Presentation Paper on LEGAL COSTS

for the City of Sydney Law Society

“GETTING THE MOST OUT OF THE COSTS ASSESSMENT PROCESS”

Presentation 2012 (and updated in 2015)

by

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About the Presenter

Alyson Ashe, Solicitor, is the principal of Alyson Ashe & Associates, Legal Costs Consultants.

Before that she worked in several law firms and then in the NSW Attorney-General’s department as a Registrar and Taxing Officer of the Supreme Court of New South Wales carrying out quasi-judicial work and court administration, variously as Registrar in Equity and Registrar Court of Appeal.

Since 1989 Alyson has specialised in the area of legal costs. Her extensive experience extends to all aspects of the NSW Costs Assessment and costs recovery in the Federal Court of Australia and in the High Court. She is a senior practitioner and has personally been involved in the resolution of costs disputes in New South Wales, Victoria, Queensland, the ACT (and Norfolk Island) and in Western Australia.

Alyson Ashe is an independent expert in costs and has appeared or provided evidence in gross sum applications and security for costs applications in important large litigation in the Supreme Court of NSW and the Federal Court: for details see her website http://www.alysonashe.com.au/

She has been appointed as a Court Referee and as a Court Expert and as a Taxing Officer for AFSA (Australian Financial Security Authority formerly the Insolvency and Trustee Service Australia).

Her clients include various government departments both State and Federal.

Her authorship includes Nevill and Ashe: Equity Proceedings with Precedents – Butterworths 1981; and Editor: Lexis Nexis Looseleaf Costs Service “Legal Costs NSW”.

She also regularly presents at legal conferences and at law firms and for government lawyers.

She is a member of the current Costs Users Group convened by the Supreme Court of NSW and has been a member of the Law Society of New South Wales Costs Committee since 2012.
“GETTING THE MOST OUT OF THE COSTS ASSESSMENT PROCESS”

Contents

Costs Assessment ...................................................................................................................... 8
GENERAL COMMENTS .................................................................................................................. 9
The Appointment of a Costs Assessor by the Manager, Costs Assessment ........................................... 9
Dealing with the Costs Assessor ....................................................................................................... 10
Costs Assessor’s Powers of Amendment – “Get it Right in the First Place” ......................................... 11
If there is an inadvertent error in a certificate it may be amended by the Costs Assessor: s 371. The Correcting of an Error in a Costs Determination ........................................................................................................... 11
SOLICITOR/CLIENT ASSESSMENT ............................................................................................. 11
Using Costs Assessment to Pursue Unpaid Fees ............................................................................ 11
  Base your Application on a GOOD BILL .................................................................................... 14
  Serving the bill(s) of costs upon which you rely ........................................................................ 14
The Practitioner/Client Application .................................................................................................. 15
  Role of the Manager, Costs Assessment in a Practitioner/Client Application ................................. 16
  Other things you can do ................................................................................................................ 17
The Importance of Objections ......................................................................................................... 17
Responding to the Objections ......................................................................................................... 17
Answering the Costs Assessor’s Requisitions .................................................................................. 17
The Disaffected Client - Client / Practitioner Assessment ................................................................... 18
There are two ways you may become involved in a Client/Practitioner Costs Assessment ............... 18
Assisting a new client to take on his former solicitors ...................................................................... 18
The Time Limits you need to know about ........................................................................................ 18
  Request for an itemised bill (challenging or being challenged).................................................. 18
  What if you use alternative billing ............................................................................................. 19
Case Law re THE ITEMISED BILL ............................................................................................... 20
Time limits for client lodging for assessment ................................................................................. 22
The vexed issue of interim accounts and the 12 month period ....................................................... 24
An important task when acting for a Costs Respondent is to check the claims in the bill against your own file and thereby pick up erroneous claims eg for instructing in court when you have a file note that the other side’s solicitor was absent from Court.
For costs effectiveness concentrate on the “big ticket items”. Also crystallize General Objections and list the items affected rather than provide Specific Objections “seriatim”. ............................................ 37
Counsel ........................................................................................................................................ 37
Cancellation fees ................................................................................................................................ 37
Review of a Costs Assessment ........................................................................................................... 37
Appeal from a Costs Assessment ........................................................................................................ 39

This Amended paper does not deal with the effect of the Legal Profession Uniform Law 2014.

Always be conscious of costs outcomes throughout the whole process of providing legal services: particularly during litigation.

Costs Assessment

The Costs Assessment Scheme NSW has been functioning relatively successfully since 1995.

It is cheaper than the alternatives for quantifying costs of gross sum application to the court or appointing a referee- however those other methods have their uses (eg when the costs are very high or are incurred in several jurisdictions).

The main criticism of the system is the perceived lack of uniformity of approach between the 60 or so costs assessors and the occasional “maverick” decisions. The lack of published decisions also adds to those uncertainties. There is no complete list of Costs Assessors published but in my experience it appears that there has always been a lack of representation by top-tier firms and CBD lawyers amongst the Costs Assessors.

However, experienced costs consultants now have an accumulated body of knowledge of the system and the Costs Assessors – derived from experience - and there are things that can be done to “get the most out of the system”.

The Supreme Court website re Costs Assessment is helpful as to process.

The mere fact that I have been asked to speak on the topic of “Getting the Most Out of the Costs Assessment System” indicates that there is a perception of a need to know more about “how things work” which demonstrates how different the system is from any court process.

Purpose of the Costs Assessment System – to speedily and cheaply quantify reasonable costs in the circumstances of –

   (a) party party (ordinary basis) costs pursuant to an order;
   (b) practitioner/client and client practitioner disputes as to costs.

I deal with both scenarios. They are equally important because effective party party recovery usually promotes a good client relationship. And achieving a good recovery relies upon good file management and record keeping which also forms the basis of success in the practitioner client forum.

While these comments appear to be most relevant to litigation lawyers, it is my experience that transactional lawyers need to have regard to the same basic principles and also usually come to need
recourse to the system at some stage in their professional life – or be forced into it by a client who seeks to avoid paying for services rendered (whether with good grounds or not).

GENERAL COMMENTS

Always be conscious of costs outcomes throughout the whole process: particularly during litigation.

I do not intend to dwell in depth on the important but elsewhere well documented aspects of -

MANAGING THE CLIENT ENGAGEMENT

- Costs Agreement – “the work”
- Hourly rates
- Disclosure and updating – the client with business acumen and the sophisticated client (s 312 Legal Professions Act 2004 (LPAct) exemptions to disclosure and also s 395A re sophisticated clients contracting out)

ASSEMBLING A COST EFFECTIVE TEAM

KEEPING A GOOD FILE (including a GOOD ELECTRONIC FILE)

These factors all contribute significantly to successful outcomes on Assessment and will be touched on from time to time during my talk.

I will focus on being careful about defining outcomes during litigation –

MANAGE LITIGATION from beginning to end with costs recovery in mind and particularly-

- Thoughtful litigators in problem areas eg Family Provisions Act Matters will consider using ADR protocols pre-litigation
- Get an effective costs order

The Appointment of a Costs Assessor by the Manager, Costs Assessment

The Manager, Costs Assessment Senior Deputy Registrar Jennifer Hedge is readily contactable: costsassessment@agd.nsw.gov.au. The Costs Assessors are allocated by the Manager, Costs Assessment having regard to-

(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 Australian legal practitioners acting for the parties concerned,

(e) the avoidance of conflict of interests of costs assessors.

If one wishes to seek a change in the allocation an application with reasons (by letter) should be made to the Manager, Costs Assessment. The Manager, Costs Assessment can be contacted by email and this is to be preferred to telephone contact. Any request to revoke the appointment must be copied to the other side. The Manager may allow submissions from both parties and the assessor to be made prior to making a determination.

ENSURE THAT MATTERS ARE NOT SPLIT BETWEEN COSTS ASSESSORS: Related applications, particularly those involving the same parties or the same matters, should be referred to the same Costs Assessor. A request to refer an application to a Costs Assessor who is already handling a related application, may be made either before it is referred or after if it is referred to another Costs Assessor. Often the request is made in the Application Form and also in the bill of costs.

After the referral to a Costs Assessor the Manager does not have any role within the assessment. However delays in the assessment can be brought to the Manager’s attention and this is a discreet way of raising sensitive issues.

Using the Supreme Court Registry appropriately is part of “getting the most out of the Costs Assessment System”.

Dealing with the Costs Assessor

Each Costs Assessor decides how they like to handle communications. They advise their preferences in their first letter after appointment.

Most Costs Assessors will not communicate directly (eg by telephone) with the parties and will communicate in writing with both parties at the same time. Some will not accept faxes, some will prefer email. Because many are not CBD lawyers, timely delivery of documents etc is difficult.

However, no matter how inconvenient the arrangements appear you must communicate (courteously) with the Costs Assessor as directed.

The Costs Assessor is required to give the parties a reasonable opportunity to make submissions. In my
experience they are usually amenable to applications for extension – especially in large and complex matters and requests which suggest that the time may be spent in achieving a settlement of the matter is likely to be appreciated.

Compliance with the notices and directions of a Costs Assessor is essential and failure may be an offence punishable by a fine and may even be capable of being professional misconduct.

**Costs Assessor’s Powers of Amendment  - “Get it Right in the First Place”**

It is very important to name parties to an Application for Assessment correctly. Otherwise enforcement proceedings may be foiled. The powers of amendment by Costs Assessors have been considered limited. However the case of *Rural And General Insurance V Goldsmiths Lawyers* [2012] NSWSC 358 held that, in the circumstances, the costs assessor erred in determining he had no jurisdiction to amend the application where the Costs Applicant in a client/practitioner costs assessment had mis-named the Applicant.

Remember that “starting again” might cause the Application to be out of time.

**If there is an inadvertent error in a certificate it may be amended by the Costs Assessor: s 371.**

**The Correcting of an Error in a Costs Determination**

Approach is made by letter (circulated to the opponent) to the Costs Assessor. If regarded as a “slip” the Costs Assessor will re-issue the Certificate of Determination and send it to the Manager, Costs Assessment who will then forward it onto the parties. Errors include incorrect additions. This correction can occur even if the Certificate has already been registered as a judgment. The new Certificate will vary the Judgment.

Some errors and omissions may not be regarded as “slips”. Or the issue may be properly part of a Review.

**SOLICITOR/CLIENT ASSESSMENT**

**Using Costs Assessment to Pursue Unpaid Fees**

Assessment is by far the best approach. Suing the client is likely to produce an allegation of negligence and a direction that the costs be assessed. A registrable judgment for reasonable costs is one way of “getting the most out of the system”
Before embarking on the process consider the costs to you of seeking assessment and also the prospects of recovery and potential enforcement costs. Registration of the Certificate of Determination as a judgment requires a brief affidavit of debt. You will also need to consider whether the client has sufficient funds to pay any such judgment.

To “get the most” out of the Assessment Process you need a **good bill of costs and should from the outset of the retainer –**

- Be careful with costs agreement when (a) describing the work, and (b) choosing who is your client and who will be liable to pay – also correctly direct your accounts – this cannot be fixed later on when seeking recovery;
- Comply with all disclosure requirements in the LPAct (s 309 and s 316);
- Keep handy the disclosure document and the costs agreement document given to the client (signed or not signed); copy correspondence delivering those retainer documents. Also you will need-
  - (a) the first and any subsequent written estimates of costs, or revision of estimates;
  - (b) any notification of an increase (by subsequent costs agreement or otherwise)in rates and why (and from what date).
- Keep a good file;
- Record time explicitly and issue itemised accounts including correct notifications to the client (s 333 and Legal Profession Regulation 111A). You may simply rely on those bills and attach them to your Application for Assessment. You must wait 30 days from the date of the last bill before lodging for assessment(s352(4)).
- If your accounts are deficient, or you have discounted fees in the unpaid tax invoices consider **having an itemised bill (including narrative) professionally prepared** from your file for the full amount of the work done (not just the unpaid portion). You can also claim interest under your cost agreement or under s 321. (Remember: s321(3) A law practice must not charge interest under subsection (1) or (2) on unpaid legal costs unless the bill for those costs contains a statement that interest is payable and of the rate of interest; see Reg 110A).
- Better to prepare a “better bill” than be directed by the Costs Assessor to provide details.
- The professional itemised bill replaces the tax invoices and bears the requisite notifications to the client. You have to wait 30 days before you can file for assessment (s352(4)).
- Do not claim the costs of dealing with client complaints.
- You must keep a record of service of the bill.
- Upside:
  - (a) you can claim more in the “better bill” than you may have billed;
  - (b) you might settle the claim because the extent of the work is more available to the client and those who might now be advising the client;
  - (c) you have given yourself the best available document to proceed to assessment with (mere tax invoices are hardly ever sufficient);
  - (d) you have control of the time frames and are not forced into complying with Costs Assessor’s timetables;
(e) you have taken the upper hand and are not having to respond to a complaint by trying to resurrect what happened in the matter and amplify your tax invoices;

(f) If you have disclosed and your costs are not reduced by 15% or more the costs of the costs assessment are paid in a practitioner/client (or in a client/practitioner application) by the Costs Assessment Scheme will pay for the costs of the costs assessment. See s 369. A FREE SERVICE FOR THE COMPLIANT AND THOSE THAT BILL THEIR CLIENT REASONABLY.

- Downside:
  (a) if you have not disclosed you will have to pay the costs of the costs assessment (which can also include the costs of the client in making submissions;
  (b) you cannot claim from the client the costs of having the bill drawn (however those costs will be tax deduction for the practice and the GST an input tax credit).

MORAL > The key to success is to **Disclosure Appropriately, Record Work Accurately and Bill REASONABLY**. Just because you have recorded time does not mean that you should charge for all that time. Trying to recover 100% of your time is an error often made by solicitors. A better result will be achieved from assessment if your fees are determined by the Costs Assessor as reasonable. If your bill is reduced by 15% or more you will also have to pay the costs of the assessment; s369.

If you have not disclosed then you will have to pay the costs of the assessment anyway (even if your fees are seen as reasonable) and so some of your tactical response is diminished in any event.

There are no time limits for a practitioner/client assessment. However there are strict and important time limits for client/practitioner assessments which will be discussed below.

See also Table being Appendix A Costs Assessment - Time Limits – in the Frequently Asked Questions re Costs Assessment on the Supreme Court Website.

**Remember that where the retainer was entered into prior to 1 October 2005 the Legal Profession Act 1987 applies so far as it is relevant.** Part 11, Division 6 of the Legal Profession Act 1987 and the Legal Profession Regulation 2002 or the Legal Profession Regulation 1998 apply to applications for costs assessments made by clients or practitioners where the client gave instructions to the legal practitioner before 1 October 2005. But see below re time limits.

However the decision of Gibson DCJ on 27 January 2010 in Eversol Legal Services Pty Ltd v Bechara [2010] NSWDC 72 makes clear the importance of the transitional provisions of the Legal Profession Act 2004 (NSW), Schedule 9. Her Honour states at-

[“6] Importantly, the provisions for the protection of third parties which are a feature of the Legal Profession Act 2004 were not contained in the Legal Profession Act 1987. Those were simpler days, when entitlement to enter into a speculative fee agreement, and other entitlements and
obligations of the more complex kind that are now a common feature of costs issues for solicitors, were of a comparatively unknown nature.”

The Court found that the 1987 Act still applies.

Finally the Court stated – “To find otherwise would be to misconceive the basis upon which the savings provisions were inserted, to avoid the undue complication of litigation by having issues falling to be determined under provisions upon which one Act is silent and the other is not, which would lead to doubt and inconsistency in the statutory requirement which must always be avoided when determining issues falling for consideration as a matter of statutory interpretation.”

**Base your Application on a GOOD BILL**

As stated above the best result will be achieved with a well-itemised bill claiming reasonable costs. If your accounts are not good enough prepare a better bill. Make sure it has the correct notifications protecting the client (s 333) and that you intend to seek interest on unpaid fees.

A good bill will normally have a detailed Narrative of the work done and its complexity. It will also set out the method of charging (whether or not a costs agreement was entered into and disclosure given). Each fee earner in the team will be named, coded, position held (eg partner, senior associate, employed solicitor, paralegal, clerk etc) and the date of admission (if applicable) provided. Additional Curriculum vitae can usefully be added including whether they are an accredited specialist. The various rates will be disclosed and, if varied, then the applicable dates. Any information likely to support the level of billing should be included.

Then -

**Serving the bill(s) of costs upon which you rely**

Ensure the bill was properly served. See S 332 (5) A bill is to be given to a person:

(a) by delivering it personally to the person or to an agent of the person, or

(b) by sending it by post to the person or agent at:

(i) the usual or last known business or residential address of the person or agent, or

(ii) an address nominated for the purpose by the person or agent, or

(c) by leaving it for the person or agent at:

(i) the usual or last known business or residential address of the person or agent, or

(ii) an address nominated for the purpose by the person or agent,

    with a person on the premises who is apparently at least 16 years old and apparently employed or residing there, or

(d) by sending it by facsimile transmission to a number specified by the person (by correspondence or otherwise) as a number to which facsimile transmissions to that person may be sent, or

(e) by delivering it to the appropriate place in a document exchange in which the person has receiving facilities, or
(f) in any other way authorised by the regulations.

(6) A reference in subsection (5) to any method of giving a bill to a person includes a reference to arranging for the bill to be given to that person by that method (for example, by delivery by courier).

(6A) Despite anything in subsections (2)–(6), a bill may be given to a client electronically if the client is a sophisticated client and requested the bill to be given electronically.

Giving of bill by email-section 332 (5) (f) of the Act  LP Regulation 111 Giving of bill by email-
section 332 (5) (f) of the Act

“For the purposes of section 332 (5) (f) of the Act, the giving of a bill by email is an authorised way of giving a bill to a person”.

The Practitioner/Client Application
- The Application is made by attaching the bill to a Form 2.
- It cannot be made before 30 days of giving the bill. Do not be too precipitous with filing – comply with service rules – eg the postage rules. Leave a few days’ grace.
- You must correctly describe the Costs Applicant (the solicitors name and entity). If a business name is used, make sure it is “XX and X Pty Limited ACN (insert) trading as XX and X Lawyers”. If it is a partnership, the names of all the partners must be listed and the Costs Applicant described as “The Partners in Schedule A attached to this application trading as XX and X Lawyers”.
- You must correctly describe the Costs Respondent. Remember that the object of the exercise is to get a registrable judgment against your client and enforce it. Check the Costs Agreement and satisfy yourself that they are persons liable to pay the costs. Ensure each of the Costs Respondents are served.
- The addresses for service must be included. And the dates they were served.
- The Cash Account should be settled at the end of the bill and also any payments made referred to in the application.
- If you know that there is already a dispute re disclosures then make a pre-emptive strike and set out in the Application what estimates were given and when and you can even attach them to the Application. [THE MORE YOU VOLUNTEER THE LESS YOU WILL HAVE TO DO IN THE RESPONSE/SUBMISSIONS PART OF THE ASSESSMENT].
- It is important to list any payments made by the client and whether they were allocated to any particular costs eg counsels’ fees.
- The Costs in Dispute are usually the whole to the fees and you will have to pay a filing fee based on the “whole”.
- If there is “any other person interested in the assessment” (apart from the Costs Respondent) eg a tenant or a mortgagor or a beneficiary then it is advisable to serve them at the outset.
The Application requires you to certify that there is no prospect of mediation (settlement) of the matter. [Mediations can be arranged through the Legal Services Commissioner].

Make sure you attach the documents you say you are attaching. Be as careful with the Application as you would be if preparing and Affidavit.

The Application must be lodged in triplicate.

**Role of the Manager, Costs Assessment in a Practitioner/Client Application**

In the case of a practitioner/client application, the client will be given a copy of the application by the Manager Costs Assessment (one of the 3 copies filed) and allowed 21 days to lodge objections.

The Form 2 requires you to specify the last known residential address of client and payer, or last known place of business if bill sent to them by post, indicating fax number or DX number. This information relates not only to your proof of having duly given the bill but also to provide an address for the Manager, Costs Assessment to send the copy Application to.

Ascertaining that address may include sighting documents emanating from the client or payer eg a letterhead or letter with an address, an affidavit or statutory declaration sworn by them stating their address. External proof may include a whitepages or yellow pages directory search entry printout or an ASIC search. Best evidence of service would be a letter acknowledging and disputing the costs.

**If no objections are lodged,** the Manager, Costs Assessment will refer the application to a Costs Assessor as soon as is reasonably practicable.

This period of 21 days is mandatory and the Manager cannot/does not grant extensions of time. It is left up to the appointed Costs Assessor to deal with applications for extension of time. Late requests to the Manager are passed onto the Costs Assessor.

Any late objections or responses are also forwarded to the Costs Assessor assigned the application.

Once notified of the request for an extension, Costs Assessors are required to give parties a reasonable opportunity to make written submissions, which may include objections and responses to objections.

**If objections are lodged,** the practitioner will be given 21 days to provide a response. After 21 days have passed, whether a response is received by the Manager or not, the Manager, Costs Assessment will refer the application to a Costs Assessor as soon as is reasonably practicable.

**Remembering** the discretionary nature of Costs Assessment it will be obvious that tardiness and obstinacy in complying with the Costs Assessor’s requirements will only reinforce any client complaints about the service they were given. So timeliness will likely enhance one’s standing with the Costs Assessor and can do no harm.

The Application – Consider claiming in the application that if your costs are allowed or substantially allowed, you claim the filing fee paid (s 367(2) LPA 2004).
Other things you can do

The Costs Assessor is likely to call for your file so make sure it is tidy and accessible and even tab important documents with the item numbers in the bill. You may wish to print of certain electronic documents for delivery to the Costs Assessor. There is no information on what Costs Assessors might do with an electronic file. This is likely to be a developing area. See article by Alyson Ashe in the Law Society Journal November 2011 at page 74 “Constructing the virtual paper trail; There are challenges in maintaining a good file in the age of cloud computing” This article was based on the paper delivered by Alyson Ashe on “Cloud Costing” at the NSW State Legal Conference in August 2011.

Read you file carefully because your application must be correct and truthful and files often reveal evidence contrary to the perceived position.

The Importance of Objections

There is an important difference between solicitor/client and party party assessments. Caselaw has dictated that a costs assessor is only to have regard to the items objected to in a solicitor’s bill. The Costs Assessor relies on O’Connor v Fitti [2000] NSWSC 540 in applying the reasonableness test. In a practitioner/client matter the assessor will only assess the costs “in dispute” – but still has a responsibility to consider whether the fees are fair and reasonable. You must make it clear what items of work are in dispute.

This creates somewhat of a problem where a client says that “all of it is objected to”. Often the Costs Assessor will direct the client to make specific objections and why.

Responding to the Objections

There is no prescribed form of Response and although they often are drafted as a seriatim document in A4 with front sheet headings as in the Application and including General Submissions it is sometimes better for the solicitor to respond on letterhead. This personal touch is helpful where what is said emanates from personal conduct to the matter and may touch upon ethical or practice management issues.

In responding to objections, be clear and brief. You may need to attach a small brief of relevant documents for the Costs Assessor.

Answering the Costs Assessor’s Requisitions

Tell your cost consultant what has been requisitioned – additional submissions may be required eg re rates/team/6 minute units.

Some Costs Assessor’s are very pro-active. While this may be all very well in a party party assessment it may be an error and reviewable in the conduct of a solicitor/client assessment.
The Disaffected Client - Client / Practitioner Assessment

There are two ways you may become involved in a Client/Practitioner Costs Assessment

(1) Acting for an unhappy client against the former solicitor; or
(2) Being a solicitor whose fees are challenged on assessment.

Assisting a new client to take on his former solicitors

- Heed the warning signs of the serial “non-payer” who has instructed prior law firms and then complains of their fees. Some clients skillfully conceal their antecedents.
- Remember that a Costs Assessor has no power to take oral evidence or hear cross examination and therefore any complex issue of negligence cannot be dealt with on an assessment. Be careful to ensure that you do not start an assessment in circumstances where the Costs Assessor will decline to hear it. Where the negligence affects the amount of costs, then a Costs Assessor can deal with the issue so long as it is not complex enough to warrant the taking of evidence as above.

Examples of cases re powers of Costs Assessors:  
Ryan v Hansen [2000] NSWSC 354
Minerals Corp v Piper Alderman
Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145
Doyle v Hall Chadwick (2007) NSWCA 159.

The Time Limits you need to know about

Request for an itemised bill (challenging or being challenged)

- A useful tool for challenging costs but also very inconvenient for the solicitor of whom the request is made.

Section 332A of the Legal Profession Act 2004 (which currently has no time limit) relevantly provides:

(1) “If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.

(2) The law practice must comply with the request within 21 days after the date on which the request is made.”

Also see LEGAL PROFESSION REGULATION 2005 - Reg 111B Contents of itemised bill

(1) The following particulars are to be included in an itemised bill given by a law practice (other than by a barrister):
(a) short details of each item of work carried out on behalf of the client, including the method by which it was carried out (whether by letter, telephone, perusal, drafting, conference, teleconference or otherwise) if not otherwise apparent,
(b) the date on which each item of work was carried out,
(c) except so far as paragraph (d) applies-the amount charged for carrying out each item of work, and particulars:
   (i) of the time (in minutes or other units of time) engaged for carrying out each item or work, and
   (ii) identifying the person who carried out each item of work,
   (d) if applicable, the amount charged for carrying out each item of work on some other basis on which work has agreed to be charged, and particulars of that agreed basis.

(2) The particulars referred to in subclauses (1) and (2) are to be set out in generally chronological order.”

Also see Mackowiak v Hagipantelis,; Bickhoff v Hagipantelis [2015] NSWSC 1087- Garling J re Brydens.

**What if you use alternative billing**

**Even where you employ alternative billing you should still keep time records (good file practices even for risk management) – including for solicitor client assessment issues**

Alternative billing methods include:

- Flat fees for repetitive, predictable services.
- Discounted fees in exchange for performance bonuses (based on cost savings).
- Blended rates for any resources used - from Senior Partner to paralegal - that should push the firm to use lower level employees when possible.
- Volume discounts that discount hourly rates as the volume increases.
- Capped fees, which may be a gamble, but can provide predictability.

- More generally, time billing provides a readily accessible audit trail if there is a need to investigate “exactly what the practitioner did to justify payment”: Bill Madden, Slater & Gordon Submission to the Legal Fees Review Panel, para 15.
- Lawyers who alternative bill should still record their time – eg Marque Lawyers who have advertised on their website that they are “Timeless”.

“We do not charge by the hour. We do not charge you when we pick up the phone or send you an email. We do not charge you for taking you to
lunch or travel time or any of that kind of stuff that is disconnected from the real value of what we do. We invest in long term relationships with our clients, and we measure the value of our services in the same way that you do. We have a lot to offer, and we provide it in a way that doesn't hurt. That's a small part of the Marque difference.

Finally, lawyers who get it.”

Case Law re THE ITEMISED BILL

In *Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2011] QDC 5 the Queensland District Court considered whether bills delivered by Clayton Utz constituted ‘itemised bills’ pursuant to the Queensland Legal Profession Act 2007. The relevant section is identical to the NSW iteration. The former client of Clayton Utz requested “itemised accounts in assessable form in respect of the (various) bills” they had been given and pursuant to the legislation Clayton Utz had only 21 days to provide the itemised bill. Clayton Utz merely provided further copies of the earlier invoices. The new solicitors for the former client P&W replied to Clayton Utz, asserting that:

[9]“The entries in your bills of costs do not allow our client, or for that matter a prospective assessor of the bills, to determine whether the amount charged in respect of a particular item is reasonable, necessary or a proper professional charge. Indeed, as previously identified, items charged in your bill of costs in many cases are grouped together with a lump sum charge attributed to that item. On that basis alone, it is not possible to determine whether the individual attendances which comprise a particular lump sum or grouped item are in themselves reasonable, necessary or proper professional charges. In those circumstances, our client maintains its views that the bills as delivered are not properly described as itemised bills as that term is defined by s 300 Legal Profession Act 2007.” [NSW s 332A].

Clayton Utz unsuccessfully denied the assertion that the bills were lump sum accounts within the meaning of the *Legal Profession Act*. They were required to be amended.

A number of relevant cases were referred to dealing with the question of whether a bill was an itemised bill at common law and/or pursuant to provisions of earlier legislation: for example *Re Walsh Halligan Douglas’ Bill of Costs* (1990) Qd R 288 which noted per Dowsett J a difficulty with time charging such that:

“It may be difficult for the client to know whether the hours worked in preparation were fairly attributable to the presentation of his case or whether they might more accurately be described as self education on the part of an inexperienced or ill-educated practitioner ….” And that - ... .

“Many of the cases concerning the obligation of a legal practitioner to his client as to fees contemplate a client with little or no commercial strength and little or not recourse to other legal advice.”
Also *Malleson Stewart Stawell and Nankivell v Williams* (1930) VLR 410, where Mann J said:

“Courts have repeatedly held that a bill of costs must contain such details as will enable the client to make up his mind on the subject of taxation, and will enable those advising him to advise him effectively as to whether taxation is desirable or not.”

The Court also quoted from Dowsett J who canvassed various other pronouncements as to the test and concluded -

“[27] If the test be what is adequate in order to enable the client to determine on advice whether to seek taxation, it is reasonable to take into account the degree of business and legal sophistication of the client, whether the client has in-house legal advice, whether another firm of solicitors is also advising and any agreement reached between the parties as to the basis of charging.”

The Court also considered *Vitobello and Hayter v Russell & Co Solicitors* (2009) QDC; and *Ralph Hume Garry v Gwillim* (CA) (2003) 1 WLR 510. In that case, Ward LJ finished with the statement that -

“ A balance has to be struck between the need, on the one hand, to protect the client and for the bill, together with what he knows, to give him sufficient information to judge whether he has been overcharged and, on the other hand, to protect the solicitor against late ambush being laid on a technical point by a client who seeks only to evade paying his debt.”

Examples (from paragraph 34 of judgment onwards)

The Court in finding that the bills were not itemised bills was conscious of the salutary warning of Patteson J in *Keene v Ward* (1849) 13 QB 515, that “if we required in respect of every item a precise exactness of form, we should go beyond the words and meaning of the statute, and should give facilities to dishonest clients to defeat just claims upon a pretence of a defect of form in respect of which they had no real interest.”

The Court’s pronouncement was not intended to direct that the only alternative was to prepare a properly itemised costs statement. The Court only found that the Clayton Utz bills did not constitute an itemised bill within the definition in the *Legal Profession Act (QLD)*. [Note: *That Act is similar but not identical to the NSW Legal Profession Act 2004*].

Remember that seeking an itemised bill can be a way of a client reviving the 12 months period in which costs can be assessed.

Once a bill is actually filed for assessment the further particulars you might be directed to (or advised by your costs consultant to) provide PLUS production of your file will provide the means to overcome deficiencies in the bill.
Time limits for client lodging for assessment

S 350 (4) An application by a client or third party payer for a costs assessment under this section must be made within 12 months after:

(a) the bill was given or the request for payment was made to the client or third party payer, or
(b) the costs were paid if neither a bill was given nor a request was made.

[Note that from 1 October 2005 and prior to 1 July 2007 the period was 60 days but that for ALL matters the time limit is now 12 months (retrospectively changed). Notwithstanding, in Dye v Fisher Cartwright Berriman Pty Ltd [2010] NSWSC 895 the 60 days remained a factor for consideration-

“14 It is to be observed then that the time for making an application for a costs assessment has been very significantly extended. On the other hand “unfair prejudice to the law practice” as the consideration dictating whether an application made out of time ought to be considered has been replaced by the broader concept of what is “just and fair” having regard to “the delay and the reasons for it”. Prior to the amendment it was for the law practice to establish that dealing with an application out of time would cause unfair prejudice to it. Since the amendment the onus is on the party making the application to establish that it is just and fair for the application to be dealt with.

18 Notwithstanding the difference in the test now to be applied compared with the language of s 350(5) before the amendment of that subsection it seems to me that regard is still to be had to the prejudice occasioned to the practitioner if the extension of time is granted. There must be some prejudice to a practitioner attendant upon the postponement of the resolution of what if anything is owed by his client pursuant to a bill of costs. I take that consideration into account here as one of the circumstances to be weighed, as well as the extent of the delay and the reasons for the delay.

19 …………..I propose therefore to grant this application.” ]

But see also Application for Extension of time to file Client/Practitioner Assessment Fails: Harvey v Goodman Law Pty Ltd [2011] NSWSC 340

A lucky escape for the practitioner………………

The application for assessment of legal costs was filed 7 weeks after the 12 months period expired. Pursuant to Legal Profession Act 2004 s 350(5) Harrison J considered whether it was "just and fair" for the plaintiff’s application for assessment of the defendant's legal costs to be dealt with after the 12 month period.

About 6 months after filing the application for the costs assessor Mr Bartos advised that the application was out of time and that he could only proceed to complete the assessment if an application for extension of time was made to the Supreme Court. A
summons was filed in November 2010, almost nine months after the 12-month period expired and almost 21 months after receiving the final account.

The client explained his failure to apply for an assessment in a timely way because he was often living and working overseas.

He had also paid all the costs claimed.

On the question of whether it was just and fair for the application to be dealt with: Dye v Fisher Cartwright Berriman Pty Ltd [2010] NSWSC 895 at [14] "having regard to the delay and the reasons for the delay": Dye at [8] His Honour stated that “It is appropriate to have regard to any prejudice occasioned to the practitioner if the extension of time is granted. … No actual prejudice is suggested beyond the proposition that a practitioner ought to be entitled to act upon the basis that there is no dispute about his or her costs after the time has expired”

While a related assessment of costs in the joint venture the subject of the proceedings indicated a likelihood that the bills that the client had paid would be much reduced on an assessment and thus why the client was anxious to now proceed with the assessment, the actual reasons for the delay presented to the Court were held to be unconvincing.

The client’s affidavit revealed that he had paid potentially twice as much as he was likely to be found liable to pay. But the hypothetical or postulated liability for costs, calculated on the assumption of what the same costs assessor would do where the law practice acted for several clients did not get the client over the hurdle of why he failed to conduct himself in a timely manner.

The client’s evidence did not say that the amount of the bill he had been given was unreasonably high, or that the solicitors had otherwise charged inappropriately or excessively. His Honour indicated that “Evidence indicating, for example, that (the client) had a legitimate complaint about the fees charged, or some cognate complaint, would tend to support the exercise of discretion in his favour. I am not satisfied that any such evidence is available.”

Moreover the reasons for the delay were found to be not convincing. Furthermore (the client) had retained another law firm within the 12-month period to do the very thing he now seeks to do, albeit out of time. He offers no explanation for why that firm did not do what the terms of the letter make clear he had instructed them to do. Instead there is different action taken by that firm thereafter, culminating in correspondence negotiating a reconciliation and a small refund. Still the application could have been made within time – but it was not.”
The summons was dismissed with costs.

The vexed issue of interim accounts and the 12 month period

Be aware of the importance of s 334 in the threshold issue of the time limit for assessment

“Interim bills S 334 (1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.

(2) Legal costs that are the subject of an interim bill may be assessed under Division 11 (Costs assessment), *either at the time of the interim bill or at the time of the final bill (emphasis added)*, whether or not the interim bill has been paid.”

The NSW case law *Retemu Pty Ltd v Joe Ryan* (NSWDC, Coorey DCJ, 16 April 2010, unreported) allowed assessment of all interim bills where the Application was filed within 12 months of the final bill. Coorey DCJ held it would be dysfunctional to the relationship between the solicitor and the client if the client had to make an application for a costs assessment on every occasion where there was an issue in relation to a claim in an interim bill.

The costs judge in the Victorian Costs Court considered *Retemu* but declined to follow it in *Dromana Estate Ltd v Warne* [2010] VSC 308. The Victorian Legal Profession Act closely follows the NSW Legal Profession Act 2004, as both adopt the Model Laws approach.

*Turner v Mitchells Solicitors* [2011] QDC 61 approves *Retemu* and disapproves of *Dromana*. The case strongly favours the client.

Another Queensland case approved *Retemu* and remains relevant after appeal. In *Golder Associates P/L v Challen* [2012] QDC 11. The Court ordered that -

1. The 27 bills delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 be assessed.
2. Further the respondent deliver to the applicant itemised bills with respect to each of the Bills of Costs delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 setting out:-
   (a) Full details of each item of work done;
   (b) The date each item of work was done;
   (c) The basis of the charge for the work;
   (d) The amount charged for carrying out each item of work; and
   (e) The details of the person that carried out the work

Interestingly the applicant in this case is a “sophisticated client”.
The solicitor tried to avoid the section by not billing some unbilled WIP and submitting there was “no final bill”. The Court was unimpressed with this approach and turned to the dictionary. The Macquarie English Dictionary defined “final” as “relating to, or coming to an end; last in place, order or time”. The Concise Oxford Dictionary defined “final” as “1. coming at the end of a series ..”.

The Court (at 33) gave “final” its plain English meaning. That is the “last in time” or “ultimate”.

The Court further favoured the client by stating—

“[48] In the end I have come to the view that the respondent should deliver itemised bills with respect to each of the bills delivered between 5 July 2006 and 9 October 2010. That is despite the applicant being a sophisticated client and having its own in house counsel.”

These decisions and the latest Victorian case of Collection Point Pty Ltd v Cornwalls Lawyers Pty Ltd [2012] VSC 492 all favour the client and there was no escape hatch for the lawyers involved. The lawyers also wasted a lot of money challenging the right to assess.

**Dealing effectively with an Assessment against you**

A client/practitioner assessment is commenced by lodging a Form 1 attaching accounts of the solicitor.

Note that some clients will pay all accounts but still pursue assessment at the end. Do not become complacent during the period that work is being done.

Carefully consider the overall cost of challenging the assessment. It is not too late to get good cost consulting advice and have a good bill prepared to stand as the response to the assessment. While you cannot seek more than the original accounts filed for assessment by the client the assessment itself is likely to have a better outcome. This may be more cost effective than Court remedies.

If a client objects to some of your accounts, you may have other accounts unpaid which you would like assessed. You must start a fresh application and seek to have it referred to the same costs assessor.

Also carefully check what has been paid. While the “settling of the cash account” is not strictly within the Costs Assessor’s role of determining reasonable fees, it is an important part of the Application which the solicitor should carefully set out for the Costs Assessor. In other words what amounts were paid and to what bills were the payments allocated.

**Try and avoid assessment occurring:** By billing responsibly and reasonably and in accordance with the costs agreement the likelihood of a very expensive assessment is minimized. Your costs and the assessor’s costs will be very considerably increased if you give the client a lot of ammunition to make a lot of objections, even if they are ill-founded. Nor can you ever have your costs of defending an assessment paid by the client. The only two options with the costs of the costs assessment are: (1) that
you, as a law practice, pay the assessor’s costs (if you have not made disclosure or if costs are reduced by 15% or more); or (2) neither party pays them and they are borne by the Costs Assessment Scheme.

You may also have to pay the client’s own costs of the assessment.

Costs consulting advice may also be used to assist negotiation and settlement of issues with the client.

**The Process of a Client/Practitioner Assessment**

If a client files for assessment by lodging your tax invoices together with an Application setting out the grounds for objection then those accounts become the moving documents for the assessment.

In the case of a client/practitioner application, as objections are made in the application, the practitioner will be given 21 days to provide a response. After 21 days have passed, whether a response is received by the Manager or not, the Manager, Costs Assessment will refer the application to a Costs Assessor as soon as is reasonably practicable.

In all cases, if objections or responses are lodged after the time stipulated by the regulations, the Manager, Costs Assessment will forward them onto to the Costs Assessor.

Assessment is available in Family Court matters-

1. If you enter into a new costs agreement with your client after 30 June 2008;
2. If you were first retained after 30 June 2008, even if the case is pending on that date;
3. If you filed a fresh application in a court under the Family Law Act after 30 June 2008.

**Effectively Responding to a Client/Practitioner Assessment**

The sufficiency of your tax invoices should be dispassionately assessed. The sufficiency of your disclosures should also be evaluated – because upon them rests the issue of who pays the Costs Assessor. Poor particularization and reliance just on the file will increase the costs of the costs assessment and may not produce the results you hope for.

Clients often do not understand the complexity of the work done or the difficulties caused by the other side in preparation. Explain reasons for escalation of costs in a Narrative. Of course these reasons should really have been part of the disclosures given from time to time in the matter.

As above – having a good bill prepared to stand as part of your Response may be the best thing you can do.
Please note there is no form for objections or responses. You may lodge them in writing as a “Document” or on letterhead with any other documents you wish to include.

Settlement negotiations
Provide for the costs of the costs assessor in any settlement negotiations after allocation of a bill.

PARTY PARTY

“Get it right from the outset”. Review and Appeal is wasteful of time and costs and often is not pursued by clients.

If possible settle when you have got a good bill. Remember also s 369 and focus on protecting your costs of assessment. They do not automatically flow from a costs order.

If you have to file for assessment be prepared for a diversity in approach between Costs Assessors and “go with the flow”.

Get a Good Costs Order

Costs of an Amendment
Meaning & ramifications of court order requiring a party to pay costs “thrown away.”

In Edelman v Badower [2010] VSC 427 the meaning of costs “thrown away” and also the meaning of costs “of and occasioned by” was considered and in particular whether the defendants’ costs before (emphasis added) amendment were recoverable under the costs order.

A court order requiring a party to pay costs “thrown away”, having been given leave to amend a pleading is routinely made in courts without the occasion to consider the precise coverage of that expression, or leaving it as a concern for the eventual assessment of costs. A point of principle, or analysis, arose in this case about the meaning of costs thrown away in some unusual circumstances involving terms of settlement.

The court at [30] considered the meaning of costs “thrown away” in the relevant Victorian rule: 63.17. It says that unless the court otherwise orders, a party who amends a pleading shall “pay the costs of and occasioned by the amendment”. His Honour continued:

“The authors (of Quick on Costs) say that ordinarily the costs occasioned by an amendment are such costs as would not have been included had the pleading been delivered originally in the form of the amendment. That would include costs of work done in preparing pleadings rendered useless by the amendment. Yet, there is support for the view that “of and occasioned by the amendment” could not include costs incurred prior to the date of the amendment order. That is, rule 63.17 is really concerned with prospective or consequential costs. That might be based on the thinking that an amendment is a substitution for the original pleading and therefore relates back to the commencement of the action. To
add to the controversy, I am aware that in practice not much attention is given to this, and it is not uncommon for practitioners and Judges to regard rule 63.17 as being the same thing as costs thrown away, that is looking to past costs.” (emphasis added).

The court concluded that while **rule 63.17 carries a connotation of being forward looking or prospective or consequential, (emphasis added)** that rule is not in play here because it is subject to court order, and in this case it was displaced by the specific order for costs thrown away.

The “forward costs” are usually the costs of preparing for and attending the application to amend the statement of claim, and the costs of any consequential amendment to the defence.

Example: A bill was drawn where the past costs only were sought. However the costs order sought on the advice of counsel was for “costs of and occasioned by the amendment”. Those words were chosen even though the correspondence between the parties leading up to consent to the amendment was unequivocal in stating that the costs thrown away by the amendment would be sought. The Federal Court Assessment has been requisitioned for submissions as to why the bill should not be rejected as not I accordance with the costs order.

Counsel may have looked at the below paragraph in Quick on Costs – it may be that the position in Queensland and Western Australia are more in tune with the realities of amendment than the Victorian Rule.

**[1.2320] Where leave given to amend pleading**

Where leave is given to amend a pleading, unless the amendment is required because of an allegation which could not reasonably have been anticipated, the order routinely made is that the party seeking the amendment should pay in any event the costs of the application to amend the costs thrown away by the amendment and the costs of any consequential amendment: Kirwan v Mason [1968] QWN 10; Golski v Kirk (1987) 72 ALR 443 at 457; Turpin v Direct Transport Ltd [1975] 2 NZLR 172 at 176; Mullett v Gabriel (1989) 52 SASR 330 at 335. The rules may express this order thus, for example, in Western Australia Common Form 58(g) it provides that the usual order for the costs of an amendment should read “The costs incurred and thrown away by the amendment(s) and the costs of any consequent amendment be the plaintiff’s [defendant’s] in any event”: Seaman, Civil Procedure Western Australia (subscription service) at [8295]. This is what is meant when an amendment is allowed "on the usual terms" or "on the usual terms as to costs": Jacob, The Supreme Court Practice 1991, para 20/5-8/33.

Where leave is obtained for the amendment, the costs encompassed within the order will reflect what is allowable by the appropriate scale or principles applicable upon taxation but ought to include the costs allowable in a reasonable opposition to the application to amend, the costs of work done in preparing pleadings rendered useless by the amendment, and the costs of drawing and taxing the bill for the costs thrown away: see Precedents 11 and 12 in Oliver, The Law of Costs (1960), p 486. Thus in Re Trufort (1885) 53 LT 498 a plaintiff was given leave to amend pleadings on the eve of trial upon terms including a term that the plaintiff pay the defendant the costs of the evidence and pleadings in the action wasted by
the amendment and the costs of the summons to amend. Ordinarily therefore, the costs occasioned by an amendment to the party against whom an amendment is obtained are such costs as would not have been included had the pleading been delivered originally in the form of the amendment. ...”

Apportionment

Apportionment – several matters heard together

“Apportionment” has several applications in a costs assessment. One use of the word is “sharing” costs between two parties you act for. In other words you cannot charge twice for the same work. If the work is shared then claim \( \frac{1}{2} \) or \( \frac{1}{3} \): eg Ms Bechara acted on behalf of three plaintiffs in circumstances where the court had ordered that the matters be heard together and that evidence in one case be used as evidence in the other. However, the practitioner charged each client for each day spent in court: Legal Services Commissioner v Bechara [2009] NSWADT 145 and Bechara v Legal Services Commissioner [2010] NSWCA 369.

Apportionment/Cross Claims

Examples: (1) Gray v Sirtex Medical Limited [2011] FCAFC 40

[35] Importantly, a cross-claim is a separate proceeding: O 5 r 11(1)-(3) of the FCR; Grundy v Lewi s (1995) 62 FCR 567. It follows that a costs order made in the same proceeding commenced by UWA against Sirtex is not a costs order made in the proceeding commenced by Sirtex by cross-claim against Dr Gray. \`

“Ingot”: Ingot Capital Investments and Ors v Macquarie Equity Capital Markets and Ors [No 6] [2007] NSWSC 124 – some 39 cross claims

Get the most out of a costs assessment of costs of a cross claim by keeping records. Conversely this acknowledgment that the costs of a cross claim are not usually the costs of the proceedings may help in objecting to your opponent’s costs and thereby saving money for your client.

Get a proportionate or “percentage” costs order

Example: In the main proceedings, the Plaintiff failed on its primary issue, but was successful on other issues. Part of the defendants’ counterclaim was abandoned and was dismissed as to quantum. In the result costs were apportioned and the defendants were allowed 75% of their costs: Joseph Street Pty Ltd & Ors v Tan & Ors (Costs Ruling) [2011] VSC 41.
The Court usefully sets out in its reasoning that a proportionate costs order is desirable in complicated proceedings. This reflects the Victorian Court of Appeal’s various pronouncements on proportionate costs orders: *Spotless Group Limited v Premier Building and Consulting Pty Ltd and Northern Suburban Properties Pty Ltd* [2008] VSCA 115, [14]; *McFadzean v Construction Forestry, Mining and Energy Union* [2007] VSCA 289; (2007) 20 VR 250 [157]–[158]; *Major Engineering Pty Ltd v Helios Electroheat Pty Ltd (No 2)* [2006] VSCA 114, [5]; *Tayles v Davis (No. 2)* [2010] VSCA 107; *Investec Bank (Australia) Limited v Glodale Pty Ltd* [2009] VSCA 113; *Zachariadis v Allfolks Australia Pty Ltd* [2009] VSCA 258. The Court repeated (at 5) the relevant principles *Chen v Chan* [2009] VSCA 233 as follows -

“(1) The general rule is that costs should follow the event. Absent disqualifying conduct, the successful party should recover its costs even where it has not succeeded on all heads of claim.

(2) The Rules of Court permit significant flexibility in determining questions of costs. In particular, the Court is entitled to examine the realities of the case and will attempt to do ‘substantial justice’ as between the parties on matters of costs.

(3) Where there is a multiplicity of issues and mixed success has been enjoyed by the parties, a Court may take a pragmatic approach in framing the order for costs, taking into consideration the success (or lack of success) of the parties on an issues basis. Generally, if such an order is made, it is reflected in the successful party being awarded a proportion of its costs but not the full amount.

(4) A Court may, when fixing costs in a claim where there has been mixed success, take into account complications which it considers will arise in the taxation of costs, as part of its consideration of the overall interests of justice.

(5) Where a Court determines to make an order apportioning costs, then it does so primarily as ‘a matter of impression and evaluation,’ rather than with arithmetical precision, having considered the importance of the matters upon which the parties have been successful or unsuccessful, the time occupied and the ambit of the submissions made, as well as any other relevant matter.”

**Example: Proportionate costs order made but Gross Sum application fails**

In *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2010] NSWSC 1106 Barrett J considered whether costs orders should be made with respect to distinct issues and found no reason to depart from general rule that costs followed the event.

“27 The guiding principles in this connection have been stated in many cases. They are conveniently summarised in the judgment of the Court of Appeal in *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]:

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“The principles governing the making of an order as to costs so as to reflect the time
taken in dealing with a particular issue in which the successful party in the proceedings or
on the appeal did not succeed were reviewed by this Court in Elite Protective Personnel
Pty Ltd & Anor v Salmon (No 2) [2007] NSWCA 373…….
Where there is a mixed outcome in proceedings, the question of apportionment is very
much a matter of discretion and mathematical precision is illusory. The exercise of the
discretion depends upon matters of impression and evaluation: James v Surf Road
Nominees Pty Ltd (No 2), citing Dodds Family Investments Pty Ltd v Lane Industries Pty
Ltd (1993) 26 IPR 261 at 272. These principles were applied in City of Canada Bay
Council v Bonaccorso Pty Ltd (No 3) [2008] NSWCA 57 at [22] and most recently in
Turkmani v Visvalingham (No 2) [2009] NSWCA 279.”

His Honour found no reason to depart from general rule that costs follow the event and held
[32] “the mere fact of failure on a particular point by the party enjoying overall success cannot
lightly be singled out with a view to its becoming the basis for some special costs order”.

Example: Proportionate costs order DENIED because of lack of evidence

Desirability of a single apportioned order:

• Reflects judge’s impressions from hearing perspective
• Only one party to prepare a bill of costs in assessable form
• Avoids disputes about whether particular work was concerned with a claim or
cross-claim or both
• Avoids disputes about how the costs of that work should be apportioned

BUT

• SWM Financial Services Pty Ltd v Lloyd (No 2) [2012] NSWSC 202 - An
apportioned (percentage) costs order not appropriate where lack of evidence as to
what work was done by each party before the hearing commenced and enabling
judge to form view whether that work was relevant to the claim, the cross-claim or
both.
Indemnity Costs -

Achieving an Indemnity Costs Order

In *Amanda Duncan-Strelec & Ors v Thomas Richard Tate & Ors* [2010] NSWSC 1256 – application failed because Nicholas J determined that the email sent was not an offer of compromise within the provisions of UCPR Pt 20.

- UCPR Pt 20, r 20.26 (3)(a) makes a mandatory requirement that a notice of offer “(a) must bear a statement to the effect that the offer is made in accordance with these rules.”

- The email did not explain the consequences of a refusal to accept the offer nor did it to indicate that it was intended to operate as a Calderbank offer or that non-acceptance would be relied upon in support of an application for indemnity costs.

Get some helpful comment from the Bench

I suggest that on an indemnity costs application the nature of the costs agreement with the solicitor and counsel and the actual level of fees being sought on an indemnity basis can usefully be asked to be revealed and become the subject of argument on the application thus maybe drawing comment from the bench that is helpful on assessment. A costs agreement is not privileged.

Preparing the Application

The basic document in the Application is the bill of costs. The Application should also set out a Narrative of the Facts and a Chronology of Events. A bill of costs drawn by a legal costs consultant will contain a Narrative. If only tax invoices are submitted for assessment a Narrative should still be prepared. The use of tax invoices is likely to provide less particulars than will ensure a maximized result.

The bill has an advocacy function because it is dealt with “in chambers and on the papers”. The bill can include some submission-like comment to pre-empt any anticipated Objection (troubleshooting). – Or you can save it up as a Response Submission or as a Submission to the Costs Assessor when asked.

You can quote legislation and principle and relevant caselaw (best to find current cases rather than dredge up cases decided before deregulation and when more restrictive tests applied).

Remember that Costs Assessors, although collegiate, make up their own mind and so stating what other costs assessors have done is inappropriate and not well received.

Try to keep the message as direct and simple as possible.
Remember also that a Costs Assessor is not limited to consider those items which are the subject of specific objections or general objections: *Turner v Pride* [1999] NSWSC 850.

**What to do before making an Application for Party Party Assessment**

The procedure for commencing a party party assessment is set out in LPreq 125 Procedure before application for assessment of party/party costs.

The main message is that, unlike originating process, the Application is served before it is filed and Objections and Responses are usually completed BEFORE filing. Filing should be a last resort after settlement fails. You can attempt settlement on several occasions – and as the relative positions of the parties emerge.

Even after a Costs Assessor is appointed the settlement process can continue (especially relevant where Objections were not provided before filing).

[**Note to Reg 125.** Section 356 of the Act requires the Manager, Costs Assessment to cause a copy of an application for assessment (whether or not for party/party costs) to be given to any law practice or client concerned or any other person whom the Manager, Costs Assessment thinks it appropriaite to notify. Section 358 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].

Being aware of what Costs Assessors usually ask for means that you can give copy documents to the other side as you attempt settlement. But remember that many solicitors sensibly withhold circulating costs agreements and accounts to their opponents on the basis that they are confidential.

**Service of the Application for Assessment**

Clause 125 of the *Legal Profession Act 2005* requires that the procedure prior to lodging a party/party application is that an applicant is to complete the form of application in the approved form 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.

The mode of “sending” to a Costs Respondent is not defined. Because an Application for Assessment is not a proceeding the “address for service” is not effective. Problems have arisen where, for example-

(i) The application is only sent to the Costs Respondent’s solicitors in the proceedings in which the costs order was made and the solicitor does not accept the application or does not respond.

(ii) The application is mailed or sent to the costs respondent and it is returned marked as “Not at this address” or “Unknown at this Address” or “Return to Sender”.

(iii) The Costs Respondent is avoiding acceptance of the application (should be established to the Manager, Costs Assessment by affidavit).
(iv) The Manager, Costs Assessment or the assessor sends a copy of the application and/or notices to the costs respondent and they are returned marked as “Not at this address” or “Unknown at this Address” or “Return to Sender”. See the case of Diemasters Pty Ltd v Meadowcorp Pty Ltd NSWSC 3238 of 2000.

It is the practice of the Costs Assessment Section in the Registry if any of these circumstances arise to requisition a further address for the costs respondent to send the application.

If a further address is supplied and the application is to be re-sent, the Manager, will hold off assigning the application for a further period of 21 days to allow objections to be lodged.

The Manager, Costs Assessment will readily advise on the appropriate protocols.

Costs Assessors have been issuing the following requisition-

“Provide to me a Statutory Declaration setting out the date and mode of service of both the Application and the Bill of Costs in respect of this matter. In this regard please note that both the Application and the Bill of Costs must be served personally upon the Cost Respondent.”

Accordingly, it is prudent and even essential to serve the bill personally on the Cost Respondent unless the solicitors who were the address for service advise that they can accept service of the Bill of Costs.

Filing the Application

Ensure that party/party applications are not filed within 21 days of being sent to the costs respondent – see clause 125 of the Legal Profession Act 2005. Failure to ensure that 21 days has passed before filing will mean that there is no jurisdiction for the assessment to proceed as the application has not been made properly.

Allocation of a Costs Assessor

When you are notified of the allocation by the Manager, Costs Assessment consider whether you should ask for a re-allocation because of perceived conflict etc.

If another part of a costs recovery had been before another costs assessor then it may be cost effective to have the one costs assessor deal with the matter. It is important to avoid different outcomes in the one matter or related matters.

Settlement negotiations

- The Costs Assessor will call for all offers and correspondence on costs. It has a bearing on the award of the costs of the costs assessment. However some parties might regard this information
as prejudicial in the assessment. You can lodge them in a sealed envelope to be opened when the Costs Assessor has concluded the assessment.

- Provide for the costs of the costs assessor in any settlement negotiations after allocation of a bill.

Can a paying party challenge a claim by raising deficiencies in complying with the Legal Profession Act between the successful party and its solicitor?

In NSW assessment of costs is governed by the Legal Profession Act 2004 (as amended) (where the Uniform Law does not apply) and specifically in Part 3.2 Costs disclosure and assessment. The main thrust of that Part is the practitioner/client relationship. Costs Assessment itself is not dealt with until Division 11 and party party recovery has only 3 sections in the dedicated Subdivision 3 namely ss. 364 to 366. Historically it must be remembered that because NSW had deregulated costs in 1994 it had no Court system where costs were taxed/assessed. So while other states adopted the Model Laws on the legal profession and disclosure and retained separately their Court oriented costs quantification processes, NSW could not. Instead the Costs Assessment process set up in the Legal Profession Act 1987 ended up in the Legal Profession Act 2004.

From its inception it was thought by those operating the NSW Costs Assessment Scheme that law practice issues should not or could not imported into party party assessments. Two cases in 2011 crossed this divide: *Sitchichai Laksanabechnarong v F Net Pty Ltd* (unreported) DC NSW (Civil) (District Ct, 16/9/11) and *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd & Anor (No. 4)* [2011] NSWSC 720.

The view of Costs Assessors was that this was not the intention of the Legal Profession Act and that it was futile to raise a submission relating for example to lack of disclosure to the client in a party party assessment. Any such submission (eg that where there is no costs agreement s 317(4) requires that a solicitor/client bill be assessed before a party party assessment can take place) was likely to receive “short shrift” or only a superficial/token consideration of the point.

However in late 2014 came acceptance of the case of *Sitchichai Laksanabechnarong v F Net P/L* by Gibson DCJ in *Enterprise Finance Solutions P/L v Ciszek* [2014] NSWDC 314 which raised a number of issues relating to there being no costs agreement with either the solicitor or the barrister and which confirmed that s317(4) of the LPAct is relevant to party/party costs.

**Displacing some unfortunate misapprehensions amongst Costs Assessors**

**Research**

Many Costs Assessors disallow charging for Legal Research. In my view it is an error to have a preconceived view and is only relevant where eg procedural rules are being considered in circumstances where the solicitor should know how to go about the work - appeals, motions etc.
The reasonableness test requires careful consideration of factors including whether the work is within the solicitor’s usual area of practice, how experienced the solicitor is, and especially whether the issue is novel or has not been decided upon recently.

The allowance of research is specifically provided for in the New Federal Court Rules – Schedule 3;

“Item 5 Research

5.1 Where it is appropriate to research a legal question of some complexity that is not procedural in nature: in accordance with item 1.”

Internal Conferences
Where the conference advances the matter and supports the team there should be no artificial or routine disallowance. Relevant factors supporting the use of several solicitors meeting with each other should be submitted to the Costs Assessor. A small element of supervision should also be allowed.

Compare Schedule 3 Federal Court Scale

4 Delegation and supervision

4.1 Where it is appropriate for more than one lawyer to be involved in the conduct of the matter, allowance may be made for attendances to delegate or supervise: in accordance with item 1.

Travel Time
While travel time is often recoverable at a lower rate it is also time away from other work. Time while travelling to court is often filled with preparatory thoughts as to the event – either submissions to make and interactions with the other side – including settlement interactions. The times claimed are therefore not necessarily “unskilled”. There are several views on whether or not a lower rate is recoverable. In any event it should not be a very low or unskilled rate.

Compare Schedule 3 of the Federal Court Scale- 1 Attendances

1.1 Attendances by a lawyer requiring the skill of a lawyer (including attendances in conference, by telephone, on counsel, appearing in court, instructing in court and travelling), for each unit of 6 minutes a sum in all circumstances not exceeding $55:

(a) having regard to the lawyer’s skill and experience; and

(b) having regard to the complexity of the matter or the difficulty or novelty of the questions involved.
**Answering Costs Assessor's Requisitions**

If you need an extension of time it is often not good enough to say that you only just received the bill and are trying to instruct a costs consultant. As you are supposed to have considered the bill when initially served you should, if possible, be more explicit about the reasons for being “caught short”. You should, wherever possible, try and comply with time tables set by the Costs Assessor. You cannot always be certain you will get the extension you asked for. So do your best to continue progressing the matter.

Be aware of the power bestowed by the s 358 Notice.

**Costs Respondents’ Notice of Objections**

An important task when acting for a Costs Respondent is to check the claims in the bill against your own file and thereby pick up erroneous claims eg for instructing in court when you have a file note that the other side’s solicitor was absent from Court.

For costs effectiveness concentrate on the “big ticket items”. Also crystallize General Objections and list the items affected rather than provide Specific Objections “seriatim”.

Often the file reveals important grounds to rebut an objection.

Attach copy documents to the Objections/Submissions to demonstrate a point.

If you need more details – ask for them specifically. The Costs Assessor wants to finalise the matter so do not stall by merely complaining about the bill. You can also ask for more time to answer or object after the details are provided.

**Counsel**

Be vigilant when retaining counsel: *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd & Anor (No. 4) [2011] NSWSC 720* where the barrister’s failure by being retained on a conditional costs agreement with an uplift in a damages case affected party party recovery.

**Cancellation fees**

Do not claim large blocks of time as cancellation fees – even if counsel billed them. However you can claim a day or so if it can be shown that counsel had no further hearing work available. Or that they did work which could have been billed before the matter settled.

**Review of a Costs Assessment**

The approach of the Review Panel can be described as a Reassessment without consideration as to the approach of the Costs Assessor to the Costs Assessor's Determination but on the basis only of the documents before the Costs Assessor.
There are few cases which are relevant to the process:

1. Master Malpass (as he then was) in *Kells v. Mulligan and Anor* (2002) NSWSC 769 (particularly paragraphs 24 to 27) indicated that the function of a Review Panel is to conduct a review as opposed to entertaining an appeal and that purpose of the Application for Review is to indicate to the Panel those items in respect to which the Review Applicant seeks reassessment.

2. In *Wende v. Horwath (NSW) Pty Limited* (2014) NSWCA 170 the Court of Appeal noted that the function of a Review Panel (Section 373 of the Legal Profession Act 2004) will vary according to the way in which the Applicant for Review chooses to frame his or her Application.

3. Under Section 375 of the Legal Profession Act 2004 the Review Panel may affirm the Costs Assessor's Determination or set aside the Costs Assessor's Determination and substitute such Determination in relation to the Costs Assessment as the Review Panel considers should have been made by the Costs Assessor. The process to be undertaken by the Review Panel involves two stages: firstly a decision whether to affirm or to set aside the Determination of the Costs Assessor, and secondly (where a decision to set aside is made) the substitution of the Panel's own Determination: see *Honest Remark Pty Ltd v. Allstate Explorations NL* (2008) NSWSC 439 at (8)-(13) per Associate Justice Malpass; *Randall Pty Ltd v. Willoughby City Council* (2009) NSWDC 5056/2008 per Judge Peter Johnstone 8 May 2009. The Review Panel has all the functions of a Costs Assessor and is to determine the Application in a manner that a Costs Assessor would be required to determine the Application for Costs Assessment. The Review Panel, however, is to carry out the Reassessment on the basis of the evidence that was before the Costs Assessor unless the Review Panel determines otherwise.

4. The Review Panel may determine not to receive any further documents or Submissions.

5. The Court of Appeal in *Wende v. Horwath (NSW) Pty Limited* (2014) NSWCA 170 determined that the "review" is not fixed and must be taken from the context in which it appears. The function of a Review Panel under Section 375 of the Legal Profession Act 2004 will vary according to the way in which the Applicant for Review chooses to frame the Application. The requirement to give reasons under Section 380 of the Legal Profession Act 2004 does not require a Review Panel to provide its own paraphrase of the reasons of a decision under review if it agrees with the conclusions and the reasons of that decision provided that the Review Panel makes a statement to that effect and makes it clear that it adopts those reasons.

6. Section 364 of the Legal Profession Act 2004 sets out the basis on which the Costs Assessor and Review Panel must carry out the Assessment. That Section also sets out matters which may be taken into account determining what is a fair and reasonable amount of legal costs. The factors which may be taken into account include the outcome of the matter. In considering the outcome of the matter, the Assessor may consider the question of proportionality of the costs and disbursements to the outcome. But *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd* [2015] NSWCA 284 held that it is not mandatory to consider outcome and s 364 of Legal Profession Act is not expressed in terms of proportionality.
Furthermore s 60 of the Civil Procedure Act is directed to courts and costs assessors are not part of a “court”.

7. On a Review the Panel will consider whether it was reasonable to carry out the work claimed in the Bill, whether that work was carried out in a reasonable manner and the fair and reasonable amount of costs for the work concerned. Those are the criteria set down by Section 364 of the Act. The Review Panel will disallow or reduce claims where it was not reasonable to carry out the work, where the work was not carried out in a reasonable manner and where the amount claimed is more than fair and reasonable for the work concerned.

8. Under Section 365 of the Legal Profession Act 2004 the Costs Assessor (and the Review Panel) are entitled to consider the terms of a Costs Agreement between the Costs Applicant and its legal advisers but not to apply its terms. A Costs Assessor can consider the terms of the Costs Agreement only to ensure that the amount of costs awarded on a party/party basis does not exceed the amount payable by the Costs Applicant to its providers of legal and other services in connection with the litigation.

9. Master Malpass (as he then was) in Turner v. Pride (1999) NSWSC 850 indicated that the Costs Assessor must make his/her Determination in accordance with statutory requirements. The Costs Assessor is to conduct each Assessment on a case by case basis. Further, a Costs Assessor is entitled to rely on his/her experience. In carrying out this Assessment I have relied on my experience of in excess of 40 years as a litigation Solicitor and in excess of 13 years as a Costs Assessor.

10. There is no provision in the Legal Profession Act 2004 as to the manner in which a claim for party/party costs may be made. In particular, there is no obligation on the Costs Applicant to serve an itemised Bill of Costs. This was confirmed by Young J. (as he then was) in Smits v. Buckworth 22 September 1997 in Supreme Court of New South Wales proceedings 3869 of 1996 in respect to the 1987 Legal Profession Act. Accordingly, in the view of the Review Panel it is reasonable for an Applicant to include in his/her/its claim all costs and disbursements, which it considers may be recoverable. Whilst there is no obligation to serve an Itemised Bill of Costs there is a natural justice obligation to inform the party receiving the Bill of the nature of the claim for costs it has to meet and the onus is on the party providing the Bill to satisfy the Review Panel in respect to any item objected to of the reasonableness of doing the work, that the work was carried out in a reasonable manner and as to the fair and reasonable amount of the costs for the work concerned. The Bill should provide sufficient details for these purposes.

**Appeal from a Costs Assessment**

- Make sure you appeal a costs assessment to the correct court.

In McCausland v Surfing Hardware International Holdings Pty Ltd [2010] NSWDC 222 at [23] Johnstone DCJ stated the result succinctly as follows: “I believe the intention of the legislature is quite clear: If a party to a costs assessment in respect of party/party costs payable as a result of a court order wishes to appeal from a costs assessor or a review panel in respect of a discrete decision as to a matter of law there lies an appeal as of right under s 384. In all other situations leave is required and the application
is required to be brought pursuant to s 385. The application for leave must be made to the court or tribunal that made the costs order and the appeal, if leave is granted, is to be heard in that other court or tribunal”.

His Honour also affirmed that further or fresh evidence may not be led in an appeal as of right as to a matter of law, the only admissible evidence being the material before the review panel [50]. See also Randall Pty Limited v Willoughby City Council 2009 NSWDC 118.

- Fruitless Grounds of Appeal

In Mohareb v Horowitz & Bilinsky Solicitors [2011] NSWDC 170 the conduct of the Costs Assessor was questioned on the basis that he made statements without providing any evidence or information as what led him to these assertions

- Held: Reasons given by the Costs Assessor need only be sufficient to disclose how he came to the findings that he has made: Levy v Bergseng [2008] NSWSC 294 at [78] - [81]

The threshold of detail for the Reasons is not very high – so get it right the first time. Relying on the appeal process is not cost effective.

Alyson Ashe – 2015. This rewrite is not intended as a comprehensive dealing with all the cases on costs assessment that have been decided since 2012 but merely to ensure that this useful article maintains the correct focus.