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The purpose of this paper is to make Legal practitioners aware of how the Cost Assessment process works and inform them of certain principles.

This paper is not intended to be a comprehensive study of the Legal Profession Act or the Cost Assessment process. Where an opinion is expressed it is the personal opinion of the author and is expressed without the benefit of comprehensive argument or detailed consideration of such arguments and accordingly none of the contents of this document should be relied on as a precedent or in any legal argument in relation to any matter that is considered by the author in his role as a Cost Assessor of the Supreme Court. In other words in his decision making capacity as a Cost Assessor the author is not bound by any of the opinions expressed in this document.

**SEMINAR NOTES RE COST ASSESSMENT OF
LAND AND ENVIRONMENT COURT MATTERS**

I would expect that the issue of costs would be dear to the heart of every practitioner in this room and hope that at the end of the day you will all walk away with some knowledge of the traps and pitfalls that beset our profession when it comes to billing our client and more importantly, obtaining the full benefit of a cost order in favour of our client.

I am constantly surprised at the number of Solicitors who are completely unaware of the process that governs recovery of costs in their profession.

The Legal Profession in New South Wales is the most controlled profession in the State. Not only are there severe controls on the method of contracting with your clients, but there are also severe controls on the methods of recovering payments from your clients. What is surprising, of course, is that most Legal Practitioners are only marginally aware of these provisions.

The profession is again under attack in relation to the costs and it is now being suggested that time costing should be abandoned in favour of some other unspecified system. The whole purpose of the amendments to the Legal Profession Act introduced in July 1994 was to encourage competition among the Legal Profession and to allow market forces to set the level of fees.

There is now a push to "put the genie back in the bottle" by reintroducing controls on the amount of costs, as has occurred in the personal injuries and workers compensation fields.

Our Profession needs to seriously embrace its obligations under the Legal Profession Act to disclose its fees in accordance with the Act.

When the proposals of fee disclosures were first mooted, I was the President of the Hunter Valley Law Society and I had reservations as to how the system would work. I am happy to confess that I was wrong. I believe that a system of open and frank disclosure of fees by the Legal Profession is beneficial to the Profession. The new regime has allowed me to know up-front whether my client is willing to pay my fees and forces the client to confront the issue of costs early in the process. I have found disputes in relation to costs the subject of Costs Agreements have almost disappeared and believe that the quality of service and not the cost of that service is what the clients are mainly interested in.

Any practitioner providing a quality service has nothing to fear by proper disclosure as I believe the market is driven by service rather than cost.

Today I hope to stress to you some basic obligations; to explain the process of cost assessments, especially in party and party costs in the Land and Environment Court and to point out some traps practitioners fall into.

HISTORY

In 1994 changes were made to the Legal Profession Act 1987 with a view to deregulating the process by which costs were previously set and reviewed in NSW.

The Legal Fees and Costs Board was abolished and in most cases the scale of costs for contentious and non-contentious business was deregulated.

A new system of cost disclosure and cost agreements was introduced with penalties to practitioners who did not disclose matters that were required to be disclosed.

The penalties are both disciplinary, in that in some instances the failure to disclose may amount to professional misconduct and also economic in that if there is a failure to disclose, a practitioner cannot recover his fees from the client until the bill has been assessed and there is a further disincentive that the cost of the assessment process must be paid by the practitioner regardless of the outcome.

The new regime encouraged costs agreements and provided an incentive to practitioners to enter a costs agreement, the major incentive being that if a practitioner enters a valid costs agreement his entitlement to costs can in many instances be protected from attack by the assessment process.

The old system taxation whereby costs were assessed by various Courts and the Registrars of those Courts was abolished. The system of using various scales for various types of work was abolished and instead of this time consuming inexpensive and significantly bureaucratic process a new process called "assessment" was introduced. The Assessors were appointed from the Legal Profession who were at least of 5 years standing and it is their job now to assess both bills given to clients and costs claimed pursuant to a Court order. Anyone who recalls the old system when costs were assessed by a person who had never practised in the real world will agree the new system is better.

The amendments changed the basis upon which costs were determined from, that which were "necessary or proper" under the taxation system to that which is "fair and reasonable" under the new system.

The new criteria applies to both Party and Party costs and Solicitor and Client costs.

The purpose of the changes was to enable a successful litigant who has the benefit of a cost order to recover the realistic market costs of the litigation.

The new system was intended to be fast, inexpensive and fair and initially it was hoped that the system would do away with itemised bills, however, this has not happened.

When the reforms were first introduced there was no requirement for Cost Assessors to give reasons, nor was there any way of reviewing a Cost Assessor's decision, other than by way of appeal on a point of law to the Supreme Court.

Attorney General of New South Wales –v- Kennedy Miller Television and Another 1998 43 NSWLR 729 the Court held that there was an obligation on the Assessor to give reasons in respect of those costs which had been rejected. The State Government subsequently enacted

reforms requiring Cost Assessors to give reasons in every case where an application was lodged with the Court from 10 September 1999. The 1998 amendments were also provided for the setting up a Review Panel of two Cost Assessors to allow a review on a merit basis to the Review Panel from a decision of a Cost Assessor.

THE ASSESSMENT PROCESS

Assessments are for either:

- Practitioner/Client costs, ie costs between a Legal Practitioner and another Legal Practitioner, ie between a Solicitor and a Barrister; or
- Solicitor/Client costs, ie costs between a Legal Practitioner and its client; or
- Party/Party costs, ie costs determined to be paid to a party by an order of a Court or a Tribunal of unspecified costs.

The provisions are generally set out in Division 6 of the Legal Profession Act 1987 (Section 199 and Section 208V). The Legal Profession Regulations set out in greater detail the process that applies.

Briefly the following statutory provisions should be noted:

- 1 Section 199 gives to the right to a client to make an application for assessment of a bill of costs;
- 2 Section 200 gives a right to a Practitioner to require an assessment of a bill given by another Practitioner. This is a new process and can be used by Solicitors, for example to have their agent's costs assessed and their Barrister's costs assessed.
- 3 Section 201 allows a Practitioner to have his own bill assessed. The advantage of this is that on assessment a Certificate is given and that Certificate forms a valid Judgment which can be enforced immediately without further litigation. It can form an effective method of cost recovery, however, the Practitioner using this method must ensure there has been full compliance with the disclosure provisions of the Legal Profession Act.
- 4 Section 202 deals with what was commonly known as Party and Party costs.
- 5 Section 203 sets out how an application for assessment is made.
- 6 Section 204 sets out who is to be notified and how they are to be notified about a bill being filed for assessment.
- 7 Section 206 gives the Proper Officer of the Supreme Court the power to refer applications to Cost Assessors and revoke such referrals. This provision also requires a Cost Assessor to refuse an assessment if he or she has an interest in the assessment, ie a conflict of interest.
- 8 Section 207 sets out the authority of a Cost Assessor to require documents or further particulars, and you should note that a failure to provide a Cost Assessor with information requested may amount to professional misconduct and the Assessor also has the right to determine whether he will continue with the process in the absence of such information.
- 9 Section 208 gives the parties rights to make submissions and provides that an Assessor is not bound by the rules of evidence and also requires the Cost Assessor to determine whether or not disclosure has been made and whether or not there is a costs agreement and if so, what are its terms.

COSTS DISCLOSURE

The relationship between a Solicitor and its client is based on the retainer.

The Professional Conduct and Practice Rules provide that a Solicitor should only accept a retainer to act for a client where the Solicitor can reasonably expect to serve the client with competence and diligence and to attend to the work with reasonable promptness.

Costs disclosures are part of the Solicitor and Client retainer and are required under Part 11 of the Legal Profession Act.

Matters that must be disclosed are the amount of costs if known and if not known, the basis of calculating the costs; billing arrangements; the client's rights to review and challenge the bill of costs under Division 6 of Part 11 and the client's right to receive a bill of costs under Division 4 and other matters prescribed in the Regulations.

This disclosure must be in writing and accordingly the fact that a Solicitor has acted for a client for a long period of time and the client was aware of the basis of costs, does not constitute a cost disclosure under Part 11 of the Legal Profession Act.

Any disclosure between a Barrister and a Solicitor must be conveyed to the Solicitor's client.

Disclosure must be made before the Practitioner is retained (unless it is not practicable to do so).

Significant increases in costs during the course of the matter must be notified to the client.

A Practitioner must estimate the likely cost of the matter, unless the fee is a set sum in which case the set sum needs to be set out in the disclosure.

The Solicitors' Rules provides certain limited circumstances where a Solicitor may be excused from disclosure and they are:

- if the client is in Prison or in Police custody;
- in hospital or similar institutions;
- suffered some substantial trauma; or
- is seeking legal services as a matter urgency

If there is no opportunity to provide disclosure prior to the performance of the service, disclosure must be given as soon as possible thereafter.

Section 182 provides that if there no disclosure the client need not pay the bill until the costs have been assessed and a Practitioner who fails to make disclosure cannot maintain proceedings for recovery of costs.

In the event there is no fee disclosure the cost of the assessment process must be borne by the Practitioner regardless of the outcome. You should also note that pursuant to Section 182(4) a failure to disclose is capable of being unsatisfactory professional conduct.

Clause 22A of the Legal Profession Regulations sets out the particulars required in a bill of costs. I won't go into these, but if you haven't read the Regulations I suggest you do so before you get into trouble.

Solicitor and Client Assessment

In this talk I do not intend to go through the requirements of a Solicitor/Client assessment, however, you should be aware that unlike a Party/Party assessment, in a Solicitor/Client assessment the Assessor can only take into account those objections to the bill that are made and if no objection is made to the bill or no objection is made to a particular part of the bill, the Assessor cannot disallow or reduce that part of the bill that was not the subject of an objection. So if you are acting for a party objecting to a Solicitor/Client bill you should remember to make objections to as many things as possible, otherwise those items that are not objected to will be allowed in full.

Party and Party Assessment

If you look at Section 202 of the Legal Profession Act and you will notice that the only cost that can be assessed are costs as a result of an order for the payment of an unspecified amount of costs made by a Court or a Tribunal.

Section 202(3) provides that an order made in criminal proceedings cannot be the subject of a Party and Party costs application, however, subsection (4) was introduced into the Act to allow orders made in connection with criminal proceedings in the Land and Environment Court to be assessed. This is of course useful to all of us involved in Land and Environment Court prosecutions.

As an applicant can only make an application for assessment of Party and Party costs if it has received costs as a result of an order for the payment of an unspecified amount of costs made by a Court or Tribunal. It is important that before an applicant commences the assessment process that it obtains a sealed copy of the order of the Court and forwards that with the application when it is filed with the Supreme Court.

There are some instances where an order may not be necessary. For instance pursuant to Part 52A Rule 14 of the Supreme Court Rules costs are payable by the discontinuing party from the discontinuance or deemed discontinuance of an appeal. On discontinuance there arises an automatic right to have costs assessed and a cost order is not necessary.

No formal order is required to discontinue proceedings in the Land and Environment Court, but as there is no automatic provision which provides that the discontinuing party is liable to pay the other party's costs. A Court order is therefore required before the assessment process can begin (Part 11 Rule 5 of the Land and Environment Court Rules).

In *Palerma –v- Liverpool City Council (2003) 124LGERA 83* the Court made it clear that discontinuance does not automatically entitle the non discontinuing party to costs. This case contains a useful discussion and the Court powers to award costs.

An application for Party and Party assessment is commenced by filing a form in accordance with Form 3 of the Regulations. Section 203 requires a declaration that mediation will be

unsuccessful, Form 3 should be amended to indicate that attempts at mediation have been unsuccessful and that mediation will not resolve the matter.

The filing fee is \$100.00 or 1% of the amount of costs remaining unpaid at the time that the application is made or 1% of the amount of costs in dispute at the time the application is made.

Where an applicant files a bill of costs in which partial objection is taken, the fees are not based on 1% of the amount to which no objection is taken, but the total amount of the bill. In my view the amount in dispute is the whole of the amount for which a party is seeking a costs certificate, ie the whole of the amount contained in the bill of costs and this is because in Party and Party costs, regardless of whether objections are made or not, the Cost Assessor is required to treat the whole of the bill as being in dispute and to consider all items, even those that are not the subject of an objection.

When the application is filed in the Supreme Court the Court will refer it to an Assessor and if the Assessor believes that there is a conflict of interest, he is obliged to refuse the assignment and return the file to the Court.

The Assessor will normally check to see if the Court fees have been paid and that an order has been made, as without the payment of correct fees or without an order the Assessor has no jurisdiction to determine the matter.

The argument is often advanced that it is too difficult to obtain a sealed copy of an order if the order was made some time ago. Unfortunately in the absence of an order the Assessor cannot be satisfied that there is jurisdiction to determine the application. No matter how difficult it is, a sealed copy of an order, in my view, is essential to clothe the Assessor with jurisdiction. In order to ensure that applicants do not have difficulty in obtaining a sealed copy of the order at some later time (for instance because the tape has been destroyed or for other reasons relating to time lapse) I suggest that the successful party should immediately take out the orders and keep sealed copies of the orders on their file. Usually that is not a problem in the Land and Environment Court, as orders normally issue automatically. Parties should, however, check the orders to ensure that the parties shown in the orders are correct and that the order made is correctly set out. It is not unusual for parties to be misdescribed or for the sealed copies to contain other errors.

It should be remembered that generally an order made against multiple parties means that the parties are jointly and severally liable. If it is to be argued before the Cost Assessor that the costs should be paid equally by each party, then it is incumbent on the person raising such argument to show that the order as made by the Court correctly reflects that situation.

It should be remembered that it is no part of the Assessor's functions to read down the order or vary the order made by the Court.

If on the face of it the Court order is unambiguous and clear, there is no room for the Assessor to read that order down on the assumption that the Judge intends the order to be something other than what appears to be on the face of it. It is not unusual for parties to argue before the Assessor that an order "that the applicant pay the respondent's costs" should be interpreted in some limited manner so as to disallow certain costs. In the absence of such a limitation the Assessor is not entitled to read the order down. If it is intended the order to

be read down or limited in some fashion, this argument should be run before the Judge and not before the Assessor. It is too late at the assessment stage to argue that an order should be read down or limited in some way.

When the Assessor receives the application he will normally forward a letter to each party advising them of their rights to make submissions under Section 208 of the Act and ask for various information from the cost applicant, including any fee disclosure or fee agreement between the successful applicant and its legal representatives.

Section 207 of the Legal Profession Act provides that the Cost Assessor may require certain documents and further particulars. It should be noted that the Cost Assessor may require such particulars to be verified by statutory declaration and a failure, without reasonable excuse, to comply with a notice under Section 207 can amount to professional misconduct.

It is now usual for Assessors to require that applicants produce any costs agreement or relevant disclosure documents between the Legal Practitioner and the client. Section 208H of the Legal Profession Act gives the Assessor powers to have regard to a costs agreement, but prohibits the Assessor from applying the terms for the purpose of determining what is fair and reasonable costs.

Cost Assessors usually require production of the disclosure documents to satisfy themselves that costs are not being claimed in excess of those actually charged.

Sometimes obtaining this information from Practitioners is harder than pulling teeth. Very often when pressed it is found that no such document exists and this is not uncommon, especially when the applicant is a large company or a Council or a Government Department. Regardless of the size or type of client, there is an absolute obligation under the Legal Profession Act to make disclosure. There is no earthly reason why disclosure needs to be made on each instance, as long there is a general disclosure document setting out the matters required to be disclosed. In each instance there should be a disclosure of the estimated total costs of the proceedings. Accordingly tender documents can form part of the disclosure.

Sometimes Solicitors object to producing their disclosure documents on the grounds that there is some privilege attached to those documents. If you produce disclosure documents and wish to claim privilege in relation to them, you will take comfort from the decision of Master Malpas in *James Hardie & Coy Pty Ltd –v- Yeomans (delivered on 16 June 2000)* in which the Master upheld the decision of a Cost Assessor refusing to require a cost applicant to produce to the cost respondent the cost disclosure document that had been produced to the Assessor pursuant to Section 208H.

Master Malpas took the view that as the documents were subject to a claim for privilege their production under Section 208H to the Assessor did not amount to a waiver of privilege, as the production was compulsory. This meant that although the applicant was required to produce those documents to the Assessor, the applicant was not entitled to have access to them.

Once the Costs Assessor receives all the relevant documents the Costs Assessors then proceeds to an assessment. The assessment is made pursuant to the Assessor's obligations under Section 208F to consider:

- (a) whether or not it was reasonable to carry out the work to which the costs relate; and

- (b) what is fair and reasonable amount of costs for the work concerned.

Section 208G allows the Assessor to consider all or any of the following matters:

- (a) the skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter,
- (b) the complexity, novelty or difficulty of the matter,
- (c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,
- (d) the place where and circumstances in which the legal services were provided,
- (e) the time within which the work was required to be done,
- (f) the outcome of the matter.

THE INDEMNITY PRINCIPLE

The Legal Profession Act does not contain the words "the indemnity principle", however it is important that you be aware that Party and Party costs are by way of indemnity to the successful party (*Gundary –v- Sainbury (1910) 1 KB 645*). Accordingly a party cannot recover in its application for Party and Party costs any amount in excess of that which it is liable to pay its Legal Practitioners.

If a party is entitled to a GST credit, that GST credit needs to be deducted before calculating the amount of costs that are recoverable from the cost respondent.

If the party is entitled to a discount, that discount needs to be fully disclosed to the Cost Assessor and needs to be applied on the application for Party and Party costs.

I have found recently that the practise of using Costs Consultants to draw bills have exposed Practitioners to substantial risk of professional misconduct. It is not unusual to see bills where an hourly rate is claimed well in excess of that specified in the Solicitor's retainer or in excess of that to which the party has been billed.

As the application for costs is signed by the Practitioner, any practitioner who signs such an application containing misleading information runs a substantial risk of being referred to the Legal Services Commission for professional misconduct. In my view all practitioners have a duty not to mislead a decision maker by filing false or misleading information. practitioners should be vigilant to ensure that bills drawn by Costs Consultants do not exaggerate the applicant's liability to pay costs to its Solicitors in any way, as otherwise there is a substantial risk that the Cost Assessor may refer their conduct to the Legal Services Commission.

In the *Commonwealth Bank of Australia –v- Hattersley & Another (2001) NSWSC60* the Court held that it is appropriate to treat an employed Lawyers on the same basis as an independent Lawyer and that a salaried Solicitor employed by a Corporation was entitled to recover costs on the ordinary basis as if he was not a salaried Lawyer and that the proper way of treating costs awarded in favour of a Corporation who employed a Solicitor was to allow

an assessment on the same basis that one would have allowed had an independent Solicitor been engaged.

The fact that the successful applicant was a Corporation and legal work was performed on its behalf by a salaried practitioner, will not prevent costs being recovered on the same basis as if that Corporation had hired an independent Solicitor.

A practitioner cannot recover costs for typically pro bono work, even if a costs order is made in favour of the practitioner.

Litigants cannot recover any more costs than is payable to their Solicitors.

Assessing Costs that are not the Subject of an Objection

In *Turner –v- Pride (1999) NSW SC 850* Master Malpas held that a Cost Assessor was not limited to the assessment of only those items that are the subject of specific or general objections and said:

"The language of inter alia subdivision 3 does not justify the view that an absence of dispute (or objection) discharges or relieves the Cost Assessor of the obligation to comply with the relevant statutory requirements. The Regulations recognise that even where there is an agreement as to the amount a discretion is retained by the Cost Assessor (clause 26G)"

Accordingly a Cost Assessor is obliged to look at the whole of an itemised bill and apply the assessment process to all items.

Even when no objections are made, the Cost Assessor is required to consider each item and apply the test specified in Sections 208F and 208G of the Act.

SOME OTHER ISSUES

Cancellation Fees

I have never had it put to me that a Solicitor is entitled to a cancellation fee, however, on numerous occasions legal costs are claimed on the basis that a Barrister is entitled to a cancellation fee.

Most Cost Assessors will occasionally allow cancellation fees of Counsel to some small extent where they are satisfied that no other work could have been undertaken during that time, that insufficient notice was given and after they have considered the nature of the proceedings and the time put aside.

In *Australian Federal Police –v- Razzi (1991) ALR425* Wilcox J held that there was presumption against an allowance for cancellation fees, however, it should be remembered that this was before the amendments to the Legal Profession Act.

It occurs to me that on a strict application of Section 208F of the Legal Profession Act there could be some argument as a matter of law that cancellation fees of Counsel are not recoverable on a Party and Party costs basis. The argument goes as follows:

- 1 Section 208F is mandatory and requires the Assessor to consider whether or not it was reasonable to carry out the work to which costs relate; and
- 2 What is a fair and reasonable amount of costs for the work concerned.

It seems to me that there is some argument that costs can only be allowed for work actually done. Where a practitioner has done nothing, other than set aside time in his diary for the doing of work, then it cannot reasonably be said any work was done and accordingly it is impossible for the Assessor to conclude that it was reasonable to carry the work or that the charge was a reasonable cost for the work when no work was ever done.

As cancellation fees are now a way of life with some sections of the Bar, I suggest that you consider your fee agreements with Counsels very carefully, as it is possible that sooner or later the Supreme Court or the Court of Appeal will be asked to consider the question of whether cancellation fees can lawfully be awarded on a Party and Party basis and it is conceivable that the Court will rule that as cancellation fees are in relation to work that was never performed the Assessor cannot have discharged his or her duty under Section 208F of the Legal Profession Act if cancellation fees are allowed.

Contingency Fee

This is another vexed question. Successful parties often seek indemnity for the contingency fee which may be up to 25% of the costs on a Party and Party assessment.

As a general rule Cost Assessors are disinclined to allow contingency fees on the basis that it is a bonus payable for success, rather than for the work. In *Madden –v- New South Wales Ministerial Corporation* Master Malpas approved a determination by a Cost Assessor declining to allow contingency fees and said:

"The exercise of determining whether the costs are unreasonable in the sense contemplated by the rule is a factual one. Each case is going to turn on its own particular facts."

Costs Consultant Fees

Generally most Assessors will allow reasonable fees for the use of a Costs Consultant, provided there is no double dipping. If for instance the Costs Consultant has been used to draw the Bill of Costs and all the Solicitor has done is sign the Bill of Costs, it would be unreasonable to allow a Solicitor fees for perusing that Bill of Costs, as it would be to allow the Solicitor to peruse the Bill of Costs if he prepares his own document. The Cost Assessors will disallow this type of double dipping.

Costs Consultants charge on the basis of a percentage of the Bill. Cost Assessors are required to consider the appropriateness of that charge pursuant to their functions under Section 208F and it is possible that sometimes the fee charged by the Costs Consultant will not be allowed in full.

Hourly Rate

There is no scale, other than in Probate, Workers Compensation and Motor Accident matters.

It is now a matter for each Cost Assessor to determine the appropriate rate. Cost Assessors discuss rates at their annual conference and do have the benefit of some relevant research, but do not apply any fixed hourly rate across the board, as they are obliged to determine the rate on an individual basis.

The question of hourly charges is of course subject to considerable discussion in the media and the profession. Most Cost Assessors do not apply the hourly rate across the board when assessing Party and Party matters. They look at the cost of the service provided and whether the charge is reasonable.

For instance, an Accredited Specialist may be entitled to charge a higher hourly rate because of his or her expertise, however, one would expect that higher hourly rates to be off-set by less use of Counsel and by less time being spent on complicated matters. If an Accredited Specialist charged a higher hourly rate and does a task in the same amount of the time as if it was done by a junior Solicitor, then you can expect that their fee for that service will be reduced accordingly.

Facsimiles and Photocopying

Facsimiles will normally only be allowed when they are required because of some urgent factor. If facsimiles are used simply because the Solicitor has been tardy, the charges of sending the facsimiles will not normally be allowed.

There is a tendency to disallow or only allow a small amount for facsimiles received.

Facsimiles will now only be allowed at a much reduced rates and the day of the \$5.00 per facsimile has well and truly gone.

Similarly in relation to photocopying, generally Assessors will allow a margin of around about 50¢ to \$1.00 for small numbers of copies and for larger numbers exceeding 20 pages or more, a commercial rate is applied normally in the region of 20¢ and 30¢. Sometimes Assessors will take into account the fact that in some country areas commercial photocopying facilities are not available and will allow a higher rate if it is shown to be reasonable to do so.

Description of Work

When drawing your bill you should give as comprehensive a description of the work as possible. The process is intended to be a paper driven process and the Assessor must consider whether the service provided was reasonably necessary and whether the cost claimed is fair and reasonable.

A cryptic description such as "telephone attendance upon client" without indicating what was the subject of discussion will probably lead in that item be disallowed or substantially reduced.

Reading Time and Research

Reasonable research will normally be allowed, however, this would depend on the degree of complexity of the case and the skill of the Legal Practitioner. Assessors will not allow practitioners to use the case to finance their own legal education.

If you have already argued that a higher rate should be payable because of the Solicitor's particular skill then the converse applies that skill should result in a cost benefit of less research and less time spent on particular items of work.

Running Briefs

A Solicitor who is merely a conduit between the client or the other party and Counsel will not normally be allowed continuous allowances for forwarding documents to Counsel.

The Cost of the Assessment Process and Assessment Fees Paid to the Court

The Assessor has jurisdiction under Section 208F to consider the costs and disbursements of the assessment, the filing fees paid to the Court and the payment of Cost Assessor's fees for carrying out the assessment. That is why the Cost Assessor very often calls for documents indicating that the parties have attempted to settle the matter without the assessment process. Most Assessors will disallow the cost of the assessment process where they are convinced that an earlier offer by the cost respondent was reasonable and should have been accepted.

Settlement

Cost Assessors have an obligation to deal with matters referred to them quickly and efficiently. In the event you are entering into settlement negotiations you should advise the Cost Assessor immediately and obtain an assessment of costs of the Cost Assessor incurred to date.

The Cost Assessor will normally allow a period of 1 or 2 weeks to enable settlement negotiations to take place, but will not delay the assessment process indefinitely.

If the matter is settled the parties have two choices and they are as follows:

- 1 To settle the matter between them and simply advise the Cost Assessor that the matter has been settled and advise the Cost Assessor who is to pay the Cost Assessor's fees;
or
- 2 alternately they can ask the Cost Assessor to issue a formal Certificate of the assessment and also advise the Cost Assessor of who is pay the Cost Assessor's fees.

It is important (regardless of how the matter is settled) that the Cost Assessor is advised as to who is to pay the fees of the Cost Assessor, as the Cost Assessor must issue a Certificate specifying who is liable to pay those fees.

When the Cost Assessor issues such Certificate, the Cost Assessor's fees are not payable to the Cost Assessor but in fact are payable to the Proper Officer of the Supreme Court. The Cost Assessor is in turn paid by the Supreme Court.

Generally in Party and Party costs the Cost Assessor has no power to award interest. It should be remembered that in Land and Environment Court matters interest accrues on the

cost order from the date of the cost order pursuant to Section 69A of the Land and Environment Court Act.

In the *Minister Administering the Environmental Planning and Assessment Act –v- Carson (1994) 35 NSWLR 342* the Court of Appeal held that interest on a cost order made by the Land and Environment Court ran from the date of the Court order and not from the date of the Certificate of Taxation.

The Court of Appeal indicated that in circumstances of substantial delay by the cost applicant the cost respondent may justifiably apply for an order that interest not run from the date the Court order take effects, but otherwise it could be expected that interest will run from the date of the order. This is of particular importance if you are acting for a costs respondent. The Court's interest rates are high and there could be some incentive for an applicant to delay filing its bill of costs. In those circumstances it should be remembered that you do have a right on behalf of the respondent to apply to the Land and Environment Court for a variation of the orders, so as to provide that interest is not to run from a certain period of time.

In the absence of such an order from the Land and Environment Court the successful cost applicant is entitled not only to the amount of costs specified in the costs certificate, but interest on that costs from the date of the order.

Major Amendments Proposed:

The Legal Profession Act 2004 (No 112) was assented to on 21/12/2004 but has not yet commenced. It has substantially reenacted the cost provisions of the Legal Profession Act 1987 but no doubt it's provisions will be the subject of another seminar at some future date.