

APPENDIX A

The *Legal Profession Act 1987*

Part 11 Legal Fees and other Costs

Division 1 Preliminary

173 Definitions

(1) In this Part:

bill of costs means a bill of costs for providing legal services, and includes a memorandum of fees.

conditional costs agreement means an agreement of the kind referred to in section 186.

costs—see section 3.

Note.

Costs includes barristers' and solicitors' fees as well as other items that may be charged by barristers and solicitors (such as expenses and disbursements).

costs agreement means an agreement referred to in section 184 as to costs for the provision of legal services.

costs assessor means a person appointed as a costs assessor under Division 6.

legal services means work done, or business transacted, in the capacity of a barrister or solicitor.

(2) In this Part, a reference to a **barrister** or to a **solicitor** includes:

- (a) a person who was a barrister or solicitor when the legal services concerned were provided, or
- (b) the assignee of a barrister or solicitor, or
- (c) the executor of the will or other testamentary instrument of a barrister or solicitor, or
- (d) the trustee or administrator of the estate of a barrister or solicitor, or
- (e) in the case of a solicitor, the receiver of the solicitor's property appointed under Part 8.
- (f) (Repealed)

(3) In this Part, a reference to the costs of a costs assessor or the costs incurred by a costs assessor includes a reference to the costs related to the remuneration of a costs assessor.

174 Clients' rights under Part

(1) This Part gives the following rights to any client of a barrister or solicitor:

- (a) the client is to be given information about how a barrister or solicitor will charge for costs for legal services and an estimate of the likely cost of legal services (Division 2),
 - (b) the client need not pay the barrister's or solicitor's bill until it has been assessed by a costs assessor if the client is not given the information about how costs will be charged (Division 2),
 - (c) the client can enter into a costs agreement with the barrister or solicitor, including a conditional costs agreement under which costs are only payable if the matter is successful (Division 3),
 - (d) the client is not liable to pay interest on unpaid costs unless notice that interest will be charged is set out in the bill of costs (Division 4),
 - (e) proceedings against the client for the recovery of costs cannot be brought unless a bill of costs in the proper form has been given to the client and at least 30 days have passed (Division 5),
 - (f) if the client disputes the barrister's or solicitor's bill, or is ordered to pay costs in proceedings, the client may apply to have the bill or costs assessed by a costs assessor (Division 6). The client has no right to have a bill as to costs that are covered by a costs agreement assessed unless there is some inequality affecting the agreement as set out in Division 6.
- (2) Nothing in this section confers any additional rights on a client or derogates from any rights conferred on a client under this Part.

175 Obligation to disclose to clients basis of costs

- (1) A barrister or solicitor must disclose to a client in accordance with this Division the basis of the costs of legal services to be provided to the client by the barrister or solicitor.
- (2) The following matters are to be disclosed to the client:
 - (a) the amount of the costs, if known,
 - (b) if the amount of the costs is not known, the basis of calculating the costs,
 - (c) the billing arrangements,
 - (d) the client's rights under Division 6 in relation to a review of costs,
 - (e) the client's rights under Division 4 to receive a bill of costs,
 - (f) any other matter required to be disclosed by the regulations.
- (3) The disclosure to a client is not required to be made by a barrister or solicitor who is retained on behalf of the client by another barrister or solicitor. However, the disclosure to the client is to include the costs of the barrister or solicitor so retained.

176 Obligation to disclose basis of costs to instructing practitioner

- (1) A barrister or solicitor who is retained on behalf of a client by another barrister or solicitor must disclose to that other barrister or solicitor in accordance with this Division the basis of the costs of legal services to be provided to the client by the barrister or solicitor.

- (2) The following matters are to be disclosed to the other barrister or solicitor:
 - (a) the amount of the costs, if known,
 - (b) if the amount of the costs is not known, the basis of calculating the costs,
 - (c) the billing arrangements,
 - (d) any other matter required to be disclosed by the regulations.

177 Obligation to disclose estimated costs

- (1) A barrister or solicitor must disclose to a client in accordance with this Division an estimate of the likely amount of the costs of legal services to be provided to the client by the barrister or solicitor, if the amount of the costs is not disclosed under section 175.
- (2) A barrister or solicitor who is retained on behalf of a client by another barrister or solicitor must disclose to that other barrister or solicitor in accordance with this Division an estimate of the likely amount of the costs of legal services to be provided to the client by the barrister or solicitor, if the amount of the costs is not disclosed under section 176.
- (3) A barrister or solicitor who has disclosed to a person an estimate of the likely amount of the costs of legal services is to disclose to that person any significant increase in that estimate.

178 When disclosure to be made

- (1) A disclosure under this Division is to be made before the barrister or solicitor is retained to provide the legal services concerned, unless this section otherwise provides.
- (2) If it is not reasonably practicable to make the disclosure before the barrister or solicitor is retained, the disclosure is to be made as soon as practicable after the barrister or solicitor is so retained.
- (3) A disclosure under this Division to a client as to the costs of a barrister or solicitor who is retained on behalf of the client by another barrister or solicitor is to be made as soon as practicable after the other barrister or solicitor becomes aware of the costs.
- (4) A disclosure under this Division as to any significant increase in the estimated costs of legal services is to be made as soon as practicable after the barrister or solicitor becomes aware of the likely increase in costs.

Disclosure to be in writing

- (1) A disclosure under this Division must be made in writing and be expressed in clear plain language.
- (2) The disclosure may be made separately or in a costs agreement or in any other contract relating to the provision of the legal services concerned.

180 Exception to disclosure

A disclosure is not required to be made under this Division when it would not be reasonable to be required to do so.

181 Regulations, rules and guidelines as to disclosure

The regulations and, subject to the regulations, the barristers rules, solicitors rules or joint rules may make provision for or with respect to:

- (a) the information to be disclosed under this Division, and
- (b) with the approval of the Attorney General, when it would not be reasonable to require a disclosure to be made under this Division

181 Regulations, rules and guidelines as to disclosure

The regulations and, subject to the regulations, the barristers rules, solicitors rules or joint rules may make provision for or with respect to:

- (a) the information to be disclosed under this Division, and
- (b) with the approval of the Attorney General, when it would not be reasonable to require a disclosure to be made under this Division.

182 Effect of non-disclosure of matters related to basis of costs

- (1) If a barrister or solicitor fails to make a disclosure to a client in accordance with this Division of the matters required to be disclosed by section 175 in relation to costs, the client need not pay the costs of the legal services unless the costs have been assessed under Division 6.
- (2) A barrister or solicitor who fails to make a disclosure in accordance with this Division of the matters required to be disclosed by section 175 or 176 in relation to costs may not maintain proceedings for the recovery of the costs unless the costs have been assessed under Division 6.
- (3) The costs of any assessment referred to in this section (including the costs of the costs assessor) are payable by the barrister or solicitor seeking to recover costs.
- (4) Any failure referred to in this section does not of itself amount to a breach of this Act. However, the failure is capable of being unsatisfactory professional conduct or professional misconduct.

183 Effect of non-disclosure of estimated costs

- (1) A failure by a barrister or solicitor to make a disclosure in accordance with this Division under section 177 of an estimate of the likely amount of the costs of legal services to be provided by the barrister or solicitor (or any significant increase in the estimate) does not of itself amount to a breach of this Act.
- (2) However, the failure is capable of being unsatisfactory professional conduct or professional misconduct.

Division 3 Costs agreements

Agreements about costs

- (1) An agreement as to the costs of the provision of legal services may be made with a client by:
 - (a) the barrister or solicitor who is retained by the client to provide the services, or
 - (b) the barrister or solicitor retained on behalf of the client by another barrister or solicitor.

- (2) An agreement as to the costs of the provision of legal services may also be made between the barrister or solicitor providing the services and another barrister or solicitor who retained that barrister or solicitor on behalf of the client.
- (3) An agreement under this section is called a **costs agreement**.
- (4) A costs agreement is void if it is not in writing or evidenced in writing.
- (5) A costs agreement may form part of a contract for the provision of legal services.
- (6) A costs agreement may consist of a written offer that is accepted in writing or by other conduct. A disclosure in accordance with Division 2 under section 175 or 176 may constitute an offer for the purposes of this subsection.

185 Regulations, rules and guidelines as to costs agreements

The regulations and, subject to the regulations, the barristers rules, solicitors rules or joint rules may make provision for or with respect to the information to be included in costs agreements.

186 Conditional costs agreements

- (1) A barrister or solicitor may make a costs agreement under which the payment of all of the barrister's or solicitor's costs is contingent on the successful outcome of the matter in which the barrister or solicitor provides the legal services.
- (2) Any such costs agreement is called a **conditional costs agreement**.
- (3) A conditional costs agreement may relate to proceedings in a court or tribunal, except criminal proceedings.
- (4) A conditional costs agreement must set out the circumstances constituting the successful outcome of the matter.
- (5) A conditional costs agreement may exclude disbursements from the costs that are payable only on the successful outcome of the matter.

187 Payment of premium under conditional costs agreement

- (1) A conditional costs agreement may provide for the payment of a premium on those costs otherwise payable under the agreement only on the successful outcome of the matter.
- (2) The premium is to be a specified percentage of those costs or a specified additional amount. The premium is to be separately identified in the agreement.
- (3) The premium is not to exceed 25% of those costs.
- (4) However, the regulations may vary that maximum percentage of costs. Different percentages may be prescribed for different circumstances.

188 Costs not to be calculated on amount recovered in proceedings

A costs agreement may not provide that costs are to be determined as a proportion of, or are to vary according to, the amount recovered in any proceedings to which the agreement relates.

189 Rights may not be waived

- (1) Any provision of a costs agreement or other agreement that is inconsistent with this Division is void to the extent of the inconsistency.
- (2) In particular, any provision of a costs agreement or other agreement that purports to waive rights to an assessment of costs under this Part, or the right to receive a bill of costs in the form required for assessment under this Part, is void.

Division 4 Interest, security for costs and bills of costs

190 Interest on outstanding costs

- (1) A barrister or solicitor may charge interest on the unpaid costs for legal services provided by the barrister or solicitor, if the costs are unpaid 30 days or more after the barrister or solicitor has given a bill of costs for those services in accordance with this Division.
- (2) A barrister or solicitor may not charge interest on the unpaid costs for legal services unless the bill of costs for those services contains a statement that interest is payable and of the rate of interest.
- (3) A barrister or solicitor may also charge interest on the unpaid costs for legal services in accordance with a costs agreement.
- (4) A barrister or solicitor may not charge interest under this section or under a costs agreement at a rate that exceeds:
 - (a) except as provided by paragraph (b)—the rate prescribed under the *Supreme Court Act 1970* in respect of unpaid judgments of the Supreme Court, or
 - (b) the rate prescribed by the regulations.

191 Security for costs

A barrister or solicitor may take from a client security for the costs of providing legal services to the client.

192 Bill of costs to be given before costs can be recovered from client

- (1) Proceedings for the recovery of costs by a barrister or solicitor for providing legal services must not be commenced or maintained against any person unless at least 30 days have passed since a bill for those costs was given to the person in accordance with this Division.
- (2) The Supreme Court may make an order authorising a barrister or solicitor to commence or maintain proceedings against a person sooner, if the Supreme Court is satisfied that the person is about to leave New South Wales.

193 Form of bill of costs

- (1) The regulations may make provision for or with respect to the form of, and the particulars to be included in, bills of costs.
- (2) A bill of costs may be described as a memorandum of fees or in any other way authorised by the regulations.

194 Signing of bill of costs

- (1) A bill of costs must be signed by the barrister or by the solicitor, or by his or her partner or employee. It is sufficient compliance with this section if a letter that is so signed is attached to, or enclosed with, the bill of costs.
- (2) A bill of costs is taken to have been signed by a solicitor (if it relates to legal services provided by an incorporated legal practice) if it has the corporation's seal affixed to it or is signed by a director of the corporation or by an officer or employee of the corporation who is a solicitor.

195 Delivery of bill of costs

A bill of costs may be given to a person in any one of the following ways:

- (a) by delivering it personally to the person,
- (b) by sending it by post to, or by leaving it for the person at, the person's place of business or residence last known to the barrister or solicitor,
- (c) 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,
- (d) by delivering it to the appropriate place in a document exchange in which the person has receiving facilities,
- (e) in any other way authorised by the regulations.

Division 5 Costs fixed by regulations

196 Regulations to provide for related costs

- (1) The regulations may make provision for or with respect to the following:
 - (a) fixing fair and reasonable costs for legal services provided in any workers compensation matter,
 - (a2) fixing the costs payable for legal services provided in connection with any claim for personal injury damages (within the meaning of the *Civil Liability Act 2002*),
 - (b) fixing the costs payable for the enforcement of a lump sum debt or liquidated sum for damages,
 - (b1) fixing the costs payable for the enforcement of a judgment by a judgment creditor,
 - (b2) fixing the costs payable for legal services provided in respect of probate or the administration of estates,
 - (c) fixing an amount of costs for a matter that is not a legal service but is related to proceedings (for example, expenses for witnesses).
- (2) A barrister or solicitor is not entitled to be paid or recover for a legal service an amount that exceeds the fair and reasonable cost fixed for the service by the regulations under this section.

Note. Amounts fixed for matters that are not legal services may be taken into account by a costs assessor in assessing costs under this Part.

197 Regulations to provide for amounts of costs passed on to other parties

- (1) This section applies to a legal service of a kind prescribed by the regulations for the purposes of this section.
- (2) The regulations may make provision for or with respect to fixing the fair and reasonable cost for any such legal service provided by a barrister or solicitor.
- (3) A barrister or solicitor is not entitled to recover for any such legal service an amount that exceeds the fair and reasonable cost so fixed if:
 - (a) liability to pay the cost of the legal service has been passed on by the client of the barrister or solicitor to a person who is not entitled to apply for an assessment of the cost under this Part, and
 - (b) the barrister or solicitor is seeking to recover the cost from that person.

198 Provisions relating to regulations generally

- (1) The regulations may fix a cost under this Division for a particular legal service, for a class of legal services or for any part of a legal service.
- (2) The regulations may fix a cost under this Division:
 - (a) as a gross amount for legal services, or
 - (b) as an amount for specified elements in the legal services provided (for example, documents prepared), or
 - (c) in any other manner.

Division 5A Mediation of costs Disputes

198A Costs dispute

For the purposes of this Division, a **costs dispute** is a dispute between a client and a legal practitioner or interstate legal practitioner concerning a bill of costs.

Referral for mediation

- (1) A client who is given a bill of costs may refer a costs dispute about the bill of costs to the Commissioner or to a Council for mediation if the amount in dispute is less than \$2,500.
- (2) The Manager, Costs Assessment may refer a costs dispute about a bill of costs to the Commissioner if the amount in dispute is less than \$2,500.
- (3) A costs dispute about a bill of costs may be referred under this section at any time before an application for an assessment of the whole or part of a bill of costs is accepted by the Manager, Costs Assessment.
- (4) 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.

Division 5B Maximum costs in personal injury damages matters

198C Interpretation and application

(1) In this Division:

defendant means a person against whom a claim for personal injury damages is or may be made.

party means plaintiff or defendant.

personal injury damages has the same meaning as in Part 2 of the Civil Liability Act 2002.

plaintiff means a person who makes or is entitled to make a claim for personal injury damages.

(2) This Division does not apply to the following costs:

(a) costs payable to an applicant for compensation under Part 2 of the Victims Support and Rehabilitation Act 1996 in respect of the application for compensation,

(b) costs for legal services provided in respect of a claim under the Motor Accidents Act 1988 or Motor Accidents Compensation Act 1999,

(c) costs for legal services provided in respect of a claim for work injury damages (as defined in the Workplace Injury Management and Workers Compensation Act 1998),

(d) costs for legal services provided in respect of a claim for damages in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the Dust Diseases Tribunal Act 1989.

198D Maximum costs fixed for claims up to \$100,000

(1) If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:

(a) in the case of legal services provided to a plaintiff maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,

(b) in the case of legal services provided to a defendant maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.

(2) The regulations may prescribe an amount to replace the amount of \$100,000 or \$10,000 in subsection (1) and may prescribe a percentage to replace the percentage of 20% in subsection (1). When such a replacement amount or percentage is prescribed, it applies for the purposes of subsection (1) in place of the amount or percentage that it replaces.

(3) The regulations may contain provisions of a savings or transitional nature consequent on the making of regulations under this section.

(4) When the maximum costs for legal services provided to a party are fixed by this Division the following provisions apply (subject to sections 198E–198G):

- (a) a solicitor or barrister is not entitled to be paid or recover for those legal services an amount that exceeds those maximum costs,
 - (b) a court or tribunal cannot order the payment by another party to the claim of costs in respect of those legal services in an amount that exceeds that maximum,
 - (c) in assessing the amount of those costs that is a fair and reasonable amount, a costs assessor cannot determine an amount that exceeds the maximum set by this section.
- (5) A reference in this Division to legal services provided to a party is a reference to legal services provided to the party by a solicitor or barrister (including by an agent or employee of the solicitor or barrister). Costs for legal services do not include costs charged as disbursements for services provided by any other person or other disbursements.
- (6) If proceedings are commenced on a claim, the amount sought to be recovered by the plaintiff is taken to be the amount sought to be proved by the plaintiff at the hearing of the claim.
- (7) Maximum costs fixed by this section apply despite regulations under section 196 (1) (a2) fixing those costs.

198E Maximum costs do not affect solicitor-client costs under costs agreements

- (1) This Division does not apply to the recovery of costs payable as between a solicitor or barrister and the solicitor's or barrister's client to the extent that recovery of those costs is provided for by a costs agreement that complies with Division 3.
- (2) The regulations may make provision for or with respect to requiring disclosure by a solicitor or barrister to the solicitor's or barrister's client of information in relation to the effect of a costs agreement in connection with the operation of this Division.
- (3) The regulations may provide that a failure by a solicitor or barrister to comply with the requirements of the regulations under this section disentitles the solicitor or barrister to the benefit of this section, and in such a case this Division applies in respect of the claim concerned despite the terms of any costs agreement.

198F Costs can be awarded on indemnity basis for costs incurred after failure to accept offer of compromise

- (1) If a party to a claim for personal injury damages makes a reasonable offer of compromise on the claim that is not accepted, this Division does not prevent the awarding of costs against another party to be assessed on an indemnity basis in respect of legal services provided after the offer is made.
- (2) An offer of compromise on a claim by a party is **reasonable** if the court determines or makes an order or award on the claim in terms that are no less favourable to the party than the terms of the offer.
- (3) The regulations may make provision for or with respect to requiring disclosure by a solicitor or barrister to the solicitor's or barrister's client of information in relation to the operation of this section in respect of any refusal by the client to accept an offer of compromise.
- (4) If it appears to the court in which proceedings are taken on a claim for damages that a solicitor or barrister has failed to comply with any provision of the regulations under this section, and that the client of the solicitor or barrister has incurred an increased

liability for costs as a result of refusing a reasonable offer of compromise in connection with the claim concerned, the court may of its own motion or on the application of the client make either or both of the following orders:

- (a) an order directing the solicitor or barrister to repay to the client the whole or any part of those increased costs that the client has been ordered to pay to any other party,
- (b) an order directing the solicitor or barrister to indemnify any party other than the client against the whole or any part of the costs payable by the party indemnified in respect of legal services provided after the offer is refused.

198G Court may order certain legal services to be excluded from maximum costs limitation

A court hearing a claim for personal injury damages may by order exclude from the operation of this Division legal services provided to a party to the claim if the court is satisfied that the legal services were provided in response to any action on the claim by or on behalf of the other party to the claim that in the circumstances was not reasonably necessary for the advancement of that party's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim.

198H Apportionment of maximum costs between solicitors and barristers

- (1) If more than one person (solicitor or barrister) provides legal services to a party in connection with a claim, the maximum costs fixed by this Division are to be apportioned between them as agreed by them or (failing agreement) as ordered by the court hearing proceedings on the claim.
- (2) The maximum then applicable to a particular solicitor or barrister is the solicitor's or barrister's apportioned share of those maximum costs.

198I Meaning of "amount recovered" on a claim

- (1) A reference in this Division to the amount recovered on a claim includes any amount paid under a compromise or settlement of the claim (whether or not legal proceedings have been instituted).
- (2) In determining the amount recovered on a claim for personal injury damages, no regard is to be had to any part of the amount recovered that is attributable to costs or to the addition of interest.

Division 5C Costs in civil claims where no reasonable prospects of success

198J Solicitor or barrister not to act unless there are reasonable prospects of success

- (1) A solicitor or barrister must not provide legal services on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (2) A fact is **provable** only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
- (3) This Division applies despite any obligation that a solicitor or barrister may have to act in accordance with the instructions or wishes of his or her client.

- (4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.
- (5) Provision of legal services in contravention of this section constitutes for the purposes of this Division the provision of legal services ***without reasonable prospects of success***.

198K Preliminary legal work not affected

This Division does not apply to legal services provided as a preliminary matter for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.

198L Restrictions on commencing proceedings without reasonable prospects of success

- (1) The provision of legal services without reasonable prospects of success does not constitute an offence but is capable of being professional misconduct or unsatisfactory professional conduct.
- (2) A solicitor or barrister cannot file court documentation on a claim or defence of a claim for damages unless the solicitor or barrister certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (3) Court documentation on a claim or defence of a claim for damages is not to be accepted for lodgment unless accompanied by the certification required by this section. Rules of court may make provision for or with respect to the form of that certification.

- (4) In this section:

court documentation means:

- (a) a statement of claim, summons, cross-claim, defence or further pleading, or
- (b) an amended statement of claim, summons, cross-claim, defence or further pleading, or
- (c) a document amending a statement of claim, summons, cross-claim, defence or further pleading, or
- (d) any other document of a kind prescribed by the regulations.

cross-claim includes counter-claim and cross-action.

198M Costs order against solicitor or barrister who acts without reasonable prospects of success

- (1) If it appears to a court in which proceedings are taken on a claim for damages that a solicitor or barrister has provided legal services to a party without reasonable prospects of success, the court may of its own motion or on the application of any party to the proceedings make either or both of the following orders in respect of the solicitor or barrister who provided the services:

- (a) an order directing the solicitor or barrister to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,
 - (b) an order directing the solicitor or barrister to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified.
- (2) The Supreme Court may on the application of any party to proceedings on a claim for damages make any order that the court in which proceedings on the claim are taken could make under this section.
- (3) An application for an order under this section cannot be made after a final determination has been made under this Part by a costs assessor of the costs payable as a result of an order made by the court in which the proceedings on the claim concerned were taken.
- (4) A solicitor or barrister is not entitled to demand, recover or accept from his or her client any part of the amount for which the solicitor or barrister is directed to indemnify a party pursuant to an order under this section.

198N Onus on solicitor or barrister to show facts provided reasonable prospects of success

- (1) If the court (*the trial court*) hearing proceedings on a claim for damages finds that the facts established by the evidence before the court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Division that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
- (2) If the Supreme Court (when the Supreme Court is not the trial court) is satisfied, either as a result of a finding of the trial court or otherwise on the basis of the judgment of the trial court, that the facts established by the evidence before the trial court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Division that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
- (3) A presumption arising under this section is rebuttable and a solicitor or barrister who seeks to rebut it bears the onus of establishing that at the time legal services were provided there were provable facts (as provided by section 198J) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success.
- (4) A solicitor or barrister may, for the purpose of establishing that at the time legal services were provided there were provable facts (as provided by section 198J) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success, produce information or a document despite any duty of confidentiality in respect of a communication between the solicitor or barrister and a client, but only if:
- (a) the client is the client to whom the legal services were provided or consents to its disclosure, or
 - (b) the court is satisfied that it is necessary for the solicitor or barrister to do so in order to rebut a presumption arising under this section.

Division 6 Assessment of costs

Subdivision 1 Applications and referrals for assessment

199 Applications by clients for assessment of costs in bills

- (1) A client who is given a bill of costs may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs.
- (2) An application relating to a bill of costs may be made even if the costs have been wholly or partly paid. If the costs have been wholly or partly paid, the application is to be made within the period prescribed by the regulations for the purposes of this subsection.
- (3) If any costs have been paid without a bill of costs, the client may nevertheless apply for an assessment. For that purpose the request for payment by the barrister or solicitor is taken to be the bill of costs.
- (4) In this section, *client* includes:
 - (a) any person who is a party to a costs agreement relating to legal services for which the bill of costs is given (other than the barrister or solicitor who gave the bill or provided the services), and
 - (b) any person, being a lessee under a lease, who is given a bill of costs, concerning legal services relating to the preparation of that lease, by a barrister or solicitor acting on behalf of the lessor, and
 - (c) any person, being a mortgagor under a mortgage, who is given a bill of costs, concerning legal services relating to the preparation of that mortgage, by a barrister or solicitor acting on behalf of the mortgagee.

200 Applications by instructing practitioners for assessment of costs in bills

- (1) A barrister or solicitor who retains another barrister or solicitor to act on behalf of a client may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, a bill of costs given in accordance with this Part by the other barrister or solicitor in relation to the matter.
- (2) An application may not be made if there is a costs agreement between the client and the other barrister or solicitor.
- (3) An application is to be made within 30 days after the bill of costs is given, or within such further time as the Manager, Costs Assessment may allow, and may be made even if the costs have been wholly or partly paid.
- (4) Further time is to be allowed as referred to in subsection (3) only if the Manager, Costs Assessment is satisfied that the bill of costs was received more than 7 days after it was given and that it would be impracticable for an application to be made under this section unless further time were allowed.

201 Application for assessment of costs by barrister or solicitor giving bill

- (1) A barrister or solicitor who has given a bill of costs in accordance with this Part may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs.

- (2) An application may not be made unless at least 30 days have passed since the bill of costs was given or an application has been made under this Division by another person in respect of the bill of costs.

202 Application for assessment of party/party costs

- (1) A person who has paid or is liable to pay, or who is entitled to receive or who has received, costs as a result of an order for the payment of an unspecified amount of costs made by a court or a tribunal may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs.
- (2) A court or tribunal may direct the Manager, Costs Assessment to refer for assessment costs payable as a result of an order made by the court or tribunal. Any such direction is taken to be an application for assessment duly made under this Division.
- (3) An application or direction under this section may not be made in relation to costs arising out of criminal proceedings in a court.
- (4) Subsection (3) does not affect regulations made for the purposes of section 52 of the Land and Environment Court Act 1979 in connection with criminal proceedings in the Land and Environment Court.

Note. Matters may also be referred to costs assessors by the Legal Services Commissioner or a Council under Part 10.

203 How is an application to be made?

- (1) An application for assessment is to be made in accordance with the regulations and is, subject to subsection (4), to be accompanied by the fee prescribed by the regulations.
- (2) The application must authorise a costs assessor to have access to, and to inspect, all documents of the applicant that are held by the applicant, or by any barrister or solicitor concerned, in respect of the matter to which the application relates.
- (3) The application must contain a statement by the applicant that there is no reasonable prospect of settlement of the matter by mediation.
- (4) The Manager, Costs Assessment may waive or postpone payment of the fee either wholly or in part if satisfied that the applicant is in such circumstances that payment of the fee would result in serious hardship to the applicant or his or her dependants.
- (5) The Manager, Costs Assessment may refund the fee paid under this section either wholly or in part if satisfied that it is appropriate because the application is not proceeded with

204 Persons to be notified of application

The Manager, Costs Assessment is to take such steps as are reasonably practicable to provide a copy of an application for assessment to any barrister, solicitor or client concerned or any other person whom the Manager, Costs Assessment thinks it appropriate to notify.

205 (Repealed)

206 Referral of matters to costs assessors

- (1) The Manager, Costs Assessment is to refer each application for assessment to a costs assessor to be dealt with under this Division.
- (2) A costs assessor who has an interest in an application must, as soon as practicable after becoming aware of that fact, refer the application to the Manager, Costs Assessment for referral to another costs assessor.
- (3) 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.
- (4) An application that has been referred to another costs assessor under this section is to be dealt with as a new assessment or, if the Manager, Costs Assessment so directs, by continuing the assessment.
- (5) When a referral has been revoked, the costs assessor to whom the application was initially referred must return all documents relating to the assessment of the application to the Manager, Costs Assessment. This includes documents relating to any work done on the assessment and a statement of the amount calculated for costs in respect of any work done on the assessment.

207 Costs assessor may require documents or further particulars

- (1) A costs assessor may, by notice in writing, require a person (including the applicant, the barrister or solicitor concerned, or any other barrister, solicitor or client) to produce any relevant documents of or held by the person in respect of the matter.
- (2) The costs assessor may, by any such notice, require further particulars to be furnished by the applicant, barrister, solicitor, client or other person as to instructions given to, or work done by, the barrister or solicitor or any other legal practitioner in respect of the matter and as to the basis on which costs were ascertained.
- (2A) If the notice referred to in subsection (1) or (2) so directs, and if it is practicable for the person to whom the notice is given to comply with such a direction, the document or particulars required by the notice must be provided in electronic form in addition to, or instead of, in paper form (as the notice may specify).
- (3) The costs assessor may require any such particulars to be verified by statutory declaration.
- (4) A notice under this section is to specify the period within which the notice is to be complied with.
- (5) If a person fails, without reasonable excuse, to comply with a notice under this section, the costs assessor may decline to deal with the application or may continue to deal with the application on the basis of the information provided.
- (6) A barrister or solicitor who fails, without reasonable excuse, to comply with a notice under this section is guilty of professional misconduct.

Consideration of applications by costs assessors

- 208** (1) A costs assessor must not determine an application for assessment unless the costs assessor:

- (a) has given both the applicant and any barrister, solicitor or client or other person concerned a reasonable opportunity to make written submissions to the costs assessor in relation to the application, and
 - (b) has given due consideration to any submissions so made.
- (2) In considering an application, a costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit.
- (3) For the purposes of determining whether an application for assessment may be or is required to be made, or for the purpose of exercising any other function, a costs assessor may determine any of the following:
- (a) whether or not disclosure has been made in accordance with Division 2 and whether or not it was reasonably practicable to disclose any matter required to be disclosed under Division 2,
 - (b) whether a costs agreement exists, and its t

Subdivision 2 Assessments of bills of costs

208A Assessment of bills generally

- (1) When considering an application relating to a bill of costs, the costs assessor must consider:
- (a) whether or not it was reasonable to carry out the work to which the costs relate, and
 - (b) whether or not the work was carried out in a reasonable manner, and
 - (c) the fairness and reasonableness of the amount of the costs in relation to that work.
- (2) A costs assessor is to determine the application by confirming the bill of costs or, if the assessor is satisfied that the disputed costs are unfair or unreasonable, by substituting for the amount of the costs an amount that, in his or her opinion, is a fair and reasonable amount.
- (3) Any amount substituted for the amount of the costs may include an allowance for any fee paid or payable for the application by the applicant.
- (4) If the barrister or solicitor is liable under section 182 (3) to pay the costs of the costs assessment (including the costs of the costs assessor), the costs assessor is to determine the amount of those costs. The costs incurred by the client are to be deducted from the amount payable under the bill of costs and the costs of the costs assessor are to be paid to the Manager, Costs Assessment.
- (5) A costs assessor may not determine that any part of a bill of costs that is not the subject of an application is unfair or unreasonable.

208B Additional matters to be considered by costs assessors in assessing bills of costs

In assessing what is a fair and reasonable amount of costs, a costs assessor may have regard to any or all of the following matters:

- (a) whether the barrister or solicitor complied with any relevant regulation, barristers rule, solicitors rule or joint rule,
- (b) whether the barrister or solicitor disclosed the basis of the costs or an estimate of the costs under Division 2 and any disclosures made,
- (c) any relevant advertisement as to the barrister's or solicitor's costs or skills,
- (d) any relevant costs agreement (subject to section 208C),
- (e) the skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter,
- (f) the instructions and whether the work done was within the scope of the instructions,
- (g) the complexity, novelty or difficulty of the matter,
- (h) the quality of the work done,
- (i) the place where and circumstances in which the legal services were provided,
- (j) the time within which the work was required to be done.

208C Costs agreements not subject to assessment

- (1) A costs assessor is to decline to assess a bill of costs if:
 - (a) the disputed costs are subject to a costs agreement that complies with Division 3, and
 - (b) the costs agreement specifies the amount of the costs or the dispute relates only to the rate specified in the agreement for calculating the costs.
- (2) If the dispute relates to any other matter, costs are to be assessed on the basis of that specified rate despite section 208A. The costs assessor is bound by a provision for the payment of a premium that is not determined to be unjust under section 208D.
- (3) This section does not apply to any provision of a costs agreement that the costs assessor determines to be unjust under section 208D.
- (4) This section does not apply to a costs agreement applicable to the costs of legal services if a barrister or solicitor failed to make a disclosure in accordance with Division 2 of the matters required to be disclosed by section 175 or 176 in relation to those costs.

208D Unjust costs agreements

- (1) A costs assessor may determine whether a term of a particular costs agreement entered into by a barrister or solicitor and a client is unjust in the circumstances relating to it at the time it was made.
- (2) For that purpose, the costs assessor is to have regard to the public interest and to all the circumstances of the case and may have regard to:
 - (a) the consequences of compliance, or non-compliance, with all or any of the provisions of the agreement, and
 - (b) the relative bargaining power of the parties, and

- (c) whether or not, at the time the agreement was made its provisions were the subject of negotiation, and
 - (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the agreement, and
 - (e) whether or not any of the provisions of the agreement impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the agreement, and
 - (f) whether or not any party to the agreement was reasonably able to protect his or her interests because of his or her age or physical or mental condition, and
 - (g) the relative economic circumstances, educational background and literacy of the parties to the agreement and of any person who represented any of the parties to the agreement, and
 - (h) the form of the agreement and the intelligibility of the language in which it is expressed, and
 - (i) the extent to which the provisions of the agreement and their legal and practical effect were accurately explained to the applicant and whether or not the applicant understood those provisions and their effect, and
 - (j) whether the barrister or solicitor or any other person exerted or used unfair pressure, undue influence or unfair tactics on the applicant and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics.
- (3) For the purposes of this section, a person is taken to have represented a person if the person represented the other person, or assisted the other person to a significant degree, in the negotiations process up to, or at, the time the agreement was made.
- (4) In determining whether a provision of the agreement is unjust, the costs assessor is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the agreement was made.

208E Interest on amount outstanding

- (1) A costs assessor may, in an assessment, determine that interest is not payable on the amount of costs assessed or on any part of that amount and determine the rate of interest (not exceeding the rate referred to in section 190 (4)).
- (2) This section applies despite any costs agreement or section 190.
- (3) This section does not authorise the giving of interest on interest.
- (4) This section does not apply to or in respect of the assessment of costs referred to in Subdivision 3 (party/party costs).

Subdivision 3 Assessment of party/party costs

208F Assessment of costs—costs ordered by court or tribunal

- (1) When dealing with an application relating to costs payable as a result of an order made by a court or a tribunal, the costs assessor must consider:
 - (a) whether or not it was reasonable to carry out the work to which the costs relate, and

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

- (1A) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs.
- (2) A costs assessor is to determine the costs payable as a result of the order by assessing the amount of the costs that, in his or her opinion, is a fair and reasonable amount.
- (3) If a court or a tribunal has ordered that costs are to be assessed on an indemnity basis, the costs assessor must assess the costs on that basis, having regard to any relevant rules of the court or tribunal.
- (4) The costs assessed are to include the costs of the assessment (including the costs of the parties to the assessment, and the costs assessor). The costs assessor may determine by whom and to what extent the costs of the assessment are to be paid.
- (5) The costs of the costs assessor are to be paid to the Manager, Costs Assessment.

Note. Section 208JA provides for the recovery of the costs of a costs assessor.

208G Additional matters to be considered by costs assessors in assessing costs ordered by court or tribunal

In assessing what is a fair and reasonable amount of costs, a costs assessor may have regard to any or all of the following matters:

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

208H Effect of costs agreements in assessments of party/party costs

- (1) A costs assessor may obtain a copy of, and may have regard to, a costs agreement.
- (2) However, a costs assessor must not apply the terms of a costs agreement for the purposes of determining appropriate fair and reasonable costs when assessing costs payable as a result of an order by a court or tribunal.

208I Court or tribunal may specify amount etc

This Division does not limit any power of a court or a tribunal to determine in any particular case the amount of costs payable or that the amount of the costs is to be determined on an indemnity basis.

Subdivision 4 Enforcement of assessment

208J Certificate as to determination

- (1) On making a determination, a costs assessor is to issue to each party a certificate that sets out the determination.
- (1A) A costs assessor may issue more than one certificate in relation to an application for costs assessment. Such certificates may be issued at the same time or at different stages of the assessment process.
- (2) In the case of an amount of costs that has been paid, the amount (if any) by which the amount paid exceeds the amount specified in any such certificate may be recovered as a debt in a court of competent jurisdiction.
- (3) In the case of an amount of costs that has not been paid, the certificate 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, and the rate of any interest payable in respect of that amount of costs is the rate of interest in the court in which the certificate is filed.
- (4) For this purpose, the amount of unpaid costs does not include the costs incurred by a costs assessor in the course of a costs assessment.
- (4A) To avoid any doubt, this section applies to or in respect of both the assessment of costs referred to in Subdivision 2 of this Division (practitioner/client costs) and the assessment of costs referred to in Subdivision 3 of this Division (party/party costs).
- (5) If the costs of the costs assessor are payable by a party to the assessment (as referred to in section 208JA), the costs assessor may refuse to issue a certificate relating to his or her determination under this section until the costs of the costs assessor have been paid.
- (6) Subsection (5) does not apply:
 - (a) in respect of a certificate issued before the completion of the assessment process under subsection (2), or
 - (b) in such circumstances as may be prescribed by the regulations.

208JAA Reasons for determination

- (1) A costs assessor must ensure that a certificate issued under section 208J that sets out his or her determination is accompanied by:
 - (a) a statement of the reasons for the costs assessor's determination, and
 - (b) such supplementary information as may be required by the regulations.
- (2) The statement of reasons must be given in accordance with the regulations.

208JA Recovery of costs of costs assessment

- (1) This section applies when the costs of a costs assessor or Manager, Costs Assessment are payable by a party to the assessment (under section 182 (3), 208A (4) or 208F (4)).
- (2) On making a determination, a costs assessor may issue to each party a certificate that sets out the costs incurred by the costs assessor or Manager, Costs Assessment in the course of the costs assessment.

- (3) If the application for costs assessment has been dealt with by more than one costs assessor, the certificate can set out the costs of any other costs assessor.
- (4) The certificate 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.
- (5) The Manager, Costs Assessment may take action to recover the costs of a costs assessor or Manager, Costs Assessment.

208JB Correction of error in determination

- (1) At any time after making a determination, a costs assessor may, for the purpose of correcting an inadvertent error in the determination:
 - (a) make a new determination in substitution for the previous determination, and
 - (b) issue a certificate under section 208J that sets out the new determination.
- (2) Such a certificate replaces any certificate setting out the previous determination of the costs assessor that has already been issued by the costs assessor, and, on the filing of the replacement certificate in the office or registry of a court having jurisdiction to order the payment of the amount of the new determination, any judgment that is taken to have been effected by the filing of that previously issued certificate is varied accordingly.

208K Determination to be final

A costs assessor's determination of an application is binding on all parties to the application and no appeal or other review lies in respect of the determination, except as provided by this Division.

Subdivision 4A Review of determination by panel

208KA Application for review of determination

- (1) A party to an assessment who is dissatisfied with a determination of a costs assessor may, within 28 days after the issue of the certificate under section 208J that sets out the determination of the costs assessor or within such further time as the Manager, Costs Assessment may allow, apply to the Manager, Costs Assessment for a review of the determination.
- (1A) Further time is to be allowed as referred to in subsection (1) only if the Manager, Costs Assessment is satisfied that the determination of the costs assessor was received more than 7 days after the relevant certificate under section 208J was issued and that it would be impracticable for an application to be made under this section unless further time were allowed.
- (2) The application must:
 - (a) be made in accordance with the regulations, and
 - (b) be accompanied by the fee prescribed by the regulations.
- (3) The Manager, Costs Assessment may waive or postpone payment of the fee either wholly or in part if satisfied that the applicant is in such circumstances that payment of the fee would result in serious hardship to the applicant or his or her dependants.

- (4) The Manager, Costs Assessment may refund the fee paid under this section either wholly or in part if satisfied that it is appropriate because the application is not proceeded with.
- (5) A party who applies for a review under this Subdivision must ensure that notice of the application is given to the other parties to the assessment not less than 7 days before the application is made or as prescribed by the regulations.

208KB Referral of application to panel

- (1) If an application for a review under this Subdivision is duly made, the Manager, Costs Assessment is to refer the application to a panel.
- (2) The panel is to be constituted by 2 costs assessors.

208KC General functions of panel in relation to review application

- (1) A panel constituted under this Subdivision may review the determination of the costs assessor and may:
 - (a) affirm the costs assessor's determination, or
 - (b) set aside the costs assessor's determination and substitute such determination in relation to the costs assessment as, in their opinion, should have been made by the costs assessor who made the determination that is the subject of the review.
- (2) For the purposes of subsection (1), the panel has, in relation to the application for review, all the functions of a costs assessor under this Part and is to determine the application, subject to this Subdivision and the regulations, in the manner that a costs assessor would be required to determine an application for costs assessment.
- (3) However, the review is to be conducted on the evidence that was received by the costs assessor who made the determination that is the subject of the review and, unless the panel determines otherwise, the panel is not:
 - (a) to receive submissions from the parties to the assessment, or
 - (b) to receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor.
- (4) If the costs assessors who constitute the panel are unable to agree on a determination in relation to an application, the panel is to affirm the determination of the costs assessor who made the determination that is the subject of the review.

208KD Relevant documents to be produced to panel

- (1) A panel constituted under this Subdivision may, by notice in writing, require a costs assessor, a barrister or solicitor or any other person (such as an applicant) to produce to the panel any document in his or her possession relating to an assessment of costs by a costs assessor.
- (2) If a person fails, without reasonable excuse, to comply with a notice under this section, the panel may decline to deal with an application for review or may continue to deal with it on the basis of the information provided.
- (3) A costs assessor is to retain in his or her possession any document relating to a costs assessment (other than a document that is returned to a party to the assessment) until:

- (a) the period of 2 months has elapsed since the issue of a certificate under section 208J setting out the determination of the costs assessor, or
 - (b) the costs assessor receives a notice under subsection (1) in relation to the document,

whichever happens first.
- (4) A barrister or solicitor is to retain in his or her possession any document relating to a costs assessment that is returned to the barrister or solicitor by the costs assessor until:
- (a) the period of 2 months has elapsed since the issue of a certificate under section 208J setting out the determination of the costs assessor, or
 - (b) the barrister or solicitor receives a notice under subsection (1) in relation to the document,

whichever happens first.
- (5) A barrister or solicitor who fails, without reasonable excuse, to comply with this section or a notice under this section is guilty of professional misconduct.

208KE Effect of review on costs assessor's determination

- (1) If the Manager, Costs Assessment refers a determination of a costs assessor to a panel for review under this Subdivision, the operation of that determination is suspended.
- (2) The panel may end such a suspension:
 - (a) if it affirms the determination of the costs assessor, or
 - (b) in such other circumstances as it considers appropriate.

208KF Certificate as to determination of panel

- (1) On making a determination in relation to an application for review of a costs assessment under this Subdivision, a panel is to issue to each party concerned a certificate that sets out the determination.
- (2) If the panel sets aside the determination of the costs assessor, the following provisions apply:
 - (a) if the amount of costs has already been paid, the amount (if any) by which the amount paid exceeds the amount specified in the determination of the panel may be recovered in a court of competent jurisdiction,
 - (b) if the amount of costs has not been paid, the certificate is, on filing of the certificate in the office or registry of a court having competent 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,
 - (c) if the costs assessor issued a certificate in relation to his or her determination under section 208J:
 - (i) the certificate ceases to have effect, and

- (ii) any judgment that is taken to have been effected in relation to that certificate also ceases to have effect, and
 - (iii) any enforcement action taken in respect of that judgment is to be reversed.
- (3) If the panel sets aside the costs assessor's determination, any amount substituted by the panel may include an allowance for any fee paid or payable for the application for review by the applicant or for any amount paid or payable for the costs of the costs assessor by a party to the assessment.
 - (4) If the costs of the panel are payable by a person (as required by section 208KH), the panel may refuse to issue a certificate relating to its determination under this section until those costs have been paid.
 - (5) Subsection (4) does not apply in such circumstances as may be prescribed by the regulations.

208KG Reasons for determination

- (1) The panel must ensure that a certificate issued under section 208KF that sets out the determination of the panel is accompanied by:
 - (a) a statement of the reasons for the panel's determination, and
 - (b) such supplementary information, in relation to the determination, as may be required by the regulations.
- (2) The statement of reasons must be given in accordance with the regulations.

208KH Recovery of costs of review

- (1) A panel that conducts a review of a costs assessor's determination under this Subdivision is to determine the costs of the review and may, subject to this section, determine by whom and to what extent those costs are to be paid.
- (2) If the panel affirms the determination of the costs assessor, the panel is to require the party who applied for the review to pay the costs of the review.
- (3) If the panel sets aside the determination of the costs assessor, and makes a determination in favour of the party who applied for review, the panel is to require the party who applied for the review to pay the costs of the review if the determination of the panel increases or decreases the total costs payable (as assessed by the costs assessor) by an amount that is less than 15 per cent (or such other percentage as may be prescribed by the regulations) of the total costs payable as assessed by the costs assessor.
- (4) Subject to subsections (2) and (3), the panel may require any party to the assessment that is reviewed to pay the costs of the review or may determine that the costs of the review are to be shared between the parties in any manner that the panel considers appropriate.
- (5) The panel may issue to each party a certificate that sets out the panel's determination under this section.
- (6) The certificate is, on 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 of the review.

- (7) The costs of the review are to be paid to the Manager, Costs Assessment.
- (8) The Manager, Costs Assessment may take action to recover the costs of a review.
- (9) Regulations may be made with respect to determinations of a panel under this section.
- (10) In this section:

costs of a review means the costs incurred by the panel or the Manager, Costs Assessment in the course of a review under this Subdivision, and includes the costs related to the remuneration of the costs assessors who constitute the panel.

208KHA Correction of error in determination

- (1) At any time after making a determination, a panel that conducts a review may, for the purpose of correcting an inadvertent error in the determination:
 - (a) make a new determination in substitution for the previous determination, and
 - (b) issue a certificate under section 208KF that sets out the new determination of the panel.
- (2) Such a certificate replaces any certificate setting out the previous determination of the panel that has already been issued by the panel, and, on the filing of the replacement certificate in the office or registry of a court having jurisdiction to order the payment of the amount of the new determination, any judgment that is taken to have been effected by the filing of that previously issued certificate is varied accordingly.

208KI Appeal against determination

- (1) Subdivision 4B applies in relation to a decision or determination of a panel under this Subdivision as if references in Subdivision 4B to a costs assessor were references to the panel.
- (2) Subject to subsection (1), the panel's determination of an application for review of a costs assessor's determination is binding on all parties to the assessment that is the subject of a review and no appeal or other review lies in respect of the determination.

208KJ Regulations

The Regulations may make provision for or with respect to reviews under this Subdivision, including the constitution and membership of a panel and the procedure for conducting reviews.

208KL Miscellaneous

For avoidance of doubt, sections 208SA and 208T extend to a costs assessor in respect of the exercise of his or her functions as a member of a panel constituted under this Subdivision.

Subdivision 4B Appeals

208L Appeal against decision of costs assessor as to matter of law

- (1) A party to an application who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in

accordance with the rules of the Supreme Court, appeal to the Court against the decision.

- (2) After deciding the question the subject of the appeal, the Supreme Court may, unless it affirms the costs assessor's decision:
 - (a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or
 - (b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.
- (3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

208M Appeal against decision of costs assessor by leave

- (1) A party to an application relating to a bill of costs may, in accordance with the rules of the Supreme Court, seek leave of the Court to appeal to the Court against the determination of the application made by a costs assessor.
- (2) A party to an application relating to costs payable as a result of an order made by a court or a tribunal may, in accordance with the rules of the court or tribunal, seek leave of the court or tribunal to appeal to the court or tribunal against the determination of the application made by a costs assessor.
- (3) The Supreme Court or court or tribunal may, in accordance with its rules, grant leave to appeal and may hear and determine the appeal.
- (4) An appeal is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.
- (5) After deciding the questions the subject of the appeal, the Supreme Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor.

208N Effect of appeal on application

- (1) If a party to an application has appealed against a determination or decision of a costs assessor, either the costs assessor or the court or tribunal to which the appeal is made may suspend, until the appeal is determined, the operation of the determination or decision.
- (2) The costs assessor or the court or tribunal may end a suspension made by the costs assessor. The court or tribunal may end a suspension made by the court or tribunal.

208NA Assessor can be a party to appeal

A costs assessor can be made a party to any appeal against a determination or decision of the costs assessor only by the Supreme Court.

208NB Notices of appeal

A copy of every notice of appeal against a determination or decision of a costs assessor must be served on the Manager, Costs Assessment by the party making the appeal.

208NC Court may refer unreviewed determination to review panel

- (1) If an appeal is made under section 208M against a determination of a costs assessor and the determination to which the appeal relates has not been reviewed by a panel in accordance with Subdivision 4A, the court or tribunal to which the appeal is made may refer the appeal to the Manager, Costs Assessment for a review by a panel under that Subdivision.
- (2) For the purposes of Subdivision 4A, the referral of an appeal by a court or tribunal under subsection (1) to the Manager, Costs Assessment is taken to be a duly made application for a review under that Subdivision.

Subdivision 5 Miscellaneous

208O Costs fixed by regulations

- (1) An assessment of costs fixed by a regulation under section 196 (1) (a), (a2), (b), (b1) or (b2) or 197 is to be made in accordance with that regulation.
- (1A) An assessment of costs fixed by a regulation under section 149 of the *Motor Accidents Compensation Act 1999* is to be made in accordance with that regulation (despite anything to the contrary in a regulation under section 196).
- (2) An assessment of costs fixed by a regulation under section 196 (1) (c) is to be made having regard to that regulation.

208P Liability of barrister or solicitor for costs

- (1) A costs assessor may act as set out in subsection (2) if it appears to the costs assessor that costs have been incurred improperly or without reasonable cause, or have been wasted by undue delay or by any other misconduct or default.
- (2) The costs assessor may in the determination:
 - (a) disallow the costs as between the barrister or solicitor and the barrister's or solicitor's client, and
 - (b) direct the barrister or solicitor to repay to the client costs which the client has been ordered by a court or a tribunal to pay to any other party, and
 - (c) direct the barrister or solicitor to indemnify any party other than the client against costs payable by the party indemnified.
- (3) Before taking action under this section, the costs assessor must give notice of the proposed action to the barrister or solicitor and the client and give them a reasonable opportunity to make written submissions in relation to the proposed action.
- (4) The costs assessor must give due consideration to any submissions so made.

208Q Referral of misconduct to Commissioner

- (1) If a costs assessor considers that any conduct of a barrister or solicitor involves the deliberate charging of grossly excessive amounts of costs or deliberate misrepresentations as to costs, the costs assessor must refer the matter to the Commissioner.

(2) For the purposes of this Act, the deliberate charging of grossly excessive amounts of costs and deliberate misrepresentations as to costs are each declared to be professional misconduct.

(2A) A costs assessor may refer any failure by a legal practitioner to comply with a notice issued under section 207, or with any other provision of this Part, to the Commissioner.

(3) Nothing in this section limits the matters which a costs assessor may refer to the Commissioner.

208R Rules of procedure for applications

(1) There is to be a costs assessors' rules committee consisting of those costs assessors appointed to the committee by the Chief Justice of New South Wales.

(2) The committee is to regulate its own proceedings for the calling of meetings and the conduct of its business.

(3) The committee may make rules, not inconsistent with this Part, governing the practice and procedure of the assessment of costs, including matters relating to the appointment of costs assessors to particular matters and the interests of costs assessors in particular matters.

(4) The committee has any other functions conferred on the committee by or under this or any other Act.

(4A) Any amount payable from the Public Purpose Fund for the purpose of meeting the costs of the committee is to be paid, in accordance with section 69G, to the Treasurer for credit of the Consolidated Fund.

(5) Part 6 of the *Interpretation Act 1987* applies to a rule made under this section in the same way as it applies to a statutory rule within the meaning of that Act.

Note. Part 6 of the *Interpretation Act 1987* contains provisions relating to the publication and Parliamentary disallowance of statutory rules and other standard provisions relating to the making, amendment and repeal of statutory rules.

208S Costs assessors

(1) The Chief Justice of New South Wales may appoint persons to be costs assessors under this Act.

(2) A costs assessor has the functions that are conferred on the costs assessor by or under this or any other Act.

(3) Schedule 7 has effect with respect to costs assessors.

(4) A costs assessor is not an officer of the Court when acting as a costs assessor.

(5) Proceedings relating to anything done or omitted to be done by the Chief Justice of New South Wales in respect of the appointment or removal of a costs assessor (including terms of appointment and any other incidental matters) may not be instituted against the Chief Justice of New South Wales but may be instituted against "The Manager, Costs Assessment" as nominal defendant.

208SA Protection from liability

A matter or thing done or omitted to be done by the Chief Justice of New South Wales, the Manager, Costs Assessment or a costs assessor does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Part, subject the Chief Justice of New South Wales, the Manager, Costs Assessment or any costs assessor personally to any action, liability, claim or demand.

208T Confidentiality

A costs assessor must not disclose any information obtained in connection with the exercise of the costs assessor's functions unless the disclosure is made:

- (a) in connection with the exercise of those functions or the administration or execution of this Act, or
- (b) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
- (c) in the case of information relating to a barrister or solicitor or other person—with the consent of the barrister or solicitor or person, or
- (d) with other lawful excuse.

Maximum penalty: 20 penalty units.

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