, and not to decide whether an agreement exists, or to construe its terms. This approach has on occasion led to applications to the Court for declaratory relief.

3.10.8 The Review does not agree with this approach, and considers that the aim of prompt resolution will best be served by clarifying that Assessors are expected to decide the issues that arise before them, and (as already discussed) improving their ability to do so by providing the facility for oral hearings where appropriate.

3.10.9 It is beyond doubt that a Costs Assessor is empowered to determine whether a Costs Agreement exists, and to construe its terms. Section 359 expressly so provides:

> **359 Consideration of applications by costs assessors**
>
> ...
>
> (3) For the purposes of determining an application for assessment or exercising any other function, a costs assessor may determine any of the following:
>
> (a) whether or not disclosure has been made in accordance with Division 3 (Costs disclosure) and whether or not it was reasonably practicable to disclose any matter required to be disclosed under Division 3,
>
> (b) whether a costs agreement exists, and its terms.

3.10.10 A Costs Assessor may determine whether a Costs Agreement complies with s 322 (Making Costs Agreements) or is rendered void by s 327(1) (Certain Costs Agreements are void).[25]

3.10.11 The Court of Appeal has suggested that, while a Costs Assessor may determine disputes as to the terms of the costs agreement, where the existence of the terms are in dispute in a way that would require the hearing of oral evidence, it might be appropriate for the costs assessor to decline to resolve the dispute, leaving the parties to approach the Court for declaratory relief:[26]

> *61 In my opinion, Davies AJ was correct to say that a costs assessor, assessing costs between a lawyer and client, can determine disputes as to the terms of the costs agreement, and Dunford J was wrong to say otherwise. However, where the existence of the terms of the agreement are in dispute in a way that would require the hearing of evidence to resolve, it may be appropriate for the costs assessor to decline to resolve the dispute; and in the Muriniti litigation, it would in my*

[25] *Wentworth v Rogers* (2006) 66 NSWLR 474; [2006] NSWCA 145, [41] (Santow JA; Hislop J concurring).

[26] *Doyle v Hall Chadwick* [2007] NSWCA 159, [61] (Hodgson JA; Mason P and Campbell JA concurring).

opinion have been open and reasonable for Davies AJ to have permitted the question to have been determined in the proceedings before him. As it turned out, the costs assessor did decline to resolve this question; and in my opinion, in those circumstances, the costs assessor should not have issued a certificate which could be converted into a judgment. That is, in a case where there is a real dispute on substantial grounds as to whether any costs are payable, a costs assessor should not complete an assessment by issuing a certificate unless satisfied that the costs are payable, because the certificate can be filed so as to take effect as a judgment.

3.10.12 Nonetheless, the conferral of jurisdiction to determine and certify the amount of costs payable necessarily carries with it the power to decide incidentally all anterior questions necessary to make that determination. Even if some such questions may be less satisfactorily resolved without oral evidence, a Costs Assessor must simply do his or her best with the material available, and if one or other party wishes to test the matter, it can seek leave to appeal which, in a case which called for resolution by oral evidence where there was none, would presumably be readily granted. Referrals of aspects of assessments to courts for judicial decision are likely to contribute to delay in the progress of an assessment. The concerns that have led to calls for a power of referral should be adequately addressed by the reforms suggested in Recommendations 12(d) and 26. While the nature of the power exercised by Costs Assessors means that their decisions on collateral issues ought not create any issue estoppel, for more abundant caution, this ought to be made explicit.

3.10.13 However, the assessment of costs is intimately interconnected with the jurisdiction of Courts: in a party/party assessment, as part of implementing the Court's judgment; and in a practitioner/client assessment, as part of the regulation of the relationship of the court's officer with a client. The Review considers that while the process of referral for assessment by an assessor should be the ordinary course (except where the Court has assessed the costs itself), the facility of the Court to intervene in what is ultimately a process within its scope should be preserved. This means that the facility should be preserved for the Court to intervene in, and even take carriage of, an assessment.

3.10.14 One of the considerations that both favours the exercise of the court's power and affects the manner in which it is exercised is the likely cost and delay of party/party assessment; judicial determination is quicker and more summary than costs assessment. Judicial determination has great advantages in an appropriate case. In *Idoport Pty Ltd v National Australia Bank Ltd*, Einstein J set out principles by which the exercise of the discretion in s 98(4)(c) should be informed.[27] It is to be noted that in cases where the discretion has been exercised (including those using a similar discretion in the Federal Court), a discount to the costs incurred is typically applied, and in many cases that discount is substantial.[28] Hamilton J, in a paper presented on 1 June 2007, suggested that

[27] [2007] NSWSC 23, [9] (Einstein J).

[28] Ibid, [13], and the cases referred to by His Honour, especially *Canvas Graphics Pty Ltd v Kodak (Australia) Pty Ltd* [1998] 23 FCA 23 (unreported, O'Loughlin J, 23 January 1998, BC9800050) where an 80% discount was applied.

it is to be hoped that use of the power in s 98 will expand, in particular in relation to interlocutory applications where the determination of amount is comparatively simple.[29]

3.10.15 Particularly in smaller matters, use of the court's power to make a lump sum costs order is encouraged. While it may achieve only rough justice, the result is superior to the delay and additional expense incurred through the assessment process. Proceeding to assessment in small cases is a Pyrrhic victory.[30] Additionally, increased use of the power to award lump sum costs may collaterally improve the capacity of costs consultants and costs assessors to arrive at objectively reliable global assessments.

Recommendations

29. LPA, s 359, be amended to explicitly provide that Costs Assessors are authorised to determine all anterior and ancillary questions necessary to resolve the application, but not so as to preclude the parties, by estoppel, from arguing such questions in subsequent litigation.

30. The facility afforded by LPA s 366 for the relevant Court or Tribunal itself to determine questions of party/party costs be preserved.

31. Judicial education programs and continuing legal education programs give emphasis to the power of courts to order lump sum costs, and to the potential public and private benefits of lump sum costs orders.

3.11 Consequences of non-disclosure

Submissions

3.11.1 Section 317 of the Act sets out the effect of a failure to disclose costs. Section 317(4) provides if there is a failure to disclose, the amount of the costs may be reduced on costs assessment by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose.

3.11.2 Mr Chris Wall submits that no one really knows what that means or how that is to be done. He notes that there are English cases and suggests that it might be appropriate to add an explanatory subsection based on those cases which sets out the considerations that may be taken into account.

3.11.3 Mr Graham Mullane, a costs assessor, also notes that where there has been a failure to disclose, and the costs assessor either sets aside, or declines to set aside, a costs

[29] The Hon. Mr Justice John Hamilton, Containment of Costs: Litigation and Arbitration, Supreme Court of NSW, 1 June 2007 (http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_hamilton010607 accessed 16 April 2012).

[30] The Hon Justice PLG Brereton, "A Less Taxing Process – Issues in Costs Assessment in New South Wales", NSW Supreme Court Conference, 22 August 2010.

agreement under s 328, it may be that the decision precludes the parties by estoppel from raising that issue in relation to an earlier, interim, bill that has not yet been assessed. He submits that the LPA ought to be amended to clarify the effect of a decision under s 328 on other costs not yet assessed. Mr Mullane also queries whether s 317 should be amended to clarify the status of prior payments where a finding of failure to disclose has been made, as the costs arguably were not, and are not, payable unless the prior, paid bills have been assessed.

Discussion

3.11.4 Section 317(4) in its current form is very difficult to apply, and would considerably benefit from elucidation. It is very difficult to relate the quantification of costs to the seriousness of a non-disclosure. One approach would be to repeal s 317(4) completely, leaving the obligation to disclose for enforcement by disciplinary sanctions. However, the intention of s 317(4) appears to have been to transport, into the current costs regime, the notion from earlier days that where a solicitor had not validly procured a costs agreement from a client, the solicitor would be restricted to scale costs. This notion is not readily applicable under the current, scale-free, system. A discretionary (and arbitrary) reduction in costs recoverable, by reason of a non-disclosure, might be thought to be an inappropriate and very blunt instrument to secure compliance with the obligation to make the requisite costs disclosure.

3.11.5 However, a fundamental purpose of the disclosure obligation is to ensure that a client is informed, at the outset, of what is going to be charged. In the days of the scales, the solution would have been that, absent disclosure, costs between practitioner and client would have been assessed according to the scale (and not on the higher basis that might have been authorised by a costs agreement). In the absence of a scale, there is no "default" position. The purpose of s 317(4) is to produce a similar result, but it admits of such arbitrary results that it is a sub-optimal instrument for that purpose. The object should be to produce an assessment of the costs that would objectively be reasonable for a client to whom the requisite disclosure was not made. The intent would be better achieved by substituting, for "an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose", "an amount that is fair and reasonable in all the circumstances, having regard to the work done, the significance of the non-disclosure, the quantum of the costs, and the recoverability of those costs under any party/party order".

3.11.6 The LSC initially expressed some concern that removal of the phrase "proportionate to the seriousness of the failure to disclose" would significantly alter the existing provision, potentially to the detriment of the function and purpose of the cost assessment and disciplinary regimes. However, further discussion and consideration elicited substantial agreement that the extant provision was very difficult to apply, and recognition that there was no proposal to change the provisions (LPA s 393) that require Assessors to refer matters to the OLSC where they consider that the legal costs charged are grossly excessive, or that there is any other matter that may amount to unsatisfactory professional conduct or professional misconduct.

3.11.7 A further difficulty with s 317 arises from the decision of the District Court in *Sittchichai Laksanabechnarong v F Net Pty Limited,*[31] to the effect that the indemnity principle (which holds that party/party costs are by way of indemnity only (and no more) for the costs liability the receiving party has incurred to his or her own legal representatives as a result of the litigation) has the consequence that in a party/party assessment, the Assessor must, where there has been a non-disclosure, apply s 317(4) and reduce the costs allowed accordingly. Contrary to the decision in *Laksanabechnarong v F Net,* the distinction between ss 363 (Criteria for costs assessment) and 364 (Assessment of costs—costs ordered by court or tribunal) – the former identifying disclosure as a relevant consideration and the latter conspicuously not doing so – seems to indicate that disclosure between practitioner and client was not to be a relevant consideration on party/party assessment.

3.11.8 Although this decision is controversial, it is unsurprisingly now being followed by Assessors. Moreover, even if (as the Review is inclined to think) the decision is incorrect insofar as it holds that the Assessor in the party/party assessment should apply s 317(4), it is at least arguable that the indemnity principle has the consequence that the receiving party could recover no costs under the party/party order unless and until the practitioner costs had been assessed on a *quantum meruit* basis, and s 317(4) applied by the Assessor in the practitioner/client assessment. This is because s 317(1) and (2) provide that if a law practice does not disclose to a client anything required by to be disclosed, the client need not pay the legal costs, and the law practice may not maintain proceedings against the client for the recovery of legal costs, unless the costs have been assessed under Division 11.

3.11.9 The consequences are that, in party/party assessments, paying parties are incentivised to scrutinise closely the dealings between the receiving party and its lawyers and wherever possible to impugn the adequacy of the disclosure made between them – when this in truth and substance should be none of the paying party's concern; and that receiving parties under party/party orders who have no grievance with their own lawyers' costs can nonetheless be required, in effect, to dispute them. To overcome this, the Review considers that s 317 should be amended to provide explicitly that nothing in the section has the effect of postponing, deferring, diminishing or otherwise affecting the client's entitlement to recover the legal costs under a party/party costs order. This would not amount to a serious erosion of the indemnity principle, as if the client recovers the legal costs without reduction from the paying party under the party/party order, then it would not be fair or reasonable to reduce the amount payable as between client and practitioner for non-disclosure.

3.11.10 The Review considers that a costs agreement once set aside is set aside *ab initio* and that amendment of s 328 to clarify that is not required.

Recommendations

32. LPA s 317(4) be amended to provide that where there is a failure to disclose, the

[31] NSWDC, 16 September 2011, McLoughlin DCJ, unreported.

amount of the costs may be reduced on assessment to an amount considered by the costs assessor to be fair and reasonable in all the circumstances, having regard to the work done, the significance of the non-disclosure, the quantum of the costs, and the recoverability of those costs under any party/party order.

33. LPA s 317 be amended to provide explicitly that nothing in the section has the effect of postponing, deferring, diminishing or otherwise affecting the client's entitlement to recover the legal costs under a party/party costs order.

3.12 Guidelines & publication

Submissions

3.12.1 A number of submissions, including those of the Law Society, addressed the issue of the need for publicly available guidelines for costs assessors, and for decisions of assessors and the review panel to be published.

3.12.2 The OLSC suggests that, given the anticipated passage of the National Law, it is an opportune time to commence the process of guideline development since the overlap between this review and what is contained in National Law in relation to costs is large. In this respect, OLSC suggests that a non-exhaustive list of potential guidelines for the purpose of this review might include the following:

- fair and reasonable,
- proportionate,
- informed consent,
- lump sum,
- itemised bill,
- costs disclosure,
- alternatives to the billable hour.

3.12.3 OLSC also observes that there is a dearth of publicly available information about market rates for legal costs, and suggests that making costs assessment determinations accessible to the public would enable such information to be collated. OLSC further notes that while information about market rates is available to costs assessors and costs consultants through the costs assessment process, and to the OLSC through the complaints process, these processes are confidential. OLSC suggests it would be useful if a mechanism could be established to collect and collate information about market rates, whilst preserving the anonymity of law practices and legal practitioners.

3.12.4 Submissions from lay users of the system identified inconsistencies. For example, Mr Beaven reported that one assessor varied the rate charged for photocopying by a practitioner, and then another assessor accepted the same rate from the same practitioner. While anecdotal evidence such as this is not indicative of endemic inconsistency, it points

to an issue that is capable of resolution in the form of guidelines as to what would be allowed in respect of a simple matter such as photocopying. BASIL support the development of guidelines, in party/party assessments, on matters such as the amount recoverable for internal disbursements, maximum hourly rates for solicitors of a certain experience; such guidelines would, they submit, assist their members in advising clients of the likely costs recoverable if a favourable costs order is obtained.

Discussion

3.12.5 Clause 127 of the LPR gives the CARC a discretion, for the purpose of assisting costs assessors in assessing costs, to distribute to costs assessors information that has been published about market rates for legal costs. However, such information is not publicly available, as s 392 provides that information about costs assessments is confidential.

3.12.6 Guidelines and publication would have a number of benefits:

- Consistency between assessors, particularly since assessors come from a wide variety of practice backgrounds;
- Minimising the subjectivity of assessments, given that the main criterion for assessment is the undefined phrase "fair and reasonable";
- Transparency of the assessment process, which gives reassurance to the public as to the process, particularly since it could be seen to be regulation of lawyers by lawyers;
- Guidance to the profession, noting its absence in a deregulated post-scale costs environment, which then also allows the profession to give more accurate estimates to clients and more appropriate recommendations to seek an assessment of another party's costs;
- Fewer costs disputes and faster resolution, as points of dispute may disappear if the solicitors know what will and will not be allowed; and
- Possible reduction of costs, as solicitors will not make unallowable claims, irrespective of whether their costs are assessed.

3.12.7 The more detailed the guidelines are, the more useful they would be to both the profession and assessors. Details could include:

- The impact of location on allowable overheads;
- Whether there are limits or ranges of rates based on experience, specialisation, paralegal status (without reverting to fixed scales, and appropriately increasing over time);
- Office costs such as photocopying, travel expenses, administrative work and agency fees;
- Research time;
- Reviewing time;
- Conferences between lawyers for the client;
- The reasonableness of certain costs incurred, e.g. senior counsel, and the effect of the retainer agreement on this;
- GST and interest; and

- The different considerations in assessments of party/party costs compared to practitioner/client costs.

3.12.8 Guidelines on the form of determinations could also assist with their publication, to ensure that they are consistent.

3.12.9 The Review considers that publication of decisions of assessors, or at least a selection thereof, would assist in making decisions more consistent and assessors more accountable. Privacy concerns can adequately be dealt with by anonymisation and/or pseudonyms, or by providing an exception for publication of decisions.

Recommendations

34. The CARC (in consultation with relevant stakeholders) develop and promulgate guidelines for assessors on whether, when and in what circumstances, and/or at what rate frequently occurring items would ordinarily be allowed, on party/party assessments, including:
    a. hourly and daily rates for practitioners of varying seniority and in varying locations;
    b. office overheads such as copying, scanning, telephone, faxes, travel expenses, and administrative work,
    c. agency search fees and filing fees;
    d. research time;
    e. reviewing time;
    f. conferences between lawyers for the client;
    g. briefing senior counsel;
    h. retaining experts; and
    i. retaining agents.

35. The CARC (in consultation with relevant stakeholders) develop and promulgate recommended formats for reasons for determination.

36. Selected decisions of costs assessors be published on the Scheme website, with appropriate pseudonyms or other anonymisation.

4 DETERMINATIONS

4.1 Introduction

4.1.1 A determination by a Costs Assessor, in the form of a certificate issued under s 368 of the LPA, is taken, upon filing in an appropriate court, to be a judgment of that court. The LPA provides that a certificate must be accompanied by "a statement of the reasons for the costs assessor's determination". As has been repeatedly stated in this Report, an object of this Review is to make the process simpler and faster. Obviously, there is a tension between the objective of the scheme to provide a simple administrative process to assess costs and the provision of reasons that afford parties the opportunity to subject a determination to review and/or appeal. The content and quality of assessors' reasons was a significant focus in those submissions that addressed determinations, and is discussed at some length in this Chapter. The other major focus is on interest on costs, which should act so as to encourage early resolution of these matters.

4.2 Interest on costs

Submissions

4.2.1 A number of submissions drew attention to the provisions in respect of interest on costs, and suggested that these do not encourage timely resolution of the dispute.

4.2.2 The Bar Association observes that interest constitutes a form of compensation for delay in the payment of costs, and suggests that interest should be integrated in any enforceable judgment arising from a certificate or other instrument issued under the Scheme, and calculated, in practitioner/client matters, from the date prescribed by the relevant costs agreement or the date of the bill.

4.2.3 Mr R Beaven submitted that the current system favours the paying party, insofar as they can choose not to make an offer of settlement and have the "luxury of the use of the debt and its potential to earn interest, whilst the [receiving party], who has already paid the bill, is faced with a long and costly process".

4.2.4 Mr Graham Mullane notes that the effect of a failure to disclose is that the client need not pay the costs unless they have been assessed, and that arguably the costs are not payable, and interest cannot be charged on them, until costs have been assessed. He suggests section 317 (effect of failure to disclose) should be amended to clearly provide that where there has been a failure to disclose, no interest is payable in respect of the period prior to completion of the assessment.

4.2.5 There were also submissions to the effect that, generally speaking, unsuccessful defendants in personal injury cases have an economic incentive to delay the quantification of party/party costs because the great majority of plaintiffs cannot fund litigation from their own resources, but rely on the proceeds of litigation to pay their own

lawyers. To the extent that successful plaintiffs cannot or do not pay their own costs up front, and/or that their lawyers allow them the proceeds of judgment before insisting on payment of fees, unsuccessful defendants receive a windfall, to the extent that they can delay the payment of costs free of interest. It is not necessary to consider whether or to what extent defendants are consciously motivated by economic advantage associated with delay.

Discussion

4.2.6 A number of submissions to the Review rightly identify impediments in the recognition and recovery of interest on costs as an incentive to delay and as a cause of substantive unfairness in itself. If interest does not run on costs until the assessment is completed, there is no economic incentive for settlement by the paying party, who, for the most part, simply wants to prolong the process.

4.2.7 The difficulties arise in somewhat different ways in respect of practitioner and party/party costs.

4.2.8 *Interest on practitioner costs.* A law practice is presently entitled to charge interest on costs at regulated rates: s 321. Absent an interest clause in a costs agreement, interest can only be charged if the costs are unpaid 30 days or more after billing. The Act does not say whether interest is calculated from the date of issue of the invoice, or from the expiration of the 30 days; the more probably correct interpretation appears to be the former. Where a costs agreement provides explicitly for interest, s 321 controls the rate of interest chargeable but not the date from which it is to be calculated. A costs assessor in a practitioner/client assessment may 'determine that interest is not payable' on part or all of the costs in question and may 'determine the rate of interest' (s 363A). The exact scope and meaning of s 363A are obscure and have not been judicially determined; while it is arguable that it authorizes inclusion of interest in a determination, it is far from clear and it is not the usual practice of assessors to include interest in a certificate.

4.2.9 Thus, in practice, where costs assessment is engaged, there is no mechanism to enforce a right to interest on practitioner costs with respect to the period before registration of the certificate of determination. As a matter of principle, the efficient integration of recovery and assessment of practitioner costs in the assessment scheme requires a practical mechanism for the recovery of interest, failing which a paying party has an incentive to delay finalisation of assessment and payment of costs. No countervailing argument has been identified by the Review. The obvious solution is to include in a costs assessor's certificate under s 368 either a dollar value for interest to the date of the certificate and a daily rate thereafter, or the particulars from which interest can be calculated without the exercise of any further judgment or discretion (e.g. starting date, principal amount, and rate of interest), on terms that interest so certified or calculated is part of the resulting judgment debt.

4.2.10 *Interest on party/party costs.* Section 101(4)-(5) of the CPA permits a court to order interest on costs, but only from the date when the costs concerned were paid (i.e. from the date after which the receiving party is "out of pocket"). If the receiving party under a costs order cannot afford to pay costs as the case progresses, and is 'carried' by his or her

lawyers either deferring payment or entering into a conditional costs agreement but (quite legitimately) charging interest, the receiving party is under compensated. By contrast, if the receiving party borrows money at interest to pay costs, interest can be awarded from the date when the borrowed money is so applied. There is no rational distinction between the two situations, save that the disentitled litigant in the first scenario is likely to be more needy. It is incumbent on the receiving party to make an application for interest, whether at the time of obtaining a costs order or subsequently. This is not frequently done, although such applications when made are increasingly and usually successful.

4.2.11 Another difficulty which has been experienced in relation to the availability of an interest component is that even where the receiving party has an award of interest on costs, assessors do not have the power to include interest in their determinations. Costs assessors in party/party assessments have no jurisdiction to assess interest. Even if the court that makes the relevant costs order has made an order for interest, there is presently no way to have that interest included in a certificate of determination. If interest is not paid, the receiving party has to sue for the interest component in separate proceedings.

4.2.12 It has been argued that party/party costs should not generally bear interest, as the receiving party will not necessarily have been out of pocket, and that it is difficult to calculate interest if the payment of the costs has been made over a long period of time. However, courts have readily been able to provide formulas for solution of these problems.[32]

4.2.13 An additional argument against the awarding of interest is that a paying party under a costs order should not have to bear interest until the amount of his or her liability is quantified. However, that argument has little merit: the function of interest is compensatory; the receiving party under a costs order is, by definition, the paying party in a practitioner costs context, and suffers a real detriment by being kept out of his or her money. It is unrealistic to think that a receiving party would be tempted to delay the quantification of costs in order to run up interest.

4.2.14 The Review therefore considers that the rule relating to interest on party/party costs should be changed to remove the incentive to delay and to provide a fairer and more accurate reflection of the time value of money withheld from a receiving party or retained by a paying party.

4.2.15 A more difficult question is whether interest on party/party costs should ordinarily run from (a) the date that the receiving party pays his or her own costs or from which interest on those costs commences to accrue, or (b) the date of the costs order. The former basis reflects the true economic burden of the receiving party, which it is the function of the costs order to alleviate, but it can require complex calculations. It is nonetheless the basis that has been adopted in the cases under CPA, s 101, referred to above. The latter basis has the virtue of simplicity. In the nature of things, almost all the receiving party's own costs are incurred well before judgment, and to take the judgment date as the starting

[32] *Lahoud v Lahoud* [2006] NSWSC 126, [80]–[81]; *Hexiva v Lederer* [2006] NSWSC 1259, [21], [24]; *Wood v Inglis* [2010] NSWSC 749, [21].

point is no injustice to the paying party. The present view of the Review is that the better default rule is (b) because of its simplicity, but that the relevant court should have an unfettered residual discretion. It is not desirable or necessary to specify a date before which interest cannot be allowed. The interests of paying parties are sufficiently protected by the judicial nature of the discretion.

4.2.16 The Review therefore considers that interest on party/party costs should accrue from such dates and on such basis as the court in question may order and that, in the absence of any other order, such interest should accrue from the date of the costs order at the rate applicable to a judgment debt. For the reasons already discussed in relation to practitioner costs, interest should be included in a deemed judgment based on a certificate of determination of costs, and sufficient particulars should be included in the certificate to enable such interest to be calculated at the time of filing the certificate.

Recommendations

37. The interest to which a receiving party in practitioner/client or party/party assessment is entitled be included in the deemed judgment arising from filing of a certificate of determination, and the certificate should contain the requisite particulars for that purpose.

38. CPA s 101 be amended to the effect that interest accrues in respect of party/party costs from such dates and at such rate as the court in question may order and, in the absence of any other order, from the date of the costs order at the rate applicable to a judgment debt.

4.3 Costs of assessment

4.3.1 LPA s 369 deals with the costs of the assessment process, but only in a limited number of cases, as follows:

> **369 Costs of costs assessment**
>
> (1) This section applies to the costs of a costs assessment in relation to:
> (a) costs to which section 317 (Effect of failure to disclose) applies, and
> (b) costs to which section 364 (Assessment of costs—costs ordered by court or tribunal) applies, and
> (c) costs that on assessment are reduced by 15% or more.
>
> (2) A costs assessor is, subject to this section, to determine the costs of a costs assessment to which this section applies.
>
> (2A) Subject to any order of or the rules of the relevant court or tribunal, the costs assessor may determine by whom and to what extent the costs of an

assessment referred to in section 364 (Assessment of costs—costs ordered by court or tribunal) are payable and include the determination in the certificate issued under this section in relation to the assessment.

(3) The costs of a costs assessment to which this section applies are payable:

(a) for a costs assessment in relation to costs to which section 317 (Effect of failure to disclose) applies—by the law practice that provided the legal services concerned, or

(b) for a costs assessment in relation to costs to which section 364 (Assessment of costs—costs ordered by court or tribunal) applies—by such persons, and to such extent, as may be determined by the costs assessor, or

(c) for a costs assessment in relation to costs that on assessment are reduced by 15% or more—by the law practice that provided the legal services concerned or, if the costs assessor so determines, by such persons, and to such extent, as may be determined by the costs assessor.

(4) The costs assessor may refer to the Supreme Court any special circumstances relating to a costs assessment and the Court may make any order it thinks fit concerning the costs of the costs assessment.

(5) On making a determination, a costs assessor may issue and forward to each party and the Manager, Costs Assessment a certificate that sets out the costs of the costs assessment.

(6) If the application for a costs assessment has been dealt with by more than one costs assessor, a certificate issued can set out the costs of any other costs assessor.

(7) The certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs.

(8) The costs of the costs assessor are to be paid to the Manager, Costs Assessment.

(9) The Manager, Costs Assessment may take action to recover the costs of a costs assessor or Manager, Costs Assessment.

(10) In this section:

costs of the costs assessment includes the costs incurred by the costs assessor or the Manager, Costs Assessment in the course of a costs assessment under this Division, and also includes the costs related to the remuneration of the costs assessor.

Submissions

4.3.2 Submissions to the Review have argued that assessors should have greater discretion in relation to costs of assessment.

4.3.3 The CARC queries whether s 369(3)(c) should apply so as to permit a costs assessor to determine that the client should pay the costs of the costs assessment. The CARC submits – in the Review's view, correctly – that, in the absence of any specific provision, there is no power to award costs of a practitioner costs assessment against a client, and suggests that a deterrent of this nature might deter those applications where the client is basically seeking time to pay.

4.3.4 Mr Chris Wall notes that whereas a client can never be ordered to pay the costs of the costs assessment, a law practice may be ordered to pay the costs of the costs assessment where there has been a failure to disclose. Mr Wall understands that in these cases the client may pay the costs of the costs assessment in order to obtain the certificate of determination and accompanying reasons, and must recover the sum paid from the law practice. Mr Wall suggests that this may be unfair to the client, and that in these cases the MCA should recover the costs of the costs assessment from the law practice. NSWYL and Mr R.A. Smith also draw attention to this problem. NSWYL submits that practitioners should be required to pay promptly and, on default, should be reprimanded or otherwise held professionally accountable.

4.3.5 The OLSC notes that whilst s 373A provides that the "costs of a costs assessment" (including a costs assessor's fees) can be reviewed on application by the MCA, there is no corresponding provision in relation to costs of review and review panel fees.

Discussion

4.3.6 Costs of a costs assessment have two basic components: first, the fees of the costs assessor, and secondly, the costs incurred by the parties to assessment, predominantly solicitors' or costs consultants' fees.

4.3.7 In a party/party costs assessment, the assessor is required to determine the costs of the assessment, and has power to determine by whom and to what extent they shall be borne (LPA s 369(1)(b), (2), (2A), (3)(b)). The matters that the assessor may take into account in determining which of the parties should pay the costs of a party/party assessment include, in accordance with cl 126 of the LPR:

- Whether the parties have negotiated in good faith before the assessment,
- The quantum of settlement offers and their relationship to the outcome,
- The manner in which the parties have conducted themselves during the assessment process, and
- The difference between the amount claimed and the amount allowed.

4.3.8 Together, these provisions provide a wide discretion in this context, which for the most part does not seem to have been problematic. However, some assessors tend to apply the traditional 15% test, which can produce unfair outcomes where a single element of the claim, such as whether senior counsel's fees should be recoverable, could make up a very

large component of the claim. The inclusion of a component such as senior counsel's fees in a party/party assessments, in circumstances where there are no guidelines or published outcomes of determinations to assist claiming parties to anticipate the likely opinion of an assessor to such a claim, can hardly be criticised. Often, the paying party simply will not negotiate and the receiving party has no option but to proceed to assessment, and it is arguable that the paying party regardless of the outcome should always pay the costs of that process, at least unless it betters an offer made by it.

4.3.9 In a practitioner costs assessment where the receiving party law practice has failed to disclose 'anything required by' LPA Part 3.2 Division 2 to the relevant client or associated third party payer (thus engaging s 317), the assessor is required to determine the costs of the assessment and those costs fall upon that law practice (s 369(1)(a), (2), (3)(a)). (An indirectly retained law practice could also be affected via s 317(5).) Given the extreme technicality and lack of clarity in the Division 2 disclosure requirements and the onerous nature of those requirements, a law practice may engage s 317 by failing to disclose in some particular respect, perhaps a minor one, but the extent and cost of the assessment process may have little or nothing to do with that failure.

4.3.10 In a practitioner costs assessment, where the costs are reduced by 15% or more, the assessor is required to determine the costs of the assessment and those costs fall upon the law practice that provided the relevant services and/or such other persons as the assessor determines (s 369(1)(c), (2), (3)(c)).[33]

4.3.11 An assessor who determines a set-aside application under s 328 also has general power to order 'payment of the costs of and incidental to determining' that application. Although not described as costs of assessment, the filing fee paid by whoever has applied for the assessment can also be taken into account; the costs assessor 'may include an allowance' for the fee (s 367). Otherwise, the costs of the assessment process are borne by whoever initially incurs them, and assessors' fees are funded from the general collection of application fees.

4.3.12 There are no circumstances in which a paying party can be liable for the costs of assessment of practitioner costs (leaving aside the filing fee and costs of a set-aside application, if made). There is thus no costs incentive for a paying party to settle a costs assessment or to conduct it expeditiously, other than whatever future costs that party may incur him- or herself. Conversely, there is pressure on a receiving party against whom an allegation of non-disclosure is made, or whose bill is seriously challenged by 15% or more, because of the risk of an adverse costs order and the certainty of not recovering any past or future costs of the assessment from the paying party. These outcomes are independent of the reasonableness or otherwise with which the parties approach the process of assessment. While the pressure on the receiving party creates an incentive to make concessions to the paying party, it may be doubted whether such pressure is

[33] In *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* [2011] NSWDC 55 (19 May 2011), Johnston DCJ decided that s 369(3)(c) does not apply to party/party assessments.

entirely fair.

4.3.13 The Review considers that costs assessors should have wider discretion in relation to costs of assessment of practitioner costs, including power to award such costs against the paying party, and that default of the kind mentioned in s 317 should not automatically subject a receiving party law practice to liability for the full costs of assessment.

4.3.14 The Review is aware that assessors treat the determination of which of the parties pays the costs of the process in diverse ways. There is no formal process prescribed for assessors to request information about the costs incurred by either of the parties during the process, with the result that the parties are generally out of pocket for most of the professional costs incurred during the course of the assessment. The certificate for the costs of the assessment usually addresses the cost of the preparation of the application (generally claimed as a disbursement in the itemisation), the lodging fee and the assessor's fee.

Recommendations

39. LPA s 369 be amended to confer on costs assessors wider discretion in relation to costs of assessment of practitioner costs, including power to award such costs against the paying party.

40. LPA s 369 be amended so that default of the kind mentioned in s 317 should not automatically subject a receiving party law practice to liability for the full costs of assessment.

41. Regulations be made pursuant to LPA s 368(7) and 378(6) prescribing as circumstances in which a party is entitled to receive a certificate without payment of the costs of the assessor or panel as the case may be, where the law practice has been ordered to pay those costs and has failed to do so; and that failure to pay such costs so ordered within a prescribed time may amount to unsatisfactory professional conduct by the law practice concerned.

4.4 Reasons

Submissions

4.4.1 Of the submissions received by the Review that addressed the reasons provided for determinations, some submitted that they were too general, others that they fail to address issues raised in objections in substantive terms, and still others that they tend to fall back to taxation without explanation.

4.4.2 Submissions from a number of practitioners also argued that in practitioner costs assessments in particular, assessors should only be able to assess costs that are objected to by the client (it being implicit in this submission that assessors are embarking on a more wide ranging assessment of the costs). Mr Charles Hockey submitted that an "assessor in a recent assessment made decisions disallowing costs which were not subject

to any objections by the client. This subjective approach is unfair and unreasonable and provides the assessor a discretion, which may be based on bias".

Discussion

4.4.3 Probably the most contentious issue amongst Costs Assessors is the content of the requirement for reasons, and the concern that too stringent a requirement effectively dictates a process of taxation and thereby defeats the very object of substituting assessment.

4.4.4 The background described at the outset of this report makes reasonably clear that the substitution of "assessment" for "taxation" was not intended to be merely linguistic. It was intended that assessment would be a simplified, quicker and cheaper process, to replace one that had become unwieldy, protracted and disproportionately expensive. That intent can only be achieved by a more broad-brushed and less detailed approach to the resolution of costs disputes than was involved in taxation. It is implicit that that will require an abbreviated reasoning process.

4.4.5 Originally, the legislation establishing the scheme contained no express obligation to give reasons. However, in *Kennedy Miller Television Pty Ltd v Lancken* (NSWSC, 1 August 1997, unreported), Sperling J said that a costs assessor was "bound to give reasons for his determination specifying the items which had been reduced, by what amount and for what reason in each instance". As to the suggestion that this was unduly onerous, his Honour said (at 35-36):

> *It does not seem to me that what I have proposed would be particularly onerous or that it would materially increase the cost of the process. It may be preferable for assessors to anticipate the possibility of a request for reasons when processing the bill. In the ordinary course, the assessor would need to note against any item reduced the amount of the reduction or the reduced amount in order to be able to tally up the result. It would be easy enough to record the reason for the reduction in each instance at the same time. In each case, the reason must be readily to mind. Otherwise, the item would not have been reduced. In most instances, a word or two would suffice. A code could be devised for recurring reasons. I doubt that this would add much to the cost of the assessment. It would, in my view, be a reasonable incident of the assessment and chargeable as part of the assessment. If a request for reasons were made at a later time, little extra work would be required to produce the reasons in suitable form.*

4.4.6 His Honour's decision was upheld by the Court of Appeal in *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd.*[34] Priestley JA, with whom Handley and Powell JJA agreed, considered that the rights of appeal under the predecessors of ss 384 and 385 pointed very powerfully towards an implied statutory duty to provide

[34] (1998) 43 NSWLR 729.

reasons.[35] As to arguments that this view of the legislation was inconsistent the primary purposes of the new system – namely to be faster, easier and cheaper than the old – that the obligation to provide reasons would cause significant problems of time and expense, his Honour observed that the argument:[36]

> *... reinforces rather than diminishes the impression I had upon reading Sperling J's reasons, that his suggestions were practical, and need not result in costs assessments taking significantly longer to do, or costing significantly more. Should I be wrong about this, I would still think the statutory implication clear, for the reasons earlier given. The idea that a costs assessor can, as in this case, reduce a bill of more than $600,000 by more than $200,000, without giving any reason, is most unattractive.*

4.4.7 In 1997, Parliament provided explicit direction that Costs Assessors were to give reasons,[37] adding the predecessor of what is now s 370:

> **370 Reasons for determination**
>
> (1) A costs assessor must ensure that a certificate issued under section 368 (Certificate as to determination) or 369 (Recovery of costs of costs assessment) that sets out his or her determination is accompanied by:
>
> (a) a statement of the reasons for the costs assessor's determination, and
>
> (b) such supplementary information as may be required by the regulations.
>
> (2) The statement of reasons must be given in accordance with the regulations.

4.4.8 A similar provision applies to the determinations of Review Panels: s 380.

4.4.9 The relevant provision of the LPR is reg 128:

> **128 Certificate of determination of costs and statement of reasons - section 370 of the Act**
>
> (1) A statement of reasons for a costs assessor's determination that is required by section 370 of the Act to accompany a certificate issued under section 368 or 369 of the Act must be accompanied by the following information:
>
> (a) the total amount of costs for providing legal services determined to

[35] (1998) 43 NSWLR 729, 734-5.

[36] (1998) 43 NSWLR 729, 737.

[37] (NSW) *Legal Profession Amendment (Costs Assessment) Act 1998.*

be fair and reasonable,

(b) the total amount of disbursements determined to be fair and reasonable,

(c) each disbursement varied by the determination,

(d) in respect of any disputed costs, an explanation of:

(i) the basis on which the costs were assessed, and

(ii) how the submissions made by the parties were dealt with,

(e) if the costs assessor declines to assess a bill of costs—the basis for doing so,

(f) a statement of any determination under section 363A of the Act that interest is not payable on the amount of the costs assessed or, if payable, of the rate of interest payable.

4.4.10 Parliament did not envisage that assessors would be required to provide extensive reasons; the requirement was only to provide limited reasons, as is apparent from the Second Reading speech:-[38]

> *The principal purpose of the* Legal Profession Amendment (Costs Assessment) Bill *is to amend part 11 of the* Legal Profession Act 1987 *to: rationalise the financial administration of the costs assessment scheme; introduce a requirement that costs assessors provide limited reasons for their determinations; and provide a mechanism for a review of cost assessment determinations. Division 6 of Part 11 of the* Legal Profession Act *establishes a scheme for the assessment of bills of costs issued by legal practitioners. The* Legal Profession Act *provides that an application may be made by a client to the proper officer of the Supreme Court for the assessment of whole or part of a legal practitioner's bill of costs. Applications may also be made for cost assessment by a party who is required to pay party-party costs as a result of a court order. The Bar Council, Law Society Council or Legal Services Commissioner may also refer a matter for the purposes of investigating a complaint.*
>
> ....
>
> *Until recently, established case law provided that there was no duty upon costs assessors to provide reasons for decisions. However, in* Kennedy Miller Television v Stephen Lancken and the Nine Network Pty Limited, *which was handed down on 1 August last year, his Honour Mr Justice Sperling held that cost assessors are required to provide reasons for costs assessment determinations upon request. Subsequent judgments have not supported the decision in Kennedy Miller, which has recently been the subject of an appeal. The judgment on appeal has been reserved and uncertainty remains amongst cost assessors as to their obligation under the Act to provide reasons for their determinations.*

[38] The Hon. M.R. Egan, NSW Legislative Council Parliamentary Debates, "Hansard", 24 June 1998 at 6347.

The proposed legislation is intended to clarify the responsibilities of costs assessors in this respect and to bring assessors into line with the government policy generally, whereby reasons should be provided for administrative decisions.

4.4.11 Subsequently, the requirement for reasons has been the subject of further judicial observation. In *Turner v Pride* [1999] NSWSC 850, Master Malpass said (at [23]):

[23] At the outset, it has to be borne in mind that the regime established by the Act and the Regulation brings into operation an assessment process (as opposed to the taxation process which it replaced). It was the taxation process that involved an item by item consideration. There will be cases where the assessment task can be properly performed by a global approach.

4.4.12 In *Madden v NSW Insurance Ministerial Corp* [1999] NSWSC 196, Master Malpass said:

It has been said that lengthy or elaborate reasons are not required; in most cases, a word or two may suffice and it is necessary that the essential ground upon which the decision rests should be articulated. Whilst there is a plethora of dicta, it may be that ultimately the question has to be dealt with on a case by case basis.

4.4.13 The extent of the obligation was further and decisively considered by the Court of Appeal in *Frumar v The Owners of Strata Plan 36957* (2006) 67 NSWLR 321; [2006] NSWCA 278. Giles JA acknowledged that an excessively onerous obligation to provide reasons could cause delay and expense and that this was a material factor in evaluating the sufficiency of a statement of reasons, particularly when assessment of costs by costs assessors was intended to provide a faster, easier and cheaper system, but set as a minimum standard a statement of reasons which places the parties in a position to understand why the decision was made sufficiently to allow them to exercise any right of appeal. His Honour said:-

43 The extent of the obligation, whether by explication of reg 68(1) or by giving content to s 208KG, is informed by the general law concerning the duty of judicial officers to give reasons for their decisions discussed in cases such as Soulemezis v Dudley (Holdings) Pty Ltd *(1987) 10 NSWLR 247,* Mifsud v Campbell *(1991) 21 NSWLR 725 and* Beale v Government Insurance Office of New South Wales *(1997) 48 NSWLR 430. The extent of a judicial officer's duty depends on the circumstances. Whether or not a costs assessor and a panel are acting administratively or judicially, which was left open in* Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd, *the extent of their duties must take into account the different nature of their task and their roles as legal practitioners bringing to bear their experience and judgment in evaluation of what work was reasonable and what is a fair and reasonable amount of costs; but it is also moulded by the basis for the obligation to give reasons in* Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd, *thereafter taken up by the legislature.*

44 The reasons must be such that a party dissatisfied with the costs assessor's or panel's determination "should have a real and not largely illusory right of appeal". These words in Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd *at 735 were qualified by "in regard to questions of law at least", but in my respectful opinion they apply equally to questions of fact: questions of whether the time engaged or an hourly rate are reasonable can be very important, and although subject to leave s 208M permitted an appeal on those questions. The filter for an appeal as to fact is the Court's decision as to leave, not the cost assessor's or panel's expression of reasons, and whether leave should be granted can only be decided if it is known why the determination was made.*

45 The delay and expense of an excessively onerous obligation to provide reasons is material, particularly when assessment of costs by costs assessors was intended to provide a faster, easier and cheaper system. In my opinion, however, the observations of Meagher JA in Beale v Government Insurance Office of New South Wales *at 444 are applicable; that the balancing act in considering the sufficiency of a statement of reasons "involves the adoption of, at the least, a minimum standard which places the parties in a position to understand why the decision was made sufficiently to allow them to exercise any right of appeal".*

4.4.14 In that case, the reasons were inadequate, for the following reasons:

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 208KG of the Act, and fell short of providing the explanation required by reg 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 of work reasonable to be 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.

63 The claimant would need to know for appeal as to a matter of law pursuant to s 208L of the Act, but plainly also for appeal pursuant to s 208M. If the claimant had contemplated disputing the extent of unreasonable charging accepted by the costs assessor to have occurred in relation to coordination work and reporting

work, how could he have done when he did not know what coordination work or reporting work had been excluded from the claim in the bill of costs, or what coordination work or reporting work the costs assessor had included in his own assessment as reasonable work to be carried out; or what the panel had done in these respects? How could he do so if he did not even know whether the panel had also accepted that there had been unreasonable charging in relation to coordination work and reporting work? The opponent also had an interest in the reasons, since it might have wanted to appeal against the cutting down of its costs, and it was equally in the dark.

4.4.15 A subsequent useful exposition of the position by White J may be found in *Cassegrain v CTK Engineering* [2008] NSWSC 457:[39]

> *[90] If the obligation to give reasons requires the specification of items which have been reduced, by what amount, and for what reason, in each instance (*Kennedy Miller Television Pty Ltd v Lancken *per Sperling J), then it is clear that the reasons were inadequate. Mr Beech-Jones SC for the plaintiffs submitted that it was never intended when the system of taxation of costs was replaced with a system of assessment that a costs assessor should act as a taxing officer upholding, reducing or rejecting individual items of bills of costs. So far as that submission goes, I agree with it. It was not necessary for the assessor to indicate by reference to each of the 1,313 items in the bill of costs which was accepted, which rejected and which varied, and in the latter case, by what amount. However, it was incumbent on the assessor to specify the amount of the reductions for the matters in [88] above, whether costs were reduced for attendances at the hearing before Windeyer J, and if so by what amount, and whether any, and if so what, costs were reduced by reference to the three submissions which were rejected only "in the main". By way of example, it would have been sufficient in my view for the costs assessor to say that instead of the amount claimed of $597 for attendances to file documents he allowed $200 (if that were the figure). It would have been sufficient for him to have said that he reduced the costs claimed by a particular amount where he considered there had been duplication in attendances of the senior solicitor and the paralegal at conferences. Likewise, it would have been sufficient to say that he reduced costs by a particular amount in respect of the derivative action or the security for costs application. Without such specificity neither Claude Cassegrain nor the plaintiffs can know how their submissions on these areas of disputed costs were ultimately dealt with (reg 128(1)(d)(ii)).*

4.4.16 In *Randall v Willoughby City Council* [2009] NSWDC 5056, Johnston DCJ said that the extent of the obligation to give reasons had been authoritatively settled by the Court of Appeal in *Frumar*. His Honour said that, in the balancing act of considering the sufficiency of a statement of reasons, and the minimum standard of reasons which placed

[39] See also *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 681 (Davies J).

the parties in a position to understand why the decision was made, sufficiently to allow them to exercise a right of appeal, failure to refer to certain categories of items that were the subject of objection did not necessarily render a right of appeal illusory, because it may be assumed that such items were allowed; whereas global reductions by reference to categories of items that were not differentiated either by way of amount, category or item were in another category.

4.4.17 In the light of the above-discussed authorities, the Review considers that the current legislative provisions with respect to reasons are adequate. Although these cases, and others like them, are sometimes decried as dictating a return to taxation, on close examination and reflection they do not. They recognise and acknowledge the purpose of the new scheme, but balance it with the statutory requirement for reasons, so as to require a sufficient statement of reasons that a party will be able reasonably to exercise its right of appeal. They do not insist on a line-by-line taxation, but contemplate various approaches that, depending on the particular case, may satisfy the obligation to give reasons. Section 370 imposes a requirement on a costs assessor to provide a statement of reasons for his or her determination along with the certificate issued under s 368. The statement must be in accordance with cl 128 of the LPR. The effect of s 370 and cl 128 is that an assessor ought provide reasons that give both parties a real understanding of the determination, both in terms of the overall amount and the rationale by which that amount was determined. The reasons need not be of the kind expected in the exercise of judicial, or even administrative, power, but should, in simple terms, deal with the matters set out in cl 128, having regard to the nature of the objections raised and replies made. In accordance with the judgment of Giles JA in *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278, "the regulation expressed a minimum extent of the reasons with the possibility of a greater necessary extent if the circumstances so require".[40] The obligation to give reasons requires that they are sufficient so that a party dissatisfied with an assessor's or panel's determination "should have a real and not largely illusory right of appeal",[41] with regard to questions of law, but equally to questions of fact. As his Honour pointed out, as a minimum it is necessary for a costs applicant or a costs respondent to know:

- 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 of work reasonable to be carried out;
- if the former, what items had been allowed, disallowed or adjusted or whether as to hourly rate or reasonable times or for some other reason; or
- if the latter, what work the panel thought reasonable and how it costed the carrying out of the work.

4.4.18 Consistent with the purpose of a faster, easier and cheaper system, a costs assessor should not be expected to refer to and individually address each and every disputed item. But he

[40] *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278, [42]-[43]. The case considered the terms of the 1987 Act, which were relevantly no different to those in the 2004 Act.

[41] Ibid, [44] citing *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729.

or she must explain why the decision was made sufficiently to allow the parties to exercise any right of appeal. This involves showing why decisions were made, but not necessarily item-by-item. Reasons should be proportionate to what is in dispute. If a decision affects in monetary terms a relatively significant portion of the bill, then more substantial reasons might be expected than of a decision to allow, reject or reduce a single item.

4.4.19 The Review notes the concern expressed in submissions as to the quality of reasons, and considers that the MCA should work with costs assessors on this, and that reasons should be addressed in the annual assessors' seminar.

4.4.20 Consistently with what has been recommended above regarding ensuring that global assessments are practicable within the framework of the Act, and what Giles JA said in *Frumar*, the Review considers that the Regulation ought to be amended to ensure that reasons can be given both for varying individual items and for making a global assessment, by inserting new subclauses 128(3)-(4) in or to the following effect:

> (3) if an assessment has been conducted by taking an itemised bill of costs or itemised party/party bill and allowing, disallowing or adjusting items a Statement of Reasons should specify what items have been allowed, disallowed or adjusted and how such items have been adjusted;
> (4) if an assessment has been conducted by the costs assessor coming to his or her own view of work reasonable to be carried out what work was thought reasonable to be carried out and how that work was costed.

4.4.21 Similarly, cl 134 (dealing with reasons of Review Panels) should be amended to the same effect.

4.4.22 The Review agrees that assessors should not be required to give reasons for allowing costs that are not the subject of objection, and considers that this is already the case, as it is the effect of LPR cl 128(2)(d), which confines the obligation to give reasons to "disputed costs". However, while the Review considers that it should not be incumbent on an assessor to examine in detail aspects of a bill that are not the subject of objection, the protective function of the assessment process means that assessors should not be entirely confined to the matters objected to, though matters not the subject of objection should be disallowed only where they are manifestly unreasonable.

Recommendations

> 42. LPR cl 128 be amended by inserting new paragraphs in or to the following effect:
> (3) if an assessment has been conducted by taking an itemised bill of costs or an itemised party/party bill and allowing, disallowing or adjusting items, then what items have been allowed, disallowed or adjusted and how such items have been adjusted;
> (4) if an assessment has been conducted by the costs assessor coming to his or her own view of work reasonable to be carried out what work was thought

reasonable to be carried out and how that work was costed.

43. LPR cl 134 be amended by inserting new paragraphs in or to the following effect:
    (3) if an assessment has been conducted by taking an itemised bill of costs or an itemised party/party bill and allowing, disallowing or adjusting items, then what items have been allowed, disallowed or adjusted and how such items have been adjusted;
    (4) if an assessment has been conducted by the costs assessor coming to his or her own view of work reasonable to be carried out what work was thought reasonable to be carried out and how that work was costed.

44. LPA s 370 be amended to clarify that an assessor need not give reasons for allowing costs that are not the subject of objection, and should disallow costs that are not the subject of objection only to the extent that they are manifestly unreasonable.

4.5 Enforcement

Submissions

4.5.1 NSWYL draw attention to the difficulties a lay or "retail" client may experience in seeking to enforce a judgment based on a costs assessment determination, and suggests the provision of more comprehensive information about enforcement.

4.5.2 Mr Richard Smith, of Smith & Smith Attorneys/Legal Costs Consultants, suggests there should be an automatic stay of any judgment based on a costs assessment determination pending expiry of the time to apply for a review or lodge an appeal.

Discussion

4.5.3 Section 372 provides that a costs assessor's determination is binding on the parties. Under s 368(5), in the case of an amount of costs that has not been paid, the certificate of determination is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs. However, case law indicates that whilst the certificate may be deemed to be a judgment for the purposes of enforcement of the costs assessment, it is not a judgment of the court as such and may be appealed or reviewed even after judgment has been obtained. The Review notes that a Guide to Registering a Certificate of Costs as a judgment of the Court has been placed on the NSW Supreme Court costs assessment page.

4.5.4 Provision of an automatic stay pending expiry of time to apply for review or appeal would be a unique indulgence to paying parties. Under LPA s 377, a review applicant already obtains an automatic suspension of the determination upon a review application being referred to a Panel. This Review does not favour further extending any automatic stay.

Recommendations

45. The MCA continues to monitor the information provided to the public to ensure it is appropriate.

5 REVIEWS AND APPEALS

5.1 Introduction

5.1.1 This chapter examines those aspects of the costs assessment scheme that involve reviews and appeals, and considers how the scheme is currently performing in this area and whether it might be enhanced having regard to those terms of reference that concern the just, quick and cheap resolution of costs disputes. Relevant matters in the terms of reference include, in particular, the speed and simplicity of the process, the transparency and consistency of the process and outcomes, the promotion of the efficient resolution of costs disputes, and the cost of the process.

5.1.2 The legislation creates several parallel and overlapping review processes, by which costs assessment proceedings may come before the courts. Broadly, it provides for reviews by Review Panels constituted by two costs assessors; and appeals to the courts (both from costs assessors and from Review Panels), the forum for which varies according to whether the question is one of law or of fact, and whether the assessment was between party and party or between practitioner and client. Theoretically at least, a costs dispute can travel from a costs assessor to a Review Panel, to the District Court, to the Court of Appeal, and finally to the High Court.

Submissions

5.1.3 Very few of the submissions specifically addressed the area of reviews and appeals, at least in a direct way. There was some general criticism of the process as being slow, cumbersome, confusing and expensive, but very little by way of constructive suggestion for reform. To the extent that there were any specific proposals, they focused on simplification of the procedures, in particular the need to identify and narrow the issues in dispute, the number of "tiers" involved in the review and appeal hierarchy, the need for increased "judicial" involvement, and the need for publication of decisions with a view to greater transparency and consistency in decision making. One of the criticisms made of the costs assessment scheme is that there are too many steps in the process.

5.2 Reviews

5.2.1 A party to a costs assessment who is dissatisfied with a determination of a costs assessor may, within 30 days after the certificate of determination has been forwarded to the parties (or within such further time as the MCA may allow), apply to the Manager for a review of the determination (LPA, s 373). Such applications are referred to a Review Panel of two assessors (LPA s 374); LPA, s 375, sets out their functions:

> **375 General functions of panel in relation to review application**
>
> (1) A panel constituted under this Subdivision may review the determination of the costs assessor and may:
> (a) affirm the costs assessor's determination, or

(b) set aside the costs assessor's determination and substitute such determination in relation to the costs assessment as, in their opinion, should have been made by the costs assessor who made the determination that is the subject of the review.

(2) For the purposes of subsection (1), the panel has, in relation to the application for assessment, all the functions of a costs assessor under this Part and is to determine the application, subject to this Subdivision and the regulations, in the manner that a costs assessor would be required to determine an application for costs assessment.

...

5.2.2 The original assessor's determination remains in existence pending the review, but its operation is suspended during the review (s 377(1)) unless the review panel ends the suspension before completion of the review (s 377(2)(b)). If the review panel comes to the same conclusion as the costs assessor, it affirms the assessor's determination, and the suspension of its operation is removed (s 377(2)(a)). If it comes to a different conclusion, it sets the assessor's determination aside and issues its own (s 375(1)(b)).

5.2.3 A decision or determination of a review panel may be the subject of an appeal, as if it was a decision of a costs assessor (LPA, s 382).

Discussion

5.2.4 In respect of reviews, the issues identified by the Review are:

- Whether there should be changes to the legislation to provide greater clarity as to the nature of and conduct of the review process.
- Whether a review should be a mandatory precondition of an appeal to a court.
- Whether the parties to a review should be entitled to make submissions to the review panel.
- Whether the review of a costs assessment by a review panel should be limited to those grounds specified in the Application for Review.

5.2.5 *The nature of the review process.* The concept of a 'review' is in itself 'quite amorphous';[42] it 'has no settled pre-determined meaning [and] ... takes its meaning from the context in which it appears'.[43] The review process under s 375 has the character commonly referred to in the context of public and administrative law as 'merits review': the review panel forms its own opinion about the correct outcome. The issue for the review panel is the preferable and correct determination, not whether the original determination was right or wrong or affected by error. In carrying out its task, the review panel has all the functions, powers and obligations of a costs assessor (s 375(2)). Neither proof nor allegation of error by the costs assessor is any condition of the review panel's

[42] *Tomko v Palasty* (No 2) (2007) 71 NSWLR 61, 71 [43].

[43] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 261; cf *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61, 71-2 [43]; *Re Brindle; Ex parte FB & FA McMahon Pty Ltd* (1992) 35 FCR 506, 509; *Siddik v Workcover Authority of NSW* [2008] NSWCA 116; 6 DDCR 228 [68].

jurisdiction. The review panel makes its decision on the evidence and submissions that were before the original assessor, unless it determines to receive further submissions or to admit more evidence (s 375(3)), in which case it has regard to those submissions and/or evidence as well. This is not to say that the review panel disregards the costs assessor's reasoning and determination. It is to be expected that the review panel will have regard to those things, as far as it finds them helpful.

5.2.6 There is some authority that suggests that the review is a two-stage process: *Honest Remark Pty Ltd v Allstate Explorations NL* [2008] NSWSC 439, [8]–[13] (Malpass AJ); *Randall Pty Limited v Willoughby City Council* [2009] NSWDC 118, [17]–[18] (Johnson DCJ). This characterisation sees the first stage as deciding whether to affirm or set aside the primary determination; the second being – if the determination is set aside – to make a fresh determination. On the basis that the first stage involved a decision, not a determination, it was submitted that reasons need not be provided for a decision to affirm a primary determination. This argument was rejected by Davies J in *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 681, [46]–[52]. His Honour's reasoning is, with respect, persuasive and correct. The fact that *Dunn v Jerrard & Stuk* was decided with reference to the 1987 Act is immaterial; the provisions of the 1987 Act dealing with reviews and appeals were copied without material alteration into the present LPA. In particular, s 375 of the present Act reproduces *verbatim* s 208KC of the 1987 Act. There is no explicit authority for the 'two-stage' theory in the legislation, nor any criteria by which a supposed first-stage decision 'whether to review' should be made. The following, from the second reading speech for the *Legal Profession (Costs Assessment) Bill 1998,* supports the view that a two-stage approach is not required:[44]

> *The review process, which is intended to be relatively informal in nature, will be carried out by two assessors of appropriate experience and expertise and be conducted along similar lines to that undertaken in the original assessment process. The review panel will be able to vary the original assessment and will also be required to provide a short statement of reasons for their decisions.*

5.2.7 In this Review's opinion, the wide-ranging *de novo* nature of the review process for a first level review of a decision is appropriate, given the nature of the assessment process. In the light of the judgment of Davies J, legislative clarification of the nature of the process is not required.

5.2.8 *A mandatory precondition.* The review process was designed to reduce the burden of appeals and leave applications from determinations of costs assessors to the courts, and to provide for merits review by experienced costs assessors without the hurdle of leave. It provides a mechanism for achieving consistency of decision-making, and accommodates questions of fact and of law, and does so at far less cost than an appeal to the courts. Recent experience is that the review panel process is working well; the incidence of appeals to the District Court is very small in relative terms; and the cost of a review is significantly lower than that of an appeal to the District Court. Particularly in circumstances where the Review has received a large number of submissions critical of

[44] Mr B. Debus, New South Wales Legislative Assembly, Parliamentary Debates, Hansard, 26 May 1998.

the inconsistency of costs assessors' decisions, the Review considers that the case for maintaining a low cost, easily accessible review process is strong. The Review has been unable to identify cases in which an appeal to a court would be a superior first resort than a review, and that providing a more rigid appellate structure would reduce uncertainty, and avoid some matters from ever reaching the court, at lower cost. Accordingly, the Review considers that the review panel process should be made mandatory (as a precondition to any appeal to the court – in other words, appeals should lie to the court only from decisions of review panels, and not from first instance decisions of assessors).

5.2.9 *Limited grounds.* Given that there will already have been an assessment, and that the Review Application will define the scope of the dispute on review, it is difficult to see why the review should range more widely than that scope. Unlike a first instance assessment, it is no longer necessary to fulfill the protective function of disallowing costs that are manifestly unreasonable of the assessor's own motion. Natural justice and efficiency of the process both support limiting a review to the parts of the assessment, and the grounds, identified in the review application.

5.2.10 *Right to make submissions.* As noted above, the review panel makes its decision on the evidence and submissions that were before the original assessor, unless it determines to receive further submissions or to admit more evidence (s 375(3)), in which case it has regard to those submissions and/or evidence as well. This means that there is potential for a Review Panel to fail to identify and address the real complaint made by a party seeking a review, or to appreciate the arguments advanced by the review respondent. In the case of review, the issues (and submissions) are likely to be narrower and more focused than in the initial assessment. Particularly if review is to become the sole (first level) review process, the case for ensuring that the Review Panel is assisted by submissions that address the real issues on review is strengthened.

5.2.11 This need not be complex or lengthy. The review applicant should lodge, with the review application, submissions identifying those parts of the assessment that are challenged, the grounds of the challenge, and any supporting argument; the review respondent should then have an opportunity to respond, and then the applicant permitted a reply.

Recommendations

46. The LPA be amended so that:

    a. in the first instance, a cost assessor's determination is only subject to review by a Review Panel (and not to appeal to the court);

    b. the scope of the Review be limited to the part of the assessment and the grounds raised by the review application.

47. The CARC make rules requiring that:

    a. a review applicant be required to lodge, with the review application, submissions identifying those parts of the assessment that are challenged, the

grounds of the challenge, and any supporting argument;

b. the review respondent be permitted to respond; and

c. the applicant be permitted a reply.

5.3 Appeals

5.3.1 The Act provides for appeals on questions of law, and against the substance of a determination. An appeal on a question of law lies as of right, and only to the District Court: LPA, s 384, which provides:

> **384 Appeal against decision of costs assessor as to matter of law**
>
> (1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the District Court, appeal to the Court against the decision.
>
> (2) After deciding the question the subject of the appeal, the District Court may, unless it affirms the costs assessor's decision:
> (a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or
> (b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.
>
> (3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

5.3.2 An appeal by leave against a determination, in the case of a practitioner/client or client/practitioner application, lies to the District Court, but in the case of a party/party application, lies to the court or tribunal that made the costs order. Section 385 of the Act provides:

> **385 Appeal against decision of costs assessor by leave**
>
> (1) A party to an application for a costs assessment relating to a bill may, in accordance with the rules of the District Court, seek leave of the Court to appeal to the Court against the determination of the application made by a costs assessor.
>
> (2) A party to an application for a costs assessment relating to costs payable as a result of an order made by a court or a tribunal may, in accordance with the rules of the court or tribunal, seek leave of the court or tribunal to appeal to the court or tribunal against the determination of the application made by a costs assessor.

(3) The District Court or court or tribunal may, in accordance with its rules, grant leave to appeal and may hear and determine the appeal.

(4) An appeal is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

(5) After deciding the questions the subject of the appeal, the District Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor.

5.3.3 In respect of appeals, the issues identified by this Review are:

- Whether the appellate structure would benefit from consolidation into a more integrated system.
- Whether the current restrictions on appeals as of right are appropriate.
- Whether the nature of the appeal as a *de novo* appeal is appropriate.
- Whether there should be changes to the legislation to ensure certainty as to the unlimited jurisdiction of the District Court to hear and determine appeals from costs assessments or reviews.

5.3.4 *An integrated appellate structure.* The current appellate structure is complex and confusing, as to when and to which court a dissatisfied party should appeal. In the context of party/party costs assessments, if a party wishes to appeal a discrete decision as to a matter of law, an appeal lies as of right under s 384 to the District Court; in all other situations, the appeal is pursuant to s 385, requires leave, and must be made to the court or tribunal that made the costs order, which can include but extend beyond the question of law (The principles to be applied when determining whether to grant leave were explained by Fitzgerald JA in *Chapmans Ltd v Yandell* [1999] NSWCA 361, [12]). If leave is granted, the court that made the costs order will hear the appeal: *Randall Pty Limited v Willoughby City Council* [2009] NSWDC 118, [30].

5.3.5 In many cases, costs orders are made by courts and tribunals that have little experience in the assessment of costs and the issues that arise on costs assessment – for example, the Industrial Court, the Land and Environment Court, and the Administrative Decisions Tribunal. It is unlikely that these courts would welcome jurisdiction to entertain appeals from costs assessments, and it does not appear that appeals under s 384 have been commonplace.

5.3.6 The Supreme Court has traditionally exercised a supervisory jurisdiction over practitioners' costs.[45] However, under the present legislation, appeals to the Supreme Court lie only by leave and only in respect of costs ordered by that Court, while appeals from practitioner/client assessments lie only to the District Court, which in recent years, has developed expertise in the field.

[45] *Veghelyi v Law Society of NSW* (Unreported Judgment of the NSWCA, 6 October 1995, BC9505459) at 8.

5.3.7 The Review considers that, consistent with its traditional supervisory role in this field, the Supreme Court ought to retain supervisory jurisdiction over appeals from costs assessments. However, the quantum and issues in such appeals can vary widely, and far from all warrant the consideration of the Supreme Court. For this reason, an integrated appeal structure providing an appeal to the District Court or the Supreme Court is proposed. The concept is that smaller appeals should go to the District Court unless there is some feature that justifies the attention of the Supreme Court, but that the Supreme Court should be capable of exercising jurisdiction in any appropriate case.

5.3.8 *When should leave should be required.* At present, leave is required to appeal from any determination, other than on a question of law under s 384, and regardless of quantum. This can give rise to sterile arguments as to whether there is a question of law. Where there is a question of law, the amount in issue might nonetheless be very small. It is considered that a monetary threshold is a superior measure of when leave is required than the existence of a question of law. For appeals to the District Court, a threshold of $25,000 in issue on the appeal is proposed,[46] and for the Supreme Court, $100,000. Obviously enough, the existence of an arguable question of law would be a significant factor in favour of the grant of leave in a case where leave was required

5.3.9 Accordingly, the scheme favoured by the Review is:

- an appeal to the District Court, by leave where the amount of costs in dispute does not exceed $25,000 and otherwise as of right;
- an appeal to the Supreme Court, by leave where the amount of costs in dispute does not exceed $100,000 and otherwise as of right; and
- a power in the Supreme Court to remit any appeal and/or application for leave to appeal to the District Court, or to remove similar proceedings in the District Court into the Supreme Court.

5.3.10 *The nature of the appeal.* The availability of a *de novo* appeal has been of significance where it was possible to appeal to the court without a prior review by a review panel, and where assessors were not empowered to receive oral evidence so that they had to decide some questions of fact with sub-optimal resources and procedures to do so. Under this Review's proposals, there will be a *de novo* review by a review panel in every case before there is an appeal to the court, and assessors will be empowered to receive oral evidence and cross-examination in an appropriate case. In those circumstances, there is little justification for providing a further *de novo* review on appeal to the court. It is proposed that appeals be by way of rehearing, with further evidence receivable by leave.

5.3.11 *The jurisdiction of the District Court.* Some doubt has been expressed as to whether the District Court has jurisdiction where the costs in dispute exceed $750,000 (its jurisdictional limit in civil actions). In the Review's opinion, it is clear that the District Court's jurisdiction to entertain appeals under the relevant provisions of the *LPA* is not jurisdiction in an "action" subject to the jurisdictional limit, and legislative amendment to clarify this is not required.

[46] Initially, a threshold of $10,000 was proposed. This has been increased to $25,000 at the suggestion of Johnstone DCJ.

Recommendations

48. The LPA and LPR be amended to establish a simplified integrated appellate structure, with an overall supervisory jurisdiction reserved to the Supreme Court, such that:

    a. An appeal lies only from a decision of a Review Panel (and not from an assessor at first instance);

    b. Such an appeal lies (on questions of fact and of law):

        i. to the District Court, but only by leave if the amount of costs in dispute in the appeal is less than $25,000;

        ii. to the Supreme Court, but only by leave if the amount of costs in dispute in the appeal is less than $100,000;

    c. The Supreme Court may remit any appeal and/or application for leave to appeal to the District Court, and remove such proceedings in the District Court into the Supreme Court.

    d. Such an appeal be by way of rehearing (not *de novo*), with further evidence receivable by leave.

6 OTHER MATTERS

6.1 The Manager, Costs Assessment

6.1.1 The New South Wales scheme co-locates all costs assessment under a single administrative structure under the MCA who, in that capacity, is an officer DAGJ.

Discussion

6.1.2 While the MCA is nominally an officer in DAGJ, in practice the role has been occupied by a Deputy Registrar of the Supreme Court, which creates the illusion that the Supreme Court administers the scheme, when the legislation does not so provide.

6.1.3 In most jurisdictions, party/party costs assessment is under the control of the court that makes the relevant costs order, while practitioner costs are assessed under the supervision of the relevant Supreme Court. Victoria has departed from this model by consolidating party/party and practitioner costs under a 'Costs Court' within the Supreme Court, headed by an Associate Justice of that Court; party/party costs continue to be regulated by rules of court, while practitioner costs are governed by the legislation that regulates the legal profession.

6.1.4 A number of submissions to the Review advocated greater centralisation of the assessment process as a means of increasing efficiency and reducing variability of decision-making, and increased judicial supervision. Generally, these issues have been addressed earlier in this Report. One recommended strategy has involved a proposed increase in the role of the MCA, particularly prior to referral of matters to assessors. Thus a number of the recommendations made above, if implemented, would give the MCA additional decision-making functions.

6.1.5 The kinds of decisions made by costs assessors and by the MCA already have a strongly judicial character, even if they be properly classified as administrative decisions. A question arises whether more direct curial supervision of the assessment system would be more appropriate, and whether the general supervision of the costs assessment system should be returned to the courts or, alternatively, remitted to a single court, as is the case in Victoria.

6.1.6 As the Supreme Court has long exercised supervisory jurisdiction over the legal profession, and as the MCA has been de facto/concurrently an officer of the Supreme Court, it is considered that the Supreme Court Registry is the appropriate location for this function. Such a reform would not require any designation of a 'Costs Court', nor abandonment of the present outsourcing model for the general quantification of costs assessments; but would see administrative and managerial functions, including those presently performed by the MCA, placed under more direct curial supervision. The principal consequence would be that decisions of the MCA would be reviewable as decisions of a Registrar; in the context of the extended powers of the MCA proposed by this Review, this is considered desirable.

Recommendations

49. The office of the Manager, Costs Assessment be transferred into the Registry of the Supreme Court, such that the MCA be an officer of the Supreme Court, whose decisions as such are subject to Review as decisions of a Registrar of the Court.

6.2 The Costs Assessors Rules Committee

6.2.1 LPA, s 394, establishes the CARC, constituted by Costs Assessors appointed by the Chief Justice, to make rules governing the practice and procedure on the assessment of costs.

6.2.2 Consistent with the role of the Courts in the assessment process, the Review considers that membership of the CARC should include a Judge of the Supreme Court and a Judge of the District Court.

6.2.3 To date, while the CARC has exercised a supervisory and educational role in respect of Assessors, it has not made rules. Some aspects of practice and procedure on the assessment of costs are covered by LPR. Prior to the initiation of this Review, some progress had been made in the development of some draft Rules. This Review has identified many areas in which Rules or guidelines could appropriately be made by the CARC (see recommendations 11, 17, 18, 21, 24, 25, 27, 34 and 35). It is envisaged that where appropriate, the CARC would do so in consultation with relevant stakeholders, including the MCA, the OLSC, the Bar Association, the Law Society, and the Costs Users Group.

Recommendations

50. LPA, s 394, be amended to extend the membership of the CARC to include a Judge of the Supreme Court nominated by the Chief Justice, and a Judge of the District Court nominated by the Chief Judge.

6.3 Assessors

6.3.1 A number of submissions raised issues relating to the pool of assessors, including:

- Identifying practitioners with the relevant experience to be able to conduct assessments and deliver determinations;
- Training the assessors to deliver consistent results;
- Auditing assessor's work to ensure compliance with the training;
- Fixing remuneration that is fair to both the assessors and those using the system.

6.3.2 *Identifying practitioners with relevant experience.* BASIL outlined a common concern, suggesting that inconsistencies in dealing with assessments may arise because costs assessors have not had any practical experience with the types of matters in which a costs

issue has arisen:

> *Costs Assessors whose experience has been in non-litigious legal practice do not have the understanding required to adjudicate a costs dispute that arises in a litigious matter. Equally, Costs Assessors whose experience has been in litigation work do not have the understanding required to adjudicate a costs dispute that arises in a non-litigious dispute. It is also the experience of our members that barristers who have not practised as solicitors do not understand what is involved in the conduct of client's affairs by a solicitor. It is anticipated that solicitors would equally not understand what is involved in the conduct of practice of barristers when it comes to assessing what is or is not fair and reasonable so far as time and costs are concerned. Indeed, it has also been the experience of our members that Costs Assessors whose experience has been in legal practice in the Sydney CBD do not have an understanding of the conduct of legal affairs by country practitioners. It is likely that the reverse may also occur.*

6.3.3 This view was supported by the OLSC, which also noted that practitioners with substantiated complaints about their professional conduct may be appointed as costs assessors. BASIL submit there should be separate "pools" of Costs Assessors, and that an assessment should be made at the outset as to whether a costs dispute is dominantly of a litigious or non-litigious nature and the matter allocated to an assessor within one of those pools. BASIL further submit that the ranks of costs assessors should include country practitioners proportionate to the number of costs disputes that arise in rural areas.

6.3.4 It was suggested that the current requirement for assessors to have at least 5 years' post admission experience should be reconsidered, and that practitioners should have at least 10 years' experience.

6.3.5 It was also observed that there did not appear to be any system for attracting assessors with specific experience, in that applicants need only tick a box identifying areas in which they would accept referrals, and there was no way to test their assertion that they had the requisite skill in those areas

6.3.6 However, Mr E J Harris, Solicitor & Costs Assessor, is of the view that the current system works well and says that costs assessors accept assignments only in the areas in which they have practised.

6.3.7 The present system for the appointment of assessors commences with a general invitation to the profession. The applicant identifies areas of experience. The applications are considered by a selection committee including a judge of the Supreme Court, a judge of the District Court, and representatives of the Bar Association and the Law Society, which makes recommendations to the Chief Justice. Applications are considered on the papers (typically, there may be 150 to 200 applicants, for about 60 appointments). Where the applicant has been a costs assessor in the past, including on applications for re-appointment, the selection committee has regard to his or her past performance. Otherwise, there is limited ability to check the statements made by the applicants as to experience and for examining the skills needed for assessment, including knowledge of the law, ability to analyse claims and write reasons.

6.3.8 The pool of assessors in fact contains practitioners from diverse practice backgrounds, and the selection committee deliberately seeks to achieve this. Thus there are barristers and solicitors, city, suburban and country practitioners, from large, medium and small firms, with a wide range of specialties. For example, when the scheme assumed responsibility for solicitor/client costs in family law matters, family law practitioners were targeted in the recruitment process.

6.3.9 Separate pools of assessors would unduly constrain the flexibility of the scheme. There is a degree of reliance upon the assessor to indicate what types of matters he or she will accept. However, it is not considered that the assessment of costs is a function that effectively demands sub-specialisation across each of the specialist areas of legal practice. The relatively low rate of successful reviews and appeals is better evidence that the scheme is working quite well.

6.3.10 No evidence was provided that skill in determining costs is directly related to the number of years of practical experience. The Review considers that 10 years' experience is excessive in the circumstances, and does not recommend any change in this respect.

6.3.11 However, one practical way of insisting on a higher level of reliability and verifiability of qualifications and experience would be to require applicants to provide referees who can attest to their relevant knowledge and competence in respect of legal practice, costs, and the LPA and LPR.

6.3.12 *Training assessors*. A common thread in the submissions was the desire for transparency in the process and the reasoning, and consistency in the outcomes. Current training for assessors includes an induction session, and annual attendance at a seminar. There is no system other than the review process, which has to be initiated by a party to the assessment, to ensure that the assessors are following consistent processes. There is a wide variety in the style and structure adopted by Assessors in writing their reasons, which is said to demonstrate that the assessors are not sufficiently regulated or supervised.

6.3.13 It is unsurprising that there is variation amongst assessors in their styles of writing reasons, just as there are variations between judges. Close regulation and supervision of assessors who perform a quasi-judicial function is not appropriate. Short of misconduct, the review process is the correct and appropriate mechanism for correcting error and achieving consistency, just as the appeal process is in respect of judges. The Review does not support an "audit" of Assessors, which would be inconsistent with their independent quasi-judicial role.

6.3.14 The LSC expressed the view that an induction session and annual seminar were not an adequate education and training program, and that costs assessors ought to be required to undertake a more comprehensive and ongoing education and training program that covers a wide range of issues, addressing not only the role of the costs assessor and the costs assessment process, but also the philosophy and purpose of the scheme and how it complements the disciplinary regime, the role of the OLSC, the role of the professional associations and new practice issues. The LSC expressed concern that after the initial

induction, assessors would be required to attend only the annual seminar, which would be insufficient to address these issues.

6.3.15 The topics identified by the LSC are appropriate to be included in the continuing education of costs assessors. However, the challenge is to balance what can reasonably be expected of costs assessors (in terms of uncompensated attendance at seminars), what can reasonably be afforded by the scheme (in terms of funding continuing education for assessors), and what assessors should be expected to know from their experience of legal practice.

6.3.16 Proof of an adequate understanding of the LPA and LPR, legal practice and costs practice should be a mandatory requirement of applicants in the selection process. Currency in recent developments could be maintained, at very modest expense, through occasional circulars from the CARC and the MCA, and through an on-line forum for costs assessors. The Review considers that a program of continuing education should remain an element of the induction session and the annual seminar, and should address, where appropriate and relevant, not only the role of the costs assessor and the costs assessment process, but also the philosophy and purpose of the scheme and how it complements the disciplinary regime, the role of the OLSC, the role of the professional associations and new practice issues. To accommodate this, the annual seminar could be extended to two days if and when the amount of subject matter warrants it. The CARC, the OLSC and the Costs Users Group should be consulted in the development of the content of the induction session and annual seminar.

6.3.17 *Fair remuneration.* Some submitters suggested that the fees charged by assessors can be unreasonable and lack transparency. The OLSC submits that costs assessor fees, currently $192.50 per hour, and the legal costs of the parties incurred during the process, may be unreasonably high for some clients or third party payers. Mr Charles Hockey gives an example of a costs assessor charging fees equivalent to 21% of the costs assessed. He observes that costs assessors are neither required to provide a quote, nor are their fees open to negotiation. He suggests costs assessors' fees should be calculated as a fixed percentage of the gross bill.

6.3.18 A number of other submissions noted that costs assessor's remuneration has not increased since the inception of the scheme, and submit that an increase would lead to better quality and more timely assessments. The assessors complain that the hourly rate of remuneration is not reasonable, as it does not represent a fair rate compared to the market for their services as practitioners, and provides little incentive for a practitioner to give priority to working on assessments, when other work is more remunerative.

6.3.19 The cost of assessment can be affected by factors that can extend the time that one might consider reasonable for the completion of the work. It was suggested that there is presently no transparency in the way in which the fees charged by assessors are communicated to the parties. However, the MCA maintains a degree of supervision by requiring that assessors provide a level of explanation for their fees in terms of time spent. This can inform a decision by the MCA to apply for a review of the costs of the assessment, pursuant to s 373A, which authorises the Manager, within 30 days after the issue of a certificate under section 369(5) that sets out the costs of a costs assessment

determined by a costs assessor, to make an application for a review (by a Review Panel) of that determination. This provides a sufficient means of supervision of the fees charged by costs assessors in respect of any particular matter, and again, for reasons associated with the role and status of Assessors, is more appropriate than an "audit".

6.3.20 Moreover, the statistics summarized above – average costs in dispute about $60,000 and average costs of assessor about $1,200, corresponding to about 6 hours' work – indicates that on average, the assessor's fees equate to about 2% of the costs in dispute. This is considered very reasonable, and tells against there being any systemic problem in this field.

6.3.21 The Review accepts that if the scheme is to attract high quality assessors, it must reward them fairly, and provide remuneration that is not so inferior to what a practitioner can generate from practice as to amount to a disincentive to give attention to assessments. In this respect, review of the hourly rate is long overdue, and an increase to at least $250 per hour is recommended.

Recommendations

51. Proof of an adequate understanding of the LPA and LPR, legal practice and costs practice, be a mandatory requirement of applicants in the selection process.

52. In the selection process, applicants for appointment as Assessors be required to provide referees who can attest to their relevant knowledge and competence in respect of legal practice, costs practice, and the LPA and LPR.

53. A program of continuing education for assessors be maintained through an induction session and an annual seminar, and should address, where appropriate and relevant, not only the role of the costs assessor and the costs assessment process, but also the philosophy and purpose of the scheme and how it complements the disciplinary regime, the role of the OLSC, the role of the professional associations and new practice issues. To accommodate this, the annual seminar could be extended to two days if and when the amount of subject matter warrants it. The CARC, the OLSC and the Costs Users Group should be consulted in the development of the content of the induction session and annual seminar.

54. The MCA, in consultation with the CARC, issue updating circulars to Costs Assessors on recent developments as and when appropriate.

55. The MCA establish an on-line forum for costs assessors.

56. The hourly remuneration rate for assessors be reviewed and increased to at least $250 per hour.

7 LIST OF SUBMISSIONS

7.1 Organisations

7.1.1 Brothers & Sisters Law Inc

7.1.2 Law Society of NSW

7.1.3 Legal Aid NSW

7.1.4 Office of the Legal Services Commissioner

7.1.5 NSW Bar Association

7.1.6 NSW Young Lawyers

7.2 Firms

7.2.1 C Burt (Burt & Allen Lawyers)

7.2.2 Conrad Turnbull Lawyers

7.2.3 V Higinbotham, Solicitor (Costacomp Pty Ltd) & D Vine-Hall, Solicitor (DSA Legal Cost Consultants Pty Ltd)

7.2.4 McCabe Terrill Lawyers

7.2.5 McDonald Johnson Lawyers

7.2.6 J McGruther, Solicitor & Costs Assessor

7.2.7 P Mathews (Mathews Folbigg Lawyers)

7.2.8 C Messenger (Messenger & Messenger, solicitors)

7.2.9 Mr N Piddock (Burke, Elphick & Mead Lawyers)

7.2.10 DG Thompson Costs Lawyers

7.2.11 P Rosier (Rosier Partners, Lawyers)

7.2.12 Seabeach Costing Pty Ltd

7.2.13 R Smith (Smith & Smith Attorneys)

7.2.14 M Stack (Stacks Law Group)

7.3 Individuals

7.3.1 B Beavan

7.3.2 Peter Breen, Solicitor

7.3.3 R Capner, Solicitor

7.3.4 M Dignam

7.3.5 Y Dubow, Solicitor

7.3.6 J Eades & J Dobson, Solicitors

7.3.7 E J Harris, Solicitor & Costs Assessor

7.3.8 PL Hill

7.3.9 C Hockey, Solicitor

7.3.10 G Hoeben, Costs Assessor

7.3.11 D Knoll AM, Barrister

7.3.12 W Lawrence

7.3.13 G Mullane, Costs Assessor

7.3.14 V Musico, Solicitor

7.3.15 K Morrissey, Barrister

7.3.16 Ms H Rebbeck, solicitor

7.3.17 G Salier, Solicitor

7.3.18 C Wall, Costs Assessor

7.3.19 [Confidential], Barrister