THE OFFICE OF THE
LEGAL SERVICES
COMMISSIONER

SUBMISSION TO THE CHIEF JUSTICE'S REVIEW OF THE COSTS ASSESSMENT SCHEME

November 2011

TABLE OF CONTENTS

INTRODUCTION 2

EXECUTIVE SUMMARY 3

RESPONSES TO MATTERS LISTED IN THE TERMS OF REFERENCE 6

1. THE COSTS ASSESSMENT SCHEME IN NEW SOUTH WALES 6

1.3 Application for a Costs Assessment 6

1.15 Costs Assessment 7

2. THE TERMS OF REFERENCE 8

2.1 Producing outcomes that are substantively just, in the context of the realities and costs of modern litigation and the current costs of legal services 8

2.2 Providing parties an appropriate measure of procedural fairness 8

2.3 The speed and simplicity of the process 9

2.4 The adequacy of the process in supporting and enabling Costs Assessors to determine applications 12

2.5 The transparency and consistency of the process and outcomes 16

2.6 The promotion of the efficient resolution of costs disputes 17

2.7 The cost of the process 20

2.8 The qualifications, selection, appointment, education and remuneration of Costs Assessors 21

2.9 Whether it would be desirable for guidelines to be established and published, for example as to items and rates generally allowed or disallowed. 22

2.10 In light of the above, whether enabling legislation and regulations should be amended 23

Appendix 1 – COMPARISON OF PROVISIONS IN THE LEGAL PROFESSION ACT 2004 (NSW) THAT RELATE TO COSTS ASSESSMENT WITH THOSE IN THE LEGAL PROFESSION NATIONAL LAW (post COAG draft – 09/09/11) 25

INTRODUCTION

The Office of the Legal Services Commissioner ("OLSC") receives complaints about solicitors and barristers in NSW. The OLSC works as part of a co regulatory system, together with the Law Society of NSW and the NSW Bar Association to resolve disputes and investigate complaints about professional conduct. The function and purpose of the OLSC is to reduce complaints against lawyers and promote professionalism within a framework of consumer protection and protection of the rule of law. The OLSC is an independent statutory body and its decisions can only be challenged through the normal process of administrative law.

As co regulator of the legal profession, the OLSC deals extensively with costs disputes between practitioners and their clients or third party payers. Whilst the OLSC responses to the terms of reference derive from that experience, many of the issues raised apply equally to party/party costs disputes.

This is the first comprehensive review of the costs assessment system since it was established in 1994. The OLSC thanks the Chief Justice for initiating this review and welcomes the opportunity to make submissions in this important area.

EXECUTIVE SUMMARY

The OLSC supports a costs assessment scheme for assessing costs disputes. The opportunity to have costs assessed provides consumers of legal services and the profession with an avenue for procedural fairness. In order to achieve procedural fairness, the OLSC submits however, that a costs assessment scheme has to be competent, cost-effective, have adequate rules that provide transparency and consistency and not be dependent only on hourly billing to assess costs.

The OLSC submits that a costs assessment scheme has to be competent. Decisions about costs need to be made by persons who have adequate qualifications and understand the legislative framework within which they operate.

At present the current costs assessment scheme is administered by an ad-hoc group of legal practitioners working on an ad-hoc basis. Many appear to be retired or semi-retired sole practitioners/partners of small suburban firms and barristers doing costs assessments to earn some extra money. The appointment process of the costs assessors is not guided by any rules or requirements as to the level of expertise a costs assessor should retain. Consequently, the level of expertise of practitioners involved in the costs assessment scheme is diverse. Costs assessors vary widely in their knowledge and experience of costing law, rules and practice.

In addition to the absence of a consistent appointment process, there also appears to be no induction or formal training for those involved in the costs assessment scheme. Nor are we aware of any ongoing training required or provided. In the current costs assessment scheme we have, for example, seen barristers assessing solicitors' costs and party/party costs and solicitors assessing barristers' costs where neither could be said to have the requisite knowledge.

The concerns about competency are also fuelled by the fact that there are no rules that are widely available in the costs assessment scheme to assist costs assessors in determining matters. The absence of rules has resulted in wide variations and interpretations of the legislative framework in relation to costs and diverse determinations. The reasons provided in determinations are also often inadequate and on occasion determinations have failed to address key issues. The problem with inconsistent determinations is that there are no principles upon which costs assessors can rely. Consistency is thus an issue of great concern and is exacerbated by the fact that in the present system determinations are confidential and are therefore not accessible by other costs assessors like judgments in court proceedings. The non-publication of determinations by costs assessors results in inconsistency.

This lack of procedural rules, transparency and consistency of determinations and their publication can adversely affect applicants of the costs assessment scheme. The OLSC is concerned that competency is being unduly compromised by the construct of the present system. The OLSC submits that in order to ensure consistency and competency, a costs assessment scheme needs to be guided by formal rules and regulations.

Lastly, the OLSC submits that a costs assessment system can only be effective if it is relevant. A costs assessment scheme needs to understand and embrace with the legal

services marketplace as changes occur. A costs assessment scheme cannot be effective it if does not move with the market.

Over the last two decades the legal services marketplace in Australia has undergone considerable change. Globalisation and technology has had a fundamental impact on the way we practise law and bill both in Australia and overseas. There has been a growth in the use of new technologies, including the use of social media websites such as *Twitter* and *Facebook* to market and deliver legal services, web-based billing, virtual law practices and electronic file and document management systems. Time billing is no longer the dominant billing method used by law firms. Law firms are embracing alternative billing methods such as fixed fees. Whilst law firms have moved away from time billing the costs assessment scheme has not.

The costs assessment process is largely premised on the existence of an itemised, time costed bill and does not readily accommodate alternative billing methods.

Whilst section 332(1) of the current *Legal Profession Act* (the Act) provides that a bill may be in the form of a lump sum bill or an itemised bill, the Act contemplates that bills submitted for costs assessment will be itemised, and in practice most are. Costs assessors frequently call for itemisation if an itemised bill is not submitted. OLSC is aware of cases where costs assessors have requested an itemisation of costs even though the disputed costs are subject to a fixed fee arrangement.

The emphasis on time billing by the costs assessment scheme is ineffective and needs to be reconsidered. The OLSC submits that the costs assessment scheme should accommodate alternative billing methods.

The contents of this submission reflects the OLSC's concerns outlined above about the current costs assessment scheme in NSW. The OLSC submits that consideration be given to the recommendations that follow:

Recommendation 1
Include beneficiaries in the definition of a client for the purposes of costs assessment.

Recommendation 2
Applications made out of time should be considered by the Manager, Costs Assessment rather than the Supreme Court.

Recommendation 3
Ameliorate ineffective communication in the costs assessment scheme by introducing an early intervention/mediation model to deal with applications.

Recommendation 4
Permit all aspects of a costs dispute, including questions relating to the existence, validity and interpretation of a costs agreement, or terms of a retainer verbally agreed, to be dealt with in the one forum.

Recommendation 5
Develop a form of bill that enables paying parties to better evaluate the costs charged.

Recommendation 6
That the costs assessment scheme flexible enough to embrace alternative forms of billing other than time-based billing.

Recommendation 7
Develop a short form for objections and responses.

Recommendation 8
That determinations should be made publicly available to ensure greater consistency and transparency.

Recommendation 9
That costs assessors should provide sufficient and consistent reasons for their decisions.

Recommendation 10
That costs assessors only be allocated matters within their area of expertise.

Recommendation 11
That all costs disputes be referred to the OLSC for early determination through mediation or other alternative dispute resolution mechanisms.

Recommendation 12
Explore the requirement to pay disputed funds into the Commissioner's office like that in Victoria.

Recommendation 13
That all determinations by the costs assessment process be final.

Recommendation 14
That a mechanism be established for the review of fees charged by the costs assessment scheme.

Recommendation 15
That costs assessors be provided with adequate training to ensure a level of expertise.

Recommendation 16
That costs assessors be appointed through a formal selection process.

Recommendation 17
That a mechanism be established to collect and collate information about market rates for legal services and that material be made publicly available.

Recommendation 18
That the process of drafting guidelines on costs and costs assessment commence as soon as possible.

RESPONSES TO MATTERS LISTED IN THE TERMS OF REFERENCE

1. THE COSTS ASSESSMENT SCHEME IN NEW SOUTH WALES

1.1 At present the costs assessment scheme that exists in NSW is conducted by the costs assessment section located at the Supreme Court of NSW. The costs assessment scheme and its processes are not however court proceedings. There are no hearings involved in the administration of the Costs Assessment Scheme. The *Uniform Civil Procedure Rules 2005* and other rules of court do not apply to the administration of the scheme. Costs Assessors are not judicial officers of the Supreme Court.

1.2 The costs assessment scheme is headed by the Manager, Costs Assessment. The Manager exercises the duties, obligations and functions conferred to the position under the *Legal Profession Act 2004.*

1.3 APPLICATION FOR A COSTS ASSESSMENT

1.4 Costs assessment is available to a client or practitioner, and to third party payers, that is, any person who is not the client but is under a legal obligation to pay all or any part of the legal costs.

1.5 An application for cost assessment must be made in accordance with the regulations (if any) and accompanied by the fee prescribed by the regulations.

1.6 Generally an application is made by completing the approved form, complying with the time limits, attaching the documentation required or any supporting documentation that you wish to add, filing the application with the Registry of the Supreme Court and payment of the filing fee.

1.7 The procedure for dealing with an application is set down by the *Legal Profession Regulation 2005* for party/party applications; and applications involving legal practitioners as parties where the instructions were given after 1 October 2005.

1.8 In the case of a party/party application it will be referred to a Costs Assessor as soon as practicable after it is filed.

1.9 In the case of a client/practitioner application, if 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.

1.10 In the case of a practitioner/client application, the client will be given a copy of the application and allowed 21 days to lodge objections. If no objections are lodged, the Manager, Costs Assessment will refer the application to a Costs Assessor as soon as is reasonably practicable.

1.11 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.

1.12 The Manager, Costs Assessment 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 Australian legal practitioners acting for the parties concerned,
(e) the avoidance of conflict of interests of costs assessors.

1.13 If the Manager, Costs Assessment is satisfied that it is inappropriate for a Costs Assessor to determine a particular application that has been referred to the Costs Assessor, the Manager, Costs Assessment may:

(a) revoke the referral of the application, and
(b) refer the application for assessment to another Costs Assessor.

1.14 Once an application to a Costs Assessor is referred the Manager does not have any role within the assessment.

1.15 COSTS ASSESSMENT

1.16 Costs assessments are not a proceeding in the Supreme Court. Costs Assessments are conducted on the papers by the parties corresponding with the Costs Assessor as directed.

1.16 Costs Assessors generally will not communicate orally with the parties and will communicate in writing with both parties at the same time.

1.17 The Costs Assessor is required to give the parties a reasonable opportunity to make submissions. The parties are also to comply with the notices and directions of a Costs Assessor. The Costs Assessor may require a party to provide particulars or produce documents. The Costs Assessor receives documentation and submissions, assesses the costs and then issues certificates of determination of the costs and a statement of reasons.

1.18 Failure by a party to comply with the directions of a Costs Assessor may result in the Costs Assessor declining to deal with the application. Alternatively, the Costs Assessor may continue to deal with the application on the basis of the information provided. Failure by a party to comply with the direction of a Costs Assessor may be an offence punishable by a fine. Failure by a legal practitioner to comply with the directions of a Costs Assessor without reasonable excuse is capable of being professional misconduct.

1.19 In a practitioner/client or client/practitioner application, a Costs Assessor will issue a certificate of determination for a bill of costs by either confirming the bill or substituting the amount of costs in the bill for an amount that in the Costs Assessor's opinion is fair and reasonable. In a party/party application a Costs Assessor will issue a certificate of

determination of the fair and reasonable amount of costs to be paid as the result of a court or tribunal order.

1.20 The time taken for each costs assessment depends upon the nature of the application and the conduct of the parties. Costs Assessors may indicate to the parties that they will set a timetable and a timeframe when corresponding with the parties.

2. THE TERMS OF REFERENCE

2.1 PRODUCING OUTCOMES THAT ARE SUBSTANTIVELY JUST, IN THE CONTEXT OF THE REALITIES AND COSTS OF MODERN LITIGATION AND THE CURRENT COSTS OF LEGAL SERVICES

2.1.1 The OLSC submits that the costs assessment scheme can be enhanced and produce outcomes that are substantively just by opening up the scheme to a wider range of persons than it currently does.

2.1.2 As the OLSC has noted above, costs assessment is available to a client or practitioner, and to third party payers, that is, any person who is not the client but is under a legal obligation to pay all or any part of the legal costs. It appears that costs assessment may, however, not be available to beneficiaries who wish to dispute the costs charged by a solicitor/executor or solicitor acting for the executor of an estate. Beneficiaries do not appear to be considered (non-associated) third party payers and so entitled to apply for costs assessment.

2.1.3 Beneficiaries who wish to dispute costs must apply under section 86A of the Probate and Administration Act 1898 for a "review of commission or amount charged or proposed to be charged in respect of any estate". The Probate Registrar may then either moderate the law practice/legal practitioner's professional costs or direct that such costs be assessed. The OLSC understands there is a lengthy backlog of such applications awaiting consideration.

2.1.4 The OLSC notes that under the *Legal Profession Act 2004* prior to its amendment by the *Legal Profession Further Amendment Act 2006* (which came into force on 1 July 2007) beneficiaries were expressly included in the definition of a client for the purposes of costs assessment – section 350(6)(f). The OLSC recommends that beneficiaries be once again included in the definition of a client for the purposes of costs assessment.

Recommendation 1
Include beneficiaries in the definition of a client for the purposes of costs assessment.

2.2 PROVIDING PARTIES AN APPROPRIATE MEASURE OF PROCEDURAL FAIRNESS

2.2.1 The OLSC submits that whilst the current costs assessment scheme does provide parties with procedural fairness that fairness is compromised by the fact that applications made out of time are constricted by the legislative framework.

2.2.2 Under the *Legal Profession Act 2004*, applications made out of time (other than by sophisticated clients/third party payers) can only be dealt with if the Supreme Court, on application by the costs assessor or client or third party payer who made the application for assessment, determines, after having regard to the delay and the reasons for the delay, that it is just and fair for the application for assessment to be dealt with after the 12-month period – section 350(5).

2.2.3 In practice, applications to extend time are usually made by the client or third party payer and must be made by way of Summons, incurring further legal costs. Contrast this to the position under the *Legal Profession Act 2004* prior to the 2006/7 amendments, which required a costs assessor to deal with an application made out of time unless the costs assessor considered that the law practice had established that to do so would, in all the circumstances, cause unfair prejudice to the law practice – section 350(5).

2.2.4 The requirement that applications made out of time can only be considered by the Supreme Court can cause undue delay in the costs assessment process. The requirement can also cause unnecessary stress for applicants who may see the use of the Supreme Court as heavy handed. The OLSC does not believe that there is any need for such applications to be considered by a judicial body like the Supreme Court. Applications made out of time at the OLSC are considered by the Commissioner. The process of consideration does not cause any considerable delay in the process or stress for the applicants. The OLSC submits that applications made out of time should be considered by the Manager, Costs Assessor and removed from the jurisdiction of the Supreme Court.

2.2.5 The OLSC submits that procedural fairness would be enhanced by allowing costs assessors to deal with applications made out of time rather than the Supreme Court.

2.2.6 Procedural fairness can also be enhanced if parties are given an opportunity to present their case and communicate with costs assessors. At the moment there is no opportunity to do so. This limitation is discussed in further detail later in the submission. At this point it is however important to note that the current construct of the system that disallows effective communications inhibits procedural fairness.

Recommendation 2
Applications made out of time should be considered by the Manager, Costs Assessment rather than the Supreme Court.

2.3 THE SPEED AND SIMPLICITY OF THE PROCESS

2.3.1 The OLSC submits that an effective costs assessment scheme requires processes that enable matters to be determined in a timely and concise manner. The OLSC is concerned that the framework of the current costs assessment system is preventing matters being processed in this manner.

2.3.2 There is a considerable delay in dealing with applications in the current costs assessment scheme. The OLSC notes that statistics have been provided by the Chief Justice's review indicating that as at 30 June 2011, the average costs assessment

application is completed within 4-5 months. This figure is calculated from the date an application is assigned to a costs assessor. In the OLSC's experience however, there is often a lengthy time lag between the lodging of an application and its allocation to a costs assessor, even taking into account the requirement for the Manager, Costs Assessment to allow a law practice 21 days in which to provide its response to a client/practitioner application before referring same to a costs assessor. We are aware of costs assessments taking much longer than the 4-5 month estimate provided.

2.3.3 One of the main reasons why there is a considerable delay is the fact that the existing costs assessment scheme is a paper driven process that is in most cases cumbersome, time consuming and difficult to navigate, particularly for lay persons.

2.3.4 In a typical costs assessment application a party will submit a lengthy itemised bill for assessment to which equally lengthy item-by-item objections are prepared. These in turn generate lengthy responses. The objections and responses are often repetitive and formulaic. In practitioner/client matters, lay clients/third party payers often find it difficult to articulate their objections and to understand what may be valid objections. Little guidance is available through the costs assessment scheme and legal representation is often necessary. It is particularly daunting for those with poor English or of a lower socio-economic background.

2.3.5 On costs assessment, the assessor considers and makes a determination on each item in dispute, which could be the majority of items in the bill, solely on the papers. It seems few costs assessors are pro-active in seeking to identify at the early stage the true nature of the dispute, and the material required in relation to the matters in dispute. There seems little attempt to hive off and deal with preliminary issues, such as whether a (provision of a) costs agreement should be set aside.

2.3.6 The problem with the paper-driven process is exacerbated by there being limited methods of communication between the costs assessors and parties. One of the most frequent complaints we hear about the costs assessment scheme is that the system does not allow effective communication between parties.

2.3.7 Under the current costs assessment scheme communication between applicants and assessors is limited. Applicants are unable to telephone costs assessors and many costs assessors do not accept communications by fax. This situation is untenable. Applicants need to be able to communicate with the costs assessor dealing with their matter without constriction.

2.3.8 There is also no opportunity for parties to meet, or for parties to argue their case before the costs assessor. There is no opportunity to call oral evidence, or to cross examine relevant witnesses, which may be crucial in certain matters, for example where there is a dispute as to the terms of a retainer verbally agreed, or a dispute as to the existence, validity and interpretation of a costs agreement. If such a matter arises, and oral testimony is required, the costs assessor must decline to deal with the issue: *Doyle v Hall Chadwick* [2007] NSWCA 159 (9 July 2007). However, costs assessors have no power to refer a matter to the court. These restrictive communication avenues are unfair to both parties seeking a timely resolution.

2.3.9 Another problem stifling the present costs assessment system that arises in disputes between clients/third party payers and their lawyers is that neither the client/third party nor their legal representatives are able to inspect the file of the lawyer whose costs are disputed, and costs assessors may not call for production of the file in assessing costs.

2.3.10 The inability of applicants to communicate effectively with their costs assessors has a significant impact on the time costs assessment takes to resolve and the cost of the process. The OLSC submits that the costs assessment scheme should facilitate a quick and easy mechanism for resolving disputes. We submit that the costs assessment scheme should adopt the same processes we have adopted for dealing with complaints at the OLSC.

2.3.11 The OLSC receives all complaints about barristers and solicitors in NSW. The complaints process usually starts when a complainant telephones the OLSC's enquiry line to discuss their complaint on an informal basis with trained OLSC staff. During the telephone call, an OLSC enquiry line officer will discuss the nature of the complaint. Enquiry line staff cannot give legal advice, but they can assist the complainants by clarifying the points in dispute, explaining their rights, helping them to consider their options and mediating simple matters.

2.3.12 The OLSC encourages complainants first to try and resolve their complaint with their solicitor or barrister by talking, or writing to them, before making a formal complaint. If complainants do not wish to resolve their complaint in the first instance with their barrister or solicitor, the enquiry line officer will notify them that they can make a formal complaint. A complaint is formally made when a complainant lodges a complaint form or forwards a letter of complaint to the OLSC.

2.3.13 The OLSC notes that the statistics attached to the terms of reference show a decline over time in total applications. The OLSC is concerned that this decline may relate to dissatisfaction with the current process. Anecdotal evidence exists that parties may be turning to other alternatives, such as seeking gross sum costs orders, or obtaining a binding opinion from a costs consultant, rather than applying for costs assessment.

2.3.14 The OLSC submits that the costs assessment scheme would benefit from a streamlined approach that is timely and effective. The streamlined approach should be designed at reducing the length of the costs assessment process. The OLSC submits that the best way to facilitate this process is to adopt a similar model we use in relation to consumer disputes. The OLSC submits that the costs assessment scheme can be enhanced by the establishment of an effective communications process.

2.3.15 The OLSC submits that a costs assessment scheme that was focused on a mediation model would address allegations about ineffective communication. A mediation model, like that used by the OLSC would also facilitate costs assessment being handled in a timely and cost-effective manner.

Recommendation 3
Ameliorate ineffective communication in the costs assessment scheme by introducing an early intervention/mediation model to deal with applications.

2.4 THE ADEQUACY OF THE PROCESS IN SUPPORTING AND ENABLING COSTS ASSESSORS TO DETERMINE APPLICATIONS

2.4.1 The OLSC submits that an effective costs assessment system must have processes that facilitate the resolution of matters with ease. Processes that are not fluid may cause frustration for all parties involved and can have an adverse effect on costs. The OLSC submits that the present structure does not operate in this manner. The reasons why this is so are multiple. Firstly, the inability of costs assessors to conduct hearings and take evidence; secondly, the limitations of time costed itemised bills and thirdly, the requirement to address every itemised cost in dispute.

2.4.2 Firstly, as we have discussed above, the fact that the current system is paper-driven can cause considerable delay in the determination of matters. The inopportunity for costs assessors to conduct a hearing or take oral evidence means that matters which can only be resolved by way of oral testimony must be referred to a court for adjudication.

2.4.3 Sending a matter to court for adjudication can cause considerable frustration for parties to the dispute. Using the court as an arbiter costs money and takes time. Neither party wants to incur additional costs and time. Parties want a quick and cost-effective process to resolve their disputes. The OLSC submits that costs assessment matters should not be sent to a court for arbitration in the first instance but should be dealt with in the one place.

2.4.4 The OLSC notes that the procedure used in the Federal Court for taxation of party/party costs (Part 40, Division 40.2 of the *Federal Court Rules 2011*) is all processed in the one place.

2.4.5 Under Rule 40.20, once a bill has been filed and served, a taxing officer is to make an estimate of the approximate total the bill is likely to tax at. The estimate is made in the absence of the parties, before objections are made, and without making any determination on the individual items in the bill. If a party wishes to object to the estimate, they must file a notice of objection. Rule 40.21 gives the Registrar three alternatives:

1. to direct the parties to attend before the Registrar for a confidential conference to identify the real issues in dispute and reach a resolution of the dispute
2. to direct that there be a provisional taxation, which involves the bill being provisionally taxed in the absence of the parties. The taxing officer may, before completing the provisional taxation, require the parties to file submissions identifying the issues in dispute.
3. to direct that the taxation of the bill proceed, which involves an attendance by the parties and an opportunity to make oral submissions (with the leave of the taxing officer). The taxing officer may summons and examine witnesses, either orally or on affidavit, direct or require the production of books, papers and documents and issue subpoenas.

2.4.6 A similar model is used in Victoria, where the recently created Costs Court handles all taxations of costs, including taxation of solicitor/client costs. Like the Federal Court, the Costs Court in Victoria has power to give an estimate of the amount a bill is likely to tax at on the papers, and may conduct a taxation hearing.

2.4.7 This structure has recently been considered in England and Wales. In his review of civil litigation costs, Lord Justice Jackson considered and discussed a proposal for provisional assessment along the lines of the estimate procedure used in the Federal Court.[1] Whilst concerns were raised that this would add to the workload of costs judges and costs officers, the majority view (supported by the Senior Costs Judge) was that the reform would be beneficial.

2.4.8 The OLSC submits that NSW should adopt a similar process in which costs assessors are able to conduct a hearing or take evidence. The OLSC submits that allowing costs assessors to conduct a hearing and take evidence in conjunction with our recommendation above that initial matters be sent to mediation for early intervention will drastically improve the costs assessment scheme.

Recommendation 4
Permit all aspects of a costs dispute, including questions relating to the existence, validity and interpretation of a costs agreement, or terms of a retainer verbally agreed to be dealt with in the one forum.

2.4.9 Secondly, the OLSC submits that the present process for assessing itemised bills by costs assessors is difficult to evaluate and therefore time consuming.

2.4.10 The traditional, time costed itemised bill usually submitted for costs assessment lists items of work chronologically without further categorisation. It is difficult for a lay client (or opposing party, for that matter) to ascertain the total costs for particular tasks or categories of work. For example, items relating to the preparation of an affidavit (such as taking instructions, drafting, engrossing, collating and copying annexures, execution and filing and service) may be scattered throughout an itemised bill, making it difficult to ascertain the total cost involved in producing the document.

2.4.11 This problem is not experienced in NSW alone. In England and Wales, Lord Justice Jackson has also questioned the form and layout of detailed time costed bills. The form and layout of time-costed bills in England and Wales is similar to that that exists in NSW. There is however one difference, in England and Wales items are grouped under heads of work. This level of specificity is not required in New South Wales.

2.4.12 The particular form of bill used in England and Wales appears to have become the norm as a result of a Court of Appeal decision[2] in which it was decided that the costs indemnity principle applied to every item in a bill individually. On assessment, it had to be demonstrated that individual items claimed on a party/party basis corresponded with items which had been charged to a client. No such constraint exists in New South Wales, where the Court of Appeal has decided in *CSR v Eddy* [2008] NSWCA 83 (2 May 2008) that the indemnity principle does not apply on an item by item basis.

---

1 Review of Civil Litigation Costs, Preliminary Report, Chapter 53, section 4.9; Final Report, Chapter 45, section 2.0

[2] General of Berne Insurance Co Ltd v Jardine Reinsurance Management Ltd [1998] 1 WLR 1231 CA

2.4.13 Challenging the construct of time costed bills in England and Wales Lord Justice Jackson recommended that a new, more informative format for detailed bills of costs be devised. The new bill, according to Jackson, should thus be able to yield information at different levels of generality. Lord Justice Jackson proposed developing software, in collaboration with costs consultants, which can generate bills that present the work done by phase and/or task and/or activity.

2.4.14 The OLSC submits that Lord Justice Jackson's proposal outlined above has considerable merit. The OLSC recommends that similar reforms should be considered in the context of this review.

Recommendation 5
Develop a form of bill that enables paying parties to better evaluate the costs charged.

2.4.15 The OLSC submits that the reliance on time based billing is unduly constraining for costs assessors. Whilst the profession appears to be moving away from time based billing, the structure of costs assessment appears not to be.

2.4.16 The use of time based bills as a preferred form of billing methodology has diminished considerably over the last decade. There have been numerous reports in the press that time based billing is no longer being utilised as much as it was in previous decades. This is because time-based billing is today considered inherently flawed. There is now an extensive body of literature canvassing the problems of time billing, and much of this was canvassed in detail in the Discussion Paper produced by the Legal Fees Review Panel in December 2004.[3]

2.4.17 Alternative methods of billing such as fixed fee agreements, event based costing and value billing are today being frequently used by legal practitioners in NSW. Unfortunately, however, the current construct of the costs assessment scheme does not accommodate the use of these methods. The OLSC submits that this is a problem which needs to be addressed.

2.4.18 The costs assessment scheme needs to encourage the use of alternative billing methods and accommodate disputes where time based billing is not used.

Recommendation 6
That the costs assessment scheme be flexible enough to embrace alternative forms of billing other than time-based billing.

2.4.19 The third area in which the current costs assessment scheme could be improved to enable costs assessors to determine applications more effectively is by restricting objections or responses in writing.

---

[3] Legal Fees Review Panel, "Lawyers costs and time billing" (2004)

2.4.20 As noted above, in NSW the costs assessment scheme is a paper driven scheme. Costs Assessors have little or no contact with parties other than by correspondence. Again, the problems experienced in NSW are not isolated. Similar problems seem to bedevil the detailed assessment process used in England and Wales for assessing party/party costs and solicitor client costs.

2.4.21 In England and Wales, parties to a detailed assessment serve points in dispute.[4] Whilst the relevant Costs Practice Direction states that points of dispute should be short and to the point, it goes on to say that the points of dispute should identify each item in the bill of costs which is disputed, and in each case state concisely the nature and grounds of the dispute.

2.4.22 Lord Justice Jackson was of the opinion that both points in dispute and points of reply needed to be shorter and more focused. He thought the practice of quoting passages from well-known judgments should be abandoned, and that the practice of repeatedly using familiar formulae should be abandoned. He considered there should be no need to plead to every individual item in a bill of costs, nor to reply to every paragraph in the points of dispute.[5]

2.4.23 He proposed the relevant Costs Practice Direction should be amended, and that a new format should be used for points in dispute.[6] Specifically, he suggested amending the practice direction to include:

> *35.2 Points of dispute have in the past become too long and repetitive. Points of dispute should be short and to the point. The points should identify any points of principle, as well as any specific items, but once a point has been made it should not be repeated in respect of subsequent items in the bill. Points of dispute should follow the amended Precedent G of the Schedule of Costs Precedents annexed to this Practice Direction.*
>
> *35.3 Points of dispute must -*
> *1) identify any general points or points of principle which require decision before the individual items in the bill are addressed, and*
> *2) identify specific points stating concisely the nature and grounds of dispute. Once the point has been made it should not be repeated but the item numbers, where the point arises, should be inserted in the left hand box as shown in the amended Precedent G.*

2.4.24 Precedent G is a table with 3 columns headed 'Item', 'Dispute' and 'Claimant's Comments'.

---

[4] Review of Civil Litigation Costs Preliminary Report, Part 10, Chapter 53, paragraph 2.17, p537
[5] Review of Civil Litigation Costs Final Report, Part 7, Chapter 45, paragraph 5.11, p 459
[6] Review of Civil Litigation Costs Final Report, Appendix 10

2.4.25 The OLSC considers the proposal by Lord Justice Jackson to limit the dispute process is a credible measure. As we have already submitted, a costs assessment scheme should allow disputes to be handled in a simple and cost effective manner. Limiting the points of dispute including through our suggested approach above will assist in achieving such a scheme.

Recommendation 7
Develop a short form for objections and responses.

2.5 THE TRANSPARENCY AND CONSISTENCY OF THE PROCESS AND OUTCOMES

2.5.1 The OLSC submits that transparency is a necessary element of an effective and efficient costs assessment scheme. A transparent scheme can prevent confusion for parties involved and encourages trust. The OLSC is concerned that the present construct of the costs assessment scheme is not sufficiently transparent.

2.5.2 Section 392 of the *Legal Profession Act* provides that information about costs assessments is confidential. The requirement that costs assessment be confidential is problematic because costs assessors' determinations are thus not publicly available. The non-publication of decisions is of concern for the OLSC. The fact that determinations are not publicly accessible means that costs assessors do not have the benefit of a precedent base of decisions to which they can refer when making their determinations.

2.5.3 The determination of a costs dispute can be a difficult task. Matters in which there are multiple disputes can take time to consider. In the present costs assessment system there is very little available to assist costs assessors in determining the disputes. There are no formal rules on the costs assessment process. Nor are there any guidelines to assist. The impact of this lack of assistance is considerable. Costs assessment determinations vary widely.

2.5.4 The OLSC submits that an effective costs assessment system needs to be consistent. Inconsistency in determinations creates frustration and confusion both for the profession and for consumers. Inconsistency can also lead to claims of injustice and allegations of unfairness.

2.5.51 The inconsistency of the costs assessment scheme is further fuelled by the fact that determinations and accompanying reasons often lack detail, making it difficult to ascertain why costs were disallowed or reduced. The limited reasons that are presently often provided are not sufficient to provide consistency and directions for both the profession and the public to understand them.

2.5.6 Inconsistency is further exacerbated by the fact that costs assessors are allocated matters on an ad-hoc basis. It appears from anecdotal evidence that costs assessors may be assigned disputes that raise issues outside their knowledge and experience. For example, barristers may be assigned disputes relating solely to solicitors' costs, and suburban sole practitioners may be given the bills of mid or top tier CBD firms. Since there appears to be no

formal training as to how costs assessors conduct their assessment and there appears to be no ongoing training or education for costs assessors that we are aware of, the potential for error is considerable. The OLSC thus recommends that the current costs assessment scheme be amended so as to ensure that costs assessors are only allocated matters within their level of expertise.

2.5.7 The lack of transparency and consistency makes it difficult to predict the outcome of a costs assessment, and the findings likely to be made on particular issues. The OLSC submits that the costs assessment scheme should be amended to ensure greater transparency. The OLSC submits that determinations should be made publicly available, costs assessors should provide reasons for their decisions and matters should be allocated to costs assessors in accordance with their particular expertise.

Recommendation 8
That determinations should be made publicly available to ensure greater consistency and transparency.

Recommendation 9
That costs assessors should provide sufficient and consistent reasons for their decisions.

Recommendation 10
That costs assessors only be allocated matters within their area of expertise.

2.6 THE PROMOTION OF THE EFFICIENT RESOLUTION OF COSTS DISPUTES

2.6.1 The OLSC submits that the effectiveness of a costs assessment scheme can only be guaranteed if the resolution of disputes is efficient. The OLSC submits that the present structure of the costs assessment scheme in NSW could be enhanced to ensure greater efficiency if a number of amendments were enacted.

2.6.2 Firstly, the efficient resolution of disputes would be greatly enhanced if disputes less than $10,000 were referred to the OLSC as provided for in the present legislation.

2.6.3 Section 336 of the *Legal Profession Act 2004* provides for the referral of costs disputes between practitioners and their clients to the Legal Services Commissioner for mediation if the amount in dispute is less than $10,000. Section 336(5) provides that:

> *Mediation is not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.*

2.6.4 The referral may be made by either the client or the Manager, Costs Assessment. Although the referral option is clearly stated in the application for costs assessment, the OLSC seldom receives referrals.

2.6.5 Section 393 of the Legal Profession Act imposes a statutory duty on costs assessors to refer to the Legal Services Commissioner:

1. matters where the costs assessor considers that the legal costs charged by a law practice are grossly excessive;
2. any other matter that may amount to unsatisfactory professional conduct or professional misconduct on the part of an Australian legal practitioner or Australian-registered foreign lawyer.

2.6.6 In practice, OLSC receives few such referrals. It may be that costs assessors are reluctant to be drawn into the complaints process and disciplinary proceedings, and are concerned they may be called to give evidence against fellow legal practitioners.

2.6.7 The OLSC notes that the latest, post COAG draft of the Legal Profession National Law (the National Law) contains provisions giving the National Legal Services Commissioner through his/her delegate (NLSC) a substantial role in dealing with costs disputes.

2.6.8 The draft National Law provides in section 5.3.7 that the NLSC is to deal with costs disputes where the total bill for legal costs is less than $100,000 (indexed) payable in respect of any one matter or the total bill for legal costs equals or is more than $100,000 (indexed) payable in respect of any one matter, but the total amount in dispute is less than $10,000 (indexed).

2.6.9 The NLSC can attempt to resolve a costs dispute but, if unable to do so, may make a binding determination about costs where the total amount of costs still in dispute is less than $10,000 (indexed). If a costs dispute falls outside the parameters of the National Law, or if the NLSC is unable to resolve the dispute, the parties may apply for costs assessment. Legal costs that have been, or are being, dealt with by the NLSC may not be the subject of a costs assessment unless NLSC is unable to resolve the dispute and refers the parties to costs assessment.

2.6.10 It is envisaged that all solicitor-client costs disputes falling within the parameters of the National Law will, in the first instance, be dealt with by the NLSC. However, there is no provision in the National Law for referral of costs disputes lodged for costs assessment to the NLSC.

2.6.11 Section 4.3.32 of the draft National Law provides that a costs assessor:

1. may refer a matter to the National Legal Services Commissioner if the costs assessor considers that the legal costs charged are not fair and reasonable;
2. must refer a matter to the National Legal Services Commissioner if the costs assessor considers that the legal costs charged, or any other matter raised in the assessment, may amount to unsatisfactory professional conduct or professional misconduct.

2.6.12 The OLSC submits that consideration should be given to establishing a means of using dispute resolution for all costs disputes, not just those falling within the parameters of

the *Legal Profession Act* and the draft National Law. The use of a dispute resolution model allows disputes to be resolved at an early stage without recourse to a formal costs assessment. In addition, many matters for which dispute resolution would be difficult or unlikely due to complexity or intransigence of the parties could benefit through this process by limiting or reducing the issues in dispute for a substantial formal assessment process.

2.6.13 The costs resolution process that operates in Victoria is a model that provides as good example how this process can operate. In Victoria costs disputes are dealt with in the first instance by the Victorian Legal Services Commissioner. The Legal Services Commissioner may accept complaints involving a dispute (costs dispute) in relation to legal costs not exceeding $25,000 in respect of any one matter. The role of the Legal Services Commissioner with respect to a costs dispute is to assist the parties to resolve their dispute. Usually this will involve negotiations by letter or telephone, but may also include referring the dispute to a formal mediation or arranging for a non-binding assessment of legal costs.

2.6.14 If the Legal Services Commissioner is unable to resolve the costs dispute, the Commissioner must give written notice to each party stating that the dispute could not be resolved and setting out the party's right to apply to Victorian Civil and Administrative Tribunal (VCAT). The application to VCAT must be made within 60 days of receiving the notice.

2.6.15 A feature of that process is that the complainant must lodge the unpaid amount of legal costs with the Commissioner, which seems to provide an incentive to reach agreement.

2.6.16 The OLSC submits that the process instituted in Victoria clearly assists in identifying and limiting the issues in dispute and, where appropriate, attempts early resolution. The OLSC submits that as it presently facilitates the mediation of costs disputes, it has the capacity to take on such a role.

Recommendation 11
That all costs disputes be referred to the OLSC for early determination through mediation or other alternative dispute resolution mechanisms.

Recommendation 12
Explore the requirement to pay disputed funds into the Commissioner's office like that in Victoria.

2.6.17 The OLSC submits that the resolution of costs disputes could also be more efficient if the certificates of determination issued by costs assessors were binding.

2.6.18 Section 372 of the Legal Profession Act provides that a costs assessor's determination is binding on the parties. Under section 368(5), in the case of an amount of costs that has not been paid, the certificate of determination is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs. However, caselaw indicates that whilst the certificate may be deemed to be a

judgment for the purposes of enforcement of the costs assessment, it is not a judgment of the court as such and may be appealed even after judgment has been obtained.

Recommendation 13
That all determinations by the costs assessment process be final.

2.7 THE COST OF THE PROCESS

2.7.1 The OLSC submits that an effective costs assessment scheme should be cost effective. The OLSC is concerned that the current costs of applying for assessment may be unreasonable and may prevent parties wishing to dispute costs from doing so.

2.7.2 At present the cost of applying for costs assessment in relation to Party/Party, Client/Practitioner, Practitioner/Client, Practitioner/Practitioner disputes, the filing fee payable for an assessment of costs for the above types is the greater of the following:

a) $100 or;
b) 1% of the unpaid bill or;
c) 1% of the total costs in dispute

2.7.3 There is no sliding scale or cap on lodgement fees. The filing fee payable for review applications (all types) is $275.00

2.7.4 The OLSC submits that costs assessor fees and the legal costs of the parties incurred during the process may also be unreasonably high. Costs assessors fees are currently $192.50 per hour payable by the party/parties as determined by Costs Assessors. The fees for Panellists for a review of an application is $192.50 per hour charged by each of the assessors on panel. Whilst section 373A of the *Legal Profession Act* provides that the "*costs of a costs assessment"* (including a costs assessor's fees) can be reviewed on application by the Manager, Costs Assessment, there is no corresponding provision in relation to costs of review and Review Panel fees.

2.7.5 The OLSC submits that the cost of applying for costs assessment and the fees charged by costs assessors should be revised to ensure that applicants seeking to have their disputes assessed are not prevented from doing so financially.

Recommendation 14
That a mechanism be established for the review of fees charged by the costs assessment scheme.

2.8 THE QUALIFICATIONS, SELECTION, APPOINTMENT, EDUCATION AND REMUNERATION OF COSTS ASSESSORS

2.8.1 As stated above costs assessors vary widely in their knowledge and experience of costing law, rules and practice. Many appear to be retired or semi-retired sole practitioners or partners of small suburban firms and barristers doing costs assessments to supplement their income. It is not clear if there exists in the current pool of costs assessors the experience necessary to deal with costs issues unique to medium to large CBD firms (for example, efficient use of teams) or the specialist expertise required in particular areas of law, such as defamation, Land and Environment Court proceedings and, since 1 July 2008, family law. As we have submitted above, this situation can result in inconsistent determinations and confusion.

2.8.2 The OLSC is concerned by this situation and submits that the costs assessment scheme would be greatly enhanced if costs assessors were trained and allocated matters accordingly. The OLSC does not advocate that costs assessors be subjected to a rigorous training program but that costs assessors be given some assistance, whether it be in the form of rules or guidance to develop an expertise. Nor does the OLSC submit that costs assessors must have certain qualifications before they can be appointed as costs assessors. The OLSC merely submits that the education and training of costs assessors be formalised to ensure a level of expertise.

2.8.3 Of further concern is the fact that legal practitioners with substantiated complaints about their professional conduct may be appointed as costs assessors. At present there is no mechanism in place that requires the appointment of costs assessors to be scrutinised. This situation cannot be sustained. The OLSC fears that if this situation did continue an occasion may arise when a costs assessor is retained and parties discover that the costs assessor features on the OLSC disciplinary register.

2.8.4 The OLSC submits that a scrutiny process for the appointment of costs assessors could effectively eradicate the possibility of disciplined legal practitioners from being costs assessors. The OLSC recommends that the current system for selection and appointment of judges, which are subject to advice by the OLSC, be adopted.

Recommendation 15
That costs assessors be provided with adequate training to ensure a level of expertise.

Recommendation 16
That costs assessors be appointed through a formal selection process.

2.9 WHETHER IT WOULD BE DESIRABLE FOR GUIDELINES TO BE ESTABLISHED AND PUBLISHED, FOR EXAMPLE AS TO ITEMS AND RATES GENERALLY ALLOWED OR DISALLOWED.

2.9.1 The OLSC wholeheartedly supports the establishment of guidelines for the costs assessment scheme. Guidelines can provide a considerable amount of assistance to those involved in the costs assessment scheme and can address uncertainty.

2.9.2 The *Legal Profession Act* contains machinery in section 394 for the establishment of a costs assessors' rules committee to make rules governing the practice and procedure of the assessment of costs.

2.9.3 Clause 127 of the accompanying *Legal Profession Regulation* gives the committee a discretion, for the purpose of assisting costs assessors in assessing costs, to distribute to costs assessors the following information:

(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.

2.9.4 It is not clear to what extent this has occurred.

2.9.5 The reason as to why it is unclear to what extent this has occurred is because at present, section 392 of the *Legal Profession Act* provides that information about costs assessments is confidential. Consequently there can be no information that is publicly accessible of the sort set out in clause 127(b). The OLSC submits that the requirement of confidentiality is unwarranted and unnecessary.

2.9.6 In relation to clause 127(a), there is a dearth of publicly available information about market rates for legal costs. Making costs assessment determinations accessible to the public would enable such information to be collated.

2.9.7 Information about market rates is available to costs assessors and costs consultants through the costs assessment process, and to the OLSC through the complaints process. However, both of these processes are confidential. It would be useful if a mechanism could be established to collect and collate information about market rates, whilst preserving the anonymity of law practices and legal practitioners.

Recommendation 17
That a mechanism be established to collect and collate information about market rates for legal services and that material be made publicly available.

2.10 IN LIGHT OF THE ABOVE, WHETHER ENABLING LEGISLATION AND REGULATIONS SHOULD BE AMENDED.

2.10.1 The OLSC submits that enabling legislation and regulations should indeed be amended to facilitate the recommendations outlined above. The OLSC notes however that with the impending move towards the establishment of a national legal profession, amending the current legislation and regulations may be difficult and unnecessary.

2.10.2 Present indications are that the *Legal Profession National Law* (the National Law) is likely to come into effect in 2013. The latest, post COAG draft of the National Law contains provisions relating to Legal Costs in Chapter 4, Part 4.3. There are provisions relating to costs assessment in Division 7, and other provisions relating to legal costs that may impact on costs assessment in Divisions 2 (Legal costs generally), 3 (Costs disclosure), 4 (Costs agreements) and 5 (Billing). Chapter 5 of the National Law covers Dispute resolution and professional discipline, and includes in Part 5.3, Division 3 provisions relating to the resolution of costs disputes. The National Law applies to legal costs payable on a solicitor-client basis, that is costs charged to a client by a legal practitioner (section 4.3.26).

2.10.3 One of the stated objectives of the National Law is to provide a framework for the assessment of legal costs (section 4.3.1). The National Law does not, however, deal with the process of costs assessment comprehensively. The National Law only sets out factors that are to be considered and some other matters. A comparison of the provisions of the *Legal Profession Act 2004* that relate to costs assessment with those in the draft National Law is attached at Appendix 1.

2.10.4 The National Law will fundamentally change the way in which regulation is administered in NSW. This is because the National Law is outcomes focussed. That is, the National Law is principles-based rather than proscriptive based. The legal profession will no longer be subject to legislation that is close to one thousand pages (1,000) in length but to legislation that totals just over two hundred (200) pages.

2.10.5 The consequences of having legal profession regulation that is considerably shorter than the legislation which exists today are both positive and challenging. For example, an advantage of principles-based legislation is that there is greater flexibility for both the regulator and the regulated in interpreting provisions. A disadvantage of principle-based legislation is the difficulty in interpreting provisions due to insufficient information. The costs provisions in the National Law provide an illustrative example of this tension.

2.10.6 The costs provisions in the draft National Law provide that a law practice must “charge no more than fair and reasonable costs.” The National Law states that costs are “fair and reasonable” if they are reasonably incurred and are reasonable in amount and are “proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest.” The provisions also state that costs are “fair and reasonable” if they “reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned.”

2.10.7 While the provisions in the draft National Law provide that costs must be “fair and reasonable” and “proportionate”, they do not explain what these terms actually mean. This will no doubt create a level of uncertainty for the profession and will give rise to the need for

guidelines to assist in interpretation. This will provide an opportunity for the regulators and the professional associations to work together through co-regulation in producing guidance to assist the profession.

2.10.8 Although the National Law has yet to take effect, the OLSC submits that it is opportune time to commence the process of guideline development since the overlap between this review and what is contained in National Law in relation to costs is large. A non-exhaustive list of potential guidelines for the purpose of this review may include the following:

- fair and reasonable
- proportionate
- informed consent
- lump sum
- itemised bill
- costs disclosure
- alternatives to the billable hour

Recommendation 18
That the process of drafting guidelines on costs and costs assessment commence as soon as possible.

APPENDIX 1 – COMPARISON OF PROVISIONS IN THE LEGAL PROFESSION ACT 2004 (NSW) THAT RELATE TO COSTS ASSESSMENT WITH THOSE IN THE LEGAL PROFESSION NATIONAL LAW (POST COAG DRAFT – 09/09/11)

OFFICE OF THE LEGAL SERVICES COMMISSIONER (NSW)

SUBMISSION TO THE CHIEF JUSTICE'S REVIEW OF THE COSTS ASSESSMENT SCHEME

Legal Profession Act 2004		**Legal Profession National Law (post COAG draft)**
Chapter 3, Part 3.2		**Chapter 4, Part 4.3 4.3.30(3)**
Division 1 Preliminary		
302B	Costs assessment is to take into account GST	4.3.30(3)
Division 3 Costs disclosure		**Division 3 Costs Disclosure**
309	Disclosure of costs to clients	4.3.6
311	How and when must disclosure be made to a client?	The National Law replaces the prescriptive disclosure obligations contained in the *Legal Profession Act 2004* with section 4.3.6, which is designed to focus on the substance rather than the form of costs disclosure. To that end, the National Law adopts a principle of *"informed consent",* requiring a law practice to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs after being given that information – section 4.3.6(4).
312	Exceptions to requirements for disclosure	
313	Additional disclosure – settlement of litigious matters	
314	Additional disclosure – uplift fees	
315	Form of disclosure	
316	Ongoing obligation to disclose	
310	Disclosure if another law practice is to be retained	4.3.7
317	Effect of failure to disclose	4.3.9
318	Progress reports	4.3.21
318A	Disclosure to associated third party payers	4.3.8

Legal Profession Act 2004		Legal Profession National Law (post COAG draft)
Division 4 Legal costs generally		**Division 2 Legal costs generally**
319	On what basis are legal costs recoverable?	4.3.4 Section 4.3.4(1) imposes an obligation on a law practice to charge costs that are no more than fair, reasonable and proportionate. Section 4.3.4(2) sets out criteria by which to assess if costs are fair, reasonable and proportionate, and under section 4.3.4(3) regard must be had as to whether the legal costs conform with any fixed costs provisions. A valid costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable - section 4.3.4(4). Note: Section 4.3.30 requires costs assessors to apply the principles set out in section 4.3.4 so far as they are applicable.
320	Security for legal costs	4.3.26
321	Interest on unpaid legal costs	4.3.25
Division 5 Costs agreements		**Division 4 Costs agreements**
322	Making costs agreements	4.3.11
323	Conditional costs agreements	4.3.12
324	Conditional costs agreements involving uplift fees	4.3.13
325	Contingency fees are prohibited	4.3.14
326	Effect of costs agreement	4.3.15
327	Certain costs agreements are void	4.3.16
328	Setting aside costs agreements or provisions of costs agreements	No comparative provision

Legal Profession Act 2004	Legal Profession National Law (post COAG draft)
Division 6 Costs fixed by Regulations	No comparative provision
Division 7 Billing	**Division 5 Billing**
331 Legal costs cannot be recovered unless bill has been served	4.3.24
332 Bills	4.3.17, 4.3.19, 4.3.20 & Legal Profession National Rules r. 8.3.1
332A Request for itemized bill	4.3.18 Section 4.3.17 provides that a bill may be in the form of a lump sum bill or an itemised bill. Section 4.3.18 provides that a person may request an itemised bill. However, neither term is defined in the National Law or accompanying *Legal Profession National Rules* and there is no indication of what must be included in an itemised bill (cf. Clause 111B of the NSW *Legal Profession Regulation,* which prescribes the particulars to be included in an itemised bill.) Section 4.3.19(1) requires a bill to be signed by a principal, or to nominate a principal as being responsible for the bill. Section 4.3.19(2) deems each principal of a law practice responsible for a bill if a principal does not sign or is not nominated as the responsible principal for the bill. Section 4.3.20 and Rule 8.3.1 of the accompanying *Legal Profession National Rules* set out the requirements for giving bills are contained in section 4.3.20.
333 Notification of client's rights	4.3.23
334 Interim bills	No comparative provision

Legal Profession Act 2004	Legal Profession National Law (post COAG draft)
Division 8 Mediation of costs disputes	No corresponding provisions but note costs dispute resolution provisions in Chapter 5, Part 5.3. Division 3
Division 9 Maximum costs in personal injury damages matters	No comparative provision
Division 10 Costs in civil claims where no reasonable prospects of success	No comparative provision
Division 11 Costs assessment	Division 7 Costs Assessment 4.3.26 - 4.3.35 The National Law applies to legal costs payable on a solicitor-client basis that is costs charged to a client by a legal practitioner (section 4.3.26). It does not apply to costs payable as a result of an order made by a court or tribunal (cf. *Legal Profession Act 2004*, Chapter 3, Part 3.2, Division 11, Subdivision 3) One of the stated objectives of the National Law is to provide a framework for the assessment of legal costs (section 4.3.1). It does not deal with the process of costs assessment save to: ➢ Set out who may apply and the time limits for doing so, and how out of time applications are to be dealt with - section 4.3.28 (1) – (6); ➢ Provide that, if an application is made, the costs assessment must take place without any money being paid into court on account of the legal costs the subject of the application – section 4.3.28(7)(a) ➢ Provide that, if an application is made, the law practice must not commence any proceedings to recover the legal costs until the costs assessment has been completed –

Legal Profession Act 2004	Legal Profession National Law (post COAG draft)
	section 4.3.28(7)(b) ➢ Require a costs assessor to cause a copy of an application for costs assessment to be given to any law practice **or** client concerned or any other person whom the costs assessor thinks it appropriate to notify – section 4.3.28(8) ➢ Set out the matters a costs assessor must determine – section 4.3.29 & 4.3.34 (costs of costs assessment) ➢ Set out the factors to be considered by a costs assessor - section 4.3.30(1), (3) & (4) ("*must*) and 4.3.30(2) ("*may have regard to"*) ➢ Require costs assessor to provide reasons – section 4.3.31 ➢ Provide for referral for disciplinary action – section 4.3.32
Subdivision 1 Applications 349A Definition	No comparative provision
350 Application by client or third party payers for costs assessment 351 Application for costs assessment by law practice retaining another law practice 352 Application for costs assessment by law practice giving bill	4.3.28
353 Application for assessment of party/party costs	No comparative provision
354 How to make an application for costs assessment	No comparative provision
355 Consequences of application	No comparative provision
356 Persons to be notified of application	4.3.28(8)
356A Regulations	No comparative provision

Legal Profession Act 2004	Legal Profession National Law (post COAG draft)
Subdivision 2 Assessment	No comparative provision
357 Referral of matters to costs assessors	No comparative provision
358 Costs assessor may require documents or further particulars	No comparative provision
359 Consideration of applications by costs assessors	4.3.29 **Note**: costs assessor must determine whether or not a valid costs agreement exists
360 (Repealed)	No comparative provision
361 Assessment of costs by reference to costs agreement	4.3.30 & 4.3.4(4) **Note**: 4.3.4(4) provides that a costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable provided costs disclosure has been given and the costs agreement does not contravene the National Law
362 Costs fixed by regulations or other legislation	4.3.30 & 4.3.4(3)
363 Criteria for costs assessment	4.3.30 & 4.3.4(3)
363A Interest on amount outstanding	4.3.29 & 4.3.30
Subdivision 3 Party/party costs	No comparative provision
Subdivision 4 Determinations	No comparative provision
367 Determinations of costs assessments	No comparative provision
367A Determinations of costs assessments for party/party costs	No comparative provision
368 Certificate as to determination	No comparative provision
369 Costs of costs assessment	4.3.34
370 Reasons for determination	4.3.31

Legal Profession Act 2004	Legal Profession National Law (post COAG draft)
371 Correction of error in determination	No comparative provision
372 Determination to be final	No comparative provision
Subdivision 5 Review of determination by panel **Subdivision 6 Appeals**	4.3.35 (appeal or review to be in accordance with applicable jurisdictional legislation)
Subdivision 7 General 390 Costs assessors 391 Protection from liability 392 Referral for disciplinary action	No comparative provision
393 Confidentiality	4.3.32 & 4.3.33 **Note:** Under 4.3.33 determinations of costs assessors are to be admissible in disciplinary proceedings as evidence as to the fairness and reasonableness of legal costs
394 Rules of procedure for applications 395 Division not to apply to interest on judgment debt 395A Contracting out of Division by sophisticated clients	No comparative provision