THE ASSESSMENT OF DISPUTES ABOUT LEGAL COSTS: A COMPARATIVE ANALYSIS OF THE WESTERN AUSTRALIAN AND NEW SOUTH WALES REGIMES.

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Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any other university and, to the best of my knowledge or belief, contains no material previously published or written by another person, except when due reference is made in the text.

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Abstract

All Australian jurisdictions provide mechanisms for assessing legal costs. Costs assessment is carried out in two circumstances. Clients who are dissatisfied with what their own lawyers have charged can have those charges assessed. When a court orders that a losing litigant pay the legal costs of the winning litigant those costs too can be assessed. Australian costs assessment mechanisms have been inherited from England, and the traditional model of costs assessment is an adversarial process operated by the courts. Western Australia has a costs assessment scheme that follows that traditional model. In contrast New South Wales abandoned the traditional model in 1994, adopting an administrative costs assessment scheme operating separately from the courts with practicing lawyers acting as costs assessors and paid as sub contractors to determine costs disputes.

This thesis explores the costs assessment schemes of both jurisdictions. The traditional judicial process still used in Western Australia and the ‘reformed’ administrative process that has been introduced in New South Wales are examined separately and in some detail. In particular, the thesis considers the various factors that led to the 1994 Reforms in New South Wales and investigates whether the Reforms have produced the results that were expected of them. The thesis then provides quantitative data from both jurisdictions and evaluates the performance of each against the other in the context of a range of different factors including the rates of return on disputed bills and the time each system takes to determine disputes.

As a result of the analysis, the thesis agrees with the New South Wales Reforms that the judicial process, where adversarial contest is used to determine the truth about the parties’ claims, is not well suited to disputes that are centred in the reasonableness of legal fees. For that and a range of other reasons the thesis concludes that the administrative model of costs assessment as adopted in New South Wales is better able to serve the interests of the various stakeholders. Nonetheless, the thesis notes that the stakeholders in the New South Wales costs assessment scheme consider it deficient and that a recent and thorough review of the scheme has made recommendations that, if adopted, will make profound changes to the way that legal costs are assessed in that state.
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