

1995—No. 173

LEGAL PROFESSION ACT 1987—REGULATION

(Relating to the assessment of legal fees and costs and other matters)

NEW SOUTH WALES



[Published in Gazette No. 57 of 12 May 1995]

HIS Excellency the Governor, with the advice of the Executive Council, and in pursuance of the Legal Profession Act 1987, has been pleased to make the Regulation set forth hereunder.

J W Shaw
Attorney General.

Commencement

1. This Regulation commences on 12 May 1995.

Amendments—legal fees and costs

2. The Legal Profession Regulation 1994 is amended:
 - (a) by inserting before clause 23 the following Division and headings:

Division 1—Bill of costs

Particulars in bill of costs

22A. (1) For the purposes of section 193 (1) of the Act, the following particulars are to be included in a bill of costs:

- (a) A description of the legal service provided.
- (b) The total amount of the costs charged.
- (c) Any intended claim for interest under section 190 of the Act if the costs are not paid (including the rate of interest).
- (d) The work done in providing the legal service.
- (e) The period over which that work was done.
- (f) The identity of the persons who did that work (including the position of the persons e.g. partner, associate).

- (g) The basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, a part of proceedings basis or other basis).
 - (h) The facts relied on to justify the costs charged by reference to the above, the practitioner's skill, labour and responsibility, the complexity, novelty or difficulty of the matter, the quality of the work done or any other relevant matter.
- (2) However, the particulars referred to in subclause (1) (d)–(h) need not be included in the bill of costs if:
- (a) the total amount of costs charged is the amount, or an amount calculated on the basis, set out in a costs agreement for the legal service made under Division 3 of Part 11 of the Act or disclosed in accordance with Division 2 of that Part; and
 - (b) the bill of costs refers to the relevant costs agreement or disclosure document.
- (3) A bill of costs may comprise more than 1 document.

Note: The above particulars are prescribed for a bill of costs required to be given by a practitioner before costs may be recovered from a client (see section 192 of the Act). A copy of the bill must be attached to an application for assessment of practitioner/client costs (see Forms 1 and 2). In an assessment of party/party costs, the particulars required are those set out in Form 3.

Division 2—Costs fixed by regulation

- (b) by inserting at the end of clause 23 the following note:

Note: Section 208O (1) of the Act requires any assessment of costs for a legal service referred to in subclause (1) (a) and (b) of this clause to be made in accordance with the costs fixed by this clause (Section 196 (2) of the Act provides that a barrister or solicitor may not charge a client more than the fixed cost for such a legal service). Section 208O (2) of the Act requires an assessment of party/party costs for a non-legal service referred to in subclause (1) (c) of this clause to be made having regard to the costs fixed by this clause. (Section 196 (2) of the Act does not regulate the amount that a barrister or solicitor may charge a client for such a non-legal service.)

- (c) by omitting clauses 25 and 26 and by inserting instead the following Divisions:

**Division 3—Assessment of bill of costs (other than party/
party costs)**

**Limitation period for applications by clients for cost
assessment where bill paid or part paid**

25. For the purposes of section 199 (2) of the Act, the prescribed period for making an application for an assessment of a bill of costs is the period of 12 months after the bill was given to the client.

Form of, and fee for, application for assessment of bill of costs

26. (1) For the purposes of section 203 (1) of the Act, the prescribed form of application for assessment (other than an application for assessment of party/party costs under section 202 of the Act) is:

- (a) in the case of an application by the client—Form 1; or
- (b) in any other case—Form 2.

The application is to be made to the proper officer of the Supreme Court in duplicate.

(2) For the purposes of section 203 (1) of the Act, the prescribed fee that is to accompany such an application is the greatest of the following amounts:

- (a) \$100;
- (b) 1 per cent of the amount remaining unpaid on the bill of costs at the time the application is made;
- (c) 1 per cent of the amount of costs in dispute at the time the application is made.

(3) For the purposes of this clause, the amount of costs in dispute is the total amount of costs for those legal services in respect of which the costs claimed are disputed by the person liable to pay them.

**Procedure before application for assessment of bill of costs
referred to assessor**

26A. (1) On receipt of an application for assessment of a bill of costs made under section 199 of the Act by a client or under section 200 of the Act by an instructing practitioner, the proper officer of the Supreme Court is to deal with the application as follows:

- (a) A copy of the application is to be sent by the proper officer to the practitioner who gave the bill of costs with a notice advising the practitioner that any response to the application must be lodged with the proper officer in writing within 21 days after the practitioner receives the notice.
 - (b) A copy of any response duly lodged with the proper officer is to be sent by the proper officer to the applicant.
 - (c) The application is to be referred by the proper officer to a costs assessor for assessment in accordance with section 206 of the Act as soon as practicable after any response is duly lodged with the proper officer or, if no response is duly lodged, as soon as practicable after the period referred to in paragraph (a).
 - (d) Any relevant response, and any response that is lodged out of time, is to be sent by the proper officer to the costs assessor to whom the application for assessment is referred.
- (2) On receipt of an application for assessment of a bill of costs made under section 201 of the Act by the practitioner giving the bill, the proper officer of the Supreme Court is to deal with the application as follows:
- (a) A copy of the application is to be sent by the proper officer to the person who was given the bill of costs with a notice advising the person that any objection to the application must be lodged with the proper officer in writing within 21 days after the person receives the notice.
 - (b) A copy of any objection duly lodged with the proper officer is to be sent by the proper officer to the applicant with a notice advising the applicant that any response to the objection must be lodged with the proper officer in writing within 21 days after the applicant receives the notice.
 - (c) A copy of any response duly lodged with the proper officer is to be sent by the proper officer to the person who lodged the objection.
 - (d) The application is to be referred by the proper officer to a costs assessor for assessment in accordance with section 206 of the Act:
 - (i) if no objection is duly lodged with the proper officer—as soon as practicable after the period referred to in paragraph (a); or

- (ii) if an objection is duly lodged—as soon as practicable after a response is lodged with the proper officer or, if no response is duly lodged, as soon as practicable after the period referred to in paragraph (b).
- (e) Any relevant objection or response, and any objection or response that is lodged out of time, is to be sent by the proper officer to the costs assessor to whom the application for assessment is referred.

Note: Section 204 of the Act requires the proper officer of the Supreme Court to cause a copy of an application for assessment (whether or not for practitioner/client costs) to be given to any barrister, solicitor or client concerned or any other person whom the proper officer thinks it appropriate to notify.

Section 207 of the Act enables the costs assessor to whom an application is referred to obtain further particulars about the application by notice served on a party.

Division 4—Assessment of party/party costs

Form of, and fee for, application for assessment of party/party costs

26B. (1) For the purposes of section 203(1) of the Act, the prescribed form of application for assessment of party/party costs under section 202 (1) of the Act is Form 3. The application is to be made to the proper officer of the Supreme Court in duplicate.

(2) For the purposes of section 203 (1) of the Act, the prescribed fee that is to accompany such an application is the greatest of the following amounts:

- (a) \$100;
- (b) 1 per cent of the amount of costs remaining unpaid at the time the application is made;
- (c) 1 per cent of the amount of costs in dispute at the time the application is made.

(3) For the purposes of this clause, the amount of costs in dispute is the total amount of costs for those legal services in respect of which the costs claimed are disputed by the person liable to pay them.

Procedure before application for assessment of party/party costs made and referred to assessor

26C. (1) The following procedure applies to an application for assessment of party/party costs made under section 202 (1) of the Act by the person to whom the costs are payable:

- (a) Before the application is made to the proper officer of the Supreme Court, the person proposing to make the application is to complete the form of application in Form 3 and send a copy of the application to the person liable to pay the costs with a notice advising the person that any objection to the application must be lodged with the applicant in writing within 21 days after the person receives the notice.
- (b) The applicant is to attach to the application any such objection received by the applicant before the application is lodged with the proper officer of the Supreme Court. The applicant may attach to the application a response to any such objection.
- (c) If no such objection is received, the applicant is to certify in the application that no objection was received by the applicant before the application was lodged with the proper officer.
- (d) The application may not be lodged with the proper officer of the Supreme Court until after the applicant duly receives an objection or the period referred to in paragraph (a) expires (whichever first occurs).
- (e) In accordance with section 204 of the Act, a copy of the application is to sent by the proper officer to the person who is liable to pay the costs.
- (f) Any objection that is lodged with the applicant after the application is lodged with the proper officer is to be sent by the applicant to the costs assessor to whom the application for assessment is referred (together with any response that the applicant wishes to make).

(2) The following procedure applies to an application for assessment of party/party costs made under section 202 (1) of the Act by the person liable to pay the costs:

- (a) Before the application is made to the proper officer of the Supreme Court, the person proposing to make the application is to complete the relevant parts of the form of

application in Form 3 and send the application to the person to whom the costs are payable with a notice advising the person that the information required by paragraph 5 of Form 3 is to be provided by the person and the completed application form returned to the applicant within 21 days after the person receives the notice (or within such longer period as the applicant and the person agree).

- (b) If the applicant wishes to object to the information provided, the applicant is to lodge the objection in writing with the person who provided the information with a notice advising the person that any response to the objection must be lodged with the applicant in writing within 21 days after the person receives the notice.
- (c) The applicant is to attach to the application any such objection made by the applicant and any response received by the applicant before the application is lodged with the proper officer of the Supreme Court.
- (d) If no such response is received, the applicant is to certify in the application that no response to the objection made by the applicant was received by the applicant before the application was lodged with the proper officer.
- (e) The application may not be lodged with the proper officer of the Supreme Court until after the applicant receives the information referred to in paragraph (a) and, if an objection is duly made by the applicant, until:
 - (i) if no response is duly lodged by the other person—after the period referred to in paragraph (b); or
 - (ii) if a response is duly lodged—after the response is lodged.

However, if the information referred to in paragraph (a) is not provided within the time required by that paragraph, the application may be lodged with the proper officer at any time thereafter.

- (f) In accordance with section 204 of the Act, a copy of the application is to sent by the proper officer to the person to whom the costs are payable.
- (g) Any response that is lodged with the applicant after the application is lodged with the proper officer is to be sent by the applicant to the costs assessor to whom the application for assessment is referred.

(3) On receipt of a direction by a court or tribunal under section 202 (2) of the Act for assessment of party/party costs, the proper officer of the Supreme Court is to deal with the direction as if it were an application referred to in subclause (2) made by the person liable to pay the costs and as if the proper officer were the applicant.

Note: Section 204 of the Act requires the proper officer of the Supreme Court to cause a copy of an application for assessment (whether or not for party/party costs) to be given to any barrister, solicitor or client concerned or any other person whom the proper officer thinks it appropriate to notify.

Section 207 of the Act enables the costs assessor to whom an application is referred to obtain further particulars about the application by notice served on a party.

Determination of costs of party/party assessment

26D. In determining under section 208F(4) of the Act by whom and to what extent the costs of the assessment of party/party costs are to be paid, the costs assessor may have regard to the following:

- (a) the extent to which the determination of the amount of fair and reasonable party/party costs differs from the amount of those costs claimed in the application for assessment;
- (b) whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned;
- (c) whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

Note: Section 208F (5) of the Act provides that the costs under any such determination, to the extent that it relates to the costs of the costs assessor, are to be paid to the proper officer of the Supreme Court. A certificate of such a determination may, under section 208J (3) of the Act, be filed in a court of competent jurisdiction and operates as a judgment debt.

Division 5—Assessment of costs (general provisions)

Reference of applications to assessors

26E. (1) The proper officer of the Supreme Court may, for the purpose of assisting in the reference of applications for assessment to costs assessors, group costs assessors in panels according to expertise, location and jurisdiction.

(2) The proper officer of the Supreme Court is to refer applications for assessment of costs to the most suitable costs assessor having regard to the following:

- (a) the availability of costs assessors;
- (b) the nature of the matter;
- (c) in the case of an assessment of party/party costs—the jurisdiction of the court or tribunal in which the order for costs was made;
- (d) the location of the parties and the legal practitioners acting for the parties concerned;
- (e) the avoidance of conflict of interests of costs assessors.

(3) The proper officer of the Supreme Court must inform the parties to an application for assessment of the name, address and other contact details of the costs assessor to whom the application has been referred.

Information relating to assessment of costs

26F. (1) For the purposes of section 208 of the Act, the costs assessor to whom an application for assessment of costs is referred is to give due consideration to the information in the application and the information provided in accordance with clause 26A or 26C. However, compliance with that clause does not satisfy the requirements of section 208 of the Act if, in the particular circumstances of the case, the parties have not been given a reasonable opportunity to make written submissions.

Note: Section 208 of the Act imposes an obligation on the costs assessor to give the parties a reasonable opportunity to make written submissions to the costs assessor in relation to the application for assessment and to give due consideration to any submission so made.

(2) The costs assessors' rules committee may, for the purpose of assisting costs assessors in assessing costs, distribute to costs assessors any of the following:

- (a) information that has been published about market rates for legal costs;
- (b) information about comparative assessments of costs previously made by costs assessors;
- (c) relevant judgments of the Supreme Court on appeal from costs assessors' determinations;
- (d) information about relevant provisions of the Act and this Regulation relating to costs assessment;
- (e) any other relevant information.

Settlement of matter by consent

26G. A costs assessor may determine that the amount of fair and reasonable costs is the amount agreed to by the parties if during the course of the assessment the parties notify the costs assessor that they have agreed on the amount of those costs.

Note: In the case of party/party costs, section 208F (4) of the Act provides that the costs assessed are to include, in addition to the fair and reasonable amount of costs, the costs of the assessment (including the costs of the costs assessor).

Delivery of application for assessment and related documents

26H. An application for assessment of costs, and any notice, information, objection, response or other document in relation to the application, may be made or given by a party to the application, the proper officer of the Supreme Court or a costs assessor in the same way as a bill of costs may be given under section 195 of the Act.

Certificate of determination of costs

26I. (1) A certificate under section 208J of the Act that sets out a costs assessor's determination is to contain the following information:

- (a) The amount of costs the costs assessor determines is fair and reasonable.
- (b) If the costs assessor declines to assess a bill of costs under section 208C of the Act—the basis for doing so.
- (c) Where the costs assessor determines that a term of a costs agreement is unjust—the basis for doing so.
- (d) A statement of any determination under section 208E of the Act that interest is not payable on the amount of costs assessed or, if payable, of the rate of interest payable.
- (e) A statement of any determination as to the person by whom and the extent to which the costs of the assessment (including the costs of the costs assessor) are to be paid.

(2) A costs assessor is to give to the proper officer of the Supreme Court a copy of any certificate setting out the determination by the costs assessor of an application for assessment of costs.

Note: Section 208J of the Act requires a costs assessor, on making a determination, to issue to each party a certificate that sets out the determination.

(d) by omitting Form 1 in Schedule 1 and by inserting instead the following forms:

Form 1

(Cl. 26 (1) (a))

**APPLICATION BY CLIENT FOR ASSESSMENT OF COSTS
(OTHER THAN PARTY/PARTY COSTS)**

Legal Profession Act 1987

IN THE SUPREME COURT OF NEW SOUTH WALES
AT SYDNEY

COMMON LAW DIVISION

No. of 19

.....
Applicant

.....
Respondent

1. I wish to object to the bill of costs given to me by my legal practitioner. I apply to have this matter referred to a costs assessor.
2. (a) The costs which are the subject of this application were included in the bill of costs (or request for payment where costs paid without bill) dated a copy of which is attached.
- (b) There is a costs agreement between myself and my legal practitioner (copy attached)/There is no costs agreement between myself and my legal practitioner*.
- (c) I seek to have the costs agreement (or part) set aside as unjust under section 208D of the Act and provide the following details to support the request:*

.....

- (d) I make the following objections to the bill of costs [**Note:** Objections on the ground that it does not comply with any costs agreement, or that it does not comply with any practitioner's disclosures as to costs, to be so identified.]:

.....

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(e) The following additional information is provided that is relevant to the assessment of fair and reasonable costs in this matter:*

.....

3. The costs have been fully paid/partly paid* in the sum of \$..... /not paid*.

[In the case of part payment, a copy of any receipt given for that payment is to be attached.]

4. The amount of costs in dispute is the whole bill/is the costs for the following services (being \$.....):

..... *

[The amount of costs in dispute is the total amount of costs for those legal services in respect of which the costs claimed are disputed by the party liable to pay them.]

5. The address for the service of notices on the applicant, respondent and any interested parties are the following:

Applicant:

.....

Respondent:

.....

Other:

.....

6. I authorise the costs assessor to whom this matter is referred to have access to, and to inspect all my documents that are held by me, or by any barrister or solicitor concerned, in relation to this matter.

Date:

.....

Applicant

(or Applicant's Practitioner)

* *Cross out whichever is inapplicable.*

Form 2

(Cl. 26 (1) (b))

APPLICATION BY PRACTITIONER FOR ASSESSMENT OF COSTS (OTHER THAN PARTY/PARTY COSTS)

Legal Profession Act 1987

IN THE SUPREME COURT OF NEW SOUTH WALES
AT SYDNEY

COMMON LAW DIVISION

No. of 19

.....
Applicant

.....
Respondent

1. I apply to have this matter referred to a costs assessor.
2. *COSTS OF RETAINED PRACTITIONER WHERE APPLICATION FOR ASSESSMENT MADE BY INSTRUCTING PRACTITIONER
 - (a) The costs which are the subject of this application were included in the retained practitioner's bill of costs dated a copy of which is attached.
 - (b) There is no costs agreement between the client and the retained practitioner.
 - (c) There is a costs agreement between the instructing and retained practitioners (copy attached)/There is no costs agreement between the instructing and retained practitioners*.
 - (d) I make the following objections to the bill of costs [Note: Objections on the ground that it does not comply with any costs agreement to be so identified.]:
.....
 - (e) The following additional information is provided that is relevant to the assessment of fair and reasonable costs in this matter: *
.....

OR

2. *COSTS OF PRACTITIONER WHERE THAT PRACTITIONER IS THE APPLICANT

(a) The costs which are the subject of this application were included in my bill of costs dated a copy of which is attached. The bill was given to the client on in the following manner:

.....

(b) *The bill of costs was given at least 30 days prior to the making of this application.

OR

(b) *An application for assessment of the bill of costs has already been made by

(c) There is a costs agreement between myself and the client (copy attached)/There is no costs agreement between myself and the client*.

(d) The following disclosures about costs were made to the client in accordance with the Act:

.....

3. The costs have been fully paid/partly paid* in the sum of \$..... /not paid*.

[In the case of part payment, a copy of any receipt given for that payment is to be attached.]

4. The amount of costs in dispute is the whole bill/is the costs for the following services (being \$.....):

..... *

[The amount of costs in dispute is the total amount of costs for those legal services in respect of which the costs claimed are disputed by the party liable to pay them.]

5. The addresses for the service of notices on the applicant, respondent and any interested parties are the following:

Applicant:
.....

Respondent:
.....

Other:
.....

6. I authorise the costs assessor to whom this matter is referred to have access to, and to inspect all my documents that are held by me, or by any barrister or solicitor concerned, in relation to this matter.

Date:

.....
Applicant
(or Applicant's
Practitioner)

* *Cross out whichever is inapplicable.*

Form 3

(CI. 26B (1))

APPLICATION FOR ASSESSMENT OF PARTY/PARTY COSTS

Legal Profession Act 1987

IN THE SUPREME COURT OF NEW SOUTH WALES
AT SYDNEY

COMMON LAW DIVISION

No. of 19

.....
Applicant

.....
Respondent

1. I apply to have this matter referred to a costs assessor.
2. The costs which are the subject of this application are the costs payable by the applicant/respondent* as a result of an order of the Court at on / / in matter No: / .
3. The costs have been fully paid/partly paid* in the amount of \$..... / not paid*.

[In the case of part payment, a copy of any receipt given for that payment is to be attached.]

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4. The amount of costs in dispute is the whole bill/is the costs for the following services (being \$.....):

.....*

[The amount of costs in dispute is the total amount of costs for those legal services in respect of which the costs claimed are disputed by the party liable to pay them.]

5. The following information relating to this matter is provided**:

(a) Details of the proceedings in respect of which the costs are payable, including the identity of the parties to the proceedings and of their legal representatives:

.....

(b) The total amount of costs payable:

.....

(c) The relevant work done in those proceedings and the period over which that work was done:

.....

(d) The identity of the persons who did that work (including the position of the persons e.g. partner, associate):

.....

(e) The basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, on a part of proceedings basis or other basis):

.....

(f) The facts relied on to justify the costs charged as fair and reasonable by reference to the above, the practitioner's skill, labour and responsibility, the complexity, novelty or difficulty of the matter, the quality of the work done or any other relevant matter:

.....

[The above information may be given by attaching a separate statement containing the information. or by attaching a copy of a bill of costs containing the information that has been given to a client or instructing practitioner.]

6. A copy of this application was sent to the respondent on

7. Attached are objections to this application, and any response, made in accordance with clause 21C of the Regulation.*

I certify that:

(a) no objection to this application by the respondent was received by me before the lodging of the application.*

[where application made by person to whom costs are payable]

(b) no response by the respondent to the objections made by me was received by me before the lodging of the application.*

[where application made by person by whom costs are payable].

8. The addresses for the service of notices on the applicant, respondent and any interested parties are the following:

Applicant:
.....

Respondent:
.....

Other:
.....

9. I authorise the costs assessor to whom this matter is referred to have access to, and to inspect all my documents that are held by me, or by any barrister or solicitor concerned in relation to this matter.

Date:

.....
Applicant
(or Applicant's Practitioner)

* Cross out whichever is inapplicable.

** If this application is made by the person by whom the costs are payable, the information in para. 5 is to be completed by the person to whom the costs are payable after a copy of this application is sent to that person.

Amendment—Solicitors' Fidelity Fund

3. The Legal Profession Regulation 1994 is further amended by omitting from clause 21 the matter "9 per cent" and by inserting instead the matter "5 per 'cent".

EXPLANATORY NOTE

The objects of this Regulation are:

- (a) to prescribe the details to be included in a bill of costs given by a legal practitioner to a client; and
- (b) to revise the form of application for assessment of legal practitioner/client costs or party/party costs; and
- (c) to prescribe a procedure for dealing with those applications to clarify the matters in dispute before they are referred to a costs assessor; and
- (d) to make provision with respect to the referral of those applications to costs assessors (including criteria for determining the most suitable assessor for a particular application); and
- (e) to make provision with respect to the determination of those applications by costs assessors, including information to which assessors are to have regard, the settlement of matters by consent and the issue of Certificates as to the costs assessed.

This Regulation also prescribes an interest rate of 5 per cent per annum (instead of 9 per cent per annum) for a successful claim made on the Solicitors' Fidelity Fund, applicable to the period between the making of the claim and the date on which the claim succeeds.

This Regulation is made under the Legal Profession Act 1987. and, in particular, sections 193, 199, 203 and 216.
