



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



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Chief Justice

ANNEXURE: STATISTICS

Filings by calendar year

Year	Party/Party	Practitioner/ Client	Client/ Practitioner	Reviews	Total applications
2006	1,357	224	387	221	2,189
% of total applications	62%	10%	18%	10%	
2007	1,217	259	358	156	1,990
% of total applications	61%	13%	18%	8%	
2008	931	331	169	125	1,556
% of total applications	60%	21%	10%	8%	
2009	1,081	502	253	155	1,991
% of total applications	54%	25%	13%	8%	
2010	1,005	461	209	187	1,862
% of total applications	54%	25%	11%	10%	
2011 (to 30 June)	434	286	96	98	914
% of total applications	47%	31%	11%	11%	

Current average waiting times

As at 30 June 2011, the average costs assessment application is completed within 4 - 5 months. The average waiting time is calculated from the date the application is assigned to an assessor to the date the assessor notifies the parties that he or she has completed the assessment.