

PRESENT DIFFICULTIES WITH THE ASSESSMENT SYSTEM

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I INTRODUCTION

The system for the assessment of legal costs, whether those costs are awarded by a court or tribunal or whether they are costs between solicitors and their own clients, has been regulated by the *Legal Profession Act 1987* (NSW) ('Act') for ten years¹ and yet there are many practitioners who still refer to the present system as the 'new' system.

Many who criticise lawyers' fees fail to recognise that lawyers are asked to predict the future course of matters and provide an estimate for work that may be undertaken many years in the future.

Thus, while it may be possible to predict the amount of time one needs to fill a molar or to paint a house, it is impossible to predict the amount of time which will be required to conduct litigation or complete a transaction – especially since time is quite often determined by the other party to the transaction.

In other words, whereas most other service providers can deliver their 'product' in a predictable amount of time or on a basis fixed by reference to the 'value' of the job, lawyers can rarely guarantee how long a matter will take and thus how much it will cost.

Opponents of hourly rate costing regularly complain that the process rewards the inefficient; however, legal work has far-reaching consequences for the parties involved and often must involve painstaking investigation and consideration of issues – all of which take time.

Furthermore, after providing their services, lawyers are faced with a system of costs assessment which, ten years after its introduction, has many problems and inefficiencies. It is expensive, and, for many users, unsatisfactory in its inconsistency and lack of transparency.

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1 The 'new' system of costs assessment was instituted by the *Legal Profession Reform Act 1993* (NSW) which amended the *Legal Profession Act 1987* (NSW).

One of the most difficult problems with the assessment system is the failure of practitioners and assessors to embrace the concepts of the system and move on from the old concepts of taxation.

II MOVING AWAY FROM 'SCALE' AND 'TAXATION'

The intention of the 'deregulation' of costs and the recovery process brought about by the *Legal Profession Reform Act 1993* (NSW) can be identified in the second reading speech.

The Attorney-General stated:

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 should then recover the full costs which he or she is required 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 Holdings Ltd*² 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 statements in other judgments. The need for reform in this area is 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 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 the proceedings shall be dealt with under the cost 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.³

2 (1991) 24 NSWLR 103, 105.

3 Second Reading Speech, *Legal Profession Reform Bill 1993* (NSW), Legislative Council, 16 September 1993 (John P Hannaford, Attorney-General of NSW).

The vast majority of users of the assessment system (both practitioners acting for the litigants and the assessors themselves) still fall back on a 'taxation' process and the principles which applied in the taxation system, which has resulted in assessments being time consuming, expensive and often unsatisfactory in the outcome.

Assessment of the fair and reasonable costs does not necessarily require the minute examination of every letter or telephone call, yet there are very few assessments which do not proceed without a fully itemised claim followed by a lengthy dissection of every single item. This is sometimes followed, at the insistence of the assessor, by another lengthy answer to any objections.

There are some assessors who issue closely written requisitions which ask for reasons for every attendance prefacing every requisition with the phrase: 'Why was it "necessary" to make this call/write this letter/issue this subpoena?'

The process thus becomes extremely expensive and frustrating using the tests which were found unsatisfactory prior to de-regulation but without the transparency and consistency of taxation within the jurisdiction awarding the costs.

In my opinion, one must either have a system of taxation, or a system of assessment. One cannot have a strange hybrid.

Claims should provide a reasonable level of detail (total hours spent and at what rates) without the necessity of breaking up work artificially into minute-by-minute explanations. Objections should attempt to identify areas of actual dispute rather than taking an adversarial approach where every aspect of the claim (rate, time taken, use of counsel, and so on) is put in issue either just to ensure that the unsuccessful party's position is 'protected', or to raise a very large number of 'objections' in the hope that some will 'stick'.

Thus, if the matter has been carried out by a practitioner who is too experienced (and thus too expensive), a simple mathematical calculation should be all that is necessary to reduce the overall cost. Or if two counsel have been retained where one would have been sufficient, this can be addressed in one line. Likewise, if counsel's fees appear high for the nature of the matter, this can be adjusted.

Unfortunately, the (understandable) desire of parties to have 'reasons' for the determination makes it very difficult for assessors who do want to make the type of global adjustments referred to above. Some assessors interpret 'reasons' as requiring minute explanations for every adjustment. These 'laundry lists' are expensive and unnecessary.

An assessor should be both able and permitted to analyse the totality of the claim and address the issues which are really in dispute. Unfortunately, because of the inexplicable discrepancies in outcomes, a perceived lack of confidence in the system has led to parties requiring detailed 'reasons'.

There also seems to be a general failure to analyse a claim with reference to the costs incurred by the objecting party, which are usually similar or even greater than those to which objection is taken.

There is no longer any reason why the costs *must* be reduced to identify an artificial difference between the actual costs paid by a party, and those which can be recovered from the unsuccessful party.

The vast majority of practitioners calculate their costs on the basis of six-minute units and the majority of objections to claims dispute the ‘reasonableness’ of the six-minute unit.

It is important not to import into the current costing principles, which enable a successful party to recover most or all of their reasonable costs, principles that date back to an earlier time; a time when there were very restrictive scales, and where the commercial reality of the conduct of a legal practice was entirely different from the current commercial realities.⁴

There is also a failure by objecting parties to move away from the concepts of scale costing, which is ‘fictional’, and to embrace deregulated costing, which should reflect the usual practices of practitioners.

Thus, while the dictation of a letter reminding the other side to comply with a direction made some months before may take only a few minutes, the responsibility to review the file, the dictation of the letter, checking and signing the letter, and perhaps adding enclosures, may take considerably longer. There are many practitioners and assessors who still view all of the work except for the actual dictation of the words in the letter as ‘solicitor and client’.

In hourly rate costing one must take into consideration that correspondence does not spring perfectly formed from the mind of the practitioner, no matter how experienced, and important correspondence may be refined over a number of drafts.

The hourly rate itself is still a controversial area because there is no publicly available explanation by assessors of the reasons for the rates they allow.

Shortly after deregulation in 1994, the gap between the scale rate and the market rate had largely disappeared, yet the failure of some assessors to ‘move with the times’ has resulted in parties in 2004 recovering sometimes only 60 per cent of their costs.

In summary, it is my opinion that it is incumbent upon assessors to apply the spirit of the system and determine reasonableness without requiring the costly, minute by minute, dissection of a claim, or making the almost automatic assumption that the claim must be reduced. It is also incumbent upon objecting parties to identify issues which are actually in dispute, rather than objecting for the sake of objecting.

III REASONS

Initially, assessors did not provide many explanations for their determinations, rendering the appeal process almost impossible.

4 *Law Society of New South Wales v Gallagher* [1999] NSW ADT 8 (Unreported, Member Molloy, 5 March 1999) (paraphrased).

Since the decision of Sperling J at first instance in *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd*⁵ ('*Kennedy Miller*') and the subsequent amendments to the legislation, assessors are required to provide 'reasons' for their determinations; however, the form and quality of the reasons provided differs immensely.

One would expect an assessor to identify the issues in dispute (for example, rate, two counsel, too many experts, too many hours spent) and address these issues in his or her reasons.

Some assessors merely note that they have reviewed the documents provided and that has led them to their determination. Others fail to provide a clear statement of opinion regarding an issue which might comprise over 50 per cent of the claim.

This is perhaps the difficulty with the system most commonly complained about. Parties are entitled to know how their claim has been determined. While the provision of lengthy lists of items adjusted may suggest a painstaking review of the claim, it can be perceived as unnecessarily increasing the cost of the assessment process, and without 'reasons' for the reductions, is useless.

IV APPEALS AND REVIEWS

Section 208L of the Act provides a process for appeal from a 'decision' made by an assessor on a question of law, while s 208M provides a process for both seeking leave to appeal, and appealing from a determination (that is, the quantum allowed).

As the first appeals were usually brought under the two sections, it became clear that there were very few decisions by assessors which could be classified as decisions of 'law' since almost all of the process of determining costs requires the application of discretion to a set of facts.

Most of the applications for leave to appeal failed because the parties could not identify a serious injustice. They were unable to do so because they did not know how an assessor had dealt with a specific issue, the assessors at that time not being required to provide reasons.

The decision of Sperling J in *Kennedy Miller* led to the amendment of the Act and Regulations and the requirement for written reasons; however, the vast difference between the form of the reasons from assessor to assessor is still the subject of many complaints.

The practical effect of the amendments to the Act by the *Legal Profession Amendment (Costs Assessment) Act 1998* (NSW) and divisions 5A and 5B of the *Legal Profession (Costs Assessment) Regulation 1999* (NSW) is to provide for a review by a panel of assessors prior to being able to avail oneself of the process under ss 208L or 208M.

5 *Kennedy Miller Television Pty Ltd v S J Lancken* (Unreported, Supreme Court of NSW, 1 August 1997).

The determination is referred to a panel comprising two assessors. The review panel's jurisdiction is to review the determination – that is the quantum – not the reasons for that determination.

The difficulty with the review system is that, first, two assessors must determine that the first assessor came, in some way, to the wrong figure. If they are not unanimous then they must confirm the original determination. Secondly, the cost of the review may not be justified as it is necessary to obtain a result more than 15 per cent greater than the first determination to avoid paying the fees of the panel, that is, two more assessors.

For example, if the 'complaint' is that the fees of only one of two counsel have been allowed, the total value of the second counsel's fees may not exceed 15 per cent of the value of the whole of the determination.

One can seek review of only a portion of the determination but the relative 'success' of the review is measured against the whole of the determination.

Only a very small percentage of reviews are successful. This is usually explained by the fact that assessment is a very subjective process, and the panel must determine that the outcome is so out of line that no other assessor could have come to that determination. From the viewpoint of the other party to the determination, the review can be a very frustrating event.

If the review is sought by the respondent the original determination is stayed and it may be many months before the outcome is certain. Additionally, if a result of more than 15 per cent is achieved, the respondent may have to pay the costs of the review, in which he has taken no part, because the original assessor 'got it wrong'.

Thus the respondent may be saddled with the costs of three assessors.

V ASSESSMENT SYSTEM INAPPROPRIATE FOR SOME TYPES OF MATTERS

In very large matters, the assessment system with its 'de facto' requirement for the preparation of a lengthy itemisation, lengthy objections, and even lengthier responses, can prove extremely onerous for the claimant.

Although a party is entitled to annex a copy of the solicitor and client 'bill of costs' to the application in answer to the particulars required in paragraph 5 of Form 3 (which has been repealed but is in the process of reformulation), it is a brave claimant who annexes anything other than a full itemisation.

An opponent will complain that there is insufficient detail to 'justify' the costs, and all of the parties will be subjected to an unwieldy process of attempting to justify – or to oppose – every telephone call and letter in a large matter.

Often, practitioners in very large matters work long days on only the one matter and do not keep minute by minute records of their work.

As the assessment system is supposed to provide an economical and efficient system for the determination of costs, the requirement (whether actually stated by the legislation or merely adopted by practitioners) to provide detailed explanations of every minute of work, cannot be overcome.

There is a growing appreciation of the efficacy of an application to the court for a lump sum costs order to achieve a more just outcome; however, while there are several interesting applications presently before the Supreme Court, most of the authority in this area is found in the Federal jurisdiction.⁶

VI WHAT CAN BE DONE?

If the public interest demands that legal practitioners should have their work and charges regulated, then a system should exist which provides a consistent outcome to all users.

The ‘taxation’ of costs provides an objective and generally consistent outcome across a range of matters. The difficulty with the taxation system was the perceived cost to the individual jurisdictions, the staffing issues, and the fact that there had to be a mechanism to update the scales which had moved far away from the commercial reality of the costs being incurred by litigants.

The assessment system has many ‘baby with the bathwater’ problems, in that the process is more expensive than taxation, very unpredictable (because of the number of assessors and their different backgrounds), and the lack of transparency and consistency.

A better way could be that the courts themselves take a pro-active role in costs quantification and that, as in New Zealand, the parties should present evidence of their costs to the presiding judge who makes a lump sum order as part of the judgment on the substantive issues.

On the other hand the creation of a tribunal with a limited number of assessor members, and a more regulated process with an ability to have short hearings would be a way of circumventing the expense of presenting voluminous written submissions. While this system would be more costly to the parties, it may also be more conducive to settlement if the cost of fighting out the issues was truly paid by the parties.

This would also give litigants their ‘day’ in court (which is often the only way that they can accept an outcome or be persuaded to settle).

In the short term there are a number of changes which would assist parties using the system:

6 In the Supreme Court of NSW, see *Idoport v National Australia Bank* (Supreme Court proceedings No 50113 of 1998); *Multiplex Ltd v HSH Hotels (Australia) Ltd* (Supreme Court proceedings No 55002). In the Federal Court, see *Beach Petroleum NL v Johnson* (1995) 57 FCR 119; *Canvas Graphics Pty Ltd v Kodak Australasia Pty Ltd* [1998] FCA 23 (Unreported, O’Loughlin J, 23 January 1998); *Spanon v Apand Pty Ltd* [1998] FCA 164 (Unreported, von Doussa J, 4 March 1998); *Australasian Performing Rights Association Ltd v Marlin* [1999] FCA 1006 (Unreported, Burchett J, 8 July 1999); *Auspine Ltd v Australian Newsprint Mills Ltd* [1999] FCA 673 (Unreported, O’Loughlin J, 21 May 1999); *Patrick Stevedores No 2 Pty Ltd v The Proceeds of Sale of MV “Sculptor Konenov”* [2000] FCA 1710 (Unreported, Tamberlin J, 24 November 2000); *Reches Pty Limited v Tadirin Ltd* [2000] FCA 924 (Unreported, Burchett J, 7 July 2000); *Hadid v Lenfest Communications Inc* [2000] FCA 481 (Unreported, Lehane J, 14 April 2000); *Hadid v Lenfest Communications Inc* [2000] FCA 628 (Unreported, Lehane J, 15 May 2000); *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629 (Unreported, Mansfield J, 30 May 2001).

- there should be fewer assessors so that consistency becomes more possible;
- assessors should receive training and be subject to review;
- there should be a system of internal review of assessors' work to address inconsistency; and
- the issue of 'permanent' tenure of assessors should be addressed as there are circumstances where it might be preferable if appointments were not automatically renewed.

There is no doubt that these changes would increase the cost of assessments; however, the present system is not really 'user pays'. The hidden costs (such as the costs incurred during the assessment process) are not taken into account. If an appropriate system requires more funds then charges should increase, but only if quality increases proportionately.