



New South Wales

Legal Profession Amendment (Costs Assessment) Bill 1998

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Legal Profession Act 1987* so as:

- (a) to remove the requirement that the remuneration of costs assessors be funded from the Statutory Interest Account and that fees and other payments received in relation to a costs assessment be paid to the Statutory Interest Account, and
 - (b) to allow regulations to be made under that Act to fix the costs payable for legal services in connection with any motor vehicle accident matter, and
 - (c) to allow the proper officer of the Supreme Court to postpone or refund a fee payable under that Act in connection with an application for costs assessment, and
 - (d) to require costs assessors to give reasons for their decisions, and
 - (e) to provide for a review procedure in relation to decisions by costs assessors.
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Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Legal Profession Act 1987* set out in Schedule 1.

Schedule 1 Amendments

Remuneration of costs assessors and funding of costs assessments generally

Schedule 1 [1] and [14] remove the requirement that payments be made from the Statutory Interest Account maintained by the Law Society under the *Legal Profession Act 1987 (the Act)* for the purpose of paying the costs related to the remuneration of costs assessors. Instead, all costs related to the administration of Part 11 of the Act (other than the costs of the costs assessors' rules committee) are to be paid out of money to be provided from an account to be established for the Attorney General's Department.

Schedule 1 [14] also removes the requirement that an application fee for assessment, or a payment for the costs of a costs assessor, be paid to the credit of the Statutory Interest Account. Instead, such fees and costs are to be paid to an account to be established for the Attorney General's Department.

Schedule 1 [2] makes it clear that the costs related to the remuneration of a costs assessor can be recovered from the party who is required to pay for the costs of a costs assessment under the Act.

Schedule 1 [15] allows the Attorney General, rather than the Bar Council and Law Society, to determine the remuneration payable to costs assessors.

Schedule 1 [8] provides that, if the costs of a costs assessment are payable by a party to the assessment, the costs assessor may refuse to issue a certificate that sets out his or her determination in relation to a costs assessment until the costs of the costs assessor in connection with that assessment have been paid (as required by section 208JA of the Act).

Fees payable for legal services in connection with motor vehicle accident matters

Schedule 1 [3] inserts a power to make regulations under the Act that fix the fair and reasonable costs for legal services in any motor vehicle accident matter. The Act provides that 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 regulations under the Act. **Schedule 1 [13]** is a consequential amendment.

Postponement or refund of fees

Schedule 1 [4] allows the proper officer of the Supreme Court to postpone the payment of an application fee for a costs assessment under the Act in cases of hardship. **Schedule 1 [6]** is a consequential amendment.

Schedule 1 [5] allows the proper officer of the Supreme Court to refund the application fee (either in whole or in part) if satisfied it is appropriate because the application is not proceeded with.

Reasons for decisions of costs assessors

Schedule 1 [9] inserts a provision that requires costs assessors to give reasons for their decisions, in accordance with regulations under the Act. It also requires costs assessors to provide the parties with such supplementary information as the regulations may require.

Review procedure

Schedule 1 [11] provides for a review procedure for determinations by costs assessors.

The provisions allow a party to an assessment who is dissatisfied with the determination of the costs assessor to apply for a review of the determination. Reviews are to be conducted by a panel consisting of 2 costs assessors. The operation of the costs assessor's determination is suspended while the panel conducts the review. The parties to the assessment, and the costs assessor who conducted the assessment, may be required to provide any relevant documents to the panel. Following a review, the panel may affirm the determination that is the subject of the review or set it aside and substitute a

new determination. The panel may also make decisions as to who should pay the costs of the review. Decisions of the panel are subject to appeal in the same way as decisions of a costs assessor. Regulations may be made with respect to reviews under the new provisions.

Schedule 1 [7], [10] and [12] make consequential amendments.

Savings and transitional provisions

Schedule 1 [16] provides power for the making of savings and transitional regulations.

Schedule 1 [17] inserts transitional provisions in the Act.

First print



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Legal Profession Amendment (Costs Assessment) Bill 1998

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New South Wales

Legal Profession Amendment (Costs Assessment) Bill 1998

No. , 1998

A Bill for

An Act to amend the *Legal Profession Act 1987* to make further provision with respect to costs and the assessment of costs; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Legal Profession Amendment (Costs Assessment) Act 1998*.

2 Commencement

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This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Legal Profession Act 1987 No 109

The *Legal Profession Act 1987* is amended as set out in Schedule 1.

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Schedule 1 Amendments

(Section 3)

[1] Section 67 Statutory Interest Account

Omit section 67 (3) (k).

[2] Section 173 Definitions

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Insert after section 173 (2):

- (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.

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[3] Section 196 Regulations to provide for related costs

Insert after section 196 (1) (a):

- (a1) fixing fair and reasonable costs for legal services in any motor vehicle accident matter,

[4] Section 203 How is an application to be made?

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Insert "or postpone" after "waive" in section 203 (4).

[5] Section 203 (5)

Insert after section 203 (4):

- (5) The proper officer of the Supreme Court 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.

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[6] Section 208A Assessment of bills generally

Insert "or payable" after "paid" in section 208A (3).

[7] Part 11, Division 6, Subdivision 4, heading

Omit the heading.

Insert instead "**Subdivision 4 Enforcement of assessment**".

[8] Section 208J Certificate as to determination

Insert after section 208J (4): 5

(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. 10

(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. 15

[9] Section 208JAA

Insert after section 208J:

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: 20

(a) a statement of the reasons for the costs assessor's determination, and
(b) such supplementary information as may be required by the regulations. 25

(2) The statement of reasons must be given in accordance with the regulations.

[10] Section 208K Determination to be final

Insert “or other review” after “appeal”.

[11] Part 11, Division 6, Subdivision 4A, sections 208KA–KL

Insert after section 208K:

Subdivision 4A Review of determination by panel

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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, apply to the proper officer of the Supreme Court for a review of the determination. 10
- (2) The application must:
 - (a) be in a form prescribed by the regulations, and
 - (b) be accompanied by the fee prescribed by the regulations. 15
- (3) The proper officer of the Supreme Court 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. 20
- (4) The proper officer of the Supreme Court 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. 25
- (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. 30

208KB Referral of application to panel

- (1) If an application for a review under this Subdivision is duly made, the proper officer of the Supreme Court is to refer the application to a panel.
- (2) The panel is to be constituted by 2 costs assessors. 5

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 10
 - (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. 15
- (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. 20
- (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 25
 - (b) to receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor. 30
- (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. 35

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. 5
- (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. 10
- (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: 15
- (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, 20
- 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: 25
- (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, 30
- 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 proper officer of the Supreme Court refers a determination of a costs assessor to a panel for review under this Subdivision, the operation of that determination is suspended. 5
- (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. 10

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. 15
- (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, 20
 - (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, 25
 - (c) if the costs assessor issued a certificate in relation to his or her determination under section 208J: 30
 - (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 35
 - (iii) any enforcement action taken in respect of that judgment is to be reversed.

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- (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. 5
- (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. 10
- (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: 15
- (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. 20
- (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. 25
- (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. 30

- (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. 5 10
- (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. 15
- (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. 20
- (7) The costs of the review are to be paid to the proper officer of the Supreme Court.
- (8) The proper officer of the Supreme Court may take action to recover the costs of a review. 25
- (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 proper officer of the Supreme Court 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. 30

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. 5
- (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. 10

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. 15

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. 20

[12] Part 11, Division 6, Subdivision 4B, heading

Insert "Subdivision 4B Appeals" before section 208L.

[13] Section 208O Costs fixed by regulations

Insert "(a1)," after "(a)," in section 208O (1).

[14] Section 208U

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Omit the section. Insert instead:

208U Costs of administering Part

- (1) All costs related to the administration of this Part (other than the costs referred to in section 208R (4A)) are to be paid out of money to be provided from a working account established for the Attorney General's Department by the Treasurer under section 13A of the *Public Finance and Audit Act 1983* for the purposes of this Part. 30

- (2) The following amounts received by the proper officer of the Supreme Court are to be paid to the credit of that working account:
- (a) an application fee for an assessment,
 - (b) an application fee for a review of an assessment under Subdivision 4A, 5
 - (c) a payment for the costs of a costs assessor,
 - (d) a payment for the costs of a review under Subdivision 4A.
- [15] **Schedule 7 Costs assessors** 10
- Omit “the Bar Council and Law Society Council jointly” from clause 3.
Insert instead “the Attorney General”.
- [16] **Schedule 8 Savings, transitional and other provisions**
- Insert at the end of clause 1A (1): 15
- Legal Profession Amendment (Costs Assessment) Act 1998*
- [17] **Schedule 8**
- Insert in Schedule 8 (with appropriate Part and clause numbers):
- Part Provisions consequent on enactment of Legal Profession Amendment (Costs Assessment) Act 1998** 20
- Definition**
- In this Part:
- amending Act* means the *Legal Profession Amendment (Costs Assessment) Act 1998*. 25
- Power to postpone or refund fees extends to existing applications**
- The amendments made to section 203 by the amending Act extend to applications made before the commencement of those amendments. 30

Reasons for determinations

Section 208JAA, as inserted by the amending Act, does not apply to any certificate issued (whether before or after the commencement of that section) in respect of an application for an assessment that is made before the commencement of that section. 5

Recovery of costs of costs assessment

Section 208J (5), as inserted by the amending Act, extends to any determination made before the commencement of that subsection in respect of which a certificate has not, before that commencement, been issued under section 208J. 10

Availability of review procedure

(1) Subdivision 4A of Division 6 of Part 11, as inserted by the amending Act, does not apply in respect of a determination of a costs assessor if the application for assessment was made before the commencement of section 208KA. 15

(2) Accordingly, a review is not available under that Subdivision in respect of such a determination. 20

Payment of fees and costs

(1) Schedule 1 [14] to the amending Act does not affect any payment made or required to be made to the Law Society for the credit of the Statutory Interest Account under section 208U (2), as in force immediately before the commencement of Schedule 1 [14], except as otherwise provided by this clause. 25

(2) Section 208U (2), as inserted by Schedule 1 [14] to the amending Act, extends to any application fee for an assessment, or payment for the costs of a costs assessor, that was payable before the commencement of Schedule 1 [14] and which, at the commencement of Schedule 1 [14], has not been received by the proper officer of the Supreme Court. Accordingly, if such a fee or payment is 30

received by the proper officer after the commencement of Schedule 1 [14] to the amending Act it is to be dealt with as required by section 208U (2), as inserted by Schedule 1 [14] to the amending Act.

- (3) The Director-General of the Attorney General's Department may direct that there is to be deducted from any amount received before the commencement of Schedule 1 [14] to the amending Act that is to be paid to the Law Society for the credit of the Statutory Interest Account under section 208U (2), as in force immediately before the commencement of Schedule 1 [14], such amount or proportion of that payment as the Director-General considers to be attributable to the costs of administration of Division 6 of Part 11, including the costs of enforcing determinations of costs assessors. 5
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- (4) Any amount or proportion so deducted is to be paid to the working account provided for by section 208U (as amended by Schedule 1 [14] to the amending Act).