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

Stephen Shaw
(LLB)

Thesis submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy

School of Law
Murdoch University
Western Australia

July
2013
I wish to acknowledge the support of my wife Chris and my daughter Kelly, both of whom spent hours reading things and editing things they had no real interest in.

My two supervisors deserve more credit than a university workload formula allows. I acknowledge Dr Kate Lewins, who read every word of this thesis at least three times; her patient corrections made what was too often a stream of consciousness into a semblance of academic discourse. I also acknowledge Dr Jaime Zander, who actually understands statistics, and who lent me that understanding so that my research could lead to some concrete conclusions. Without their gentle pushing and occasional kicks this thesis would have remained in my head and not found its way onto paper.

I also wish to acknowledge the help and support of the staff from the Supreme Court of Western Australia and the Costs Assessment Scheme in New South Wales. In particular I thank Ramon Loyola, who was kindness personified during my visits to New South Wales. I also specifically thank the librarians in the Supreme Court of Western Australia for allowing me a work space that kept me safe from students.

Lastly, I wish to thank David Garnsworthy, Western Australia’s most well-known costing specialist. This thesis and my abiding interest in the issues surrounding legal costs originate with him.
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.

____________________________________

Steph
en Shaw

July 2013
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.
Contents

ACKNOWLEDGEMENTS ............................................................................................................. I
DECLARATION ......................................................................................................................... III
ABSTRACT .............................................................................................................................. V
LIST OF TABLES ..................................................................................................................... XIII
LIST OF FIGURES .................................................................................................................. XIII

CHAPTER ONE: INTRODUCTION TO THE THESIS .................................................................. 1

1.1: OVERVIEW. ..................................................................................................................... 1
1.2: INTRODUCTION TO THE THESIS ................................................................................. 2
  1.2.1: The Law of Costs and Costs Assessments ................................................................. 2
  1.2.2: The structure of the thesis ...................................................................................... 3
1.3: THE LAW OF COSTS: A BRIEF HISTORY .................................................................... 5
  1.3.1: Costs as a creature of statute .................................................................................. 6
  1.3.2: The law of costs in Australia ................................................................................... 6
  1.3.3: Why have a law of costs? ....................................................................................... 7
  1.3.4: The Assessment Process ......................................................................................... 8
    1.3.4.1: Client/solicitor and solicitor/client costs ......................................................... 8
    1.3.4.2: Party/party costs ............................................................................................... 9
  1.3.5: Costs: the default position .....................................................................................11
  1.3.6: Contracting out of the default position ...............................................................12
1.4: THE SCOPE OF THIS THESIS .......................................................................................13
1.5: THE PURPOSE OF THIS THESIS .................................................................................14
  1.5.1: Did the 1994 Reforms achieve their intended outcomes? ....................................14
  1.5.2: Which of the two costs assessment regimes provides the most advantages to the jurisdiction’s courts? 15
  1.5.3: What are the unintended benefits of the 1994 Reforms? ....................................15
1.6: HOW WILL THE THESIS ACHIEVE ITS PURPOSE? ..................................................15

Table 1.1: Historical timeline of costs assessment ................................................................. 17

CHAPTER TWO: ASSESSMENT OF COSTS IN WESTERN AUSTRALIA- A BRIEF HISTORY ............ 19

2.1: OVERVIEW ..................................................................................................................... 19
2.2: THE EARLY YEARS ....................................................................................................... 19
2.4: THE REVIEW OF THE CRIMINAL AND CIVIL JUSTICE SYSTEM IN WESTERN AUSTRALIA ......................................................................................................................... 28
  2.4.1: The LRCWA’s views on costs assessment and related issues ...............................28
  2.4.2: The time frame for seeking assessment ................................................................29
  2.4.3: Solicitor initiated assessment ..............................................................................30
  2.4.4: ‘One more such success will ruin me’: reasonable costs recovery for a successful litigant ....................................................................................................................30
  2.4.5: Reducing the burden on the courts .....................................................................32
  2.4.6: The LRCWA position on contingency and uplift fees .......................................33
  2.4.7: The fate of the LRCWA recommendations .........................................................39
2.5: THE 2008 REFORMS: TOWARDS A NATIONAL APPROACH TO REGULATION ............ 40
  2.5.1: Some particular effects of the 2008 Reforms .......................................................43

vii
CHAPTER THREE: ASSESSMENT OF COSTS IN NEW SOUTH WALES- A BRIEF HISTORY ..........52

3.1: OVERVIEW .............................................53
3.2: A BRIEF HISTORY OF COSTS ASSESSMENT IN NEW SOUTH WALES UP UNTIL THE LATE 1970s ..................57
3.3: THE LEAD UP TO AND RATIONALE FOR THE NEW SOUTH WALES REFORMS ...........59

3.3.1: Responsibility for providing scales of costs shifted from the courts to an expert panel by the Legal Practitioners (Solicitors’ Remuneration) Amendment Act 1984 .................................................................60
3.3.2: The Legal Profession Act (1987); general Reforms and a signpost to costs reform ..............63
3.3.3: The NSWLRRC report 1991-1993.........................................................................................64
3.3.4: Government seeks further input as to costs reform (1992-1993) .....................................65
3.3.5: The Legal Profession Reform Bill 1993: An introduction and overview ..........................66

3.3.5.1: The Legal Profession Reform Bill 1993: A move to market forces and the abolition of scales of costs to benefit clients ....................................................................................................73
3.3.5.2: The Legal Profession Reform Bill 1993: changing the process of assessment ...............76
3.3.5.3: The Legal Profession Reform Bill 1993: Uplift fees and the rationale for introducing them .................................................................78
3.3.5.4: Criticism of the rationale for conditional costs agreements containing uplift fees ..........80
3.3.5.5: Party/party costs recovery of conditional fees under the 1994 Reforms .........................82

3.4: THE LEGAL PROFESSION REFORM ACT 1993 IS ENACTED ............................................84

3.4.1: A new Part 11 for the 1987 Act .........................................................................................85
3.4.1.1: Dealing with invalid costs agreements: default in disclosure ........................................88
3.4.1.2: Performing the assessment ............................................................................................91
3.4.1.3: Appeals against a costs assessment ...............................................................................94

3.5: AMENDMENTS; TEETHING PROBLEMS WITH THE 1994 REFORMS .........................95
3.6: A PAUSE FOR REFLECTION ...............................................................................................98

3.6.1: Discussion on the removal of scales of costs ................................................................99
3.6.2: Problems with contingency costs agreements with uplift fees ......................................105


3.8: LEGAL PROFESSION AMENDMENT (COST ASSESSMENT) BILL 1998 ......................110

3.8.1: Making costs assessment user-pays .................................................................................110
3.8.2: Reasons for determinations and internal review mechanisms ..........................................111
3.8.3: Limiting costs for MVA claims .........................................................................................113
3.8.4: The 1998 amendments: a bipartisan agreement as to further reform .............................113

3.9: THE NATIONAL COMPETITION POLICY REVIEW OF THE LEGAL PROFESSION ACT 1987: FINAL REPORT .................................................................114

3.9.1: The National Competition Review Report; Scales of costs, benchmark fees and some confusion .................................................................................................................................115
3.9.2: The National Competition Review Report: Uplift fees ..................................................117

3.10: FURTHER AMENDMENTS: THE CIVIL LIABILITY ACT 2002 .............................118
3.11: THE 1987 ACT IS REPLACED BY THE LEGAL PROFESSION ACT 2004 ..................122
3.12: AMENDMENTS POST 2004 ACT ......................................................................................126

3.12.1: The Legal Profession Amendment Act 2006 ................................................................126
3.12.2: The Legal Profession Further Amendment Act 2006 ....................................................127


3.13.1: Submissions to the Chief Justice’s Review ...................................................................131
3.13.1.1: The Office of the Legal Services Commissioner submissions ....................................132
3.13.1.2: The Law Society of New South Wales submissions ................................................................. 135
3.13.1.2.1: The Law Society’s view of a party/party assessment ........................................................ 137
3.13.1.2.2: The Law Society’s view of an assessment between a practitioner and a client .................. 138
3.13.1.3: The Legal Aid Submissions ..................................................................................................... 140

3.13.2: The 2011 Review: Draft Recommendations ............................................................................ 142
3.13.2.1: The 2011 Draft Recommendations: The aims pursued ......................................................... 142
3.13.2.2: The 2011 Recommendations: Set out of the recommendations ........................................ 143
3.13.2.3: The 2011 Recommendations: Constraints on the Review Panel and analysis of those constraints .............................. 144

3.13.3: The 2011 Recommendations: the suggested Reforms ............................................................ 146
3.13.3.1: Suggested Reforms: Under the Court’s wing and an increased workload for the Manager Costs Assessment ............................ 146
3.13.3.2: Suggested Reforms: Encouraging rapid resolutions ............................................................ 147
3.13.3.3: Suggested Reforms: ‘guidelines’ a partial return to scales .................................................... 152
3.13.3.4: Suggested Reforms: Determinations .................................................................................... 155
3.13.3.5: Suggested Reforms: Reviews and Appeals ........................................................................ 156
3.13.3.6: Suggested Reforms: Costs Assessors .................................................................................. 158
3.13.3.7: Suggested Reforms: an overview and some final observations ........................................ 160
3.13.3.7.1 Increasing the gap between what is spent on costs and what is recovered on a costs order .............................. 161
3.13.3.7.2 Abandoning the ‘user pay’ model .................................................................................. 162
3.13.3.7.3: Guidelines for client and own practitioner disputes ...................................................... 162

3.14 CONCLUSION ................................................................................................................................. 163
3.14.1 One reservation ......................................................................................................................... 164
3.14.2: The expense of the current system in New South Wales and the ‘user pay’ principle .......... 166
3.14.3: An alternate argument for administrative costs assessment ................................................ 168
3.14.4: Closing .................................................................................................................................... 169

CHAPTER FOUR: COMPARISONS BETWEEN THE WESTERN AUSTRALIAN AND NEW SOUTH WALES COSTS ASSESSMENT SCHEMES ............................................................................ 171

4.1: OVERVIEW .................................................................................................................................... 171

4.2: METHODOLOGY ............................................................................................................................ 172

4.2.1: Methodology in Western Australia: the practicalities .............................................................. 173
4.2.1.1: Extracting data from party/party in Western Australia .......................................................... 173
4.2.1.2: Extracting data from client/solicitor bills in Western Australia .......................................... 174

4.2.2: Methodology in New South Wales: A much easier approach ................................................. 175

4.2.3: An immediately obvious and beneficial consequence of the 1994 Reforms ............................ 175

4.3: THE CASES COLLECTED .......................................................................................................... 177
Table 4.1 Type and quantity of assessments from each jurisdiction .................................................. 177

4.4: THE DATA EXTRACTED AND THE RATIONALE AS TO WHY IT WAS EXTRACTED ......... 178

4.4.1: Data as to monetary quantum ............................................................................................... 178
Table 4.2 Data as to Monetary Quantum ........................................................................................... 178

4.4.2: Temporal Data ............................................................................................................................ 179
Table 4.3 Temporal Data ..................................................................................................................... 179

4.4.3: Difference in data collection across the jurisdictions ............................................................ 180

4.5: THE DATA PRESENTED ............................................................................................................... 181

4.5.1: Interpreting statistical results: a helpful guide ...................................................................... 181
4.5.1.1: t-tests .................................................................................................................................. 181
4.5.1.2: Correlation .......................................................................................................................... 182

4.5.2: Quantum of party/party bills filed for assessment ................................................................. 183
Figure 4.1: Pie charts illustrating the percentage of party-party bills falling into each quantum category for WA and NSW .......................................................... 184
List of Tables

TABLE 1.1: HISTORICAL TIMELINE OF COSTS ASSESSMENT .................................................................17
TABLE 4.1 TYPE AND QUANTITY OF ASSESSMENTS FROM EACH JURISDICTION ......................177
TABLE 4.2 DATA AS TO MONETARY QUANTUM ..................................................................................178
TABLE 4.3 TEMPORAL DATA ..............................................................................................................179
TABLE 4.4: AVERAGE PERCENTAGE OF PARTY-PARTY BILLS AWARDED BY ASSESSORS IN WA AND NSW .................................................................188
TABLE 4.5 VOLUME OF CLIENT/SOLICITOR ASSESSMENTS ACROSS WA AND NSW ..............200
TABLE 4.6: AVERAGE PERCENTAGE OF BILLS AWARDED BY ASSESSORS IN WA AND NSW ....206
TABLE 4.7 COMPARISON OF VOLUMES AND COMPLETIONS OF ASSESSMENT, DISPUTES BETWEEN PRACTITIONERS AND THEIR OWN CLIENTS IN NEW SOUTH WALES ..................................................215
TABLE 4.8 TIME OWN-CLIENT DISPUTES SPENT ‘IN SYSTEM’ FOR ASSESSMENT IN NEW SOUTH WALES, EXPRESSED IN MONTHS .................................................................................................................223

List of Figures

FIGURE 4.1: PIE CHARTS ILLUSTRATING THE PERCENTAGE OF PARTY-PARTY BILLS FALLING INTO EACH QUANTUM CATEGORY FOR WA AND NSW .................................................................184
FIGURE 4.2: PERCENTAGE OF BILL AWARDED FOR PARTY-PARTY BILLS IN WESTERN AUSTRALIA .............................................................................................................................186
FIGURE 4.3: PERCENTAGE OF BILL AWARDED FOR PARTY-PARTY BILLS IN NEW SOUTH WALES .............................................................................................................................187
FIGURE 4.4: PARTY/PARTY PERCENTAGE OF B-Q RETURNED ................................................................189
FIGURE 4.5: MONTHS TAKEN TO COMPLETE ASSESSMENT FOR PARTY-PARTY BILLS IN WA AND NSW ..........................................................................................................................194
FIGURE 4.6: PIE CHARTS ILLUSTRATING THE PERCENTAGE OF CLIENT-SOLICITOR BILLS FALLING INTO EACH QUANTUM CATEGORY FOR WA AND NSW .................................................................201
FIGURE 4.7: PERCENTAGE OF BILL AWARDED FOR CLIENT-SOLICITOR BILLS IN WA AND NSW .............................................................................................................................205
FIGURE 4.8: MONTHS TAKEN TO COMPLETE BILL ASSESSMENT FOR CLIENT-SOLICITOR BILLS IN WA AND NSW ..........................................................................................................................209
FIGURE 4.9: TIME TAKEN TO DO SOLICITOR CLIENT BILLS IN NSW .............................................................................................................................211
FIGURE 4.10: PIE CHARTS ILLUSTRATING THE PERCENTAGE OF OWN CLIENT BILLS FALLING INTO EACH QUANTUM CATEGORY FOR THE TWO TYPES OF ASSESSMENT IN NEW SOUTH WALES.................................................................211

FIGURE 4.11: PERCENTAGE OF BILL AWARDED FOR SOLICITOR/CLIENT BILLS IN NSW ..........219

FIGURE 4.12: TIME TAKEN TO DO ASSESSMENTS IN NEW SOUTH WALES, ACROSS THE THREE TYPES OF ASSESSMENT THAT OCCUR IN THAT JURISDICTION .................................................................222

FIGURE A2.1: PARTY/PARTY ASSESSMENT IN WESTERN AUSTRALIA .................................................273

FIGURE A2.2 CLIENT/SOLICITOR ASSESSMENT IN WESTERN AUSTRALIA ...........................................280

FIGURE A3.1: PARTY/PARTY ASSESSMENT IN NEW SOUTH WALES.........................................................301

FIGURE A3.2: CLIENT/SOLICITOR ASSESSMENT IN NEW SOUTH WALES ..............................................310
“Our first step in the endeavour to compel law making to take more account and more intelligent account of the social facts upon which law must proceed and to which it must be applied must be to make all the agencies of law making completely conscious of what they are doing. The next step is to make plain the end and purpose of what they are doing”¹ Roscoe Pound

Chapter One: Introduction to the thesis

1.1: Overview

The function of a parliament is to make law; an Australian state parliament in particular is tasked with making laws for ‘peace, order and good government’.² Jeremy Bentham wrote that ‘the common end of all laws prescribed by the principle of utility is the promotion of the public good’.³ It follows that parliamentarians must have some view of the common good and some clear ends in mind when they create laws. Roscoe Pound, comparing legislators with jurists, noted that ‘[h]ence the one (the legislator) is prone to attempt far too much and to be careless how he carries out the details of what he attempts’.⁴ Pound’s concerns as to the deficiency of parliamentarians, that they legislate with too little information and too much in the way of expectations, are as valid today as they were at the time he was writing. The relentless political cycle creates the potential for legislators who are long on rhetoric and unclear as to the effects of the laws they create.⁵

Bentham, discussing the end a law maker may have in view, wrote that “[n]ow by end is here not meant the eventual end, which is a matter of chance, but the intended end which is a matter of

² Constitution Act 1889 (WA) s 2; Constitution Act 1902 (NSW) s5. The wording in the New South Wales Act is slightly different, with the parliament having authority to make laws for the ‘peace, welfare and good government’ of the state.
³ HLA Hart (ed), Of laws in general from the collected works of Jeremy Bentham (The Athlone Press, 1970), 32. Perceptions of the public good change over time, and parliament amends its laws to suit; law reform, driven by public opinion and political expediency, is ongoing.
⁴ Pound, above n 1, 755.
design”. Laws do have unintended consequences, and when needed (and where noticed) those consequences can be dealt with through law reform. As for the intended consequences, laws may not always do what they were meant to do.

In order to determine whether or not a law has achieved its intended consequences one must first identify what the parliament intended. Parliamentary debates usually give clear indication of what the legislators intended to achieve with a law, but any attempt to see if the law has produced its desired outcome can only be made after the law has operated for some time.

1.2: Introduction to the thesis
This thesis will investigate one particular set of parliamentary reforms, those made to the New South Wales legal costs assessment scheme by way of the Legal Profession Reform Act 1993 (the 1994 Reforms), to see how well the Reforms achieved the ends the New South Wales Parliament had in mind at the time of the Reforms. As well as making an attempt to determine if the ‘designed ends’ were achieved, the thesis will look at some of the unintended consequences of the Reforms. It will do so in part by comparing the ‘reformed’ legal costs assessment scheme in New South Wales with the ‘unreformed’ scheme of costs that operates in Western Australia. In doing so, this thesis makes the assumption that costs assessment in New South Wales, as it existed before the 1994 Reforms, was substantially the same as costs assessment as it is now carried out in Western Australia. First however, this introduction will provide a general overview of legal costs and some of the issues that pertain to them in order that the two chapters that follow, one on costs assessment in Western Australia, and the second on the reformed costs assessment scheme as it operates in New South Wales, can be seen in the relevant context.

1.2.1: The Law of Costs and Costs Assessments
The law of costs, as practiced in Australia, governs both how lawyers charge their clients (solicitor/client costs) and how winning litigants recover a portion of those charges from those

---

7 As a general rule this thesis will the term lawyer when discussing matters that relate to the entire legal profession, but will use the words solicitor or practitioner when referring to individual practices or to situations where legal work is or was done directly in the employ of clients.
8 A more detailed explanation of solicitor/client costs is provided at 1.3.5.1 in this chapter.
they have defeated (party/costs). Lawyers and their clients do fall out over money; losing litigants often dispute the quantum of fees they are asked to pay towards the winner’s costs. All Australian jurisdictions provide formal procedures to resolve these disputes. As noted above, costs assessment regimes from two Australian jurisdictions, Western Australia and New South Wales differ profoundly. The Western Australian regime follows the traditional adversarial model that developed from the British system while the New South Wales regime is the product of deliberate reform.

In short, Western Australia has a costs assessment regime that has developed incrementally from the body of law that arrived from Britain with the first settlers. Cost assessment in Western Australia has always been and remains part of the judicial function of the courts. New South Wales abandoned that approach to costs assessment in 1993, and now has a costs assessment scheme that is administrative. New South Wales is the only Australian jurisdiction to depart substantially from the inherited norm, and it did so as to reform, in order to address a range of ‘problems’ that the New South Wales parliament saw as inherent in the traditional system.

1.2.2: The structure of the thesis
As noted above, the first part of this thesis, below, provides an introduction to the law of costs. It will give a synopsis of the development of that law from its early British antecedents. It will also describe and explain the two basic limbs of costs assessment; assessments between lawyers and their disgruntled clients, and assessments between litigants who have received costs orders in their substantive matters. Having introduced these essential concepts, the first part will then provide a full explanation of the scope of the thesis research and will further explain the purpose for which the comparisons between the regimes were made.

The second chapter of the thesis will map costs assessment in Western Australia from the time of first settlement up until the present.

The third chapter of this thesis follows the same format for New South Wales; starting with a history of the law up until the 1994 Reforms. The chapter will give an overview of the various forces that led up to the Reforms, and will investigate the Reforms by way of analysing the

9 A more detailed explanation of party/party costs is provided at 1.3.5.2 in this chapter.
parliamentary debates that surrounded the passage of the Legal Profession Reform Bill 1993 (NSW), which created the Reforms. The third chapter then also illustrates the mechanisms of the reform and the changes that have occurred within the reformed system since it was introduced. It will also provide some in depth analysis of the effects of the Reforms and will provide a detailed critique of various issues that have arisen within the reformed costs assessment system.

The fourth chapter of the thesis is centred in data extracted from the two costs assessment regimes. It will make quantitative comparisons between the two systems and will attempt to explain the differences that arise between them. It will describe how the data upon which the comparisons rely came about. It will set out the data and give the conclusions that flow from it. Chapter four will also elaborate on those conclusions and will provide discussion on what they mean in relation to the scope and purpose of the thesis.

The thesis will conclude by furnishing a determination as to whether or not the New South Wales Reforms have achieved their ‘designed ends’. Further, the thesis will conclude that it is the unintended consequences of the Reforms that have made them a success despite that fact that they have not demonstrably achieved all of the outcomes they were designed to produce. It will suggest that both costs assessment regimes have strengths, but will note that for a variety of reasons, which it will explain, the New South Wales system of costs assessment is the preferable one. It will however argue that the New South Wales system could benefit from the reintroduction of scales of costs, despite the fact that the abolition of those scales was a central platform of the 1994 Reforms.

The thesis is followed by annexure that present pertinent, but not necessarily central information that helps to set the thesis more fully into the context of the law of costs. The annexure first set out, by way of example, how an individual litigant is charged for the costs of his or her legal representative. The law of costs is procedural law, and the annexure then set out the various procedures that are used to determine disputes as to liability for costs. As the two costs assessment regimes are substantially different it will present two separate descriptions of how costs are assessed in the two jurisdictions. The annexure are drafted to be stand-alone documents that, individually, provide a comprehensive look at a narrow area; collectively they provide the
background knowledge that a reader not well versed in the law of costs would require to understand the thesis.

1. 3: The law of costs: a brief history

In the British system of law, from which Australian law devolves, those who went to law to resolve a civil dispute paid the costs of doing so. Early British law forced litigants to stake their personal safety in a manner so extreme as to allow an assumption that God would step in and allow the innocent party to the dispute to conquer, regardless of the how unlikely that success really seemed. Trial could be by ordeal, or by battle. The system evolved, and perhaps not unsurprisingly, to a system that allowed litigants to put cases up for adjudication by way of hired agents. These hired agents are the antecedent of the modern legal practitioner. The champion hired to put a case through trial by battle, where pointed argument led to final and binding determinations, may have lost more than his client. The winner did pay legal fees in the most basic way, by paying the contracted fighter his due wages, but considering the consequence of losing had he fought himself, may not have grudged the fee. In time however, the battles moved to courtrooms, and winners and losers paid fees in money to those who argued, rather than fought by force or arms, for them. The winner won, but was out of pocket for the fees paid. The loser lost both cause and costs.

---

10 Despite differences between the laws of the various kingdoms that eventually made up the British Empire, and as a general rule, litigants in each kingdom risked life and limb. ‘The fundamental rule of the Anglos Norman legal system was that disputes had to be settled by personal confrontation between the parties in battle’. See Harry Kirk, Portrait of a Profession: A History of the Solicitor’s Profession, 1100 to the Present Day (Oyez Publishing Limited, 1976) 1.

11 For a harrowing description of trial by battle in a civil matter see D. Danzinger & J. Gillingham, 1215 The Year of the Magna Carta D. Danziger & J. Gillingham, (Hodder & Stoughton 2003)190.

12 Kirk, above n 9, 5.


14 Ibid, 1-3.

15 Kirk, above n 9, 83: Money is a constant theme running through the history of the profession. Hardly had attorneys started being paid for their services than there were complaints about their avarice, and it would be idle to believe that solicitors in the twentieth century are entirely acquitted by the public of giving a high priority to the amount of their fees. Although the complaints of lawyers waxing fat at their clients’ expense started early, there is little likelihood and no evidence that they did so. The number of attorneys seeking business, the ease with which the profession could be entered, the size of the disputes; these were all factors which must have tended to depress the earnings of individuals.

16 While previously the defendant may have also lost his life: see above n 10.
This is, of course, no longer the case in either England or Australia. A complex ‘law of costs’ has arisen whereby courts order the apportionment of legal costs between the litigants. The general rule is that the loser pays, though as with all general rules there are a host of exceptions. Further, the law of costs also governs the financial relationship between solicitor and client, and adjudicates disputes as to the quantum of legal fees that practitioners charge to clients.

1.3.1: Costs as a creature of statute
Until the 13th century English litigants could not recover monies spent on the conduct of litigation. In 1267, by way of the Wardship Act, the tenant who was successful in litigation against distraint became able to recover the costs of the plea as a part of the damages suffered. These recoverable costs were narrow, but over time the range of cost recovery for plaintiffs was expanded. It took another 264 years for defendants to gain the right to recover costs, with the costs conceptualised as damages. The issue has been controversial ever since. Suffice to say that despite ongoing controversy as to methods of charging and the recovery of legal costs, it is an area of law that is now firmly seated in statute, regulation, and court rules.

1.3.2: The law of costs in Australia
Not long before the time that a defendant became able to recover costs, the English had commenced an explosion of conquest and settlement that took their culture to wildly different parts of the globe. Where the English settled, so did their law. Australia has cost adjudication systems that have evolved from the English model, though over time different Australian

---

17 In 2002 a UK pensioner’s request to have a motoring infringement decided in a trial by combat was refused. See <http://www.telegraph.co.uk/news/uknews/1416262/Court-refuses-trial-by-combat.html>
18 See for instance Correa v Whittingham (No2) (2013) NSWCA 471.
19 Wardship Act, 1267 (UK) 52 Hen. 3 Cap. VI. See also Re Brickman; Ex parte Pickering (1860) 1 QSCR 14, 15 (Lutwyche J):

Costs are a creature of statute. At common law neither the plaintiff nor the defendant was entitled to costs. The Statute of Gloucester, 6 Ed. I, c. 1, gave costs to the plaintiff, but to the plaintiff only. The defendant was left without any remedy for the expenses to which he had been put, until the passing of the statutes 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, by which it was enacted that, in all cases in which a plaintiff would be entitled to costs if he recovered the defendant should have his costs if a verdict be found for him.

20 Ibid.
21 The common law does still have some play though see Guss v Veenhuizen (No.2) (1976) 136 CLR 47, 51 where three judges of the High Court found that a legal practitioner could recover costs for appearing as a self litigant, despite that not generally being the accepted position under interpretations of the various statutes.
jurisdictions have developed a range of different solutions to the problems that occur in attempts to award costs to successful litigants or to deal with solicitor client disputes.

As we enter the 21st century, Australian jurisdictions are reversing their slow drift toward disparate systems and are embracing model uniform laws in an attempt to standardise the practice of law across Australia. In particular, most Australian jurisdictions have adopted the provisions of the model Legal Profession Act.\(^2\) That Act sets out the regime practitioners must use in dealing with their clients in relation to costs, and that regime is now common between Western Australia and New South Wales. However, the model legislation does not deal with apportionment of costs between the parties; that remains the province of the various courts’ rules and regulations.

1.3.3: Why have a law of costs?

Most people find law a strange language; a form of English for which they need expensive interpreters, whether they like it or not. To a client it might appear that the legal practitioner operates from some place of mystery, and to be engaged in taking the simple, making it complex, and charging large amounts of money for doing so.\(^2\) It is often hard to see the value in much of what a lawyer does as his or her produce is not concrete and easily measured, and the client really needs to trust that there is value for money and honest charging.\(^2\) Lawyers in turn could be accused of having sound financial reasons for keeping the veil of mystery intact; obscure and

---

\(^2\) The model legislation has been adopted in Western Australia as the Legal Profession Act 2008 (WA) and in New South Wales as the Legal Profession Act 2004 (NSW). While there are some minor substantive differences between the two acts, they are largely interchangeable. It is worth noting that the acts are substantially similar in many of the costs provisions, but are the source of very different costs assessment regimes.

\(^2\) 'Moreover, he made his money out of other men’s misfortunes and disputes and to make matters worse he does so not by honest toil as a craftsman did but by pen and paper and the use of his wits': Kirk, above n 9, 200.

\(^2\) Ipp J put it very well in Brown v Talbot and Olivier (1993) 9 WAR 70, 81: the client’s position is fraught with uncertainty; he is susceptible, to a large degree, to the subjective decision of the solicitors, and he is dependent on the exigencies of the practice of the solicitors- something about which he knows nothing. Alexander Forrest, Western Australian Legislative Assembly member for West Kimberley and Mayor of Perth put it less eloquently in 1893, ‘if you go to a lawyer it will cost you between £2 and £3 for preparation of the transfer of a bit of land that may not be worth £1’: Western Australia, Parliamentary Debates, Legislative Assembly, 15 August 1893, 335 (Alexander Forest).
archaic words, while often unnecessary when they appear in legal work, help keep the client dependent and willing to pay up.\textsuperscript{25}

It seems that no one has ever really trusted lawyers to do the right thing in terms of charging for services,\textsuperscript{26} and the courts have developed and jealously maintained procedural mechanisms to ensure that lawyers’ fees are open to scrutiny and challenge.\textsuperscript{27} This process, which derives from statute and is determined by the Court’s procedural rules, has, since its inception and until recently, been referred to as the taxation of costs.\textsuperscript{28} The Legal Profession Acts of both New South Wales and Western Australia now refer to the process as assessment of costs and this thesis will adopt that current descriptor throughout.

\textbf{1.3.4: The Assessment Process}

There are two basic limbs to the assessment process. The first limb governs assessments between lawyers and their own clients (either client/solicitor or solicitor/client costs). The second provides the mechanisms for assessments between litigants, where the general rule is that the loser pays the winner’s costs (party/party costs).

\textbf{1.3.4.1: Client/solicitor and solicitor/client costs}

A client who is disgruntled about what he or she is being charged can ask that the court assess his or her own solicitor’s bill.\textsuperscript{29} When a court does so, the assessed bill replaces the original bill as the determinant of what the client (or whoever is liable for the costs) owes to the lawyer in

\begin{itemize}
\item \textsuperscript{25}The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble (Charles Dickens, \textit{Bleak House, The complete works of Charles Dickens} Vol. 18 (P.F. Collier and Son) 608).
\item \textsuperscript{26}‘The Elizabethan slang name for a highway-man or a footpad was a “high lawyer”: Kirk, above n 9, 201. A description of how lawyers charge out for their services is provided at Annexure 1.
\item \textsuperscript{27}Description of the practicalities of the costs assessment process in the Western Australian and New South Wales jurisdictions are provided at Annexure 1 and 2.
\item \textsuperscript{28}For the uninitiated, the word taxation as used in cost adjudication is at best confusing. When sums are removed from a bill of costs those sums are described as being ‘taxed off’. The verb ‘tax’ derives from the Latin word ‘taxare’ which means “to evaluate, estimate or assess” (T.F. Hoad (ed), The Concise Oxford Dictionary of English Etymology (Oxford University Press, Great Britain 1986) 484).The model legislation has largely, though not completely, abandoned the word, and the adjudication of costs is now described as costs assessment. However, the various other rules that govern the law of costs continue, for now, to refer to taxation of costs.
\item \textsuperscript{29}The client may simply refuse to pay, leaving the practitioner to sue for the costs as a debt. Cost assessment will usually be a quicker and cheaper way of resolving the dispute.
\end{itemize}
relation to that retainer. An assessment sought by a client (a client/solicitor assessment) goes to
the court as a new matter, and is not considered part of the substantive matter to which the
challenged retainer pertained. Client/solicitor assessment, wrought as they are with the angst
that comes from failed professional relationships and the perceived betrayal of trust, are a
fascinating area of study. When faced with a client/solicitor taxation, even solicitors seem to lose
that rational objectivity that is the hallmark of a good lawyer.

In 1993 New South Wales also allowed solicitors (rather than only clients) to have the bills that
they render to clients assessed when there is a dispute as to quantum. This allows a solicitor to
have the scheme make an assessment about the costs and to recover on that basis, rather than
having to chase up the costs by way of proving them as a debt in court. Western Australia
adopted this innovation by way of the model Legal Profession Act, enacted as the Legal
Profession Act 2008 (WA).

1.3.4.2: Party/party costs
As stated above, the Australian litigation system generally operates on a ‘loser pays’ model. However, absent a special costs order, the ‘loser’ is generally only obliged to pay the winner’s costs on a party/party basis. Party/party costs are usually less than the costs the winning litigant
has expended as party/party costs are based in (and assessed on) a concept of reasonableness
rather than in relation to what was actually spent. Persons (or entities) that have a costs order
made against them and are thus liable for an opponent’s legal costs can have those costs assessed
in order to determine the quantum they must pay. The costs order that creates the obligation to

---

30 The usual term used to describe this situation in Western Australia is ‘solicitor/client assessment’. At the time the data for this thesis was collected clients in Western Australia could ask for a costs assessment if there was a dispute, the lawyers involved could not. In New South Wales solicitors gained the right to seek assessment of their own bills by way of the 1994 Reforms. This is also now the situation in Western Australia. Both jurisdictions now allow practitioners as well as clients to seek assessment. As the data from New South Wales, presented later in this thesis, covers assessments initiated by clients and by solicitors the thesis will refer to assessments filed by or on behalf of clients as client/solicitor assessments and will refer to assessments filed by or on behalf of practitioners as solicitor/client assessments.
31 In Western Australia all client/solicitor and solicitor/client assessments take place in the Supreme Court of Western Australia. In New South Wales all assessments are filed with the Manager Costs Assessment.
32 It is the author’s experience that otherwise sensible practitioners will often allow a client to proceed to assessment rather than make a sensible commercial decision to reduce a bill. They will do so as they feel that a request for assessment is an affront to their professionalism. See also Annexure 2 n50.
33 This model is in no way universal. The United Kingdom uses it, in the United States, litigants mainly bear their own costs, regardless of the outcome of the litigation. See for instance John Leubsdorf, ‘Towards a history of the American Rule on fee recovery’, (Winter 1984) 47 Law and Contemporary Problems, 9-36.
pay the costs may have been made at any stage during, or at the end of, the substantive litigation, but in most cases the costs assessment occurs after the substantive matter has been determined. The assessment of these costs is known as party/party assessment.\(^{34}\)

In all but one of the Australian jurisdictions party/party bills of costs are assessed against some form of statutory scale, regardless of the existence of a solicitor/client costs agreement.\(^{35}\) This means that losing litigants will not usually have to pay the other party’s costs as actually incurred. Instead, the loser will pay costs as at a rate at or below a fixed ceiling of costs, as deemed suitable by the costs assessor doing the assessment. That ceiling rate for any given legal service is provided by a costs determination committee as a scale of costs and is usually substantially less than the rate a practitioner will have charged for that service. New South Wales abolished scales of costs as part of the 1994 Reforms and assessors in that jurisdiction assess against their own view as to what are reasonable costs for the legal works in question.

As a general rule the successful litigant only recovers between 60%-80% of the actual cost of litigation.\(^{36}\) This means that the successful litigant usually pays the practitioner with conduct of the matter substantially more than can be recovered from the loser. The shortfall in recovery is a constant source of complaint from clients and the New South Wales Reforms of 1993 were in part driven by a desire to see successful litigants more fully indemnified.\(^{37}\) That said, the shortfall in recovery is also the basis of a very effective tool that courts have to discourage

\(^{34}\) In Western Australia party/party costs are assessed in the court where the substantive matter was heard. In New South Wales all party/party assessments are filed with the Manager Costs Assessment.

\(^{35}\) Subject to costs agreements, which may displace the scales of costs, the scales regulate ‘(a) the taxation of bills of law practices; and (b) any other aspect of the costs charged by law practices’: Legal Profession Act 2008 (WA) s 280(1). Scales of costs are described more fully at 1.3.6 below. The statutory authority for recovering costs at scales in state and territories jurisdictions are as follows: Legal Profession Act 2006 (ACT) s279(b); Legal Profession Act 2006 (NT) s314(b); Legal Profession Act 2007 (Qld) s316(b); Legal Profession Act 2007 (Tas) s303(b); Legal Profession Act 2004 (Vic) s3.4.19(b); Legal Practitioners Act 1981 (SA) s42(6)(b).

\(^{36}\) This thesis will provide measurements of actual return rates for both the jurisdictions under study.

\(^{37}\) Not all jurisdictions consider a high level of costs recovery to be a central issue. Reforms in New Zealand have seen the High Court introduce an assessment system where a winning litigant can only recover 66% of what the court considers reasonable, regardless of what the litigation has actually cost. This means that the actual percentage recovered is likely to be less than 50% of what was expended as costs. These Reforms, promulgated by the Court Rules Committee, were designed to address a range of ‘problems’ with the previous system, but the Committee does not seem to have been unduly concerned with the fact that the Reforms guarantee that a winning litigant is nearly always going to be substantially out of pocket on costs. See Justice Geoffrey Venning, ‘Alternatives to Activity Based Costing: The New Zealand Approach’ (Paper presented at the AIJA Annual Conference, Adelaide, 15-17 September 2006).
unnecessary litigation; the indemnity costs order. In certain circumstances a court can order that the shortfall be reduced or largely eliminated; more will be said about this below and in Chapter Three where the unintended consequences of the 1994 Reforms are explored.

A full description of how a practitioner charges costs and how the winning litigant recovers those costs through a party/party assessment, including a worked example, is provided in the annexure to this thesis.

1.3.5: Costs: the default position

The assessment process requires that the bills produced be compared to some standard to see if the bills are either excessive or unfair. In most Australian jurisdictions the default standard is a scale of legal costs. Most Australian jurisdictions produce and regularly update cost determinations, more commonly known as scales of costs, which usually take the form of itemised lists of the minutia of legal services and mandate the maximum amounts a lawyer can charge for each of those services. The origins of scales of costs go well back in time, arguably, they came about in the decades following an English Act of Parliament promulgated as

[a]n Act to reform the multitude of misdemeanours and abuse of some attorneys and solicitors, who, by charging excessive fees for their services, and by making other unnecessary demands, caused clients to be financially overburdened, whereby legal services were being extraordinarily delayed.

As to how the scales were initially devised, as Western Australia’s best known costs expert once noted, ‘[n]o one knows where the hell it came from’.

---

38 The authority for recovering costs at scales in each of the state jurisdictions is provided at note 35 above.
39 This thesis does not attempt to canvass costs assessment in any of the Australian jurisdictions other than Western Australia and New South Wales, but it notes that the different jurisdictions, and especially the Federal jurisdictions, have numerous variations from the traditional system used in Western Australia. An example from a Western Australian costs determination and an explanation how the determination is applied on assessment is provided in Annexure 2.
41 An Act to reform the multitude of misdemeanours and abuse of some attorneys and solicitors, who, by charging excessive fees for their services, and by making other unnecessary demands, caused clients to be financially overburdened, whereby legal services were being extraordinarily delayed 1605 (UK) (3 Jas 1. c.7).
The scales of costs, which are regularly reviewed by statutory bodies charged with that duty, provide the default standard as to what it is reasonable for a practitioner to charge. In those jurisdictions, and absent a special costs order, party/party bills that go to an assessment (as opposed to being settled between the parties) are assessed against the relevant scale of costs in order to determine their reasonable quantum. The scales of costs also are also the default as to what a client should be charged by his or her own solicitor, but solicitors and their clients can contract out of that default position by way of costs agreements.

1.3.6: Contracting out of the default position

Defaults aside, most legal retainers are subject to costs agreements, wherein the various hourly and other rates that a client will be charged are set out. A costs agreement is a contract of engagement between the practitioner and the client, and is subject to all the general common law and specific statutory regimes that govern contracts. In addition, costs agreements are governed by the Legal Profession Act operating in each jurisdiction. Valid costs agreements displace court sanctioned scales of costs, at least in terms of what monies the client must pay to his or her own solicitor. Costs agreements do not however displace scales of costs for party/party assessment.

If the client is dissatisfied with the bill generated under the costs agreement and requests assessment the assessing officer then assesses the bill in accordance with the costs agreement.

43 In Western Australia the Legal Costs Committee has been reconstituted under Division 5 of the Legal Profession Act 2008 (WA). The Committee, consisting of lawyers and laypeople, is responsible for reviewing cost determination on a bi annual basis, and amends them when it considers necessary. For example, the Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 (WA), which regulates fees for contentious matters in both the District and the Supreme Courts of Western Australia, has been reviewed and replaced in 1996, 1999, 2002, 2004, 2006, 2008 and most recently in 2010. In 1996 the scale hourly rate for a senior practitioner was $270.00, currently it is $429.00.

44 A court’s discretion to award costs in party/party matters includes the discretion to award indemnity costs (which displace the scale limits) or to make orders lifting the scale limits (see for example Rules of the Supreme Court 1971 (WA) Order 66).

45 In Western Australia s 282 of the Legal Profession Act 2008 (WA) allows costs agreements; that section mirrors s 236 of the Legal Profession Act 2004 (NSW).

46 Both Western Australia (s 288 of the Legal Profession Act 2008 (WA)) and New South Wales (s 328 of the Legal Profession Act 2004 (NSW)) have similar criteria that will allow a client to avoid a costs agreement. The criteria are broad, with reasonableness, which is always mostly a matter of fact, being the baseline. An unreasonable costs agreement may be set aside and the fees charged under the retainer are governed by the relevant scale of costs. Failure to make adequate disclosure as to cost at the inception of the retainer is strong ground for a client to overturn a costs agreement.

47 A costs agreement may impact on a party/party assessment if there is an indemnity costs order.
rather than in accordance with any relevant scale. The client is ultimately responsible for paying the solicitor the amount that the assessing officer considers reasonable in relation to both the costs agreement and the particular instructions that were given to the solicitor.

This is the reality in most Australian jurisdiction, and in particular the Western Australian jurisdiction. New South Wales, however, abolished scales of costs in 1993. The scales were abolished for a number of reasons, in part to address the perceived injustice of successful litigants being out of pocket for legal costs that they have legitimately incurred. In New South Wales costs assessment is, at least in the first instance, no longer part of the judicial process. Costs assessment has become an administrative process under the auspices of a statutory body.

1.4: The scope of this thesis
This thesis investigates and compares two differing costs adjudication systems; those of Western Australia and New South Wales. It does so from a Western Australian perspective. Western Australia has the model that is standard in most jurisdictions; a judicial process that is dependent on scales of costs and is adversarial. New South Wales has boldly abandoned costs scales and the adversarial system; instead it has adopted an administrative model of costs assessment (the 1994 Reforms). Research for this thesis in the Western Australian jurisdiction has been restricted to costs as ordered and determined in the Western Australian Supreme Court. This limit was in part because all solicitor/client costs disputes in the Western Australian jurisdiction are heard in that court, and in part for reasons of practical efficiency. The New South Wales costs assessment scheme embraces all the state courts, so data from the research conducted there represents a wider spread of litigation. However, despite the fact that the lower courts in Western Australia deal with costs in the same way as does the Western Australian Supreme Court, findings drawn from the Western Australian Supreme Court material may not be valid for lower courts in that jurisdiction.

48 In addition, costs agreements are governed by the various acts that generally govern the legal profession in each jurisdiction as follows: Legal Profession Act 2006 (ACT) Division 3.2.5, Legal Profession Act 2006 (NT) Division 5, Legal Profession Act 2007 (Qld) Division 5, Legal Practitioners Act 1981 (SA) s42(6), Legal Profession Act 2007 (Tas) ss306-312, Legal Profession Act 2004 (Vic) Division 5. A brief history of costs assessment in Western Australia is provided in Chapter Two.

49 A brief history of costs assessment in New South Wales is provided in Chapter Three.

50 Appeals relating to costs assessments are initially heard as a further administrative process, however there is still a right to appeal that review to the District Court (Legal Profession Act 2004 (NSW) ss284, 285).
Any comparison of differing systems is likely to raise the issue of the ‘best’. To determine a ‘best’, one must first determine the stakeholders. Once they are found the real question will be ‘best for whom?’ There are at least four separate stakeholder groups in relation to the issue of legal costs: the courts, lawyers, clients, and the public in general. Clients are necessarily divided into two groups, winners and losers of litigation, where what is the best for one group is likely to be worse for the other. A winning client will think it best that he or she regains all the monies outlaid as legal costs; a loser will be very keen to pay as small a portion of the victor’s costs as possible. Clients also have a homogenous interest; winner or loser, the system also adjudicates the financial relationship between the client and his or her own lawyer, and clients will consider a system that keeps a tight rein on what lawyers can charge to be the best. This thesis will not try to determine an overall ‘best’, for the scope of such determination is too large.

1.5: The purpose of this thesis

The purpose of this thesis is threefold in that it attempts to answer three questions:

1.5.1: Did the 1994 Reforms achieve their intended outcomes?

Firstly, the thesis will consider the main drivers of the New South Wales Reforms and will question whether the Reforms functioned as intended to alleviate what its proponents saw as central problems with the traditional assessment regime. The purpose of the Reforms is dealt with in detail in Chapter Three, however, the parliamentary debates surrounding the Reforms continually come back to one key issue, the fact that winners in litigation often found themselves significantly out of pocket for legal fees despite the New South Wales being a ‘costs follow the event’ jurisdiction.51 Litigation determines disputes, and the Australian legal system generally expects that the loser will pay not only any damages awarded, but his or her opponent’s costs as well.52 This is a general principle rather than a firm rule and cost recovery rates vary greatly from matter to matter. A reform that addresses this and creates a situation where the winner recovers a larger portion of the monies paid to his or her lawyer would appear to make the system fairer; both sides of the New South Wales parliament that instituted the 1994 Reforms agreed that this

---

51 John Hannaford, introducing the 1994 Reforms, described costs following the event as “a key component in our judicial system”. New South Wales, Parliamentary Debates, Legislative Council, 28 October 1993, 4645 (The Honourable John P Hannaford, Attorney General and Minister for Justice).
52 This is a general expectation, there are many instances where costs do not follow the event, exploring them is outside the scope of this thesis.
was to be a major outcome of the new legislation. Further, the reform agenda was informed by the *National Competition Policy Review of the Legal Profession Act 1987* (NSW) and a view that scales of costs were anti-competitive. The legislators argued that removing scales of costs would make those who supplied legal services more genuinely competitive and that through better competition the cost of legal works would fall.

Aligned with the above, the thesis will attempt to ascertain how the reformed system in New South Wales compares with the traditional model of costs assessment that operates in Western Australia when dealing with disputes between lawyers and their own clients. The thesis will attempt to make a finding as to whether lawyers or their clients are more advantaged in one system than in the other, with a view to determining if that aspect of the Reforms was successful.

**1.5.2: Which of the two costs assessment regimes provides the most advantages to the jurisdiction’s courts?**

Secondly, it will attempt to make some judgment in relation to which of the two schemes works for the courts of the jurisdiction as administrative institutions. The system that is best for the courts will largely be the system that produces reasonable results in a timely and not overly expensive manner. Reasonable, in this context, would mean results that are generally perceived as fair, transparent and open to scrutiny.

**1.5.3: What are the unintended benefits of the 1994 Reforms?**

Thirdly, and in a general sense, the thesis will identify incidental benefits that flow from the New South Wales Reforms.

**1.6: How will the thesis achieve its purpose?**

In relation to the first of those three purposes, the thesis will present data drawn from costs assessments in each jurisdictions and will provide analysis of that data. It will attempt to demonstrate whether (and where) the two different costs assessment schemes produce materially different outcomes in terms of the quantum of fees payable under assessed bills of costs and in

---

53 The National Review did not finish its report until after the 1994 Reforms were instituted, but the review itself was taking place in the background to the costs reform.

terms of other relevant aspects of the assessment regimes. In relation to the first purpose, regarding the agreed goal of increasing the winning litigant’s cost recovery, this thesis will show that the 1994 Reforms have resulted in increasing the amount a winning litigant recovers under a costs order.

Further, in relation to the third purpose, the thesis will investigate some of the possibilities that have opened up through the practicalities of the New South Wales system and will argue that those practicalities provide unparalleled opportunities to develop deeper knowledge of how well our legal system works and what parts of it are more or less effective.

Lastly, the thesis will argue that the 1994 Reforms, as well as providing some measure of relief for winning litigants, have provided clear advantages as compared to the traditional adversarial model.

These things are all important. They are important in the narrow area of costs assessment; in Western Australia costs assessment continues to develop slowly and along traditional lines without there being a great deal of scrutiny into the effectiveness of the system overall. New South Wales has taken a radical departure from the traditional systems in order to address what were seen as systemic problems with the way disputes as to costs were determined. Nearly two decades later New South Wales has instituted the first thorough investigation into the efficacy of that departure by way of the Chief Justice’s Review of the Costs Assessment Scheme, and that review is yet to produce a final report. Having two quite different systems for dealing with the same problem, with both of those systems now mature and entrenched, creates an opportunity to find out what works and what does not work as well. They are also important in the broader sense; if we agree with Pound as to the need to have better informed legislators then investigations into the eventual outcomes of reform, and measurements as to how well laws have measured up to their designed ends are important tools for good governance.

The following illustration provides a timeline for the historical development of costs assessment in Western Australia and New South Wales, as further described in Chapter Two and Three.
### Table 1.1: Historical timeline of costs assessment

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1788</td>
<td>English Law and with it costs assessment arrives in NSW</td>
</tr>
<tr>
<td>1824</td>
<td>Supreme Court of New South Wales established</td>
</tr>
<tr>
<td>1829</td>
<td>English Law arrives in WA</td>
</tr>
<tr>
<td>1847</td>
<td>An Act to regulate Attorney’s Fees (NSW)</td>
</tr>
<tr>
<td>1861</td>
<td>Supreme Court of Western Australia established</td>
</tr>
<tr>
<td>1888</td>
<td>Rules of the Supreme Court WA sets out scales of costs</td>
</tr>
<tr>
<td>1893</td>
<td><em>Legal Practitioners Act (1893)</em> regulates legal practice in WA</td>
</tr>
<tr>
<td>1898</td>
<td><em>Legal Practitioners Act (1898)</em> regulates legal practice in NSW</td>
</tr>
<tr>
<td>1971</td>
<td>New Supreme Court Rules culls scales of costs to 28 items in WA</td>
</tr>
<tr>
<td>1984</td>
<td>Responsibility for setting scales of costs shifts from the courts to an expert panel (NSW)</td>
</tr>
<tr>
<td>1987</td>
<td>Responsibility for setting scales of costs shifts from courts to expert panel (WA)</td>
</tr>
<tr>
<td>1993</td>
<td>NSWLRC report recommends reform of costs assessment regime (NSW)</td>
</tr>
<tr>
<td>1993</td>
<td>The Legal Profession Reform Act passed to amend the Legal Profession Act 1987 and introduces costs reform (NSW)</td>
</tr>
<tr>
<td>1994</td>
<td>Costs assessment reforms come into effect in NSW, Costs assessment scheme set up as an administrative dispute resolution body. Scales of costs abolished. Contingency fees with uplift introduced</td>
</tr>
<tr>
<td>1999</td>
<td>LRCWA completes review of justice system, proposes costs reforms</td>
</tr>
<tr>
<td>2002</td>
<td><em>Civil Liability Act 2002</em> caps costs for liability in tort</td>
</tr>
<tr>
<td>2004</td>
<td><em>Legal Profession Act 2004</em> takes away right to charge uplift fee in actions for damages</td>
</tr>
<tr>
<td>2008</td>
<td><em>Legal Profession Act 2008</em> Practitioners get right to file own bill for assessment. Time for requesting assessment enlarged from 30 days to one year. Conditional agreements with uplift fees allowed</td>
</tr>
<tr>
<td>2009</td>
<td>Supreme Court introduces provisional assessment</td>
</tr>
<tr>
<td>2006</td>
<td>Time to seek assessment of costs enlarged from 30 days to one year</td>
</tr>
<tr>
<td>2011</td>
<td>Chief Justice announces major review of the costs assessment scheme</td>
</tr>
<tr>
<td>2013</td>
<td>Draft report from the Chief Justice’s review makes sweeping recommendations for further reform</td>
</tr>
</tbody>
</table>
Chapter Two: Assessment of costs in Western Australia - A brief history

2.1: Overview

This thesis compares and contrasts two costs assessment regimes; the adversarial system used in Western Australia and the ‘reformed’ administrative system that was adopted in New South Wales in 1993. The Western Australian system, as exists in 2013, is a lineal descendant of the adversarial costs assessment system that developed in England. That English system was received in Western Australia with the body of English law that accompanied the first white settlers to the nascent colony. This chapter gives historical context to the thesis by tracing the evolution of the costs assessment regime within Western Australia from the time of colonisation to the present. As will be illustrated, features of the current costs assessment regime, such as scales of costs and costs agreements that avoid those scales have been a part of the regime since its inception at the time Western Australia was colonised. As will be seen below, some of the more recent attempts at reform have moved costs assessment in Western Australia, at least in some parts of the jurisdiction, closer to the administrative model, but in all costs assessments in Western Australia are still carried out much as they always have been.

2.2: The early years

The British colonisation of Western Australia was initiated in 1829. Captain Stirling, the colony’s first Governor, in conjunction with a Legislative Council, was empowered to pass laws as necessary for the new colony, but it was clear that the free settlers of Western Australia were subject to English law as current at the time of colonisation. The first law

55 A brief history of the development of the law of costs in England was provided in Chapter One.
56 Costs reform was an issue in England at that time. In 1828 Lord Brougham gave a speech in parliament recorded as ‘A speech on the present state of the law in the country’ in which he canvassed the problems and inequities the then current costs regime created. A transcript of the speech is available at http://hdl.handle.net/2027/hvd.hnf6kj.
57 10th Geo, 4th cap. 22 (Western Australia Act 1829 (UK)).
58 ‘It may be proper to notice that Australia being a Territory acquired by mere rights of occupancy, and not by conquest, the King’s Subjects residing there are, by a general principle of law, entitled to all the Rights and Privileges of British Subjects and carry with them the Law of their native country, so far as it is applicable to their new situation and circumstances.’ (An extract from Lord Greville’s second despatch to Governor Stirling, dated 28 April 1831.) This would seem to include the right to have a bill of costs assessed. It is interesting to
passed by the Governor of the new colony established a Court of Civil Judicature.\(^{59}\) That court was given the jurisdiction of the Courts of the Queen’s Bench, Common Pleas, the Exchequer, as well as jurisdiction for probate matters.\(^{60}\) Those jurisdictions included the power to award legal costs to winning litigants, regardless of whether they were plaintiffs or defendants. Failure to pay costs was considered serious; defaulters were not simply imprisoned, they were imprisoned and kept at hard labour for up to a month or until all the costs they owed were paid.\(^{61}\)

A Supreme Court was created by way of an ordinance assented to in 1861.\(^{62}\) The jurisdiction, powers and assets of the Court of Civil Judicature was transferred to the new court, and the Chief Justice was given the power to make rules of court.\(^{63}\) In 1863 a Court for Divorce and Matrimonial Causes was established, although in reality the small colony meant that it was the Supreme Court sitting in that guise.\(^{64}\) The ordinance that established that court made provisions for the assessment of costs.\(^{65}\)

Local Courts were established at much the same time.\(^{66}\) The newly established Local Court regime was alive to the need to limit fees payable to lawyers, and to limit cost recovery.\(^{67}\)

\(^{59}\) 2 Gul. IV., No. 1, (An Act for Establishing a Court of Civil Judicature 1832).

\(^{60}\) Ibid, s 7.

\(^{61}\) 14 Vict. No. 5, (An Ordinance to Facilitate the Performance of the Duties of Justices of the Peace Out of Sessions within the Colony of Western Australia with Respect to Summary Convictions and Orders 1850) s 23.

\(^{62}\) 24 Vict. No. 15, (An Ordinance to provide for the more effectual administration of justice by establishing a Supreme Court) assented 17 June 1861.

\(^{63}\) Ibid s 26 made the transfer, s 31 gave the Chief Justice power to make the rules of court.

\(^{64}\) 27 Vict. No. 19, (An Ordinance to Regulate Divorce and Matrimonial Causes 1863).

\(^{65}\) (As noted in the body of this thesis, assessment of costs was known as ‘taxation of costs’ in Western Australia until the model legislation was passed in 2008. For the sake of clarity and consistency this annexure will refer to assessment of costs throughout).

\(^{66}\) Ibid s 59. The bill of any proctor, attorney, or solicitor, for any fees, charges or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial causes, shall, as well as between proctor and attorney or solicitor and client, as between party and party be subject to taxation by the Registrar of ‘the Supreme Court, and the mode in which any such bill shall be referred for taxation and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under this Ordinance, and the certificate of the registrar of the amount at which such bill is taxed shall be subject to the Judge of the Court.’ The right to assessment rested with the client; a practitioner could not file his or her own bill of costs for assessment and, if unpaid, had to sue in debt. This remained the position in Western Australia until 2008, see discussion at 2.4 and 2.5 below.

\(^{67}\) 27 Vict. No. 2, (An Ordinance for the Recovery of Small Debts and Demands 1893). Section 2 of that Act read as follows: ‘IT shall be lawful for the Governor from time to time, and at any time by proclamation
However, even in 1861 the ubiquitous costs agreement allowed lawyers and clients to contract out of the restricted scales of costs. The Attorney General was given the power to frame scales of costs for the Local Courts for matters over £20 and until he did so the scales of costs of the English County Courts were to apply. The Ordinance setting up the Local Court also allowed for taxation of costs both between party/party and client/solicitor, with client/solicitor assessment being subject to any written costs agreement.

In 1880 the Supreme Court and the Court of Divorce and Matrimonial Proceedings were amalgamated. New rules of court were drafted, and came into effect in 1888, but the old rules and procedures remained in force where they were not inconsistent with the new. If damages recovered in the new court were less than £20 in contract or less than £5 in tort, cost recovery was restricted to the Local Court Scale.

---

67 Ibid s 30. ‘And no attorney shall be entitled to have or recover therefore any sum of money unless the debt or damage claimed shall be more than 40s, or to have or recover more than 10s for his fees and costs, unless the debt or damage claimed be more than £5, or more than 15s unless debt or damage claimed be more that £20, and in no case where the debt or damage claimed not exceed £20 , shall any fee exceeding £1 3s 6p be allowed for employing a barrister as counsel in the case, and the expense of employing a barrister or an attorney either by plaintiff or defendant, shall not be allowed on taxation of costs in the case of a plaintiff where less than £5 is recovered or in the case of a defendant where less than £5 is claimed, or in any case unless by order of The Magistrate.’

68 27 Vict. No. 19, (An Ordinance to Regulate Divorce and Matrimonial Causes 1863). By way of s 31, in matters of over £20, the Magistrate had discretion to allow a solicitor to recover more than was allowed under s 30 if the Magistrate was satisfied ‘by writing under the hand of the client’ that the client agreed to the extra payment.

69 Ibid s 32.

70 Ibid s 33. An oddly worded section whereby “all costs and charges shall be taxed by The Magistrate...”. The emphasis is mine, as the section seems to disallow agreement as to costs and make taxation mandatory.

71 Ibid s 34. ‘With respect to such proceedings as are last hereinbefore specified, all costs and charges between attorney and client shall, on the application either of the attorney or client, but not otherwise, be taxed by the Magistrate of the court in which such costs and charges were incurred; and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless The Magistrates shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed; and no attorney shall have the right to recover from his client any costs or charges in respect of such proceedings, unless they shall have been allowed either on such taxation, or on the taxation of the Master of the Supreme Court.’

72 44 Vict. No. 10, (An Act to make Provision for the Better Administration of Justice in the Supreme Court of Western Australia (The Supreme Court Act) 1880).

73 Ibid s 17.

74 14 Vict. No. 5, (An Ordinance to Facilitate the Performance of the Duties of Justices of the Peace Out of Sessions within the Colony of Western Australia with Respect to Summary Convictions and Orders 1850) s 23.
The Rules of the Supreme Court 1888 (WA) were the recognisable ancestor of the current Rules of the Western Australian Supreme Court. Order 61 dealt with costs. Order 61 Rule 31 set out the general regulations that applied to assessments in the Supreme Court. A bill of costs drawn up pursuant to the 1888 Rules would resemble a bill drawn up in 2012 in appearance, if not in quantum. By way of Order 61 Rule 31(25) an assessing officer was given broad powers, similar to the powers such an officer has today. The assessing officer was to allow the costs of procuring counsel’s opinion as “in his discretion think just and reasonable”, while other costs were to be allowed in accordance with the Scale of Costs set out in Appendix N of the rules.

Court fees on assessment were due at the end of the assessment process, and payable on the bill as assessed, though the assessing officer was able to require a deposit of the full amount of the fees that may be payable at completion if he so desired. The filing fee was not a set component per se, but was fixed at 2 shillings for any bill not exceeding £4 and then an additional shilling for every £2 allowed above £4. By comparison, in 2013 there is an immutable fixed fee on filing, and then a further fee that is set at roughly 5/8 the fee that was charged in 1888.

The Legal Practitioners Act 1893 (WA) was described through its full title as “[a]n Act to consolidate and amend the Law relating to the admission of Practitioners in the Supreme Court, and to regulate their Conduct and their Remuneration in certain cases”. The Act consolidated previous statutes governing legal practice. It allowed practitioners to give a

---

75 Rules of the Supreme Court of Western Australia 1888 (WA) O 61 r 31(15).
76 Appendix N, found at page 343 of the Rules, is entitled ‘Costs’. There are 174 separate cost items on the Scale, with the first, ‘writ of summons for the commencement of any action’ being allowed at 6s8p. Attendance on taxation is also allowed at 6s8p. Where an hourly rate is allowed, it too is allowed at 6s8p. Under the Supreme Court (Contentious Business) Cost Determination 2010, the hourly rate for a senior solicitor in Western Australia is $429.00. A Writ of Summons is allowed at 1.5 hours and matters to do with taxation are ‘such amounts as are reasonable under the circumstances’.
77 For a full description of the current assessment regime, including information on filing fees, see Annexure 2 of this thesis.
78 The Legal Practitioners Act 1893 (WA) s 2 as follows: 24 Vic., No. 15. The Supreme Court Ordinance (WA), 1861 (section 16 repealed and ‘and so much of section 31 as relates to the power of the Chief Justice to make rules and orders as to the fees and costs of practitioners’ (amended)). The following acts were also repealed: 29 Vic. No. 9, An Ordinance to regulate the admission of Attorneys and Solicitors; 45 Vic., No. 1. An Act to regulate the admission in certain cases of Barristers, etc., 50 Vic. No. 31, An Act to amend the Law regulating the admission of Barristers, etc. and 53 Vic. No. 6, The Barristers Board Act, 1889.
quote to a client rather than charge by way of items on a scale of costs, so long as the arrangement was covered by a written costs agreement. The Court could, on application and with a finding that the agreement was unreasonable, set a costs agreement aside and assess costs, but the costs of a retainer subject to valid costs agreement could not be assessed.

Despite the *Legal Practitioners Act 1893* (WA), the procedures of cost adjudication continued to be governed by court rules. The *Supreme Court Rules* of 1888 were displaced by the 1909 rules, but the costs assessment process remained the same, despite a change in the numbering of the rules that governed the process. The fee allowed for drafting a Writ of Summons was still 6s 8p and the fees charged on assessment remained unchanged.

The scale of costs crept up incrementally, generally in line with the cost of living, until 1951, when all increases were repealed and the scale as applied in 1909 was simply doubled. In effect, the Court had allowed for a 100% increase in legal fees over the period of 63 years.

When the *Supreme Court Rules* were again replaced in 1971, Order 66 governed costs, as it does in 2013. The scale of costs that had appeared as Appendix N of the old rules was drastically culled to a list of 28 allowable items, and placed in Schedule 4 of the new rules. A Writ of Summons was now to be allowed at up to $40.00. The new scale had a lower fees division, for matters where less than $3000.00 was claimed, and a higher scale for those

---

79 *Legal Practitioners Act 1893* (WA) s 29.
80 Ibid. The 1893 Act, as passed, governed the legal profession with a mere 53 sections; the current *Legal Profession Act* (2008) has 714 sections.
81 O 65 now pertained to costs, rather than O 61, but a scale of costs was still to be found at Appendix N.
82 *Rules of the Supreme Court of Western Australia 1909* (WA).
83 Western Australia, *Government Gazette*, No 91, 21 September 1951, 2514. In 1909 the Rules allowed a writ of summons at 6s8p. Where work was allowed at an hourly rate that rate was the same at 6s8p. The 1951 doubling took the hourly rate to 13s4p.
85 The scales of costs are no longer part of the Court Rules. Scales of costs are now delegated legislation in their own right. See for instance the *Legal Practitioners (Supreme Court) (Contentious Business) Determination* (WA) 2010.
In general, the fees allowed were expressed across a range of values, and in particular for ‘getting up’ the fees allowed in the higher division were calculated by reference to the amount claimed at trial.\textsuperscript{88}

2.3: The winds of change: The Clarkson Committee 1979-1983

In April 1979 the Government of Western Australia commissioned an inquiry into the reorganisation of the legal profession in Western Australia.\textsuperscript{89} The inquiry, headed by The Honourable Gresley Clarkson QC (the Clarkson Committee), had terms of reference that required it to investigate scales of cost and the method used to determine them, but was not asked to investigate the more fundamental question; whether there should be scales of costs at all.

Notwithstanding that, the Law Society of Western Australia made the following submission to the inquiry:

\begin{itemize}
  \item[a)] That scales of costs prescribed under statute should be dispensed with apart from the need to retain some fixed statutory items in litigious costs (such as for issue of writ, judgement and execution).
  \item[b)] The Society should have the power to prescribe guidelines as to costs,
  \item[c)] Any lawyer should be at liberty to charge such amount as he considers appropriate (and which is fair and reasonable for the work done) there being no obligation to follow the guidelines; and
  \item[d)] The client’s right to have his lawyer’s bill assessed by an officer of the Court should be retained in all circumstances.\textsuperscript{90}
\end{itemize}

Despite expressly stating that the right to have a bill assessed by the court is fundamental, the

\begin{footnotes}
\item[87] The split scale was for work directly related to trials. By the time of the 1976 reprint, the lower scale was for matters up to and including $10,000.00.
\item[88] Note 80 above, Schedule 4, Item 9 (getting up). In the lower division getting up was allowed at between $60.00 and $240.00, while in the higher division getting up was allowed at “$100.00 to $300.00 for the first $3,000.00 plus 4\% of the balance to $6,000.00 then 2\%.”
\item[89] See ‘Lawyers come under government scrutiny’, The West Australian (Perth), 4 April 1979, 3. The report ‘would include the discipline and control of the legal profession, assessment of costs and the best method of dealing with complaints against lawyers’.
\item[90] The Law Society of Western Australia, Submissions to the Committee Inquiring Into the Future Organisation of the Legal Profession in Western Australia, June 1980, 91.
\end{footnotes}
Law Society did express concern about costs assessors because they were ‘not always close to the problems of running a busy private practice’ and might therefore lack insight into the problems and difficulties of costing legal work.\textsuperscript{91} This concern continues to be expressed by lawyers on a regular basis, without perhaps any acknowledgement that costs assessors, who also preside over a wide range of interlocutory matters, may well know a great deal more about what work is reasonably necessary for the successful carriage of litigation than do the bulk of lawyers.\textsuperscript{92}

The Law Society’s approach seemed to be based on the view that scales of costs were anticompetitive, rather than in any concern that a winning litigant was left out of pocket for a portion of his or her legal fees. This seems strange, as scales of costs in themselves do not set the minimum rate that a solicitor can charge for his or her work. That said, at that point in time charging below the scales of costs could be seen as a breach of professional conduct rules,\textsuperscript{93} and had been frowned on by courts.\textsuperscript{94} If the Law Society considered that removing scales would mean that the cost of legal services would drop, it did not say so in its submission.

The submission did address the issue of cost determination in party/party matters and noted that a system where an assessing officer informed himself by reference to Law Society guidelines and made a judgment on a quantum meruit basis, rather than by way of set scales, would produce no great difficulties.\textsuperscript{95} Implicit in this submission is the notion that a winning litigant should recover costs that were reasonably spent in the carriage of the litigation, rather than some artificially limited costs set out by the court. This submission ignores the fact that

\textsuperscript{91} Ibid.
\textsuperscript{92} Costs assessors in all of the Western Australian courts perform that duty as one of many. In the Magistrates Court it is the Clerk of Court who performs the role, in the District and Supreme Courts costs assessment is done by the registrars.
\textsuperscript{93} Western Australian Legal Professional Conduct Rule 29 formerly provided:

\begin{quote}
A practitioner shall not make a practice of charging less than the fees allowed under the appropriate scale, although in any particular case for reasons such as friendship with or poverty of the client he may charge less.
\end{quote}

\textsuperscript{94} Re Evill (1951) 2 TLR 25 at 267 (High Court England):

\begin{quote}
It is most undesirable for a profession that, where there is a recognised scale of fees, whether laid down by Act of Parliament or by custom, there should be competition among members of the profession to get or keep business by offering to charge less than the others are entitled to charge.
\end{quote}

\textsuperscript{95} Above n 89.
scales of costs are themselves set as guidelines as to what the reasonable costs of litigation should be.  

The Clarkson Committee did not adopt the Law Society submissions in making its recommendations.  

The Clarkson Committee considered that scales of costs should continue to govern cost recovery (except between solicitor/client when the solicitor and client have contracted out of the scales by way of a costs agreement). However, it recommended that the responsibility for producing the scales be taken from the court and given to a statutory body to be known as the Legal Costs Committee. This recommendation was an amelioration for both the courts and the legal profession; the judges who were responsible for creating the scales were freed from that onerous task, while the profession was to gain substantial representation on the Legal Costs Committee and thus have a real say in what they were able to charge, under the guise of bringing ‘real world’ experience to the task of creating the scales.

The legislative response to the report was the Acts Amendment (Legal Practitioners, Costs and Taxation) Bill 1987. It was read for the first time on Wednesday 21 October 1987, by the then Minister for Works and Services, Mr Peter Dowding. He believed that the body set up to determine scales of costs ‘should start from first principles to determine what is fair and reasonable remuneration having regard to more general considerations’. Some of the opposition were scathing about the concept of scales, considering them to be price fixing by a profession that considered itself different from all others. Mr Mensaros, the Liberal member for Floreat, also noted that scales were made irrelevant through the existence of costs agreements. Mr Dowding, in response, noted that the courts had always had

---

96 For a brief description of how scales of costs are determined page 27 below.
97 The Clarkson Committee released its findings as Inquiry Into The Future Organisation Of The Legal Profession In Western Australia: Report May 1983.
99 Western Australia, Parliamentary Debates, Legislative Assembly, 21 October 1987, 4890 (Peter Dowding, Minister for Works).
100 Western Australia, Parliamentary Debates, Legislative Assembly, 12 November 1987, 5782 (Andrew Mensaros, Member for Floreat).
101 Ibid.
mechanisms regarding solicitors and costs. He stated that

[t]here is a good reason. It is the same reason why we have regulation for television and radio companies, and hotels. Where the community grants a monopoly to a group of people, it is entitled to have some control over the way in which those who possess that monopoly operate. 102

His argument seems more than a little naive, as merely setting a floor below which a lawyer is discouraged from charging, and above which a successful litigant is prescribed from recovering, does not really seem to be much in the way of control. 103

The Bill was passed and as a result the Supreme Court was relieved of the responsibility for setting scales of costs. The scales of costs were now to be set by the Legal Costs Committee, a statutory body created by way of section 58M of the Legal Practitioners Act 1893 (WA). The Legal Costs Committee was to be chaired by either a judge or a senior practitioner and to include two practicing lawyers and three lay members, one of whom was required to be an accountant. 104 This particular reform has survived to this day. The Legal Costs Committee was reconstituted under the Legal Practice Act 2003 (WA) when the Legal Practitioners Act 1893 (WA) was repealed, 105 and reconstituted again under the Legal Profession Act 2008 (WA). 106

The Committee consults widely and sets new scales approximately every two years. The current Legal Practitioners (Supreme Court) (Contentious Business) 2012 (WA) scale came into effect on 1 November 2012. 107 The scales set the maximum amounts (absent a special costs order) that a successful litigant can recover as costs regardless of what amounts were reasonably spent in pursuing the litigation. They also provide the default fees a legal practitioner can charge if he or she has not contracted out of the scales by way of a costs

102 Western Australia, Parliamentary Debates, Legislative Assembly, 12 November 1987, 5791 (Peter Dowding, Minister for Works).
103 For a further discussion on the point see Chapter Three at 3.3.5.1.
104 Legal Practitioners Act 1893 (WA) s 58M(2).
105 Legal Practice Act 2003 (WA) s 207. Section 207 has the identical wording to section 58M of the Act it replaced.
106 Legal Profession Act 2008 (WA) s 310.
107 Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 (WA) Schedule s 2.
agreement with the client.108

2.4: The Review of the Criminal and Civil Justice System in Western Australia

In September 1997 the then Attorney General of Western Australia the Honourable Peter Foss QC, asked the Law Reform Commission of Western Australia (The LRCWA), to review the Criminal and Civil Justice systems109 The LRCWA, chaired by Wayne Martin QC, as he then was, advertised for submissions in December 1997. In June 1998 it released an issues paper and commenced public meetings across the State in an effort to access the stakeholder’s views on the justice system as it then operated.110 The LRCWA received submissions from 650 individuals and organisations.111 The final report of its findings, published in 1999, recommended wide ranging reform and contained 447 recommendations; 40 related to costs in the civil jurisdiction. Of those 40, 13 were recommendations that directly or indirectly related to costs assessment. Those recommendations are dealt with in some detail below; firstly with a review of general issues and then with concentrated analysis of the issue of uplift fees.

2.4.1: The LRCWA’s views on costs assessment and related issues

The LRCWA looked into various issues surrounding costs assessment. One must note the particularly jaundiced view of the costs assessment scheme seemingly held by the LRCWA. The attitude of the LRCWA appeared to be that costs assessment was a necessary evil which they felt ‘should be avoided if at all possible’.112 Their report quoted von Doussa J of the Federal Court who had described costs assessment as, ‘an exercise that cannot be described as socially useful’.113

108 For an explanation of how scales of costs act to regulate fees see Chapter One at 1.3.8.
109 Above n 42. Ms Grace Meertes, providing context to the article announcing the review claimed that lawyers were ‘discarding ethics to win at all costs and pricing themselves out of the market’: at 10.
111 Ibid vi.
113 Ibid vol 1, 484. Quoting here von Doussa J in Beach Petroleum NL v Johnson (No. 2) (1995) 57 FCR 119, 123.
With respect to the LRCWA, they seem to have taken his Honour out of context,\(^{114}\) and while a judicial assessment of costs, like all other forms of litigation, should be, without very good reason, an avenue left unexplored, it should not be ‘avoided if at all possible’. A costs dispute differs little from most other disputes; one party is demanding money of another, and that other party does not agree how much or even if he or she should pay. Such disputes are the very purpose of a civil justice system. Further, the fact that in Australia an aggrieved client of a legal practitioner can, expeditiously and at a reasonable price, obtain an independent judicial (or, as in the case of New South Wales, administrative) decision as to what, in all the circumstances, is a reasonable price to pay for the services that practitioner has rendered, is an adornment to our legal system.\(^{115}\)

2.4.2: The time frame for seeking assessment.

One proposal before the LRCWA was to enlarge the time within which a client could seek assessment of his or her own costs. At that time, a client had 30 days from receipt of the practitioner’s bill to request assessment, once those 30 days had passed the client needed to seek an enlargement of time for assessment.\(^{116}\) The LRCWA noted that it was a rare situation in which a practitioner should even object to a request for an extension of time. As it happens most solicitors welcome taxation (assessment) because as soon as the bill of costs is signed it takes effect as a judgment of the Supreme Court and may be executed upon accordingly.\(^{117}\)

\(^{114}\) In *Beach Petroleum NL v Johnson (No. 2)* (1995) 57 FCR 119, 119-120, the applicants sought to ‘have gross sums fixed by order of the court as the costs payable by three of the respondents’ rather than having the costs argument proceed to a traditional assessment. Costs claimed in the matter exceed $18,000,000.00 and costs for drawing the bills were in the order of $450,000. His Honour noted that such instances showed ‘how inappropriate the old system of taxation (assessment) is to the modern commercial world’: at 123.

\(^{115}\) As will be seen in Chapter Three, it is the lawyers of New South Wales, rather than their clients, who most often access costs assessment. It is perhaps less an adornment that legal practitioners sit, to their advantage, outside the general reality of having to sue in debt when a party to a commercial transaction refuses to pay.

\(^{116}\) *Legal Practitioners Act 1893* (WA) s 66. This was problematic in situations where the client had been paying interim bills in accordance with a term in a costs agreement. A client may not have questioned the costs of the matter until the matter had ended, but in such circumstances it was difficult for that client to have anything but the final bill assessed.

\(^{117}\) Law Reform Commission of Western Australia, above n 110, 465.
However, the LRCWA did not recommend any change to that time limit in its final report. As will be seen below at 2.5.1.1, time limits on seeking assessment were substantially enlarged in 2008, and that enlargement has proved problematic.

2.4.3: Solicitor initiated assessment
The LRCWA recommended that practitioners be allowed to refer a bill rendered to a client for assessment. As noted at 1.3.5.1 above, a practitioner whose client refused to pay (rather than seek assessment) had no right to instigate an assessment of that bill on his or her own motion. Instead, he or she had to sue in debt, a far more lengthy and expensive process. As already canvassed, the LRCWA recognised that practitioners usually welcomed an assessment. In conjunction with that recommendation the LRCWA also considered that a court hearing a practitioner’s suit for fees owed should have the power to refer the bill in question for assessment before that court could rule on what was due. The Parliament of Western Australia was slow to follow this recommendation; legal practitioners in Western Australia did not gain the right to have their own bills assessed until 2008. It remains to be seen if Western Australian practitioners will embrace this right as enthusiastically as did the practitioners of New South Wales, where more practitioners access assessment than do clients.

2.4.4: ‘One more such success will ruin me’: reasonable costs recovery for a successful litigant
The gap between what a successful litigant paid his or her own lawyer as legal costs and what that litigant then recovered through the court order that awarded them costs from the unsuccessful party also received a good deal of attention from the LRCWA. They noted that, in part, that gap was part of a conscious policy to restrict litigation. However, the LRCWA

---

119 Ibid. See Recommendation 135.
120 See Chapter Four at 4.7.1.
121 Law Reform Commission of Western Australia, above n 116, 515. The LCRCWA here referred to Singleton v Macquarie Broadcasting Holdings Ltd (1991) 24 NSWLR 103, 106. Rogers CJ, hearing that matter, also noted, at 105, that:

It seems wholly inappropriate that a party, forced to take legal action, entirely through the wrongful and inappropriate conduct of the other party, be left badly out of pocket at the successful conclusion of the proceedings, simply by reason of an inappropriate method of taxation (assessment) of costs.
felt that the gap was unfair, and recommended that the gap be narrowed by allowing a wider range of file maintenance costs (then not included in the scales of costs) on party/party assessments. It recommended that a principle should be established that a winning litigant should recover a ‘fair and reasonable amount for the work that was reasonable required for the litigation’ and that the principle be enshrined either in the court rules or a new costs Act. The LRCWA recognised that the court was alive to this problem and was able, to some extent, to alleviate it through the use of indemnity orders. However, in wrestling with this issue, the LRCWA put its collective finger on the difficulty of assessing a party/party bill that was governed by an indemnity order as follows:

an order for indemnity costs does not oblige the loser to pay whatever the winner’s solicitors have charged the winner under a time costs agreement. Reasonableness is always the touchstone. But how does one define ‘reasonable’? Is ‘reasonable’ something more than the scale? If reasonable is something more than the scale does that make the scale unreasonable and thereby suggest that the scale should be made more generous or even done away with?

The questions raised in the passage above apply more broadly to party/party assessments in general. As is initially noted in Chapter One, in New South Wales the second part of that last question was answered in the positive, and scales of costs were done away with in 1994. After that in New South Wales individual assessors were left to determine ‘reasonableness’ on a case by case basis and from their own experience. The position in Western Australia was (and still is) that the scales of costs were a determination of what the reasonable costs of litigation were. After 1987 those scales were promulgated by a statutory body that had both experience and expertise in determining what legal costs should reasonably be.

---

122 Law Reform Commission of Western Australia, above n 118, 130. See Recommendations 130-131. The LRCWA also noted the plight of solicitors who failed to govern the retainer with a costs agreement, as absent a costs agreement the solicitor could only charge for work on the relevant scale, and no scales allowed for file maintenance: Law Reform Commission of Western Australia, above n 118, 518.

123 Law Reform Commission of Western Australia, n 118, 130, 137. See Recommendations 130 and 152. The principle of party/party costs assessment is that the successful party should recover his or her reasonable costs, and the scales of costs were (and in Western Australia still are) the benchmark of what is reasonable. Recommendation 130 seems to suggest establishing a principle that has already in existence.

124 Law Reform Commission of Western Australia, above n 118, 516.

125 See discussion above at page 27.
LRCWA noted that the Supreme Court scale was “generous”.\textsuperscript{126} If the ‘touchstone’ of indemnity costs is reasonableness, and ‘generous’ scales of costs are produced by an expert body and to reflect the reasonable costs of litigation, why are indemnity orders needed and why is there a gap between what a winning party pays his or her lawyer and what he or she receives in accordance with a costs order at all? A litigant is entitled to instruct a practitioner to go beyond what is reasonable, and a practitioner is entitled to payment for doing that work. It would be unfair to ask a losing litigant to pay for that work through a costs order, and an assessor will strike out unreasonable (and thus unfair) costs even in the presence of an indemnity order. It may be that the gap, while unfair, does act as a barrier to litigation, and it is arguable that in a market driven society even those who receive justice should pay a price for it.

\textbf{2.4.5: Reducing the burden on the courts}

The LRCWA’s final report was delivered six years after New South Wales reformed its costs assessment regime and moved to a system of specialist costs assessors. The LRCWA noted that there were no Western Australian provisions that allowed appointment of costs assessors,\textsuperscript{127} and recommended that such provisions be introduced and provided a very brief description as to how they could be utilised.\textsuperscript{128} That description, while deficient in detail, was in essence a thumbnail sketch of the reformed New South Wales regime in the way it envisaged the assessment process.

Recommendation 138 suggested that appeals from such assessments should be heard by an officer of the Supreme Court.\textsuperscript{129} The wording of Recommendation 138 makes clear that such costs assessors would be used for disputes between clients and their own practitioners. It

\textsuperscript{126} Law Reform Commission of Western Australia, above n 118, 516. With respect to the members of the LRCWA who were practitioners at the time they carried out the review, theirs was not a view that would have been widely shared by the bulk of Western Australian practitioners.

\textsuperscript{127} Law Reform Commission of Western Australia, above n 118, 132. That is one possible view of the situation. All the courts had judicial officers who were responsible for costs assessment, though in that function they were called taxing officers. What is implicit but not expressed in the final report is that costs assessment should be, at least so far as client/solicitor disputes are concerned, moved, at least initially, outside the judicial function of the Supreme Court.

\textsuperscript{128} Ibid 130. See Recommendations 137, 138.

\textsuperscript{129} Ibid. See Recommendation 138.
appears that the LRCWA did not envisage using costs assessors to determine party/party disputes,

The lack of data on costs assessment in Western Australia also garnered LRCWA attention. The final report recommended that all Western Australian courts and tribunals should publish data about costs assessment, as was then (and is now) the practice in the Federal Court. As will be seen in Chapter Four, this lack continues to be a feature of the Western Australian costs assessment regime.

In an effort to reduce the need for costs assessment, and the burden assessments placed on the justice system, the LRCWA recommended that courts should issue practice directions for situations where costs should be awarded in a lump sum, or as such orders are more generally known, as fixed costs. As noted above, the Honourable Wayne Martin QC, as he then was, chaired the LRCWA over the period of the review, and, as Chief Justice of the Supreme Court, as he is now, he has led a change in court practice where fixed costs are now more commonly awarded in the Western Australian Supreme Court.

2.4.6: The LRCWA position on contingency and uplift fees.

Contingency fees are extra fees above normal charges that a legal practitioner can charge his or her client if the matter is successful. Such fees are usually levied when payment of all of the fees is contingent on the success of the matter. All the Australian jurisdictions had long accepted that contingency fees, in the form of the ‘no win-no fee’ retainer, were permissible. Despite the old common law rule that both maintenance and champerty were forbidden, a no win-no fee retainer provided an access to justice for indigent clients who had valid claims but no means to pursue them. It was even accepted that practitioners could ‘maintain’ those actions by paying disbursements from their own pockets.

---

130 Ibid 132. See Recommendation 139.
131 Clyne v New South Wales Bar Association (1960) 104 CLR 186, 203, where the Full Court noted:
And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings. This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding.
However, the American position, where a practitioner can agree to take a percentage of the damages as remuneration for the retainer, was and remains anathema in Australia.\(^\text{132}\) The issue before the LRCWA was set in the middle ground, and the question they had to answer can be expressed as follows ‘should a practitioner who took on a no win- no fee retainer be allowed to charge some extra fee above what he or she would normally charge as compensation for the risk of losing the matter and not being paid at all?’\(^\text{133}\) As will be discussed in Chapter Three, the right to include a premium, or uplift, in a contingency retainer had been introduced as part of the 1993 New South Wales Reforms. The United Kingdom had adopted limited contingency retainers in 1990.\(^\text{134}\)

This is not a straightforward issue. One of the hallmarks of a good legal practitioner is that he or she is professionally independent and thus dispassionate about the matter in which he or she is engaged.\(^\text{135}\) A client is, quite understandably, caught up and emotionally engaged in a dispute, and as such unable to view the matter with that level of detachment we expect from legal practitioners. A practitioner is paid for his or her work, but in part the necessary detachment that allows him or her to view the matter dispassionately is strengthened by the fact that despite being paid a practitioner traditionally does not have a financial interest in the outcome of litigation. Contingency fees change that traditional position. The LRCWA was alive to this problem, and noted that if uplift fees were introduced there was a ‘real risk’ that practitioners would become ‘joint venturers’ with their clients if the practitioners were to be paid extra for running a matter successfully.\(^\text{136}\) However, the LRCWA went on to note that such a situation already existed with traditional no win-no fee retainers.\(^\text{137}\)

---

\(^{132}\) Ibid.

\(^{133}\) Law Reform Commission of Western Australia, above n 118, 483.

\(^{134}\) Courts and Legal Services Act 1990 (UK) c 41, s 58(1) was the original legislative instrument that allowed contingency fees in England and Wales. Contingency fees have been controversial in the UK (see for instance Mirror Group Newspapers Ltd v United Kingdom (European Court of Human Rights, Fourth Section, Application No 39401/04, 18 April 2011) where the European Court of Human Rights (Fourth Division) found that allowing a successful litigant to recover a success fee from the unsuccessful party was a breach of Article Ten of the European Convention on Human Rights).

\(^{135}\) See for instance Legal Profession Conduct Rules 2010 (WA) r 6(1(d)).

\(^{136}\) Law Reform Commission of Western Australia, above n 118, 484.

\(^{137}\) Ibid. Not everyone agrees that lawyers having a ‘real’ interest in the outcome of litigation as a problem. The Commonwealth Attorney General’s Department, discussing contingency fees, listed among the advantages of such arrangements that “they would also provide lawyers with a direct financial interest in the success of the case, unlike the present arrangements where lawyers get paid no matter the result” (The Department of the
The LRCWA noted other problems that could arise with the introduction of uplift fees. In particular they noted that while the Commonwealth Attorney General’s Department was “strongly” in favour of contingency fees that Department had identified three problems that could arise with them.\(^{138}\) They were as follows:

1. The potential for increased litigation; fuelled by
2. Uplift fees raised on ‘sure bet’ cases that would have gone ahead in the absence of contingency fees; and,
3. Windfall fees,\(^{139}\) which may result from lawyers charging uplifts when there was no risk of losing.

The Commonwealth Attorney General’s Department, dealing with this concern as part of its Justice Statement (1995),\(^{140}\) noted the first of those concerns, a version of the perennial ‘floodgates’ argument, but discounted it.\(^{141}\) The Department noted that ‘the increased access to the courts that contingency fees may allow will enable people of limited means to use the law, quite properly, to protect their rights or to be compensated for harm’.\(^{142}\) This seems a reasonable view of the perceived problem. Despite the fact that in some areas of litigation no win-no fee retainers were common, it may be correct to assume that introducing uplift fees will result in more litigation. It does seem likely that if uplift fees are used more broadly across the different types of litigation lawyers will be more likely to take on matters with a strong likelihood of success even if the clients are not in the position to pay upfront or monthly fees. However, if uplift fees are only paid in matters where the client is successful, and if, as it seems likely, practitioners would only enter such arrangements if they felt the case was of strong merit, then it also seems likely that the vast bulk of any extra litigation would be litigation where the plaintiff was vindicated and the court found that the plaintiff’s legal rights had been transgressed. Extra litigation comes at an extra cost to society as a

\(^{138}\) Law Reform Commission of Western Australia, above n 118, 484.

\(^{139}\) The Department of the Attorney-General, above n 137, 48 – 49.

\(^{140}\) The Justice Statement (1995), a wide review of issues surrounding access to justice, can be found at http://www.austlii.edu.au/austlii/articles/scm/.

\(^{141}\) The Department of the Attorney-General, above n 137, 49.

\(^{142}\) Ibid.
whole, but if a reform allows more people to use the justice system successfully to uphold their rights then that extra litigation should not be seen as a problem.

The final two concerns are two sides of the same issue and can prove to be a genuine problem. In New South Wales, where contingency retainers with uplift fees were introduced in 1993, perceptions of abuse around those two issues led to contingency fees being disallowed for damages actions in 2004. As previously noted, a practitioner would not generally enter into a conditional arrangement, with or without uplift fees, if he or she did not believe there was a strong chance of success and thus payment for the work he or she has done. Conditional fees have always been most prevalent in the area of tort, as it is not unusual for a person who has suffered a tortious injury to lack the means with which to seek compensation. When a practitioner enters into a no win-no fee conditional retainer with such a client, with or without an uplift fee, payment is contingent on success and the practitioner can and should define success in the costs agreement that he or she draws up and has signed at the beginning of the retainer. A sensible definition of success, from the perspectives of both client and lawyer, and for any matter, would include situations where the matter comes to a reasonable settlement, as it is axiomatic that the bulk of litigation does settle before trial. This means that, in most instances, a practitioner who included an uplift fee in the retainer would collect that uplift fee. In personal injury matters, where quantum rather than liability is often the issue, it is even more likely that a retainer will conclude in a way that can be described as successful. If the right to add an uplift fee to a conditional costs agreement was restricted to no win-no fee retainers there may be some rationale as to why a practitioner should, much more often than not, be paid above his or her normal rates. In the preface to its

143 Contingency fees were introduced in New South Wales in as part of the 1994 Reforms but were disallowed for any action for damages in 2004 because of perceived abuses. Some practitioners were seen to be claiming them in situations where there was no risk of loss and were thus gaining windfall fees. For an analysis of the rise and fall of uplift fees in New South Wales see Chapter Three and in particular 3.6.2. Uplift fees were introduced in Western Australia by way of the Legal Profession Act 2008 (WA) s 284(1) and the author is aware (through first hand hearsay) of one instance in Western Australia where a practitioner’s retainer to seek damages for personal injury in a road accident contained an uplift clause despite the fact that the defendant’s insurer had admitted liability.

144 See Gilles and Eliades v Giakoumelos [2008] NSWSC 70 where senior counsel failed to define success and lost a portion of his fees for doing so. See Nassour v Malouf (t/a Malouf Solicitors) [2011] NSWSC 356 where the solicitor purported to terminate a no win-no fee retainer but still claim costs for a later settlement and was unable to do so.
recommendation to introduce such fees the LRCWA appears to consider that contingency fees are limited to no win- no fee retainers, but that is not necessarily the case. Practitioners can enter into retainers where only a portion of the costs are conditional.

The LRCWA did not address recovery of uplift fees on party/party costs assessments, but in New South Wales, despite some early uncertainty, a successful litigant did not usually recover an uplift fee on a party/party basis.

The LRCWA was broadly in favour of allowing a retainer where the practitioner could charge an ‘uplift’, and noted that ‘the extra remuneration can quite justifiably be seen as a fair reward for taking on the very substantial risk of not being paid at all for a very large expenditure of professional time’. However, that view overlooks that fact that general no win-no fee retainers had been operating successfully without a uplift fee for some time, as practitioners, usually well placed to gauge the merit of claim, did not enter into such retainers unless they felt some strong belief in the likelihood of their being successful. It is true that in such situations a practitioner was effectively loaning the client money in the form of work over the period of the retainer. However, practitioners were entitled to bill those clients on a monthly basis and then charge commercial rates of interest on those bills so that on the successful completion of the matter the practitioner recovered his or her reasonable fees plus interest to cover the opportunity cost of the loaned work.

The LRCWA recommendation that uplift fees be introduced was not made without some strong reservations. In particular, the LRCWA referred to the Justice Advisory Committee: Access to Justice (an Action Plan) report, which had been commissioned by the

---

145 Law Reform Commission of Western Australia, above n 118, 133. The LRCWA noted that ‘Contingency fees allow a solicitor to be paid only if a case is won and on the basis of a percentage of the damages awarded’. That is not an accurate statement, except possibly in a narrow semantic sense. No win-no fee arrangements are contingency fee arrangements, but in Australia is has never been acceptable for a practitioner to take a percentage of the damages as payment for his legal fees.

146 For further discussion of this aspect of uplift fees see 3.6.2 below. See also McElwaine v Bulmer (Unreported, Supreme Court of New South Wales, Malpass M, 26 June 1998). This raises an interesting philosophical point. If the principle is that a winning litigant should recover all the reasonable costs of his or her litigation, but is unable to recover an uplift fee, is an uplift fee therefore unreasonable?

147 Law Reform Commission of Western Australia, above n 118, 483.
Commonwealth Attorney General and had been published in 1994. That report had also approved of contingency fees but had recommended that they be subject to eight safeguards, which can be summarised as follows:

- Contingency fees should only be allowed if the practitioner believed some was some real prospect of success but that the risk of failure and the client having to meet his or her own costs was ‘sufficiently significant’;
- That such agreements should be in writing and in plain English in a standard form developed not by the individual practitioner but by law societies in conjunction with relevant consumer bodies;
- That in entering into such agreements the practitioner should set out his or her usual fees and the rationale for including an uplift;
- ‘Success’ for the purposes of the uplift fee be clearly defined;
- Clients be allowed a cooling off period during which they could withdraw from the agreement;
- In addition to the general disclosure regime, contingency agreements should expressly inform the client of:
  - the cooling off period;
  - the client’s right to obtain independent legal advice;
  - why legal aid was not available in that particular instance; and,
  - that in the event of failure the client may have to pay the successful party’s costs.
- The client should be expressly informed that he or she had a right to apply to have any agreement set aside for unreasonableness, and;
- That the general provisions applying to the review of costs agreements also apply to conditional agreements and uplift fees.

The LRCWA recommended uplift fees for all matters other than family and criminal law, and that those fees should be used only when ‘all other means of avoiding the use of a

149 Ibid.
contingency fee arrangement have been exhausted; and (that) the client is financially unable to conduct the litigation without the use of a contingency fee arrangement’. They also recommended that uplift fees be calculated on what the winning litigant recovered from the losing litigant by way of a costs order as they argued that allowing an uplift fee on a time based costs agreement was a way of further awarding inefficiency and waste. Further, the LRCWA recommended that the safeguards set out in the Access to Justice Report be adopted, and strengthened by a requirement that all retainers including such fees be by leave of the court. The court, when approached for leave, was to consider the individual circumstances of the case when assessing the suitable amount to be charged as uplift.

The contingency fee regime envisaged by the LRCWA was a complete rejection of the American system where practitioners could take a percentage of a litigant’s damages as costs. The LRCWA recommended a regime hemmed in by a range of safeguards to ensure that practitioners could not abuse the right to charge extra for success. The LRCWA had also proposed that a disbursements fund be set up to avoid a situation where practitioners loaned money to their clients to cover those costs, as it was felt that such a situation was at odds with a practitioner’s fiduciary duty to their clients. The rationale that the LRCWA provided for that recommendation did not include that concern, but did note that a disbursement fund would be a beneficial reform even without uplift fees.

2.4.7: The fate of the LRCWA recommendations

Although the LRCWA handed down its final report in 1999, the Western Australian Parliament was slow to implement any of its far reaching recommendations. The 2002 National Competition Policy Review of the Legal Practitioners Act 1893 (WA)
recommended that reform to cost adjudication wait until the national approach to such reform could be determined and thus followed.\textsuperscript{158} For that reason costs Reforms were put on hold.

The \textit{Legal Practice Act 2003} (WA), which repealed the \textit{Legal Practitioners Act 1893} (WA) and contained sweeping Reforms to the governance of the legal profession merely replicated the costs assessment regime as it had existed under the \textit{Legal Practitioners Act 1893} (WA). As is described below, the ‘national approach’ to reform took place by way of the \textit{Legal Profession Act 2008} (WA), and as that Act was taken from a model bill it appears that the vast amounts of work performed by the LRCWA in relation to legal costs, and the well-reasoned recommendations for reform that flowed from that work were to some extent ignored by Parliament.

\textbf{2.5: The 2008 Reforms: towards a national approach to regulation}

The various jurisdictions of the Australian states have been in a slow drift away from any uniformity since they were first established.\textsuperscript{159} Each state was a colonial entity before Federation; and each colony was essentially self governing. The rules established at the formation of each colony incorporated the laws of England, but by the time the colonies federated there was already clear differences between the laws of each State, and by and large those differences had grown since then. As a simple example, the road rules of Western Australia are not identical to the road rules of New South Wales. More to the point, the rules that governed the legal profession had also evolved. By the time Australia entered the 21\textsuperscript{st} century they were substantially different from state to state.

There has long been a call for more uniformity of law across Australia in every sense.\textsuperscript{160} Many legal professionals now operated across the range of Australian jurisdictions, and it seemed ludicrous that an admitted practitioner from Western Australia could not act in New

\textsuperscript{158} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 24 October 2007, 6695 (Jim McGinty, Attorney General).

\textsuperscript{159} That drift is being reversed through the introduction of model legislation. The model Legal Profession Act, which has now been adopted by all the states and territories of Australia excepting South Australia, is an example of the reversal. 

\textsuperscript{160} Commentators called for uniformity of law for reasons of business efficacy and as a matter of common sense. For example, the corporation is Australia’s most common business entity; it made no sense that the rules for forming them and governing them differed from state to state.
South Wales without first becoming admitted there. Despite the Mutual Recognition Act 1992 (Cth) such an admission was not a given. A Western Australian practitioner who wished to be admitted in New South Wales was required to do extra coursework, as the requirements for admission differed in each state. It was problematic that practitioners who practiced across state boundaries had different rights and responsibilities depending on which jurisdiction they were operating in, and it was desirable that those rights and responsibilities should be standardised across the nation.

In 1994 the Law Council of Australia created a ‘Blueprint for a National Profession’. Since that time there has been an increasing push for the governance of the profession to be standardised in an ‘all Australia’ system to give consumers of legal services both uniformity and certainty. The then Attorney General, Darryl Williams noted that in his view:

the greatest challenge facing the Australian legal profession is the need to remain relevant, flexible and competitive in an increasingly borderless world. To allow the profession to embrace change we must deliver a foundation on which it can do so unimpeded by jurisdictional barriers.

On 7 August 2003 the Standing Committee of Attorneys General (SCAG) released a communiqué announcing that they had agreed on the implementation of model legislation to govern the legal profession. SCAG claimed that the model legislation would ‘bring benefits to both legal practitioners and consumers and lift current barriers to the practice of law across State and Territory borders’. SCAG provided a list of those benefits. For the purposes of this thesis the most relevant benefit provided by the model legislation was that it would standardise ‘the requirements for disclosing information on legal costs to clients, and

---

161 That Act was designed ‘for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia’: Mutual Recognition Act 1992 (Cth) s 3.
163 Darryl Williams, (plenary speech delivered at the Thirty Second Australian Legal Conference, Canberra, 14 October 2001).
165 Ibid.
thereby ensuring both clients and practitioners will have the same understanding of their rights and obligations regardless of where they live’. It is important to note that what was being standardised was the disclosure regime practitioners had to adhere to informing clients of their rights and obligations but not the rights and obligations themselves.

The model legislation came before the Western Australian Parliament on 24 October 2007 as the Legal Profession Bill 2007 (WA) (the 2007 Bill). Provisions as to costs in the then current Legal Practice Act 2003 (WA) were contained in 40 sections; the proposed Bill almost doubled that number and contained 75 sections dealing specifically with cost related issues. The then Attorney General, Mr J. A. McGinty, when he introduced the Bill, pointed to the various Reforms it contained, and in particular, noted that the Bill allowed for the introduction of uplift fees in the Western Australian jurisdiction. The Bill hardly garnered the attention of parliament. The lead Opposition speaker noted that “frankly, we need not look at much in this Bill”.

The Bill passed by the Legislative Assembly in its original form and sent to the Legislative Council in its original form on 21 November 2007. The Legislative Council discussed some of the sections relating to costs adjudication at some length, but passed it unamended. The Bill was assented to on 27 May 2008 and became law as the Legal Profession Act 2008 (WA).

Most of the provisions of the Legal Profession Act 2008 (WA) that relate to costs adjudication are relatively uncontroversial and easily justified. In particular, the profession has had more stringent cost disclosure rules imposed upon it; in light of the general public

---

166 Williams, above n 163.
167 Western Australia, Parliamentary Debates, Legislative Assembly, 24 October 2007, 6695 (Jim McGinty, Attorney-General). Uplift fees, whereby the costs agreement between client and practitioner can stipulate an additional fee payable if the matter is successfully litigated, had been introduced in New South Wales in 1993. To this author the introduction of uplift fees, which are not recoverable on party/party taxation, seems counterintuitive when most cost reform in that area is driven by a view that successful litigants should recover more of the moneys spent on the conduct of their litigation.
168 Western Australia, Parliamentary Debates, Legislative Assembly, 20 November 2007, 7400 (Sue Walker).
169 Both Western Australia and New South Wales now have their own version of the model legislation. The two acts are largely consistent, but despite this they found very different costs assessment regimes.
perception that lawyers overcharge this is understandable. As a result of the 2008 Reforms practitioners who fail to provide adequate and ongoing disclosure may find themselves significantly out of pocket and facing disciplinary proceedings.\textsuperscript{170}

2.5.1: Some particular effects of the 2008 Reforms
Among the bulk of the provisions, three in particular stand out. Two in particular have a real impact on cost adjudication and are discussed below. The third, the introduction of uplift or success fees, while not impacting directly on costs assessment, deserves consideration and is also dealt with below.

2.5.1.1: The extended time limit for assessment
Section 295 of the \textit{Legal Profession Act 2008 (WA)} extends the general time limit on applications for assessment of costs out from the 30 days to one year. This was done to protect consumers of legal services.\textsuperscript{171} However, the result of this change (because of the way in which s 295 operates in conjunction with s 293) may be more far reaching than was considered at the time the Bill was drafted.

Section 293 of \textit{Legal Profession Act 2008 (WA)} allows practitioners to issue clients interim bills.\textsuperscript{172} Practitioners are able to bill the clients on a monthly basis. Until s 293 came into effect, a legal retainer was considered an entire contract, and, pursuant to the doctrine of entire contract, no right to bill for fees arose until the contract was complete.\textsuperscript{173} In most circumstances a costs agreement between the practitioner and the client displaced the doctrine, and allowed for interim billing by way of a contractual term of the costs agreement. Interim bills issued in relation to a costs agreement carried a mandated statutory disclosure that set out the client’s right to have the interim bill assessed, and the time limit on the

\textsuperscript{170} The \textit{Legal Profession Act 2008 (WA)} s 268 sets out the effects of a default in the disclosure regime. The assessing officer has broad discretion to reduce the costs payable, the client may be able to get any costs agreement set aside, and the practitioner may have engaged in professional misconduct.
\textsuperscript{171} Western Australia, \textit{Parliamentary Debates}, Legislative Council, Thursday 8 May 2008, 2684 (Adele Farina).
\textsuperscript{172} This thesis does not deal with interim assessments as separate from assessments generally. The data collected and used as the basis for analysis in Chapter 4 did not allow for any differentiation between interim and end of retainer assessment.
\textsuperscript{173} G E Dal Pont, \textit{Law of Costs} (LexisNexis Butterworths, 2003) 100.
application for assessment was set at 30 days.\textsuperscript{174} Section 293 provides that interim bills can be assessed ‘either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid.’\textsuperscript{175} Some litigation, and especially complex and expensive litigation, can take a good many years. In practice, this may mean that practitioners could be required to have interim bills assessed many years after the services have been provided and paid for.\textsuperscript{176}

Take this extreme example. One year after a law firm issues the final bill for legal costs relating to a complex retainer regarding lengthy litigation; the firm could find itself being required to attend on a costs assessment of every bill ever rendered to the client in relation to the matter. The bills could run back over a number of years, and have a large (and long gone) quantum. Many of the practitioners who performed the earlier works may well have moved on. The resources the firm would have to muster to address such an application adequately would be enormous, and the cost of failing to address it potentially catastrophic. Even the mere threat of being able to request assessment would give clients in such circumstances enormous bargaining power when it came time to settle up with the final bill. This is especially the case where the taxing officer must allow the costs of the assessment against the firm if the overall bill is assessed at less than 85\% of the original quantum.\textsuperscript{177} Not only would the firm be required to go through this extraordinary process for bills long since paid, but if its bill is reduced by over 16\% it will have to pay not only its own costs of the assessment but also the clients’. The provisions that allow the possibility of such a scenario were passed for consumer protection,\textsuperscript{178} but this cannot have been part of their intended function. It seems

\textsuperscript{174}Sections 231 and 232 of the \textit{Legal Practice Act 2003} (WA) provided the mandatory warnings and the time limits for applications for assessment of all bills of costs, and governed interim bills that arose pursuant to costs agreements. Under the \textit{Legal Profession Act 2008} (WA) all bills had to be accompanied by a notification of rights (which included information as to assessment) pursuant to Section 291 of that Act.

\textsuperscript{175}\textit{Legal Profession Act 2008} (WA), s 29(2). Under the \textit{Legal Practice Act 2003} (WA) ss 231, 232, a client had 30 days to request an assessment of the bill, after which time the right to assessment lapsed, unless the client could get the time for applying enlarged.

\textsuperscript{176}See for instance, \textit{Westpac Banking Corporation v The Bell Group Ltd (In Liq)} [No 3] [2012] WASCA 157, the culmination of litigation that commenced in 1995.

\textsuperscript{177}\textit{Legal Profession Act 2008} (WA) s 304.

\textsuperscript{178}Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 20 November 2007, 7400 (Sue Walker). Ms Walker’s comment was in response to a question from the Opposition as to why the original model bill provided for a time limit of 60 days, being double the old limit, and her response was that a year limit was seen as ‘a better result for consumer protection’.
likely that the Parliament that so wholeheartedly endorsed them did not give adequate consideration to their possible effect. The provisions would benefit from a re-examination, and could be effectively amended to achieve a reasonable balance between the rights of consumers and the rights of the legal practitioners who serve those consumers.

2.5.1.2: Practitioners gain the right to file their own bills for assessment

Section 297 of the Legal Profession Act 2008 (WA) gives the legal practitioner who has produced the bill in order to render it to a client the right to apply to have the bill assessed. Until this section came into operation costs assessment was a one way street; clients could challenge a practitioner’s bill of costs if they were unhappy with it, and the courts would adjudicate by assessing the bill. A lawyer who served a bill on a client and remained unpaid had to sue for his or her costs in the same manner one would sue for any other debt. This was an expensive and lengthy process that wasted the time of both the practitioner and the courts charged with hearing the matter. Sensible practitioners, who regularly advised clients not to waste time pursuing less than significant sums through the courts, often heeded their own advice and wrote off monies genuinely due them when clients refused to pay.\(^\text{179}\) Now the practitioner can apply to have the disputed bill assessed, the court will assess it and the court assessment will stand as a judgement that can be immediately enforced.\(^\text{180}\) If the bill is allowed at above 85% of the original quantum the client will also have to pay the costs of the assessment.\(^\text{181}\)

It is odd to note that s 297 of the Legal Profession Act 2008 (WA) does not place a time limit on practitioners seeking assessment of their own bills. Perhaps the drafters felt that solicitors would act swiftly in such circumstances; perhaps the absence of a time frame is mere

\(^\text{179}\) In the author’s own experience, otherwise sensible practitioners spent thousands of dollars chasing hundreds owed to them, on the ‘principle of the thing’.

\(^\text{180}\) In personal injury matters, practitioners often settle their fees with the relevant insurer. In such cases, the settlement offered may be described as ‘Quantum x plus reasonable legal fees’. Some dispute may then arise as to what fees are reasonable. In negotiations as to the quantum of those fees the insurer holds all the cards. It may be that the provisions of the Legal Profession Act 2008 (WA) could be very useful to practitioners who are being denied reasonable fees. In short, a practitioner could arguably accept the sum offered while reserving his or her rights and then file the disputed bill with the Supreme Court of Western Australia on the grounds that the insurer is a ‘third party payer’ whose liability for the costs has arisen through contract and in accordance with s253 of the Legal Profession Act 2008 (WA). The Court would then assess the costs using reasonableness and the relevant scale of costs as the yardsticks and a careful solicitor would recover both the remainder of his or her costs and the costs of seeking them.

\(^\text{181}\) Legal Practitioners Act 2008 (WA) s 304(2)(a).
2.5.1.3: Uplift fees are introduced in Western Australia

The third pertinent result of the 2008 Reforms was that Western Australian legal practitioners were given the right to charge an uplift if a matter was successful. As noted above, uplift fees do not have any direct impact on the assessment of party/party costs as such fees are not recoverable on a party/party basis. A winning litigant who has paid an uplift fee will not recover that money and is thus out of pocket that amount as well as the amount of the gap between his or her base fees and the fees recovered from the other party. As uplift fees are not included in a party/party bill that goes to assessment, and as there is no way for a researcher to identify whether or not such a fee was charged on the winning litigant’s retainer, the gap between the amount recorded as recovered on assessment and the bill as drawn may not be an accurate reflection of how much the winning litigant has paid above what he or she has recovered.

In allowing this the Western Australian Parliament ignored the safeguards recommended by the LRCWA and paid no heed to the issues that had arisen when uplift fees had been allowed in New South Wales. As noted above at 2.4.6, the LRCWA, in its 1999 Review of the Criminal and Civil Justice System in Western Australia, considered the advantages and disadvantages of allowing contingency retainers where the practitioner was able to charge a success or uplift fee when a matter was concluded successfully. The LRCWA recommended that such arrangements should be allowed, but in doing so it was alive to the fact that uplift fees were problematic. The LRCWA recommendations contained a raft of safeguards and limitations to ensure that clients only entered into costs agreements with uplift fees as a means of last resort. Those recommendations were handed down in 1999; eight years later when the Western Australian Parliament considered the 2007 Bill those recommendations...

---

182 The Western Australian data used in the body of this thesis pre dates the introduction of the practitioner’s right to seek assessment of his or her bill. In New South Wales more practitioners seek assessment than do clients, see Chapter Four at 4.7.1. Information on the uptake of that right in Western Australia is not readily available.
183 See discussion at 2.4.6 above
184 Ibid.
The Model Bill from which the 2007 Bill was taken did not contain some of the safeguards recommended by the Attorney General’s Advisory Committee and endorsed by the LRCWA, but the Western Australian parliament did not appear to have had any of that material in mind when it considered the 2007 Bill. The fact that uplift fees had been introduced in New South Wales in 1993 and, because of perceptions of abuse, been disallowed in actions for damages in 2004, does not seem to have come to the Western Australian parliament’s attention.

The Legal Profession Act 2008 (WA) formalised conditional costs agreements as follows: ‘[a] costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate’.

Conditional contracts could contain uplift fees, but the maximum that could be charged as an uplift in a litigious matter was set at 25%.

As is so often with legislation, the devil is in the detail. Traditionally, conditional contracts were usually no win- no fee arrangements. As noted at 2.4.6 above, the rationale for allowing an uplift fee was that it was reasonable to allow a practitioner some extra award for the risk he or she ran of not being remunerated at all if the client was unsuccessful at trial. When conditional retainers were formalised as part of the 1993 Reforms in New South Wales, the costs agreements that governed retainers containing an uplift fee had to be structured so that all of the practitioner’s fees were contingent on success. Conditional agreements in Western Australia, which can contain an uplift fee, allow an uplift fee in situations where the practitioner is to receive ‘some or all of the legal costs’ he or she would

---

185 There was no reference to the LRCWA’s concerns about uplift fees in the second reading speech for the bill, nor were they addressed in the debates or the explanatory memoranda.

186 Legal Profession Reform Act 1993 (NSW) Schedule 3 187(1).

187 Legal Profession Act 2004 (NSW) s 324(1).

188 Legal Profession Act 2008 (WA) ss 283(1), 284. As noted at 2.4.6 above, conditional costs agreements had already common and in Western Australia they had not previously been regulated by statute.

189 Legal Profession Act 2008 (WA) s 284(1).

190 Legal Profession Act 2008 (WA) s 284(4)(b). There appears to be no limit on what can be charged in non-litigious matters, although the court always has the right to strike down an unreasonable costs agreement (s288) and if a costs assessor believes that costs are grossly excessive he or she must refer the matter to the Complaints Committee (s 307(1)).

191 Law Reform Commission of Western Australia, above n 112.

192 Legal Profession Reform Act 1993 (NSW) Schedule 3 186(1).
normally bill for the matter. It may be that the Supreme Court, viewing such a costs agreement, would find it unreasonable, but on the face of the law a practitioner can make 10% of the fees conditional yet still avail himself or herself of an uplift fee if the matter is successful. The Western Australian Parliament, which had access to a wealth of material informing it that uplift fees were problematic, seems to have rubber stamped a provision that takes the possibilities for abuse beyond anything the various expert bodies that had provided that material had considered. The overview in the introduction to this thesis noted Roscoe Pound’s concern that legislators tend ‘to be careless how he carries out the details of what he attempts’; the Western Australian Parliament’s blind introduction of uplift fees seems a case in point.

2.5.2: One radical reform: Provisional Assessment
Not all legal reform is driven by parliament. The Supreme Court of Western Australia introduced a voluntary system of provisional assessment in January 2009. It did this by way of practice direction. The purpose of the innovation was to ‘reduce the number of bills that proceed to assessment and result in a saving of costs for parties’. In essence, bills of costs are filed for assessment in the usual way but the parties can ask for provisional assessment. Alternately, if the assessing officer to whom the bill is assigned thinks the bill suitable for provisional assessment, he or she contacts the parties asking if they would consent to that process. If the parties either request or consent to a provisional assessment, the assessing officer will assess the bill. This process does not appear to be adversarial, as

\[\text{[t]he parties will not appear before the taxing officer and, unless requested by the taxing officer, will not be entitled to provide any additional materials to the taxing}\]

\[\text{officer.}\]

---

193 Pound, above n 1, 755.
194 Supreme Court of Western Australia Consolidated Practice Directions 2009 (WA) r 4.7.2.
195 Ibid r 4.7.2.1. There is no other formal information as to why this reform was instigated.
196 Ibid r 4.7.2.4.
197 Ibid r 4.7.2.3.
198 Ibid r 4.7.2.6.
officer other than if requested by the taxing officer vouchers for disbursements [sic].

The assessing officer provides a notice of provisional assessment but does not provide any written decisions to explain the amount he or she arrived at on the assessment. If either party is dissatisfied with the result of the assessment they are not obliged to accept the provisional assessment; instead the bill will be assessed by the same assessing officer but in the usual adversarial manner. However, the provisional assessment acts as a form of Calderbank offer, and a party who has refused to abide by the provisional assessment ‘may be required to pay all or some of the costs of the assessment if the assessment does not result in that party achieving an outcome more favourable to that party than was arrived at by the provisional assessment’. The practice direction that has created this novel process notes that provisional assessment ‘principally to party and party bills drawn pursuant to the scale’. However, the direction also notes that the process can, at the discretion of the assessing officer, be applied to any other form of bill.

The idea of an Australian court giving a provisional opinion about a matter before it for adjudication is a strange one. Assessment of party/party bills of costs is part of a substantive adversarial dispute between parties who are expected to argue the merits of their respective cases. A costs assessor who gives a provisional assessment of a bill of costs will do so without the benefit of any submissions from the parties and in the absence of any scrutiny as to how he or she decides the final amount. Costs assessors in such situations have neither the benefit of the adversarial argument that helps clarify amounts charged on bills of costs, nor the obligation to explain how they came to a conclusion. A party who is dissatisfied has little or no guidance as to why they did not get the expected result.

Provisional assessment is certainly expedient. It creates what appears to be an administrative adjudication in the flow of a judicial process. It is likely to suit the interests of legal

199 Ibid.
200 Ibid r 4.7.2.7.
201 Ibid r 4.7.2.8-.10. For a full description of the assessment process in Western Australia see Annexure 2.
202 Ibid r 4.7.2.11.
203 Ibid r 4.7.2.12.
204 Ibid.
practitioners, as many practitioners are neither interested in nor well informed about costs assessment. It puts practitioners in a position where they can tell a client that the person who will assess the bill has done so and that the best approach is to accept that decision as challenging it is fraught with risk. Clients in turn are likely to accept that advice. Provisional assessment will certainly lighten the workload of court officers whose roles stretch much wider than costs assessment. However, it is of ‘fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’205 A process where a judicial decision maker sits on what is essentially an appeal against his or her own decision does not seem to come up to the high standard we are entitled to expect of our judicial system.

2.6: Conclusion
Adjudication of costs disputes in the Western Australian jurisdiction continues to be governed by the various courts’ procedural rules as well as the Act governing the legal profession (currently the *Legal Profession Act 2008 (WA)*). The rules and the Act change from time to time, and despite some recent and real reform, the basis of the process remains the same as it was when the colony was first founded in 1829. For the most part, the Reforms that have occurred have been in the form of unsatisfactory tinkering with the system; they have been piecemeal, ill thought out and, despite the fact that the Western Australian Parliament has often sought expert advice, often contrary to that advice. Cost assessment remains adversarial in nature and is performed by relatively senior court staff in a judicial and adversarial process. Attendance at a Western Australian costs assessment is much the same now as it always has been, though today’s practitioner, unlike his or her 1829 counterpart, is no longer required to wear a wig.

For the purposes of this thesis, the Western Australian costs assessment regime stands as a ‘norm’ in that most of the changes that have occurred in its operations have not altered its basic conceptualisation. Costs assessment in Western Australia remains a creature of the courts. As will be seen in the following chapter, there are other models of costs assessment. Chapter Three of this thesis provides a counterpoint to the Western Australian costs

205 *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).
assessment regime. Chapter Four in turn provides the comparisons that are central to this thesis. Chapter Four allows an informed assessment as to whether the longstanding conceptualisation of costs assessment, accepted in Western Australia on the grounds that ‘if it isn’t broken don’t fix it’ is in reality the best approach to dealing with disputes as to costs.
Chapter Three: Assessment of costs in New South Wales- A brief history

3.1: Overview

This chapter will trace the history of legal costs assessment in New South Wales from its origins immediately before colonisation in 1788 through to the present. The chapter contains five parts, being this overview, three substantive sections that map out the evolution of costs assessment in New South Wales and then a conclusion that will provide an evaluation of the Reforms that occurred to the costs assessment regime in New South Wales in 1994. Over that time period the New South Wales costs assessment regime has moved from its origins as an obscure and somewhat hidebound judicial process to the current reality of an accessible administrative system that legal consumers and legal practitioners both use to determine costs disputes. The three substantive sections will be presented in a chronological flow, but they do contain digressions that are necessary in order to explore particular nuances of costs assessment at particular times and the various other matters that impinge upon the costs assessment regime.

The first of the three substantive parts of the chapter will give a relatively brief and generally mechanical description of the early history of costs assessment in New South Wales. It will describe the nature of the framework the British colonisers had provided for a judiciary in New South Wales before the first fleet arrived in Sydney. The legislative evolution of the costs assessment regime will be tracked up until the sweeping range of Reforms to the governance of legal practice that commenced in the 1980s. As will be seen, the costs assessment regime changed over those early years, but it was change by way of general evolution rather than by any revolution. As the costs of legal services increased over time in the way that all costs increased by way of inflation, the costs assessment regime was adapted to take those increases into account. The assessment process however remained largely the same; a judicial process that was, to the general public, obscure and arcane.

The second substantive part of the chapter deals with the origins of and motivations behind
the New South Wales Legal Profession Reform Bills of 1993 (the Reform Bill). The Reform Bill, passed as the *Legal Profession Reform Act 1993* (NSW), made a profound and fundamental change to costs assessment in New South Wales. It took costs assessment out of the purview of the courts and created a statutory body to oversee an administrative decision making process where costs assessments were performed by legal practitioners acting as subcontractors rather than court officers.

This section of the chapter provides the background of the Reform Bill as relates to the various reports and papers that informed its creation. It also explores and critiques the parliamentary debates that surrounded the passage of the Reform Bill, in part to illustrate some of the miscomprehensions that tainted the New South Wales Parliament’s view of the Reforms but also to clarify the intended consequences of the costs Reforms. This section of the chapter provides analysis of the Parliament’s expressed expectations of the Reform Bill, noting that the language of the debates was often at odds with the realities of the proposed Reforms as drafted. It will show that one of the strongest drivers for reform was a belief that winning litigants should recover most if not all of their legal costs from the losing party and that the then current costs assessment regime was not allowing that to happen.

As a necessary digression, this part of chapter will also discuss one of the other key effects of the Reform Bill, namely the introduction of conditional or contingency contracts where practitioners could charge their clients a premium or uplift fee if the client’s matter was successfully concluded. It will argue that, by formalising conditional costs agreements and allowing the impost of an uplift fee, the Reforms contained an essential contradiction. It will highlight the uncertainties and ambiguities that came with conditional costs agreements and point out that if an uplift fee is not recoverable from the unsuccessful litigant on a party/party assessment then, despite the parliamentarians’ clear intent that winning litigants should be

---

206 The original bill, the *Legal Profession Reform Bill (1) (1993)* was introduced to parliament on 16 September 1993 but was withdrawn on 27 October 1993, and a redrafted version was reintroduced as the *Legal Profession Reform Bill (2) (1993)* on that same day. The majority of changes made to the second version of the Reform Bill do not relate to the subject matter of this thesis and for that reason the two bills will be referred to in the singular as ‘the Reform Bill’. Also for that reason this thesis reports on and analyses the parliamentary debates without necessarily following the strict order of those debates and without always noting which version of the Reform Bill was being debated. However, where the second version of the Reform Bill carried changes to the costs Reforms those changes are noted.
more fully indemnified for their costs, in some areas of litigation successful litigants were likely to recover less of their costs than they would have done before the Reforms. It will also highlight the dilemma posed by uplift fees; if they can be recovered from an unsuccessful litigant then they will act as a penalty imposed on top of the damages that that unsuccessful litigant is obliged to pay.

The third substantive part of the chapter deals with costs assessment in post-reform New South Wales. It commences at the date when the *Legal Profession Act 1987 (NSW)* was amended and the traditional judicial approach to costs assessment was abandoned.

The first part of this section of the chapter will review the 1994 Reforms as at the time they came into force. It will then identify some of the teething problems that arose with the 1994 Reforms and track the various alterations and amendments that have occurred to the legislative framework that underpins the New South Wales costs assessment regime since then. It will note that conditional costs agreements and uplift fees, explained in some detail in the preceding section, proved so problematic that they were eventually disallowed in actions for damages. The section will also discuss the tensions that arose from abandoning scales of costs as ‘uncompetitive’ and the perceived need for some sort of benchmark against which costs could be assessed.

Lastly, in conclusion, this chapter will argue that a close look at the Reforms proves the statement by Roscoe Pound that was used in the overview of Chapter One of this thesis; that ‘[h]ence the one (the legislator) is prone to attempt far too much and to be careless how he carries out the details of what he attempts’.\(^{207}\) The chapter will point out that the 1994 Reforms seem to have been introduced without any realisation that they carried internal inconsistencies that would vitiate against their intended outcomes. It will also point out that the introduction of the *Civil Liability Act 2002 (NSW)* further undermined the goals of the 1994 Reforms. Notwithstanding that, this chapter will argue that the 1994 Reforms did achieve some of the outcomes the Parliament intended them to achieve, and that on top of that they provided other unforeseen benefits. This chapter will argue that good intentions (despite poor understandings), a degree of parliamentary bipartisanship and a willingness to

\(^{207}\)Pound, above n 1, 755.
continue reform through a cycle of constant feedback and amendment have produced real improvements to the costs assessment regime in New South Wales.

Some key themes will be revisited a number of times over the length of the chapter. It will be noted that Reforms to the costs assessment regime have been based on common perceptions rather than on any real evidence. Aligned to this, it will be argued that the stated justifications for reform and the aspirations about what the Reforms will achieve were often unrealistic. For these reasons, the chapter adopts the view that one of the key aspects of the 1994 Reforms, the abolition of scales of costs, was a mistake. In addition, and while the 1994 Reforms may seem coherent when viewed on their own, this chapter will argue that when they are viewed in the context of other law reform, they lead to inconsistencies that act to defeat their stated purpose. In particular, this chapter will argue that the introduction of contingency fee retainers and the effects of tort reform have, for at least some areas of legal work, destroyed any chance of the 1994 Reforms producing some of their stated objectives.

The chapter will also note the problems that arise with public perceptions around the question often expressed as ‘Quis custodiet ipsos custodes’ or ‘who will guard the guards themselves?’ As was noted in the introduction to this thesis, the public views legal costs with some suspicion, and the New South Wales Parliament has always struggled to find the balance between external and self-regulation for the fees lawyers charge. The original position was that lawyers and the courts set the standard for what a lawyer could reasonably charge, but that position was abandoned in New South Wales in 1984. Ten years later, the 1994 Reforms, despite being designed to promote competition and drive down legal fees, handed that responsibility back to practicing lawyers. As will be seen, if recommendations for further reform that are currently being considered are adopted, that position will be further entrenched. This thesis argues that if legal fees should be regulated an expert body, such as existed in New South Wales between 1984 and 1994, and as currently exists in Western Australia, would be far more suited to benchmarking that regulation than are practicing lawyers. Further, and regardless of who determines what costs are reasonable, this thesis will show that legal practitioners have gained an enormous benefit from the 1994 Reforms.
3.2: A brief history of costs assessment in New South Wales up until the late 1970s

New South Wales was colonised in 1788, 41 years before Western Australia. When the first fleet anchored in Botany Bay it bore, as well as a cargo of convicts and their gaolers, the corpus of English law. The wherewithal for a civil jurisdiction in the new colony had been created before the ships landed, by way of a Charter of Justice proclaimed on 2 April 1787. The Charter, which was in the form of letters of patent rather than a statute, noted that:

sufficient Provision should be made for the recovery of Debts and determining of private Causes between party and party in the place aforesaid (being the Eastern Coast of New South Wales or someone or other of the Islands adjacent).

The Charter gave the Governor the power to appoint a Deputy Judge Advocate and six court officers. The Court of Civil Jurisdiction sat in relation to property disputes as well and also had the responsibility for adjudicating in relation to disputes over wills and estates. The court was empowered to award costs to successful litigants. The Charter made no reference to the assessment of those costs, but it is clear that legal costs were being awarded to civil litigants as early as 1800.

New Letters Patent revoking the Court of Civil Jurisdiction and constituting the Supreme Court of Civil Jurisdiction were issued on 4 February 1814. That court was in turn abolished in 1824 after further Letters Patent were issued on 13 October 1823.

---

209 Ibid. (The quote above is from the first paragraph of the document.)
210 Ibid. It is interesting to note the civil jurisdiction in New South Wales was created through executive action and had no statutory basis, while the criminal jurisdiction was constituted through 27 Geo. III C.2 (An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and the Parts adjacent) in the same year, 1787, being one year before the settlement was founded.
211 Ibid.
212 Ibid. The supplementary notes to the document report that the first civil litigation to occur in New South Wales was heard in 1788, wherein a convict couple successfully sued the captain of the ship that had transported them for the loss of some of their goods: Cable v Sinclair (1788-1814) SR (NSW) 2/8147.
213 See Lewin v Thomson, Court of Civil Jurisdiction Proceedings, 1788-1814, SR (NSW) 2/8150 where the successful plaintiff in an action relating to defamation, adultery and married women’s legal rights was awarded damages of £30 and the costs of the suit.
215 Ibid.
The Supreme Court of New South Wales was created in May 1824. The original court was created through Letters Patent, but the Supreme Court was given statutory footing and its role was expanded under a British Act in 1828.

The Request Court Rules, which pertained to the Supreme Court, set out costs, fees and witness expenses at Rule 37. That rule was repealed, so far as attorney’s costs were concerned, on 1 May 1844 by way of Rule 51, which set out a scale of costs for attorneys with the instruction that ‘the proper Officer do tax [assess] and allow all Bills of Costs according to such scale... ’.

In 1847 the colonial government of New South Wales passed an Act specifically to regulate attorney’s costs (The 1847 Act). The prologue of the Act, which came into operation on 2 October 1847, set out the situation succinctly:

[w]hereas it is expedient that attorney’s bills of costs whether for law, equity, criminal, conveyancing or any other business transacted by them as such attorneys be liable to be taxed (assessed) and that the price of conveyancing be regulated.

Sections 1-12 of the 1847 Act were substantively similar to the statutory provisions that create current assessment regimes, although the language is archaic and the sections are verbose and difficult to follow. Section 2 of the 1847 Act allowed the practitioner to apply to have his own bill of costs assessed. The person charged with costs could also apply

---

216 The Charter of Justice 13 October 1823 (which came into effect in New South Wales on 17 May 1824)
217 9 Geo. IV C.83.
218 Rule 37, Request Court Rules (Court of Requests Office, Sydney) from Callaghan, New South Wales Acts and Ordinances (1844-1852), 1431.
219 Ibid r 51 1425. Costs to be allowed for a Writ of Summons were 3 shillings and 4 pence.
221 Ibid. See the Prologue to the Act.
222 Each section provides for a range of substantive matters, current drafting techniques would see each broken down into a number of separate sections and subsections.
223 As a general rule this thesis will use the term ‘his or her’ when referring to practitioners. However, as women did not gain the right to practice law in New South Wales until 1918, any reference to practitioners before that date will assume that they are male.
224 11 Vict. No.33 (1847), s 2. With the exception of the brief period between the commencement of the Legal Profession Act 1987 and the 1993 amendments to that Act that remained and is currently the situation in New South Wales. A Western Australian practitioner only obtained the right to have his or her own bill assessed in 2008.
for assessment up until one month after being issued the bill. Costs of the assessment were to
be paid by the person charged, unless the bill was reduced on assessment by more than 1/6\textsuperscript{th}.
If the bill was reduced by more than 1/6\textsuperscript{th} the practitioner was responsible for the costs of
assessment.

The Legal Practitioners Act 1898 (the 1898 Act) repealed seven former Acts that dealt with
procedural matters concerning the legal profession. The 1847 Act was included among the
repealed Acts, and the provisions relating to Bills of Costs and assessment of costs were
enacted by Sections 21-39 of the 1898 Act. The 1898 Act did not make any significant
substantive changes to the assessment regime. The legal profession in New South Wales was
governed by the 1898 Act up until 1987, and while over those ensuing 89 years a multitude
of varying amendments were made to the 1898 Act, the costs assessment regime remained
largely unchanged. Costs assessment was part of the judicial function of the courts and was
carried out by court officers as one of many tasks they performed. An esoteric creature of the
courts, the costs assessment regime did not get much attention from parliament and was
largely unnoticed by the public.\textsuperscript{225}

3.3: The lead up to and rationale for the New South Wales Reforms
As noted above, for many years costs assessment, in New South Wales and in all of the
Australian jurisdictions, was not much in the public eye. Lawyers worked in an area of
mystery\textsuperscript{226} and from a position of authority; the charges they levied were seen as expensive
and perhaps inexplicable.\textsuperscript{227} The public had always complained about lawyers, and had
always suspected them of overcharging.\textsuperscript{228}

\textsuperscript{225} The public has always been concerned about the costs of legal services, but remains generally unaware about
the assessment of legal costs. A Law Foundation of New South Wales publication discussing the ramifications
of scales of costs and anti-trust issues published in 1978 noted that ‘the public has not been notably vocal in
pressing for Reforms in this area apart from the usually vague expressions of concern about legal charges’. See
Roman Tomasic, Lawyers and the Community (the Law Foundation of New South Wales, 1978) 70.
\textsuperscript{226} Above n 24.
\textsuperscript{227} One practitioner writing about the ‘bad old days’ of the 1960s, described the situation as follows: ‘Too often,
in the absence of precise file notes, solicitors relied on a “by guess and by God” approach, with the weight of
the file and sadly on occasion, the client’s ability to pay, as being regarded as relevant factors’: J Ahern, A
Weingart and M Johnson, above n 40.
\textsuperscript{228} See for instance note 15 above.
Over the middle years of the last century however western society experienced profound social change and authority in all its guises became the legitimate target of investigation and criticism. Law, and lawyers, were not excluded from this social phenomenon, and parliaments in Australia, which had always seen the need to regulate lawyers,\footnote{The perception of that need preceded Australian parliaments. In 1605 the British Parliament passed An Act to reform the multitude of misdemeanours and abuse of some attorneys and solicitors, who, by charging excessive fees for their services, and by making other unnecessary demands, caused clients to be financially overburdened, whereby legal services were being extraordinarily delayed (3 Jas 1. c.7)} began to look more closely at the legal profession and the monopoly it maintained over legal practice.

Reforms to the New South Wales costs assessment regime must be viewed in the context of the sweeping range of Reforms to the governance of legal practice that commenced in the 1970s. In 1978 the government of New South Wales requested that the New South Wales Law Reform Commission (the NSWLRC) review the legal profession. The NSWLRC released a comprehensive series of reports, three in 1982 and a fourth in 1984. These reports covered the legal profession generally, proposing extensive reform of the way in which the legal profession was regulated. The issue of costs was not specifically addressed in the reports.

3.3.1: Responsibility for providing scales of costs shifted from the courts to an expert panel by the Legal Practitioners (Solicitors’ Remuneration) Amendment Act 1984 (NSW)

Regulating solicitors’ fees became a public issue in New South Wales in 1984 when the New South Wales Legislative Assembly disallowed a portion of a scale of costs that fixed conveyancing costs because of a perception that the new scale was too generous. Scales of costs, the benchmarks against which legal costs were assessed in New South Wales until those scales were abolished in 1994, were generally described in the introduction at 1.3.6.

Creating and updating the various scales of costs had always been one of the functions of the New South Wales courts and the courts had performed that function with little notice from the public or the parliament.

The disallowed scale was created by the New South Wales Supreme Court to replace a scale produced in 1977, and in some parts it made hefty (up to 40%) increases in costs. As noted
above, there was a public backlash and the scale was disallowed by Parliament. Disallowance
did not mean that the old scale was revived, and a vacuum ensued.\footnote{In the combined second reading speech for what he described as a ‘complex of legislation’, Mr Unsworth explained that the four bills before the Legislative Council were required to correct the confusion that had occurred as ‘in another place, on 23rd February, 1984, that part of the December general order which related to lump sum conveyancing fees was disallowed, as the Conveyancing Act permits to be done by either House. But neither House can amend a general order, and there is no provision that disallowance revives the previous order. There was confusion as to what, if any, lump sum provisions then applied’: New South Wales, \textit{Parliamentary Debates}, Legislative Council, 22 May 1984, 1211 (Barrie Unsworth).} The New South Wales parliament decided to shift the responsibility for producing scales of costs away from the
courts and to an expert panel by way of the \textit{Legal Practitioners (Solicitors’ Remuneration)
Amendment Act 1984}. The amending Act also reinstated the 1977 costs scale
(retrospectively) until the new panel produced another scale.\footnote{\textit{Legal Practitioners (Solicitors’ Remuneration) Amendment Act 1984} (NSW) sch 3 s 2.}

The Honourable Barry Unsworth explained the situation in the second reading speech for the
amending Bills as follows:

\begin{quote}
I speak with the greatest respect, and a good deal of sympathy, for the Chief Justice,
and for the other members of the committees convened by him from time to time,
when I say that this system is archaic, disorganised and industrially irresponsible.

Whatever may have been its value when it was imported from England in 1919, it is
indefensible now. The system is vulnerable to a great many criticisms It creates a fee-
fixing authority with no industrial base, and a numerical bias towards the profession;
it gives the authority no guidelines and does not require any consideration of wage-
fixing principles; it does not require notice of the committee having been convened,
nor does it give any opportunity to make submissions; there are no open hearings;
there are no regular reviews; no reasons are published. All of these criticisms are
accounted for in the legislation now proposed.\footnote{New South Wales, \textit{Parliamentary Debates}, Legislative Council, 22 May 1984, 1211 (Barrie Unsworth).}
\end{quote}

The Opposition supported the broad principle of shifting the responsibility for producing scales away from the courts and into a more rationalised and transparent body but did note
that ‘[o]f all the learned professions the legal profession has been more tied down and more limited and restricted in its costing structure than has any other profession.’

The newly constituted Board consisted of one judicial member, one practicing solicitor and two members who, not being in practice, had experience in and knowledge of wage fixing and economics. The Board set fees for both contentious and non contentious business.

The amending Act also allowed practitioners more leeway to advertise their services. Mr Unsworth pointed out that the traditional position was anti-competitive, as;

[w]ithin the conveyancing monopoly, the ban on touting for business goes too far, and forbids a solicitor to advertise his willingness to work for less than the scale fees. To a large extent, the maxima prescribed thus become minima as well, because a solicitor is forbidden to hold himself out as generally charging less than the maxima.

Mr Unsworth’s comment, although strictly true, was misleading. The maxima were only maxima until the solicitor displaced them with a costs agreement. That said, his comment illustrates how the scales did act as a floor to legal fees in some areas. This is counter intuitive; scales that were generally designed to act as a ceiling on costs were instead being used to determine a minimum rate. This was because practitioners usually insisted that their clients contract out having their fees governed by the scale rates by way of a costs agreement [as discussed in Chapter One at 1.3.7]. This was an issue upon which future reformers would seize to argue that scales should be abandoned.

New South Wales, Parliamentary Debates, Legislative Council, 22 May 1984, 1214 (Sir Adrian Solomon).

Sir Adrian went on to explain that he did not feel input from non practicing lawyers was of any real use as follows:

We do not value any less either our academic brethren or our public service brethren. Each of them is a valuable person who performs a proper function in the state of things. But the main bill is not to fix their salaries. It is not to fix the salary of the academic, the corporation lawyer, or the public service lawyer. It is to fix the salary of the lawyer in private practice.

This statement reflects the ongoing concern that practitioners have about having fees created or assessed by non practitioners, but it misrepresents the situation as, except for some narrow areas of legal practice, the scales of costs did not and do not control what practitioners can charge.

Legal Practitioners Act 1898 (NSW) s 20E as inserted by the Legal Practitioners (Solicitors' Remuneration) Amendment Act 1984 (NSW) sch 3 s 2.

Ibid s 20J, as inserted by the Legal Practitioners (Solicitors’ Remuneration) Amendment Act 1984 (NSW) sch3 s 2.

New South Wales, Parliamentary Debates, Legislative Council, 22 May 1984, 1213 (Barrie Unsworth).
It was to be another ten years before scales of costs would be abandoned in New South Wales. In the meantime, this 1984 reform created a system that based the scales in studied reasonableness. The composition of the Board brought a range of expertise to the task of creating the scales and ensured that scales of costs balanced the needs and interests of the various legal stakeholders. Scales of costs had become accessible benchmarks for the costs of legal services, and costs assessments that used the scales to determine costs disputes were assessments based on objectively determined and reasonable fees for legal works. Practitioners, however, generally continued to use the scales as a floor from which to determine what to charge.

3.3.2: The Legal Profession Act (1987): general Reforms and a signpost to costs reform

In 1987, and as a result of the reports published by the NSWLRC in the early 1980s, the Parliament of New South Wales repealed the Legal Practitioners Act 1898 by way of the Legal Profession Act 1987 (the 1987 Act). The 1987 Act introduced major Reforms to the way the legal profession was structured and governed, but not to the costs assessment regime. With some few exceptions the provisions from the 1898 Act relating to assessment of costs were merely replicated in Division 5 of the 1987 Act. However, the then Attorney General Terrance Sheahan, in his second reading speech for the Bill which became the 1987 Act, noted that it was ‘widely acknowledged that present system (of costs assessment) is slow and costly’, and promised that there would be a complete review of the system in the near future as he was ‘considering the feasibility of introducing an arbitration system, which would enable appropriate cases of disputes over bills of costs to be settled quickly and in a less costly manner for all parties involved’. The Attorney General’s comments pointed to two of the perceived problems with the costs assessment regime, namely the time it took to have costs assessed and the cost of doing so. Amelioration of those two aspects of the system had become an expressed outcome of the impending Reforms

237 New South Wales, Parliamentary Debates, Legislative Assembly, 29 April 1987, 10761 (Terrance Sheahan, Attorney General). The 1987 Act gave the Court the discretion to order that an applicant pay money into court before commencement of an assessment. Solicitors lost the right to have a charge over property that was recovered or preserved as security for payment of their costs.

238 New South Wales, Parliamentary Debates, Legislative Assembly, 29 April 1987, 10761-10762 (Terrance Sheahan, Attorney General).
The Attorney General foreshadowed a change away from a judicial system of taxation towards an administrative arbitral system. This was a radical rethinking of how costs could be assessed. As noted at 1.2.1 above, costs assessment had always been a part of the courts’ judicial functions in the Australian jurisdictions. In the case of party/party costs disputes the assessment was seen as part of the substantive dispute; assessments between solicitors and clients were brought before the court as new substantive disputes. As such, both types of assessment were carried out in an adversarial manner.

3.3.3: The NSWLRC report 1991-1993

In November 1991 the NSWLRC was asked to investigate ‘the necessity for implementing alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public’. They were asked to consult widely, and they did so. In May 1992 the NSW Commission released Discussion Paper No 26: Scrutiny of the Legal Profession. The Discussion Paper was followed by a full report in 1993, and that report found that the then current mechanisms for dealing with complaints against legal practitioners were inappropriate, as they were ‘promoting the common idea that the legal profession is simply “looking after its own”’. In particular, there is still a profound gap between what angers clients (and others) sufficiently to go to the trouble of complaining, and what lawyers and their professional associations see as important enough to merit serious attention, disciplinary action or compensation.

The NSWLRC made 77 recommendations for a sweeping overhaul of disciplinary procedures, and although it noted that practitioners’ remuneration was not in its terms of reference, three of those recommendations related to legal costs. The NSWLRC explained this digression by noting that ‘disputes about legal fees, costs and disbursements represent a significant proportion of the complaints received by the legal professional associations and

239 Ibid.
240 See 3.14.3 below for an argument as to why an adversarial system is unsuited for costs assessment.
242 Ibid.
243 Ibid. [3].
are the cause of a good deal of the current public disquiet about lawyers". The NSWLRC recommended that the costs disclosure regime be strengthened, that bills of costs should contain clear instructions on dispute resolution processes and that ‘the system of taxation of costs by the Supreme Court should be replaced by a two phased process of mediation and arbitration’. The NSWLRC did not prescribe the detail of the proposed new system, noting that an investigation into such a change was already underway and that it expected legislation to implement such changes in the near future.

3.3.4: Government seeks further input as to costs reform (1992-1993)

While the NSWLRC was taking submissions and formulating its recommendations the Attorney General’s Department was firming up its position on costs reform. The situation, described in the debates for the Legal Profession Reform Bill (No 2), was that so many reviews had already taken place, in New South Wales and in other jurisdictions, that,

[all that work having been done, the Attorney decided that there was no need to conduct a further review in New South Wales. Rather, he decided to review the results of various inquiries to ascertain those amendments that could be put together in this landmark legislation.]

In November 1992 the government of New South Wales released a green paper relating to the structure and regulation of the legal profession in general. A range of stakeholders responded and in May 1993 the government, after considering the responses, issued a statement of policy as to reform of the profession. As noted above, the statement of position, which covered a range of issues including costs reform, had been prepared after lengthy consideration of a number of reports on legal systems in a range of jurisdictions outside of New South Wales, as well as in consultation with the local profession. As was

---


246 New South Wales Law Reform Commission, above n 241, [5.66].

247 He made this decision despite the fact that a review was already on foot.


mooted in the debates for the 1987 Act, the government’s position on costs reform was that the judicial system then in use should be abolished, and scales of costs should have a similar fate. Instead, an administrative system of costs adjudication should be created, and to bring that about the Legal Profession Reform Bill 1993 was brought before Parliament. This thesis now considers that Bill.

3.3.5: The Legal Profession Reform Bill 1993: An introduction and overview
The Attorney General’s foreshadowed changes to the New South Wales legal costs regime were introduced into the Legislative Council on 16 September 1993 by way of the Legal Profession Reform Bill 1993 (the Reform Bill) by the then Minister for Justice and Attorney General, the Hon John Hannaford. Originally named the ‘Maintenance and Champerty Abolition Bill’, the Reform Bill had a rocky start and it did not survive in its original form. Over the course of the initial debates a number of deficiencies were identified. The weight of comment, criticism and necessary amendment, from stakeholders as well as from the opposition, led the government to withdraw the Bill from the Legislative Council on 27 October 1993. This inauspicious start to a Bill that was drafted before the NSWLRC could finalise its report into the issues the Bill was supposed to address seems a product of attempting to create ‘policy on the run’, despite the Government’s protestations that it had thoroughly canvassed the issues before it designed the Reforms.

Mr Hannaford introduced the Legal Profession Reform Bill (No 2) on that same day. The second Bill maintained the direction of the original Bill, but had 60 “minor” changes, made as the result of “public comment and further consideration”. The Government considered that it was easier to start afresh with a “clean and comprehensive Bill” rather than having to deal with 60 proposed amendments in Committee, and the Opposition agreed with that.

---

250 The Reform Bill was styled as the Abolition of Maintenance and Champerty Bill. See below where this is discussed in relation to conditional fees.
251 This is perhaps a misleading description, as the bill abolished them as causes of action and allowed practitioners to take an interest in litigation by way of contingency fee arrangements.
252 For the purposes of this thesis the two bills are referred to as the Reform Bill. The second bill was mostly a mirror of the first in relation to costs reform; with the exception that the second bill dropped the concept of ‘benchmark costs’.
254 Ibid.
sentiment.255 The following discussion will not differentiate between the two versions of the Reform Bill except where the differences between them have a direct bearing on costs assessment.

The Honourable Ron Dyer, speaking for the Opposition, was generally in favour of the main thrusts of the Bill.256 He was, however, very sceptical about any benefits arising from a new cost regime.257 In particular, he was concerned that instead of a situation where court officers assessed bills to the objective standard of a scale of costs, part time costs assessors, who continued to work as solicitors, would be assessing bills as against their own subjective standards as to what would be ‘fair and reasonable’ in the circumstances.258 He felt that such assessments “made by those assessors more often than not will be of a substantially higher amount than would have been allowed under the existing court scales by a taxing officer.”259 Mr Dyer did not address this issue any further at this point, but the obvious question as to who would ‘guard the guardians’ lies beneath his comments. This concern is well founded. Assessing officers in the pre reform regime may well have started their careers as legal practitioners, but they had moved on to be employees and officers of the court, and as such were seen to be impartial between the parties to a dispute. Part time assessors, who continue to draw most or a substantial part of their income from their own work as legal practitioners, may be seen to have a vested interest in having bills of costs generally allowed at a higher rate. Even without impugning the assessors it seems likely that successful litigants ‘fair and reasonable’ costs were likely to be substantially higher than costs that are artificially held to the base rate of a scale of costs, even when that scale itself was designed to reflect reasonable charges. This seems particularly likely to be so if the assessors are drawn from a profession that had generally regarded the scales as minima. As will be seen in the following chapter, and as was the intention of the New South Wales Parliament that introduced the Bill, this is one of the results that has been effected by the cost Reforms

255 New South Wales, Parliamentary Debates, Legislative Council, 27 October 1993, 4505 (John Dyer, Member of the Opposition).
256 Ibid.
257 Ibid.
258 Ibid.
259 Ibid.
Mr Dyer seemed to confine his concerns to party/party disputes, as the existence of costs agreements between solicitor and client effectively meant that solicitor/client disputes were, in the absence of special circumstance, to be assessed against the provisions of the costs agreement. At any rate, he felt that solicitor/client disputes were not as important as party/party disputes, and pointed to the fact that in 1992 only 46 solicitor/client bills were filed with the court for taxation while in the same year 1,851 party/party bills were received. He was concerned that a change to an assessment system would mean that unsuccessful litigants would pay a much higher portion of the successful opponent’s legal costs, and that the risk of exposure to such high and undeterminable costs would deter many potential litigants from accessing the justice system. In essence, he agreed with the government as to the likely outcome of the Reforms in relation to party/party disputes, that winning litigants would recover more of their costs, but he disagreed that the outcome would be socially beneficial.

In response, the government, through the Honourable Ms Elizabeth Kirkby, acknowledged that there was concern that the Reforms may ‘be a hazard to people of limited resources in difficult cases’ and that it had been suggested that the main beneficiaries of the proposal will be not those who are presently squeezed out of the civil justice system but the public liability insurer who successfully fights off an accident victim and the newspaper proprietor who successfully defends a defamation action.

However, Mr Hannaford remained adamant that:

---

260 Mr Dwyer considered that ‘the client can protect himself or herself to some extent from the jeopardy I am mentioning if he or she insists on a fixed fee quote from his or her solicitors’: New South Wales, Parliamentary Debates, Legislative Council, 27 October 1993, 4513 (John Dyer, Member of the Opposition). With respect to Mr Dwyer, it would be unusual for a client to be in a position to do that.

261 Ibid. Disputes between clients and their practitioners made up 2.4% of all assessments. Mr Bob Debus, commenting on the reformed costs assessment regime in 2004 noted that Between 1997 and 2003, an average of 2155 applications for costs assessment have been filed each year in the Supreme Court. Of these applications, on average, 85 per cent concerned party/party matters (cases in which a court or tribunal has made an award for costs without specifying the quantum of costs). On average, clients disputing the bill of costs provided by a legal practitioner made up approximately 12 per cent of all applications.

[t]he principle that costs should follow the event is a key component in our judicial system. At present it is weakened by the fact that a successful party can be left substantially out of pocket by the unfair basis of taxing party-party costs.  

Debate concerning the Bill was robust, though reform of the costs adjudication regime was not an issue in contention. In light of problems that arose from the Reforms, and as we shall see in the discussion below, is particularly relevant to note that the Opposition did not oppose conditional costs agreements with uplift fees. The Opposition did move three amendments, none of which related to costs assessment, but were unsuccessful, they then decided not to proceed with any further attempts at amendment but rather to ‘consider its position and move other amendments in another place’. The Reform Bill was passed through the Legislative Council on 28 October 1993, and moved on to that ‘other place’; the Legislative Assembly.

The second version of the Reform Bill was introduced into the New South Wales Legislative Assembly on 9 November 1993 by way of the Legal Profession Reform Bill (No 2). Mr John Fahey, then Premier, read the Reform Bill for the second time. His speech concentrated on the ‘big picture’ in terms of reform; he did not dwell on the detail of the proposed change from a judicial/taxation system of cost adjudication to an administrative assessment system. He reported the purpose of the Reform Bill as being to provide ‘a more competitive market for legal services’. He explained that the Reform Bill was designed to reform three main areas: the structure and regulation of professional practice, the complaints system, and legal fees. Mr Fahey stated that the main problem with legal costs was that they were too high. He noted that the New South Wales Parliament set a scale of costs, but that many

264 Conditional costs agreements, a significant inconsistency that was at odds with the stated goal of allowing winning litigants to recover a greater portion of the costs they had expended in pursuit of the litigation are discussed later in this chapter at length.
266 New South Wales, Parliamentary Debates, Legislative Assembly, 9 November 1993, 4981 (John Fahey, Premier).
267 Ibid.
268 New South Wales, Parliamentary Debates, Legislative Assembly, 9 November 1993, 4981 (John Fahey, Premier).
269 Ibid 4982.
lawyers charged above that scale.\textsuperscript{270} He said ‘[t]he scale has in effect become the base rate, not an average or common fee,’\textsuperscript{271}

Mr Fahey went on to outline the introduction of a fee disclosure regime.\textsuperscript{272} He also pointed out that the Reform Bill introduced conditional fees that were to be chargeable if a matter was successfully concluded.\textsuperscript{273} Although he did not specifically address the fact that the current system of assessment of costs was to be discontinued, he noted that in cost disputes fee arrangements could be reviewed by costs assessors that were to appointed by the Supreme Court.\textsuperscript{274} He claimed that the Reforms would ‘rationalise anomalies in the fee assessment process’.\textsuperscript{275}

The Opposition did not agree. It considered the second Reform Bill to be a “lame duck” full of “weak kneed proposals” that would do little to regulate the cost of justice.\textsuperscript{276} The opposition had a raft of proposed amendments, though few involved the proposed changes to costs assessment. Three of those amendments however related to Schedule 3 of the Reform Bill, and were directly related to legal costs or the assessment process.

One of the proposed amendments concerned client’s rights and costs disclosure. The Reform Bill ensured that clients were to be informed what the costs they would pay to their own lawyers were likely to be,\textsuperscript{277} but it was silent about disclosure of potential liability for party/party costs if a matter was unsuccessful. The Opposition’s amendment would have made practitioners disclose an estimate of those costs; the Government rejected that proposal.

\textsuperscript{270} Ibid.
\textsuperscript{271} Ibid. His statement may have been correct in practice but it was wrong in principle. At one time it would have been considered unprofessional to charge less than the scale price (see note 87), but by 1993 that time had passed. A legal practitioner who wanted to increase market share was free to charge as little as he or she pleased. However, the vast majority of practitioner in all jurisdictions entered into costs agreements that allowed them to charge above, and often well above, the scale rates. Mr Fahey seems to have considered that the existence of a rate ‘floor’ would keep the price of legal services artificially high, but when few solicitors stooped to that floor his argument seems, at the least, odd.
\textsuperscript{272} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 9 November 1993, 4983 (John Fahey, Premier).
\textsuperscript{273} Ibid.
\textsuperscript{274} Ibid.
\textsuperscript{275} Ibid.
\textsuperscript{276} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 10 November 1993, 5093 (Paul Whelan, Member of the Opposition).
\textsuperscript{277} \textit{Legal Profession Act 1987} (NSW) ss 174, 177, as inserted by \textit{Legal Profession Reform Act 1993} (NSW) sch 3(1).
Mr Fahey considered that attempting to impose such an obligation was ‘entering the realm of fantasy - I cannot describe it any other way - where a practitioner will have to gaze into the crystal ball and guess what is happening with his opponent’. The Parliament did not explore the middle ground, that clients should at least be informed that such a liability was at least a possibility, without the practitioner having to estimate its quantum.

Two of the Opposition’s further amendments were accepted, namely that disclosure include information on the right to receive an itemised bill if the original bill a client received was in lump sum form, and that disclosure be ‘in writing and be expressed in clear plain language’.

A further proposal for amendment is worth noting. An independent member, John Edward Hatton, proposed an amendment that would have introduced ‘indicative costs’ into the Reform Bill. Indicative costs were to be set by a legal costs committee and would be the ‘costs the committee considers to be fair and reasonable for the provision of legal services’. Practitioners were to disclose those costs when disclosing the costs they intended to charge in accordance with their costs agreements, and costs assessors were to take indicative costs into account when assessing solicitor/client disputes. In short, it seems that Mr Hatton wished to rename and retain scales of costs. Mr Hatton’s amendment failed, as neither the government nor the opposition would support. Further discussion of benchmark costs is provided below at 3.3.5.1 in conjunction with discussion of the abolition of scales of costs in general.

Despite its initial rhetoric, the Opposition was in generally in support of the Reform Bill; it was satisfied the range of issues that costs assessors had to consider when carrying out their

---

278 New South Wales, Parliamentary Debates, Legislative Assembly, 19 November 1993, 5866 (John Fahey, Premier).
279 New South Wales practitioners have since been forced into that realm of fantasy, as provision of an estimate of costs payable on a party/party basis if a matter is unsuccessful is now part of the New South Wales’ mandatory disclosure regime, see Legal Profession Act 2004 (NSW) s 309(1)(f)(ii).
280 New South Wales, Parliamentary Debates, Legislative Assembly, 19 November 1993, 5887 (Paul Whelan, Member of the Opposition).
281 Ibid.
282 Ibid.
283 Ibid.
284 Mr Hatton was silent on how ‘Indicative Costs’ were to relate to party/party assessments, so it is not clear on whether he intended assessors to use them in those assessments.
work, and supported ‘reasonableness’ as the touchstone of assessment and described the process that costs assessors would go through as ‘evolutionary’. In general, the debates over costs related issues fell into line with party political ideology. The governing Liberal Party was in favour of a relatively free legal marketplace with minimum constraints on what solicitors could charge. It felt that so long as solicitors made genuine disclosure of costs at the commencement of matters, free competition and increased levels of efficiency would create an open market where prices were held to ‘real’ levels. The Labor opposition was in favour of far more in depth regulation of what it saw as a closed shop and an essentially self interested profession. Despite these ideological differences, the debates surrounding the introduction of the Reform Bill make it clear that despite some disagreement about the details of the Reforms to costs assessment, there was bipartisan support for change and about the desired outcome of the changes, namely that winning litigants received a higher level of return on party/party assessments.

In summary, the Reform Bill was to do remove costs assessment from the purview of the courts and transform it into an administrative function managed by a standalone body. A more detailed investigation of that change, the motivations that lay behind it and the expectations that accompanied it are provided below.

3.3.5.1: The Legal Profession Reform Bill 1993: A move to market forces and the abolition of scales of costs to benefit clients.

The Reform Bill should be viewed in the wider context of general reform in the name of stamping out anti-competitive practices. In 1992 the then Prime Minister, Paul Keating, had established a National Competition Policy Review, and the Hilmer Report which flowed from that review was released in August 1993. New South Wales, along with the other states, had accepted that its legislation should be reviewed to ‘consider any potentially anti-
competitive restrictions in legislation and whether they are in the public interest’. The legal profession had long been the target of criticism as being essentially a closed shop monopoly, and scales of costs were considered by many to be anti-competitive.

Mr Hannaford’s second reading speech made it clear that the government viewed the Reform Bill as ‘the most significant change to the structure and regulation of the legal profession ever undertaken in New South Wales.’ Schedule 3 of the Reform Bill would repeal part 11 of the 1987 Act and institute a new system of setting and reviewing fees. Mr Hannaford claimed that the thrust of that reform was to ‘move away from a system of regulated fees to reliance on market forces to set fees with an appropriate safety net to protect consumers’.

One of the many problems that Mr Hannaford saw with the then current system was that scales of costs did “not encourage solicitors towards greater efficiency since there is no way that the benefits of extra skill or efficiency can be competitively passed on to the consumer through lower fees with the object of obtaining greater market share.” This was a strange observation, as lawyers were able to charge less than scale to obtain market share if they wished to do so. Mr Hannaford did differentiate between contentious and non-contentious business in the second reading speech. Contentious business was subject to scales of costs that, although designed to be a ceiling, in fact acted as a floor or as base rates. This was because solicitors could and usually did enter into costs agreements that allowed them to charge above the scale rates. Non-contentious business was subject to prescribed fees that acted as maxima, but as Mr Hannaford observed, discount fee advertising allowed practitioners to charge less and to make it known that they charged less. In essence, and in light of the prevailing system of scales of costs at that time in New South Wales, Mr Hannaford’s premise that removing scales would lower costs simply does not make sense. Lawyers were already free to charge less than scale costs if they wished to do so. As the

---

288 Ibid.
289 The many included the then Premier of New South Wales, John Hannaford: New South Wales, Parliamentary Debates, Legislative Council, 16 September 1993, 3275 (John Hannaford, Minister for Justice).
290 Ibid 3269. The Reform Bill introduced many of the Reforms proposed by the Law Reform Commission in its series of reports However, this paper deals solely with the ‘reform’ of the legal cost recovery system.
291 Ibid.
292 Ibid 3275.
293 Ibid 3269.
scales of costs were designed as a default ‘ceiling’ for legal costs there was no cogent argument as to how removing them would lead to decreased legal costs.

Nonetheless, despite there being an odd premise to Mr Hannaford’s arguments, his second reading speech made it clear that the government believed that the proposed benefits of reform would include increased efficiency and a real drop in the costs of legal services, and that those benefits would in part flow from better competition. One of the key reasons that competition would increase was that scales of costs would be abolished and lawyers would then be able to fix their rates competitively.

As was noted above, Mr Chris Hatton, an independent member of the New South Wales Legislative Assembly, attempted to have an amendment allowing indicative costs inserted into the Reform Bill. Indicative or benchmark costs had been subject to some consideration over the evolution of the Reforms. In its original form, before it was withdrawn, redrafted and reintroduced, the Reform Bill had included provision for benchmark costs. As was explained earlier in the introduction to this thesis, scales of costs had originated in reaction to the view that lawyers were unethical in their billing methods. Over time they had evolved to become genuine estimates of what it was reasonable to charge for legal works, and had provided the limitations on recovering costs on a party/party basis. There was now a view that they stifled competition and thus acted to keep legal costs artificially high, although as noted above that view does not stand up to any detailed analysis. If costs assessors were to assess against a standard of reasonableness, it seems sensible to ask what guidance they should be given, and eminently sensible to provide such guidance through the workings of an expert body that was responsible for determining the guidelines. The Liberal government that drove the 1994 Reforms had originally included benchmark costs as part of the Reforms, but

294 Chapter 1 at 1.3.6.
295 Mr Fahey, rejecting benchmark fees, stated that this amendment brings scale fees back into the Act. The honourable member can hide it in whatever manner he likes but it brings back scale fees and it flies in the face of competition. The honourable member for South Coast has indicated on a number of occasions how strongly he feels about competition in the legal profession and now he is proposing a return to a set of standard fees that will be abolished by the bill. One of the prime reasons for the bill, which is before the Parliament today at the instigation of the Government, is to introduce true competition, and that means the abolition of scale fees.

New South Wales, Parliamentary Debates, Legislative Assembly, 19 November 1993, 4884 (John Fahey, Premier).
had abandoned them by the first draft of the Reform Bill. The Honourable John Hannaford, then Attorney General, in the second reading speech for the first draft of the Reform Bill explained that abandonment as follows:

First, the Trade Practices Commission indicated that there is a danger that a benchmark or default scale would become a basis from which practitioners set their fees. For example, if the benchmark fee represents on average a discount of 25 per cent, practitioners may start charging on the basis of 25 per cent above the benchmark fee. This would effectively retain all of the worst features of a regulated fee system and defeat the intention of the legislation to create a competitive market for legal services. 296

The Premier, Mr John Fahey, disagreed with Mr Hatton’s amendment; pointing out that such an amendment would bring scales of costs back into the Act. 297 He was firmly of the opinion that ‘[i]t is essential, in order to achieve competition, that there be no scale fees.’ 298 The Opposition seems to have been confused as to how they viewed benchmarks, as over the course of the debates surrounding the Reform Bill, they had described benchmark costs as ‘draconian’ 299, ‘ridiculous’ 300 and, alternately, a ‘novel and unprecedented concept [that] may have been a move in the right direction’ 301. However, the Opposition, in line with the governing party, rejected Mr Hatton’s amendment and benchmark costs.

As indicative or benchmark costs were really scales of costs renamed, and while there may have been real problems with the existing scales, it is hard to see that a form of regulation that had been extant and functioning for nearly 400 years was novel. Nor is it easy to agree with Mr John Turner of the National Party who noted that ‘I am pleased that the benchmark fee proposed in the discussion paper has been abandoned. I had great difficulties with that

297 New South Wales, Parliamentary Debates, Legislative Assembly, 19 November 1993, 5885 (John Fahey, Premier).
298 Ibid.
299 New South Wales, Parliamentary Debates, Legislative Council, 27 October 1993, 4513 (John Dyer, Member of the Opposition).
300 New South Wales, Parliamentary Debates, Legislative Assembly, 10 November 1993, 5112 (Paul Whelan, Member of the Opposition).
301 Ibid 5093.
proposal and I made that abundantly clear to the Attorney General. From a practical application, having worked as a solicitor in a country firm, I believed it would not work.\textsuperscript{302}

Despite Mr Hatton’s lone voice in favour of providing costs assessors with some form of objective guidance as to what were reasonable costs, it is clear that the abolition of scales of costs enjoyed bipartisan support. Scales of costs were viewed as anti-competitive, and removing them was stop lawyers from keeping their prices artificially high. Some later views on this issue are provided below in the section of this chapter that deals with the consequences of the 1994 Reforms

3.3.5.2: The Legal Profession Reform Bill 1993: changing the process of assessment

Mr Hannaford went on to describe the then current cost adjudication system as follows:

The taxation process in New South Wales is overly formal, legalistic and complex. The name of the process lends itself to considerable confusion. It is unlikely that any but the most sophisticated of legal services (sic) understand the term "taxation" in this obscure usage.

The system is also adversarial, requiring an application to the court and often representation by a solicitor to seek taxation of costs. The system is unnecessarily complex and artificial with court officials spending lengthy periods going through piles of documents to determine a “winner” and a “loser” on the issue of what is a fair bill for service. The Legal Fees and Costs Board recently drew attention to problems with the system of taxation. The board noted that the decision-making process in taxation is unnecessarily complex and time consuming. The board also noted that taxation is carried out by court officers who often occupy the position of a taxing officer in a transitory capacity, have little or no experience in the commercial world

\textsuperscript{302} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 10 November 1993, 5093 (John Turner). Note that despite their general abolition, New South Wales retains scales of costs for some forms of legal work.
of running a legal practice and little or no knowledge of the intricacies of the day-to-day activities of legal practice.\textsuperscript{303}

Mr Hannaford went on to argue that:

Clearly, what is needed is a faster, easier and cheaper system of review of bills of costs. It may not be possible to achieve this by reform of the taxation process which is heavily based on an adversarial approach.\textsuperscript{304}

It is clear that the government believed that the Reforms would provide a beneficial social effect of making unsuccessful litigants bear the real costs of the litigation. Mr Hannaford described the situation as follows:

The current system of taxation of party-party costs creates injustice and confusion. It means that even though a successful litigant is awarded costs against the other party he or she may be out of pocket for a significant amount. This is because party-party costs are those “necessary and proper” while solicitor-client costs are “all costs save those which are of an unreasonable amount or have been unreasonably incurred”. It is proposed to abolish this distinction and that, subject to the judicial discretion to vary the basis of awarding costs, the criterion for awarding costs should be those reasonably incurred. The client would then recover the full costs which he or she is required to pay other than any unreasonable costs.\textsuperscript{305}

It seems that many shared Mr Hannaford’s bleak view of the status quo. He noted that current system had been criticised by a number of judges, and quoted the Legal Fees and Costs Board as reporting that cost recovery by successful parties to large commercial litigation as being in the order of 40\% or even less.\textsuperscript{306} He was adamant that the new system

\textsuperscript{303} New South Wales, \textit{Parliamentary Debates}, Legislative Council, 16 September 1993, 3277 (John Hannaford, Minister for Justice). His sentence encapsulates the practicing lawyers’ chief complaint about the costs assessment scheme as it operates in Western Australia (see above n 84).

\textsuperscript{304} Ibid 3277.

\textsuperscript{305} New South Wales, \textit{Parliamentary Debates}, Legislative Council, 16\textsuperscript{th} September 1993, 3278 (John Hannaford, Minister for Justice).

\textsuperscript{306} Ibid. He stated that a number of judges had made negative comments about the current system, and earlier, at page 3277 notes that the then Chief Justice supported the changes. In particular he provide a scathing quote
as proposed in the Reform Bill would mean that ‘successful litigants should expect to receive all the legal costs they have incurred, except in the clear instances where costs in excess of that which may be determined as reasonable have been incurred with the express consent of the client’.  

Mr Hannaford’s statement above is unambiguous, and sets out one of the key goals for the Reforms to the costs assessment scheme. As noted above, Reforms were expected to ensure that winning litigants recovered a higher percentage of the costs of that litigation from the losing parties.

3.3.5.3: The Legal Profession Reform Bill 1993: Uplift fees and the rationale for introducing them.

As noted above, the Reform Bill was styled as the Abolition of Maintenance and Champerty Bill. Maintenance described the situation where an otherwise disinterested party provided the financial support for litigation, while champerty described a situation where a lawyer provided services in exchange for an interest in the subject matter of litigation. Both situations gave rise to an offence, and either provided the foundation of an action in tort. This was problematic, as conditional costs agreements had long been common in some areas of legal work, and in particular in personal injury matters, where the condition was often ‘no win- no fee’. Despite the strong social utility of such arrangements, and although ‘no win-no fee’ retainers were accepted as legitimate, practitioners offering them were ‘maintaining’ litigation and did, in a real sense, have an ‘interest’ in the outcome of the litigation. Such practitioners were not receiving American style contingency payments based in a percentage of the damages received, but an argument that a practitioner who will only be paid if

---

308 Ibid.
309 Dal Pont, above n 171, 62.
310 Ibid.
damages are awarded (or a settlement is reached) does not have a financial interest in the outcome of the matter hinges on a very fine semantic point.311

The Reform Bill sought to do away with the two offences and to discontinue them as causes of action in tort.312 Instead, it prescribed the ways in which a practitioner could charge for legal fees, with an allowance for a method of charging that fell within the definition of champerty. The Reform Bill allowed conditional costs agreements that included ‘uplift’ fees. Under the Reforms, practitioners were to be given the right to charge a success fee of up to 25% (the uplift) above their normal rates. In essence, and despite the way in which the Reform Bill was described, the effect of the reform was to allow and formalise a form of champerty, as it gave lawyers the right to have a direct financial interest in the outcome of litigation.313 Mr Hannaford explained that:

New sections 186 to 189 provide for conditional costs agreements. Conditional fees provide for payment of the legal practitioner only when the client is successful. Conditional fees will not involve profit sharing, where the lawyer receives a fee proportionate to the result. In this regard the arrangements permitted under this proposal are clearly different to contingency fee arrangements which exist in the United States whereby the lawyer may receive a proportion of the amount of money awarded by the court. Conditional costs arrangements arise where a lawyer and client agree that the lawyer's fee will be paid only if the client is successful.

Under such an agreement, there may be a premium on the agreed fee to take account of the risk involved, but the fee must not vary according to the benefit received by the client. The premium allowable may be up to 25 per cent of the reasonable fee

311 For a view of these issues contemporary to the 1994 Reforms see McDermott, Contingency Fees and Law of Champerty [1993] NZLJ 25. See also Clyne v New South Wales Bar Association (1960) 104 CLR 186, 203.
312 The Reform Bill continued to recognise the discontinued offences as problematic, and the 1987 Act was amended to ensure that while such behaviour was now permitted, it was only permitted in narrow circumstances as follows: ‘Maintenance or champerty by a legal practitioner (except in connection with a conditional costs agreement under Part 11) may constitute professional misconduct despite the Maintenance and Champerty Abolition Act 1993’: Legal Profession Act 1987 (NSW) s 127(2), as inserted by Legal Profession Reform Act 1993 (NSW)sch 2(2).
313 Legal Profession Act 1987 (NSW) s 186, as inserted by Legal Profession Reform Act 1993 (NSW)sch 3(1).
disclosed in the costs agreement. What constitutes the successful outcome must also be agreed by the parties and included as part of the conditional costs agreement.\textsuperscript{314}

One of Mr Hannaford’s colleagues, Ms Elizabeth Kirkby, justified conditional fees as follows:

These conditional fee agreements will help to align lawyer-client interests. Only cases with a likelihood of success will go ahead. They will allow plaintiffs with limited financial resources to have their cases dealt with. Restrictions on profit-sharing will curb the disadvantages of contingency fees, such as the temptation to deceive the courts and pervert the legal system, the incentive to increase spurious litigation, and potential conflicts between lawyer and client where the financial interests of the lawyer become paramount.\textsuperscript{315}

3.3.5.4: Criticalism of the rationale for conditional costs agreements containing uplift fees

Ms Kirkby’s justification deserves some analysis.

Her first statement, claiming that conditional fees will help align lawyer-client interests, is problematic. Lawyers stand as a fiduciary to their clients;\textsuperscript{316} and in carrying forward their client’s litigation it should not be necessary to pay them extra to align their interests. At the most basic level her argument seems to be that if lawyers will get more for ‘winning’ litigation than for losing it they will be more interested in winning. The statement can be contrasted with an observation from the National Competition Policy Review of the Legal Profession Act 1987, released some years after the Reforms had been instituted, where it was noted that “such agreements create a conflict of interest between the financial interests of a lawyer in the outcome of litigation and their duties to the court”.\textsuperscript{317} Of these two views on


\textsuperscript{315} New South Wales, \textit{Parliamentary Debates}, Legislative Council, 28 October 1993, 4629 (Elisabeth Kirkby).

\textsuperscript{316} For Australian confirmation of this long established principle see \textit{Hospital Products Ltd v United States Surgical Corporation} (1984) 156 CLR 41, 68 (Gibbs CJ).

\textsuperscript{317} Independent Committee of Inquiry, above n 283, [12.28]. The final report considered conditional uplift fees to be problematic, but falls short of finding that introducing them in New South Wales was a mistake.
how a practitioner’s interests may be affected by a conditional costs agreement, the second
seems the most cogent.

Ms Kirkby’s second statement, a remarkably broad observation as to the effect of conditional
contracts, does not really seem to make any sense. In the narrowest way, practitioners would
not be likely to defer payment in a matter with little likelihood of success, if payment was
going to be conditional on being successful. However, practitioners would have been very
unlikely to take on cases that were not likely to succeed without payment up front before the
success fee was introduced; practitioners had always been able to take on ‘pay as you go’
matters even if there was little likelihood of success and the Reforms did not alter this.

Ms Kirkby’s third observation is less problematic. It may be that the ability to charge an
uplift fee will encourage practitioners to act in matters without monies in trust, so that
‘plaintiffs with limited financial resources’ may be more likely to have their matters progress.
However, practitioners would only be likely to take on such cases if there was a fairly strong
chance of success. In such instances practitioners have always been able to accept payment at
the end of the matter, and in some areas of practice that approach has always been
common. An agreed uplift fee would help cover the opportunity costs of waiting until the
end of a matter for payment, but practitioners had already been able to charge more to cover
such costs by way of an ordinary costs agreement, as costs agreements displaced scales of
costs. Further, an uplift fee charged against a matter where the damages recovered were not
substantial could result in the bulk of the litigant’s award going to the solicitor as the uplift
fee. A conditional costs agreement with an uplift fee may be beneficial for practitioners
representing impecunious litigants with strong cases involving substantial amounts of money,
but that is not a justification for introducing such fees across the wide range of litigation.
Such litigants would have been likely to get their day in court in any event; they were now to
be charged up to 25% more for having done so.

The last part of Ms Kirkby’s statement is not a justification for introducing conditional costs
agreements with uplift fees. Rather it is recognition that allowing a practitioner to have an

318 Tortious actions, in which the plaintiff is often a first time user of the legal system and also often unable to
afford up-front fees, despite having a strong claim, have traditionally been the area where no win-no fee
retainers are commonly used.
interest in the subject matter of the litigation, as is done in the United States, can be very problematic. Although she stated that the Reforms would ‘curb the disadvantages of contingency fees, such as the temptation to deceive the courts and pervert the legal system’\(^319\), it seems she must have meant that they would do so because they did not introduce the American system, rather than that the Reforms did not themselves give practitioners a financial interest in the outcome of the retainer. It may be that ‘restrictions on profit sharing’ are a good thing, but the 1994 Reforms did not really provide further such restrictions than were already in place, rather, as noted above, they recognised a form of retainer that had long been common (no win-no fee), and then added a right to charge what was essentially a bonus on top of the regular fees (the uplift). As noted above, the 1994 Reforms made profit sharing professional misconduct rather than a general offence or cause of action.\(^320\) The most that can be said about Ms Kirkby’s final statement in support of conditional costs agreements with uplift fees is that it can be seen as an admission that although a form of maintenance was now going to be recognised, and lawyers were going to have a direct financial interest in the outcome of litigation, at least the situation was not going to be the way it was in the United States.

The reality of conditional agreements with uplift clauses is that they created a significant costs increase for any client subject to one who was successful in litigation. Uplift fees are very good for legal practitioners, who get paid extra for the same amounts of work they were often previously willing to do for less. If conditional contracts are not carefully monitored they allow a practitioner to charge a premium even in cases where there is little likelihood of losing. As will be seen below, that proved to be the situation in post reform New South Wales.

**3.3.5.5: Party/party costs recovery of conditional fees under the 1994 Reforms**

In light of Mr Hannaford’s unambiguous statement that winning litigants should recover ‘all’ of their reasonable costs, introducing conditional fees that allow an uplift charge seems


\(^{320}\) *Legal Profession Act 1987* (NSW) s 127(2), as inserted by *Legal Profession Reform Act 1993* (NSW) sch 2(2).
immensely problematic, unless of course the winning litigant was also able to recover that uplift charge on party/party assessment. The Reform Bill, and the subsequent Reform Act, was silent as to recovering the uplift fee from the losing litigant. However, it would seem unjust to ask that losing litigants pay what is, from their perspective, a penalty cost for losing. Nonetheless, it is arguable that the 1994 Reforms allowed a winning litigant to recover that fee if it had been reasonable to charge it. After all, reasonableness was the touchstone of assessment, and the clear intention of the parliament was that monies expended reasonably should be recovered.

The second reading speech given by Mr John Fahey, then Premier of New South Wales, when he introduced the second version of the Reform Bill to the Legislative Assembly, further illustrates that the reformers seem not to have properly considered this issue when drafting the Reforms. He stated that:

In some circumstances, a conditional fee may be paid to the lawyer if the client is successful. Conditional fees must conform with certain principles; for example, they must not be varied in proportion to the benefit won by the client. The Government is wary of the pitfalls of the American system of contingency fees and so will limit conditional fees to no more than 25 per cent of the total fee. The Government's Reforms will also ensure that courts award all reasonable costs. This will largely eliminate the gap between costs available for award by the courts and the actual fees charged by lawyers, a gap which often results in the payment of substantial fees by successful litigants.

The Parliament never addressed the issue of who would ultimately be responsible for the uplift fee directly in any of the debates pertaining to the Reform Bill.

321 The Australian jurisdictions do allow a court to ‘punish’ a losing litigant through an award of exemplary damages, but such damages ‘are intended to punish the defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence’: Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, 149 (Windeyer J). Such a rationale precludes punishing losing litigants simply because their opponents entered into a conditional costs agreement that allowed an uplift fee.

322 New South Wales, Parliamentary Debates, Legislative Assembly, 9 November 1993, 4983 (John Fahey, Premier).
Mr Fahey’s speech above catches the absurdity of trying to rationalise counteracting Reforms. In the space of a few words he says firstly that a conditional fee may be paid to the lawyer if the client is successful, and then he notes that courts will award all reasonable costs and that the Reforms ‘will largely eliminate the gap between costs available for award by the courts and the actual fees charged by lawyers, a gap which often results in the payment of substantial fees by successful litigants’. Reading this, it would seem that the parliament thought it was reasonable for a lawyer to be paid extra if the matter he or she was litigating ended in success for the client. Unless the client can recover this reasonably incurred cost from the losing litigant, every situation where there was a conditional costs agreement with an uplift fee, there would be the ‘gap between the costs available for award by the courts and the actual fees charged by the lawyers’, the very situation Mr Hannaford so deplored.

Despite Mr Fahey’s assurances as to ‘reducing the gap’, introducing uplift fees must always act to ensure that a winning litigant is out of pocket for, at the very least for the amount of the uplift, if those fees were not recoverable. As will be seen in the portion of this chapter that explores the consequences of the 1994 Reforms, uplift fees proved to be seriously problematic.

3.4: The Legal Profession Reform Act 1993 is enacted

The Legal Profession Reform Act 1993 (No.87 of 1993), received assent on 29 November 1993. It was an Act designed to:

“amend the Legal Profession Act 1987 in relation to the structure, regulation and discipline of the legal profession, the making and handling of complaints about legal practitioners and the regulation of legal fees and other costs; and for other purposes.”


323 Ibid.
324 Ibid.
325 Explanatory Note, Legal Profession Reform Bill 1993 (NSW).
The means of costs adjudication in New South Wales was profoundly changed; costs assessment was no longer a judicial function; instead an administrative system of costs assessment was instituted and the courts were relieved of that burden. Scales of costs, extant in all Australian jurisdictions since the earliest days of the colonies, were gone. New South Wales entered a brave new world of cost dispute adjudication.

3.4.1: A new Part 11 for the 1987 Act

The 1993 Reform Act repealed and replaced Part 11 of the 1987 Act (which had dealt with legal costs and costs assessment) in its entirety.

The first division of the new Part 11 contained definitions and set out the clients’ basic rights in relation to costs and costs assessments. The first division also allowed conditional costs agreements, where the client could be charged an uplift or success fee if the practitioner was able to conclude the matter successfully. Uplift fees were discussed above and the centre of that discussion is an argument that while uplift fees may have some social utility; they come with immense capacity for abuse. Uplift fees for litigation work had a short lifespan in New South Wales; their demise is discussed at below.

The second division of the new Part 11 set out a robust disclosure regime. A solicitor or barrister who failed to provide timely and proper disclosure as to costs at the time he or she entered into a retainer was unable to recover costs from his or her client until those costs were assessed under the scheme.

Further, while failure to provide proper disclosure was not in itself a breach of the Act, it could be unsatisfactory professional conduct or even professional misconduct.

---

326 Legal Profession Act 1987 (NSW) s 174(1) (c). The uplift, or success fee, was capped at 25%. The Act does not specifically preclude recovery of the uplift fee on a party/party basis, but the newly appointed assessors did not consider it recoverable and their view was confirmed in a paper (full name) produced by the New South Wales Attorney General in 1998. The uplift fee, a charge levied on successful matters, is not recoverable on a party/party basis (authority from article). The introduction of an uplift fee betrays one of the fundamental drivers of reform; that successful litigants get back a higher proportion of what they have spent on costs. Uplift fees were introduced in Western Australia by way of the Legal Profession Act 2008 (WA) s284.

327 See also discussion about uplift fees in Western Australia at 2.4.6.

328 Legal Profession Act 1987 (NSW) ss 174(1) (b), 182(1).

329 Legal Profession Act 1987 (NSW) s 182(4). Legal Services commissioner reports failure to disclose is an issue in 10% of complaints, understates issue and there is ‘widespread ignorance of laws and many practitioners
With the exception of the definitions provided in Division 1, the first three divisions of the new Part 11 dealt with the relationship between legal practitioners and their clients. They provided reform and clarification of the rights and responsibilities that existed between the two. The rest of the new Part 11 introduced more overarching reform which moved out from the legal practitioner/own client relationship to the costs assessment process itself.

Divisions 4 and 5 of the new Part 11 dealt with interest on costs, security for costs, the form and delivery of bills of costs and cost fixed by regulation. These matters are generally outside the scope of this work and are therefore not discussed.\(^{330}\)

Division 6 of the new Part 11 set out the procedural details of the new costs assessment scheme. This division provided the core of the Reforms to costs assessment.

As noted above, prior to the Reforms party/party costs assessment was usually done in the court or tribunal where the costs orders were made. The assessment was part of the substantive matter to which the costs orders pertained. Solicitor/client assessments, on the other hand, had always been considered as a separate substantive matter and had been dealt with in the Supreme Court of New South Wales. This was true regardless of how those disputed costs arose, so long as they arose in the New South Wales jurisdiction.

Under the new regime nearly all\(^ {331}\) assessments of party/party costs arising from matters in either the courts or tribunals of New South Wales, and all assessments of costs between practitioners and their own clients were now to be performed by the newly created costs assessment authority. Cost assessment was no longer to be part of the judicial process and

---

\(^{330}\) Note however that by providing for fixed costs in some areas of legal work the New South Wales Parliament, despite its expressed antipathy for scales of costs, saw social utility in keeping scales alive at least to some degree.

\(^{331}\) Clients complaining about overcharging and lack of disclosure continues to be an issue in New South Wales, with 13.9% of the complaints against lawyers received by the New South Wales Office of the Legal Services Commissioner in 2010-2011 being about either overcharging or lack of disclosure: Office of the New South Wales Legal Services Commissioner, Annual Report 2010-2011 <http://www.olsc.nsw.gov.au/agdbasev7wr/olsn/2010_2011_olsn_annrep.pdf>.
was now to be dealt with by an administrative body governed by principles of administrative law.

Division 6 set out the time limits for applications for the various forms of assessment, and the methods by which assessment could be accessed. An application for assessment was filed with the Manager, Cost Assessment. The Manager, Cost Assessment did not himself or herself decide on the validity of the application, that decision was made later in the process by the costs assessor.

On receipt of an application the Manager, Cost Assessment was required to give notice of the application to the other party to the assessment and to inform both parties of any mediation process that might be available. If the Manager, Costs Assessment considered that mediation may be successful he or she was required to defer the assessment until mediation had taken place.

If there was no prospect of a successful mediation, or if there was mediation and no agreement was reached, the Manager, Cost Assessment sent the application and the relevant documents on to a costs assessor.

The assessor’s initial task was to determine whether the costs were eligible for assessment. If the application was pursuant to party/party costs this would not usually have been a live issue. However, in many of the disputes between a practitioner and his or her own client, a

332 The 1993 amendments are ambiguous as to who heads the costs assessment scheme, and simply refers to the person with who the distractive duties of the scheme rest as the proper officer of the Supreme Court. The Courts Legislation Amendment Act 2001 (NSW) inserted a new definition in s 3 of the 1987 Act, being: 'Manager, Costs Assessment means the person holding office, under Part 2 of the Public Sector Management Act 1988 (NSW),as “Manager, Costs Assessment” in the Attorney General’s Department’. The Courts Legislation Miscellaneous Amendments Act 2002 (NSW) expanded that definition by adding the words ‘and includes any person to whom that person has delegated the functions of that officer’ to the end of that definition. For the purposes of this document the phrase Manager, Costs Assessment, will be used to describe the person managing the costs assessment scheme.

333 Legal Profession Act 1987 (NSW) s 208, as inserted by Legal Profession Reform Act 1993 (NSW) sch 3(1).

334 Ibid ss 204, 205.

335 Ibid s 205.

336 At 2.3 above, the author notes a view that is ubiquitous among the Western Australian legal profession; that court officers, not themselves exposed to the realities of running a legal practice, tend to be out of date as to the realities of charging clients. One would think that sourcing assessors from the legal profession would put paid to that particular complaint, but see Deborah Vine Hall, ‘Present difficulties with the assessment system’ (2004) 10(1) UNSW Law Journal Forum 6, 8, where she notes that ‘the failure of some assessors to ‘move with the times’ has resulted in parties in 2004 recovering sometimes only 60 per cent of their costs’.
costs agreement would have been the basis of the retainer from which the costs arose, and in some circumstances that would mean that a client’s application for assessment might be invalid.

3.4.1.1: Dealing with invalid costs agreements; default in disclosure

A provision in Division One of the new Part 11 stated that a client who entered into a valid costs agreement where there had been proper costs disclosure was not entitled to have his or her costs assessed under the new scheme. However, costs agreements were governed by Division Three of the new Part 11 and that division specifically disallowed contracting out of the costs assessment scheme by way of a term in a costs agreement. At first glance this seems at odds with the provision in Division One. However, if the client argued that the costs dispute was as to something other than the actual quantum of costs charged, or the rate those costs were charged at, then the assessor could assess the costs but at the rate set out in the agreement. The amendments were silent on what those other matters might be, but the section that allowed assessment in such circumstances did not apply to situations where there agreement was tainted by some ‘inequality’ or where there had been insufficient disclosure.

If a client argued that the costs agreement was in some way tainted by an ‘inequality’ as set out in Division 6, or by a lack of proper disclosure, the client could apply for assessment and the costs assessor could determine either (or both) of those things as a threshold question.

337 Legal Profession Act 1987 (NSW) s 174(f), as amended by the Legal Profession Amendment Act 1993 (NSW) sch 3(1). A legal practitioner was in the same position, and arguably worse off. If the practitioner had provided proper disclosure and entered into a valid costs agreement and the client refused to pay, the practitioner could not access the assessment system and had to sue in debt unless the client was alleging that there was some reason other than the rates charged (in accordance with the agreement) or the amount charged that was the reason for refusing to pay. See Lange v Back & Schwartz (Unreported, District Court of New South Wales, Norrish QC DCJ, 12 June 2009) where the client’s appeal against a costs assessor allowing a bill in total despite his arguing that some of the costs were either for work not instructed or not reasonably carried out was not upheld. See also the Legal Profession Act 1987 (NSW) s 208C (1).

338 Legal Profession Act 1987 (NSW) s 189(2), as inserted by Legal Profession Reform Act 1993 (NSW) sch 3(1).

339 Ibid ss 208C (3), (4).

340 Ibid s 208C (2).
If the costs assessor felt that the costs agreement was, in all the circumstances, unjust then he or she could assess the costs despite the costs agreement.\textsuperscript{341}

The division provided a wide range of matters an assessor had to take into account when determining if a costs agreement was or was not just.\textsuperscript{342} If proper disclosure was lacking, or if the costs agreement itself was tainted by unreasonableness, the assessor could assess the costs without reference to the costs agreement. If the costs assessor considered that a practitioner had engaged in charging grossly excessive costs or had deliberately misrepresented costs, the assessor was required to refer the matter to the Legal Services Commissioner.\textsuperscript{343}

The amended Act was oddly silent on how the costs assessor was to view the costs agreement in such situations. It did not say that the offending section of the agreement (or the agreement itself) fell away or was to be ignored, but perhaps by necessary implication such a situation left a costs assessor to come to an assessment that was reasonable in all the circumstances.

Despite some confusion in how the 1993 amendments set out the relationship between costs agreements and costs assessments as between practitioners and their own clients, the overall thrust seemed clear. Clients who had been properly informed about costs and who had entered into costs agreements that were not unjust were to be held to those agreements so far as works that had been reasonable to carry out and that had been carried out in a reasonable way. If the client alleged that any works had been unreasonable, or carried out unreasonably the costs assessor could address that contention and make an adjustment to the costs if he or she supported it. If, however, there was a more fundamental problem with the agreement; it was unjust or if costs disclosure had been inadequate, then the agreement fell away. This seems at some levels problematic. What was an assessor to do where the costs had not been

\textsuperscript{341} Ibid s 174(f). Section 208C(1) states that an assessor must not assess a bill of costs governed by a valid costs agreement if the dispute is only about the amount charged under the agreement or the rate specified in the agreement. On its face that precludes a practitioner from seeking assessment if the client is refusing to pay because of a dispute over either of those things, but that is clearly not what was intended (see note where you say practitioner can file).

\textsuperscript{342} Ibid s 208D.

\textsuperscript{343} Ibid s 208Q. As corollary to this, the Legal Services Commissioner or a committee investigating a complaint against a practitioner could send that the matter to a costs assessor to be assessed under the new Part 11: \textit{Legal Profession Act 1987} (NSW) s 153 as inserted by \textit{Legal Profession Reform Act 1993} (NSW) sch 2(2).
properly disclosed, or there had been some inequality that tainted the agreement, yet the costs
themselves as set out in the agreement were in all other ways reasonable? This dilemma
would not have arisen if scales of costs had been retained in some form, as had been
originally intended.\textsuperscript{344} Assessors in such circumstances had to fall back on their own idea of
what the reasonable costs should be in that particular set of circumstances.

If, however, the costs agreement was sound, the assessor could only assess the costs if the
dispute was about something other than the actual rate charged.\textsuperscript{345} In such instances, any
assessment had to be made at the rate set out in the costs agreement.\textsuperscript{346} In determining this
and any other matter the costs assessor was not bound by the laws of evidence and could
inform himself or herself as he or she saw fit.\textsuperscript{347}

If the assessor determined that there should be a costs assessment he or she could, if he or she
so required, send out a notice to the party that was claiming the costs (who may or may not
be the party asking for the assessment) requiring delivery of further and better particulars
relating to the disputed costs.\textsuperscript{348} The assessor was then required to give both the parties an
opportunity to give written submission as to any or all of the issues that arose.\textsuperscript{349} Cost
assessors had a duty of confidentiality in regard of materials they received when performing
assessments and could be fined if they breached that duty.\textsuperscript{350}

\textsuperscript{344} The draft version of the original reform bill (the Legal Profession Reform Bill 1993 (NSW) had included
(John Hannaford). As noted in that second reading speech, there was strong opposition to the concept and the
final version of the reform bill did not include such a ‗draconian‘ proposal, to the relief of the parliamentary

\textsuperscript{345} \textit{Legal Profession Act 1987 (NSW) s208C as inserted by Legal Profession Reform Act 1993 (NSW) sch 3(1).

\textsuperscript{346} Ibid s 208C (2). An example of this would be where there had been proper disclosure and a valid costs
agreement, but the client alleged that some portion of the costs related to work that was unreasonable or
excessive. In such an instance the assessor could determine what portion of the work (being none, some portion,
or all of that work) was reasonable and could be charged for, and he or she would then apply the rate set out in
the costs agreement to that work and disallow any other work.

\textsuperscript{347} Ibid. However, as administrative decision makers, costs assessors were bound by the rules of procedural
fairness, see more recently \textit{CSR v Eddy} (2008) NSWLR 725.

\textsuperscript{348} Ibid s 207. A barrister or solicitor who failed to respond to such a notice without a reasonable excuse for that
failure was guilty of professional misconduct.

\textsuperscript{349} Ibid s 208(1) (a).

\textsuperscript{350} Ibid s 208T. Despite being appointed from the ranks of practicing lawyers and barristers, assessors were not
officers of the court while performing assessments and no retainer existed between them and the costs applicant.
For that reason the usual fiduciary duties that would bind a solicitor or barrister to confidentiality did not apply,
and the new Reforms replace that duty by applying a statutory equivalent.
3.4.1.2: Performing the assessment

The sixth division set out those things the assessor had to consider when making a costs assessment, and also provided a list of those things that the assessor may consider in determining what costs were ‘fair and reasonable’. In essence, the costs assessor in the new administrative system was to consider much the same things that costs assessors in judicial assessment regimes have always had to consider, whether it had been fair and reasonable to do the work the costs related to, whether the work was fairly and reasonably done and, in the absence of a valid costs agreement, whether the amounts charged for that work were fairly and reasonably done.

Subdivision 3 of Division 6 related to party/party costs only. Those costs were the costs the losing party had to pay towards the winning party’s costs pursuant to an order of a court or a tribunal. As scales of costs had been repealed as a part of the Reforms, the assessor no longer had any benchmark to give guidance, and limitations, as to what could be recovered by the winning litigant towards his or her legal costs. However the underlying principles of assessment remained as they always had been; fairness and reasonableness remain the touchstone of costs assessment. The assessor, who had the relevant file which recorded the work being charged for, and submission from the parties that set out the reasons for the dispute as to the costs, had to determine if it had been fair and reasonable to do the work being charged to the loser and if the charges levied for the work were themselves fair and reasonable. Subdivision 3 gave a thorough but non exhaustive list of what the assessor was to take into consideration in making those determinations. In party/party assessment the costs assessor was not usually entitled to consider any costs agreement that governed the winning litigant’s relationship with his or her own lawyer when determining how much costs

---

351 Ibid ss 208A, s208B.
352 An administrative costs assessor in New South Wales considers much the same things when determining the reasonableness of costs as does a judicial costs assessor in the Western Australian jurisdiction. The measures of what is fair and reasonable are wide but sensible. Fairness and reasonableness will always depend on the particular set of circumstances surrounding the retainer, and costs assessors have both firm guidance and broad discretion to determine those circumstances.
353 Legal Profession Act 1987 (NSW) s 363.
354 Legal Profession Act 1987 (NSW) ss 208F(1), 208G, as inserted by Legal Profession Reform Act 1993 (NSW) sch 3(1).
the losing litigant had to pay.\textsuperscript{355} However, if the court or tribunal had made an order for indemnity costs then the assessor was to have regard to the actual costs the winning litigant had paid.\textsuperscript{356}

Although the basis for the discretionary decisions that made up the assessment remained much the same as it had been before the Reforms, one key difference was that the parties were no longer required to appear in person for the assessment. As noted above, the costs assessor had wide powers to call for supporting documents and the parties had the right to make written submissions. The costs assessor also had the solicitor’s file that contained the record of the works claimed under the bill of costs. However, the assessment was done at a time and a place (which would as often as not be the law practice where the practitioner was otherwise engaged) convenient to himself or herself. The previous costs regime, where the parties or their legal representatives had to make an appearance in an adversarial process and where clients had to have an assessment heard in the Supreme Court if they wished to challenge their own solicitor’s bills, was much less accessible. However, in a situation where the parties made personal appearances each deduction that an assessor made could be individually argued and the reason for the assessor’s deduction would be relatively clear; under the new regime the assessor, and administrative decision maker, had no duty to give reasons to explain the finalised assessment.\textsuperscript{357}

The costs assessor also determined the costs of the assessment process and had a broad discretion to determine who paid those costs, and could order payment on a proportional

\textsuperscript{355} Ibid s 208H.
\textsuperscript{356} Ibid s 208I. As is noted above, the Parliament that introduced the 1994 Reforms did not envisage losing litigants being responsible for paying an uplift premium. However, if the measure of recovery was reasonableness, and if in all the circumstances it was reasonable for the practitioner to charge and the client to pay an uplift fee then arguably the loser should reimburse the monies spent on the uplift. In terms of an uplift fee where there is an indemnity order, see \textit{Madden v NSW-IMC (Insurance Ministerial Corporation)} [1999] NSWSC 196 where in a party/party assessment subject to an indemnity costs order the assessor refused to allow the an uplift fee and was upheld on appeal and contrast that to \textit{Porter v John Fairfax Publications} [2001] NSWSC 680 where the assessor allowed the uplift as a reasonable costs on a party/party assessment and that decision was upheld on appeal. See also discussion of the effect that the 1994 Reforms had on indemnity orders later in this chapter.
\textsuperscript{357} See for instance \textit{May v Hullah & NRMA Ltd & Anor} (Unreported, Supreme Court of New South Wales, Greenwood M, 22 October 1996), where Greenwood M noted that there was no common law rule that an administrative decision maker had to give reasons for decision and that the Act did not create any such duty.
basis between the parties.\textsuperscript{358} Costs of the process were narrowly defined to include the filing fees and the cost charged for the assessor’s services. The costs assessor could not award the costs of preparation, which may well have included the costs of specialist costs practitioners so those costs were borne by that parties regardless of the outcome of the assessment.\textsuperscript{359} Those costs were to be paid to the proper officer of the Supreme Court, being in this case the Manager of the costs assessment scheme.\textsuperscript{360} Those monies were in turn paid to the Law Society which paid them on to the Statutory Interest Account.\textsuperscript{361}

Once the assessor had worked through the file and decided which costs would be upheld and which would be assessed off and had come to a final figure, he or she issued each of the parties with a certificate setting out what he or she had determined the costs should be.\textsuperscript{362} The party who was receiving costs, be it the winning litigant or the practitioner whose bill had been challenged, had the benefit of the assessment and was owed costs, the certificate could be registered in a competent court as a judgment and could be executed as such.\textsuperscript{363} Alternately, if the costs had been paid and the assessment resulted in the payee having to return some part of those costs to the payer, that amount was recoverable as a debt in a court of competent jurisdiction.\textsuperscript{364} This seems an odd difference of approach as there is no obvious reason why a party who had overpaid should be in a position that was materially worse, in that he or she had a more costly and time consuming remedy, than did a party who had not been paid.

\textsuperscript{358}Legal Profession Act 1987 (NSW) s 208(4), as inserted by Legal Profession Reform Act 1993 (NSW) sch 3(1).
\textsuperscript{359}This was problematic, if the losing and therefore paying litigant challenged the winning litigant’s bill, and the winning litigant could not recover the full costs of the ensuing assessment (being fees charged by the winning litigant’s own practitioner for the time taken up with the assessment process) that vitiated one of the key drivers to the 1994 Reforms; that the winning litigant recover all of the reasonable costs of litigation. As will be seen below, this incongruence was removed in 1996.
\textsuperscript{360}Legal Profession Act 1987 (NSW) s 208(5), as inserted by Legal Profession Reform Act 1993 (NSW) sch 3(1).
\textsuperscript{361}Ibid s 208U (2).
\textsuperscript{362}Ibid s 208J (1).
\textsuperscript{363}Ibid s 208J (3).
\textsuperscript{364}Ibid s 208J (2).
3.4.1.3: Appeals against a costs assessment

A party who was dissatisfied with an assessment had two avenues of appeal. The first, where there was an allegation that the assessor had made an error of law, was to the Supreme Court and was by right.\textsuperscript{365} The Court, hearing such an appeal and finding for the appellant, could replace the assessor’s determination with its own.\textsuperscript{366} The Court also had the power to send the matter back to an assessor for a new determination, and if it awarded that remedy the appellant was entitled to the equivalent of a de novo hearing and could bring fresh evidence.\textsuperscript{367} The second, which was by leave, mirrored the old appeal routes. Appeals relating to party/party determinations were made to the court or tribunal that had heard the substantive matter while appeals relating to solicitor client determinations were to the Supreme Court.\textsuperscript{368} In either instance the parties were entitled to bring fresh evidence.\textsuperscript{369} If a party appealed a determination the costs assessor, or the court, could suspend the determination for the duration of the appeal.\textsuperscript{370} However, the assessor could discontinue his or her suspension, and the court could discontinue a suspension imposed by either an assessor or by itself.\textsuperscript{371}

Despite the two avenues of appeal a costs assessor’s decision remained an exercise of discretion, and such decisions are always difficult to challenge. As noted above, assessors were not required to give reasons and that made identifying an error upon which to found an appeal very difficult.\textsuperscript{372}

\begin{footnotesize}
\textsuperscript{365} Ibid s 208L (1).
\textsuperscript{366} Ibid s 208(2).
\textsuperscript{367} Ibid.
\textsuperscript{368} Ibid s 208M.
\textsuperscript{369} Ibid s 208M (4).
\textsuperscript{370} Ibid s 208N.
\textsuperscript{371} Ibid s 208N (4).
\textsuperscript{372} Ms Susan Pattison, a New South Wales costs practitioner, addressing the Standing Committee on Law and Justice in \textit{Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs)1997} commented that, the existing assessment procedure is opaque. By that I mean that you do not get any written reasons back, any marked bills, or any real feedback as to why a certain amount was found to be fair and reasonable by the Assessor, either solicitor and client or party/party. Also, because you have no reasons or findings, the rights of appeal set out in the Act at 208L and 208M are effectively unenforceable. It is virtually impossible to bring an appeal. Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, 57 (Susan Pattison). Ms Pattison’s cogent submission to that proceeding is explored further below.
\end{footnotesize}
The Chief Justice of the Supreme Court was given the power to appoint and dismiss costs assessors.\textsuperscript{373} To be appointed, an applicant must have been admitted as a barrister or solicitor for at least five years.\textsuperscript{374} The appointment was for a fixed term of not more than three years, but assessors could be re-appointed.\textsuperscript{375} Assessors generally remained in practice and did assessments on a part time basis. While acting as assessors they were not officers of the court, rather it appears that they were contractors engaged by the manager of the costs assessment scheme.\textsuperscript{376} Assessors could be dismissed for a range of obvious reasons, such as being convicted of a criminal offence or losing mental capacity, and they could resign from the position.\textsuperscript{377} Assessors were to be paid at an hourly rate that Bar Council and the Law Society were to establish.\textsuperscript{378}

The 1994 Reforms were commendably thorough and any new regime, no matter how much attention to detail its creators have given it, is bound to have teething problems. New laws come into operation, operational difficulties arise, and the laws are amended to deal with those difficulties. By the time the Reforms came into operation on July 1 1994 a Manager Costs Assessment had been appointed, costs assessors had been retained, largely from the ranks of senior practitioners, and a registry with a small administrative staff had been created within the Supreme Court of New South Wales. It was only once the new form of assessment commenced that problems inherent in the Reforms became visible.

\textbf{3.5: Amendments; teething problems with the 1994 Reforms}

The implementation of any legislation that institutes large scale reform is likely to be problematic. Despite the best efforts of the drafters who codified the Reforms, minor issues will have been forgotten or miscalculated. Some of the consequences that flow from the Reforms will be unforeseen and may well be problematic. The Parliament of New South Wales was well aware that this would be the case, and had included a mandatory review

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{373} \textit{Legal Profession Act 1987} (NSW) s 208S, as inserted by \textit{Legal Profession Reform Act 1993} (NSW) sch 3(1).
\item \textsuperscript{374} Ibid sch 7 s 1, as inserted by \textit{Legal Profession Reform Act 1993} (NSW) sch 3(4).
\item \textsuperscript{375} Ibid sch 7 s 2.
\item \textsuperscript{376} Ibid s 208S, as inserted by \textit{Legal Profession Reform Act 1993} (NSW) sch 3(1). The Reforms did not define the employment relationship between the Manager, Cost Assessment and the individual assessors.
\item \textsuperscript{377} Ibid s 208U.
\item \textsuperscript{378} Ibid sch 7 s 3, as inserted by \textit{Legal Profession Reform Act 1993} (NSW) sch 3(4). The rate was set at $192.50 an hour and remains the same to this point in 2013.
\end{itemize}
\end{footnotesize}
clause in the 1994 Reforms. The Attorney General’s Department was to undertake the review ‘as soon as possible after the period of four years from the date of assent’ and was to ascertain ‘whether the policy objectives of the Act remain[ed] valid whether the Act remains appropriate for securing those objectives’.

The first amendments to the reformed Act occurred even before the mandated review and were contained in Schedule 2 of the Legal Profession Amendment Bill 1996, (the 1996 Bill) which went on to become the Legal Profession Amendment Act 1996 No 95 (the 1996 Amendments). The 1996 Bill was introduced and read for the second time on 1 May 1996. The Honourable Paul Whelan, then Minister for Police, gave the second reading speech, where he noted that while ‘on the whole the Reforms seem to have worked well, practical experience of the administration of the new legislative provisions has thrown up some areas in which further refinement or clarification is required.’

The bulk of the 1996 Amendments dealt with matters outside the scope of this thesis, but in relation to costs and costs assessment the 1996 Amendments sought to remove some ambiguities in the original Reforms and to expand some of the costs assessor’s powers.

The 1996 Amendments also clarified and broadened the areas where scales of costs were still to be applied; they confirmed that the costs legal services retained in relation to probate work were still subject to regulation, and provided for fixed costs for various procedural works. They also rationalised attempts to ensure that disputes amenable to mediation did not come before the assessors by requiring applicants to include a statement in their applications attesting to the fact that there was little likelihood of a mediated settlement to the dispute.

The Manager, Cost Assessment was also given the power to recall an application from an

---

379 Ibid sch 8 1B, as inserted by Legal Profession Reform Act 1993 (NSW) sch 4(12).
380 Ibid sch 8 1B (2).
381 Ibid sch 8 1B (1).
382 New South Wales, Parliamentary Debates, Legislative Assembly, 1 May 1996, 6440 (Paul Whelan).
383 Legal Profession Act 1987 (NSW) s 196, as amended by Legal Profession Amendment Act 1996 (NSW) sch 2 [2].
384 Ibid s 203(3), as inserted by Legal Profession Amendment Act 1996 (NSW) sch 2 [3]. In their original form the 1994 Reforms gave the Manager, Costs Assessment the responsibility for deciding on the whether an application should go to mediation rather than assessment. That section was repealed as part of the 1996 amendments and the responsibility for determining the likelihood of a mediated outcome was instead given to the applicant. The Manager, Costs Assessment had never been in a good position to determine the likely success of mediation, while an applicant arguably was.
assessor on his or her own motion; previously an assessor could return an application but the Manager, Cost Assessment did not have the power to recall applications.

Cost assessors were given expanded powers to seek relevant documents, so that they could demand documents from people who were not parties to the assessment and they could produce those documents to the parties so that they would have an opportunity to comment on them. If a practitioner failed to comply with such a notice the costs assessor could report that failure, or the failure to comply with any other duty arising from Part 11 of the 1987 Act to the Legal Services Commissioner. The costs assessors were also given protection from liability for any act done in good faith for the purposes of carrying out their duties under the 1987 Act.

The 1996 Amendments also made provision for costs assessors to include the costs of a party to an application in their determinations. As noted above, under the original Reforms assessors could only make provision for the costs of the assessment and not for the costs a party incurred in preparing for and dealing with the assessment process. This brought the assessment process more closely into line with the pre amendment procedures where costs assessors were able to award parties their own costs in a cost dispute. Those costs could be substantial and allowing the successful applicant (or respondent if the costs assessment process did not result in the applicant receiving a substantial discount on the original and disputed quantum of costs) was conceptually in line with the general thrust of allowing a winning litigant to recover a higher percentage of his or her costs.

Finally, at least in terms of costs assessment, the 1996 Amendments expanded the remedies available to a court that heard an appeal on the merits of a costs assessment to bring them into line with the remedies that were available to the Supreme Court hearing an appeal based in an alleged error of law. The 1996 Amendments did not address the more fundamental

385 Ibid s 206(2), as inserted by Legal Profession Amendment Act 1996 (NSW) sch 2 [5].
386 Ibid s 207, as inserted by Legal Profession Amendment Act 1996 (NSW) sch 2 [6].
387 Ibid s 208Q (2A), as inserted by Legal Profession Amendment Act 1996 (NSW) sch 2 [19].
388 Ibid s 208SA, as inserted by Legal Profession Amendment Act 1996 (NSW) sch 2 [20].
389 Ibid s 208F (4), as amended by Legal Profession Amendment Act 1996 (NSW) sch 2 [9]. Mechanisms for recovering those costs were created by Legal Profession Amendment Act 1996 (NSW) sch 2 [15].
390 Ibid s 208M(5), as inserted by Legal Profession Amendment Act 1996 (NSW) sch 2 [16].
problem with appeals; that because assessors did not give reasons it was difficult for a dissatisfied party to find the substance with which to bring an appeal.

From a consumer’s point of view it would appear that the main outcome from the 1996 Amendments was that they allowed assessors to use their discretion to award a party to the process the reasonable costs of the entire exercise, rather than just the filing fee and the costs of the assessors’ services. The rest of the amendments were, not dealt with specifically in this thesis, were sensible fine tuning of the new costs assessment regime.

3.6: A pause for reflection

By 1997, the 1994 Reforms, as amended in 1996, had been in effect for long enough for the legal profession to have come to terms with the profound change to the costs assessment regime. Legal costs were still an issue, and on 4 June 1997 the Standing Committee on Law & Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) (the 1997 MVA proceedings) was released. As will be discussed more generally below, a view had arisen that there was a crisis in terms of tortious liability and skyrocketing insurance premiums. One view of this ‘crisis’ was that it was driven by avaricious lawyers. The MVA proceedings looked into the way legal costs were being charged in relation to the regulated proceedings under the Motor Accidents Scheme and the New South Wales compulsory third party insurance regime.\(^{391}\) The Committee charged with carrying out those investigations was to ‘obtain such expert advice as may be necessary to assist the Committee with its inquiry’\(^{392}\) and in doing so it sought the views of some of the people who had the most exposure to the 1994 Reforms. The various people who addressed the Committee included Mr John Hannaford, the liberal politician who had been one of the drivers of the 1994 Reforms, as well as the head of the Australian Competition and Consumer Commission, the Legal Services Commissioner, the President of the Law Society, and Ms Susan Pattison, a prominent\(^{393}\) cost consultant.\(^{394}\)


\(^{392}\) Ibid, Terms of Reference (2).

\(^{393}\) Ms. Pattison has published widely on the costs assessment process in New South Wales and on costs in general.
The 1997 MVA proceedings were specific to a particular area of litigation. Notwithstanding that they are a good source of informed comment on the 1994 Reforms and the impact they had on the costs and provision of legal services in a general sense. The observations of the various participants provide a good starting point for discussion of two of the issues raised in the commentary on the debates surrounding the 1994 Reforms as provided above, namely the abolition of scales of costs and the introduction of contingency fees. For that reason the views of the various participants, and commentary on those views, are provided in some detail below.

3.6.1: Discussion on the removal of scales of costs

As noted at 3.3.1 above, scales of costs had originally been set by the New South Wales courts. That longstanding practice changed when the 1987 Act created the Legal Fees and Costs Board. The reason for that change, explained more fully at 3.3.1 above, was to ensure broad input into the creation of scales of costs. In short, it was to ensure that the sums allowed for costs via the scales were reasonable sums; reasonable in that they had been created after informed investigation into the costs of providing the legal services.

One of the reasons that scales were considered problematic was that ‘[t]he scale has in effect become the base rate, not an average or common fee.’ To put this in context, it is important to understand that scale rates were set as maxima. The amount set for any given item in the scale was the most (absent a special costs order) that a winning litigant could recover for that item. However, practitioners had long been able to contract out of the scale rates in their dealings with their own clients, and they usually did so, except in some discrete areas of practice where scale fees could not be displaced. This meant that although the scale rate was generally more than the client would recover on a party/party assessment it was often less than what he or she had been charged for the legal services.

394 Standing Committee on Law and Justice, above n 391, Table of Contents (i).
395 New South Wales, Parliamentary Debates, Legislative Assembly, 9 November 1993, 4982 (John Fahey, Premier).
396 For instance worker’s compensation matters are subject to statutory costs limits in both New South Wales and Western Australia. In New South Wales scales of costs also still govern probate work and worker’s compensation matters.
This is the heart of one of the key issues that drove the Reforms; a practitioner’s client was usually contracted to pay more, and sometimes far more, for legal fees than the scales of costs deemed ‘reasonable’ and therefore recoverable. Practitioners charged more than the scale rates; the scale rates were maxima so the clients generally recovered less than the scale rates on party/party assessments. As Mr Hannaford, explaining the Reforms to the MVA proceedings, noted that the situation before the Reforms was that you could: ‘[e]xpect, if you win, to get about 40% of those costs back.’\textsuperscript{397}

It is true that scales acted as a default ‘base rate’. This was because there were areas of practice where they provided the set fees a practitioner could charge, and because it provided the default in situations where there was no costs agreement or the costs agreement was invalid. Practitioners were free to charge at less than scale if they wished to. Where a practitioner could contract out of the default scale via a valid costs agreement he or she could do so as long as the terms of the costs agreement was not ‘unreasonable’.\textsuperscript{398} A costs agreement that allows for rates above, even well above, scale is not for that reason alone unreasonable. This creates a large gap between scale costs (set as reasonable after informed investigation by a specialist body) and costs that are unreasonable (where a practitioner is deemed to be overcharging). Where possible, many practitioners, from reasons of financial self-interest, prefer to operate towards the upper end of that gap and to charge more than scale but less than would be deemed unreasonable.\textsuperscript{399}

An argument that removing the scales in order to do away with an artificial floor will result in lower costs for legal services stems from the view that competition in the legal market place will encourage some suppliers to drop their prices to as low as is economically possible to increase market share. This in turn should encourage further competition and increased efficiency, with an overall effect of lowering the costs of legal services. However, as Mr

\textsuperscript{397} Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, (John Hannaford) 60.

\textsuperscript{398} This remains the case. Scale rates were a baseline of what was reasonable in terms of monies charged and time spent, but reasonableness is an elastic concept, and a costs assessor in New South Wales has a wide range of factors to take into account in determining if a costs agreement is reasonable: Legal Profession Act 2004 (NSW) s 328.

\textsuperscript{399} This does not necessarily mean that practitioners are overcharging. A practitioner in a small country town will pay a very different rate of rent to a practitioner with offices in the centre of a city, and hourly rates have to reflect that. What is reasonable in one place is not necessarily reasonable in another.
Steve Rix, of the New South Wales Public Interest Advocacy Centre, addressing the MVA Proceedings noted; ‘from an economics perspective, if the legal services market does not exhibit the features of a perfect market, and that there are frictions in that market, attempts to reduce those frictions by fixing one problem may in fact create greater problems’. 400

It is certainly arguable that the legal services market does not ‘exhibit the features of a perfect market’. Mr Rix argued that the Reforms may have been predicated on the erroneous view as to the nature of the legal market, and that they ignored the fact that the market is firstly a monopoly, and thus not a market, and secondly that the required information available to allow consumer to make an informed choice in a market was not available. 401

Putting aside the question of whether or not the legal market is a monopoly, it is clear that one of the features of a perfect market is that the consumer has access to information. Consumers of legal services do not have access to good comparative information on legal costs. If they approach a practitioner with legal work they should be given very thorough information on what they will be charged, 402 but that does not help them determine what other people would charge. As Mr Steve Mark, New South Wales Legal Services Commissioner, addressing the MVA Proceedings commented:

One of the things I can say is that if consumers do not have access to price information, deregulation cannot work. You cannot drive down prices through increased competition when the consumers don’t know what the price is, what market rate is, so that they could negotiate or put the quote into context, when they do get a quote. 403

400 Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, 73 (Steve Rix).
401 Ibid 72-75.
402 Practitioners in both New South Wales and Western Australia have mandatory and high levels of costs disclosure (see Legal Profession Act 2004 (NSW) Part 3.2, Division 3, Legal Profession Act 2008 (WA) Part 10, Division 3).
403 Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, 28 (Steve Mark).
One of the things scales of costs provided was an overarching and readily available guide to reasonable costs rates. As Mr Mark also commented (in relation to country rather than city practitioners);

I hear many practitioners decrying the removal of scale. They often say, ‘Look, you have removed scale, and now it is terrible.’ It is only the big firms that demanded that you remove the scale because they all wanted to charge above scale. In the country we like scale simply because it gives us something to refer to or to relate to. We can show the scale to our clients and say, “Look, I have to charge you that much.”

Abolishing the scale of costs, which provided a guide to what was a reasonable fee, at the same time as instituting a costs assessment regime where practicing lawyers did the assessments raises the ‘qui custodiet ipsos custodes’ question; who will guard the guardians? Costs on party/party assessment had been measured against some objective guide as to what was reasonable, the scales. Under the new system individual lawyers, who often specialise in the area of practice the bills they assess relate to, had no guidance as to what was reasonable other than their own experience. It may well be that if scales had generally been a floor, individual practitioners assessing other practitioner’s bills against them may have felt that it was reasonable to recover a higher percentage of the bill, but that seems a very subjective way to make a determination that is based in objectivity. This creates a situation where assessments are returned at a recovery rate that lawyers who specialise in a certain field consider reasonable. At the very least this creates a perception of self interest. If instead the assessors worked to a benchmark (particularly a benchmark that has been arrived at by a cross segment of society including lawyers and economists) all assessors would then be working to the same objective and more transparent concept of what constituted reasonable costs.

404 Ibid. Two things contained in this view bear special comment. Firstly the belief that large firms wanted rid of scales so that they could charge above them does not make sense; they had usually done so in any event. It may be more accurate to say that they wanted rid of them so that they could not be asked why they were charging above them. Secondly, the country practitioner was arguing that the scales provide a useful floor when he or she says ‘I have to charge you that much’. The practitioner may have chosen to charge that much, but was always free to charge less. That said, he or she was always able to charge more if the market would bear it.
Ms Susan Pattison, addressing the Seminar, noted that ‘without reasons, precedents or guidelines, it is very difficult to know what an individual assessor will do.’\footnote{Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, 69 (Susan Pattison). Ms Pattison was not then arguing that scales were the answer to that problem, rather she was concerned that the Reform Act, as passed, did not allow assessors to give reasons for their determinations and she felt that the lack of reasons meant the system lacked transparency. As will be seen below, this issue was addressed by the Legal Profession Amendment (Cost Assessment) Act 1998 (NSW) which made assessors responsible for providing reasons for their determinations.}\footnote{Ibid 65.} Ms Pattison also stated that;

I believe that far more information needs to be given than is provided under the regulations. In particular, I think if claims are made for costs on an hourly basis, there should be some indication as to what rates were found to be acceptable by that Assessors for solicitors and counsel; and, in relation to daily fees charged by counsel, similarly there should be an indication of what kind of rates and ranges were found to be reasonable.\footnote{Ibid 66.}

Ms Pattison was not arguing for the return of scales of costs, rather she was concerned that there should be more objective guidance as to what assessors were likely to consider reasonable. She was arguing that assessors should provide reasons for their determinations; under the Reform Act they were not required to do so. However, she did not reject scales of costs outright. In relation to a limited return to scales she noted that;

However, any attempt to set up scales or bands has to be free of the previous criticisms about scales, which often were literally ‘set and forget’; i.e. sometimes the scale was set, it was not reviewed regularly, and it very quickly fell into disarray, it was not relevant to the profession and how it was charging, and so of course the profession where possible, solicitor/client contracted out of it. Any thought of going back to scales can only go hand in hand with some kind of consistent procedure as to how those scales would be set and how they would be reviewed on a regular basis.\footnote{Ibid 66.}
Dr. John Tamblyn, of the Australian Competition and Consumer Commission addressed the MVA Proceedings in relation to strengthening competition, and he too had concerns about the lack of benchmarks for costs assessment as follows:

There is also a suggestion that fee assessment and taxation arrangements that operate are being based on the escalating fees that are being seen in the market place. In other words, what benchmarks are being used for fee assessment and taxation? If there is an escalation of these fees- and I realise that is an empirical point- are they simply being rolled through in the assessment and taxation procedures?\(^{408}\)

Dr. Tamblyn also felt that competition in a marketplace required access to knowledge about the costs of the service on offer;

I have already mentioned the need for objective data on the costs of providing services; the fees that are required to cover those costs; and, to make that data and those analyses public, the profession needs to know, the clients need to know and the insurers need to know, and I am pretty sure the policy makers would like to know as well. So we need information.

I believe that taxation officers (costs assessors) should be basing their analyses on this objective data. At the moment, I am concerned that we do have objective benchmarks that assessors and taxation officers can use, The analysis to which I and others have referred is critical to making that work.\(^{409}\)

Dr. Tamblyn did not address how that objective information as to benchmark costs was to be promulgated, but he felt that without that information the goal of deregulation, or at least lighter regulation, was endangered. He explained that for public policy reasons, ‘if the market is not working, we have to make a choice between what I call light handed regulation and heavy handed regulation’.\(^{410}\) He was clear that the benchmark information should be used by assessors, and that the public should have access to it. He felt that without it that there would

\(^{408}\) Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, (Dr John Tamblyn ) 9.
\(^{409}\) Ibid 9, 10.
\(^{410}\) Ibid 9.
be a need to ‘return to a compulsory fee scale’ and the thought that would be undesirable.\textsuperscript{411} On the surface this seems an odd stance, as the whole point to scales of costs is to provide the very benchmark he was seeking against which to measure costs at assessment. It may be that Dr. Tamblyn, who described himself as an ‘advocate of competition and deregulation’, considered that a ‘compulsory’ scale of costs was a constraint on the market. This is not necessarily so, as scales of costs are applied as a guide and a limit on the use of a discretion. The amounts provided by scales of costs are not set in stone. A court can order that the scales be lifted if appropriate and assessors frequently allowed less and even much less than the scales provide. There are areas of legal works where costs are fixed\textsuperscript{412} and the scales thus compulsory, and the costs in those areas are fixed for public policy reasons. They are instances where the Parliament has considered that for a variety of reasons it was and still is better policy to have very heavy regulation. These limited areas were and, despite the 1994 Reforms, still are the only areas where there is a compulsory scale of costs, so it is hard to understand Dr. Tamblyn’s concerns about returning to compulsory scale.

As will be seen below, the issue of reintroducing scales of costs was raised again when the 1994 Reforms were reviewed in 1997-1998, and again by the draft report of the Chief Justice’s Review of the Costs Assessment Scheme in 2013. Scales of costs, benchmarks, and guidelines continue to be an area of contention and confusion.

3.6.2: Problems with contingency costs agreements with uplift fees

As was noted above, the 1987 Act, as reformed, was silent on recovery of the uplift fee on party/party assessment. Nonetheless, and despite some initial confusion,\textsuperscript{413} it became clear

\textsuperscript{411}Ibid, 11.
\textsuperscript{412}Mr David Bowen, Assistant Director, Legislation and Policy, New South Wales Attorney General’s Department, addressing the MVA Proceedings, noted that ‘even at the time of the 1993 Act, [there was] acceptance by government that scale rates were necessary in some areas, and scale rates were in fact retained on workers comp, conveyancing, costs of default judgments and enforcing judgments’: Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, 49 (David Bowen). Although Mr Bowen uses the term ‘scale rates’, some of these areas of legal works would be better described as having fixed costs as a practitioner cannot contract out charging the scale rates (for example probate matters) while others (such as motor vehicle accidents matters) allow a practitioner to contract out but govern what a winning party can recover.
\textsuperscript{413}Compare Cachia v St George Bank Ltd (Unreported, Supreme Court of New South Wales, Malpass M, 26 October 1995) where an appeal was dismissed on the grounds that an assessor had no duty to give reasons with Attorney-General & Anor v Kennedy Miller Television Pty Ltd & Anor (1998) 43 NSWLR 729 where there was a finding that assessors had to give reasons sufficient to ground an appeal.
that uplift fees were not intended to be recoverable on costs assessment. The National Competition Policy Review of the *Legal Profession Act 1987* (NSW), released in November 1998 (and discussed in more detail at 3.9 below), four years after the Reforms had been put into effect, reported that:

> It is noted that in New South Wales that although the Act is silent on this point, a conditional uplift was only intended to form a part of solicitor/client costs. The uplift is therefore effectively deducted from any award or settlement received by clients.\(^414\)

Mr Hannaford, in addressing the MVA Proceedings explained that the uplift fee was only to be used in narrow circumstances, and that further he could not understand a claim that the fee was driving insurer’s legal costs up:

> In fact, one might well argue that you would have been acting fraudulently against your client in negotiating a 25 per cent uplift if there was no risk involved, because the 25 per cent is not an amount that has to be paid by the other party to litigation. The 25 per cent actually comes out of the client’s share of the take.

> Therefore, I have some difficulties in comprehending the argument that has come from the insurer that the contingency fee has in fact generated an increase in fees payable by the insurer. It should not, because the 25 per cent has come out of the client’s share of the take.\(^415\)

Mr Hannaford went on to explain how the uplift fee may well have resulted in more litigation, as its function was to allow increased access to justice, and he commendably discounted any complaint that insurer’s fees had been increased for that reason as he pointed out that ‘[i]f that means that people are able to gain access to their rights, then that is part of the structure of our legal system.’\(^416\)

---

\(^{414}\) Independent Committee of Inquiry, above n 279.

\(^{415}\) Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, (John Hannaford) 60.

\(^{416}\) Ibid.
While not everyone agreed that solicitors were abusing the right to charge an uplift fee, there was a clear perception that the fees were problematic. Ms Susan Pattison pointed out those conditional costs agreements with uplift fees ‘make it possible for persons who could not otherwise fund litigation to have access to the court system’ but she also noted that:

I am aware of instances where conditional agreements are entered into where one might say that the actual risk of losing, whether on liability or quantum, is quite small. There are also difficulties when such agreements are entered into very close to trial. One might feel that the real risk should be properly known by that stage.

Ms Pattison went on to question how uplift fees fit with the overall thrust of the Reforms as follows:

This really raises issues in relation to the policy concerns expressed prior Reforms, which were that deregulation was to lessen the gap between party/party costs and solicitor/client costs, i.e., it was to lessen the subsidisation by the successful parties of non-successful parties. In a situation where conditional agreements were used but were not allowed party/party, the issue is raised about what the really means in relation to access to justice and the ultimate money that ends up in the hand of the successful plaintiff.

She also had concerns that uplift fees could result in unfair results for clients:

However, with the conditional agreement and the provision for the 25% mark up, this can actually represent quite a substantial proportion of a successful party’s verdict if the verdict is relatively small and a lot of work has been done by the practitioners.

---

417 Mr Patrick Fair, then President of the New South Wales Law Society, addressing the same proceedings, claimed that ‘in our experience, this 25 per cent uplift is not imposed where it is not reasonable to do so’: Evidence to the Standing Committee on Law and Justice, Legislative Council, Sydney, 4 June 1997, 38 (Patrick Fair).
418 Evidence to the Standing Committee on Law and Justice, above n 397, 59.
419 Ibid.
420 Ibid.
421 Ibid 60.
Ms Pattison’s remarks can be summed up as ‘what were they thinking of if they ever believed that they could lower costs to winning litigants with a reform that allowed the winning litigant to be charged a non recoverable success fee because they won?’. It is apparent that the 1994 Reforms were not that well though in terms of their entire effect, and is an illustration of Roscoe Pound’s statement: ‘[the legislator] is prone to attempt far too much and to be careless how he carries out the details of what he attempts’. As will be seen below, conditional costs agreements that allowed an uplift fee for a successful conclusion to a legal retainer continued to be problematic and, at least for actions for damages, were abolished in 2004. Despite the salient warning provided by the New South Wales experience uplift fees were allowed for damages actions in Western Australia in 2008, and are included in the draft model *Legal Profession National Law 2011* (Cth).

### 3.7: An introduction to the first review of the 1994 Reforms: the National Competition Review

As noted above at 3.5, the Attorney General’s Department of New South Wales was required to review the 1994 Reforms after four years. Further, the Council of Australian Governments endorsed the Competition Principles Agreement in April 1995 and that agreement also included an obligation to review the 1994 Reforms To that end the Attorney General appointed a reference group (the Reference Group), made up from a wide range of stakeholders and chaired by the Director General of the Attorney General’s Department. The Reference Group put out a discussion paper in August 1998 explaining that the review was to ‘fulfil the obligations required by the Competition Principles Agreement.’ The perspective through which the review was to take place was in accordance with one of the key drivers of the reform, which was to ensure that the legal profession was to be subject to competitive market forces. The Reference Group’s terms of reference were broad, and much of what they were to review was not related to costs assessment and is thus outside the scope

---

422 Pound, above n 1.
423 *Legal Profession Act 2008* (WA) s 284.
424 *Legal Profession National Law 2011* (Cth) 4.3.1.3(draft version).
426 Ibid.
427 Ibid.
of this thesis; discussion is limited to those parts of the review that pertained to costs assessment.

The discussion paper noted that there was a general concern as to whether the 1994 Reforms had produced a more competitive legal market as intended.428 Further, it identified a problem with ‘the incidence of lawyers charging contingency fees for cases where success is almost assured’.429

The Reference Group was taxed with answering the broad set of questions relating to the reformed costs assessment scheme.430 In essence they were asked to determine if the Reforms had produced an effective means of reviewing legal fees and if they had could they be further improved. They were to determine if there should be some sort of benchmark fees so that assessors had some objective standard against which to perform their assessments.431 Tellingly, they were also asked to determine what role procedural reform could play in costs containment.432 This issue was central to the ideological theme that ran through the review, which was a ‘free market’ conceptualisation of the legal industry. Reform, by way of deregulation, was to have created competition and competition was to have driven the cost of legal services down. As has been illustrated above in the context of the MVA Proceedings, the fundamental basis for this expectation, that the legal industry is a ‘market’ in the classic sense, may well be false.433

428 Ibid.
429 Ibid.
430 Ibid.
431 Ibid.
432 Ibid.
433 This thesis has consistently taken the view that the reformers conceptualisation of the way in which scales of costs regulated the legal industry, as stifling competition, was erroneous. Further, as Dr John Tamblyn, head of the Australian Completion and Consumer Commission noted, there is considerable potential for what is called market failure in the legal services market. This is because the services are very complex and the information available to the practitioner is more detailed and specialised than that available to most clients’: evidence to the Standing Committee on Law and Justice, above n 400, 6. In essence he points out that the provision of legal service is not a true market in the ideological sense as the participants do not have equal access to knowledge. He also noted that competition in regards to legal services seemed healthy for big business and insurers, but that for the public user deregulation had not been effective in increasing competition: at 8. It is arguable that competition had been healthy for big business and insurers before the Reforms. Further, it makes little sense to call for increased competition while decrying the fact that the client is kept bereft of information needed so that he or she can make valid choices, while at the same time keep very strict regulation on practitioner’s rights to advertise their services.
The Reference Group sought and received submissions from a wide range of stakeholders, including: ‘[the] Law Society, Bar Association, other organisations representing members of the legal profession, the Legal Services Commissioner, the judiciary, the Legal Profession Advisory Council, consumers, representatives of business and the insurance industry, and other interested parties’.  

The Reference group was aware that the legal market was problematic and that despite a general view that markets should be deregulated, legal practice had a range of characteristics that meant it might ‘be difficult to reconcile with deregulation’.  

However, despite setting up the review, the government of New South Wales had already made firm decisions as to what immediate reform should take place. For that reason the review was released after many of the issues it considered had already been dealt with. The Legal Profession Amendment (Cost Assessment Bill) 1998 was introduced into the Legislative Assembly on 26 May 1998, six months before the review was handed down, and the second reading speech for that Bill occurred on that same day. The findings of the National Competition Review of the Legal Profession Act 1987 are discussed at 3.9 below.

3.8: Legal Profession Amendment (Cost Assessment) Bill 1998

The Honourable Mr Debus, acting for the Attorney General, described the principal purpose of the Bill as being ‘to amend part 11 of the Legal Profession Act 1987 to: rationalise the financial administration of the costs assessment scheme; introduce a requirement that costs assessors provide limited reasons for their determinations; and provide a mechanism for a review of costs assessment determinations.’

3.8.1: Making costs assessment user-pays

The Minister explained that the then current funding model for the costs assessment scheme was unnecessarily complex and did not make adequate provision for the administrative costs.
of the scheme.\textsuperscript{438} Monies paid in by the parties to costs assessments went to a statutory interest account, but while monies to remunerate the individual assessors were drawn from that account, the Courts own costs of administering the system were not.\textsuperscript{439} The first of the Reforms was to ‘provide for the scheme to be funded on a cost-recovery basis and to provide for administrative costs associated with the scheme to be recouped.’\textsuperscript{440} The Parliament of New South Wales had decided that costs assessment should be on a user pay basis or at least that any subsidy provided to it should be kept to a minimum. As will be seen in the discussion at 3.13.3.3 below, despite that still being the current approach, it is an approach that may be abandoned.

3.8.2: Reasons for determinations and internal review mechanisms

Although the 1994 Reforms had not specifically required costs assessors to provide reasons for their decisions there was some ambiguity as to the existence of such a duty. The Bill sought to remove this uncertainty by clarifying ‘the responsibilities of costs assessors in this respect and to bring assessors into line with the government policy generally, whereby reasons should be provided for administrative decisions.’\textsuperscript{441} The Minister pointed to \textit{Kennedy Miller Television v Lancken and Anor}\textsuperscript{442} where there was a finding that assessors had a duty to provide reasons for their decisions if so asked. The minister commented that assessors were not following the decision but it had created ambiguity.\textsuperscript{443} The Attorney General of New South Wales appealed that finding, and the appeal, \textit{Attorney-General of New South Wales and Another v Kennedy Miller Television Pty Ltd}\textsuperscript{444} was handed down a month after the Minister’s second reading speech. It was there held that costs assessor did have an obligation to provide reasons as otherwise the right to appeal such a determination would be negated. It appears that in this instance, the Court pre empted the 1998 Reforms and confirmed that assessors did have a duty to provide reasons for decisions before that duty

\textsuperscript{438} Ibid.
\textsuperscript{439} Ibid.
\textsuperscript{440} Ibid.
\textsuperscript{441} Ibid 5194.
\textsuperscript{442} Unreported, Supreme Court of New South Wales, Sperling J, 1 August 1997.
\textsuperscript{443} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 26 May 1998, 5194 (Robert Debus).
\textsuperscript{444} (1998) 43 NSWLR 729.
was clearly expressed in the statute. One does wonder why the Attorney General appealed a decision recognising a duty before introducing Reforms that were to entrench that same duty.

Further, the Bill introduced a new level of review that was to sit between the original determination and a review in the Supreme Court. The new review mechanism allowed that:

Parties aggrieved by a costs assessment determination may, within 28 days of receiving the original certificate of determination, apply to the proper officer for a review of the determination. The review process, which is intended to be relatively informal in nature, will be carried out by two assessors of appropriate experience and expertise and be conducted along similar lines to that undertaken in the original assessment process. The review panel will be able to vary the original assessment and will also be required to provide a short statement of reasons for their decisions.

Allowing an intermediate form of review seems an effective and sensible way to keep disputes from escalating to a judicial process (and thus moving out of the user pay system) but a review was often not a cost effective way to challenge an assessor’s determination. An internal review mechanism is especially useful as challenging an assessor’s determination in a court of law is difficult as there are ‘very few decisions by assessors which could be classified as decisions of ‘law’ since almost all of the process of determining costs requires the application of discretion to set of facts’.

However, a review is not necessarily a cheaper option, one commentator has noted that at $385 an hour (in 2001) it did not take long for the cost of a review to mount up, making the risk of seeking review, where costs of the review would be awarded against the applicant if he or she did not have the bill reduced by 15% or more, quite substantial.

---

446 Ibid 5193.
447 Vine Hall, above n 336, 9.
3.8.3: Limiting costs for MVA claims

The other main thrust of the amendments was to limit the costs that could be charged for legal works pertaining to personal injury arising from motor vehicle accidents.\textsuperscript{449} This issue, while outside the scope of this thesis, was very much in the political forefront of the Reforms. As noted above, the MVA Proceedings of the previous year had looked into the issue in depth, and it was this issue that attracted the bulk of debate in both houses during the passage of the Bill. Despite that general rhetoric about access to justice it is hard not to suspect that lobbying from the insurance industry was the real impetus of some of the Reforms. As will be seen in the discussion of the \textit{Civil Liability Act 2004} (NSW) at 3.10 below, costs reform can as easily be used to restrict access to justice as it can to ameliorate it.

3.8.4: The 1998 amendments; a bipartisan agreement as to further reform

Debate as to the costs assessment Reforms was minimal. During the second reading speech in the Legislative Council, the Honourable J. P. Hannaford, then the Leader of the Opposition (and, as we have seen, one of the key drivers of the original 1994 Reforms) did not go so far as to argue that assessors should not be obliged to give reasons, though he did suggest that the burden put upon them should not be too onerous.\textsuperscript{450} He felt that ‘if costs assessors have to provide detailed reasons for their decisions, the system will revert to the bad old days and will become bogged down’.\textsuperscript{451}

Mr Hannaford was also critical of law firms that were abusing uplift fees, and while conditional fee arrangements were not a target of this particular set of Reforms, his remarks show that uplift fees remained a live and vexed issue. Mr Hannaford was broadly in favour of uplift fees, but acknowledged that some practitioners were abusing the right to charge them:

\begin{quote}
If solicitors enter into agreements where liability is not an issue, there is no risk. The party will get compensation and there can be no justification for a fee increase. To enter into a conditional agreement when liability is not at issue is a fraudulent representation as to risk and the solicitor is basically defrauding his client.\end{quote}

\textsuperscript{449} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 26 May 1998, 5194 (Robert Debus).
\textsuperscript{451} Ibid.
no win, no fee agreements have been entered into when liability is admitted, but there has still been an increase in fees. In those circumstances that is clear fraud. A fee uplift is being extracted when all elements of risk have been eliminated. I welcome this issue being dealt with by way of regulation. It is incumbent on the Law Society to indicate that it is prepared to pursue fraud allegations against solicitors who extract moneys from their clients in those circumstances.\textsuperscript{452}

The Bill received assent on 8 September 1998 with no significant amendments to the sections which reformed the costs assessment scheme. The most significant Reforms that the Legal Profession Amendment (Costs Assessment) 1998 Act made to the costs assessment regime were ensuring that assessors provided reasons for decision and creating a timely and efficient route for a disgruntled party to appeal an assessors determination.\textsuperscript{453}


The final report from the National Competition Policy Review of the 1987 Act (the Final Report) which satisfied the obligation to review contained in the 1994 Reforms was released in November 1998. In terms of the costs assessment scheme, the report was somewhat redundant. By the time the final report was available the costs assessment scheme, itself a reform, had already been itself reformed a number of times, and in particular the 1998 Reforms contained clear answers to some of the questions that had been put to the Reference Party that produced the Final Report. The Final Report acknowledged that the Reforms had, in the main, dealt with the concerns and issues that had been raised in submissions.\textsuperscript{454} The Final Report noted that ‘deregulation’ (by which it meant the initial 1993 Reforms as amended in 1996) had been a success.\textsuperscript{455} It qualified that statement by noting that there was ‘currently insufficient evidence to conclude that costs disclosure has led to the development

\textsuperscript{453} According to the 2010/2011 Annual Report of the Supreme Court of New South Wales, in 2010 10% (187 of 1862) and in 2011 12% (218 of 1695) of assessments went on to review. Report at: \url{http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/e154dd079de60d044a2565fa0012aa89/43f1c1693f91a839ea257b6c00d8ad3/$FILE/2010.11\_Annual\_Review.pdf}.
\textsuperscript{454} Independent Committee of Inquiry, above n 287.
\textsuperscript{455} Ibid.
of a more competitive market for legal services. The Reference Party provided general discussion of various issues relating to costs agreement in Chapter One of the final report, and it provided 12 key questions and answers to those questions as part of that chapter. Two of those questions raised the recurring issues surrounding the abolition of scales of costs and contingency contracts with uplift fees. The National Competition Policy Review Report analysis of these issues is canvassed below.

3.9.1: The National Competition Review Report: Scales of costs, benchmark fees and some confusion
As has been noted, scales of costs had been abolished, largely as they were seen as anti-competitive. One of the questions the Final Report addressed related to the standards costs assessors used to come to their determinations and specifically asked if assessors should have access to benchmark fees. The Final Report provided an answer as follows:

Although there is little information available as to the standard applied by costs assessors, few complaints have been made. However, assessors should have access to benchmark fees, which should be made publicly available. In addition, assessors should publish guidelines for fees to be charged in consumer matters, such as straightforward appearances, probate, and conveyancing. Consideration should be given to publishing guideline fees for other matters, for example, in the form of a lump sum fee for particular categories of litigation.

This answer should be read in conjunction with commentary relating to poor costs disclosure, where the Final Report noted that:

One possible strategy to encourage competitive practices amongst both lawyers and consumers within the existing costs framework is the publication of comparative fee information. However, there may be a danger of such fee information operating as a quasi-fee scale, creating an anti-competitive effect.

---

456 Ibid.
457 Ibid.
458 Ibid.
459 Ibid.
These findings are expressed generally, but viewed from the specifics of costs assessment, they are contradictory. In essence, the Final Report is claiming that removing scales of costs was successful\textsuperscript{460} when in fact an informed consumer is the key to competition in pricing. The Final Report claimed that removing the scales had helped to improve competition although there was no evidence of increased competition. Despite finding that removing scales was good, the Final Report now suggested that some sort of costs guidelines (being guideline or benchmark fees) would now be beneficial. It also claimed that providing the public with comparative fee information would undermine the Reforms. The confusion in the Final Report’s views seems to stem from a basic misunderstanding of what scales of costs did and did not do.

As has been previously noted, before the 1993 amendments cost recovery for winning litigants had been regulated by scales of costs. Those scales had been regularly updated to ensure that they were a fair representation of what it was reasonable to pay for the legal works covered by the scales. The costs actually charged by the solicitor to the client had not been regulated in any true sense as solicitors contracted out of the scale rates by way of costs agreements. In terms of what a client paid his or her own lawyer, the scales of costs had only ever acted as benchmarks or guidelines, but, more to the point, they had not for years acted as minimum rates. Any legal practitioner who wished to charge less than scale rates was at liberty to do so.

A re-introduction of benchmark fees could only serve to guide assessors in relation to what a winning litigant should recover on a party/party basis. They could not regulate what lawyers acting pursuant to a costs agreement actually charged and recovered from their own clients (unless of course the lawyer defaulted on proper costs disclosure) as to do so would be to go against the spirit of competition and the express provisions of the Act which dealt with costs agreements. It is arguable that despite the stated goals of the original Reforms, and despite the otherwise generally valid claim that the Reforms had been successful, fees between lawyers and their own clients had not been deregulated simply because they had never really

\textsuperscript{460} But see 3.6.1 above.
been substantially regulated in the first place.\textsuperscript{461} Fees recovered on a party/party basis had been regulated, but were now no longer regulated by scales of costs based on what it was reasonable to charge for legal works (rather than what was actually charged). Instead, those fees were now regulated by an individual assessor’s subjective view of what constituted reasonable fees. The Final Report’s finding that assessors would benefit from guidelines as to what was reasonable seems to fly in the face of any attempt to ensure that successful litigants were able to recover what they had actually spent on litigation if those benchmark fees only related to party/party assessments and to situations where the solicitor was in default.\textsuperscript{462} In essence, such an approach would provide heavy regulation on the amounts that a winning litigant could recover and very light regulation on what practitioners could charge. This may, or may not, be an acceptable approach, but if it is the approach that was to be adopted then it should be properly understood in all of its ramifications. As will be seen later in this chapter, the current recommendations (2013) for reform of the costs assessment regime also include benchmarks as to costs. Now, as was the case with the Final Report, there is a distinct lack of clarity as to the real effect of such a reform.

As has been noted, the fact that winning litigants, absent an indemnity costs order, had never recovered the true quantum of costs that they had spent on their litigation was one of the main drivers of the original Reforms. However, the Reforms had also (and incidentally) introduced conditional fees, normally fees that winning litigants were often required to pay their own lawyers but could never recover on a party/party basis. Ironically, this put the winning litigant back in the position he or she had been in before the Reforms; considerably out of pocket on legal fees despite being successful in the substantive matter. As is discussed above in the context of the MVA Proceedings, there was a growing view that conditional fees were problematic. The Review had been asked to answer the following question: ‘[s]hould

\textsuperscript{461} Solicitor/client fees were regulated as a sanction once a practitioner was guilty of some default, such as failing to provide proper disclosure, or overcharging (and then only if the practitioner was found out), but fees that were ‘reasonable’ in all the circumstances were not regulated.

\textsuperscript{462} Ibid.
any restrictions be placed on the use of conditional fees involving an uplift?" The review did not answer the question, noting instead that

In view of concerns expressed about conditional fees, further submissions will be sought by the Department, as to: Whether there should be conditional fees at all; and, If conditional fees are to be retained, whether the Act should be amended to require solicitors and barristers to provide clients with advice about the prospects of success before signing an agreement; and to provide that an uplift cannot be levied on any costs incurred after liability has been admitted.

As will be seen below, these questions were answered in 2005 and the experiment with uplift fees for actions involving damages was called to a halt.

3.10: Further amendments: The Civil Liability Act 2002

After passage of the 1998 Amendment Act and until 2005 there were 31 further Acts that either amended or otherwise altered the 1987 Act. There were a total of 65 alterations to provisions relating to costs assessment. For the most part those alterations provided sensible clarification or were necessary to bring the provisions into line with other legislation, but individually they were not of enough impact to warrant any detailed discussion. The impact of the Civil Liability Act 2002 (NSW) (the CL Act) however does deserve some in depth investigation, as it made some profound changes to the way some legal costs could be charged.

The Ipp Report, dealing with tort law reform, was handed down on September 22, 2002. At that time Australia saw itself as gripped in an insurance crisis, with beleaguered insurers at the mercy of avaricious lawyers who were flooding the courts with spurious claims based in an exploded duty of care. Many of the Australian jurisdictions introduced draconian

---

463 Independent Committee of Inquiry, above n 286.
464 Ibid 12.5.
465 The full report is available at http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf. Note in particular the second term of reference (at Terms of Reference: ix) given to the Ipp Panel; the Panel was to ‘Develop and evaluate principled options to limit liability and quantum of awards for damages’.
limits to recovery for personal injuries, with New South Wales jumping the gun and acting before Ipp’s report was handed down. The New South Wales Parliament’s response to the ‘crisis’ was the Civil Liability Bill 2002 which received assent on June 18 2002. So concerned were the New South Wales Parliament that the CL Act was retrospective, coming into force on March 20 of that same year, three months before the date of assent. The CL Act contained provisions that amended the 1987 Act to address the state government’s view that insurance was in crisis and to ensure that unscrupulous practitioners would no longer have a free go at insurers.

The main effects of the CL Act amendments, insofar as it affected the legal costs regime, were the limits it put on costs and costs recovery and the burdens it placed upon legal practitioners in relation to the validity of claims

Firstly, the CL Act amendments capped costs for actions for various sorts of personal injury damages.\textsuperscript{467} If a personal injury claim resulted in an award of $100,000.00 or less, plaintiffs’ costs were restricted to 20% of the amount recovered or $10,000.00, whichever was greater, while defendants’ costs were restricted to 20% of the amount that had been sought, or $10,000.00 whichever was greater. There was however, so far as practitioners were concerned, an ‘out’.\textsuperscript{468} The limits on costs did not apply to retainers governed by a valid costs

\textsuperscript{467} The New South Wales Premier, Mr Bob Carr, giving the second reading speech for the Civil Liability Bill 2002 (NSW) noted that:

people tell stories that they put money down on the lawyer's table and got a return from a judge dressed in Santa Claus gear, the practice will spread. People will think, “Why not take your chances?” Lawyers advertise in the print media, “Come to us. If you lose, we won't charge you.” We have banned them from doing it in the print media and we have banned them from doing it in the electronic media. This is ambulance chasing to the nth degree. Local government cannot carry the cost of it; society cannot carry the cost of it; surf clubs, show societies and sporting organisations cannot carry the cost of it. It is a national problem.


With respect to the Premier, as he then was, and without considering his remarkable views on the sartorial habits of judges, he appears to be blaming the crisis on a flood of meritless claims run by lawyers who therefore do not get paid.

\textsuperscript{468} Damages in relation to matters under the Motor Accidents Act 1988 (NSW), Motor Accidents Compensation Act 1999 (NSW), Workplace Injury Management and Workers Compensation Act 1998 (NSW), Dust Diseases Tribunal Act 1989 (NSW) or Part 2 of the Victims Support and Rehabilitation Act 1996 (NSW) were not affected: \textit{Legal Profession Act 1987 (NSW)} s 198C(2), as inserted by \textit{Civil Liability Act 2002 (NSW)} sch 2 [2]. As did a party who had the benefit of an indemnity order sourced from a refusal to accept a reasonable compromise; the limitations did not apply in such cases: \textit{Legal Profession Act 1987 (NSW)} s 195F, as inserted by \textit{Civil Liability Act 2002 (NSW)} sch 2 [2]. See also \textit{Herbert v Tamworth City Council (No. 4) [2002]} NSWSC 394.
agreement. If however the costs agreement fell away the practitioners were also restricted to the above limits. This thesis is not concerned with the political and economic strictures that drove such a reform, but it should be noted that such a provision could, in many cases, leave an injured person who had successfully validated a legal right to recovery with very little to show for the effort. A small claim, in monetary terms, is not necessarily a simple claim, and it is easy to imagine successful litigation where nearly all of the damages awarded are swallowed up by the legal costs of litigating the matter, especially if those costs were subject to a conditional retainer and an uplift fee. The defendant, who the courts have found to be liable, will have to pay the damages, but the defendant will only pay a maximum of $10,000.00 towards the successful plaintiff’s costs. This is incongruent with one of the key drivers of the 1994 Reforms; that successful litigants should recover the reasonable costs of having had their rights upheld. The position seems to be people who suffer fairly serious

469 Legal Profession Act 1987 (NSW) s 198E, as inserted by Civil Liability Act 2002 (NSW) sch 2 [2]. The then Premier, Mr Bob Carr, rather fudged this in the second reading speech as follows:

The cap will not be a standard fee for lawyers to charge their clients. It is the maximum fee which applies unless there is a costs agreement. In many cases the Government expects lawyers to charge significantly less. Bills of costs will still be subject to the normal costs assessment rules in the Legal Profession Act. Lawyers will not be permitted to inflate their costs up to the cap. The cap on fees will promote efficiency on the part of the legal profession and help to contain claims costs.

New South Wales, Parliamentary Debates, Legislative Assembly, 28 May 2002, 2085 (Bob Carr, Premier.) Mr Carr failed to note that practitioners would very rarely act without a costs agreement and that for that reason the cap would be unlikely to apply to most solicitor/client relationships. He also failed to note that at that time a good many personal injury matters were subject to conditional fee arrangements and thus not only regulated by a costs agreement but also likely to attract a costs uplift.

470 For discussion of the various reasons that could render a costs agreement invalid see the annexure attached to this thesis.

471 The government of the day was also clear that if the legal profession did not exercise restraint more draconian limitations would follow:

Clause 196 contains a regulation-making power which will enable the Government to introduce a cap on those parts of lawyers’ fees which are not regulated by the bill. This is a consumer protection measure. The Government will not hesitate to make a regulation to impose a cap on the fees that can be agreed between lawyers and clients or to introduce a scale for those fees if plaintiff or defendant lawyers take advantage of their clients.

New South Wales, Parliamentary Debates, Legislative Assembly, 28 May 2002, 2085 (Bob Carr, Premier). It is worth noting that here the Premier is suggesting that scales of costs are a useful consumer protection device, despite the fact that the 1994 Reforms did away with scales of costs on the grounds that they were anti-competitive and bad for consumers.

472 The costs of any appeal that flows from a capped PI matter are also caught in the original cap. See Newcastle City Council v McShane (No.3) 65 NSWLR 155, 166 where Mason J, so finding, noted that ‘[t]he court is not at liberty to rewrite legislation. Our decisions may illustrate its harshness in particular circumstances… If this points to problems with the policy or implementation of the legislation then parliament is free to address them’.

473 See the comment by Ms Susan Pattison at 3.6 above.
injury through the fault of others have been told that they should perhaps just forget about that and get on with their lives unless the injury is at a fairly serious level.\textsuperscript{474}

The CL Act amendments were intended to ensure that a personal injury claims (or defences to such claims) that were without merit did not waste the court’s time.\textsuperscript{475} A barrister or solicitor that acted in circumstances where there was ‘no reasonable prospect of success” did not commit an offence, but those actions could be seen as either professional misconduct or unsatisfactory professional conduct.\textsuperscript{476} In such circumstances practitioner’s themselves were susceptible to having costs ordered against them in their personal capacities.\textsuperscript{477} If a claim or the defence to the claim had no reasonable prospect of success the court could, on a motion from either of the parties or on its own motion, order that the practitioner indemnify his or her own client against any party/party cost that the client was ordered to pay and to indemnify any party other than his or her own client for any costs that party had incurred.\textsuperscript{478} A practitioner who found himself in the position where the court, or the appeal court if the matter went to the Supreme Court on appeal, was of the opinion that the action or defence was without merit had the disadvantage of a presumption that the legal service he or she had provided had been provided despite the fact that there was no reasonable prospect of success.\textsuperscript{479}

\textsuperscript{474} The opposition was fairly blunt in their explanation for this approach:

\begin{quote}
What this bill does is deliver for insurers. The insurers wanted, the insurers asked and the insurers got. There is no doubt that if this bill is passed by the Parliament it will reduce insurer payouts, it will improve insurer profitability and it will reduce the rights of injured people. That is the simple summary of this bill.
\end{quote}


\textsuperscript{475} A future Premier pointed out that:

\begin{quote}
The Government's package is aimed squarely at stopping such practices undertaken by ambulance chasers in country New South Wales. Barristers and solicitors will be prohibited from providing a legal service if they do not have any reasonable grounds for believing a case is more than likely to succeed. If they fail to do this, their actions may be deemed to be unsatisfactory professional conduct and forced [sic.] to pay the costs.
\end{quote}

New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 29 May 2002, 2196 (Morris Iemma). Mr Iemma seems to have been misinformed as to the test would used to determine if a practitioner was to be liable for costs. Although the opposition was of the opinion that the provisions were to be enacted to protect the insurance industry (see above n 474), they too were not averse to traducing the profession’s reputation.

\textsuperscript{476} \textit{Legal Profession Act 1987} (NSW) s 198L(1), as inserted by \textit{Civil Liability Act 2002} (NSW) sch 2 [2].

\textsuperscript{477} This danger existed before the CL Act came into effect. At common law a court has the power to order a lawyer to repay costs he or she has charged a client ‘grounded in its inherent jurisdiction over lawyers in their capacity as officers of the court, to ensure that lawyers properly perform their duty to the court to conduct litigation with propriety”: Dal Pont, above n 171, [ 23.15],796.

\textsuperscript{478} \textit{Legal Profession Act 1987} (NSW) s 198M(1), as inserted by \textit{Civil Liability Act 2002} (NSW) sch 2 [2].

\textsuperscript{479} Ibid s 198N.
These particular provisions of the CL Act, which placed a strong onus on practitioners to ensure that they did not act in matters where there was no reasonable prospect of success, produced a rather ironic dissonance. This thesis has been critical of uplift fees in relation to claims for damages and has not supported the rationale that such fees are reasonable because they increased access to justice by recompensing practitioners for the cost of carrying matters that are ‘risky’. After the passage of the CL Act amendments practitioners were in a position where they were not allowed to commence an action for personal injury damages unless they also certified that there was a reasonable prospect of success. However, in the same matter they could charge the client an uplift fee for a matter that was successful when it was reasonable to do so, with the generally accepted reason for doing so that the matter was carried a reasonable level of risk. One wonders how a practitioner who has lost a matter and was looking at having costs awarded against himself or herself unless he or she could overcome the onus to prove that there had been a reasonable prospect of success when he or she had entered into an agreement to charge a client an uplift fee because the matter was risky enough to require being paid extra to take it on. As will be seen below, this was an untenable position.

The CL Act, and in particular the amendments it made to the 1987 Act, provides an excellent example of Reforms that are narrowly pointed at one perceived problem without real consideration as to how they will relate to Reforms pointed at other problems. The New South Wales Parliament had been very clear that successful litigants should recover as much as possible of what had been reasonably spent on vindicating their rights, and since legislating to ensure that it had consistently held up what it had done as sound social policy. That same Parliament then eviscerated that reform, at least insofar as people who had suffered personal injury where the damages were quantified at less than $100,000.00 were concerned, in the name of sound social policy.

3.11: The 1987 Act is replaced by the Legal Profession Act 2004
On 1 October, 2005 the 1987 Act was repealed by Schedule One of the Legal Profession Act 2004 (NSW) (The 2004 Act). The 2004 Act had passed through parliament with no real

480 Ibid s 198L(2).
debate and was assented on 21 December 2004. The 2004 Act was part of a move towards uniform legislation and Australia wide regulation of the legal profession and was based on a Model Bill then being drafted by the Standing Committee of Attorneys General.\(^{481}\) For that reason it appears that the New South Wales Parliament gave the Bill little scrutiny, and did not really consider some of the implications of the new law. The 2004 Act was substantially amended by the Legal Profession Amendment Act 2005 (NSW) [No. 46] (the 2005 Amending Act) before it came into force. The 2005 Amending Act came into force the same day as the 2004 Act, so that the 2004 Act came into force with Reforms already in place.

The 2005 Amending Act was ‘an Act to make amendments to the Legal Profession Act 2004 (NSW) of a minor, clarifying or machinery nature’.\(^{482}\) The various stakeholders, unlike the New South Wales Parliament, went through the draft 2004 Act with some care after it was assented and found a number of problems with it.\(^ {483}\) Some of the changes were merely grammatical, while some picked up and corrected fairly substantial problems with the original provisions of the 2004 Act. For example, in its original form the 2004 Act made it mandatory for assessors to refer any costs that were excessive to the Legal Services Commissioner for potential disciplinary action.\(^ {484}\) Any time an assessor reduced any item of costs on a bill, he or she was doing so because he or she thought the costs were excessive. The section was amended so that referral was mandated when the assessor considered that the costs were grossly excessive;\(^ {485}\) a far more sensible approach.

The 2005 Amending Act also cleared up a very real problem that had arisen within the costs assessment regime. Assessors awarded the costs of the assessment and often awarded them against the paying party. It was difficult to then get the paying party to pay those costs to the scheme. Until the party that was to receive payment had the certificate there was no way for the that party to enforce payment of the costs, so withholding the certificate until the paying

\(^{481}\) The discussion draft of the model bill was released in August of 2006.
\(^{483}\) New South Wales, Parliamentary Debates, Legislative Assembly, 9 June 2005, 16927 (Bob Debus).
\(^{484}\) Legal Profession Act 2004 (NSW) s 393(1) which read ‘If, on accosts assessment, the costs assessor considers that the legal costs charged by a law practice are excessive the costs assessor must refer the matter to the Commissioner to consider whether disciplinary action should be taken’ (emphasis added).
\(^{485}\) Legal Profession Act 2004 (NSW) s 393(1), as amended by the Legal Profession Amendment Act 2005 (NSW) sch 3 [61].
party owed for what he or she owed for the assessment was not a realistic sanction. The 2004 Act was amended so that the assessor sent the certificate of determination to the Manager Costs Assessment who was then responsible for paying the assessor’s costs but could register the certificate of determination and use that to recover any costs owed to the scheme if the party responsible for paying for them refused to do so. \footnote{Ibid ss 378-379, as amended by the Legal Profession Amendment Act 2005 (NSW) sch 3 [56]-[58].}

Mr M Costa, member for Hunter in New South Wales later \footnote{He was speaking two years later when seeking to introduce amendments that were to bring the 2004 Act further into alignment of the draft national bill.} stated that:

> The Government enacted the *Legal Profession Act 2004* in December 2004 and commenced it on 1 October 2005. The Act is a major milestone in the regulation of the Australian legal profession, recognising and providing for a national profession. The Standing Committee of Attorneys-General developed the national legal profession scheme and model legislation in consultation with legal profession regulators and the profession. The scheme removes many of the barriers to increased efficiency and competition in the legal profession. The model provisions are designed to achieve greater consistency and uniformity in legal profession regulation in order to facilitate legal practice across State and Territory boundaries, and to standardise consumer protections across jurisdictions.

The 2004 Act replicated most of what had been contained in Part 11 of the 1987 Act in its Part 3.2 (Costs disclosure and assessment). Part 3.2 commenced with a section that set out the purposes of the Part. Part 3.2 set out costs disclosure regimes, to regulated costs agreements and the billing of costs for legal services, and to provided a method of costs assessment as well as a mechanism for setting aside some costs agreements. \footnote{Legal Profession Act 2004 (NSW) s 301. The section points to regulating the billing of costs for legal services, but it does not claim to regulate the actual costs except in certain narrow circumstances; where costs agreements are set aside. This is misleading, as the costs assessment regime does regulate party/party costs when the parties are unable to agree those costs and have them assessed. Party/party costs continued to be recoverable on a ‘reasonable costs’ basis and are thus regulated.}

The 2004 Act also strengthened the costs disclosure regime; as one commentator put it, practitioners were going to have to ‘nail down everything’ or they would find themselves in the position where...
any default in a rigorous disclosure regime meant that their costs agreements became invalid.  

Conspicuously missing from the 2004 Act were uplift fees for actions in pursuit of damages. As noted above, the costs provisions of the 2004 Act was not subject to any real debate in its passage through the New South Wales parliament, but one key difference between the 2004 Act and the second draft Model Bill as released in August 2006, was that while the 2004 Act continued to allow uplift fees in some circumstances, it forbade practitioners from entering into a conditional contract with an uplift fee if the action was for damages. It seem that the right to charge uplift fees for matters involving damages, after providing years of fertile grounds for complaint against the legal profession, went not with a bang but with a whimper. The rationale behind such fees is easily dismantled, but the goal they were intended to promote, which was to increase access to justice, was laudable. They were a well-intended experiment, and were given a long trial (perhaps too long) before being abandoned as too problematic. As was seen in Chapter Two, the right to charge uplift fees, including in retainers for the pursuit of damages, were introduced in Western Australia four years after New South Wales abandoned them. Decisions from the courts of New South

---

489 Susan Pattison, ‘A new costs regime: Prepare to nail down everything’ (2005) 43 Law Society Journal 27. Ms. Pattison, a noted authority on costs assessment in New South Wales, pointed out that ‘[t]he 2004 Act makes no distinction between core and noncore disclosure. Every element has equal weight’ (in terms of invalidating a costs agreement): at 27. See for instance Gilles v Gakoumelos [2008] NSWSC 70, where a disbursement for senior counsel was reduced by $52,360.00 from an original $125,000 on assessment and that reduction was upheld on appeal in part because the hourly rate was excessive but also because the retainer (between counsel and the solicitors, who had paid the fees) was described as being on a contingency basis but there was no disclosure as to the basis of the contingency or the circumstances in which it would be paid. See discussion on the abolition of uplift fees for damages below and note that this decision related to a probate matter and a contingency in such circumstances is not in contravention of s 324(1) of the Legal Profession Act 2004 (NSW).

490 Contingency fees in general were introduced 2.4.6 while the debates surrounding the introduction of contingency fees in New South Wales, and the issues that had arisen through their use are scrutinised widely above.

491 The provisions of the Legal Profession-model laws project Model Bill (Model Provisions) 2nd Edition August 2006 were in line with the provisions of s 187 of the repealed 1987 Act, and allowed conditional costs agreements with uplift fees across the range of legal retainers (subject to any other fee caps in place).

492 Legal Profession Act 2004 (NSW) s 324(2).

493 Ibid s 324(1).

494 But see Ventouris Enterprises Pty Ltd v D B Group Pty Ltd (No.4) [2011] NSWSC 720, where counsel’s fees of $365,675.00 were found in a retainer that charged a uplift in an action for damages and which was thus in contravention of s 324(1) of the Legal Profession Act 2004 (NSW). An argument that counsel should recover fees less the uplift failed and the entire amount was disallowed.

495 See discussion 3.6.2 above.
Wales may well be persuasive in the Western Australian jurisdiction, but the experiences of those courts seem not to be.

3.12: Amendments post 2004 Act

The New South Wales Parliament was well aware that the 2004 Act was going to require further amendment after it was introduced in order to ‘get it right’. As noted above, it had been amended before it came into effect, and in the second reading speech for the 2005 Amending Act Mr Bob Debus noted that: ‘[a]n undertaking of this scale is necessarily to be regarded as a work in progress, and I will propose future amendments to maintain uniformity with the national model and to improve and streamline the operation of this new Act as necessary.\(^496\)

3.12.1: The Legal Profession Amendment Act 2006

The first of the amendments to the 2004 Act, so far as costs assessment was concerned, came through the Legal Profession Amendment Act 2006 (No 30) (NSW), (the first 2006 Amending Act) which dealt with two areas that required greater clarity. Costs assessors were given wider powers in determining the reasonableness of a costs agreement, and while uplift fees remained restricted to a maximum of 25% for litigious matters (not relating to damages) that maximum was removed for non-litigious work. The 2006 Amending Act also resurrected on aspect of the pre reform costs assessment regime; clients were once again given the right to request an itemised bill.\(^497\) As will be seen below, one of the underlying assumptions behind the 1994 Reforms was that costs assessments would be done in a ‘global’ way.\(^498\) The reality of the reformed scheme was an item by item assessment of the challenged costs, and an itemised bill gave clients a better chance of determining if the cost they had been charged were reasonable.

Mr Matt Brown, giving the second reading speech for the Bill that became the first 2006 Amending Act to the Legislative Assembly, did throw light on the abolition of uplift fees and the incongruence noted above in relation to practitioners being able to charge those fees

\(^496\) New South Wales, Parliamentary Debates, Legislative Assembly, 9 June 2005, 16927 (Robert Debus).
\(^497\) Legal Profession Act 2004 (NSW) s 332A, as inserted by Legal Profession Amendment Act 2006 (NSW) sch 3 [24].
\(^498\) See discussion at 3.13.3.2 below.
while also having to certify that there was a reasonable chance of success in an action for personal injury damages. He noted that; ‘[s]ection 324 (1) of the Legal Profession Act 2004 (NSW) prohibits uplift fees in claims for damages to ensure that practitioners do not certify that their claims for damages have reasonable prospects of success and then charge their clients an extra 25 per cent for the inherent risk’. He went on to explain that the 2004 Act was being brought into line with the provisions for uplift fees in the model legislation in other respects, but despite that model legislation allowing uplift fees in actions for damages, it appears that the New South Wales Parliament had had enough of that particular part of the 1994 Reforms and uplift fees for damages no longer form part of the legal landscape of New South Wales.

3.12.2: The Legal Profession Further Amendment Act 2006

The 2004 Act was further amended later that same year by way of the Legal Profession Further Amendment Act 2006 (No 116) (the second 2006 Amending Act). This Act had two separate schedules that provided amendments to the 2004 Act, one for amendments that brought the 2004 Act further into alignment with the Model Bill and a second with general amendments to deal with issues that had arisen during implementation.

The second 2006 Amending Act made three significant changes to the costs assessment scheme. One of those was fairly straightforward, the second slightly problematic, and the third quite profound.

Firstly, the 2006 Amending Act clarified the effects of a law practice’s failure to properly disclose costs. As drafted, the provisions of the 2004 Act dealt with a law practice failing its duty to disclose by disallowing it from maintaining an action to recover costs. The client in turn had no obligation to pay the firms its costs until those costs had been assessed.

499 New South Wales, Parliamentary Debates, Legislative Assembly, 5 April 2006, 22174 (Matt Brown).
500 Ibid.
501 The draft model bill had been finalised by the Standing Committee of Attorney Generals and released in 2006.
503 Legal Profession Act 2004 (NSW) s 317(3).
504 Ibid.
client could also apply to have the costs agreement that governed the retainer set aside.\textsuperscript{505} The amendments continued that position, but also gave a costs assessor the right to reduce the costs as assessed ‘proportionate to the seriousness of the failure to disclose.’\textsuperscript{506} Failure to disclose remained capable of being considered either unsatisfactory professional conduct or professional misconduct.\textsuperscript{507} At one level this seems a sensible adjustment, as it allowed a costs assessor to scale a punishment to fit the particular failure of disclosure; as originally drafted the remedy was more of an all or nothing solution. Even if a costs agreement was found to be invalid because of a failure to disclose the costs themselves might be reasonable, and there would then be no sanction for the failure. After this particular amendment the costs assessor could reduce those costs in any event if it was appropriate to do so. However, imposing a financial sanction for a lawyer or law practice’s failure to disclose is a fairly serious thing. It does seem strange that costs assessors, practicing lawyers themselves, were given such a task but not given any guidelines as to what would be ‘proportionate’ when applying the sanction.

Secondly, and in line with the model legislation, the second 2006 Amending Act extended the duty of disclosure to include disclosure to third party payers.\textsuperscript{508} In non litigious matters it is fairly common that the person who engages the legal practitioner is not the person who pays the legal costs; most commonly landlords engage a practitioner to draw up a lease. It is usual in such a case that the lease includes a provision that the tenant has to pay the legal costs involved. The same situation can occur with litigation as litigation funders become a larger player in the legal marketplace. It is sound policy to ensure that the person or company who will ultimately be responsible for paying the costs has reasonable disclosure of what those costs will be before committing to them. However, one portion of this particular amendment does seem capable of producing odd results. If there is a third party payer, the

\textsuperscript{505} Ibid s 317(2).
\textsuperscript{506} Ibid s 317(4), as inserted by \textit{Legal Profession Further Amendment Act 2006 (NSW)} sch 2 [112].
\textsuperscript{507} Ibid s 317(7). As originally drafted this subsection was s 317(4) of the 2004 Act, but although the wording remained the same it became s 317(7) after s 317 was omitted and a new s 317 was inserted by \textit{Profession Further Amendment Act 2006} sch 2 [112]. Various other amendments were made to ensure that third party payers had the same right to costs disclosure as did other more directly engaged clients.
\textsuperscript{508} Ibid s 302, as amended by \textit{Legal Profession Further Amendment Act 2006 (NSW)} sch 2 [86]. The term third party payer was inserted into the definitions used for Part 3.2 Costs Disclosure and Assessment, s 302A as inserted by \textit{Legal Profession Further Amendment Act 2006 (NSW)} sch 2 [87].
law firm is not barred from seeking costs pursuant to the agreement from one of the paying parties if the failure to disclose was only in relation to one party.\footnote{Legal Profession Act 2004 (NSW) s 317 (1), as amended by Legal Profession Further Amendment Act 2006 (NSW) sch 2 [112].} As noted above, if a landlord had a lease drawn up by a practitioner, and it was a term of the lease that the lessee paid the legal costs involved, that lessee would be a third party payer. If the practitioner had provided costs disclosure to the landlord, and not to the lessee, the lessee has the right to the remedies for non disclosure while the landlord does not. In effect, the landlord could be forced to pay the difference between the costs under any costs agreement and the costs as assessed, which seems an odd position if the default originated with the practitioner.\footnote{Ibid s 350(4), as inserted by Legal Profession Further Amendment Act 2006 (NSW) sch 2 [131].}

The third, and most profound, change that the second 2006 Amendment Act made to the 2004 Act was to change the time allowed for seeking assessment. As drafted, the 2004 Act allowed ‘within 60 days after the bill was given or the request was made or after the costs were paid in full (whichever is earlier or earliest)’.\footnote{Legal Profession Act 2004 (NSW) s 350(4).} This time limit was drastically expanded to one year, and there were provisions to extend that time limit if the circumstances surrounding an application so warranted it.\footnote{Ibid s 350(4), as inserted by Legal Profession Further Amendment Act 2006 (NSW) sch 2 [131].} Although this change was mentioned in the second reading speech, neither house of parliament seems to have considered it problematic as it was not mentioned in debates. The one year time limit on applying for assessment is sourced from the Model Bill promulgated by SCAG, and that expanded limit was also adopted in Western Australia. The analysis of the effects of that provided at 2.5.1.1 above, in the context of the Legal Practice Act 2008 (WA), is also valid for the expanded limit in New South Wales.

\subsection*{3.12.3: Further amendments 2007- 2011}

After the second 2006 Amendment Act and up until June 2011, a further ten numbered acts made amendments to the 2004 Act. The bulk of those amendments did not affect the
provisions of the 2004 Act that dealt with costs assessment, and with few exceptions, those that did made minor adjustments that are not explored in this thesis. That said there was one change of some import; the District Court replaced the Supreme Court as the venue for appeals against costs assessment.

As noted above, the costs assessment regime contained an internal review mechanism whereby a party who did not agree with an initial assessment could have that assessment reviewed by a review panel. That panel decision could in turn found an appeal, and the appeal had originally been to the Supreme Court.

The Courts and Crimes Legislation Amendment Act 2008 (NSW) (the 2008 Amending Act) changed the route of appeal for a wide range of matters. The reason for this, as was explained in the second reading speech for the Bill that went on to become that Act, was that ‘transferring such cases will free up sitting time for the Supreme Court and will encourage the use of a more appropriate and less expensive forum for resolving smaller matters’.\footnote{New South Wales, Parliamentary Debates, Legislative Assembly, 6 June 2008, 8635 (Barbara Perry).} This seems eminently sensible. Costs assessments may sometimes relate to large sums of money, but in real terms they are ‘smaller matters’. A review of appeals heard in the New South Wales Supreme Court between 1995 and 2008 shows that the majority of the appeals were unsuccessful. A good many of those appeals had bypassed the review mechanisms provided within the scheme and gone straight to judicial appeal.

Other amendments between 2007 and 2011 are not of sufficient importance to warrant scrutiny. However, as will be seen below, 2011 marks the move from a focus on ‘single issue’ amendment and ‘tweaking’ to in depth investigation and review, and recommendations for the first sweeping reform to what was already a reformed costs assessment scheme.

3.13: The 2011 Review of the Costs Assessment Scheme
On 7 September 2011 the Honourable T F Bathurst, Chief Justice of New South Wales, announced a review of the costs assessment scheme in New South Wales (the 2011 Review). He noted that there were ‘strong grounds to examine – for the first time – whether the legislation, principles and procedures underpinning the Scheme’s operations, which have
remained virtually unchanged since 1993, support the just, quick and cheap resolution of costs disputes’.\textsuperscript{514}

The 2011 Review Panel, chaired by the Honourable Justice Paul Brereton AM RDF was a truly expert body. The panel included a second judge, the Legal Services Commissioner, and representatives from the New South Wales Bar Association, Law Society, the Costs Assessors Rules Committee, the Cost Consultant User Group and the Supreme Court (the Review Panel).\textsuperscript{515} Between them, the members of the Review Panel brought to the table the perspectives of the key stakeholders in the New South Wales costs assessment regime.

The terms of reference for the 2011 Review were broad, and were usefully summarised by the Chief Justice as follows: ‘[t]he Review will examine and report how effectively the Scheme is achieving the aims of providing a just, quick and cheap resolution of costs disputes’.\textsuperscript{516} Submissions were invited from ‘any interested party’. The Chief Justice’s invitation was well taken up and the 2011 Review Panel received ‘39 responses from peak professional bodies, current and retired costs assessors, costs consultants, commercial and government lawyers, and self-represented litigants’.\textsuperscript{517}

### 3.13.1: Submissions to the Chief Justice’s Review

The Office of the Legal Services Commissioner (OLSC), the Law Society, and Legal Aid were among the ‘peak professional bodies’ that made submissions to the 2011 Review.\textsuperscript{518} Mr Steven Mark, the Legal Services Commissioner, and Mr Stuart Westgarth, of the Law Society, were also members of the 2011 Review Panel.\textsuperscript{519} The submissions and recommendations made by those three bodies, which show some of the key areas of discontent with the costs assessment regime, are summarised, and discussion of their content is provided below.


\textsuperscript{515} New South Wales Supreme Court, ‘Review of the Costs Assessment Scheme: Release of Reform Recommendations’ (Announcement, 12 March 2013).

\textsuperscript{516} Ibid.

\textsuperscript{517} Ibid.

\textsuperscript{518} Ibid.

\textsuperscript{519} Ibid.
3.13.1.1: The Office of the Legal Services Commissioner submissions

The OLSC is a statutory body set up under the 2004 Act\textsuperscript{520} and acts to ‘resolve complaints and to investigate complaints about legal conduct submissions’.\textsuperscript{521} It is therefore well placed to lobby from a law consumer’s point of view of the costs assessment scheme. The OLSC’s submissions were scathing. It noted that:

At present the current costs assessment scheme is administered by an ad hoc group of legal practitioners working on an ad hoc basis. Many appear to be retired or semi retired sole practitioners/partners of small suburban firms and barristers doing costs assessment to earn some extra money. The appointment process of costs assessors is not guided by any rules or requirements as to the level of expertise a costs assessor should retain. Consequently, the level of expertise of practitioners involved in the costs assessment scheme is diverse. Costs assessors vary widely in their knowledge of costing law rules and practice.\textsuperscript{522}

In short, the OLSC argued that the costs assessment scheme was too slow, lacked transparency, and was too expensive.\textsuperscript{523} It considered that assessors were insufficiently trained, had widely inconsistent views on the legislative framework that governed their work, that they had no coherent body of rules to guide them, and that the reasons they gave for their determinations were often inadequate.\textsuperscript{524} Most tellingly, the OLSC pointed out that the costs assessment scheme was not keeping up with the realities of the legal market and was losing relevance, as follows:

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

\textsuperscript{520} Legal Profession Act 2004 (NSW) pt 7.3. The OLSC had existed under the 1987 Act (Legal Profession Act 1987 pt 5A).
\textsuperscript{521} The Office of the Legal Services Commissioner of New South Wales, Submission to the Supreme Court of New South Wales, The Chief Justice’s Review of the Costs Assessment Scheme, November 2011, Executive Summary, 3.
\textsuperscript{522} Ibid.
\textsuperscript{523} Ibid Terms of Reference, 9-25.
\textsuperscript{524} Ibid 9-25.
services market as changes occur. A costs assessment scheme cannot be relevant if it does not move with the market.  

The OLSC considered that this was partly because the scheme was predicated on time costing and itemised bills of costs while it argued that time billing was no longer the dominant form of billing. It noted that assessors were calling for itemised bills even when the legal works they covered had been governed by a fixed amount contract.

The OLSC made 18 recommendations that would ameliorate the problems it saw with the costs assessment scheme. The recommendations were generally as might be expected considering the OLSC views on the system, and were designed to ensure that the costs assessment regime better reflected the changes that were occurring in the legal marketplace and that it better served the needs of practitioners and the public.

Recommendation 17 of the OLSC submission is worth particular scrutiny: ‘That a mechanism be established to collect and collate information about market rates for legal services and that material be made publically available’. Fee benchmarking, which was the role that had been played by the now abolished scales of costs, has already been canvassed at some length in this chapter, and the conclusion to the chapter will return that issue. The OLSC’s recommendation addresses one of the key deficiencies in the legal marketplace; the lack of information on what ‘reasonable costs’ are, and the lack of information to help consumers decide what costs go beyond reasonable. This problem was previously noted by the participants of the MVA proceedings (at 3.6.1 above), and was also raised in other submissions to the 2011 Review.

The OLSC also recommended that ‘all costs disputes be referred to the OLSC for early determination through mediation or other alternate dispute resolution mechanisms’.

Considering the volume of applications for assessment that are lodged in New South Wales
each year, and considering that applicants are required to include a statement to the effect that ‘there is no reasonable prospect of settlement of the matter by mediation’ on lodgement, the OLSC seems to be wishing a large volume of difficult work upon itself. However, in discussion, the OLSC also noted that ‘the efficient resolution of disputes would be greatly enhanced if disputes for less than $10,000.00 were referred to the OLSC as provided for in the current legislation’ but that the OLSC receives very few such referrals. It may well be that the costs assessment scheme, like the courts, is more cost efficient for larger disputes, and it may be that the participants in small disputes would find that an OLSC mediation is a more cost efficient way to resolve the dispute. That approach could mean that rather than the participants paying for the process the taxpayer would be funding it. That said, most jurisdictions do have a small or minor claims division where lower sum litigation is dealt with expeditiously, and it may be that the costs assessment regime would benefit from a similar small dispute mechanism, or from more regularly using the one that is currently provided. This is particularly the case when one considers that in 2005 30.5% of party/party and 55% of client/solicitor bills that were filed for assessment in New South Wales were for amounts under $10,000.00 (see Chapter 4 at Figures 4.1 and 4.6).

The OLSC submissions should be seen in the context of that body’s role and client base. In 2010 there were 1862 applications for costs assessment in New South Wales. The OLSC submission does not record how many complaints it had received about the operation of the costs assessment system. It should be noted that while the OLSC notes that its interaction with legal costs complaints is mainly in regard of disputes between practitioners and either the practitioner’s clients or third party payers, that does not necessarily mean that those complaints relate to the assessment system. Complaints about practitioners overcharging are not complaints about the assessment process. Costs assessors are obliged to report grossly excessive charging or ‘conduct that may amount to unsatisfactory professional conduct or professional misconduct’ to the OLSC for investigation. Clients with complaints about

531 Legal Profession Act 2004 (NSW) s 354(3).
532 The Office of the Legal Services Commissioner of New South Wales, above n 521, Terms of Reference, 20.
534 Legal Profession Act 2004 s 393(1).
535 Ibid s 393(2).
what they have been charged are also able to approach the OLSC direct. For those reasons, some, and perhaps most of the complaints about costs that the OLSC deals with are more likely to be with the costs charged rather than with the costs assessment scheme.\footnote{This is not to detract from the OLSC’s submissions, but it must be kept in mind as the submissions therefore reflect the experiences of clients who have dealt with worse case scenarios. Without knowing how many complaints specifically about the costs assessment scheme those submissions reflect it is not possible to determine if the OLSC’s view is truly representative of most of the scheme’s user’s experience. Nonetheless, it is clear that some serious issues have arisen within the system, and it may be that some of the recommendations made by the OLSC would successfully address them. The OLSC submissions noted that a new draft of a Model Legal Profession Bill was likely to be adopted in the near future (it identified 2013 as the likely time of adoption), and that as the legal practice regime that would flow from that would be much less prescribed than is currently the case, further amendments to the costs assessment regime at this time may be pointless.\footnote{The OLSC submissions also provide a useful comparison of the provisions of the current costs assessment scheme with the provisions for costs assessment under the draft Model Bill.\footnote{Some brief comments on the draft Bill are included in the conclusion to this chapter.}}}

\subsection*{3.13.1.2: The Law Society of New South Wales submissions}

The Law Society of New South Wales submissions mirrored some of the concerns raised in the OLSC submissions, but in a much less critical way. The Law Society considered that the current scheme (in 2011) ‘presently affords parties a satisfactory degree of procedural fairness’\footnote{with the exception of one noted issue, that parties to a review should be given a} with the exception of one noted issue, that parties to a review should be given a
statutory right to make submissions to the review panel.\textsuperscript{541} The sixteen recommendations that the Law Society made went to the speed and transparency of the system, and addressed a perceived lack of training and consistency among assessors.\textsuperscript{542} Although the Law Society approached the issue in a different manner to the OLSC, it too raised the issue of benchmarking; the executive summary of the Law Society submissions noted that there were no:

Published guidelines or benchmarks which costs assessor could use in making their determinations and which parties could rely on. Guidelines would assist parties to predict outcomes to enable settlement.\textsuperscript{543}

This concern was reflected in Recommendation 7 of the submissions, which read: ‘Guidelines for costs assessments should be developed and published.’\textsuperscript{544}

The Law Society also recommended that assessors provide an early estimate of the range of costs that might be awarded on assessment ‘perhaps expressed in terms of a range between $X$ and $Y$ of the total costs likely to be allowed’.\textsuperscript{545} Discussion as to the issues that arise with provisional assessment as part of a judicial process can be found at 2.5.1.3 above but the issues that arisen in such circumstances do not arise, at least to the same degree, in an administrative process. It may be that provisional assessment would encourage a negotiated settlement, but expecting costs assessors to provide a provisional assessment with any real accuracy might be unrealistic. That said, benchmark costs would make provisional assessment a more realistic proposal.

One of the Law Societies’ recommendations seems at odds with one of the underlying principles of the 1994 Reforms; that costs assessments and its internal review mechanisms should no longer be part of judicial process. The Law Society argued that system users should have easier access to judicial oversight in the course of the assessment process. The Law Society considered that:

\begin{itemize}
\item\textsuperscript{541} Ibid.
\item\textsuperscript{542} Ibid 2, 3.
\item\textsuperscript{543} Ibid 5.
\item\textsuperscript{544} Ibid Summary of Recommendations, 3. See Recommendation 7.
\item\textsuperscript{545} Ibid 2. See Recommendation 2.
\end{itemize}
For example, if an assessor should unreasonably refuse to allow a party to tender material or make a further submission or act contrary to guidelines, a party should have the right to approach a Registrar for directions.546

The 1994 Reforms separated costs assessment from the judicial process, and turned costs assessment into an administrative function that was subject to judicial review. The New South Wales Law Society submissions seem to suggest a hybridisation of the two approaches, with an applicant being able to access judicial review before he or she had exhausted the administrative review process. With due respect to the Law Society, this seems unnecessary, and if problems like the one postulated in the example it gave were occurring, it would seem more sensible to create powers vested in the Manager Costs Assessment that would allow such problems to be dealt with within the administrative process. Judicial review should still be available, but judicial review should not something that immediately accessible for what is really an operational issue within the system. As will be seen below, the draft recommendations from the Chief Justice’s Review do place greater responsibility for this type of issue with the Manager Costs Assessment. The issue of costs assessment and its fundamental amenability to administrative rather than judicial determination will be further addressed in the conclusion to this chapter.

Of particular interest and utility in terms of the purposes of this thesis, the Law Society also provided estimates of the costs of assessment; one for a party/party matter with a bill postulated at the $250,000.00 and one for a dispute between a practitioner and a client with the bill at $50,000.00.547

3.13.1.2.1: The Law Society’s view of a party/party assessment
In the first instance, the Law Society considered that a party/party assessment would cost the party responsible for paying the costs between $19,500.00 and $31,750.00 if that party received and then challenged a bill for $250,000.00. That estimate is predicated on the paying party having the costs of the assessment awarded against it, so it includes the costs outlaid by both parties over the course of the assessment. That estimate means that a party

547 Ibid 12.
challenging a bill of $250,000.00 would pay between approximately 8 to 13% of the original amount of the bill in order to mount the challenge. The low end of the estimate range is a significant amount of money, and the high end, in context of the bill overall, is large. Assuming that the Law Society’s estimate is realistic, it means that a losing litigant, served with a $250,000.00 bill, should consider $270,000.00 to $280,000.00 as the amount from which deductions would be made if he or she is going to challenge the bill. As will be seen in Chapter Four, the average return on a $100,000.00 or above bill after assessment in New South Wales (in 2005) was 76%. Averages are perhaps dangerous in that they do not apply to individual situations, but as the example the New South Wales Law Society has given for the cost of assessing a bill is given as an average, then on average it would be in the paying party’s interests to have it assessed despite the estimate of the costs of doing so. At the high end of the example, where the bill can be considered as being for $280,000.00, the bill the payer would be responsible for at the end of the process would be in the order of $210,000.00, and that means that the payer would be much better off because of the assessment process. In real terms the paying party should seek and receive expert legal advice as to the particular bill in question, but despite the Law Society’s concern about the expense of the system, that expense may not be so great if it is considered in context of the results it might return.

3.13.1.2.2: The Law Society’s view of an assessment between a practitioner and a client
The example that the Law Society provides for a dispute between the solicitor and the client, with a bill postulated at $50,000.00 is not dependent on which party seeks assessment, except that whichever party does will go to a greater expense initially. The Law Society considered that the applicant, be it either the practitioner or the client, will incur expenses of between $7,500.00 and $12,500.00 to mount the challenge. This estimate is contingent on a client applicant seeking legal representation for the assessment process, or a practitioner applicant determining the cost of his or her time taken up in the assessment process at current legal rates or, alternately, engaging a costs specialist to do the works involved for a costs assessment in his or her stead. The sums the Law Society provides mean the applicant would pay 15% to 25% over the amount of the bill as filed in order to mount the challenge. That range is significantly higher than was arrived at for the party/party bill. In part that may be
because the smaller the bill is the higher the costs of challenging it would be when the cost of the challenge is considered as a percentage of the original bill. It seems likely that had the example for the party/party bill been a $50,000.00 bill rather than a $250,000.00 bill the cost of challenging it would have been in a similar percentage range. The respondent in this own client example had an estimated cost of between $4,000.00 and $6,500.00. Those amounts represent between 8% and 13% of the bill total.

There is one fundamental difference here as compared to a party/party assessment; if the bill in this dispute is reduced by 15% or more, the practitioner will pay the costs of the assessment.\footnote{548\textit{Legal Profession Act 2004 (NSW) s 369.}} This is true regardless if the practitioner is the applicant or the respondent. As will be seen in Chapter Four, the rate of return on bills that were assessed between solicitors and their clients in New South Wales (in 2005) did differ depending on whether or not the client or the solicitor instituted the challenge.

The average return for a client instituted assessment of a bill in the $50,000.00 to $69,999.00 range in New South Wales was 81.5% (in 2005). This means that a client challenging a $50,000.00 bill in New South Wales would, on average, find that after the assessment the bill had been reduced to $40,500.00. In such circumstances, the costs of the assessment itself would have been borne by the solicitor. The solicitor would have his or her own costs to meet as well as the client’s costs, and using the Law Society’s figures those total costs would have been in the order of $11,500.00 and $19,000.00. On these figures, and taking into account the costs of assessment, the solicitor could find that the return on what had been a $50,000.00 bill was as low a $31,000.00.

If the solicitor had decided to seek assessment there is some difference in the likely result. As will be seen at 4.7.1 in Chapter Four, only 30 percent (98 of 329) of the bills that practitioners filed for assessment in 2005 went through to a full determination. Assuming that those applications that were withdrawn before assessment were instead resolved by way of some form of settlement, it appears that commencing an assessment is a productive way for a practitioner to get some form of resolution to an unpaid bill. It seems likely allowing
practitioners to file their bills for assessment rather than having to sue defaulting clients in
debt has been a very real benefit of the 1994 Reforms

3.13.1.3: The Legal Aid Submissions

Legal Aid’s submissions to the enquiry were restricted to three discrete issues, about which
Legal Aid made three recommendations. Legal Aid demonstrated two particular deficiencies
it identified within the costs assessment scheme with case examples drawn from its own files
and made recommendations to deal with them. The third recommendation was more general,
and as will be seen, it dealt with what appears to be a universal concern with the post 1994
Reforms costs assessment regime. Again, as with the OLSC submissions, the Legal Aid
submissions must be seen in context with the Legal Aid client base.

Firstly, Legal Aid recommended that a provision be inserted into the 2004 Act to stay the
assessment process if a client alleged that a costs agreement or a term of a costs agreement
was unjust. 549 Legal Aid argued that a client should have the right to test such an allegation
and seek a remedy in ‘an appropriate forum’ before there is a determination and a proved
debt that can be executed against them. 550 The current position is that a costs assessor has
wide powers to determine if a costs agreement, or any part of a costs agreement, is unjust if a
client so alleges. 551 When one considers unsophisticated clients that seem problematic as the
costs assessor does not appear to be able to make such a determination of his or her own
volition. Once the client has raised the issue, costs assessor can refuse to deal with an
application if he or she does find that a term is unjust, but whether or not he or she does so is
at the election of the costs assessor and not the client. 552 The costs assessor can make a
determination as to the costs that are owed even if he or she finds that the costs agreement is
unjust, and in such circumstances the practitioner will have the advantage of an enforceable
determination against the client even if the agreement was unjust. It may be good policy to
introduce a duty along the same lines as the duty a costs assessor has if he or she determines

549 Submissions on behalf of Legal Aid New South Wales to the Supreme Court of New South Wales on the
Chief Justice’s Review of the Costs Assessment Scheme, (November 2011) <
2011>,
550 Ibid.
551 Legal Profession Act 2004 (NSW) s 328.
552 Ibid s 328(3).
there has been gross overcharging; if a costs assessor finds that a costs agreement contains any serious injustice then he or she should be obliged to stay the assessment process (as recommended by Legal Aid) and to report that situation to the Office of the Legal Services Commissioner. This seems preferable to having a costs assessor dealing with unjust terms in a costs agreement only when a client asks that he or she do so and then at his or her own discretion.

Secondly, Legal Aid considered that service of notice of costs assessment should be by way of personal service. The case example provided was of a situation where the first notice that the client had of the fact that a determination for costs against them had been handed down was the bankruptcy notice the client received when the practitioner moved to enforce the determination. A requirement that practitioners who commence the costs assessment process ensure personal service on their clients, combined with sensible mechanisms that stop clients from frustrating that service, would be a sensible amendment to the costs assessment scheme.

Lastly, and perhaps not surprisingly, Legal Aid suggested that ‘guidance as to what items and rates are generally allowed or disallowed would be invaluable for advising a client as to when it may be appropriate to seek a costs assessment’. Legal Aid, in common with the OLSC and the Law Society, believed that the provision of some form of benchmarks as to what were and what were not reasonable costs would improve the efficacy of the costs assessment scheme. As will be seen below, the draft report of the Chief Justice’s Review of the Cost Assessment Scheme agreed with those submissions. The reintroduction of guidelines as to costs will be further explored in the conclusion to this chapter.

---

553 In the case example that Legal Aid provided to illustrate the problem it had identified the behaviour alleged against the practitioner was such that a formal investigation was warranted, and a mere adjustment of the costs owed would not have been an satisfactory remedy had the conduct been proved. Costs assessors are mandated to report ‘conduct that may amount to unsatisfactory professional conduct or professional misconduct’ to the OLSC: Legal Profession Act 2004 (NSW) s 393(2). Arguably, an unjust costs agreement may fall within the current reporting duty. The Legal Aid submissions to not reveal whether the particular incident it reports led to an OLSC investigation. However, as the assessment in question occurred ex-parte the costs assessor would not have been aware of the circumstances surrounding the costs agreement.

554 Legal Aid New South Wales, above n 549, Recommendation Two.

555 Ibid.

556 Ibid.

The following portion of this thesis provides an overview of the recommendations made by the Review Panel that produced the Chief Justice’s Review of the Costs Assessment Scheme (the Draft Report). The draft report was released on 12 March 2013.


Some of the key concerns that the 2011 Review Panel faced are set out in the discussion of submissions provided above at 3.13.1 directly above. The Review Panel described those concerns as being ‘fundamentally about the time the process takes, and consistency and predictability of outcomes’. 557 That the Review Panel took on board and understood those concerns is clearly evident from its description of the purpose of its proposals as follows:

Together, it is intended that this package of Reforms will inculcate cultural change in the manner in which parties approach the assessment process, increase the speed of resolution of costs disputes, increase consistency and predictability in decision-making, and facilitate the just, quick and cheap resolution of costs disputes’. 558

Further to those aims, the Review Panel noted that ‘the costs assessment process should promote the early resolution of costs disputes, by removing incentives for delay, and providing incentives for early resolution, even at a discount’. 559

The Review Panel’s aims are understandable and laudable. However, they illustrate one of the key tensions in the costs assessment process. As has been repeated noted in the preceding parts of this chapter, the New South Wales Parliament felt that it was vitally important that winning litigants recover all the reasonable costs of their litigation. However, as the Review Panel noted, a utile costs assessment scheme must provide ‘just, quick and cheap resolution’ even ‘at a discount’. In terms of party/party costs it is likely to be the winning litigant who would be providing that discount and the losing litigant who would be receiving it. Any justice that is quick and cheap is likely to be rough justice, and in terms of party/party

558 Ibid 8, 11-12.
559 Ibid 1, 9.
assessments it is the winning litigant who is trying to recover his or her costs that will most experience the roughness. Such a result would be a direct contradiction of the original aim that winning litigants should recover more of their reasonable costs.

This thesis will argue below that the Review Panel’s Reforms, though eminently sensible and carefully reasoned, when combined with other Reforms that have taken place within the New South Wales legal marketplace, effectively abandon that key driver of the original 1994 Reforms. This argument is not meant as negative criticism; it may be that while that particular driver of reform makes an attractive political sound bite, it was never really something that could be achieved in a system where individual practitioners can effectively contract out of fee regulation.

3.13.2.2: The 2011 Recommendations: Set out of the recommendations
The 2011 Review released the Draft Report on 12 March 2013. The recommendations contained in that report canvass the full spectrum of the costs assessment process, and if instituted they will bring about fundamental changes to the way that costs assessment is carried out in New South Wales. The draft recommendations are usefully divided into five main groups, four of which straddle the assessment process and the fifth catches more general matters that are directly related to the process as a whole. The division is as follows:

1. The process for instituting an assessment proceeding,
2. The conduct of the assessment process,
3. The effect and consequences of determinations,
4. The review and appeal process;\textsuperscript{560} and;
5. Other matters, which contains recommendations pertaining to the Manager, Costs Assessment, The Costs Assessor Rules Committee, and the Assessors themselves.\textsuperscript{561}

The draft review contains 56 core recommendations, and a number of those are further divided into separate and detailed specific recommendations. The review document is remarkable for the depth of analysis it provides and the specificity of its recommendations. In

\textsuperscript{560}Ibid 2, 9.
\textsuperscript{561}Ibid 103-108.
a number of instances the Review Panels provided the recommendations in the form of ‘ready to enact’ clauses. This thesis will be restricted to providing a summary of its content and discussion of the likely effect of some of the key recommendations where such discussion is warranted. Many of the recommendations are sensible and effective resolutions to minor procedural matters. Others, less minor, are not contentious in either broad terms or in detail. For that reason this thesis will look holistically at the ‘package’ created by the Review Panel and will only go into detail about the Reforms where that detail is necessary for an understanding of the overall results that will ensue if the recommendations are adopted.

3.13.2.3: The 2011 Recommendations: Constraints on the Review Panel and analysis of those constraints

Before investigating the recommendations themselves, it is necessary to consider the key assumption that the Review Panel made about what it was engaged in doing, and to unpack the three parts of that assumption. The Review Panel noted that:

   ‘For the purposes of this review it has been assumed that the regulation of practitioner costs, the ‘fair and reasonable’ criteria for party/party costs, and the ‘user pays’ funding model for the assessment process are not open to general reconsideration’.

Firstly, practitioner costs have never been genuinely regulated in the broad sense, other than by the fairly elastic rule that they should not be unreasonable. Scales of costs did act to regulate what winning litigants recovered under costs agreements, but those costs are party/party and are not practitioner costs. Scales of costs also regulated practitioner fees if, and only if, the practitioner either failed to contract out of them by way of a costs agreement or if the practitioner’s costs agreement was in some way invalid. A practitioner only faced having his or her fees regulated if he or she had in some way been deficient, by failing to get a costs agreement, by being unreasonable in his or her charging, by defaulting in his or her disclosure obligations or alternately, because he or she operated in an area of law that only

---

562 Ibid 32 [1.4.4].
563 There are narrow areas of real regulation, such as MVA matters and Workers Compensation matters, where practitioners are not allowed to charge above prescribed maxima.
allowed the practitioner to charge scale costs. Legal practitioners only faced having their fees reduced to scale, but as a sanction. Otherwise, the only real regulation on their fees was the legal marketplace. After the 1994 Reforms and once the scales of costs were removed, a practitioner faced even less regulation, in that the scale as sanction disappeared and a practitioner was only subject to the rule that his or her fees had to be reasonable. Fellow practitioners were (and are) the arbiters of what is reasonable. To describe practitioner’s fees as ‘regulated’ in such circumstances is misleading. That said, the Review Panel did not recommend anything that moved away from any of the lightweight regulation of practitioner’s fees that does occur.

Secondly, that the determinant for recovery of costs due under a costs order should remain the yardstick of ‘fair and reasonable’ is not in itself contentious. The Review Panel’s recommendations are concerned with creating a costs assessment that is expeditious. From a systemic view, expeditious is a reasonable and laudable aim. However, as has been noted above, quick cheap justice is likely to be rough justice. From the perspective of the party that is to receive costs, ‘justice’ is likely to diminish as the speed of the system increases. Further, to provide consistency in assessing what is fair and reasonable, the Review Panel recommended introducing guidelines as to what ‘would ordinarily be allowed on party/party basis’ for some of the fundamentals of legal work. Such guidelines, in the context of practitioners being able to contract out of them by way of a costs agreement, may not be seen as ‘fair and reasonable’ by the costs recipient who will find that he or she is increasingly out of pocket on what was actually spent on the litigation. That said, this thesis supports the recommendations to require the return of scales of costs, albeit in a limited way and under another name.

Lastly the Review Panel noted that it could not move away from the ‘user pays’ system. As will be seen below, its recommendations, if adopted, would do just that. How much of the justice system should be user pays is not a question this thesis attempts to answer.

---

564 Prior to 1994 a practitioner who defaulted in costs disclosure faced having the costs agreement set aside and his or her bill assessed against the scale. This remains the case in Western Australia but in New South Wales a default in costs disclosure that leads to a costs agreement being set aside leads to the bill in question being assessed against the yardstick of ‘reasonableness’. The differences that arise in such situations are explored in 4.6 below.
Nonetheless, it will be argued below that if the Review Panel’s recommendations are adopted the costs of running the assessment system will be significantly redirected away from the user and onto the costs assessment system, and thus onto the taxpayer. This may be a good or bad thing, but any Parliament that institutes Reforms should have a clear idea of what the full effect of those Reforms might be.

3.13.3: The 2011 Recommendations: the suggested Reforms
As noted above, the Review Panel’s recommendations are presented in an accessible format that follows the chronological flow of the costs assessment process. To some extent this thesis will follow that flow. However, as there is a great deal of interplay and interdependence among the recommendations there is necessarily some significant blurring of the boundaries between the areas of reform in the discussion in order that the overall effects of the recommendations can be understood.

3.13.3.1: Suggested Reforms: Under the Court’s wing and an increased workload for the Manager Costs Assessment
One of the fundamental aspects of the Draft Report recommendations is that they would take the costs assessment scheme and bring it back, to some extent, into the judicial process. The Draft Report falls short of recommending that costs assessors become court officers who are carrying out a judicial function. Rather, the Manager Costs Assessment (MCA) would be given a much larger role in the assessment process that would make him or her directly responsible for a range of decisions that are currently either the responsibility of the costs assessors or the subject of application to the court. Those decisions would be reviewable as if the MCA was a Registrar of the Supreme Court. This shift is designed to streamline the assessment process, as the Review Panel felt that ‘a more centralised control of the assessment process at an early stage can contribute to reduction of delay’. However, and despite the Review Panel being very clear that it had not been given a license to depart from the user pay principle, shifting a large amount of work away from assessors who charge the

---

565 Arguably, if the system is further reformed to make it cheap and quick, and thus less fair to a costs recipient, subsidising the cost of accessing the system increases the level of fairness that a costs recipient receives.
566 Supreme Court of New South Wales, above n 557, 104. See Recommendation 49.
567 Ibid 46 [3.1.13].
parties a direct hourly rate and onto the administrative structure that is (notionally) funded by filing fees does have that effect. The Review Panel does not expressly address this, but it does note that it ‘contemplates a greater role for the MCA than under the present regime’. 568

3.13.3.2: Suggested Reforms: Encouraging rapid resolutions

Under the recommended application process there would be an initial filing fee, which the Review Panel describes as ‘say $250.00’. 569 The party that seeks assessment, being the costs recipient under a costs order, a disgruntled client or a legal practitioner whose bill remains unpaid, would pay that fee as part of a valid application. The Review Panel describes that fee as being ‘to cover the costs up to early assessment’. 570 Once the 28 day period in which the respondent can reply had elapsed the MCA would issue an interim certificate for any costs not in dispute.

At this stage, or at any stage after receipt of the application, the MCA would have the power, under his or her own volition, or on application from one of the parties, or from a costs assessor if the process of assessment had commenced, to direct the matter to an ADR procedure. 572 The Review Panel recommended that the MCA ‘maintain a panel of suitably qualified persons, which could include the Office of the Legal Services Commissioner, and persons also appointed as assessors for that purpose’. 573 The Review Panel was silent on the costs of such dispute resolution. These recommendations expand the current provisions allowing the MCA to refer disputes to mediation. Currently the MCA’s powers in that area are more specifically related to disputes between practitioners and clients and are only in relation to disputes are in relation to sums of less than $10,000.00. 574 As parties to a dispute

568 Ibid.
569 Ibid, Summary of Recommendations, 8, 14
570 Ibid.
571 The Review Panel addressed issues relating to service of the application on the respondent, as raised in (among others) the Legal Aid submissions. The Review Panel’s recommendations as to reform of the service process adequately address those concerns and are not in themselves contentious, although it should be noted that this is an area where the Manager, Costs Assessment would have increased workload, and thus increased expense: Supreme Court of New South Wales, above n 557, 14. See Recommendations 5, 6.
572 Supreme Court of New South Wales, above n 557, 61. See Recommendation 22.
573 Ibid. See Recommendation 23.
574 Legal Profession Act 2004 (NSW) s 336. This section is in some ways ambiguous, as subsection 2 refers to sending a dispute about a bill to mediation if the bill is for less than $10,000.00, and read on its own it would seem to include a bill of costs challenged in a party/party assessment. When read in context with the rest of the
are currently required to file a statement to the effect that mediation is not likely to produce a settlement and the Review Panel has not recommended that that requirement be removed, it is questionable how effective such referrals would be if they did not come at the request of the parties.

Assuming that the application is not sent off for ADR, the MCA would then send the matter file to a costs assessor for a contested assessment if the costs respondent had provide a reply within the 28 days allowed, or for a default assessment if they had not. This reform has the effect of making that portion of the costs that is not in dispute payable forthwith, and will go a long way towards stopping parties using the assessment process as a delaying tactic. There will be some issues with disputes between practitioners and unsophisticated or unrepresented clients as in such situations the clients are likely to insist that the problem is with the whole bill, despite the Review Panel recommendations that applicants and respondents both particularise their concerns about the bill ‘so far as reasonably practicable’. The process of identifying that amount not in dispute and issuing the certificate of determination for that amount is workload that will fall on the MCA or his or her delegates and will be some of the works covered by the $250.00 filing fee.

In a default assessment the assessor is to allow the costs as claimed (or allow those costs not subject to objection if the applicant was a client challenging his or her own practitioner’s bill), unless those costs were ‘manifestly unreasonable’. A default assessment is akin to a summary judgment, and if the Review Panel’s other recommendations as to reasonable service provisions are adopted a default assessment would be a reasonable way to help stop the costs assessment scheme from being used as a time wasting mechanism.

section it seems that the MCA’s power to refer a dispute to ADR does not currently extend to party/party disputes.

575 Ibid s 354(3).

576 The MCA would have the power to extend that time, and his or her decision would be reviewable as if he or she was a Registrar of the Supreme Court. See Recommendation 12(b) and Recommendation 49.

577 Supreme Court of New South Wales, above n 557, 49. See Recommendation 12(c).

578 Ibid 47. See also Recommendation 12: at 48-49.

579 Ibid 49. See Recommendation 12(d). The constraint that costs not be manifestly unreasonable means that a default assessment is not a rubber stamp and that some form of assessment must occur. This will come at a cost as the assessor charges an hourly rate, and his or her costs will have to be borne by one of the parties, and in this case it would be most likely the paying party, with the exception of a client application where the costs would generally be subtracted from what was owed to the practitioner.
If the assessment was contested the application would be subject to an early assessment.\textsuperscript{580}
Early assessment is a key aspect of the Review Panels recommendations. Early assessment is akin to provisional assessment as practiced in the Federal Court and in Western Australia. The Review Panel does not go into any great detail about how early assessment is to be performed, but it did consider that early assessment ‘should require much less time and work of a costs assessor than full assessment’.\textsuperscript{581} The costs assessor doing an early assessment would have access to the submissions provided with the application and the respondent’s response to those submissions, and, if he or she so chooses, can direct the parties to attend (by telephone conference or in person) a confidential conciliation conference before the early assessment is carried out.\textsuperscript{582} The discretion to hold a conference imports aspects of ADR directly into the assessment process, and it would seem likely that in some circumstances such a conference would be a successful mechanism for resolving a dispute. That said, assessors are paid at an hourly rate and a conference, with an early assessment if the conference is not successful, will come at some significant cost to the party paying the costs of the assessment process.

As for the early assessment process itself, the Review Panel did not provide much direct guidance of how it would occur. However, the Review Panel did note that although

\begin{quote}
\begin{center}
it seems to have been an underlying assumption of the Scheme when introduced that experienced practitioners would be able to make a global determination of what a particular piece of legal work should reasonably cost, …without the need for the kind of detail that had been customary in the taxation of bills of costs…
\end{center}
\end{quote}

assessment had instead always been a detailed inspection of the minutia of legal works.\textsuperscript{583}

The Review Panel noted that submissions it had received ‘advocated provision for

\textsuperscript{580} Ibid 52. See Recommendation 13. There are a number of significant differences with early assessment as recommended in New South Wales and provisional assessment in Western Australia, one being that the system being recommended for New South Wales puts the decision as to whether or not to have an early assessment or whether to proceed to a full assessment on the costs assessor, and the Review Panel’s recommendations seem to consider that early assessment will be the default position. In Western Australia provisional assessment is at the election of the parties.

\textsuperscript{581} Ibid 51.

\textsuperscript{582} Ibid 52. See Recommendation 13.

\textsuperscript{583} Ibid 32 [1.4.2].
assessment without resort to detailed itemisation and it obviously had some sympathy for that view. The Review Panel, despite being alert to tensions between global assessment and genuine fairness, considered that ‘global assessment by a costs assessor should be permissible’. Although the Review Panel’s discussion about this issue was in the context of the assessment process as a whole it seems likely that early assessment of costs would be a global process, albeit of the costs that are actually in dispute rather than of the totality of legal works represented in the bill of costs.

Either party will be able to object to the result from an early assessment. However, this is where the key reform that will act to stop costs disputes from progressing through to full assessment occurs; the objecting party will have to pay the balance of the fee for assessment at the time of making the objection. That fee would be ‘the difference between the initial filing fee and (say) 1% of the costs in dispute’. As well, the party who wishes to object to the early assessment must make a confidential offer of settlement to the other party and if it does not better that offer on the full assessment then that party will ‘pay the [not inconsiderable] costs of the assessment from that point’.

For disputes concerning smaller bills the second component of the fee is not a large sum. The intuitive way to determine that amount seems to be that one would subtract the $250.00 paid at the initiation of the process from the 1%, but with a $10,000.00 bill the second part of the fee would be therefore be -$150,00, and the objecting party would be due a refund. Despite this confusion, if the bill is large, and bills can run into millions of dollars, the second part of the filing fee could be considerable. That said, and as will be seen in Chapter Four, only 8.5% of party/party bills filed in New South Wales in 2005 were for a sum above $100,000.00. However, as well as paying the second part of the filing fee, if the party who objects would have to either pay the amount assessed on full assessment, or repay an amount

---

584 Ibid 55 [3.4.1].
585 Ibid 57 [3.4.6].
586 Ibid 52. See Recommendation 14.
587 Ibid.
588 Ibid.
590 Chapter Four does not break the data down to a level where this is fully illustrated, but the raw data the informs Chapter Four shows that there were only 4 party/party bills filed at between $500,000.00 and 1,000,000.00 and only one filed for above that amount.
on full assessment, the default position leaves that party having to ‘pay, or repay or give acceptable security for, the amount of the early estimate as a condition of objection’”. 591

This combination of mechanisms will almost certainly stop a significant number of applications from going through to a full assessment. It would be a very brave or very stubborn party that would be willing to say in effect ‘go ahead, do the assessment, I am betting that you got it wrong when you did your early assessment’. Early assessment will provide resolutions that are quick and relatively cheap, but they are likely to be done in some sort of global way, and in accordance with guidelines as to reasonable costs promulgated by the Costs Assessors Rules Committee. 592 As a litigant’s lawyer will usually have contracted out of those guidelines, as noted above, it seems unlikely that winning litigants will be able to recover all of the costs that they (reasonably) spent on their successful legal action.

If this view is correct, and a significant amount of the costs disputes that enter the costs assessment system do not go through to full assessment, then the usual amount of money collected by the scheme as filing fees will be (say) $250.00 per matter. The Review Panel second part of the filing fee is described as ‘to cover the costs of full assessment’ 593 but that appears to be a misnomer, as the costs of a full assessment are mostly the costs assessors’ fees for service yet those fees will be charged to whoever is responsible for paying for the assessment at a rate of ‘at least $250.00 an hour’. 594

At this point it is worth exploring the contention made at 3.13.2.3 above; that the Review Panel’s recommendations depart from the user pay principle. As has been noted, the Review Panel’s recommendations, sensible as they well may be, will create a good deal more work for the MCA and his or her delegates, which will be made up of the administrative staff of the Court based Costs Assessment scheme. If the bulk of assessments do not go past early assessment the cost to the paying party will be a filing fee of (say) $250.00 and whatever the hourly rate the costs assessor has charged for his or her work. This means that the Costs

591 Supreme Court of New South Wales, above n 557, 52. See Recommendation 15.
592 Ibid 76. See Recommendation 34. The Review Panel recommended that the Costs Assessors Rules Committee include a judge of the Supreme Court and a judge of the District Court (Recommendation 50).
593 Ibid Summary of Recommendations 8, 14.
594 Ibid 108. See Recommendation 56.
Assessment Scheme itself, as the overarching administrative body, will only be taking in that initial filing fee to cover its expenses. Those expenses would include salary costs, running costs such as mail and telecommunications, the costs of the office space it occupies and the costs of dealing with assessors. If the volume of applications for 2011 is used as a baseline, and if all assessments are finalised without a full assessment (a best case scenario in terms of the operation of the scheme) then the Cost Assessment Scheme would have had revenue of $424,250.00 from initial (non-review) applications. To put this further into context, the Costs Assessment Scheme would be expected to do all its share of the work involved in a costs application that terminates after an early assessment for the same sum that the Review Panel has recommended as a reasonable amount to pay a costs assessor for one hour of work, $250.00. The cost to applicants would of course be higher (and even much higher) than that baseline fee of $250.00, as they would not only pay for the assessor’s time spent in the run up to the early assessment (which may or may not include a conference) and the time spent in that assessment, but also the professional costs of preparation for either the application or the response. However, regardless of what the individual user pays overall, it is clear that either the court or consolidated revenue is going to have to further subsidise the costs assessment scheme, and in such circumstances it cannot be accurately described as ‘users pays’.

3.13.3.3: Suggested Reforms: ‘guidelines’ a partial return to scales

Matters that go on to a full assessment process, either because a party objected to the early assessment or because the costs assessor considered early assessment unsuitable, are not as directly affected by the Review Panel’s recommendation as are the procedural steps that precede such an assessment. However, as noted above, assessors would no longer be left as the sole arbiter of what was ‘reasonable’ as the Review Panel considered that the Costs Assessors Rules Committee (CARC) should ‘develop and promulgate guidelines for assessors’. Despite not saying so directly, and as is illustrated by nature of the works (below) that the Review Panel suggested should be the subject of guidelines, it appears that the

595 There were 1697 applications for assessment in 2011, and a further 220 applications for a review of assessment: Supreme Court of New South Wales, above n 557, 31 [1.3.6].
596 Ibid 108. See Recommendation 56.
Review Panel has recommended a vigorous investigation as to whether there should be a return to scales of costs.

The rationale for abandoning scales of costs was set out above in this chapter, and this thesis takes the view that the rationale was deeply flawed. As the Review Panel’s recommendation in this instance is a radical departure from the 1994 Reforms, the recommendation is worth setting out in full. Recommendation 34 reads:

“The CARC (in consultation with the relevant stakeholders) develop and promulgate guidelines for assessors on whether, when and in what circumstance, and/or at what rate frequently occurring items would ordinarily be allowed, on party/party assessments, including:

a) hourly and daily rates for practitioners if varying seniority and in varying locations;
b) office overheads such as copying, scanning, telephone, faxes, travel expenses, and administrative work,
c) agency search fees and filing fees;
d) research time,
e) reviewing time;
f) conferences between lawyers for the client;
g) Briefing senior counsel;
h) Retaining experts; and
i) Retaining agents.”

It seems likely that those guidelines will re-create the issue that dogged the old scales of costs; that a gap will grow between what the practitioner charges under the costs agreement and what the litigant recovers on the party/party order. It is important to note, in context of this thesis’s contention that the Review Panel has abandoned the view that litigants with the benefit of a costs order should recover all monies that have been reasonably spent on litigation under that order, that this recommendation only relates to party/party assessments.

If this recommendation is adopted and guidelines as described above are produced, such guidelines would also be a useful measure for assessors dealing with disputes between clients and their own practitioners where there is some default in either the costs agreement or the

---

597 Ibid 76. See Recommendation 34.
disclosure regime. The Review Panel did not recommend that the guidelines be applied to assessment of disputes between clients and their practitioners. As noted above, the Review Panel claimed that it could not change the basic goalposts of regulation (which we have seen involved no regulation once a practitioner complied with the rules governing costs agreements). In this instance the Review Panel has missed an opportunity to move towards regulating those fees in circumstances where regulating them is sensible; where a costs agreement falls away and there is a gap between what is allowed under the guidelines and what is charged under the (invalid) costs agreement. In such a situation applying the guidelines would be an easily used sanction, much better than the current position where an individual assessor is required to determine his or her own idea of reasonable costs in those circumstances.  

Although this thesis argues that a return to some form of scales is a beneficial reform, it is less than ideal to task the CARC, ‘in consultation with relevant stakeholders’ to develop the costs guidelines. The CARC is made up of legal practitioners, and will have two judges added to its membership if the Reforms are adopted. Having the CARC determine the guidelines means that legal practitioners will be in charge of deciding what legal practitioners should be charging. While those practitioners would have the guidance obtained through consultation, and the input of the two judges, the Legal Fees and Costs Board, as it was constituted before the 1994 Reforms, was much better equipped to set reasonable costs. Setting costs is not particularly within a judge’s area of expertise, and should not be left to legal practitioners. With respect to the Review Panel, this particular aspect of their

---

598 In Western Australia the scales of costs are static across the state. Law firms operating out of the Perth city centre have higher overheads than do firms operating in country towns. Practitioners with lower overheads are more likely to work at or close to scale rates than are their city centre brethren. For that reason a country practitioner whose costs agreement falls away suffers less of a sanction than does a city practitioner in the same situation. The Review Panel’s recommended that hourly and daily rates be set for ‘varying locations’ and if that recommendation is adopted an assessment against a New South Wales guideline may act as a more universal sanction than does an assessment against a Western Australian scale. 

599 Supreme Court of New South Wales, above n 557, 76. See Recommendation 34. 

600 The chairman of that board was a judicial member of the Industrial Commission of New South Wales, one board member was a practicing solicitor and the other two were ‘persons, (not being practicing barristers or practicing solicitors), having experience in, and knowledge of, wage fixing, economics and associated matters’: Legal Practitioners Act 1898 (NSW) s 20B, as inserted by Legal Practitioners (Solicitors Remuneration) Amendment Act 1984 (NSW) sch 1(3). The Legal Fees and Costs Board was reconstituted under the Part 11 Division 2 of the Legal Profession Act 1987(NSW).
recommendation to reintroduce costs guidelines appears to be a return to what the New South Wales Parliament called the ‘bad old days’ of scales that produced the ‘crisis’ of 1984 (discussed at 3.3.1 above) and the move to an expert body taxed with determining costs.

3.13.3.4: Suggested Reforms: Determinations
Once a costs assessor completes a costs assessment he or she issues a certificate of determination for costs that are unpaid and that certificate can be registered with a court and which can be executed as if it were a judgment.601 The Review Panel’s suggested Reforms for the use of determinations are not contentious, and act to ensure that liability of interest on unpaid costs is recoverable under a determination,602 to ensure law firms that have costs orders against them pay them promptly (and allowing the client, if he or she is owed money, to receive the certificate of determination before those costs are paid).603 It also clarified the scope duty to provide reasons.604

The Review Panel has also recommended that the assessor’s discretion to award the costs of the assessment process is given a wider play, allowing the assessor to excuse a law firm that has failed in its disclosure obligations to avoid the full costs of the assessment process if it is fair that is should do so.605 The Review Panel noted that ‘given the extreme technicality and the lack of clarity in the Division 2 disclosure requirements and the onerous nature of the requirements’ a law practice can have the costs of assessment awarded against it for a minor disclosure that had nothing to do with the costs being assessed.606 Further, the Review Panel recommended that the assessor should be allowed to award the costs of practitioner assessments against the paying party, as currently they do not have the power to do so.607 If more than 15% is assessed off a practitioner’s bill the practitioner has to pay the client’s costs, but the practitioner has to bear his or her own costs in any event. The fact that the client is only ever liable for his or her own costs provides ‘no costs incentive for a paying

601 Legal Profession Act 2004 (NSW) s 368(5). If costs are to be repaid, as may happen when a client challenges a bill he or she has already paid, the certificate is proof of a debt: at s 368(4).
602 Supreme Court of New South Wales, above n 557, 80. See Recommendations 37-38.
603 Ibid, 84. See Recommendation 41.
604 Ibid 92-93. See Recommendations 42-44.
605 Ibid 84. See Recommendation 40.
606 Ibid 83 [4.3.9].
607 Ibid 84. See Recommendation 39.
party to settle a costs assessment or to conduct it expeditiously other than whatever future costs that party may incur him or herself. It seems fair that a client that refuses to pay and seeks assessment or thus forces the practitioner to apply for assessment, in circumstances where the bill is not significantly reduced, should have to pay the practitioner’s costs of the process and interest on those costs for the period of delay.

3.13.3.5: Suggested Reforms: Reviews and Appeals

The Review Panel commented that it did not receive much in the way of direct or constructive submission about the review process, although there was feedback that the process was ‘slow, cumbersome, confusing and expensive’. Nonetheless, the Review Panel identified key deficiencies in the process and addressed them.

The current position is that the assessment process enlivens a right of appeal to the District Court as of right if the appeal is based in a question of law. This is a direct route of appeal that does not require the applicant to first use the internal review process, and is essentially a de novo hearing in which the Court can affirm the original assessment, make its own determination instead, or remit the application to the assessor for re-determination. A further right of appeal, requiring leave, is available to the District Court if the assessment was between a client and a practitioner, or to the court or tribunal that made the costs order that founded a party/party assessment is also available. The current routes of appeal are ‘complex and confusing’ and can (but according to the Review Panel rarely do) result in appeals to courts or tribunals that have little expertise in costs assessment.

Firstly, and probably to the relief of the courts, the Review Panel recommends that the first level of review be limited to review by a review panel and that such a review be limited to the narrow issues raised in the review application, rather than requiring that the panel review

608 Ibid 83 [4.3.12].
609 Ibid 95 [5.1.3].
610 Legal Profession Act 2004 (NSW) s 384.
611 Ibid.
612 Ibid s 385.
613 New South Wales Supreme Court, above n 557, 100 [5.3.4].
614 Ibid 100 [5.3.5].
615 See Christopoulos v Angelos [2005] NSWSC 1029 for an example of judicial restraint in the face of a complete waste of the Supreme Court’s time. See also, more recently, Satchinthanantham v Jackson Smith Lawyers Pty Ltd [2011] NSWSC 412.
the entire assessment either specifically or globally.616 This would improve the current situation where applicants are allowed to bypass the review panel and proceed directly to the relevant court.617 This had meant that the court had been dealing with matters that could have been resolved elsewhere. This may in part have been because applying to the court was, in some instances, cheaper than applying to the review panel; a court hearing is heavily subsidised while the review panel charged an hourly rate.618 The Review Panel recommended a basic and procedurally fair process that would be reasonably expeditious, with the applicant detailing the reason for appeal with supporting argument, the respondent being permitted to respond to the application and the applicant then getting a final right of reply.619 The Review Panel did not further discuss the internal review process directly, though some of its other recommendations, going to the publication of reasons for decision, and the qualification and training regimes for costs assessors, would apply to the review process as well as to the initial assessment processes.

The Review Panel noted that the Supreme Court has traditionally been in charge of supervising practitioners’ costs, but that since taking over the jurisdiction the District Court had developed expertise in the area of costs generally.620 For that reason, if matter was not finalised at review the Review Panel recommended a split system where both courts had jurisdiction. The Review Panel recommends that smaller matters (by leave if the amount in dispute is less than $25,000.00) are taken on appeal to the District Court and larger matters go to the Supreme Court (by leave if the amount in dispute is less than $100,000.00).621 It

616 New South Wales Supreme Court, above n 557, 98. See Recommendation 46.
617 Legal Profession Act 2004 (NSW) ss 384, 385. See DCL Constructions v Di Lizio [2007] NSWSC 653 as an example of why such a right can act to waste the Court’s time.
618 See, for example, Stanizzo v Grpcel [2005] NSWSC 1185 where Associate Justice Harrison noted that ‘The practitioner’s counsel submitted that because the issue was s discrete one, this matter would be more conveniently and inexpensively determined in this jurisdiction rather than seeking redress from the costs Review Panel’: at 9.
619 New South Wales Supreme Court, above n 557, 99. See Recommendation 47.
620 Ibid 100 [5.3.6].
621 Ibid. See Recommendation 48(b). The intent of this recommendation seems clear, but the discussion and the recommendation leave the situation a little less than clear. It appears that an applicant can choose either court, with the choice being influenced by whether or not leave is required. On the face of the recommendation, an applicant with a dispute for over $100,000.00 can file in either court without leave, and that it would then be up to the Supreme Court to decide the best venue for the hearing without there being any obvious mechanism that would put that question before the Supreme Court. It might have been simpler if the appeal was with leave to the District Court for disputes of up to $25,000.00 and by right for sums above that with the District Court able
also recommended elasticity in that structure, so that the Supreme Court could remit matters to the District Court or to take them from the District Court where appropriate.622 The Review Panel has recommended that the internal review, to be conducted by a panel of 2 costs assessors, be a de novo hearing in every case,623 but that any appeal to a court be a rehearing where the participants require leave to bring fresh evidence.624 A comprehensive reading of the various court decisions that have been handed down for appeals against costs assessment since the 1994 Reforms illustrates the quiet frustration that the Judges who have had to hear the appeals have sometimes allowed to leak through into their reasons.625 Many of the appeals have been misconceived, and, in short, have been a waste of the Court’s resources. This has been particularly the case where the applicant has chosen to skip the internal review procedures and gone straight to an appeal.

The Review Panel’s recommendations in relation to the review and appeal process are eminently workable. If they are adopted, and the recommendations surrounding early assessment are also adopted, the volume of appeals from costs assessment determinations should drop off significantly.

3.13.3.6: Suggested Reforms: Costs Assessors
As noted at 3.3.1.1 above some of the submissions before the Review Panel were scathing about the lack of expertise demonstrated by some of the costs assessors, and there was a strong view that the assessors lacked any real consistency among themselves in terms of what they would and would not allow on assessment. However, the Review Panel’s discussion noted a submission from a costs assessor who argued that assessors only dealt with matters from areas of legal work where they had personal experience,626 and the Review Panel noted to refer matters upward if they were complex, and by right to the Supreme Court for disputes over $100,000.00 with the Supreme Court able to remit matters that fall within that range but are less complex downwards.

622 Ibid. See Recommendation 48(c).
623 Ibid 101 [5.3.10].
624 Ibid 100. See Recommendation 48(d).
625 Judges are usually reticent as to their personal view of a case they are presiding over, but see for instance May v Hullah & NRMA Ltd & Anor (Unreported, Supreme Court of New South Wales, Greenwood M, 22 October 1996) 22, where Greenwood J, giving his reasons for finding against the appeal from a determination of a costs assessor noted that ‘I am informed that the sum involved is small but the matter is being argued on principle.’ Greenwood J, described the evidence before him in that matter as ‘of little help’, ‘equivocal’ and, more often ‘no evidence’.
626 Supreme Court of New South Wales, above n 557, 105 [6.3.6].
that the current pool of assessors were deliberately chosen from very diverse practice backgrounds.\textsuperscript{627} The Review Panel’s recommended that costs assessors be required to prove that they had ‘adequate understanding of the 2004 Act and the Legal Practice Regulations 2005, legal practice and costs practice’ as part of selection process.\textsuperscript{628} Assessors would also have to provide referees as to their ‘relevant knowledge and competence’.\textsuperscript{629} The Review Panel also recommended a suite of mechanisms, including an annual seminar, circulars with updates when necessary and an online forum where assessors could discuss issues that arose in their work, to ensure that costs assessors have access to regular continued professional development.\textsuperscript{630} If adopted, these mechanisms, in conjunction with the guidelines as to costs and the publication of assessors’ reasons discussed above, should adequately address concerns about both competence and consistency.

The Review Panel also recommended that costs assessors be paid more. Despite the Office of the Legal Services Commissioner noting that the current rate of $192.50 an hour was too high for some applicants,\textsuperscript{631} the Review Panel noted that the hourly rate for costs assessors had remained static since the 1994 Reforms It recommended that costs assessors be paid ‘at least $250 per hour’.\textsuperscript{632} There are no scales of costs in New South Wales, but costs assessors must be senior practitioners to be appointed,\textsuperscript{633} and the current scale rate for a senior practitioner in Western Australia is $451.00 per hour.\textsuperscript{634} Nonetheless, if that new rate is adopted, the internal review process, which requires a panel of two assessors, would cost at least $500.00 an hour. At that rate review would quite quickly mount up to an expensive exercise. To put this into perspective, the current standard (non corporate) fee for allocating a

\begin{itemize}
\item \textsuperscript{627} Ibid 106 [6.3.8].
\item \textsuperscript{628} Ibid 108. See Recommendation 51.
\item \textsuperscript{629} Ibid. See Recommendation 52.
\item \textsuperscript{630} Ibid. See Recommendations 53-55.
\item \textsuperscript{631} Ibid 107 [6.3.17].
\item \textsuperscript{632} Ibid 108. See Recommendation 56.
\item \textsuperscript{633} \textit{Legal Profession Act 2004 (NSW) sch 5 (1)}, which requires that a practitioner have five years post admission experience to be eligible for appointment as a costs assessor.
\item \textsuperscript{634} \textit{Legal Practitioners’ (Supreme Court) (Contentious Business) Determination 2012 (WA) cl 8 (Table A)}. 
\end{itemize}
civil hearing in the New South Wales District Court with a judge and jury is $632.00 and there is a further jury fee of $459.00 for each additional day of trial.635

3.13.3.7: Suggested Reforms: an overview and some final observations

The recommendations canvassed above should be seen in the broader context of the various procedural changes that the Review Panel has suggested to expedite the assessment process. If the Review Panel’s recommendations are adopted the whole costs assessment process will be streamlined. Time limits within the process will be tightened,636 and where parties do not meet those time limits there will be summary or default assessments.637 Decisions that impact upon the process will be shifted away from the assessors and to the MCA, who will make those decisions early in the assessment process where possible.638 The bills of costs that accompany the costs assessment application will have to be in form that is readily assessable.639 Objections to those bills and any responses to those objections will need to be concise and focused.640 Where it is appropriate, assessments that are not finalised at the end of an early estimate will be done in a global way,641 and there will be a move towards ‘appropriate lump sum amounts’ for more routine types of legal work,642 with guidelines as to what those sums should be and as to what are ‘reasonable costs’ for other aspects of legal work, including guidelines as to hourly rates.643 The appeals process, particularly appeals to the courts, will be clarified and streamlined.644 The costs assessors will benefit from more formalised training645 and their decisions will be open, in an anonymous format, to public scrutiny.646

635 Fees for the District Court of New South Wales (Civil Jurisdiction) can be found at http://www.districtcourt.justice.nsw.gov.au/districtcourt/forms_fees_civil.html.
636 Supreme Court of New South Wales, above n 557. See Summary of Recommendations, Recommendations 10, 12.3, 19, 24, 25, 14-18 (Recommendation 19, which would allow electronic submission of the various documents required throughout the procedure would be particularly expeditious.)
637 Ibid. See Recommendation 12.3.2.
638 Ibid 14-16. See Summary of Recommendations, Recommendations 2, 3, 6, 12.3.
642 Ibid. See Recommendation 21.
643 Ibid 19. See Recommendation 34.
The Chief Justice’s Review of the Costs Assessment Scheme (Draft) Report 2013 has systematically addressed the various issues raised in the submissions it received. The reformed New South Wales Costs Assessment Scheme, which has been operating for 19 years, has been running for long enough that the legal profession and other stakeholders were able to provide informed criticism about its operation. It is probably to be expected that the submission the Review Panel received concentrated on defaults in the system and that those submissions gave little attention to the schemes’ many strengths. The Review Panel’s recommendations, if adopted, should rectify the defaults that had been identified in submissions.

3.13.3.7.1 Increasing the gap between what is spent on costs and what is recovered on a costs order

As argued above, this thesis takes the view that the Review Panel’s recommendations abandon one of the key drivers of the 1994 Reforms. One aspect of the recommendations is that once again there is going to be an increased gap between what lawyers charge and what litigants recover under a costs order. In some instances, this may not be a bad thing. Justice is, after all, a commodity, and it does not necessarily have to be free. It should not be so expensive that people cannot access it, but it is not necessarily unfair that a person contemplating litigation should do so knowing that even if they proved to be in the right it will come at a cost. It should be remembered that a lot of litigation is in conducted as part of a business endeavour, and thus tax deductible. In such circumstances it does not seem unfair that a business has had to pay for access to a dispute resolution mechanism.

In general it may well be good social policy that those who go to justice pay a price. However it does seem unfair that defendants, who are dragged to justice rather than choosing to go there, may still be significantly out of pocket even if completely vindicated. There are a wide range of mechanisms that can be used to deal with unfairness if it arises in this and other contexts, and access to justice is a far broader issue than can be addressed by a costs assessment scheme.

\[\text{\textsuperscript{647}}\] It may be that the courts who hear such matters are best placed to provide justice though the use of special costs orders. A court’s power to award costs is based in a discretion to do that which is ‘fit and just’, so judges

161
3.13.3.7.2: Abandoning the ‘user pay’ model
As also noted, and despite the Review Panel’s protestations, a new model costs assessment scheme as recommended would be a significant departure from a ‘user pay’ model. It may be that a trade-off, greater subsidy for more expedience in resolving costs disputes, is reasonable. However, if that is to be so then that trade-off should be clearly identified. It is not good social policy to ignore or hide the financial realities of law reform.

One drawback related to moving away from a ‘user pay’ model that is that if work is shifted towards the MCA and away from costs assessors measuring the true costs of the costs assessment scheme will become more difficult and less exact. Costs assessors are paid by the hour, and are thus likely to be careful timekeepers. The MCA is quite probably going to be overworked, and his or her focus will be on finalising disputes, not on timing them. This means that although the further subsidy may be known in the broad sense, it will be harder to quantify with any precision. As will be further discussed in the conclusion to this thesis, one of the unexpected benefits of the 1994 Reforms is that they have produced a costs assessment scheme that is remarkably ‘knowable’. The Western Australian costs assessment scheme, against which this thesis measures the New South Wales scheme, stands in stark contrast. In Western Australia costs assessment is subsumed into the court process and it is difficult, if not impossible, to work out what it costs the jurisdiction. In New South Wales it would be relatively easy to work out what the system really costs and, as Chapter Four of this thesis will show, relatively easy to investigate other aspects of the system.

3.13.3.7.3: Guidelines for client and own practitioner disputes
The one criticism this thesis would make of the Review Panel’s recommendations is that while ‘guidelines’ as to reasonable costs would be a welcome and useful tool for a wide range of reasons, it would have been preferable if the use of those guidelines had been extended to costs disputes between client’s and their own practitioners. The current default

---

648 Recommendations 2, 3, 6, 12.3, 23, 49, 50, 54, and 55 all create work for the MCA and his or her delegates. Other recommendations will less obviously do so. The current costs assessment scheme has a small staff; the recommendations are likely to result in an increased workload.
position can be reintroduced; a practitioner with the benefit of a valid costs agreement would have his or her fees assessed against that agreement.649 It would not be unfair for a practitioner who did not have a valid costs agreement, either because there had never been one or because of some default that had vitiated the one he or she did have, to have costs assessed against an objective guideline as to what is reasonable. The current position,650 where individual assessors have to determine that from their own experience, promotes inconsistency and does not necessarily act as a sanction.651 It is clear that the recommendations would increase the gap between what a practitioner charges and what a client recovers on a costs order. As such is the case, those guidelines would provide a fair mechanism for regulating practitioners’ fees and reducing that gap in the circumstances where it is reasonable to do so.

Despite the arguments originally mounted in favour of abolishing scales, using guidelines as default regulation of practitioners’ fees would not be anti-competitive. If practitioners wanted to increase market share they would be able to charge below the rates set out in the guidelines in order to do so. To be competitive, a market must be informed, and the guidelines would provide a useful source of information to legal consumers.

The only real regulation currently in place rests with the costs assessor, who can determine whether or not the practitioners are excessive to the point of being unreasonable and has a discretion to reduce fees if there has been a default in disclosure. By failing to recommend guidelines that also govern practitioners’ fees in the absence of a valid costs agreement the Review Panel has implicitly supported the current unsatisfactory form of regulation, which rests in the subjective view of an individual costs assessor.

3.14 Conclusion

This chapter has traced the history of costs assessment in New South Wales with a particular focus on (and analysis of) the 1994 Reforms through to their first real review in 2011-2013. Despite it seeming that the Parliament responsible for the 1994 Reforms did not really know

649 Legal Profession Act 2004 (NSW) s 361.
650 Ibid s 328(5).
651 See also Recommendation 32, where a costs assessor would have to determine a reasonable sanction for a default in the disclosure regime: Supreme Court of New South Wales, above n 557, 19.
what it was doing, and as will be seen by the comparisons provided in the following chapter, the reformed costs assessment scheme in New South Wales has proved to be a useful and cost effective way to settle costs disputes. If New South Wales Parliament accepts the Chief Justices’ Review of the Costs Assessment Scheme recommendations and as a new model Legal Profession bill may well be adopted in the near future, costs assessment in New South Wales will soon be a substantially different, and perhaps much more expedient process to what it is today.

3.14.1 One reservation
This thesis does argue that despite the 1994 Reforms being generally sound, and sensibly altered where they proved to be unsound, there was, and still is, one fundamental inadequacy in their approach. Scales of costs, which were mistakenly construed as anti-competitive, should never have been abandoned.

Lack of information about legal fees, and the effect that has on the market, is a recurring theme in New South Wales. The Legal Fees Review Panel Report: Legal Costs in New South Wales (2005), commissioned to address ‘the perception that lawyers’ fees are too high, and that the level of these fees makes access to justice unduly expensive’ noted that ‘one of the major contributing factors to this perception is the lack of publicly accessible information on the costs structures of legal practices’. One of the recommendations of that report was that:

A formal and independent research capacity should be established within the Office of the Legal Services Commissioner to examine and publicly discuss issues of law firm economics and legal practice management, and their economic impacts on the overall legal and justice systems.

In light of that reported perception, it is hard not to conclude that the costs assessment scheme in New South Wales would be more transparent if there were benchmarks against

---

652 The 2004 abolition of uplift fees for damages actions is an example of where problems within the 1994 Reforms were dealt with once they became obvious.
653 Nor were they in full, as noted above, some areas of legal work in New South Wales are still governed by scales of costs. Further, the limitations on recovery of costs for personal injury matters are also a form of scale.
655 Ibid. See Recommendation 37.
which costs were assessed. The current benchmark is the individual assessors view of what is reasonable, a view reasonably tempered by a range of factors that are set out in the 2004 Act. However, there are no overarching benchmarks to which assessors can refer. The assessor is a practitioner, and as such the public would be excused for thinking that the assessor’s view as to what costs are reasonable is likely to be in line with what the profession as a whole thinks of as reasonable. The profession’s is arguably not a particularly objective viewpoint.

As noted above, and, despite strong disclosure regimes ensuring that they are properly informed as to what they will be charged, the public do not have ready access to what the general charge out rates are in the industry. It is very difficult, especially for infrequent users of the legal system, to bargain for legal services, in part because the public does not have enough information to bargain.

It seems certain that regularly updated benchmark costs, applied by assessors as a discretionary guide and made readily available (and properly explained) to the public would ensure that the indemnities that winning litigants enjoy under a costs order would be founded on objective and trusted measures of reasonableness. The inconsistencies identified for return rates in the current costs assessment scheme promote uncertainty and make it more difficult to make objective decisions about the efficacy of litigation.

It is sound policy that legal practitioners lose the benefit of the costs agreements that they draft to confirm their fees and protect their interests if those agreements are in some way unreasonable. The same holds for situations where the practitioner defaults in the disclosure regime. It is also sound policy to have some objective measure of what the practitioners should be paid in those circumstances. One might expect that the costs assessors put in the position of having to make those determinations would be relieved to have some guidance as to what was appropriate. In any event, those measures should not be left to the individual determinations of fellow legal practitioners.

Although costs assessment in New South Wales has been moved, at least in the first instance, outside judicial purvey, benchmarks for costs would give costs assessors some of the same guidance judges get from statute law. Costs assessors would be in a position where they
applied benchmarks, albeit with some necessary and creative discretion, rather than having to
determine them for themselves.

Benchmark costs, properly arrived at and properly packaged so that the consumers of legal
services can readily understand them, would encourage competition and empower legal
consumers. Costs assessors, being legal practitioners, are not the people who should be
determining the benchmarks. An expert body, made up along the lines of the Legal Costs
Board as constituted before the 1994 Reforms, and including representation from the legal
profession, would better provide rational and objective measures of what practitioners should
reasonably charge for their services. Those measures would help standardise party/party
returns and provide a default for practitioner costs.

Scales of costs, rebadged as benchmark costs or guidelines, properly explained and applied
would strengthen the New South Wales costs assessment regime. The recommendation for
reintroducing guidelines as to costs as contained in the draft report from the Chief Justice’s
Review of the Costs Assessment Scheme are sound, but by failing to recommend applying
those guidelines as a default measure of practitioners’ costs they fall short of going far
enough.

3.14.2: The expense of the current system in New South Wales and the ‘user pay’
principle.
One of the common complaints about the New South Wales costs assessment regime is that it
is expensive. This is particularly so with the review level of assessment. However, any view
that the reformed system is more expensive than the system it replaced overlooks one of the
key aspects of the reform. The expense of costs assessment has been shifted from the court
(and thus the taxpayer) to the users of the system. Under the old form of costs assessment
there were fees paid to the court, but those fees were in no real way related to the amount of

---

656 Scales of costs are an integral part of costs assessment in Western Australia. They provide a breakdown of
the litigation process and give guidelines as to what is a reasonable cost for each part of the process. They are
applied with discretion, and absent a special costs order they act as maxima. A full description of the assessment
process is Western Australia is provided in Annexure 2. The Western Australian scales are not well known to
the public, and while readily understood by practitioners, they are not in a format that the general public would
easily understand. It may be that competition in both jurisdictions would be encouraged if benchmark costs
were made more user friendly and integrated into the current disclosure regimes.
time or to the volume of resources that the court put into assessments. In effect, the true cost of costs assessment was unknown. After the 1994 Reforms the costs of assessment were easy to ascertain and thus easy to pass on to the people who used the system. The lawyers who did the actual assessment are now paid an hourly rate and they record their time accurately for that reason. The rate that they are paid is not unreasonable; in most cases it is a considerable discount on what they would charge for doing legal work of a similar level of complexity. The administrative structure that runs the costs assessment regime is small and efficient, and as the cost of that infrastructure is easily determined, filing fees can be charged at a level that recovers the costs of administration. A more accurate expression of the complaint about expense can probably be expressed as follows: ‘if I apply for assessment and have the costs awarded against me I will pay the true costs of having that assessment done rather than having my application subsidised as was previously the case’.

There is an argument that making a litigant (or a disgruntled client) pay the true costs of assessment is a restriction on access to justice. However, it should be recognised that justice is not something that occurs naturally, it is instead a manufactured product of a social system. There is an argument that a person who wishes to access a product should pay the real cost of that product. The costs assessment regime has a principled mechanism to ensure that people who access the system for good reason are not penalised; the assessor has the discretion to award the costs of the process as he or she thinks it just or reasonable to do so. If, in a dispute between a client and a practitioner, the bill in question is reduced by 15% or more the practitioner will pay the costs of assessment. This is eminently fair as the client has been proved right in his or her contention that the bill was too high. The situation is not so straightforward in relation to party/party assessments, where generally it is the party who is responsible for paying the costs ordered who also pays the costs of assessment, but if an assessor feels that is unjust he or she can order otherwise. If the current 15% rule was extended to party/party assessments, and there are published guidelines that allow the

---

657 As noted above, it has remained unchanged since 1994. It seems unlikely that any other area of legal work has done the same.
658 Or not, if there has been a decision to subsidise it.
659 Legal Profession Act 2004 (NSW) s 369.
660 Arguably, subsection 369(3)(c) of the Legal Profession Act 2004 (NSW) already allows for a creative sanction for situations where a party/party bill has been drawn too high. That subsection seems designed to
parties to make realistic determinations as to what costs are likely to be awarded, it may be that the volume of assessments would be dramatically reduces. The reduction would come through the parties making rational choices guided by the risks of having to pay for the process.

3.14.3 An alternate argument for administrative costs assessment

There is an argument for separating the function of determining legal disputes from the function of determining the cost of those disputes that did not arise in the parliamentary debates surrounding the 1994 Reforms. That argument is largely centred in the philosophy of an adversarial dispute resolution system. An adversarial system relies on conflict to produce truth. Having a legal system that centres on truth is no bad thing; a dispute resolution system that has to determine an individual citizen’s rights should surely do so on the basis of knowing the true story behind the conflict that has driven that citizen to enforce or defend his or her rights. However, costs disputes are not resolved because of solid truths. Cost disputes are resolved, one way or another, and in all Australian jurisdictions, around the concept of reasonableness. Adversarial costs assessments rely on scales of costs, originally promulgated by the courts themselves and more lately by expert panels. Those scales give a range of values for what are considered reasonable costs in particular circumstances and are not

operate in client/practitioner disputes, regardless of which of the parties has instituted the assessment. It is designed to stop a practitioner from ‘drawing a long bow’ when drawing up a bill, and to vindicate a client whose bill is substantially reduced. However, on its bare words, the subsection is capable of another and much more creative use. When the party that are owed costs under a costs order seek those costs, it is usually a legal practitioner who quantifies them, being either their own practitioner or a costing specialist who has been brought in to do the job. This section does seem to allow the assessor to award the costs of the assessment process against the payee’s own practitioner if it is fair to do so. It may be that a 15% reduction is too low, and the current lack of consistency among assessors in New South Wales would make such an award problematic. However, if there are objective cost guidelines that the practitioner had access to when drawing a bill that reflected his or her own work, or the work produced by that practice he or she is involved in, and if the reduction was great enough, it may be sound policy to award the costs of the assessment process against the practitioner (or firm) who provided (and quantified the cost of) the legal services. After all, if he or she had done the job properly in the first place and produced an accurate bill, there may not have been any need for an assessment process. As can be seen in the data provided for party/party assessments in New South Wales for 2005 (in Chapter Four at Figure 4.3), a significant amount of the party/party bills filed for assessment in New South Wales in 2005 were returned at less than 50% of the amount claimed. In such circumstances it seems likely that the practitioner who drew the bill had, albeit inadvertently, seriously misled his or her client as to what could be recovered on the costs order. It does not seem particularly fair that the client bear the costs of that assessment when a realistic estimate of what would be returned may have resulted in the parties settling costs rather than having them assessed.
concerned with truths per se. An administrative system of costs assessment, where an
assessor generally practices in the area of law from which the bills he or she assesses arise, is
a form of binding arbitration. Arbitration works well in areas where the dispute is around a
question of reasonableness and common use, and where the arbitrator has knowledge that
informs the determination. An administrative costs assessor will consider the file that
contains the legal works in question, and will bring his or her personal knowledge of the area
of law to bear on determining what reasonable costs are, but an administrative costs assessor
is not required to hear argument as to the truths of the matter.

It is worth noting that although New South Wales Costs Assessors are legal practitioners they
are not acting as officers of the court when they perform assessments. They are acting as
arbitrators and they make administrative decisions which a disgruntled party can challenge
on the various grounds that give a right to judicial review of an administrative decision. The
questions of law that arise in such situations are questions about the process rather than about
the expertise that underlies the determination. From a philosophical point of view this seems
a preferable way to deal with disputes that are about what is reasonable rather than about
what is true.

3.14.4: Closing:
This chapter has looked at the costs assessment regime in New South Wales as it has evolved
into a stand-alone entity. More broadly, the purpose of the thesis is to provide a comparative
analysis of costs assessment in New South Wales and in particular an assessment of how it
operates after having been extensively reformed in 1994. In order to do so it will provide
those comparisons against what is essentially the default for costs assessment, an
unreformed, adversarial assessment system that is provided by the Courts. Western Australia
still uses such a system, and the Western Australian system was explored above in Chapter
Two. Chapter Four of this thesis provides quantitative comparisons between the New South
Wales and Western Australian costs assessment regimes, and in addition it provides analysis
from which qualitative conclusions about the two different systems can be drawn.

661 Legal Profession Act 2004 (NSW) s 390(4).
Chapter Four: Comparisons between the Western Australian and New South Wales costs assessment schemes.

4.1: Overview

The main purpose of this thesis is to make an empirical determination as to whether the costs assessment Reforms that the New South Wales jurisdiction introduced in 1994 (the 1994 Reforms) achieved the desired outcomes that they were expected to achieve. In particular the thesis set out to determine if the Reforms have meant that winning litigants in New South Wales recover more of the costs of litigation than do winning litigants in Western Australia. Additionally, the thesis attempts to resolve which costs assessment system regime, as between the reformed system from New South Wales and the more traditional system used in Western Australia, provides the most benefits for courts of the jurisdiction. Lastly, the analysis provided below will be used to identify any ‘unintended’ benefits that have flowed from the New South Wales Reforms.

This portion of the thesis reports the methodology and results of an empirical comparison between costs assessment regimes in Western Australia and New South Wales. Initially it will describe the cases from which data was extracted and provide an explanation as to why there is a variation in case type between the two jurisdictions. The chapter will then describe and explain the data set; again with an explanation for why, in some cases, different types of data were gathered in each jurisdiction. The chapter will provide an explanation for and a description of the data collection. The analysis will be presented and discussed in detail and finally, the chapter will make the determinations set out above.

The data, and more particularly the comparisons drawn from the data and between the two costs assessment regimes, is at the core of this thesis’ analysis. This chapter will illustrate that successful litigants in New South Wales do, on average, recover a greater portion of the bills they file for costs assessment than do Western Australian litigants in the same position.

See Chapter One at 1.5 for a more thorough description of the purpose underlying this thesis.
However, while it is clear that the New South Wales Reforms were successful in that sense, this thesis argues that the reason for that success may not be clear cut. The thesis will also argue that an administrative system of costs assessment as introduced in New South Wales in 1994 is better suited for the determination of costs disputes than is the more traditional judicial system used in Western Australia. Lastly, and through a reflection on the data gathering process, this thesis will show that the New South Wales system carries with it the benefit of ‘knowability’ and transparency, attributes largely lacking in the Western Australian costs assessment regime.

4.2: Methodology

With the cooperation of the Western Australian Supreme Court and the Manager of the New South Wales Costs Assessment Scheme, access was obtained to either assessed bills of costs (in Western Australia) or statistics gathered on costs assessment (in New South Wales). In terms of gathering data, it was not a case of choosing the most suitable methodology. Rather it was a case of gathering the data that was both available and potentially useful for making comparisons between the two regimes. Structural differences between the two jurisdictions meant that although the same data was sought, the mechanics of getting that data were very different. In short, gathering data in Western Australia was time consuming, with the data coming from a random selection of the ‘physical’ costs assessment files. In New South Wales it was a simple matter of accessing the data for the year in question by computer as all the data points chosen were regularly captured and recorded as part of the operation of the costs assessment scheme.

The research commenced in Western Australia where the author attended at the court on a one day a week basis; in New South Wales the research was done over a one week visit to the Supreme Court. The data taken was used make comparisons between the two jurisdictions, but it was further used to make internal comparisons between the two forms of own-client costs dispute that were assessed in New South Wales.
4.2.1: Methodology in Western Australia; the practicalities

The Principal Registrar of the Western Australian Supreme Court agreed to allow the author access to the files of substantive matters that had gone to the costs assessment stage.\textsuperscript{663}

The Principal Registrar requested that the court records manager make available to the author files containing bills of costs for data extraction. After some discussion with the author as to the thrust of the research, the records manager in turn made files available from the two limbs of costs assessment; party/party assessments and client/solicitor assessments.\textsuperscript{664}

4.2.1.1: Extracting data from party/party in Western Australia

The records manager arranged for files that contained bills of costs to be removed from the normal flow of file management and made available for data collection. In practice, the records manager instructed the documents staff to put aside files that contained such bills, and where possible keep them out of the system for a week. The files extracted were passing through the filing office between interlocutory appearances in the costs assessment process or because the litigation to which the bill pertained had been finalised and the files were en route to offsite storage. Such files necessarily related to matters that had reached the cost adjudication stage, as otherwise no bill of costs would form part of the matter file. All such files were from matters litigated in the Supreme Court of Western Australia as party/party costs disputes are generally filed for assessment in the same courts where the substantive

\textsuperscript{663} It is important to note, as has been discussed elsewhere, that substantive matters that go on to costs assessment are atypical. Substantive matters usually terminate, through settlement or by way of judgment, with an order that costs be either assessed or agreed. Most disputants manage to assess costs. As costs assessments are part of the substantive matter in a party/party dispute the assessment is not recorded separately from the overall file and it is not therefore possible to tell how many assessments occur each year. Equally, it is not possible to tell what percentage of party/party matters go on to have costs assessed. Nor is it possible, in either jurisdiction, to determine what percentage of legal retainers give rise to an own-client costs dispute that goes to assessment.

\textsuperscript{664} As noted at Chapter Two at 2.5.1.2 above, solicitors in Western Australia were not able to file their own bills for assessment until given the right to do so by way of the \textit{Legal Profession Act 2008} (WA). As previously noted, the assessment of bills filed at the request of clients in Western Australia are generally known as solicitor/client assessments, but for the purpose of this thesis they have been rebadged as client/solicitor bills. At the time the data was extracted solicitor/client bills (filed by legal practitioners against their own clients) did not exist in Western Australia and no data is therefore presented in relation to them.

\textsuperscript{664} There are circumstances where a bill can be assessed in a court other than where the litigation took place, and there are tribunals that hear legal costs bills. They are exceptions to the general run of costs assessment and have not been dealt with in this thesis.
matters they originate from were heard. The document staff removed the bills of costs from the file and the author attended at the court one half day per week to extract data from the bills that had been finalised. Bills that were still in interlocutory processes were ignored. The document staff collected the bills at the end of each session, returned them to their relevant files and then those files were returned to the system. This process was random, in that the only criterion used for choosing which bills to investigate was that they were recently finalised.

4.2.1.2: Extracting data from client/solicitor bills in Western Australia

The records manager made available all of the files from client/solicitor assessments that were filed for assessment in 2005. These files, where clients had asked for assessment of the bill served upon them by their solicitors, came from the broad sweep of work undertaken by Western Australian practitioners. Unlike party/party bills, the bills from solicitor/client assessments were not limited to either litigation or matters in the Supreme Court of Western Australia.

Client/solicitor bills of costs are assessed in the Western Australian Supreme Court as a substantive application separate from any associated legal action. A total of 78 client/solicitor bills were filed in the Supreme Court in 2005, and each was given a separate filing number spanning from LPA 1 of 2005 to LPA 78 of 2005. The author had access to majority of those bills. However, only 15 of the files were finalised to the point where the complete data set could be taken. The process of collecting the data from the individual files mirrored the process used for party/party files.

---

665 This is a general rule in the Western Australian courts, but there are a number of exceptions not specifically relevant to this thesis. The Federal Courts operating in Western Australia have their own costs assessment regimes, and specialist tribunals may deal with party/party costs in their own. See for instance the *Workers Compensation and Injury Management Act 1981* (WA) s 268(2)(c) which allows for costs assessments by conciliators and arbitrators.

666 *Legal Profession Act 2008* (WA) s 295 (2). This is regardless of the nature of the legal work or the court the litigation they flowed from was heard in, if indeed the bills pertained to litigation work at all. In Western Australia a dispute between a practitioner and his or her own client is a substantive matter that falls into the jurisdiction of the Supreme Court of Western Australia.

667 Most of the rest of the files appeared to be moribund. If there had been an initial appearance the matter may have been adjourned sine die and the parties had not requested that the matter then advance. This seems likely to be because there had been some form of negotiated settlement.
4.2.2: Methodology in New South Wales: A much easier approach

The initial approach to data retrieval in New South Wales mirrored the approach used in Western Australia. The New South Wales Cost Assessment Scheme provided a workspace and access to files that were returned to the office after assessment. After a couple of days spent extracting data from the files, the author discussed his slow progress with one of the costs assessment staff, whose response was along the lines of ‘Is that all you want? We can give you all that quite easily’.

The New South Wales Costs Assessment Scheme employs practicing solicitors to assess bills of costs on a sub contract basis. The solicitors in turn enter various details, including all but one of the data points that the author was collecting, onto a statistical form provided with the files. The Costs Assessment Scheme collected and recorded that data on a database. The Cost Assessment Scheme then supplied the author with a print run for all files assessed in 2005, with the data sought (and other data) out against each file. The author in turn simply transcribed the data onto the same spreadsheet used to record the Western Australian data.

4.2.3: An immediately obvious and beneficial consequence of the 1994 Reforms

As noted in Chapter One and again in the overview above, part of the purpose of this thesis is to identify unintended consequences flowing from the 1994 Reforms.

One of the key differences between the Western Australian and the New South Wales costs assessment schemes is in the degree of transparency and ‘knowability’ of each scheme. ‘Knowability,’ in terms of the ease with which information about any given portion of the legal system can be retrieved, is clearly a desirable attribute. If the administration of justice is to be run in an efficient and cost effective way it must be possible for those responsible for managing the system to make informed decisions about what does and does not work. A system that allows for the easy retrieval of data about its day to day operation and its overall efficacy is more easily evaluated and more likely to benefit from informed adjustment than is a system where the details of operation are largely immeasurable or at least difficult to measure.

668 The New South Wales data did not include the date of the costs order that enlivened the right to assessment.
669 The author continues to regret not asking to have the data in electronic format. That would have made hours of data entry unnecessary.
The 1994 Reforms have left New South Wales with a costs assessment regime that is remarkably ‘knowable’. In New South Wales the costs assessment scheme is very well documented. It would be relatively easy to work out the annual cost of the scheme, and to break that cost down into its components.\textsuperscript{670} If there was any drive for further or deeper investigation into costs assessment or even litigation in general, assessors could easily be instructed to collect other data from the files that pass through their hands.

The Western Australian system is largely mysterious, and it is difficult to look at its operation in any detail. In Western Australia the scheme is not formally recorded; the court does not know how many party/party assessments occur, nor does it have any aggregated record of the results of the assessments. Costs assessment in Western Australia, at least on a party/party basis, is simply an unmeasured part of the substantive matter. It would be almost impossible to determine what the costs assessment system in Western Australia uses up in terms of court resources, and it was very time consuming and laborious tracking the relatively small amount of bills that provided the data for this thesis. It is not possible to say how many party/party bills of costs are assessed in Western Australia in any given year, or even in any given court. It may be that the Western Australian system works well as between the parties to each assessment and is at least efficient enough, but in Western Australia, unlike in New South Wales, there is no real way of knowing that at the systemic level.

The Parliament of New South Wales set out a number of reasons why it felt that the 1994 Reforms were needed and would be successful. At no point did they appear to entertain the idea that the Reforms would create an environment where information on the costs of the costs assessment regime and the efficiency of the individual assessor working for the scheme would become suddenly available. Nor did they realise that while files that go to costs assessment are perhaps atypical of litigated matters and legal disputes in general\textsuperscript{671}, the

\textsuperscript{670} For instance, as the New South Wales scheme employs individual assessors on a sub contract basis (at the time the data was collected in 2005 there were 82 assessors) and each assessor returns data on each file he or she handles, it is relatively easy to make judgments about the efficiency and expedience of each assessor.

\textsuperscript{671} It is trite that well over 90\% of all matters that are commenced in court settle before trial. Party/party costs assessments usually relate to matters that have gone through the full litigation process and they are atypical in that way. Further, even when there is a trial the majority of disputants are able to agree costs, so matters that go to assessment are in that way even more atypical. A retainer that ends with the client’s bill being assessed is also atypical; the vast majority of retainers do not result in an assessment. Nonetheless, party/party assessments
system they were introducing would also, through its nature, provide the opportunity to collect readily accessible data from which conclusions about the litigation process in general could be reached. However, if the recommendations contained in draft report of the *Chief Justice’s Review of the Costs Assessment Scheme* (2013) (and discussed in Chapter Three) are adopted it is likely that some of that ‘knowability’ will disappear.

4.3: The cases collected

As previously noted, costs assessments come in three basic types; Party/party assessments, client/solicitor assessments and solicitor/client assessments. 672 Table 4.1 below shows the type and number of assessments accessed from each jurisdiction.

<table>
<thead>
<tr>
<th></th>
<th>Party/party</th>
<th>Client/solicitor</th>
<th>Solicitor/client</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Australia</td>
<td>103 (87.3%)</td>
<td>15 (12.7%)</td>
<td>0</td>
<td>118 (100%)</td>
</tr>
<tr>
<td>New South Wales</td>
<td>1204 673 (81.5%)</td>
<td>176 674 (11.9%)</td>
<td>98 675 (6.8%)</td>
<td>1478 (100%)</td>
</tr>
</tbody>
</table>

Firstly, it is noted that there is a large discrepancy between the numbers of cases studied from each jurisdiction. As discussed above, this difference is due to a major difference in the two assessment regimes; the Western Australian costs assessment regime does not collect historical data, meaning only a snapshot of the files available to the author dependant on costs files in the system at that exact time were available, while the New South Wales costs assessment regime is managed in a way that allows access to a large data set with speed and accuracy. The fact that the two sample sizes are so disparate does raise the question of

---

672 For a full description of each type of assessment see the 3 annexes to this thesis.
673 There were 1457 party/party bills filed for assessment in 2005, but 253 of those bills did not provide data for this thesis as they did not proceed to assessment. See the Supreme Court of New South Wales, *Annual Review 2005* <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/scnsw%20annual%20review%202005.pdf>, 38.
674 Ibid. There were 219 client/solicitor bills filed for assessment in New South Wales in 2005.
675 Ibid. There were 329 solicitor/client bills filed for assessment in New South Wales in 2005.
whether valid comparisons can be made between them. This was addressed by removing a random sample of the New South Wales data to create a New South Wales sample that was the same size as the Western Australian sample. The extracted sample was compared to the entirety of the New South Wales data and no significant difference was found between them. This process is described more fully at 4.4.2 below.

Secondly, no cases of solicitor/client assessments are reported from Western Australia. At the time the data was extracted solicitors in Western Australia were unable to have bills of costs assessed on their own motion.676

4.4: The data extracted and the rationale as to why it was extracted.

The data extracted from the bills of costs under assessment falls into two types; data relating to monetary quantum and temporal data. The data sets were not uniform across the two jurisdictions; once again the nature of the New South Wales costs assessment regime allowed for more detailed data collection.677 A description of each data set and a rationale for why each set was collected is provided below.

4.4.1: Data as to monetary quantum

The data as to monetary quantum was related to different amounts charged on the bill of costs and to the amounts actually recovered on assessment. These data points are described, and a rationale for collecting them is provided below. The data, once collected, was categorised into quantum ranges of bills, as further described.

Table 4.2 sets out the data points as initially extracted from the bills of costs in the Western Australian jurisdiction and from the statistical reports provided by the Costs Assessment Authority in New South Wales.

Table 4.2 Data as to Monetary Quantum

676 Western Australian practitioners were given the right to initiate costs assessment through s 297 of the Legal Profession Act 2008 (WA).
677 As noted above, one of the unintended results of the 1994 Reforms was that costs assessors, who are required to provide various information about the bills they assess, have allowed the manager of the costs assessment scheme to collate and keep detailed information about every costs assessment that is filed in the system as part of the day to day operation of that system.
The quantum of the bill in dispute was the full amount sought in the bill of costs. This amount is inclusive of disbursements and the filing fee. This is the financial starting point for all bills, the amount the person filing the bill believed was the amount they were owed.

The quantum the bill was assessed at is the amount of full recovery. This includes the costs of assessment if awarded, regardless of whether the costs were claimed in the bill as filed or added on at the end of the assessment. This measure, subtracted from Q-B, allows a calculation of the percentage of the original bill that was received on the finalised assessment.

For the purpose of analysis, the data was categorised by reference to the quantum of the bills as filed for assessment (Q-B) and was expressed across seven ranges of value for Bill-Q: $1-$999; $1000-$9999; $10,000-$29,999; $30,000-$49,999; $50,000-$69,999; $70,000-$99,999; and greater than $100,000. The categories are not linear progressions; rather they represent different ‘ranges’ of litigation, from the very small through to the large. This further division was made in order to determine if trends in assessments, both internally within a jurisdiction and in comparison between the jurisdictions, operated across the full range of litigation or if they were specific within particular ranges of litigation.

4.4.2: Temporal Data
The temporal data relates to how long various stages of the assessment process took. The data points are described, and a rationale provided as to why they were collected follows in Table 4.3.

Table 4.3 Temporal Data

<table>
<thead>
<tr>
<th>Description of variable</th>
<th>Rationale for the data point.</th>
</tr>
</thead>
<tbody>
<tr>
<td>T-O</td>
<td>The date the order for assessment of costs was made. <em>(This information was not available for costs assessments in New South Wales)</em></td>
</tr>
<tr>
<td>T-F</td>
<td>The date the bill of costs was filed for assessment (in Western Australia) or the date the file was assigned to an assessor (in New South Wales).</td>
</tr>
<tr>
<td>------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>T-C</td>
<td>The date that the assessment was completed.</td>
</tr>
<tr>
<td>T-A</td>
<td>The time taken, measured in minutes, for the actual assessment. <em>(This information was not available for costs assessments in Western Australia)</em></td>
</tr>
</tbody>
</table>

### 4.4.3: Difference in data collection across the jurisdictions

It was not possible to collect data about the same temporal events across both jurisdictions. As explained in 4.2.1 above, the only way to collect any data in Western Australia was through scrutiny of individual bills after those bills had been through the assessment process. Although it was time consuming this approach did allow for a wide range of data collection. For example, in Western Australia the date that the costs order that enlivened the winning litigant’s right to recover his or her costs was extracted from the matter file that contained the bill of costs. That information was not recorded by the New South Wales costs assessment regime and so not available.

However, in Western Australia it was not always possible to determine how long the actual assessment took. Some Western Australian assessors noted the start and finish times for the appearance or appearances where the assessment took place, many did not. Of the 103 party/party bills investigated in Western Australia, only a small percentage provided enough information for the author to determine how long the actual assessment took. By contrast, in New South Wales, where assessments are done on the papers and the assessors are

---

678 Parties to a costs dispute will usually make some real attempt to settle the dispute and this time may reflect time spent in trying to reach an agreement. Alternately it may reflect delay on the part of the lawyers in preparing and filing the bill for assessment.

679 In New South Wales there was an unmeasured ‘lag’ between when the bill was filed and when it was sent to an assessor, as the date of filing was not recorded but the date of assignment was.

680 A full description of the assessment process in Western Australia is provided in annexure 2 to this thesis.
subcontractors to the assessing authority (and paid an hourly rate), each assessor reported how long the actual assessment process took. 681

4.5: The data presented

The data is presented in either table or figure format, and initially the data from both jurisdictions is presented together to make comparisons easier. Presentation of data used for internal analysis of individual jurisdictions follows. Data for party/party assessment is dealt with first, followed by the data for client/solicitor assessments. The data relating to solicitor/client assessments was extracted from only the New South Wales jurisdiction and that data is presented last. 682

4.5.1: Interpreting statistical results: a helpful guide

There are certain basic principles that need to be explained in order to facilitate the reader’s understanding of statistical results presented in this thesis.

Inferential statistics are statistics that allow an inference to be drawn about the everyday relevance of results. (In other words, can we extrapolate from the data we collected to the real world?) This is achieved by looking at the probability figure which is generated from these statistics. This is the probability of being wrong if you extrapolate from the statistical result. We obviously want this figure to be as low as possible. By convention, we are not permitted to say there is a ‘difference’ or a ‘relationship’ when the probability figure is greater than 0.05. Therefore, by convention we accept an error rate of 5 times in every 100 results.

Two types of inferential statistics are used in this thesis. Each will be explained separately.

4.5.1.1: t-tests

Testing for a difference between two means (averages) can be done by way of t-tests, which are relatively simple tests. There are three types of t-test, but this thesis only uses two of them. The interpretation of the t-tests is the same for each. The larger ‘t’ value (or result)
the greater the difference between the two means, and the smaller the probability of being wrong will be.

Single sample t-tests are used when you want to see if a smaller sample is different from the larger sample from which it was drawn. In the case of this thesis, the single sample t-tests are used to determine if a random sample drawn from the larger dataset from NSW is reflective of that larger sample. We want to see the single sample t-test results to be non significant (that is with a probability figure of greater than 0.05). This tells us that the smaller sample is not different from the larger original sample.

The second type of t-test used in this thesis is an independent sample t-test. This tests for a difference between two independent groups (jurisdictions for example). We use this test to determine if NSW and WA are truly different. We want to see the ‘t’ value as large as possible and the probability value to be as small as possible to be able to say that there is a real difference between the two jurisdictions.

The t-tests are expressed in the following manner and at the end of the written explanation of the results.

Example:

The percentage of bills returned was significantly greater in NSW than in WA \(t(210) = 4.17; p=0.002\).

\[ t \text{ value} \]

\[ \text{Probability of being wrong} \]

4.5.1.2: Correlation

Correlational analysis allows an inference to be drawn about whether one variable is related to another variable. In other words, it allows us to say whether there is a relationship between two things, such as the size of a bill and how long that bill takes to assess. Correlation is represented by the letter r and can range from -1 to 1. Correlation is reported in
the same way at t-tests and is interpreted in a similar way. The larger the $r$ figure, the stronger the relationship and the smaller the probability of being wrong. In addition, correlation has three standard ‘cut-offs’. Correlations smaller than .3 (or -.3) are said to be weak, .3 to .5 (or -.3 to -.5) are moderate, and larger than .5 (or -.5) are strong. Below is an example in the standard format for reporting a correlation.

Example:

There was a weak but significant positive relationship between the size of a bill and the length of time taken to assess that bill, indicating that the larger the bill the longer it took to assess ($r(105) = .25; p = .04$).

4.5.2: Quantum of party/party bills filed for assessment

The bulk of costs assessments in both jurisdictions involve party/party bills of costs. As previously noted, in New South Wales all party/party assessments are made by the Cost Assessment Scheme; while in Western Australia party/party costs assessments are performed by the court that heard the substantive matter that gave rise to the costs orders that enliven the right to assessment. For this reason the data from New South Wales represents all manner of party/party bills, from all of the courts of the New South Wales jurisdiction and from all types of legal work. The data from Western Australia only relates to Supreme Court litigation, and as the Supreme Court is the highest court in the jurisdiction one would expect that the quantum of the bills filed for assessment there would generally be higher than the quantum of the bills filed in New South Wales.
As is explained below, the data confounds the intuitive expectation that Western Australian party/party bills of costs will be generally trend higher than those filed in New South Wales. The opposite appears to be true.

At the lowest value category neither jurisdiction records many filings. This is as it should be. The successful practitioner whose client has the benefit of a costs order knows that using the costs assessment scheme to recover it is not likely to be cost effective if the quantum of the bill is low. Even if the bill is assessed as filed, the works the solicitor does towards the costs assessment will be charged out to the client at the costs agreement rate and recovered (if it is recovered) at scale rates. In such instances it is far better to settle costs, even at some substantial discount, than it is to have them assessed. Conversely, if the bill of costs that has been served on the losing party is reasonable, that party’s lawyer should advise that failing to settle costs and having the winner proceed to assessment will mean that the losing litigant may not only pay more to the winning party but will also be paying unnecessary costs to his or her own solicitor. In such instances there is a very strong imperative to settle cost for bills at the lower end, and in any event.
It is the next two value categories that show surprising results. The bulk of New South Wales party/party assessments (63%) are for bills of between $1,000.00 and $30,000.00. This is the low to lower mid range of litigation, and when the bills have been drawn from all of a jurisdiction’s courts it seems likely that the low to lower mid range of bills would be well represented. In Western Australia however over 83% of all party/party bills filed for assessment also fall into those two value categories. This comparison provides a counter intuitive result. Viewed on its own, the Western Australian data may seem unsurprising, but viewed against the New South Wales data it seems to show an odd difference between the jurisdictions. The party/party bills that are assessed in the Western Australian Supreme Court come from substantive matters before that court. The Western Australian Supreme Court is the highest court in the hierarchy of Western Australian courts. It sits above the Magistrates’ Court and the District Court, and the threshold for civil disputes coming before the Supreme Court’s General Division was (in 2005) $500,000.683 It is certainly true that the quantum of a disputed bill does not necessarily relate to the legal complexities of the matter, but the Supreme Court hears a range of other generally complicated matters in its original jurisdiction. That 83% of the party/party bills filed for assessment in the Western Australian Supreme Court fall come from matters where the legal costs are below $30,000.00 is an unexpected result.

There is no clear reason why such a large portion of the assessed bills should relate to what are, in overall terms, smaller levels of litigation. It may be that this unexpected result says something about the type of client that is choosing to access the costs assessment regime. Litigants can be divided into two basic types, sophisticated and unsophisticated, and are so divided by the Legal Profession Act 2008 (WA).684 Sophisticated litigants, well versed in the litigation process, aware of legal costs generally and often able to claim monies expended on

683 The District Court’s general division was increased from $500,000.00 to $750,000.00 on 1 January 2009, for general disputes (excluding personal injury matters where the District Court has unlimited jurisdiction) above that amount matters are heard in the Western Australian Supreme Court: Courts Legislation Amendment and Repeal Act 2003 (WA) s 82(1). There are a range of other matters which may involve smaller and even much smaller sums that are heard in the Supreme Court under its original jurisdiction: see Supreme Court Act 1935 (WA) div 1, ss 16-20.

684 Legal Profession Act 2008 (WA) s 263(2) (c) provides a list of ‘sophisticated’ litigants; the general disclosure regime is reduced for such clients. Sophisticates litigants are generally litigants who are engaged in litigation as a general (rather than specific) element of their organisational functions, for example public companies and insurers.
legal costs as a tax deduction, may be more likely to take a rational approach to a costs dispute and to settle legal costs without going to assessment. Such litigants may also be more likely to be involved in larger sum litigation. Unsophisticated litigants, often involved in their first (and hopefully only) interaction with the courts may be less likely to accept a costs settlement that it well below what they have paid for the conduct of the litigation, on the grounds that they have won and that a principle is at stake. However, as no attempt was made to differentiate between the types of litigant involved in each assessment, this can only be postulated, and cannot be proved.

4.5.3: Percentage of party/party bill awarded after assessment

The following graphs show the percentage at which party/party bills were assessed at any given return rate across the two jurisdictions. The vertical measure is the number of bills and the horizontal measure is the rate at which bills were returned.

![Figure 4.2: Percentage of bill awarded for party-party bills in Western Australia](image)

This table shows the variance between the amount party/party bills in Western Australia were filed at and the amount that the bills were assessed at, expressed as a percentage of the filed amount. As can be seen, the bulk of the Western Australian bills fall between 70.90 and 103.09% return. As BA (amount the bill was assessed at) includes the costs of assessment, part of the reason that some of the bills were returned at a small amount over the amount they were filed at may be that the costs of attendance at the assessment were awarded to the party
that filed the bill and added to the bill at the time of assessment (rather than when the bill was drawn up and those costs were unknown). The winning litigant whose costs have been assessed would generally have paid his or her legal practitioner to draw up the bill of costs and to attend on the assessment. As a general rule those further costs would have been recovered, albeit at scale rates and for that reason possibly below the rates that have been paid in accordance with the costs agreement that covers the retainer. 685

Figure 4.3: Percentage of bill awarded for party-party bills in New South Wales

This chart shows the same measure as the preceding chart, but for party/party bills of costs filed for assessment in New South Wales. Note that in New South Wales a number of bills were returned at an assessed rate well above the amount claimed in the bill as filed. This was much less the case in Western Australia. These outliers, which in cases reflect the paying party having to pay two and a half times the amount at which the bill was originally filed,

685 If the bill is reduced significantly the assessing officer may refuse to award the winning litigant the costs of the assessment and in some cases (for instance in where there has been a Calderbank Offer to pay the costs) may even order that the losing litigant recover his or her own costs of the assessment. However, unlike the situation with solicitor/client costs disputes, there is no particular cut-off point below which the winning litigant is automatically refused the costs of the assessment. See Legal Profession Act 2004 (NSW) s 369.
defy reasoned speculation. However, those outliers aside, the visual representations of bill returns does not seem to differ that greatly between the two jurisdictions. In both jurisdictions the general rate of return for the bulk of bills is between approximately 70 and 103%. A closer inspection, provided below, shows that there are some statistically significant differences between the jurisdictions.

Table 4.4: Average percentage of party-party bills awarded by assessors in WA and NSW

<table>
<thead>
<tr>
<th></th>
<th>Western Australia</th>
<th>New South Wales</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average %</td>
<td>Median %</td>
</tr>
<tr>
<td>1-999</td>
<td>64.29</td>
<td>One case only</td>
</tr>
<tr>
<td>1,000-9,999</td>
<td>80.17</td>
<td>83.52</td>
</tr>
<tr>
<td>10,000-29,999</td>
<td>73.06</td>
<td>77.40</td>
</tr>
<tr>
<td>30,000-49,999</td>
<td>66.74</td>
<td>72.80</td>
</tr>
<tr>
<td>50,000-69,999</td>
<td>56.93</td>
<td>56.93</td>
</tr>
<tr>
<td>70,000-99,999</td>
<td>84.88</td>
<td>84.88</td>
</tr>
<tr>
<td>100,000+</td>
<td>59.69</td>
<td>79.43</td>
</tr>
</tbody>
</table>

Note: a indicates only two cases in the sample

Table 4.4 replicates the data provided in the two previous figures in a way that allows direct comparison between returns in the two jurisdictions. As can be seen, the return rate on bills in New South Wales is generally higher in New South Wales. The averages expressed in the table above are illustrated in the chart below.

---

686 It is hard to imagine a practitioner drawing up his or her own bill so negligently that an assessor looking at the file of work the bill reflects makes a determination that the bill should be that much higher, but that is one possible reason why there would be such a result to an assessment.
In the lowest level of bills the comparison is meaningless as there was only one such bill in each jurisdiction and the rate each was returned at is truly idiosyncratic. At the second level of bill the difference is substantial, while at the fifth level the difference is large. At the sixth level of bills there is a reversal, and the rate of return was higher in Western Australia. The lack of an obvious trend across the compared rates of returns (and internally with the Western Australian rates of return) may be due to the small sample size in Western Australia. In isolation, the rate of return in New South Wales across the five higher levels shows a remarkable consistency. While those rates may be inflated by the presence of the outlier cases, they are more consistent as medians than as averages. This tells us that there is some real consistency in how much the practitioners who draw the bills for assessment are overstating their bills, right across the whole range of bills. It should be noted that party/party

---

687 The Western Australian bill was significantly reduced on assessment. Despite that, if the paying party was represented and once the costs of assessment are taken into account, it seems unlikely that the paying party was any better off financially for having challenged the bill. As noted above, clients are divided into two types, and this client must surely have been an unsophisticated client.
bills in New South Wales are, across the range of medians, reduced by more than 15%. If those bills were drawn by solicitors against their own clients, the costs of assessment would fall upon the solicitors, a sanction for charging above what is reasonable.\textsuperscript{688} That sanction does not exist for party/party assessments and practitioners are not required to be as exact when drawing such bills.

In order to compare NSW and WA directly, rather than intuitively through sighting the results, an independent samples t-tests needed to be conducted. Before conducting that test, the outlier samples were removed from the overall data. Unfortunately, as noted above, the unequal cell sizes (WA=106,\textsuperscript{689} NSW=1218) posed a significant problem for this type of analysis. This issue was overcome by randomly selecting 106 NSW cases, thus producing equal cell sizes for the t-test analysis. Prior to any comparisons of WA and NSW, single sample t-tests were conducted comparing the randomly selected sample to the full NSW average. There was no significant difference in the percentage of bill returned between the smaller randomly selected NSW sample and the full NSW average ($t (105)=1.45; p=0.149$). Similarly, there was no significant difference in the months taken to complete the assessment between the smaller randomly selected NSW sample and the full NSW average ($t (105)=-0.09; p=.929$).

The comparison between the WA sample and the randomly selected NSW sample showed that the percentage returned after bills were assessed in party-party cases was significantly higher in NSW than in WA ($t (210)=-3.59; p=.0004$).

As can be seen from Table 4.4 and Figure 4.4 above, with the exception of bills in the $70,000.00 to $99,999.00 range, litigants in New South Wales who have the benefit of a costs order and who take their bill through the assessment process were generally able to recover a higher percentage of the costs they were claiming than could similar litigants in Western Australia.

\textsuperscript{688} Legal Profession Act 2004 (NSW) s 369(3) (c).
\textsuperscript{689} The original Western Australian sample had 108 cases, but two were removed as outliers.
As noted in 4.1 above\textsuperscript{690}, one of the key drivers for the New South Wales costs Reforms was the view that a winning litigant should recover the reasonable cost of the litigation, and that the system before it was reformed was not allowing that to happen. The analysis above shows that, generally, winning litigants in New South Wales recover more of what they claim as costs than do their Western Australian counterparts. It is important to ask why that is so. It is also important to consider if that finding also means that they are actually getting more of the actual costs back than are winning litigants in Western Australia, as proving that they get more of their bill back is not necessarily the same as proving that they get more of the actual costs back.

In relation to ‘why is this so?’ the answer may not be exactly determinable. However, it is possible to speculate. The New South Wales Reforms were expected to provide that result, and as discussed at Chapter Three.3.5.1, abolition of scales of costs was to produce that result. In both jurisdictions the test for allowing an item on a bill of costs is set out in the relevant Legal Profession Act, and in both jurisdictions the wording of the sections is functionally identical.\textsuperscript{691} Costs assessments in both jurisdictions are made using the discretionary application of same subjective criteria; being ‘was it reasonable to do the work and was the work reasonably done?’\textsuperscript{692} The key difference lies in where the assessor gets guidance for the application of that discretion. In Western Australia costs assessors doing party/party assessments work by reference to scales of costs that provide a benchmark as to what is a reasonable cost for any given part of the litigation process. Those scales are provided by an independent body made up of three legal practitioners, and three laypersons, one of whom must be an accountant.\textsuperscript{693} The scales of costs are drawn to provide maxima, and thus provide limits on recovery as well as guidance on what can be recovered. In New South Wales the costs assessors, who are lawyers subcontracting into the role, have no such guidance and no such limitation. It may be that the reason for the difference lies here. At the

\textsuperscript{690} For a full exploration of the motives that drove the 1994 Reforms see Chapter Three.
\textsuperscript{691} Legal Profession Act 2004 (NSW) s 363; Legal Profession Act 2008 (WA) s 301. The New South Wales Act refers to costs assessors while the Western Australian Act uses the term ‘taxing officer’.
\textsuperscript{692} Ibid.
\textsuperscript{693} Legal Profession Act 2008 (WA) s 310.
time the data was taken there were 80 costs assessors subcon-
tacting into the costs assessment system in New South Wales and they had at least one thing clearly in common; they were practicing lawyers with their own subjective view of what a lawyer should reasonably charge. In Western Australia the costs assessors were all judicial officers in strict sense of the term; they were registrars of the Supreme Court of Western Australia. Their views of what work was reasonably done may not have differed much (in the general sense) from the views held by the New South Wales assessors, but their views on what could be charged for that work was more strictly circumscribed by reference to the scale of costs. It may be that the reason party/party bills were generally assessed at a higher rate in New South Wales was that there was no scales of costs in that jurisdiction and thus no fundamental guide or limitation as to what amounts would be (or not be) reasonable. That abolishing scales of costs would increase the return was, as has been noted above, an expected result of the 1994 Reforms

This thesis maintains that the data above establishes that winning litigants in New South Wales do recover a higher portion of the legal costs that they have expended than do winning litigants in Western Australia, despite the fact that the comparisons do not always directly prove that to be the case. It is demonstrated above that, in general, the litigants in New South Wales get a higher return on their bills, and, further, it is argued that in New South Wales the bill that a winning litigant files for party/party assessment is more likely to approach the true cost of the litigation than does a bill filed in Western Australia. This argument too rests in the absence of scales of costs in New South Wales. In Western Australia the practitioner who is engaged for litigation will, as required by the mandatory costs disclosure regime and as a part of the ubiquitous costs agreement, inform the client that he or she will only recover legal costs from the other party if he or she is successful and that recovery will only be at the rates allowed by the scales of costs. For litigation in the Western Australian Supreme Court it is

694 In 2013, the Chief Justice’s Review of the Costs Assessment Scheme (Draft Report) noted that there were 62 costs assessors: Supreme Court of New South Wales, above n 557, 30 [1.3].
695 This raises the hoary question of ‘who will guard the guardians’ and one could wonder if having lawyers acting as the general arbiter of what it is reasonable for lawyers to charge is really the best way to ensure that lawyers do not overcharge. For discussion of this aspect of the New South Wales costs assessment scheme see Chapter Three at 3.13.3.3 and 3. 14.1. See also 4.7.1 below where it is clear that the ‘guardians’ do not appear to be favouring their fellow practitioners.
696 Or for any other type of legal work.
most likely that the client will, by way of the costs agreement, contract out of the scales and agree to pay the practitioner a higher rate than allowed under the scale. This has a fundamental effect on the way that the practitioner will draw up the bill for a party-party assessment. In Western Australia a client is made aware that the bill drawn up for assessment will be drawn in accordance with the scale and not in accordance with what he or she has been charged. A party-party bill drawn for assessment in the Supreme Court of Western Australia is likely to be for a lower, and quite possibly significantly lower, amount than the client was actually charged for the works done. As seen above, the overall return for the bulk of party-party bills of costs in the Western Australian Supreme Court was in the 70% to 103% range, but any reduction from the amount the bill was filed at would almost inevitably be on an amount that was already reduced from what was actually spent on the conduct of the litigation.

The situation is different in New South Wales as the lack of scales of costs and the reliance on the subjective view of the individual assessors’ means that the practitioner drawing up a party-party bill is not restricted and can claim for all the works he or she has reasonably undertaken. This position is reinforced by the general lack of sanction for drawing a bill at too high a level, as noted above and briefly discussed at 3.14.2. This means that a party-party bill drawn in New South Wales is more likely to reflect the true cost of the litigation.

As has been demonstrated above, it is clear that party-party bills in New South Wales are generally assessed at a higher rate. If it is true that the bills more accurately reflect the costs of the litigation in the first instance then it follows that winning litigants in New South Wales do recover a higher percentage of the costs they have expended on the litigation and it is likely that the difference in recovery between the two jurisdictions is higher than it appears through the comparison of the return rate for the bills. As was discussed in Chapter Three,

697 Even if the hourly rate charged under the costs agreement is not actually higher than the rate allowed by the scale the limitations as to maximum amounts for given ‘parts’ of the litigation will not apply. For instance, the 2012 scale allows a maximum of x hours for providing discovery, and absent a special costs order the winning litigant cannot recover more than that no matter how long the process took. If it did take longer the winning litigant would pay his or her practitioner for all of the time the discovery took and would not recover that difference.

698 See above n 660.
this is a position that may change if the recommendations made in the draft report of the
*Chief Justice’s Review of the Costs Assessment Scheme* are adopted.

### 4.5.4: Time party/party bills spent in the assessment process

Party/party assessments in both jurisdictions were measured for time spent ‘in the system’. This measure records the time between initial filing of the bill for assessment (in Western Australia) or the date the bill was assigned to an assessor (in New South Wales) and finalisation of the assessment (although in real terms the assessment may not be truly final as the measure does not make allowances for situations where there is an appeal against the assessment). As was noted above, the time between filing for assessment in New South Wales and the time that the file was assigned to an assessor was not measured. Time was expressed in months, with the measure being taken so that a week was recorded as .25 of a month.699

![Figure 4.5: Months taken to complete assessment for party-party bills in WA and NSW](chart)

699 The time taken to assess the single bill from the lowest echelon of the Western Australian jurisdiction was not recorded.

194
The time a party/party bill spent in the assessment system in New South Wales was significantly less than the time bills spent in the system in Western Australia ($t (185)=5.48; p<.001$). Also, in New South Wales the quantum of the bill filed for party/party assessment seems to make no real difference to how long that bill spends in the system. The results are quite remarkably consistent, with bills in New South Wales taking an average of four months to go from assignment to finalisation, regardless of the size of the bill. The only inconsistency is in the lowest level of bills, and as there was only one bill at that level the time it took to be assessed can be viewed as an idiosyncrasy and thus ignored.

Litigation is notoriously slow, and a system that can complete an assessment process in four months, having included in that time a chance for the participants to give written submissions as to their dispute and to also supply them with a written reason for the decision is laudable in the extreme. It is also a little odd; one would expect to see some upward trend in the time taken to assess bigger bills, as after all those bills pertain to a larger and sometimes much larger amount of legal work than do the smaller ones. The reason that this does not appear to be the case may be because actual assessment time is only a relatively small portion of the time a bill spends in the system. In order to explore this, a $t$-test was run on the T-A data, which was only available from New South Wales. In that test the size of the bill was strongly and significantly related to the time taken to assess the bill ($r (1216) = .61; p <.001$).

Therefore, in New South Wales, the larger the bill, the longer it took for an assessor to perform the assessment.\textsuperscript{700}

The Western Australian data shows a very different picture. No value category has an average assessment of less than four months. Bills in the higher categories take between a year and two years to find their way through the assessment process. It may be that as the higher end bills only represent a small portion of the overall number of bills (only 15.9% of the bills fall above $30,000.00) there is some special reason for the delays. However, even in the second and third quantum levels ($1,000.00 to $9,999.00 range and $10,000.00 to $29,000.00 range) where 83.2% of the bills fall, a bill in the Western Australian assessment system was spending, on average, twice as long in the assessment system as was a similar bill

\textsuperscript{700} See also 4.7.2 below.
in New South Wales. Party/party bills make up the bulk of costs assessments and are an integral part of litigation. A matter that has been before the courts may well be ‘finished’ in terms of its substance, but the matter, and the ongoing cost of that matter, does not finish until the costs dispute is finalised.

It seems clear the New South Wales costs assessment regime provides finalisation to the overall litigation process in a much timelier manner than does the Western Australian system.

4.5.5: Time taken to file a party/party bill for assessment in Western Australia

As was noted above, in the Western Australian jurisdiction it was possible to ascertain how much time elapsed between the time that the right to claim costs arose (the date of the costs order) and the time at which the bill of costs was filed for assessment. A sensible legal practitioner whose client has the advantage of a costs order will make a real attempt to arrive at a negotiated settlement. The practitioner will draw up a draft bill of costs that sets out what he or she is claiming the winning litigant is owed, and forward that to the losing litigant’s representative (if he or she still has one). In most circumstances a negotiated settlement will ensue. However, the losing litigant may be recalcitrant, and the winning litigant’s solicitor will then draw up a more detailed bill and enter that bill for party/party assessment. If the bill is for a larger amount the winning litigant’s solicitor may engage specialist representation to draw and argue the bill. This takes time, so one would expect that there would be some reasonable gap between the date that the costs order was made and the date that the bill is filed for assessment.

The data shows that the amount of time it takes for a practitioner to file a bill varies quite widely. As only 99 of the party/party bills from Western Australia provided the date required to calculate that time, and the variations were so great, a graph showing average times by value of bill would be misleading as to the true circumstances. For that reason the discussion below will report on average times and the various outliers that make the averages unrepresentative, and will set out the situation in a general way.

701 For a full description of this process in Western Australia see annexure 1 and 2.
The author submits that in most cases it would be reasonable to have a bill entered for assessment within three months of having received the costs order. Three months is long enough to enter into negotiations and come to a conclusion that they are going to be fruitless. It is long enough to then draw up the bill and file it for assessment. After all, the client has won, and has an order for costs and, in most cases, already paid his or her own solicitor for conducting the litigation. There are of course any number of reasons why it might take longer, and some of those may be good reasons, but generally it would seem that once it is clear that a negotiated settlement will not be happening there should be no further delay in seeking assessment.

As was seen in Figure 4.1 above, over 83% of the party.party bills that are filed for assessment in Western Australia fill below a value of $30,000.00. The average time that elapsed between the date of the costs order and the date the bill was filed for assessment for the bills in that range was 4.75 months. This seems longer than is reasonable. However, of the 85 bills in that range where it was possible to make that calculation, 14 bills were not filed for assessment until 12 months or more had elapsed since the costs order was granted. In one case 42 months had elapsed. If those 14 bills are removed from the calculation, the average time elapsed drops to 2.8 months. That is a reasonable amount of time in which to conduct negotiations and then, realising that the negotiations are fruitless, prepare and file a bill for assessment.

There were only 8 bills filed for above $50,000.00 and the average time it took from the date of the costs order to filing the bill for assessment was 12 months. Once again the range of times was large; two of the bills were filed 3 months after the costs order was made, two of the bills were not filed until more than 20 months had passed. The highest bill, where the winning litigant was claiming he or she was owed nearly $350,000.00 in legal costs was not filed for an assessment until nearly 22 months after the costs order was made. That bill, which included disbursements of $146,000.00, was allowed in full, and the costs of assessment were added on to the determination of what the winning litigant was owed.

That case is extreme, but it does illustrate a problem. It may be that most of the practitioners who are unable to negotiate a settlement for their client’s party.party costs are prompt in
chasing those costs through assessment, but a significant proportion are not. While the long wait that some clients are having to endure before they recover their costs may be ameliorated by the fact that the losing litigant must pay interest on the costs as awarded from date the costs order is made, it seems undesirable that those sorts of delays are happening fairly regularly.

Why is this so? There is nothing in the data that will provide an answer to this, but informed speculation is possible. As noted in the Chapter One of this thesis, the author has practiced in the area of costs assessment in Western Australia and is conversant with the attitudes about costs and costs assessment prevalent in the legal profession. In short the reason is likely to be that Western Australian lawyers do not like costs as an area of law. Practitioners who work in litigation may well know their area of specialisation and the litigation process very well, but they rarely know much about costs assessment. As noted above, most costs settle, so practitioners are not usually asked to prepare a bill for assessment. Practitioners are often either ignorant of or loathe to call upon costing specialists, and there are not many costs specialists operating in the Western Australian jurisdiction. It is the author’s experience that otherwise diligent practitioners shy away from having to deal with costs assessment and for that reason there is often excessive delay in getting party/party costs assessed. It is the author’s opinion that a practitioner who is lax in chasing up unpaid costs fails in his or her duty to the client.

Costs assessors in New South Wales, who receive the matter file as well as some form of bill of costs, could be directed to record the date of the costs order that establishes the right to assessment. If they did so it would be possible to see if the same inordinate delays are occurring in New South Wales. It may be that they are not, as in New South Wales a practitioner does not need to break down a file that was kept in chronological order so that it can be mapped against the items in a costs scale. It seem likely that in New South Wales practitioners are more likely to commence the assessment process as it requires less expertise on their behalf, but it is not currently possible to say if that is so.

702 State Planning Commission v Della Vedova (1992) 7 WAR 81, 84.
4.6: Client/solicitor assessments

As has been previously noted, at the time the data that informs this thesis was gathered, Western Australian practitioners could not file their own bills for assessment unless they were doing so at the request of the client. A Western Australian practitioner who did not get paid for his or her services had to either write off the debt or pursue it as a contractual claim in the relevant court. This changed in 2008 when Western Australian practitioners were given the right to seek assessment on their own motion.703 Practitioners in New South Wales gained that right some 14 years earlier as part of the 1994 Reforms704 For that reason, this thesis only has data from assessments in Western Australia where clients have applied to have their practitioner’s bill assessed while the data from assessments in New South Wales is from applications that were commenced either by the client or the practitioner. As will be see,705 in New South Wales it makes some difference as to who commences the process.

For the reasons above, this portion of the chapter will commence with comparisons between bills that clients have filed for assessment in the two jurisdictions. Internal comparisons, between client/solicitor and solicitor/client applications in New South Wales are presented separately after the cross jurisdictional material.

Unlike the data from Western Australian party/party assessments, which was taken from a small but representative sample of such assessments, the Western Australian data from client/solicitor assessments was taken from all such applications made in 2005. The data from New South Wales is from all the assessments finalised in that jurisdiction in 2005.

4.6.1: Volume of client/solicitor bills filed for assessment in WA and NSW

Table 4.5 presented below shows the quantum of client initiated (client/solicitor) assessments across both jurisdictions:

---

703 Legal Profession Act 2008 (WA) s 297.
704 Legal Profession Act 1987 (NSW) s 201, as inserted by the Legal Profession Reform Act 1993 (NSW) sch 3(1)
705 See 4.7.1 below.
As can be seen, more clients in New South Wales filed applications for assessment than did clients in Western Australia. This is as would be expected as New South Wales has a much larger population. Population differences aside, one possible reason for that happening is discussed below in relation to quantum of bills assessed and ease of access to the assessment system.

Of 74 client/solicitor bills filed in Western Australia in 2005, only 15 (19% of the total) proceeded to a full assessment process and provided data for this thesis. As the data was not collected until well into 2006 it is unlikely, although not impossible, that the matters that had not gone on to assessment would eventually do so. In Western Australia costs assessments are by way of peremptory appointment with the assessing officer\textsuperscript{706}, and in the first instance the assessor will either assess the bill or give directions as to the course of the assessment\textsuperscript{707}. The registrars of the Supreme Court of Western Australia who act as costs assessors do not like to see court time wasted and if either party to the costs dispute does not have a clear argument as to the validity (or otherwise) of the bill in question the registrars are likely to be candid about that and to adjourn the assessment. In such instances the parties will often reach a settlement rather than proceed with the assessment. The settlements may not be communicated to the court and the assessment, having been adjourned sine die, will languish.

In New South Wales the situation was remarkably different, with 176 (80%) of the 219 applications going on to a full assessment. It may be that the reason for this difference is a reverse of the reason that so few Western Australian assessments do likewise. In New South Wales the assessment process is far less personal. The costs assessor does the assessment on

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
 & Assessed in 2005 & Not Assessed & Total \ \\
\hline
Western Australia & 15 & 59 & 74 \ \\
New South Wales & 176 & 43 & 219 \ \\
\hline
\end{tabular}
\caption{Volume of client/solicitor assessments across WA and NSW}
\end{table}

\textsuperscript{706} Supreme Court Rules 1971 (WA) O 66 r 38.

\textsuperscript{707} The assessing officer has wide powers as to how he or she can perform the assessment: see Supreme Court Rules 1971 (WA) O 66 r 44.
the papers and the parties are not given that (arguably) useful dose of realism that comes with appearing before a busy court officer who will prefer that the parties come to some reasonable compromise on their own so that he or she can get on with other duties. One imagines that assessors in New South Wales must occasionally wonder why the parties did not just work it out between themselves, but then put that question aside to get on with their task and earn their hourly fee.\footnote{Despite the \textit{Legal Profession Act 2004} (NSW) s336 (2) allows the Manager Costs Assessment to direct a bill for under $10,000.00 this seems to be an infrequently used option: Supreme Court of New South Wales, above n 557, 57 [3.5.7]. As the applicant has to attest to the fact that there is little chance of a mediated settlement as part of the application process it seems reasonable that this is so.}

4.6.2: Quantum of client/solicitor bills as assessed in NSW and WA

The percentages of client-solicitor bills within each Bill-Q category were calculated for both Western Australia and New South Wales and are presented below in Figure 4.6.

![Figure 4.6: Pie charts illustrating the percentage of client-solicitor bills falling into each quantum category for WA and NSW](image)

In this section of the analysis the two data sets aligned more closely than they did for the party/party analysis across the jurisdictions. Unlike the data for party/party bills in Western Australia, here the Western Australian data did not necessarily reflect work done in the

\footnote{Despite the \textit{Legal Profession Act 2004} (NSW) s336 (2) allows the Manager Costs Assessment to direct a bill for under $10,000.00 this seems to be an infrequently used option: Supreme Court of New South Wales, above n 557, 57 [3.5.7]. As the applicant has to attest to the fact that there is little chance of a mediated settlement as part of the application process it seems reasonable that this is so.}
Western Australian Supreme Court. Most of the client/solicitor assessments in Western Australia take place in the Supreme Court regardless of what the legal works that formed the substance of the bill were about or in which court they took place.\footnote{There are exceptions, for instance the District Court may assess a solicitor/client bill if the client was acting as a next friend for a person under a disability. See \textit{Featherstone v Westar Engineering Pty Ltd} (1999) 23 SR (WA).} Client/solicitor assessments from both jurisdictions relate to the full range of legal works and was not restricted to bills pertaining to litigation.

As can be seen from the left hand chart on Figure 4.6, the majority of client-solicitor bills (60\%) for Western Australia fell within the $10,000 to $29,999 value category. The next biggest numbers of assessments were in the $30,000.00 to $49,999.00 value category. This represents low to lower end of mid range litigation. There were no client/solicitor assessments on bills filed at or over $70,000.00 and only one in the $0.00 to $999.00 value category.

Unlike the results for Western Australia, the majority (55\%) of client-solicitor bills in New South Wales fell in the second lowest value category. There were also a substantial percentage of cases (27\%) which fell in the $10,000 to $29,999 range. There were client/solicitor assessments in the higher value brackets, but at only 7\% of the overall total they do not make up a large portion of overall assessments.

In the broad sense the charts show a solid similarity; in Western Australia all of the bills assessed related to legal bills where the legal fees charged were less than $70,000.00 and for New South Wales 93\% of bills assessed fell into the same category. It may be that more sophisticated litigants who spend large amounts on legal fees do not often resort to assessment. It may also be that the bulk of legal retainers are in that range of values and are thus most likely to be strongly represented.

However, there is a strong difference noted between the two jurisdictions when it comes to small legal matters and the fees charged for them. In Western Australia 26\% of all client/solicitor assessments relate to legal bills where the quantum of the bill is less than $10,000.00. In itself this seems that a high number of assessments are being filed for what
are essentially fairly small legal works. A bill for under that amount will not generally relate to any litigation that has proceeded to a full trial as it would be unlikely for any lawyer to take a matter through to trial for under $10,000.00.\footnote{That is generally true. As previously noted though, client/solicitor bills in Western Australia, unlike party/party bills, are not limited to matters that went before the Supreme Court; instead they come full the full range of legal works in the jurisdiction. It may be that some of those lower bills come from full, albeit brief, trials in the Western Australian Magistrates Court.} In New South Wales 57\% of all client/solicitor assessments were related to bills of under $10,000.00. This difference is pronounced, and there is certainly one credible, though unproven, explanation for it. In New South Wales a client who wants to dispute his or her practitioner’s bill does not have to make any personal appearance at a court to do so, and can file the relevant documents and deal with the matter remotely and needs not to be represented by a legal practitioner to do so.\footnote{Arguably, a Western Australian client who appears, unrepresented, before an assessor in an adversarial process is at a greater disadvantage than is a New South Wales client who simply writes that he objects to the bill and has an assessor deal with the bill on that basis.} This means that any client of any practitioner in New South Wales, regardless of whether that client is in Sydney, some other city, a small town, or an isolated rural area, can access the costs assessment system at no great personal inconvenience. This is likely to make contesting a relatively small bill a more attractive proposition than it is in Western Australia where the client will have to either engage a legal practitioner or make a personal appearance at the Western Australian Supreme Court, regardless of the quantum of the bill. Regardless of the reason, it is clear that lower end legal services consumers are far more likely to use the costs assessment scheme if they are in dispute with their solicitors in New South Wales than are similar clients in Western Australia. From an access to justice perspective this is a very real advantage to the costs assessment regime in New South Wales. However, as will be see below, the fact that they access the system does not mean that it has been to their advantage to do so and that their decision to access may have been misguided.

As noted above in terms of the quantum of bills filed for party/party analysis across the jurisdictions, another reason why smaller end bills seem to be over represented may be the nature of the clients involved. This thesis has noted that sophisticated litigants, who may well be regular clients of a particular legal practitioner and are accustomed to higher end retainers may be less likely to challenge their bills. Such clients are also less likely to be in retainers
governed by the ubiquitous six minute interval, as their greater bargaining power and repeat business increases the chances of fixed fee retainers.\textsuperscript{712} Smaller and first time legal consumers may also be more likely to be dissatisfied with a legal bill. This could be in part because a bill for a smaller matter may seem proportionally large, especially for a client lacking knowledge as to the costs of legal work, and perhaps because such clients are less likely to be able to negotiate a lower fee if the matter has not been successful.

Surprisingly, on a per capita basis it appears that clients are almost equally likely to access the costs assessment scheme in both jurisdictions; New South Wales saw approximately three times as many client solicitor bills filed as did Western Australia, while the population of New South Wales is approximately three times as large as the population of Western Australia.\textsuperscript{713} However, the picture is unlikely to be that simple, and considering the ease of access to the New South Wales system and the higher proportion of smaller bills assessed in New South Wales as discussed above it is slightly perplexing. While that ease of access might well explain why more lower end bills are assessed, one would expect there to be a consequent higher per capita access rate in New South Wales overall. This does not appear to be the case.

4.6.3: Percentage of client/solicitor bills awarded after assessment
Figure 4.7 illustrates the percentage of bills awarded after assessment for Western Australia and New South Wales.

\textsuperscript{712} For discussion of the trend away from the six minute interval in New South Wales, see Supreme Court of New South Wales, above n 557, at Chapter One, Introduction, 1.4.4, 32.

\textsuperscript{713} There were 74 client/solicitor bills filed in Western Australia in 2005, as compared to 219 in New South Wales (1:2.8) while the population of Western Australia in 2005 was 2.01 million and in New South Wales it was 6.77 million (1:3.4)
As can be seen from above, there is no obvious trend in the data. Over the five ranges of value where there is data from both jurisdictions there are two instances where rate of recovery seems better in Western Australia and three where it seems better in New South Wales. To obtain a better understanding of the return on client-solicitor bills, an analysis of the average percentage and the range of percentages in each quantum category was conducted. This information is presented below in Table 4.6.

This data indicates that the range of returns on bills was far more varied in New South Wales than it was in Western Australia. This difference in the ranges was a product of bills being assessed as higher than the original quantum, as well as some bills being assessed for much less than the quantum sought. This didn’t seem to occur in Western Australia where there were no outlier cases. New South Wales on the other hand had several client-solicitor cases which were considered outliers and removed from the analysis. 714 Specifically, 12 client-solicitor cases were removed. Eight of these cases were in the $1,000-$9,999 range (six were assessed at below 10% of the bill as filed and two were above 300%). Of the remainder, two

---

714 See discussion on removing outliers at 4.5.3 above. Outliers were identified according to empirical convention. That is, any case with a percentage returned on the bill which was less than 2.5 standard deviations below the mean, or more than 2.5 standard deviations above the mean were removed.
were from the $10,000-$29,999 range, and one each from the $30,000-$49,999 and $50,000-$69,999 ranges.

Table 4.6: Average percentage of bills awarded by assessors in WA and NSW

<table>
<thead>
<tr>
<th>Western Australia</th>
<th>New South Wales</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Average</strong></td>
<td><strong>Range</strong></td>
</tr>
<tr>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td><strong>1-999</strong></td>
<td>84.10</td>
</tr>
<tr>
<td><strong>1,000-9,999</strong></td>
<td>76.57</td>
</tr>
<tr>
<td><strong>10,000-29,999</strong></td>
<td>84.30</td>
</tr>
<tr>
<td><strong>30,000-49,999</strong></td>
<td>70.69</td>
</tr>
<tr>
<td><strong>50,000-69,999</strong></td>
<td>99.72</td>
</tr>
<tr>
<td><strong>70,000-99,999</strong></td>
<td>NA</td>
</tr>
<tr>
<td><strong>100,000+</strong></td>
<td>NA</td>
</tr>
</tbody>
</table>

Recovery varies from 70% to nearly 100% in Western Australia but there was no clear pattern to recovery rates in the Western Australian jurisdiction. This may be a function of the small sample size. Recovery rates in New South Wales do show a pattern, with recovery rates tending to drop as Q-B rises. This means that a client in the higher level ranges was getting a significant reduction on their bill through the assessment process. In New South Wales, clients at the lower end, with B-Q less than $10,000.00 are, at least on average, wasting their time going to assessment as the solicitor recovers a high proportion of the costs such that the expense of assessment is unwarranted.

As is demonstrated above, in Western Australia the lower end legal service consumers who do access the costs assessment system generally have a reasonable deduction from their bills. This means that their dispute had merit and that they were being overcharged. This is certainly not the case in New South Wales, where lower end disputes were generally assessed in a way which affirmed the bill. As noted above, the New South Wales system provides greater access to justice, but that in no guarantee that the person accessing the system will be pleased with the justice he or she receives.
The quantum at which the bill was returned included any amount ordered as costs of assessment if that amount had been awarded against the paying party. Both jurisdictions have a 15% rule,\(^{715}\) where if the bill in a solicitor/client assessment is reduced by that amount or more, the costs of assessment is awarded against the law firm drawing the bill. Alternately, if the reduction is less than 15%, the client will usually have to pay those costs. As the costs assessment scheme in New South Wales is user pays, the costs of assessment are generally higher in that jurisdiction. Clients with smaller bills that are affirmed at over 85% of the quantum sought do risk having to pay more than they were originally billed once the assessment is finished and the costs of assessment are added on. In Western Australia the costs of assessing a minor bill are nominal,\(^{716}\) and will have less effect on the recovery rate even if the client does have to pay them. This may wholly explain the difference in recovery rates, but there are other differences in the two systems that may also be helping to create this inconsistency.

In New South Wales, where assessments are done on the papers and without any face to face contact between the assessors and the disputants, the system works to assess bills efficiently and all disputes, real or imagined, move quickly through the system.\(^{717}\) This may mean that an assessor who received submissions from the parties and who decides that the client’s submissions do not show cause for any significant reduction then simply assesses the bill and the practitioner is awarded the full amount. As noted above, in Western Australia, where the parties appear in person, the assessor faced with similar circumstances may well make it clear to the client that he or she should go away and come to some reasonable settlement. If this is so bills that are likely to be assessed at or near the full amount claimed may settle out of court and the application for assessment may well languish, as so many Western Australian applications seem to have done.

\(^{715}\) *Legal Profession Act 2004* (NSW) s 369; *Legal Profession Act 2008* (WA) s 304.

\(^{716}\) Both jurisdictions have a set filing fee, and in Western Australia there is a further ad valorem fee of 2.5% of the bill as filed. In New South Wales the costs then include an assessor’s time at an hourly rate while in Western Australia there are no further fees. For a fuller description of the process see annexure 2 and 3.

\(^{717}\) As instituted, the 1994 Reforms put the onus on the Manager Costs Assessment to evaluate the likelihood of a mediated settlement and to direct mediation if that seemed the preferable option. That was unworkable and after 1996 the applicant had to provide a statement to the effect that mediation was not an option when making the application.
There is another difference between the two systems that may have some causal effect on this portion of the data. Western Australian assessors will assess a client/solicitor bill against a scale of costs if there is neither a valid costs agreement nor sufficient costs disclosure. Practitioners may have charged significantly above scale rates in reliance on an invalid agreement and a reduction to those rates will have a fair impact on the bill. In New South Wales there are no scales of costs and absent a valid costs agreement or in the case of insufficient disclosure the assessor allows the bill at what he or she thinks is reasonable. This is quite a different situation. Lacking scales of costs as a reference, the New South Wales costs assessor may consider that the amounts charged were reasonable in any event, and allow the bill at a higher rate than would his or her Western Australian counterpart. While this may make a large difference in individual bills, without data as to how many of the assessments involved situations where there was no valid costs agreement it is not possible to know if such situations arise often enough to be affecting recovery rates as a whole.

More generally, and as discussed above in relation to party/party assessments, assessors in New South Wales are practicing solicitors and it may be that their views on what reasonable costs are in any given set of circumstances are more generous than are the Western Australian scales of costs.

4.6.4: Time taken to assess client/solicitor bills

The date each bill was filed for assessment (in Western Australia) or assigned to a costs assessor (in New South Wales) was compared to the date that each bill had a finalised assessment. This allowed a calculation of how long (the calculation was to an approximate amount of weeks) each bill spent in the system. The months taken to complete bills within

---

718 This seems a little circular. In Western Australia scales of costs provide what is essentially a floor to legal costs when a practitioner is deciding what to charge and a ceiling to legal costs where a costs agreement has been found to be invalid. In New South Wales there are no scales but a practitioner is only able to charge reasonable costs (plus an uplift fee if successful). This would seem to put a costs assessor in a difficult place. If a practitioner does not have a valid costs agreement (or the costs agreement is set aside under s 328 of the Legal Profession Act 2004 (NSW)) but has been charging at some particular rate, then the bill should be assessed against a standard of reasonableness. However, the rate the practitioner was charging should in itself be reasonable (as it might otherwise be seen as professional misconduct) so one might wonder why the costs assessor would assess the bill at any other rate.
each quantum category by assessors in Western Australia and New South Wales are presented below in Figure 4.8.

![Chart showing months taken to complete bill assessment for client-solicitor bills in WA and NSW](image)

Figure 4.8: Months taken to complete bill assessment for client-solicitor bills in WA and NSW

The above figure indicates that in Western Australia there is no obvious pattern across the ranges of bill. As previously noted data on the actual time taken to assess the bills, being the time where the assessor was in attendance on the parties and assessing the bill, was not always recorded on Western Australian files. Some assessors made a note of the length of assessment appointments, but many did not. For that reason that data was not extracted. The data above reflects the time that bills spent ‘in the system’ rather than the time taken to do the actual assessment. The actual assessment, where the parties and the assessor go through the bill item by item, is usually a relatively small part of the time that the bill spends in the overall assessment process. For that reason, there seems little reason for a bill from the fifth range to take twice as long to assess as a bill from the second range. It seems likely that as

---

719 For the purposes of this thesis, the ‘time in system’ relates to the time between when the bill was filed for assessment (in Western Australia) or the time it was assigned to an assessor (in New South Wales) and the time the assessment is completed. A completed assessment does not necessarily mean the dispute is over. Both jurisdictions have appeal mechanisms; any assessment can reappear in the system as an appeal. Even if there is no appeal there can still be considerable time spent in enforcing the assessment; the payee may benefit of a fixed sum that the payer is legally obliged to pay, but that does not mean that the money will be promptly handed over.
the sample size is small in Western Australia what is actually being observed is idiosyncratic variation relating to individual bills rather than to the assessment process as a whole.

Neither is any pattern observed for New South Wales. The difference between the ranges is at a maximum of about 2:1, with bills in third range taking about twice as long as bills in the second. There is no obvious reason why this should be so. This is quite a different result to the situation with party/party assessments in New South Wales, where time spent in the system was remarkably uniform. However, as noted above, the time spent doing the actual assessment is not a large part of the overall assessment process, and so the size of the bill should not necessarily relate closely to how long it spends ‘in the system’.

Overall, the Western Australian assessment system took, on average, less time to process and assess client/solicitor bills than did the system in New South Wales ($\bar{x}^{WA} = 2.98$; $\bar{x}^{NSW} = 3.33$). This may be misleading though, for the reasons noted above. Only a small portion of the client/solicitor bills filed in Western Australia had actually finished the assessment process; the bulk of them was still in the system, and thus did not supply data. Although as discussed above, many of the bills appeared to have languished and may not ever have moved on to assessment, it is possible that some would do so on a time scale outside that measured for this analysis. If those bills were eventually assessed they will have spent a great deal of time in the system and, if those times were included in the analysis the average time ‘in system’ in Western Australia would rise significantly.

For both NSW and WA, there was no discernible relationship between the size of the bill and how long it was in the system (months to complete).

4.6.5: How long client/solicitor assessments took in New South Wales

As data was available for how long each assessment took in New South Wales (as compared to how long each bill spent in the system) it was possible to analyse how the quantum of the bill as filed related to how long it took to assess the bill. That comparison is provided in Figure 4.9 below:
As can be seen in Figure 4.9, and as would be expected, there was a clear correlation between the quantum of the bill and the time taken to assess the bill. Larger bills are for greater amounts of work, and it seems clear that the amount of time spent by a person tasked with evaluating the charges in a bill will rise with as the quantum of the bill rises. In an overall way, and as can be seen in Figure 4.9, client solicitor bills in New South Wales spent between 2 and 5 months in system being assessed. It was taking the assessors between 8-10 hours to do the assessment. As was seen in Chapter Three, submissions to the Chief Justice’s Review of the Costs Assessment Scheme (2011) were generally of the view that costs assessment was taking too long. It seems that the assessments themselves are usually done quite quickly, so if there are efficiencies to be gained through further reform then that reform
must be aimed at the procedures surrounding assessments and not at the actual assessment itself. One of the key rationales behind the recommendations of the Chief Justice’s Review of the Costs Assessment Scheme Draft Report (2013) is that a form of provisional assessment will reduce the time it takes the costs assessment scheme to produce a costs determination and the finding above does call that rationale into question.

4.6.6: General observations on the client/solicitor assessments.
The retainers that underlie client/solicitor assessments originate from across the full spectrum of legal works. The reasons behind a client seeking assessment of a legal bill are common across the jurisdictions. The client may genuinely believe the bill is too high; or it may be that seeking assessment is a bargaining ploy in an attempt to have the bill reduced; or seeking assessment may simply be a delaying tactic. Despite these fundamental similarities, there is a very noticeable difference in the results that lower end clients are achieving between the two jurisdictions. Assessment of bills below $1000.00 (the lowest range), where the costs of assessment can be as high as the original bill, can be ignored as there are so few of them. However, bills in the second range ($1000.00 to $9,999.00) however make up a significant percentage of all bills filed in both jurisdictions but more noticeably so in New South Wales.

A client who receives a bill in the $1000.00 to $9,999.00 range is paying for a small amount of legal work. Some of those smaller bills would have related to minor litigation that resulted in a trial; many will have been for other smaller legal tasks, including litigation, that did not go on to a full trial.

In New South Wales 55% of all client/solicitor assessments are of bills in that range, and on average those bills are assessed at 97% of the amount claimed in the bill. In short, it appears that clients at the lower end of legal consumption in New South Wales are, on average, wasting their time seeking assessment, particularly once the costs of the assessment are added on to their bills. The situation is completely different in Western Australia, where only 20% of the bills are filed in that range and where on average the clients filing those bills are being vindicated as the bills are being assessed at only 86% of the amount the practitioner sought to recover. Some possible reasons for this were presented above, where it was argued that the personal nature of the Western Australian discouraged frivolous assessment.
applications. It was also noted that in New South Wales, where practicing lawyers perform the assessments, the measure of ‘reasonableness’ may be more generous to practitioners than it is in Western Australia, where court officers perform that task. If this is so then the difference seems likely to relate to what it is reasonable to do in performing a legal task rather than to what it is reasonable to charge. This is because client/solicitor assessments in both jurisdictions should usually be done in accordance with the charges set out in a valid costs agreement\textsuperscript{720} and not against either a scale of costs (Western Australia) or the assessor’s personal view of what rate is reasonable (New South Wales).

This marked difference disappears completely for bill in the next range ($10,000.00 to $29,000.00) of bills. That range includes the costs of matters that have gone on to full trials and more complex and time consuming matters, and while a larger percentage of the Western Australian clients (40% of all bills filed for assessment) are seeking assessment of bills in that range than are their counterparts in New South Wales (27% of all bills filed for assessment) the return on the assessments is remarkably similar at 84% (WA) and 86% (NSW). Clients who seek assessment of bills in that range are not wasting their time; they have been overcharged and the practice rendering the bill will (usually) have been ordered to pay the costs of the assessment.

There are two intertwined reasons that may explain why there is such a sudden drop in the recovery rates in New South Wales. It may be that, generally, clients who seek assessment of larger bills are more sophisticated and more likely to be repeat users of the legal system. They may have a better view of what it is reasonable to pay for legal services than do the lower end users. The return rate recorded for the bills includes the costs of the assessment process where that was awarded to the payee. Clients that are more genuinely able to assess the reasonableness of a bill are less likely to have the costs of assessment awarded against them than are unsophisticated clients, and are thus less likely to have those costs added to the amount they are finally obliged to pay. Lower end clients, who may feel that the bill is very high for the service received, but who lack the experience to realise that it is not therefore

\textsuperscript{720} It is normal practice to secure a retainer by way of a costs agreement that, among other things, sets out the rates that the practitioner will charge (see Chapter One.3.9).
necessarily unreasonably high, are paying what, from their perspective, amounts to a penalty for seeking an assessment.

As was discussed at Chapter Three.13.1.1, the New South Wales Legal Services Commissioner’s submissions to the Chief Justice’s Review of the Costs Assessment Scheme (2011) were particularly scathing of the costs of costs assessment. It may be that his submissions reflect complaints from those lower end users who have challenged a bill and then wound up with either a very small discount or having to pay more than they were originally charged. Once the clients who are challenging bills for under $1000.00 are included, 57% of clients who challenge a bill in New South Wales are not gaining any benefit from doing so. In such circumstances it is easy to see why there is a strong belief among unsophisticated users that the costs assessment scheme is not properly addressing their belief that they have been overcharged. The New South Wales Legal Services Commissioner’s push for more mediation of costs disputes instead of costs assessments is sourced in that view.

It is clear that from the lower end consumer’s perspective, the client/solicitor assessment regime in New South Wales is not working. However, this does not mean that the scheme is producing unfair results. Although the costs disclosure regime in New South Wales is comprehensive, it may be that the answer is in better dissemination of information about the realities of costs assessment. The Chief Justice’s Review of the Costs Assessment Scheme Draft Report (2013) takes that view.721 Although a wide range of information on the procedures of costs assessment in New South Wales is readily available, the information on the results of assessment applications, presented above, is not. As has been seen throughout the first three chapters of this thesis, the view that lawyers overcharge has been prevalent since lawyers first started charging. It may be that there is nothing that can be done to do away with that view completely, but it does seem sensible to ensure that information on the result of costs assessment is collected, analysed, and disseminated to legal consumers. As was noted above and as will be further discussed below, the fact that the New South Wales

721 See discussion at 3.13.
costs assessment scheme is set up in a way that makes it straightforward to find and analyse such information is one of the key advantages of that scheme.

4.7: Internal analysis of the New South Wales scheme
The data gathered from the New South Wales costs assessments scheme was from all assessments finalised in 2005, across the three different types of assessment, being party/party, client/solicitor, and solicitor client. For that reason it is possible to make valid comparisons across the types of bills assessed in New South Wales.

4.7.1: Client/solicitor assessments as compared to solicitor/client assessments: New South Wales
In 2005 the position in New South Wales (as is the case now) was that disputes between practitioners and their own clients about fees could result in either party commencing the assessment process. The source of the dispute behind each type of assessment is essentially the same, in that the client will not pay the bill as rendered. However, despite that common ground, and as will be illustrated below, there are some significant differences between what happens with the two different forms of application for assessment.

Table 4.7 below shows the difference between the likelihood of client/solicitor disputes going on to full assessment in New South Wales as compared to solicitor/client disputes in the same jurisdiction:

Table 4.7 Comparison of volumes and completions of assessment, disputes between practitioners and their own clients in New South Wales.

<table>
<thead>
<tr>
<th></th>
<th>Assessed</th>
<th>Not assessed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client Applicant</td>
<td>176</td>
<td>43</td>
<td>219</td>
</tr>
<tr>
<td>Solicitor Applicant</td>
<td>98</td>
<td>231</td>
<td>329</td>
</tr>
</tbody>
</table>

In 2005 there were 329 bills in the New South Wales costs assessment system that were being assessed on the application of legal practitioners. This compares to the 219 bills in

---

722 As noted above, in 2005 Western Australian practitioners were not able to file their bills for assessment of their own motion. Solicitors in New South Wales gained that right as a part of the 1994 Reforms.
applications commenced by clients. The difference in completion rates between the two types of assessment was statistically significant ($y^2(1)=134.54; p<.001$). Only 98 (30%) of the bills filed by solicitors went through the actual assessment process. This means that 70% of the bills were withdrawn from the system before assessment. Of the 219 bills filed by clients 176 went on to an assessment, so only 20% were withdrawn. It seems likely that the main reason an applicant will withdraw a bill before assessment is because the parties have come to some agreement as to what is owed or what should be paid.

As seen above, the likelihood of an application for assessment of a dispute between a legal practitioner and his or her own client going on to a full assessment is very clearly dependent on which of the two parties files the application. More practitioners file applications than do clients, far fewer of the solicitor’s applications go on to a full assessment. It appears from this that commencing the assessment process acts as an efficient way for practitioners to drive a resolution for disputes as to costs with their clients. However, as will be seen below, that does not mean that that a practitioner whose bill goes through the full assessment process will be pleased with the result.

It is possible to speculate as to why the source of the application has such a strong influence on whether or not an application goes on to a complete assessment. When a client files for assessment, the client is acknowledging the debt, but disputing the amount owed and asking for a resolution. Some negotiations about the quantum of the bill would usually take place before the client filed for assessment, and those negotiations must have been unsuccessful. If the client and the practitioner can come to some agreement as to what should be paid after the application takes place, either because the practitioner offers some reasonable discount or because the client adopts the view that what has been charged is actually fair (or at least likely to be upheld), the application will be withdrawn. However, it does seem likely that in most cases the client will want the assessment to run its full course so that he or she has some independent verification of what is a reasonable amount to pay.

The situation is likely to be quite different when a practitioner files for assessment. In such cases the client has not paid and may have simply ignored the bill, for one reason or another. The amount of the bill may not be disputed. As noted above, the practitioner’s remedy in
such cases used to be an action in debt. An application for costs assessment is quicker and cheaper than that former remedy. It seems likely that an application for assessment acts as does commencing litigation against any other debtor; it focuses that debtor’s mind on that particular debt. It makes the debt ineluctable, and if the client is juggling a number of debts then the debt to the practitioner may well be given precedence over the others. In such cases the client is likely to pay, or to offer to pay a reduced but acceptable amount, and the practitioner will then withdraw the application. From a practitioner’s point of view an efficient use of the costs assessment scheme does not necessarily require a costs assessment.

In summary, a client who initiates assessment wants an independent verification of what is owed and it makes sense that such applications would go to a full assessment. A practitioner who initiates assessment wants a commercial settlement of a debt that he or she is owed, and, analogous with all other litigation, the practitioner will discontinue the application once a commercial settlement is reached.

As is seen in Figure 4.10 below, practitioners are more likely to use the costs assessment scheme to determine lower level disputes than are clients.

*Figure 4.10: Pie charts illustrating the percentage of own client bills falling into each quantum category for the two types of assessment in New South Wales*
As can be seen above, 41% of the bills filed by legal practitioners are for amounts under $10,000.00. This compares with 30.5% of client filings being for bills in that range. This is a noticeable discrepancy, and as argued above may illustrate that legal practitioners are using costs assessment as fast way to enforce payment of smaller bills.

The New South Wales costs assessment scheme has clients and legal practitioners from throughout the jurisdiction accessing it to solve costs disputes. It is attractive to them because the process is all done on the papers and does not require any personal attendance of the parties. It may be that more that more country and small firm practitioners are using the costs assessment scheme than are their Sydney and other larger city counterparts. One country practitioner from New South Wales, discussing costs assessment with the author, noted that he could not afford to write off any of his bills and that he always sent any unpaid bill to assessment. He explained that this was not because he could not afford the particular amount in question; it was because as a practitioner in a smaller town he could not afford a reputation as a person who would forgive a debt. If he had such a reputation a lot of his clients would ‘forget’ to pay. For that particular practitioner, an application for costs assessment against a particular client was a message to all of his clients, and the actual amount he recovered on the bill was not as important as was ensuring that his clients knew he would pursue payment.

However, while the New South Wales costs assessment scheme could collect and record data on the location of costs disputes it does not currently do so and his view is only an anecdotal explanation as to why practitioners send so many more smaller disputes to assessment. It would be useful to assess applications to the New South Wales scheme in terms of the geographical source of the applications it receives.723

One thing is very clear about the own-practitioner costs disputes in New South Wales. Legal practitioners are using the costs assessment scheme far more often than are their clients. The scheme gives a legal practitioner a remarkable privilege that is not shared by any other business person. If a legal practitioner has a dispute with his or her client about fees, that practitioner has access to a fast, efficient and reasonably cheap system of dispute resolution.

723 In retrospect the author regrets not taking data from applications that were withdrawn from the scheme before assessment, as such data may have provided evidence to either strengthen or disprove the hypothesis as to why more client initiated applications go through to full assessment.
that will either bind the client to a costs agreement where it is reasonable to do so, or will
determine what a reasonable fee for the works the practitioner performed should be. The
person making the assessment as to what fee is reasonable will be a fellow practitioner. The
practitioner who is chasing his or her fees will be given a determination that can be registered
as a judgment and be executed accordingly. Unlike every other person who works directly
for and is paid by members of the public, a legal practitioner does not have to sue in debt if
there is a dispute as to what the services he or she has provided should cost.

That said, it does not follow that legal practitioners are always using the scheme wisely. As
argued above, practitioners may be commencing applications to ensure that the defaulting
client prioritises their bills. Most applications filed by practitioners do not go on to full
assessment. As was seen above, clients who file bills for assessments in the lower range of
values usually find themselves getting no real discount on the bill. As is illustrated in Figure
4.11 below, the situation is different when it is a practitioner who has commenced the
applications;

\[ Figure 4.11: \text{Percentage of bill awarded for solicitor/client bills in NSW}^{724} \]

\[ ^{724} \text{There was only one bill in the $1-$999.00 range and for that reason no data is presented for that range.} \]
As can be seen in Figure 4.11, when a practitioner files a bill in the $1000.00 to $9,999.00 range and does not settle the dispute before it goes on to full assessment, the average return on such a bill is 78%. If bill for an own client dispute is reduces on assessment by more than 15% the practitioner who rendered the bill is responsible for the costs of assessment. Practitioners in New South Wales may be using the costs assessment scheme to collect smaller debts, but it appears that when the process does not lead to a compromise and the bill is assessed, smaller bills, which make up 40% of those that do go on to assessment, are generally found to be drawn for an amount that is more than reasonable in that particular set of circumstances. The average time taken to assess such bills is approximately three hours, and at 2005 rates (which are still current) the costs of the assessment process, including the filing fee, would have been in the order of $700.00. This finding seems counter intuitive. It may be that clients who had resisted paying lower level bills for reasons other than a belief that they were being overcharged paid those bills once the practitioner initiated assessment. Those clients who still refused to pay may have been the clients who genuinely believed they were being overcharged, and those clients were, in general, proved right. However, it seems odd that the practitioners whose bills were assessed down did not take more care to ensure that did not happen. A practitioner who is unpaid and seeks assessment, knowing that he or she will pay the costs of assessment if the bill is too high, should be diligent to ensure that the bill is reasonable in every respect. Doing so is sensible professional practice. The practitioner, dealing with a client who refuses to pay the bill, should go through the bill carefully with an eye for what may be removed on assessment. If the practitioner feels that there are any works that will be reduced then a reduced bill should be sent to the client in an attempt to settle the matter before the assessment process commences. This does not seem to be happening for lower level bills.

The situation is quite different for medium level bills in the 10,000.00 to $29,000.00 range. Thirty four percent of all practitioner initiated assessments are for bills in that range and on

---

725 *Legal Profession Act 2004 (NSW) s 369.*
726 This does not include the costs of preparing for the assessment. If the client had engaged a costs consultant those costs would be recoverable from the practitioner whose bill had been reduced by more than 15%.
average the bills are returned at 88%, which means that the clients have to pay the costs of the assessment. For medium range bills and for bills of over $100,000.00 practitioners in New South Wales are, on average, having their bills assessed at close to 90% of what they have charged. For all other ranges practitioners are falling below the 15% threshold and have to pay the costs of the assessment process. As noted above, in a situation where it is the practitioner that has commenced the application this should not be happening.

It is noteworthy that, in general terms, solicitor/client assessments in New South Wales do result in the bill being reduced by a significant amount. It appears that the bulk of clients who face an assessment pay their bills, but those who do not and go on to a full assessment are being vindicated and were being overcharged. In 62% of finalised assessment the bills that practitioners have filed for assessment are being reduced by more than 15%, leaving the practitioners to pay the costs of the process. The same holds generally true for client initiated assessments where the bill is for $10,000.00 or over; the average reduction in such cases is over 15%. 727

One criticism of the New South Wales scheme is that it allows practicing lawyers to determine if what other practicing lawyers have charged is reasonable. An analysis of the results of own-practitioner costs disputes in New South Wales refutes that criticism. The costs assessors in New South Wales may well be practicing lawyers, but they do not favour their fellow practitioners and they generally find that there is some level of truth in a client’s contention that their bill was too high.

4.7.2: Time taken to assess a bill: New South Wales: all bills
As noted at above, the actual time taken up with the personal appearances before a Western Australian costs assessor was not generally recorded. In New South Wales, the costs assessors took careful note of how much time they spent on each application for assessment (being their overall chargeable time) as that information was the source of their invoices to the costs assessment scheme. For that reason it was possible to determine how much time it took to assess bills in accordance with the quantum of the bill as filed and across the three

727 In the $30,000.00 to $49,000.00 range the average return rate was 90%, over the threshold where the practitioner would be responsible for the costs. There were 17 such instances.
types of assessment that occur in that jurisdiction, That information is presented in Figure 4.12 below:

![Figure 4.12: Time taken to do assessments in New South Wales, across the three types of assessment that occur in that jurisdiction](image)

As can be seen, and as would be expected, the amount of time it took to assess a bill generally, and across all three bill types, trended higher as the quantum of the bill grew. What is of interest is that party/party bills took less time, and often quite significantly less time, across all the ranges. With an exception for one value range, bills filed by clients took less time to assess than did bills filed by practitioners.

One explanation might be that party/party assessments, where both sides would usually be represented by legal practitioners, have the particulars of the dispute set out clearly and in a manner that takes the costs assessor immediately to what is truly in contention. If that is so one would expect party/party assessments to take less time than other assessments at any given quantum of bill. A costs assessor dealing with a party/party bill should only need to assess the portions of the bill that are in dispute and should not have to assess the whole bill.
The reason behind the difference in times for solicitor/client and client/solicitor assessments is not obvious. In both instances, unless the client has sought separate specialist representation, it is likely that the client’s contentions as to why the bill is too high would not have been set out with any real specificity. In such instances the assessor may well have to go through the whole bill, either piecemeal or in a global way. This would hold true regardless of whether the client is the applicant or the respondent and explains why party/party assessments take less time. It does not explain why applications initiated by practitioners would take longer than do applications initiated by clients.

It is easier to see why an application filed by a client may take less time ‘in system’ as if a client initiates the assessment the client will have given his or her reasons for complaint, however vague they may be, at the time of application. The practitioner would be expected to respond promptly and the matter should move quickly to assessment. If the solicitor has initiated the assessment the client who has refused to pay may have any number of reasons to drag out the process as long as possible, and that may be why such assessments spend longer ‘in system’. As can be seen in Table 4.8, which illustrates how long bills from the various ranges spent ‘in system’ for assessment, such is generally the case (there is an exception for the $10,000.00 to $29,000 range).

Table 4.8 Time own-client disputes spent ‘in system’ for assessment in New South Wales, expressed in months

<table>
<thead>
<tr>
<th>Bill Range</th>
<th>Solicitor/Client</th>
<th>Client/Solicitor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – 999</td>
<td>3.00</td>
<td>3.00</td>
</tr>
<tr>
<td>1,000 – 9,999</td>
<td>2.89</td>
<td>2.31</td>
</tr>
<tr>
<td>10,000 – 29,999</td>
<td>3.38</td>
<td>5.41</td>
</tr>
<tr>
<td>30,000 – 49,999</td>
<td>3.67</td>
<td>2.89</td>
</tr>
<tr>
<td>50,000 – 69,999</td>
<td>7.50</td>
<td>4.57</td>
</tr>
<tr>
<td>70,000 – 99,999</td>
<td>5.50</td>
<td>4.25</td>
</tr>
<tr>
<td>100,000+</td>
<td>4.67</td>
<td>4.00</td>
</tr>
</tbody>
</table>

728 As either applicant or respondent the client would have set out reasons for disputing the bill, and an unsophisticated client’s argument may be as simple as ‘it is too high’.
However, that does not explain why the actual assessment, the time taken for the assessor to sit down and check through the bill, takes longer.

It was noted above that bills filed by practitioners have more assessed off, and it does seem reasonable that an assessor takes longer to determine that any part of the bill is unreasonable and to then work out what a reasonable charge would be than he or she would take to confirm a bill. If this was the explanation for solicitor/client bills taking longer there should be a strong correlation between the amount the bill is returned at as compared to the time it took to assess the bill across all the value ranges and that strong correlation does not always occur. There is some correlation in the lower ranges bills, and those bills do make up the bulk of assessments. It seems intuitively likely that it does, on average, take an assessor longer to deal with a problematic bill than it does to affirm a bill. However, there is more at play here than that and there is no other obvious reason why assessments filed by practitioners take longer (on average) to do than do other assessments.

4.7.3: General observations on internal New South Wales comparisons

Analysis of the data on costs assessment in New South Wales in isolation produces some intuitive results and some surprises. As noted above, it is not surprising that the bulk of assessments, both for party/party and for own-practitioner disputes, are for lower to medium range bills. It is to be expected that party/party assessments take less time. It is interesting to note that legal practitioners have embraced costs assessment in that they are more likely to turn to it than are their clients, and are also more likely to withdraw from it before it concludes than are clients. It seems reasonable to assume that legal practitioners withdraw because they have achieved what they sought, which is to have their bills paid.

What is surprising is that when a practitioner initiates an assessment and the assessment is carried out to a final determination, the practitioner’s bill is, on average, substantially reduced. As was noted at Chapter Three at 3.13.1.1above, the Legal Profession Act 2004 (NSW) was originally drafted so that costs assessors were required to report ‘overcharging’ when they came across it, but that original draft was amended so that it had to be ‘gross
overcharging.729 If the 2004 Act had been left in its original form the Legal Services Commissioner would have been receiving a report on overcharging after the majority of own-practitioner costs dispute assessments. One of the recommendations made by the Chief Justice’s Review of the Costs Assessment Scheme Draft Report (2013) was that information about costs assessment be more widely disseminated,730 but if that were to be the case it would become general knowledge that clients who have their bills assessed are generally likely to receive a significant discount and that the costs of the assessment process would be borne by the legal practitioner. In short, it would appear published results of the costs assessments scheme would prove the old contention that lawyers overcharge. It is not quite that simple. What the results would actually prove is that those clients who think they are being overcharged are generally right, which is not the same thing at all. Nonetheless, it is really not a good position for the legal profession to find itself in and it seems desirable that some mechanism is introduced to ensure that practitioners who face having their own bills assessed are encouraged to make sure that the bill they rely on is a reasonable bill. The rule that practitioners have to pay the costs of the assessment if the bill is assessed at less than 85% of what was claimed is not working to ensure that practitioners’ bills are reasonable.

4.8: Discussion of the data in relation to the stated goals of the 1994 Reforms

As described in Chapter Three, one of the main drivers of the New South Wales Reforms was a stated desire to see winning litigants recover a larger percentage of the monies they have spent on running their litigation. As the then Attorney General of New South Wales noted in the debates surrounding the 1994 Reforms:

The principle that costs should follow the event is a key component in our judicial system. At present it is weakened by the fact that a successful party can be left substantially out of pocket by the unfair basis of taxing party-party costs.731

The average return on party/party assessments in Western Australia, taken across all but the lowest range of bills, was 74.71%. At first glance this would appear to mean that winning

729 Legal Profession Act 2004 (NSW) s 393(1).
730 Supreme Court of New South Wales, above n 557, 19. See Recommendation 36.
litigants recovered, on average, around \( \frac{3}{4} \) of the monies they had spent conducting their litigation. This is not likely to be so. In Western Australia costs recovery is limited by the relevant scale of costs, and a party/party bill is drawn with that in mind. If the client has entered into a costs agreement and is paying rates above those allowed in the scale those extra monies would not be included in the bill that is drawn for assessment. The bill drawn for assessment is likely to be discounted, perhaps substantially, from what the client has paid the practitioner for the conduct of the litigation. The client should have been made aware that such would be the case in the initial costs disclosure that was provided at the time the retainer commenced. The Western Australian party/party bills that provided data for this thesis show what the party was claiming he or she was owed for legal works in accordance with the scale, but it was not possible to ascertain what monies had been paid to his or her own solicitor for those same legal works. That said, the Law Reform Commission of Western Australia: Review of the Criminal and Civil Justice System (1997) noted that ‘In any event, most practitioners agree with the estimate that costs recoverable from the other side will only be between 40 and 60 per cent of what the winning client has to pay his or her lawyers’.\(^{732}\) Although that report is now 14 years old there is no reason to believe that position has changed. If those figures are accepted, and if the client is averaging a 75% return on the party/party bill as filed, then the party/party bill has, on average, been drawn at somewhere between 53% and 80% of the amount the client was charged by his or her own solicitor.

In New South Wales the average return on a party/party bill was 81.33%. The difference between the two jurisdictions, at around 6%, is significant but, in isolation, not startling. An unknown percentage of the bills assessed in New South Wales would have come from matters where the solicitor was charging an uplift fee, and those fees, although paid by the winning litigant to his or her solicitor, would not have been reflected in the amount returned on assessment. Nonetheless, excepting that the 1994 Reforms introduced that uplift fee, at first glance it seems that the Reforms have succeeded, albeit in a modest way, in achieving that particular goal of the reform. As can be seen from the discussion on the Western

Australian position above, and further explained below, the actual difference is likely to be much more, and not ascertainable from the data that informs this thesis.

In New South Wales, where there are no scales of costs and a client can recover whatever monies that were reasonably spent, a legal practitioner is more likely to draw a party/party bill that closely reflects the costs he or she has charged for taking conduct of litigation. A costs assessor in New South Wales assesses a bill against the following criteria, regardless of whether the bill is a party/party bill or a bill between a legal practitioner and his or her own client:

“(a) whether or not it was reasonable to carry out the work to which the legal 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 legal costs in relation to the work, except to the extent that section 361 or 362 applies to any disputed costs.” 733

If the bill is between a practitioner and his or her own client, and there is a valid costs agreement, the costs assessor must assess the costs with reference to the amounts specified in the agreement. 734 However, the agreement and the rates it sets out must be reasonable. Reasonableness in terms of rates charged is determined by reference to a wide range of criteria set out in the Legal Profession Act 2004, and includes:

the skill, labour and responsibility displayed on the part of the Australian legal practitioner responsible for the matter, the retainer and whether the work done was within the scope of the retainer, the complexity, novelty or difficulty of the matter, the quality of the work done, the place where, and circumstances in which, the legal services were provided, the time within which the work was required to be done. 735

Reasonableness is also determined by any other things that the costs assessor deems relevant. 736 For that reason, it seems that although costs recovery for a given matter in New

733 Legal Profession Act 2004 (NSW) s 363(1).
734 Ibid.
735 Ibid s 363(2).
736 Ibid.
South Wales may be higher if the bill is assessed against a costs agreement rather than against the assessor’s own idea of reasonableness, there is no reason for a party/party bill to be assessed at much less than the solicitor/client bill that reflects that same work. In essence, an order for party/party costs in New South Wales is more akin to an order for indemnity costs in Western Australia. As one commentator noted, ten years after the 1994 Reforms, ‘[t]here is no longer any reason why the costs must be reduced to identify an artificial difference between the actual costs paid by a party and those which can be recovered from the unsuccessful party.’

It appears that the 1994 Reforms did result in winning litigants, other than those who have been charged uplift fees or have been caught by the draconian limitations of the Civil Liability Act 2002 (NSW), recovering more, and possibly much more, of the costs reasonably spent on their litigation. The bills such litigants put in for assessment are, on average, assessed at an amount closer to the amount they are claiming than are the bills their counterparts are filing for assessment in Western Australia. In addition, the bills they are filing more closely reflect what they have actually spent, and for that reason it seems likely that they are recovering an even larger percentage of what they have spent than is shown in the data above.

That difference is not caused by a change from an adversarial/judicial assessment process to an administrative one. Rather, the difference flows from the abolition of scales of costs, as those scales created a clear differentiation between what a practitioner charged under a costs agreement and what a client could recover in accordance with the scales. In addition, and without scales as a guide, it may also be that having practicing lawyers doing the assessments means that the view of what is ‘reasonable’ stretches to higher amounts in New South Wales than it does in Western Australia, where the costs assessors are court officers. As was noted at 3.13.3.3, the Chief Justice’s Review of the Costs Assessment Scheme, Draft Report (2013) has recommended a limited return to scales of costs in New South Wales, albeit under the new label of ‘guidelines’ for party/party assessments. If that recommendation is adopted the

737 Vine Hall, above n 336, 8.
gap between what a client pays his or her own lawyer (pursuant to a costs agreement) and what that same client recovers on a party/party assessment is likely to increase. The winning litigant will recover less of the costs of litigation and one of the key goals of the 1994 Reforms will be at least partially abandoned.

One of the other drivers behind the 1994 Reforms was the stated belief that abandoning scales of costs would make legal services cheaper. Whether or not that has a happened in the broader sense of making all legal services cheaper is not something that this thesis attempts to answer, although it was argued above (see Chapter Three at 3.13.3.3 and 3.14.1) that the foundations of that belief, that abandoning scales of costs would make the market more competitive and the costs of legal services thus cheaper, was fundamentally flawed.

In the narrower sense of costs disputes, the question of which system provides the cheapest solution to a costs dispute is not easily answered in any overall way. The costs of such disputes can differ greatly, and are dependent on a wide range of variables. As was noted in Chapter Three at 3.13.1.1, there is a strong perception that the costs assessment regime in New South Wales is too expensive. This does not necessarily mean that it is more expensive to have costs assessed there than it is to have costs assessed in Western Australia, where there does not appear to be any such perception. It does appear that for smaller disputes between solicitors and their own clients the New South Wales system is narrowly more expensive. As noted above in the discussion of the data for the lower level client/solicitor assessments, one of the reasons that recovery rates for bills are higher New South Wales is that the costs of those assessments are higher than they are in Western Australia.

This is easily illustrated by postulating a dispute between a client and a solicitor the resulted in a costs assessment of a bill of costs for the sum of $10,000.00, and that assessment taking an assessor 5 hours to complete. If the client does not hire another legal practitioner to have carriage of the dispute, the costs of assessment in Western Australia would be $195.50 plus 2.5% ($250.00) of the bill in dispute with a total of $445.00. In New South Wales the same bill would cost 1% of the unpaid bill, being $100.00, plus the assessors costs of $962.50 (5 hours at $193.50 per hour) for a total of $1062.50.

---

738 This fee is for an individual or small business. If the disputant is corporate then the fee would be $379.00.
Once matters become more complex, or if the dispute is party/party, the costs are likely to rise substantially if the matter goes on to full assessment, as the parties are more likely to be represented and to have to pay the costs of that representation. The time spent preparing for assessment can be substantial and costly. This is true in both jurisdictions. In Western Australia, where personal appearances are required for the assessment process, the costs of representation for the time spent in the process will add to the expense. In New South Wales such costs will not arise, but preparation time is likely to be greater. Written submissions must be drafted to cover all contingencies as they lack the flexibility and immediacy of the oral advocacy that is the hallmark of a Western Australian assessment. In New South Wales the assessor’s fees mount up quickly if the assessment is lengthy, but that has to be balanced against the much lower filing fee that is charged in that state. A bill for $200,000.00 has a $5,000.00 ad valorem fee on top of the fixed filing fee in Western Australia, while in New South Wales the same bill has flat filing fee of $2,000.

In short, despite the views of the New South Wales Parliament that instituted the 1994 Reforms, this thesis is unable to show that the reformed system in New South Wales has made costs assessment cheaper (from the users’ point of view) than it is in the unreformed Western Australian system. However, as will be argued below, it has at least shifted the financial burden of costs assessment from the courts.

If the New South Wales costs assessment is not generally cheaper, it is at least clear that the overall process is generally quicker. The old saying, that ‘time is money’, is valid, and a faster system does provide some level of financial benefit to its users. Lawyers and winning litigants, on average, get what the system determines they are owed more quickly in New South Wales than they do in Western Australia.

**4.9: Discussion of which system is ‘better’ from the perspective of the courts**

Arguably it is a benefit to the court when a winning litigant recovers a larger percentage of the monies spent on litigation, as a litigant who is significantly out of pocket after vindicating his or her rights is likely to think ill of the legal system in general and thus the courts involved in particular. However, and alternately, it is also possible to argue that if winning litigants can have their rights vindicated at no cost then it is likely that there will be more
litigants. A person who contemplates litigation is less likely to take that route if he or she knows that even with a win there will be some real cost. More litigation means that it costs more to keep the courts running at an optimal level.

That aside, the Courts of New South Wales have received a strong costs benefit from the 1994 Reforms Put simply, the courts of New South Wales no longer have to use their resources in costs assessment, with the exception of having to deal with appeals against costs determinations. The costs of the assessments system are easily quantified as despite it being housed in the New South Wales Supreme Court, the costs assessment scheme is a separate entity that has its own staff and keeps its own records. Despite being described as ‘user pays’ it seems unlikely that the current low filing fees charged in New South Wales cover the administrative costs of the system. This is especially so if those costs included a commercial rent for the premises it occupies as well as the wages for its staff. However, if the Parliament of New South Wales decided the system should be truly user pays it could easily work out the real costs of the system and charge filing fees that genuinely recovered those costs. As the New South Wales system is measurable in that data is carefully recorded, it would be possible to forecast income and outgoings with some accuracy. As the costs of the assessor are charged to one or more of the parties to the assessment, those costs are not borne by the courts.

In short, in New South Wales the expense of costs assessment may be subsidised by the government, but it is not borne by any of the courts. Courts are notoriously overburdened, and this is one burden that the courts of New South Wales are well rid of.

In Western Australia, where each court is responsible for party/party assessments flowing from the substantial matters that appear before it, court officers spend an unquantified amount of time dealing with the various aspects of assessment. It is not easily possible to find out how many costs assessments occur in Western Australia, as party/party assessments are not recorded separately from the substantial matter from which they originate. As noted above, for both party/party and for client/solicitor assessments in the Western Australian

739 With the exception of the costs of appeals against determinations, as noted above, and that same burden is borne by the courts of Western Australia.
Supreme Court the times spent doing assessments are not always accurately recorded or recorded at all. The Western Australian courts bear the full burden of costs assessment and there is no obvious way of finding out what that burden actually entails. For the Western Australian Courts costs assessment is just another step in the continuum of a court file. It is a generally unmeasured part of what the courts do, but just because something is unmeasured does not mean it is cheap. Institutions that rely on government funding to carry out substantive duties but that are unable to quantify or cost those duties are at a disadvantage when it comes to justifying any demand for increased public funding. As the provisional assessment scheme available in the Western Australian Supreme Court becomes better known and more often used, costs assessment in Western Australia will become even more opaque.

When the New South Wales Parliament described its various rationalisations for the 1994 Reforms it did not bring up better record keeping or increased ‘knowability’ as outcomes it had in mind from its new model costs assessment regime. Those outcomes seem to be an unintended and unforeseen but beneficial by product of moving from a judicial system of costs assessment to an administrative system that stands separate from the courts. The Western Australian courts could, conceivably, achieve the same outcomes without moving from the current judicial system, but it seems unlikely that they would ever do so. Asking busy court officers to quarantine and measure one relatively small part of their duties would probably be unreasonable.

This thesis argues that an effective and utile legal system must incorporate an efficient costs assessment scheme. That which cannot be easily measured cannot be checked for efficiency. Just because something has always been done a particular way and there is no groundswell of concern about how it is operating is not really a reason to keep doing it that way. This thesis argues that one of the strongest reasons for adopting a system as is used in New South Wales is that such a system allows for a discrete, measurable and easily modified way to deal with disputes about legal costs in a way that can allocate the costs of those disputes to the parties involved in a fair way. This seems much preferable to a system that is unknown and unable to be costed, and where the taxpayer, by way of funding the courts, picks up the tab.
4.10: Suggestions for further research

The data that was used to make the comparisons presented above was taken from the first level of costs assessment. The conclusions drawn from the comparisons have made it possible to determine that the reformed New South Wales costs assessment system is generally a better system than is the system used in Western Australia. However, this thesis did not attempt to evaluate the next stage of the New South Wales system, which is the stage of internal review. It would be useful to investigate and evaluate the internal review mechanisms in New South Wales. This is especially the case in light of prevailing view that that internal review is too expensive and that bypassing it and proceeding straight to judicial review is often the preferred option. However, in light of the recommendations made by the Chief Justice’s Review of the Costs Assessment Scheme Draft Report (2013) and the further changes that are likely to follow the new draft legal profession legislation, such investigation, if carried out now, would probably be obsolete before it was completed. Nonetheless, and considering how easy it would be to have assessors collect various specific data in a costs assessment, the potential to achieve real and valuable knowledge about a range of litigation related matters is something that should be more fully explored.

There is also scope for research into the judicial review of costs assessment in New South Wales, and into the higher level of review that occurs in Western Australia when a costs assessor’s initial decision is subject to appeal. In order to put costs assessment in context, the author read a large number of appeal decisions from the District and Supreme Courts of New South Wales, and the general feeling that emerges from those readings is that far too many of them represent a waste of the parties and the courts time and money. This may or may not be the case in Western Australia. If research provided some clarity as to why matters that were essentially doomed to failure still went on to appeal it might be possible to ameliorate that situation. That said, it should be recognised that if the recommendations of the Chief Justice’s Review of the Costs Assessment Scheme Draft Report are carried through into a final report and adopted there is likely to be a real drop in the volume of matters that go on to appeal.
As noted above, practitioners in New South Wales seem to be failing to draw accurate bills when it comes to having their own work assessed. Data analysis could determine if there are particular areas of legal work that are problematic. If there are, and they can be identified, it would be possible to provide training so that the problems do not continue to encourage perceptions that the legal profession is overcharging. Such training could be presented as part of general CPD training that legal practitioners are required to do in any event. If there is a real drive to stop practitioners overcharging data from costs assessment could also be used to help achieve that. The current position, where a costs assessor has to report ‘gross overcharging’ is laudable but may not go far enough. However, it would be worth digging deeper to see if particular practitioners are more often involved in costs disputes or are having their bills more heavily discounted. Such research would help identify practitioners whose charging practices are problematic, and once such behaviour is identified it can be addressed.

Finally, practitioners in Western Australia are now able to file their own bills for assessment. It is possible to determine if Western Australian practitioners are embracing such costs assessments in the way their New South Wales counterparts did. It is now possible to compare practitioner initiated assessments across the jurisdictions, and to make the internal comparisons for Western Australia that were made for New South Wales above.

4.11: Conclusion
This chapter has presented and discussed the data taken from costs assessments that took place in the New South Wales and Western Australian jurisdictions in 2005. It has shown that in New South Wales, litigants with the advantage of a party/party costs order get, on average, a higher percentage of what they are claiming as costs awarded to them than do litigants in the Western Australia. It has argued that for reasons not obvious in the data, true recovery rates are probably higher, and even much higher, again. It has also shown that litigants in New South Wales have their disputes settled in a much timelier manner than do litigants in Western Australia.

The comparison between the systems for client/solicitor assessments gave far less clear and consistent results. It was evident that although clients with disputes about smaller bills were
making up a higher percentage of the applications that went to assessment in New South Wales, but were then having to pay a larger portion of what they were originally billed. It was not clear that such clients were getting their disputes determined any more quickly than were their Western Australian counterparts.

The internal comparison of client/solicitor disputes against solicitor/client disputes in New South Wales showed that the costs assessment scheme works very well for legal practitioners whose clients dispute their bills, so long as they do not actually allow the bill to move on to a full assessment. A practitioner who initiates a costs assessment in New South Wales shows his or her client that the bill must be paid, and it appears that is usually enough to ensure a negotiated solution. However, the practitioners of New South Wales who do have their bills assessed seem to be unrealistic with the bills they are presenting. As no such comparison was available for Western Australia in 2005 it is not possible to make any such determination for that jurisdiction. However, as of 2008 Western Australian practitioners have been able to file their own bills for assessment (as compared to suing for unpaid fees) and, as noted above, research can now be done that will allow an inter-jurisdiction comparison of that type of assessment.

The real difference that shows up between the two jurisdictions was not illustrated by the data itself; rather it was the sheer availability of the data. In New South Wales data was and is regularly and accurately recorded from all the assessments that take place in that State. The data set was the total of all the assessments recorded for 2005. In Western Australia the data had to be gathered in a random way, as any attempt to take the full sample of party/party assessments for the year would have required going through every substantial matter from each individual court in the jurisdiction. This meant that any conclusions drawn about party/party assessments in the Western Australian system are necessarily based on a small sample size. It is argued above that this is the most remarkable difference between the two jurisdictions; one is knowable and the other is not.

As was noted in Chapter Three, if the New South Wales Parliament adopts the recommendations of the Chief Justice’s Review of the Costs Assessment Scheme (2013), the 1994 Reforms will be themselves thoroughly reformed. It was argued that the advantage a
New South Wales litigant with the benefit of a costs order has as compared to his or her Western Australian counterpart will diminish. It may be that the New South Wales system will be quicker, and it is likely to be cheaper. It is also likely to be more expensive to run. Regardless, it will remain ‘knowable’ and the data that will allow a researcher to measure and report on those things will be easy to access and evaluate. This means that any future Reforms can themselves be evaluated and if necessary amended to deal with any undesirable consequences. For this reason alone, and not because of any advantages that flow to litigants or legal practitioners, this thesis argues that the New South Wales costs assessment regime is a better model and more suited for to the effective provision of justice than is its Western Australian counterpart.

As this chapter has presented comparisons, there is one final comparison that can be made between the two systems, and that is a comparison of the different philosophical approaches that the two different costs assessment schemes represent. The Western Australian costs assessment scheme is judicial and adversarial. The New South Wales scheme is administrative, and is essentially a form of expert arbitration. As was noted at 3.14.3 above, there is a strong philosophical argument that a system of specialist arbitration is better suited to resolving questions of reasonableness than is a judicial system that is base in adversarial presentations.
Chapter 5: Conclusion

5.1: Overview

This thesis has compared two costs assessment regimes; the Western Australian regime, which follows the traditional model of costs assessment, and the New South Wales regime which has been thoroughly reformed.

Western Australia uses a regime that has developed linearly and incrementally from the traditional English model. In Western Australia party/party costs disputes are dealt with as part of the substantive matter that gave rise to the bills in dispute and are assessed against scales of costs by the court that heard the substantive matter. Assessing costs disputes between solicitors and their clients is part of the judicial function of the Western Australian Supreme Court.

New South Wales, on the other hand, abandoned the traditional model of costs assessment in 1994 and removed costs assessment from the judicial sphere. Instead, in New South Wales there is now a statutory body that deals with all costs assessments as administrative matters that are separate from the substantive legal dispute from which they arose. That change to an administrative system has been described throughout this thesis as ‘the 1994 Reforms’.

One of the purposes of the comparison was to determine how effective the 1994 Reforms were against the stated goals of the New South Wales Parliament that introduced them. In particular, the government of New South Wales stated that one central goal of the 1994 Reforms was to improve the rate of return to successful litigants when a court has ordered that the unsuccessful party was to pay their costs.\(^{740}\)

In addition the thesis has evaluated the effects of the Reforms from the position of the various stakeholders in costs assessment: the parties to litigation, legal practitioners, and the

---

\(^{740}\) As was noted in the introduction, this thesis takes the position that the current system for assessing costs in Western Australia is substantially the same as the system used in New South Wales prior to the 1994 Reforms.
courts. As has been seen throughout the previous chapter, it appears that all of those parties have gained some benefit from the Reforms

5.2: Do winning litigants recover more of the costs of their litigation because of the 1994 Reforms?

A successful litigant, despite having the benefit of an order that his or her costs are to be paid by the unsuccessful litigant, may remain substantially out of pocket on those costs despite what he or she recovers from the unsuccessful party. This is so in all Australian jurisdictions and seems to be a core issue among legal consumers. The Parliament of New South Wales intended that the 1994 Reforms ameliorate that position. They have done so. This thesis has demonstrated, through the study of the data presented in Chapter Four, that winning litigants in New South Wales do recover a significantly higher percentage of what they claim in costs than do their counterparts in Western Australia. In addition, and because of the abolition of scales of costs in New South Wales, it appears that litigants in that jurisdiction have bills drawn at a level that reflects what they have actually spent on the litigation. The 1994 Reforms have allowed winning litigants in New South Wales to claim more of what they spent on costs and then award them more of what they have claimed. Winning litigants in Western Australia are constrained in what they can claim by the operation of scales and they receive a smaller percentage of that reduced amount on assessment.

5.2.1 Muddying the waters: the rise and demise of uplift fees

There are some differences between the jurisdictions that may have an effect on that finding that cannot be quantified on the data presented.\textsuperscript{741} In particular, the New South Wales data in this thesis that relates to party/party costs did not reflect the impact of the uplift fee that was introduced as part of the 1994 Reforms The uplift fee, being a success fee charged by the successful litigant’s lawyers, was and is not recoverable on a party/party basis and is not included in the bill of costs as lodged for assessment. The fee can be up to 25\% of the base fee that the lawyer has charged. As was discussed above\textsuperscript{742} the uplift fee proved to be

\textsuperscript{741} There are some similarities that may also have unmeasured effects on return rates. Litigants in both jurisdictions may have had draconian limits put on what they can recover through the operation of the jurisdictions respective Civil Liability Acts.

\textsuperscript{742} The issues that arise with allowing an uplift were discussed in Chapters 2 and 3 respectively, but see in particular Chapter Three at 3.6.2.
problematic and as of 2004 the New South Wales Parliament disallowed uplift fees for matters where the remedy sought was damages. The data that informs this thesis was drawn from assessments performed in 2005, and some portion of the party/party assessments were likely to be for matters where the winning litigant had paid an uplift fee and did not include that fee in the bill as filed for assessment. In such cases the winning litigant recovered less of what was actually spent on the conduct of their litigation than the return rate of their assessed bill suggests.

It seems unconceivable that a parliamentary party could draft and introduce Reforms to costs assessment when there were provisions in the Reforms that would have completely contradictory effects. Although the key rationale for the 1994 Reforms was that costs recovery would improve it must have been obvious to the Parliament that one of the key provisions of those Reforms would have the opposite effect and would significantly reduce the quantum of recoverable costs. Despite this remarkable confusion, it is at least laudable that once it became clear that uplift fees were seriously problematic those fees were then abolished.

In 2005, the year from which the data in this thesis was sourced, the Western Australian jurisdiction did not allow uplift fees. Although the data shows that successful litigants in New South Wales were realising higher levels of return on their assessed bill than were their Western Australian counterparts, in real terms that may not always have meant that they were getting more of what they had spent returned to them. This is because New South Wales litigants who had paid an uplift fee did not claim it in the bill they filed for assessment and for that reason those litigants were deeper out of pocket on what they had spent than the data shows. It was not possible to measure the effect that uplift fees had on actual return rates for winning litigants in New South Wales but it must be acknowledged that there was some real effect.

Uplift fees were introduced in Western Australia in 2009 via the *Legal Profession Act 2008 (WA)*. Their introduction in Western Australia came about through a positive recommendation from the Western Australian Law Reform Commission, but that

---

743 See discussion at Chapter Two at 2.5.1.4 above.
recommendation was hedged with numerous qualifiers and doubts. None of the mechanisms that the WALRC recommended as safeguards necessary for introducing uplift fees were adopted. For that reason, the advantage that some Western Australian litigant’s enjoyed as compared to their New South Wales counterparts has now disappeared. On the whole, winning litigants in Western Australia are now likely to be likely to be recovering even less of what they have spent as compared to winning litigants in New South Wales. In 2013, a winning litigant in Western Australia may have paid an unrecoverable uplift fee, is likely to had the bill of costs drawn for significantly less than what he or she actually paid (aside from the uplift fee) the practitioner with conduct of the matter and, if the 2005 trend holds true, then recover a smaller percentage of what he or she has claimed than would a litigant in New South Wales.

Uplift fees remain problematic. To date no research had been done on the prevalence or effect of such fees in Western Australia. If New South Wales adopts the provisions of the current daft national Legal Profession Bill uplift fees for damages will be resurrected in that jurisdiction. The wording of the relevant sections of the Western Australian act and the draft Model Bill do not appear to limit a practitioner’s to charge uplift fees to ‘no win/no fee’ matters or to matters where the practitioner does not get paid until the litigation is finalised. Practitioners can benefit from an uplift fee even when they are not carrying any substantial financial risk from conducting the litigation.

It seems obvious that allowing a successful party to recover an uplift fee from the unsuccessful party is undesirable; allowing that makes legal costs punitive. Nonetheless, it also seems clear that a costs regime that allows legal practitioners to recover uplift fees from their clients when they are successful in a matter but does not allow those clients to recover those same fees from the loser is not a regime that is unduly concerned about winning litigants being out of pocket despite winning. This thesis argues that while it may be desirable to allow legal practitioners some way of recouping the opportunity costs of taking on litigation without upfront payment, allowing uplift fees is not a sound way to address that issue. As was seen in New South Wales, uplift fees are too easily abused and the use of such
fees helps to perpetuate the public perception that lawyers are greedy and likely to overcharge.\textsuperscript{744}

Despite the misgivings expressed above, it is clear that the 1994 Reforms have operated to ensure that winning litigants in New South Wales do recover a greater portion of what they spend on the conduct of litigation than do litigants in the unreformed system still in use in Western Australia.

5.3: Do clients who have their own practitioner’s bills assessed benefit from the 1994 Reforms?

In relation to assessing disputes between practitioners and their own clients the picture is not so clear. This may be in part because of the very small sample size from Western Australia. It seems that on the whole solicitors are awarded a higher portion of their bill when it is assessed in New South Wales as compared to Western Australia. However, this has to be aligned with the fact that a far greater portion of assessments of client/solicitor disputes are filed in the lower quantum ranges in New South Wales. It is unclear why this is so, though it may be that less sophisticated clients are more willing to seek assessment in New South Wales because the system there is expeditious and cheap.

At the very least the data shows that clients in New South Wales who dispute their practitioner’s legal bill and have it assessed are generally not getting substantial reductions in their costs because of the 1994 Reforms. Alternately, and taking into account the bills that practitioners file in an attempt to recover money from defaulting clients, it is clear that clients have not been particularly disadvantaged by the change. This is important, as it addresses one of the fundamental criticisms that could be levelled at the New South Wales costs assessment regime; that it allows lawyers to determine if what lawyers charge is reasonable. It is clear that the costs assessors in New South Wales, all of whom are practicing lawyers, do not unduly favour the financial interests of their profession over the interests of legal consumers.

\textsuperscript{744} The author is anecdotally aware that one Western Australian firm had entered into a retainer to pursue damages from a motor vehicle accident that caused personal injury and where the costs agreement specifies that an uplift is payable if the firm is successful in recovering money for the client. In that instance the defaulting driver, through his insurer, has admitted liability for the accident.
There is one other clear advantage to the New South Wales costs assessment regime, and that is that it does not require a client who disputes his or her legal practitioner’s bill to make a personal appearance or to engage other representation to appear on his or her behalf. In Western Australia a client that does not live in Perth or its surrounds is at a particular disadvantage if he or she wants to challenge a bill, as the hearing of the assessment will occur in the Western Australian Supreme Court, located in the centre of the city. In New South Wales it makes no real difference if the client lives in Sydney or ‘out the back of Bourke’, as the assessment is done on the papers.

5.4: Have the 1994 Reforms provided a benefit for the courts in the New South Wales jurisdiction?

The second goal of the thesis was to determine which of the two costs assessment systems works best for the related courts. This determination can be made from two perspectives: Firstly, how do the differing costs assessment regimes affect public perception of the courts, and secondly; is one scheme or the other more efficient in terms of the use of court resources.

5.4.1: Access to justice via costs assessment

The public’s perceptions of a legal system are important. The people who use the system must see it as fair, transparent and open to scrutiny, as well as been timely and not too expensive. If any part of the judicial system is not perceived in this light all of the judicial system is tainted.

This thesis did not include research into public perceptions of the costs assessment schemes and the author is thus unable to draw any firm conclusions as to how the consumers of the assessment systems view them. However, it is worth noting that lower end consumers (being consumers with smaller legal bills) who have disputes with their lawyers are proportionally more likely to access the New South Wales system. This is balanced by the fact that lower end consumers in Western Australia are more likely to access the costs assessment system if there is a dispute with the losing litigant about how much of the winner’s legal costs should be paid.
One conclusion relevant to this that can be drawn from the data is that people who seek party/party assessment in New South Wales have concluded the assessment in, on average, four months, regardless of the quantum of their costs. In Western Australia the system is nowhere near as timely. No value category of bill has an average assessment time of less than six months, with the overall average being approximately 11 months. The average time to assess mid range bills is over a year. In light of that it is hard not to suspect that New South Wales costs assessment consumers are much better served by their system, and for that reason the New South Wales system better serves the courts. That said, in terms of overall public perceptions of the judicial system, it is the author’s view that costs assessment is not much in the public eye.

5.4.2: Which costs assessment regime is most advantageous to the courts of the jurisdiction?
The costs of running the assessment system would be reasonably easy to ascertain in New South Wales. The entire scheme is run by a small and discrete administrative staff based at but separate from the Supreme Court. The rental value of the space the staff uses, the wages for those staff, and the other outgoings such as postage and telecommunications that are outlaid in running the system could all be determined with some exactitude. The filing fees that accompany each application for assessment could be offset against those costs. The costs assessors are paid hourly rates for performing assessments and their fees are currently covered by the parties to each assessment. This thesis did not attempt to determine the costs of running the New South Wales costs assessment scheme, but there is no reason why the annual full cost of the system could not be calculated.

By contrast, in Western Australia the situation is completely different; the expense of running the costs assessment regime is unknown and largely unknowable. In Western Australia costs assessment is simply part of the various court’s general business and no real record is kept of how much of a court officer’s time is spent doing assessments. Although filing fees are generally higher in Western Australia, none of the courts appear to measure or charge for the time that court officers spend in dealing with costs assessment.
In short, it is very easy to know what the New South Wales costs assessment scheme makes as income and spends in providing its services. The scheme makes an annual report detailing how many costs assessment applications it receives each year, and it breaks that down into the varying sort’s of assessment. If the scheme administrators want to compare the performance and determinations of individual assessors within the system it would be easy to do so. In Western Australia no one knows how many costs assessments take place each year, as with the exception of solicitor/client assessments under the LPA, that information is not collected in any formal way. The courts do not separate out the time internal assessors spend on doing assessment, nor do they specifically record the other costs involved in providing that system.

For the above reasons it is not possible to make any real determination as to which scheme is more cost effective. One scheme can be measured with relative ease, the other cannot. However, a scheme that is financially transparent and readily measured across all of its dimensions should be preferred to a scheme that is unknowable in its overall results and its cost of operation.

The 1994 Reforms have created costs assessment scheme that is much better suited to the efficient and measurable administration of justice and contemporary requirements of transparency than was the unreformed scheme it replaced. The courts of Western Australia are still using an unreformed scheme. The data shows that the Western Australian courts are not as well served by that system as are their New South Wales counterparts.

5.5: Which costs assessment regime is better for legal practitioners?

The author noted above that it is his opinion that the public does not much consider costs assessment. It is also his opinion that most legal practitioners in Western Australia do not understand costs assessment very well and are not comfortable dealing with it. Many legal practitioners will go through their whole careers without one of their own bills is taken to costs assessment by a disgruntled client. The party/party costs disputes that arise at the

---

745 Over the 2010-2011 period there were 4652 legal practicing certificates issued in Western Australia. If applications for client/solicitor assessment remain similar in volume to those commenced in 2005 there is approximately one assessment for every sixty practitioners per year. In real terms the ratio is less as some practitioners seem to figure regularly in the assessment process. The chances of any individual practitioner
end of substantive matters are usually settled by negotiation. For those reasons most practitioners will only deal with costs assessment very rarely and are not likely to develop much understanding of the system.

In Western Australia, when a party/party costs dispute cannot be settled by negotiation and has to prepared for assessment a good deal of work ensues. The matter file, which has usually been kept in chronological order, must be re formatted so that it provides evidence of work done towards particular items on the scales of costs. Some firms will have clerks that have at least some experience at doing this; some firms will engage specialist practitioners to do this work, especially if the matter and the costs involved are large. In New South Wales it is not necessary to reformat the file to make it accord with a scale of costs; a costs assessor needs only the matter file and the bill as rendered to determine what the reasonable costs of the matter are. One effect of the 1994 Reforms has been that it requires less specialist knowledge from practitioners who wish to use it, and that in turn makes it more likely that they will. A practitioner in New South Wales who has concluded a substantive matter but who is then faced with a dispute as to costs recovery is more easily able to turn to the costs assessment scheme to have that dispute determined than is his or her Western Australian counterpart. For this reason the New South Wales costs assessment scheme better suits legal practitioners.

As noted above, clients are more readily able to challenge their bills in New South Wales than are their Western Australian equivalents. Individually, some practitioners may consider this a bad thing, although the legal profession in general benefits if unscrupulous lawyers are more easily identified and corrected. One of the notable things about the New South Wales costs assessment regime is that the practitioners in that jurisdiction have embraced the right to have their own bills assessed in order to recover money from defaulting clients. The 1994 Reforms have provided the legal practitioners of New South Wales an efficient and cost

having his or her bill assessed are not high and many of the senior practitioners that are personally known to the author have never had a bill assessed. See the Law Society of Western Australia, Annual Report 2010-2011 <http://www.lpbwa.org.au/files/files/146_2010-2011_Annual_Report_LPB.pdf> for statistics on practice certificates.

746 This is not to say that firms in New South Wales do not put in extra work on a file or engage costing specialists in larger matters, but it is less necessary to do so in that jurisdiction.
effective way to recover monies they are owed for their services, and it has done so in a way that does not appear to compromise the client’s right to have a impartial review of what they have been charged. It may be that some aspects of this particular advantage has been replicated in Western Australia through the operation of the Legal Profession Act 2008 (WA) which allows practitioners to file their own bills for assessment, but in Western Australia it remains the case that the practitioner, like the client, is required to either make a personal appearance for the assessment or to engage a specialist to do so on his or her behalf. This is particularly onerous on practitioners working outside the Perth metropolitan area. The 1994 Reforms have produced a better way to deal with own client costs disputes from a practitioner’s as well as a client’s perspective.

5.6: Unintended consequences of the 1994 Reforms

The third purpose of the thesis was to explore the unintended consequences of the New South Wales Reforms. One thing does become clear when a researcher has approached both systems with the intent of finding data to make judgments about overall efficacy of the systems; data on costs assessment in Western Australia is sparse and difficult to extract. In New South Wales the costs assessment scheme, as a result of its being a separate body from the courts and thus having to be accountable in a more narrow sense, retains data for its own uses. This data allows a researcher to come to some clear conclusions about costs assessments both generally and specifically.

If the New South Wales costs assessors were instructed to record and report further data it would then be possible for a researcher to find out all manner of things about what does and does not work in the costs assessment process. It would be easy to give such instructions as New South Wales costs assessors approach each assessment as a ‘job’ and are already extracting and reporting some data. It is not that costs assessors in Western Australia could not be asked to record similar data, but as costs assessment is just one of many things a

---

747 See discussion at Chapter Four at 4.7.1 above.
Western Australian court officer does on any given day as part of an overall, rather than particular, job it would be more difficult to achieve compliance.\(^{748}\)

One of the most striking things about the New South Wales costs assessment scheme is not what it achieves, but what it could achieve as a diagnostic tool on the health of the overall legal system. As noted above, the costs assessors, many of whom assess files in a specialised range of litigation, report basic but key data as part of the assessment process. While doing the assessments they deal with the file in some depth and are therefore well placed to retrieve other data that could be used to make accurate judgments as to the efficacy of different portions of the legal system.

For example, in both jurisdictions a researcher can readily work out how much litigation is commenced in any given year. Each matter that comes before a court is given a number so that working the total quantum of matters is relatively simple. It is also fairly easy to work out how many matters go through to resolution by way of legal judgment. From that it is possible to work out how many of the matters that commence each year are discontinued for one reason or another before trial.\(^{749}\) However, beyond that it becomes very difficult to determine anything at all. We do not have many real ways of working out why the bulk of matters settle. We do not know how long the various stages in the litigation process take, or where there are bottlenecks and inefficiencies. Matters that go to costs assessment could be a ready source of data about the litigation process in general, and not just about the costs assessment process specifically. If costs assessors were instructed to gather a broader range of data there a variety of avenues for valuable insight into the legal system in New South Wales would become available.

\(^{748}\) As noted in Chapter Four, client/solicitor files in Western Australia often did not have any measure of the time spent on appearances. It seems likely that they should, but as the costs assessors are not charging for their own time spent in the assessment they may feel that there is no real need to record that time. This may simply be a function of being overworked, with the costs assessor rushing on to the next job after having done what needs doing, rather than finishing off the finer details of a job that is essentially done. At the very least, New South Wales costs assessors, being practitioners and being paid for the actual time spent on each assessment, are very alive to the requirement to make a careful record of time spent on each one.

\(^{749}\) As litigation is notoriously slow, this process would have to span an number of years. For example, some of the matters that are commenced in 2013 may finish in 2013, others may still be afoot ten or more years from now.
Over the three years of 2009-2011, there was an average of 1000 applications for party/party assessment each year.\textsuperscript{750} The applications are more likely to involve matters that went to trial than matters that have settled, but that is not always necessarily the case. Any dispute that has gone through the court process to the point where there has been an order for costs can go to assessment. A dispute where the parties are able to settle the substantial dispute but not the quantum of costs one party should pay the other is likely to go to assessment. If costs assessors, who have to go through the files relating to each matter in some detail, collected data on the various procedural milestones that make up the litigation process it would then be possible to make informed analysis of what is and is what is not working well in that process. Such analysis makes reasoned law reform possible. To return to the words of Roscoe Pound that were used as an introduction to this thesis, such analysis would allow us to “compel law making to take more account and more intelligent account of the social facts upon which law must proceed and to which it must be applied”.\textsuperscript{751}

5.7: Closing remarks
As was noted in the introduction of this thesis, the author has had some professional exposure to costs assessment in Western Australia. His view is that costs assessment is little understood by the bulk of legal practitioners and not much considered at all by the general public. For those reasons there is no strong drive to reform the costs assessment regime in Western Australia. There are moves towards reform of the way the courts awards costs, and much disquiet about how lawyers charge clients, but those are separate issues from the assessment of costs once they are either awarded by the court or disputed by the client. One view prevalent in Western Australia is that ‘if it is not broken, don’t fix it’. However, as is clear from the material presented above, it is not really possible to tell if costs assessment in Western Australia is broken or not. It is clear that in New South Wales costs assessment is run in a way that is more transparent and more assessable to its users. There are no real impediments to reforming costs assessment in Western Australia so that it more closely mirrors what has been achieved in New South Wales through the generally successful 1994 Reforms. Any attempt to reform costs assessment in Western Australia could benefit from

\textsuperscript{750}{To date (June 2013) the most recent figures available for costs assessment in New South Wales are for 2011.}

\textsuperscript{751}{Pound, above n 1, 756.}

248
the New South Wales experience, as in that state there have been fairly regular amendments to the original 1994 Reforms to ensure that problems that arose within the scheme were properly addressed.

It seems clear that the courts of Western Australia would benefit from a reform that took costs assessment out of their purview. As was argued in Chapter Four, an administrative system of costs assessment may be fundamentally more suited to determining reasonable costs than is a judicial system that has instead evolved to determine the truths behind disputes.

This thesis closes by noting that, having tracked both costs assessment schemes from their commencement to the present day, and having provided analysis of both from the available quantitative data, the reformed costs assessment scheme in New South Wales better serves the public and the legal practitioners that use it and the courts that depend on it than does the unreformed system used in Western Australia.

However, as a final note, it must be recognised that the costs assessment regime in New South Wales may be on the cusp of a sweeping range of further reform. Such Reforms will be designed to address shortcomings that the various stakeholders in costs assessment have reported with in the scheme as it currently operates. If those Reforms do occur a further research into the New South Wales costs assessment regime should take place once there has been time for the new Reforms to make their full effects known.
Annexure 1: How liability for legal costs arises

A1.1: Overview

At the most basic level, any time a practitioner and a client enter into a paid retainer and legal services are provided to the client in accordance with the retainer, liability for costs arises. In all Australian jurisdictions the retainer is governed by the relevant legal practitioner's act. The Legal Profession Act 2008 (WA) provides for default rates for most forms of legal work; the Legal Profession Act 2004 (NSW) does not.¹ As most Western Australian practitioners contract out of the default rates by way of a costs agreement² with their clients, the situation in both states is that charge out rates are market driven³ and practitioners, by and large, charge what the market will bear.⁴ The costs that a client owes to his or her lawyer are generally known as solicitor/client costs.

All Australian courts have the power to make orders as to who is liable for paying legal costs. As a general rule, in the Australian jurisdictions ‘costs follow the event’ and the party that is successful in one of the procedural steps that make up litigation will have the benefit of a costs order that makes the losing party to that event liable for the costs of that event.⁵ The costs a winning party can recover on a costs order are known as party/party costs. As will be seen below

---

¹ Division 9 of Part 10 of the Legal Profession Act 2008 (WA) provides for a Legal Costs Committee that is responsible for setting and reviewing scales of costs. Scales of costs were largely abolished in New South Wales as a part of the 1993 Reforms.
² Practitioner’s in New South Wales are also likely to set out their conditions of engagement in a costs agreement but unlike their counterparts in Western Australia they do not need to do so in order to displace default rates for the work they will perform.
³ Many commentators would disagree, and would argue that the legal fees are fixed by the profession operating either as a monopoly, or in the absence of an informed clientele. See Chapter 3 at 3.6.2 for discussion on costs and the legal market.
⁴ There are areas of law where the parliaments have considered that it was in the public’s interests to fix costs, for instance legal costs for worker’s compensation matters are charged in accordance to a fixed scale in both Western Australia and New South Wales. In both jurisdictions practitioners are not allowed to charge above the scale rates for such work.
the solicitor/client costs and party/party costs for the same set of legal work can differ markedly in quantum.\textsuperscript{6}

\textbf{A1.ii: The Smith v Johnston retainer}

For the purposes of explaining current billing practices, the reader is asked to consider a hypothetical dispute between Mr Smith (Smith) and Mr Johnson (Johnston). At this stage it does not matter which jurisdiction their dispute has occurred in. Smith engages the fictional firm of SBM Legal, and enters into a costs agreement with that firm. In this instance we presume that the costs agreement binds Smith to paying for the legal services by the time billing method.\textsuperscript{7} This means that he will be charged an hourly rate for each practitioner who works on the file, and will also be responsible for any disbursements incurred for the file.\textsuperscript{8} We will also presume that SBM Legal provide the correct initial and ongoing disclosure about those costs; we will see later that failing to do so can have a profound effect on SBM Legal’s ability to recover costs from its client.

The nature of a litigated dispute is not usually relevant to how a lawyer charges for taking conduct of it.\textsuperscript{9} Suffice to say that Smith’s retainer with SBM Legal is entered into in January 2010 and the writ, alleging a commercial debt of $750,000.00, is filed in the relevant Supreme Court later that month. The matter goes to a two day trial in April 2012. The outcome of Smith v Johnston is a decision, handed down in July 2012, whereby Mr Smith is awarded his damages and a costs order against the defendant.

Many and perhaps most practitioners organise their retainers as much by way of specialist legal software as by way of physical files. SBM Legal is an up to date firm that utilises one of the various commercial file management software applications. A practitioner who is going to work

\textsuperscript{6} This annexure, and the two that follow it, give an overview of how costs are charged and recovered. For a more thorough explanation of the differences between solicitor/client and party/party costs see the thesis to which this annexure is attached.

\textsuperscript{7} There are various billing methods, some firms work to quotes or budgets, or at a fixed rate, but such methods are generally used when law firms are dealing with sophisticated clients. A person who does not generally have much contact with the legal system will usually engage a practitioner via time billing, which is essentially a cost plus method of charging.

\textsuperscript{8} The term disbursement refers to cost the practitioner expends on non legal works, such as private investigators, expert witnesses, and medical reports. Barrister’s fees are often also styled as disbursements as the practitioner who has engaged the barrister is responsible for paying them. The practitioner then recovers the money from the client.

\textsuperscript{9} There are exceptions to this generality, see above n 4.
on Mr Smith’s will enter the file number into the file manager software. The file will then ‘open’ on that practitioner’s computer screen and an internal clock will start running. Each time the practitioner saves the work he or she is performing the software will bring up a narrative entry screen and the practitioner will enter some brief narrative as to the work preformed. The software will then charge that work at the ubiquitous six minute interval to the client’s account at the charge out rate for that particular practitioner. More than one practitioner can be working on, and thus charging time against, any given file at any given time. Each electronic document produced in relation to the file, including emails, can be printed off and be saved to the physical file.

A1.ii.a: Interim Bills

Stephen George Short, a hypothetical practitioner working at SBM Legal, may sit down at his desk at 8:00 a.m. on 12 March 2010 and commence work the Smith file. He may proceed as follows:

<table>
<thead>
<tr>
<th>Time</th>
<th>Work performed</th>
<th>Billed time</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00</td>
<td>Open file, telephone client and have a discussion about the progress of the matter and taking further instructions. Write file note and save, entering ‘telephone to client and file note re same’ in the narrative box. Elapsed time 9 minutes.</td>
<td>12 minutes</td>
</tr>
<tr>
<td>8:10</td>
<td>Check relevant legislation online, draft letter to client confirming instructions, print letter for mailing out, write file note setting out research. Save work entering ‘research and letter to client’ in the narrative box. Elapsed time 22 minutes.</td>
<td>24 minutes</td>
</tr>
<tr>
<td>8:32</td>
<td>Telephone expert witness, discuss documents relating to the matter, fax documents to witness. Write file note and save, entering ‘telephone to expert witness, fax documents to same’ in the narrative box. Elapsed time 13 minutes.</td>
<td>18 minutes</td>
</tr>
<tr>
<td>8:45</td>
<td>Write short email memo to supervising partner setting out proposed course of action. Save work, entering ‘memo to (partners, initials, say SBM)’ Elapsed time 3 minutes.</td>
<td>6 minutes</td>
</tr>
<tr>
<td>8:48</td>
<td>Close file, open another file.</td>
<td>Total 60 minutes charged to file.</td>
</tr>
</tbody>
</table>
Later that day the supervising partner will receive and read the memo and will also record his time for reading it and any response he creates. Note that our hypothetical Mr Short's time was charged at $280.00 per hour, with minimum charge periods of 6 minutes. He is a junior solicitor and will do the bulk of the work needed to get the matter up for trial. SBM, the supervising partner, is a senior practitioner and is charging out at $500.00 per hour, or $50.00 per six minute interval.\(^{10}\)

At the end of each month the firm’s accounts department will create an account from all the entries against the Smith file.\(^ {11}\) The account itself will take one of the two forms. It may be a lump sum bill, in which case it will have a brief narrative describing the work carried out in that month, or it may be an itemised bill.\(^ {12}\) For our purposes we will assume that no other work than that reported above was done on the Smith file in March 2010. The bill will be sent out under cover of a letter and a statement of the clients rights will be enclosed with the bill. An example of the March 2010 bill, issued as a lump sum bill, is provided at the end of this annexure as A.

Smith is entitled to ask for an itemised bill if he feels that the bulk bill has not given him enough information;\(^ {13}\) many firms send an itemised bill in the first instance.\(^ {14}\) If the bill is itemised, the body of the account will usually consist of a printout with columns showing the date work was done, an identifier of the practitioner who did the work, the amount charged, and the GST. An

\(^{10}\)The current (2013) scale rates for senior and junior practitioners engaged in Supreme Court litigation in Western Australia are $451.00 and $319.00 respectively (Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 Schedule, Table A.). There is no benchmark or scale rate for solicitors in New South Wales.

\(^{11}\)This assumes that the costs agreement Smith entered into allowed for monthly billing, which is the usual practice. Some practitioners defer the bills until the matter is resolved, some practitioners, particularly in personal injury matters, use a conditional ‘no win no fee’ arrangement where fees are not due until the end of the matter and are only payable if the matter is concluded successfully.

\(^{12}\)The Legal Profession Act 2008 (WA), s 290(2) and the Legal Profession Act 2004 (NSW) s 332(1) give the practitioner the right to send either a lump sum or an itemised bill. At this stage the account is known as a bill, once a bill is drawn up in the form used for filing in court for assessment it is known as a bill of costs.

\(^{13}\)The Legal Profession Act 2008 (WA) s 292 and Legal Profession Act 2004 (NSW) s 332A(1) allow a client who receives a lump sum bill the right to request an itemised bill; a firm receiving such a request must provide that bill within 21 days of the request.

\(^{14}\)Many Western Australian firms will send out a copy of the report generated by a computer based billing system as an itemised account. These reports usually provide a brief description of the works done (entered by the practitioner doing the works), a note of the time taken (with minimum six minute intervals), an identifier for the practitioner, and the cost of the works. Some costs assessors do not consider this to be an itemised bill, although they will usually assess a bill in that form. Those assessors take the view that an itemised bill is a bill where the works covered are described by reference to the items listed on the relevant scales of costs.
example of the Smith v Johnson bill for March 2010, but issued as an itemised bill, is provided at the end of this annexure as B.

Regardless of what form it takes, the bill will have a separate section for disbursements. The bill will also contain some form of notice to the client as to how he can dispute the account if he is not satisfied with it.15

The account sent out to Smith in April 2012 would most likely be the largest, as it would include the costs of the trial. If a barrister was engaged, the cost of the barrister would be included as a disbursement. Smith may have received 31 individual bills from the commencement of the retainer up to and including the July 2012 account. In most instances he will have paid the bills as they came in, as the costs agreement would have a term allowing SBM Legal to end the retainer if accounts were not paid.16 The bills for the months between the trial and the decision would be minimal, but Smith would incur more costs after the decision has been handed down. The costs of Smith enforcing his judgement, and the costs orders the judgement contained, will be included in those later costs.

A1.ii.b: Solicitor/client and party/party costs

For the purposes of this exercise, we have already decided that Smith was successful at trial and that the Court awarded him his costs. Shortly after the decision was handed down SBM Legal would have written to Smith and informed him of the success of his matter.17 SBM Legal may have enclosed the July account, or if the firm had been carrying the matter without regular payment,18 an account for the entire costs of legal services and disbursements he has incurred in the matter.

---

15 In accordance with s 291 of the Legal Profession Act 2008 (WA) if the matter is in Western Australia, or at s 333 of the Legal Profession Act 2004 (NSW) if the retainer is in New South Wales. In both jurisdictions notice can be by way of a list of the rights set out in the statute or by way of a link to an internet site that provides that information.
16 Until the Legal Profession Act 2008 (WA) s 293(1) and Legal Profession Act 2004 (NSW) s 334(1) respectively took away the common law position where a legal retainer was an entire contract, practitioners were not entitled to send out monthly accounts unless they had obtained that right though a costs agreement. Some firms did so anyway, in ignorance of this, and arguably had their accounts not being paid they would not have been able to discontinue on those grounds or to sue in debt for their fees as those fees were not yet owing.
17 Alternately Smith may have attended for the decision.
18 This is unlikely if the matter is commercial litigation but not unusual if the retainer was for personal injury litigation.
Smith is liable to his solicitor for the legal costs he has incurred throughout the conduct of his matter. His liability is incurred through a contractual arrangement, the costs agreement he entered into with SBM Legal. As was noted above, those costs are generally known as solicitor/client costs.

Smith has been awarded his proven damages and costs. In essence, the Court has said as he has been proved right and that the defendant was in the wrong, the defendant is liable for the costs Smith has incurred in proving his case. This approach, known as costs following the event, is the general approach to costs awards in Australia. The costs that the unsuccessful party to litigation must pay to the successful party are known as party/party costs. The unsuccessful litigant is also liable for the solicitor/client costs he or she has incurred with his or her own practitioner.

The fundamental difference between the costs Smith will pay to SBM Legal and the costs Johnson, the unsuccessful litigant, will pay to Smith is that Smith’s liability for costs arises out of a contractual relationship and Johnson’s liability for costs (to Smith) arises out of an order of the court. Smith’s liability is in accordance with the costs agreement he entered into with SBM Legal. Johnson’s liability will be in accordance with the costs recovery scheme operating in the jurisdiction. The difference in quantum between the two liabilities may be large; Smith may find that Johnson is only liable to pay him somewhere between 60% and 80% of what he has paid out to SBM Legal. As this was a Supreme Court matter that went to a full trial, Smith may have paid large costs, perhaps in the order of $60,000.00. He may only recover $36,000.00 to $48,000.00 of the monies he has paid SBM Legal.\textsuperscript{19}

The order granting Smith his costs is likely to state that the costs are to be agreed or assessed. Most practitioners view assessment of costs as an avenue of last resort.\textsuperscript{20} By the time costs become a pressing issue the substantive dispute has been resolved in one way or another. Further

\textsuperscript{19} As illustrated in Chapter 4 of the thesis this annexure accompanies, for party/party bills in the $50,000.00 to $69,000.00, assessed return of the original bill averaged 57\% in Western Australia and 81\% in New South Wales. In other words, if the bill was treated as average Smith would recover $37,000.00 of the $60,000.00 he had nominally paid in fees in a Western Australian assessment and $48,600.00 if the assessment was in New South Wales. The Western Australian return of 57\% for that tranche of bills is outside the general range of average returns; they fall between around 65\% and 80\%.

\textsuperscript{20} This perception may be changing in Western Australia due to the introduction of provisional assessment. Provisional assessment was discussed at Chapter 2.5.1.3. As discussed at Chapter 3.13.3.2, New South Wales may also introduce a form of provisional assessment.
dispute as to costs, while often inevitable, is, quite simply, further dispute. Practitioners from both sides of any given dispute will generally make reasonable efforts to bring their clients to an agreement as to costs rather than resort to filing a bill for assessment. SBM Legal is likely to draw a draft bill of costs for that matter and send it off to Johnson’s solicitor on a without prejudice or without prejudice save as to costs basis.

**A1.ii.c: The effect of interim costs orders**

Although Smith was awarded the costs of the substantive action, it may be that he too has a liability for costs to Johnson. This is because while any given trial has an overall ‘winner’, there may have been other, and possibly many other, costs orders made through the interlocutory stages of the matter.

As soon as the parties to a legal dispute make an appearance in court and the court makes orders in relation to the substantive dispute, it is likely that the court will include among the orders made an order as to costs. The costs order will usually allocate responsibility for the costs of the appearance, and for costs associated directly with that appearance. Each appearance is an ‘event’, and as noted above, costs generally follow the event. The ‘winner’ of each event will usually have the benefit of an order that the other party pay his, her or its legal costs. In the absence of an order that a party pay costs ‘forthwith’, such costs become due at the end of the matter and are subsumed into the overall costs of the matter.\(^{21}\)

For instance, if during the early part of preparing Smith’s matter for trial, SBM Legal considered that Johnson had documents that were undiscovered, and had made an unsuccessful application for the further and better discovery; the costs of that application would have been awarded against Smith and to Johnson.\(^{22}\) If Johnson had the benefit of any costs orders in his favour, he would have those costs taken into account in the negotiations that take place to settle the costs of

---

\(^{21}\) The Western Australian Supreme Court has put out a practice direction that will result in the costs of interlocutory proceedings being largely fixed and payable forthwith. This measure will remove the costs of those proceedings from the assessment process and may have far reaching effects on the way litigation is run in that court. See Supreme Court of Western Australia, *Consolidated Practice Directions 2009* 4.7.1 Costs of Interlocutory Applications.

\(^{22}\) If the matter were in the Western Australian Supreme Court Smith may well have had the costs of this application fixed and paid forthwith, see above n 15. This would mean that it would not be taken into account at the final costs determination.
the action. If no settlement was reached he may have his solicitor prepare his own bill for assessment or ask that the costs awarded to him were assessed against those due to Smith.

Offers and counter offers to agree the costs may ensue. As noted above, in the vast majority of cases the costs are settled through negotiation. If no negotiated agreement is reached then SBM Legal will draw up a final Bill of Costs for assessment. The Bill will be drawn according to the costs recovery system in the jurisdiction. It is at this point where the jurisdiction, for our purposes either Western Australia or New South Wales, will have a bearing on the form of the bill and on what procedures will be followed. Up until this point there would have been no significant difference as to how Mr Smith incurred liability for costs to his solicitor, nor to how Johnson incurred liability for cost on both a party/party basis (to Smith) and to his own solicitor.

A1.iii: Conclusion
To this point it the Smith v Jones litigation as described above may have occurred in either Western Australia or New South Wales. The conduct of litigation about a substantive matter differs little between the two jurisdictions. Now however, the substantial litigation is finished and the disputes that we will follow are to do with the liability for legal costs. The practicalities and procedures relating to the assessment of costs differ greatly between Western Australia and New South Wales; those practicalities and procedures are dealt with in the following two annexure.

---

23 It is the author’s experience that these costs are not always considered in a costs negotiation.
24 This bill is likely to be larger in quantum than the draft bill used for negotiations. The assessment system is not sympathetic to a bill that appears to be an ambit claim, but the bill may none the less draw a longish bow. As noted above, the draft bill may well have been tendered as ‘without prejudice except as to costs’. A cost dispute, in Western Australia at least, is still litigation and the general rules apply. If a bill is assessed and it does not have more than 15% assessed off, and the person who has filed the bill can produce a draft bill that was refused in negotiations and is for less than or equal to the assessed bill, the assessor is likely to award the costs of the assessment to that party.

258
A: Account to client (Smith v Jones): Lump sum version

SBM LEGAL: LAWYERS ABN 34 694 100 350
Memorandum of Professional Fees
Our Reference: SGS: KJT 1265 Date: 04/04/2010
Mr J Y Smith
67A Watkins Street
Willetton WA 6108

Dispute with Andrew Johnson

Account for our professional fees in the above matter for the month of March 2010:
Professional Fees: $348.00
GST on Professional Fees: $34.80
Total Professional Fees and GST: $382.80

<table>
<thead>
<tr>
<th>Item / Description</th>
<th>GST</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fax Charges</td>
<td>$0.37</td>
<td>$3.70</td>
</tr>
<tr>
<td>Long distance call to expert witness</td>
<td>$0.40</td>
<td>$4.00</td>
</tr>
<tr>
<td>Photocopying</td>
<td>$0.60</td>
<td>$6.00</td>
</tr>
</tbody>
</table>

Disbursements: $13.70
GST on Disbursements: $1.37
Total Disbursements and GST: $15.07
Total Professional Fees and Disbursements including GST: $397.87

BALANCE DUE & PAYABLE: $397.87

Stephen George Short
SBM Legal
B: Account to client (Smith v Jones): Itemised version

SBM LEGAL: LAWYERS ABN 34 694 100 350
Memorandum of Professional Fees
Our Reference: SGS: KJT 1265 Date: 04/04/2009
Mr J Y Smith
67A Watkins Street
Willetton WA 6108

Dispute with Andrew Johnson

Account for our professional fees in the above matter for the month of March 2010:

<table>
<thead>
<tr>
<th>Date</th>
<th>Practitioner</th>
<th>Narrative</th>
<th>Units</th>
<th>Billed</th>
<th>GST</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/3/09</td>
<td>SGS</td>
<td>Telephone attendance on client to update on matter and to seek further instructions.</td>
<td>2</td>
<td>$48.00</td>
<td>$4.80</td>
</tr>
<tr>
<td>12/3/09</td>
<td>SGS</td>
<td>Letter to client confirming instructions and research into the Fair Trading Act.</td>
<td>4</td>
<td>$96.00</td>
<td>$9.60</td>
</tr>
<tr>
<td>12/3/09</td>
<td>SGS</td>
<td>Telephone attendance on Tony Tooley CPA, re proving debt, fax documents to same</td>
<td>3</td>
<td>$76.00</td>
<td>$7.60</td>
</tr>
<tr>
<td>12/3/09</td>
<td>SGS</td>
<td>Memo to SBM outlining proposed plan of action.</td>
<td>1</td>
<td>$28.00</td>
<td>$2.80</td>
</tr>
<tr>
<td>12/3/09</td>
<td>SBM</td>
<td>Consider memo, draft instructions re same.</td>
<td>2</td>
<td>$100.00</td>
<td>$10.00</td>
</tr>
<tr>
<td>13/3/09</td>
<td>SBM</td>
<td>Consider memo (no charge)</td>
<td>0</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

Total | $348.00 | $34.80  |

Professional Fees: $348.00
GST on Professional Fees: $34.80
Total Professional Fees and GST: $382.80
<table>
<thead>
<tr>
<th>Item / Description</th>
<th>Amount</th>
<th>GST</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fax Charges</td>
<td>$3.70</td>
<td>$0.37</td>
<td>$4.07</td>
</tr>
<tr>
<td>Long distance call to expert witness</td>
<td>$4.00</td>
<td>$0.40</td>
<td>$4.40</td>
</tr>
<tr>
<td>Photocopying</td>
<td>$6.00</td>
<td>$0.60</td>
<td>$6.60</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>$15.07</td>
</tr>
</tbody>
</table>

Disbursements: $13.70  
GST on Disbursements: $1.37  
Total Disbursements and GST: $15.07  

Total Professional Fees and Disbursements including GST: $397.87  

BALANCE DUE & PAYABLE: $397.87

Stephen George Short  
SBM Legal
Annexure 2: The mechanics of costs assessment in Western Australia

A2.i: Overview

The preceding annexure (Annexure 1) explained how liability for legal costs arises in the context of a litigated dispute. Annexure 1 postulated a legal dispute between Smith and Mr Johnston (Smith v Johnston), with Smith, represented by SBM Legal, being successful at trial. This annexure will continue to use the Smith v Johnston dispute as a framework, and will follow Smith through the mechanisms of the two limbs of costs assessment as practiced in the Western Australian jurisdiction.

For the purposes of describing how liability for the costs of the Smith v Johnston dispute arose, it would not have mattered if the dispute had taken place in Western Australia or in New South Wales. In both States liability for costs will arise in much the same way. Our successful litigant, Smith, could be involved in two different disputes as to liability for costs; with Johnston (party/party) or with his own legal representatives, SBM Legal (client/solicitor or solicitor/client).¹

As Smith was the successful party to the litigation, the general rule is that the court would have awarded him the costs of the litigation.² The order that makes that award provides the grounds for one limb of the costs assessment process. If Johnston does not agree to pay the amount Smith seeks from him that dispute will form the basis of a party/party costs dispute. Johnston’s liability for Smith’s costs is the result of a court order made under the Act that governs the particular court that heard the dispute (for the purposes of this illustration the Western Australian Supreme Court). The foundation of that liability is basically the same in Western Australia and New South Wales. The general rule in the courts of both jurisdictions is that the loser pays the winner’s cost as agreed between the parties or as determined at a costs assessment.

¹ The costs a client owes to a practitioner are usually described as solicitor/client costs. For the purposes of the thesis and for this annexure solicitor/client costs describe situations where the solicitor has sought assessment and client/solicitor costs describes situations where it is the client who has initiated the assessment.
² The general rule as to costs is that costs follow the cause: G E Dal Pont, Law of Costs (LexisNexis Butterworths, 2003) 210.
The other possible costs dispute relates to the costs Smith has paid or owes to his own solicitor. For Smith, the mechanics of engaging and paying his solicitors, governed as it is by the model legislation, would have been fundamentally the same in both jurisdictions. If Smith does not agree with the quantum of the bill that SBM Legal has given him for their legal services he may dispute that amount as a client/solicitor dispute. Due to a welcome and much needed reform, SBM Legal can file their bill for assessment if Smith refuses to pay the bill but does not himself seek assessment pursuant to the *Legal Profession Act 2008* (WA) (the WA Act).

Despite the basic similarities in the way the costs disputes will have arisen, the two jurisdictions have fundamentally different costs dispute resolution systems, as is explored in the body of this thesis. This annexure (Annexure 2) describes how disputes as to the quantum of costs payable by the losing litigant to the winning litigant by way of a court order, or payable to one’s own solicitor for services rendered, are resolved in the Western Australian jurisdiction. Annexure 3 describes how the same disputes would be resolved in New South Wales.

---

3 The lawyer client relationship in Western Australia is currently governed by the *Legal Profession Act 2008* (WA). In New South Wales it is governed by the *Legal Profession Act 2004* (NSW). Both Acts are fundamentally the same and are modeled on the Legal Profession Model Bill as promulgated by the Standing Committee of Attorneys-General in 2006. New South Wales adopted the provisions of the model bill two years before it was officially released by the Standing Committee of Attorneys-General.

4 There many reasons a client may disagree with a lawyer’s bill. In theory costs assessments are narrow in focus; they only deal with disputes as to actual costs. If the client has other allegations against his or her practitioner, such as negligence, a costs assessment is not the place to air them. However, s 307(1) of the *Legal Profession Act 2008* (WA) makes it mandatory for a costs assessor to refer grossly excessive charging to the Complaints Committee; s307(2) give the assessor the discretion to report any other conduct that he or she believes may amount to unsatisfactory professional conduct or professional misconduct to the Committee. This can be a fine line; the practitioner should recover costs for works ‘reasonably done’ in a costs assessment. As the assessor is able to decide on what works are reasonable, the assessor is not likely to allow any works that he or she thinks was negligently or improperly done, even though the assessor may choose not to refer the matter to the Committee.

5 The bills that provided the raw data for this thesis were sourced from 2005; at that time practitioners in Western Australia could not seek costs assessment of their own motion. Up until 2009 a practitioner whose client did not pay had to sue in debt to recover the money. If a solicitor sues for his or her money he or she must commence an action in the relevant court, prove the debt in its entirety in a forum that is not particularly informed about solicitor/client retainers (unless of course the matter was heard in the WASC) and then enforce the judgement. Generally, he or she would engage another solicitor to run that action. If the solicitor files for the bill for assessment that process will cost substantially less, be dealt with much more quickly by an assessor who is well versed in costs and, generally, without the need to employ another solicitor to run it. At the end of the assessment process the solicitor with have a certificate of assessment that can be enforced as a judgement.
As previously noted, in Western Australia there are some fundamental differences to the way party/party and client/solicitor disputes are resolved. This Annexure will track through the mechanisms for each type of dispute, commencing with party/party assessment.

**A2.ii: The Party/Party dispute**

When a Court awards costs in a matter it usually does so on a ‘to be agreed or assessed’ basis. Smith’s lawyers, SBM Legal, will have attempted to settle the costs by providing a draft bill of costs to Johnston or his representatives. Negotiations will ensue and in the majority of cases the parties do settle costs. As in all litigation, settlement is the most cost effective way to end the dispute. As we shall see below, the costs assessment process will take time and further expenditure; settlement is a cheaper option overall. For the purpose of this illustration however, we assume that no agreement is reached. SBM Legal will draw a final bill of costs for the entire course of Smith's matter, and that bill may differ from the draft bill that formed the core of the attempt to settle. The final bill may be amended to include costs not included in the draft bill if the draft bill was drawn low in an attempt to settle. The final bill will be filed for assessment in the Court that heard the substantive dispute as a continuation of the substantive matter.

In the *Smith v Johnston* example the bill drawn up by Smith’s lawyers for the party/party dispute will bear little resemblance to the bill they have given Smith. Smith’s relationship with SBM Legal, and the hourly rates he has agreed to pay for the works done for him was governed by a costs agreement. Smith has been billed in accordance with time SBM Legal’s practitioners spent working on his matter, with the charges expressed as an hourly rate dependant on the seniority of the practitioner doing the work. Smith has received interim bills, either in the form of lump sum bills or by way of an itemised account on a monthly basis throughout the retainer. From SBM Legal’s perspective it has not mattered what parts of the litigation they have been working on in

---

6 The Court may use the word ‘taxed’ instead of ‘assessed’, but for the purposes of this thesis and its annexure, the archaic word ‘taxed’ has been replaced with the word assessed throughout.

7 This claim is based in the author’s personal experience but as there is no data as to how many party/party bills are assessed in Western Australia each year there is no data to back it up.

8 As previously noted, this is not the case for solicitor/client disputes; in Western Australia they are all heard in the Western Australian Supreme Court as separate matters regardless of what works the legal retainer in dispute related to.

9 As noted in Chapter One, most Western Australian practitioners contract out of the scales of costs that provide the default rate for legal work by way of a costs agreement pursuant to s 282 of the *Legal Profession Act 2008* (WA).

10 Examples of both lump sum and itemised bills are provided in Annexure 1.
any given month; what has mattered is which lawyers had spent how much time working on Smith’s matter in the month covered by the bill.

In contrast, Johnston, who has been ordered to pay Smith’s costs, is not a party to that contract and is not bound to pay the rates Smith has agreed to. As far as Johnston is concerned, any costs agreement between Smith and his lawyers is irrelevant. Instead, Johnston’s liability, stemming as it does from a court order, is assessed against a scale of costs that the Legal Costs Committee, a statutory body created by the WA Act has created as a guide to and limitation on what are considered reasonable amounts to pay for the various stages of litigation. Therefore, although Johnston’s liability to pay costs relates to the same body of legal work (relating to the dispute) the methodology of calculating what Johnston owes for that work is completely different and bears no real relationship to what that work actually cost.

A2.ii.a: Scales of Costs

As Smith v Johnston was heard in the Western Australian Supreme Court in April 2012 the Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 will govern the assessment of Johnston’s liability under the costs order that formed part of the judgement in the matter.

The scales of costs that govern party/party assessments do take into account the amount of time a practitioner should reasonably spend on each component of the works they have done for their clients, but not in the direct way that those practitioners charge for that time. As discussed in Chapter One at 1.3.7, scales of costs are item based. The Costs Committee determines the scales around easily recognised milestones or events in the litigation process. The scale that governs Supreme Court litigation, such as the Smith v Johnston dispute, has 34 items that between them cover all the works that could possibly have been done in the course of litigating the matter.

---

11 If there is an indemnity order Johnston will pay much higher costs and may pay at the rate set out in the costs agreement, but it is still unlikely that Smith will recover all of his costs.

12 For further discussion on the Legal Costs Committee in Western Australia see Chapter 2.3.

13 The Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 did not come into operation until November 1 2012.

14 The first 32 items on the Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 cover the particulars of litigation; item 33 ‘Other work’ and catches any works reasonably done but not otherwise allowed
A2.ii.b: Drawing the bill at scale

The bill that SBM Legal draws up to present to the losing litigant would be drawn in accordance with the relevant scale of costs, not in relation to the account issued to the client.\textsuperscript{15} To prepare the bill in that format SBM Legal will have to break down the file kept in relation to Smith’s litigation into work as describe in items on the scale.\textsuperscript{16}

For example, Smith, through SBM Legal and as part of the litigation process, would have provided discovery of all his documents relevant to the matter that he had in his possession. He would have delivered all the documents to SBM Legal and they in turn would have gone through the documents checking their contents and removing any they considered privileged or irrelevant. Once the documents were ready for inspection SBM Legal would contact Johnston’s solicitors and arrange for them to come and inspect the discovered documents. For illustrative purposes, we assume that the documents were voluminous. It may be that this process took 20 hours to complete. If so, Smith’s bill for that month would include 20 hours of work at the charge out rate stipulated in the costs agreement that governed the retainer. This was work reasonably done in relation to the litigation and Smith is able to recover the ‘costs’ of that work from Johnston. This does not mean he can recover what he has paid SBM Legal. Giving discovery (including notice) is Item 7 on the relevant scale. The maximum that Smith can recover from Johnston (absent a special costs order) is $4356.00.\textsuperscript{17} That limit is a maximum amount of recovery, not a set amount that Smith will recover, and the assessing officer will allow the amount he or she thinks is reasonable in the particular set of circumstances up to that amount.

We assumed that the costs agreement Smith entered into with SBM Legal priced a senior practitioner at $500 an hour (plus GST), and if a senior practitioner from the firm spent 20 hours providing discovery, Smith will have paid $11,000.00 (inclusive of GST) for that portion of the

\begin{flushright}
\textsuperscript{15} Rules of the Supreme Court 1971 (WA) O 66 r 42 mandates what a bill must contain, including ‘items consecutively numbered, together with a reference to the item in the scale to which the item in the bill relates’. The Smith v Johnston bill, drawn for assessment, is provided at the end of this annexure.
\end{flushright}

\begin{flushright}
\textsuperscript{16} See above n 12.
\end{flushright}

\begin{flushright}
\textsuperscript{17} Although the scale is item based, the amounts allowed on the scale are arrived at through consideration of what maximum amount of time could reasonably be spent doing the work and what level of experience the practitioner doing the work should have. Item 7 allows ten hours of a senior practitioner’s time for giving discovery, with the hourly rates of a senior practitioner set at $429.00 (inclusive of GST), with a further $66.00 for a notice of discovery.
\end{flushright}
litigation process and he will not recover the difference between what the costs assessor awards and what he has actually paid.\textsuperscript{18} An example of how that work would appear as charged in Smith’s bill from SBM Legal as compared to how it would look in the bill filed for assessment is provided at Table 1 below.

**Extract from SBM bill to Smith**

<table>
<thead>
<tr>
<th>Date</th>
<th>Practitioner</th>
<th>Narrative</th>
<th>Units</th>
<th>Unit cost</th>
<th>Amount</th>
<th>GST</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>various</td>
<td>SGS (SP)</td>
<td>Providing Discovery</td>
<td>200</td>
<td>50.00</td>
<td>10,000.00</td>
<td>1000.00</td>
<td>11,000.00</td>
</tr>
</tbody>
</table>

**Extract from bill as filed for assessment**

<table>
<thead>
<tr>
<th>No</th>
<th>Date</th>
<th>Narrative</th>
<th>Item on Scale</th>
<th>Total</th>
<th>Assessed Off</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>various</td>
<td>Discovery</td>
<td>7</td>
<td>$4510.00</td>
<td></td>
</tr>
</tbody>
</table>

Table 1 Providing discovery as it may appear in the bill to Smith as it compared to how it may appear in a bill filed for assessment

The work involved in drawing the bill, which will entail translating the accounts and the work done into a format that can be measured against the scale of costs, can be substantial.\textsuperscript{19} Many larger firms employ costing clerks who specialise in this task; there are also a few practitioners who specialise in this area.\textsuperscript{20} SBM Legal will charge Smith for the works involved in drawing a party/party bill, but SBM Legal will include drawing as an item in the bill and attempt to recover the costs of drawing from Johnston at the assessment. As with the rest of his costs Smith is unlikely to recover those costs in full; SBM Legal will charge Smith at the hourly rate set out in

\textsuperscript{18} The winning litigant who benefits from an order that the loser pay his or her costs never recovers more than a portion of those costs actually expended. Despite this thesis being able to show what percentage is likely to be recovered on a party/party assessment, it is not possible to ascertain what percent of the monies actually expended is ever recovered.

\textsuperscript{19} This is work that Smith will have to pay SBM Legal to do, and while he may recover some of it at assessment, avoiding these costs is part of the reason why it is better to settle a costs dispute rather than take it to assessment.

\textsuperscript{20} Western Australia, unlike New South Wales and Victoria, does not have very many firms that specialise in costs. This may be because of the much smaller legal market in Western Australia.
the costs agreement. If Smith he does recover the costs of assessment from Johnston it will be at scale rates.21

SBM Legal will file the bill of costs in the Supreme Court.22 A worked copy of the party/party bill from the Smith v Johnston litigation is provided at the end of this annexure. There is a fixed filing fee of $379.00 and further fee of 2.5 % of the overall amount of the bill as assessed.23 In this case, as the total of the bill as filed is $76,949.91, the filing fee will be $1,898.75.24 That fixed fee will have been listed as a disbursement on the bill of costs and an allowance of 2.5% of the bill as assessed will be added to the total at the end of the assessment.

A2.iic: Provisional assessment

SBM Legal can, at the time of filing, ask that the bill be provisionally assessed, providing that Johnston’s lawyers have agreed to that course.25 Alternately, if the costs assessor who is assigned the bill thinks it suitable, he or she can write to the parties asking if they will consent to a provisional assessment.26 The costs assessor can also deem that a bill is not suitable for provisional assessment.27 If both of the parties agree to a provisional assessment the assessor appointed to their matter will view the full court file and the materials provided as to the costs dispute and give a provisional view as to what the bill will be assessed at. If both parties accept

21 The work done for assessment of costs is item 30 on the 2013 scale. No amount is set, rather the limit is ‘such amounts as are reasonable in the circumstances’: Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012, Schedule, Table B, Item 30.
22 Unlike some other documents, bills of costs are not just stamped and returned for service. They go into the court system as a costs assessor must be appointed and a date for either a directions hearing or the assessment has to be set. The bill will be endorsed with that information and returned to the party some days later and that party will in turn have a copy of the endorsed bill served on the party that is responsible for paying the bill. This can take from a few days to a week.
23 Information as to civil fees in the Western Australian Supreme Court can be found at http://www.supremecourt.wa.gov.au/G/general_division_fees.aspx?uid=1953-2760-2885-1682. The fee mentioned is for individuals and small businesses, corporate entities pay $369.00 plus the 2.5% ad valorum fee.
24 This gives rise to a small incongruence. The costs assessor will allow the costs of the assessment to one party or the other, depending on the overall circumstances of the assessment. The person filing the bill for assessment included the ad valorum fee as a disbursement but if they are awarded the costs of the assessment they can only recover the portion of the fee that relates to the bill as assessed. Any other disbursements that are allowed are usually allowed in full.
25 Supreme Court of Western Australia Consolidated Practice Directions 2009 (WA) r 4.7.2.4. For a description and critique of the provisional assessment regime see Chapter 2.5.1.3.
26 Ibid r 4.7.2.2. The court will send a copy of the bill as filed to Mr Johnston’s solicitors if the assessor thinks that the matter can be assessed provisionally.
27 Ibid r 4.7.2.3, 4.7.2.4
that provisional finding the certificate of assessment, known as the allocatur, will be signed at that amount.

A2.ii.d: The appointment with the assessor

If the bill is not provisionally assessed (or if one of the parties objects to amount that the bill was provisionally assessed at) the bill will listed for assessment ‘in the usual way’\(^{28}\). The usual way is for the court to return two endorsed copies of the bill to SBM Legal. The endorsement sets the time and place for the assessment, and the appointment is pre-emptory.\(^{29}\) In this instance Smith is being represented by SBM Legal and will not appear himself. Johnston is still represented by his trial lawyers. SBM Legal will serve a copy of the endorsed bill on Johnston’s lawyers.

The costs assessor will have received the court file on the matter and will have perused it before the initial appointment. If the matter is small or simple the assessor may make the assessment at that first appointment. Otherwise, the parties may use the first appearance to make submissions as to the conduct of the assessment and the material to be put to it and the assessor will make directions as to who will do what and as to the date of the full assessment.

The assessment itself will usually take part in chambers, and in the lower courts often in the assessor’s own chambers, rather than in a small hearing room. Although the assessment is a judicial hearing, general court etiquette is relaxed, with the parties sitting across from each other and not required to rise when they speak.\(^{30}\) If the dispute has not been narrowed down by earlier appearances and directions, the assessor will go through the bill scale item by scale item and assess each item. This will be done in accordance with section 301 of the WA Act which reads:

**Criteria for assessment**

\[
\text{(1) In conducting an assessment of legal costs, a taxing officer must consider —} \\
\text{(a) whether or not it was reasonable to carry out the work to which the legal costs relate; and} \\
\text{(b) whether or not the work was carried out in a reasonable manner; and}
\]

\(^{28}\) Ibid r 4.7.2 9.

\(^{29}\) Rules of the Supreme Court 1971(WA) O 66 r 38 states that ‘The appointment made by the taxing officer shall be peremptory, and he shall proceed thereon \textit{ex parte} on proof that due notice has been given to the opposite party, unless sufficient cause appears for postponement.’

\(^{30}\) This is not always the case; some assessments can take the form of the more usual contested hearing and may be heard in a courtroom.
(c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 302 or 303 applies to any disputed costs.\textsuperscript{31} The assessor making costs determination under s301 of the WA Act has a very broad discretion; in essence the costs assessor can effectively run an assessment as if it was a trial.\textsuperscript{32}

The party who has filed the bill will provide evidence, either orally or by way of documents, to support the amount claimed under each item. This should not usually be difficult for a competent solicitor who would have noted down every portion of work done on a file and ensures that the work is recorded on the file.\textsuperscript{33} Proving the work was reasonably done can be more difficult, especially if the original file keeping has been less than satisfactory.\textsuperscript{34}

**A2.ii.e: Work assessed off the bill**

Even when a file has been well run and well presented significant amounts can be assessed off a bill. Some typical examples of what can cause monies to be assessed off the bill are provided below:\textsuperscript{35}

1. Smith was a focused and committed client who, initially, (we will deal with his costs dispute with SBM Legal later) was not too concerned about what he needed to spend on costs. He wanted to ensure that the truth came out and that Johnston lost the litigation; for Smith the principle mattered as much as the money. He instructed SBM Legal that they were to identify, locate and interview every possible witness to the events in question. SBM Legal did so, and they found fourteen witnesses in total. SBM Legal took lengthy witness statement from each of them. At trial they only called four of those witnesses.

\textsuperscript{31} Legal Profession Act 2008 (WA) s 301.
\textsuperscript{32} Rules of the Supreme Court 1971(WA) O 66 r 44.
\textsuperscript{33} There is probably nothing like getting a file, especially a long and complex one, ready for a costs assessment that will most drive home to a young practitioner the importance of good file keeping. Files are kept in chronological order, but a file prepared for assessment is better organised in relation to the items claimed on the bill rather than in strict chronological order.
\textsuperscript{34} Having the lawyer who conducted the matter attending the assessment is helpful, as his or her explanations of the works performed are evidence that the assessor can evaluate in order to determine the reasonableness of the works done.
\textsuperscript{35} The examples given relate to works done by the practitioners, but reasonableness is also the measure for disbursements. For example, expert reports that are not used or not successfully relied on may not be allowed. Assessors may also take a dim view of claims for disbursements that appear to be part of the costs of running an office. If a firm charges a client separately for word processing, it may find it difficult to convince the assessor that such a charge is a disbursement for the purposes of a party/party assessment.
One of those witnesses was completely discredited. Smith has been billed the costs of dealing with those witnesses and SBM Legal has included all that work under item 17, ‘getting up’. Johnston’s solicitor disputed those costs at the assessment. The work was done, but Johnston’s solicitor argued that it was not reasonable to do it. He claimed that only the costs relating to three of the witnesses should be recoverable. He may well be successful in having all or at least some part of the costs relating to the unused (and the unsuccessful) witnesses assessed off, depending of course on whether the overall circumstances make it clear that it was reasonable to deal with that many witnesses.

2. Stephen George Short (SGS), a junior solicitor, did most of the work on the matter, under the supervision of the firm’s managing director, SBM. Smith v Johnston was the first matter SGS has taken all the way to trial. As this was his first practical experience of litigation, he found himself somewhat deficient in knowledge of the necessary procedures. SGS was diligent however, and spent hours and hours reading and checking the Court Rules and other relevant materials. He documented those hours carefully under the heading of research in the schedule supporting item 17. Johnston’s solicitor argued that this is not research, it is simply SGS ‘getting up to scratch’ on things a competent practitioner should know. Johnston’s solicitor contended that work to further SGS’s necessary education is not something that can be charged out at the junior practitioner’s rate of $297.00 an hour. There is a very good chance that an assessor would agree with that argument and most or all of that ‘research’ would be assessed off.

3. SBM, the managing director, claimed 6 hours in total for telephone attendances with the client. He is an older practitioner who believes that excessive documentation is a way of needlessly running up costs for the client. There were 24 file notes dated over one week, all barely legible, that read ‘telephone attendance on client’. Johnston’s solicitor argued that there is not enough information about the calls for the assessor to be able to ascertain

---

36 Item 17 covers a broad range of work, and the bill of costs may contain schedules setting that work out in some detail. The Western Australian Supreme Court Consolidated Practice Directions, at Direction 4.7.3.3, allow for schedules in relation to item 16, ‘getting up’, but that appears to be a reference to the 2008 determination. The Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010(WA) has moved ‘getting up’ to Item 17 and 2012 Determination, although yet to come into effect, has renamed those works ‘preparation of case’. The Consolidated Practice Directions have yet to catch up with those changes.

37 Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 (WA) s 8 (Table to Clause 10).
assessor will usually accept that the calls took place, but lacking evidence that it was reasonable to make them he or she may well disallow the time claimed for those calls or at least assess off a significant portion of the time claimed.

The assessor will decide how much (if anything) to assess off each item claimed. He or she will also award the costs of the assessment, which will include preparation and the necessary appearances. Usually the payee will pay those costs, but if the bill is assessed to less than Johnson offered in negotiations then that previous offer may be used as a Calderbank Offer and Johnston may be awarded his costs of the assessment. If so, Johnston will have those costs removed from the amount he owes Smith, and those costs can be substantial. For this reason the party who has lodged a bill for assessment is not encouraged to make any ambit claims in the bill.

A2.ii.f: Finalising the assessment

At the end of the process the assessor will ask if there is any objection to him or her signing the certificate. Up until the certificate is signed either of the parties that is dissatisfied with any aspect of the assessment can ask the assessor to review his or her assessment. An assessor who reviews his or her own decision may seek further evidence regarding the item or items in dispute. The assessor may provide written reasons as to how he or she arrived at a determination about the item or items that have been reviewed and will provide those reasons with the signed certificate if so requested by either Smith’s or Johnston’s representatives. If neither party requests a review the assessor will sign the certificate of assessment and the assessment is over.

The certificate of assessment is a judgement of the court and can be enforced as such. In the Supreme Court of Western Australia, a bill of costs such as Smith’s, which falls in the $70,000.00 to $99,999.00 range, will, on average, return around 85% of the amount that has been

38 Rules of the Supreme Court 1971 (WA) O 66 r 53.
39 Ibid O 66 r 54(1).
40 Ibid O 66 r 54(2).
41 For a junior practitioner the assessor may well sign the certificate with the proviso that the junior practitioner can seek instructions as to objections before the signing ‘officially’ takes place. In such instances, silence, or a failure to report back promptly with any objections, is assent.
42 Legal Profession Act 2008 (WA) s 305(3).
claimed. In our example this means that the bill would be allowed at (say) $64,500.00. As will be seen below, the amount the bill has claimed may in turn be significantly lower than Smith’s practitioner charged him for the works, with a probable result that Smith may only get back around 60% of what he spent on legal fees, despite him having been successful in the action and the court having ordered that Johnston pay his costs.

A simplified illustration of the party/party assessment process to this point is provided below:

---

**Figure A2.1: Party/party assessment in Western Australia**

**A2.i.g: Review of assessment**

If a party has asked the assessor to review the assessment and is not satisfied with the outcome, that party has 14 days from the day the certificate was signed to ask that the items reviewed be

---

43 See data on rates of return on party/party bills in the Western Australian jurisdiction presented in Chapter 4 at 4.5.3.
further reviewed by a judge of the Supreme Court sitting in chambers.\textsuperscript{44} If the judge believes that the assessor made some error of principle in either allowing or disallowing an item or in arriving at an amount for an item the judge can rectify that error.\textsuperscript{45} However, the judge’s review can only relate to objections made in accordance with the rules and the part of the assessment not subject to objection is final. The judge will usually order the costs of review in the cause.

\textbf{A2.iii: The solicitor client dispute}

Smith may also find himself in a costs dispute with his own practitioners, SBM Legal. Only a very small portion of legal retainers are taken to assessment, but when practitioners and their clients fall out over monies owed assessment is the fastest and cheapest way to resolve the dispute if negotiation alone will not do so.

As SBM Legal is a well-run firm of competent practitioners it provided Smith with proper costs disclosure at the beginning of the retainer.\textsuperscript{46} We will also assume that the costs agreement that governs the retainer and by which SBM Legal has contracted out of the default charge out rates provided by the Scales of Costs is reasonable and valid in every way.\textsuperscript{47}

As previously noted, SBM Legal has been billing Smith on a monthly basis and Smith in turn has been paying those bills. If Smith has had dispute about any of the monthly bills he could have taken that up with the SBM partner who had ultimate conduct of his matter. In most cases that dispute would be settled at that point in time in any one of a number of ways. The firm may have discounted the bill. Smith, on receiving a proper explanation of the bill, may have been willing to pay it. However, it is also possible for a client to dispute the entirety of the fees charged at the end of the matter, despite having paid interim bills throughout.\textsuperscript{48} We will assume that at the end of the entire matter Smith has decided that he has been overcharged and that he has not been able to come to any agreement with SBM Legal about what he should have paid as compared to what

\begin{itemize}
\item \textsuperscript{44} \textit{Rules of the Supreme Court 1971} (WA) O 66 r 55(1).
\item \textsuperscript{45} Ibid O 66 r 55(2).
\item \textsuperscript{46} Failure to provide proper disclosure comes with a range of sanctions, not the least of which is that it can displace a costs agreement entirely so that the defaulting practitioner can only recover fees for his or her work at the relevant scale rates and then only after an assessment takes place. For costs disclosure generally see Division 3 of the \textit{Legal Profession Act 2008} (WA) and for the effects of deficient disclosure see s 268 of that Act.
\item \textsuperscript{47} An invalid costs agreement has the same effect as failure to disclose costs, and the bill is then assessed at scale rates.
\item \textsuperscript{48} \textit{Legal Profession Act 2008} (WA) s 292(2).
\end{itemize}
he has been billed. He is able to have the whole bill assessed, despite having paid all but the final invoice. An exercise of this right gives rise to a client initiated assessment (a client/solicitor assessment). If Smith does not avail himself of that right and merely refuses to pay the bill SBM Legal also has the right to file the bill for assessment. The procedure for carrying out the assessment in either case is the same.

A2.iii.a: The client/solicitor bill

SBM Legal will draw up a combined version of all the bills that they have sent Smith over the course of and at the termination of his matter. The bill drawn for the party/party assessment (included at the end of this annexure) was drawn to the limits provided in the scale of costs. As the client/solicitor assessment is pursuant to a costs agreement the party/party bill is not relevant. As has been previously noted the amount that Smith has paid SBM Legal over the duration of his matter may be higher and even substantially higher than the amount claimed in the party/party bill. The sample party/party bill provided was drawn for a total of $75,949.91. For the sake of

49 As a firm of competent practitioners, SBM Legal would have made sure that Smith was well aware of the shortfall between what he would recover in costs and what he will have actually paid, as doing so is part of the disclosure regime (The Legal Profession Act 2008 (WA) s 260(4)). Despite this, the reality of that shortfall, once the party/party bill has been finalised, may well leave Smith feeling that he has been overcharged.

50 The quantum of clients who insist on having bills assessed by the court is, in relation to the quantum of clients who receive bills, statistically insignificant. There were 75 client/solicitor assessments filed in the Western Australian Supreme Court in 2005; there were tens of thousands of retainers formed in Western Australia that year. A dissatisfied client is more likely to refuse to pay than to ask for an assessment. Prior to the 2008 Act, which allowed practitioners to file their own bills for assessment; a practitioner could either write the matter off or sue on the retainer to recover the debt due in contract. Many solicitors will write small debts off as the cost of pursuing them is often greater than the debt to be recovered. Time and energy spent chasing a debt may be better spent working on a new retainer. See for instance Mossensons (A Firm) v Coastline Associates (Unreported, Supreme Court of Western Australia, Pigeon, Ipp and Templeton JJ, 12 December 1997).

This unreported judgement from the Full Court of the Supreme Court of Western Australia started as a client/solicitor assessment in the Local Court (as it then was), went before a single judge of the Supreme Court on appeal and then on the Full Court. Mossensons had their bill reduced in the first instance, and instigated both appeals. Templeman JJ, one of the three presiding judges, was willing to inquire into the merits of Mossensons objections to the assessment, but in doing so he felt that ‘since that inquiry discloses that the amount of costs actually in issue is a few hundred dollars only, I would decline to exercise any discretion which might exist to set aside the allocatur’ (in the last paragraph of his judgement).

51 See above n 48. For discussion on this issue see Chapter 2 at 2.5.1.1.

52 There would be one very real difference in the example used. If Smith feels he is being overcharged he may have costs of the entire retainer assessed. If he has paid on a monthly basis and refused to pay the final bill SBM Legal would have only the final bill assessed.
this example we will assume that SBM has charged Smith $100,000.00 for the conduct of his matter. The difference between the two amounts is the difference between what was charged for the work under the costs agreement as compared to what was claimed in accordance with the scale of costs.

SBM Legal will then file that document in the Supreme Court of Western Australia as a substantive matter. All client/solicitor and solicitor/client assessments in the Western Australian jurisdiction are heard in the Supreme Court of Western Australia. The fee on application (2013) is the same as the fee charged for a party/party assessment, being $195.00 for an individual or small business, or $379.00 for a corporation, plus an ad valorem fee of 2.5% of the total amount claimed. In this instance, as Smith’s litigation was behalf of his company, the total filing fee would be $2,879.00. That amount would be added to the $100,000.00 charged for the works as an additional disbursement on the bill of costs.

A2.iii.b: The conduct of the assessment and the issues that will determine it
From this point on the conduct of the assessment will mirror that of a party/party assessment with two key differences; firstly the assessment will be governed by the costs agreement rather than the scale, and secondly the test for determining what can be allowed will be expanded, as is explained below.

Smith and SBM Legal can agree to a provisional assessment as discussed at A2.2.3 above. If they do not do so, and unless the bill is small or straightforward, the assessor can call a directions hearing before the actual assessment takes place. In the directions hearing the assessor will attempt to get the parties to settle the matter and if that attempt is unsuccessful the assessor will make orders that help narrow and define the dispute.

If the matter goes on to a full assessment and, as in this instance, there is a valid costs agreement, the assessor will use the rates set out in that agreement as a yardstick, rather than the scale of costs. Assuming that the rates set out in the costs agreement are not unreasonable, those are the rates that will be applied to the works being assessed. Secondly, the criterion set out in Section 301(1) (a) of the Act will be expanded; the test will still be ‘was it reasonable to carry out the

---

work?’, but works carried out under the instructions of the client will be considered reasonable, even if those works were unnecessary in terms of the litigation. In the example above Smith has instructed SBM Legal to interview and take statements from every possible witness to his matter.\(^{54}\) As was explained, a good portion of that work may not be recoverable on a party/party basis. However, if SBM Legal can show that the works, though excessive, were carried out in accordance with instructions, the fees they have charged for those works will stand.\(^{55}\)

A 2005 Western Australian client/solicitor assessment had an average return of approximately 83% of the amount that was claimed in the bill as filed.\(^{56}\) If Smith’s bill was reduced by that average amount he would have the costs of the assessment (if he had incurred any)\(^{57}\) awarded to him and would make a substantial saving as compared to his original bill.\(^{58}\) Smith’s bill would have had the filing fee and the charge for preparing the bill assessed off and the bill would have been allowed at (say) $83,000.00. As was seen above Smith recovered $64,500.00 from Johnston on the party/party assessment. In this instance Smith has paid $18,500.00 more to his lawyer for the conduct of the litigation than he has received from the losing litigant by way of a costs order.

However, that average return on client/solicitor assessment in Western Australia used is only an average, and the real rate of return depends on individual circumstances. In short, it seems likely that the assessors for majority of the assessments that provided data for this thesis found that the clients had genuine grievances and had been overcharged; in terms of retainers generally this is likely to be atypical. As the assessment process in Western Australia does tend to weed out the unrealistic disputes,\(^{59}\) and as for the purposes of this exercise we have assumed that SBM Legal

\(^{54}\) See A2.2.5 above.

\(^{55}\) A prudent practitioner, faced with instructions to do more than he or she thinks is necessary, will raise that issue with the client and will insist on written confirmation that they have done so and that the instructions are to do those works in any event.

\(^{56}\) See data on rates of return on client/solicitor bills in the Western Australian jurisdiction presented in Chapter 3 at 4.6.3. The Western Australian data did not include any bills in that range, so for the purposes of the illustration the average return has been used.

\(^{57}\) As a client/solicitor assessment is a substantive matter in its own right Smith may have engaged a legal practitioner to act for him, and would thus incur costs. Alternately he may be unrepresented, and his only costs will be the filing fee. It is the author’s experience that, in Western Australia, an unrepresented client attending an assessment of his or her own bill will receive some guidance from the assessor. It is also the author’s experience that the solicitor, unless he or she has engaged another practitioner to deal with the matter, will not be awarded any costs even if the bill is not reduced on assessment.

\(^{58}\) Legal Profession Act 2008 (WA) s 305(2)(a).

\(^{59}\) For example, in the bill filed as LPA 37 2005, the amount claimed was $35,326.00. The costs agreement governing the retainer was deficient, and after three appearances the solicitor decided against assessment and
is a firm that bills in an ethical and competent matter, we cannot assume that Smith will necessarily do as well as the Western Australian clients whose bills provided the data for this thesis. It may well be that Smith’s client/solicitor assessment could be returned at an amount much closer to the quantum of the bills SBM Legal had rendered Smith. If Smith’s bills were reasonable in all the circumstances Smith would only have recovered around 60%-65% of his actual expenditure from Johnston.

A legal practitioner should not fear a costs assessment if he or she has a valid costs agreement and has done his or her job competently and kept a good record of what work has been done, despite the statistic recorded above. It remains to be seen how many Western Australian practitioners will avail themselves of the right to seek assessment of their own motion, but it seems likely that doing so, in the circumstances where the firm has acted competently, will be more cost effective than suing a client who will not pay in debt.

**A2.iii.b1: Issues that will cause a reduction in the bill**

Nonetheless, things can go wrong for a solicitor on assessment, as is evidenced by some of the Western Australian client/solicitor bills that provided data for this thesis. There are three examples of how costs claimed in a party/party assessment can fall away listed above at A2.2.5; the second and third of those examples are also relevant to client/solicitor assessments. There are also other sets of circumstances that can have a disastrous effect on a client/solicitor bill:

1. The first is centred in costs disclosure. The practitioner’s duty to disclose costs at the start of the retainer and during its existence has become progressively (and, many would argue, desirably) more onerous.\(^6\) A client who becomes aware that costs disclosure has been deficient can apply to the Supreme Court to have the costs agreement set aside so that the assessor will assess the bill against the relevant scale of costs.\(^6\) A costs assessor who reaches that conclusion on his or her own can reduce the bill by the amount that he consented to an allocator at $13,000. The majority of the bills filed for client/solicitor assessment in the Supreme Court of Western Australia did not go on to a full assessment. In some cases it may be that the result was quite different to the LPA 37 example and the client was made aware that assessment would result in little or no discount and there was then a settlement on those grounds.

\(^6\) The Act makes provision for sophisticated clients and exempts retainers with such from the full disclosure regime, see *The Legal Profession Act 2008* (WA) s 263. That said, while some forms of legal works are easily mapped in advance, working out the likely costs of litigation is very much a ‘how long is a piece of string?’ exercise.

\(^6\) *Legal Profession Act 2008* (WA) s 288 (3)(c).
or she thinks is warranted according the seriousness of the deficiency.\(^{62}\) Deficiency of costs disclosure can also be considered unsatisfactory professional conduct or professional misconduct.\(^{63}\) Such circumstances can lead to the original bill being assessed to far less than it was filed at, even though the bill accurately described the work done. Once the costs agreement falls away the solicitor is left with the scale rates and those rates, applied instead of the rate set out in the costs agreement, are likely to mean that the solicitor will be unable to recover a substantial portion of the bill. If the bill has already been paid the solicitor will have to refund the difference between what was charged and the assessed amount.

2. A second set of circumstances that can lead to a large amount being assessed off a client/solicitor bill stems from poor file management. As a general rule, a practitioner who has taken initial instructions will give the client a copy of the firm’s costs agreement and inform them that they should seek independent advice as to the terms of the agreement. The client will be asked to return that agreement, signed, after they have sought that advice.\(^{64}\) Not all clients do so, and if the firm does not pick up on the fact that the costs agreement has not been signed, the retainer can run its course and if the bill is later disputed and it becomes apparent that there was no costs agreement the bill will be assessed against the scale, regardless of what the law firm has charged.\(^{65}\)

As with a party/party assessment, once the assessor has signed the certificate (or allocator as it is otherwise described), SBM Legal can enforce that certificate as if it were a judgement of the court.\(^{66}\) The parties have the same rights of appeal as have the parties in a party/party

\(^{62}\) Ibid s 268(3).

\(^{63}\) Ibid s 307(2).

\(^{64}\) Clients rarely seek that advice; if they approached another practitioner to receive it they would be faced with a costs agreement……. Nonetheless, a practitioner should ensure that a client has time to go through the agreement carefully and for that reason should not accept it back signed at that original meeting. Doing so can cause problems later as if the client applies to the court to have the agreement set aside, the circumstances in which the costs agreement arose are one of the things that the court will consider in deciding the application, see LPA 288(3)(d).

\(^{65}\) This is less the case than it used to be. The Legal Profession Act 2008 (WA) s 282(2) stipulates that a costs agreement must be evidenced in writing, so in a situation where a costs agreement has been sent out and the client, having received it, continues to give instructions, the agreement is likely to be seen as binding. Under the Legal Profession Act 2008 (WA) s 221 a client could make a costs agreement in writing and it is the author’s experience that costs assessors insisted on a client signature as evidence that the client had made that agreement.

\(^{66}\) Legal Profession Act 2008 (WA) s 305(3).
assessment. The same would be true if it had been SBM Legal that had sought the assessment, rather than Smith.

A simplified illustration of the client/solicitor assessment process to this point is provided below:

![Figure A2.2: Client/solicitor assessment in Western Australia](image)

Mr Smith now has been through two costs assessments. He knows how much the unsuccessful defendant has to pay him, and he knows how much he has to pay SBM Legal. If SBM Legal has provided proper disclosure, had a valid costs agreement, and handled his matter competently Smith is likely to be significantly out of pocket on his legal costs, despite having won the litigation and obtaining a court order that Johnston be liable for his costs. The further costs that he has had to pay for the two assessments (assuming that he was not awarded the costs of

---

67 See A2.2.7 above for a discussion of the rights of appeal against a costs assessment.
68 If Smith has been paying interim bills, and in particular if he has paid the large bill that covered the trial period, and his client/solicitor bill was reduced by any significant amount, it may be SBM Legal that owes him money.
assessments on the party/party bill and that he engaged other solicitors to conduct the client/solicitor assessment and SBM Legal’s bill was not reduced by more than one-sixth) may be substantial.

**A2.iv: Conclusion**

This annexure has provided a ‘hands on’ look at costs assessment as it is carried out in the Western Australian jurisdiction. As noted in the body of the thesis in Chapter One 69 a Western Australian assessment is a judicial process carried out by officers of the court. It is adversarial in nature, regardless of whether it is a party/party assessment that is part of the substantial matter before the court or whether it is a new action where either a client or a solicitor disputes the client’s liability for his or her own costs. A costs assessment in Western Australia is not significantly different from assessments performed when the colony was first founded. The system is, more or less, what it always has been. There are no loud calls for reform. 70 As it has received little attention one might conclude that it is not perceived as deficient, or perhaps for the bulk of Western Australians it is not much perceived at all.

---

69 At 1.4.

70 In the consultation drafts for its 1999 Review of the Civil and Criminal Justice System of Western Australia (at page 23 as Proposal 517), the Law Reform Commission of Western Australia proposed that a new Costs Act enshrine the principle that a winning litigant should recover the reasonable costs of litigation. This proposal was not carried through into the final report, although that report (at page 133 as Recommendation 131 did recommend that the gap between solicitor/client and party/party assessment be narrowed by allowing recovery of file management works on a party/party assessment. Martin CJ, who chaired the committee that produced that report and is now the Chief Justice of the Western Australian Supreme Court, has reformed the way the court awards costs and is driving a debate about how lawyers charge for their fees. However, there is currently no real discussion about the costs assessment regime as it currently operates. In particular, the thesis to which this annexure is attached provides the first comparison of the Western Australian system with the ‘reformed’ system that was introduced in New South Wales in 1993.
The *Smith v Johnston* Bill: An example of the bill drawn for a party/party assessment

The following bill of costs has been drawn in accordance with the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010*. It is provided as an example of what a bill drawn for a party/party assessment in the Supreme Court of Western Australia would generally look like.

As can be seen in the bill, the costs of the litigation are broken down into the items on the scale of costs. The assessing officer will work through the bill item by item as described above and will either agree that the item charge is reasonable or ‘tax off’ an amount from the item so that it becomes reasonable.

This thesis and its annexure have used the term ‘assessment’ to describe the process used to determine the final quantum of the costs that a litigant will recover. However, the example provided uses the terms ‘tax’ and ‘taxation’ as those terms are still current in the Supreme Court of Western Australia.

There is no sample bill provided for the client/solicitor assessment described above. Legal practitioners are more idiosyncratic in the form of such bills than they are able to be in drawing up party/party bills. For that reason a sample would only show what the author would consider an acceptable bill and would not necessarily reflect a bill as would be drawn by most practitioners.
IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

IN THE MATTER of a commercial dispute

B E T W E E N:

SMITH PTY LTD
Plaintiff

and

JONES PTY LTD
Defendant

Plaintiff’s Bill of Costs Pursuant to the orders of THE HONOURABLE Justice Lewins
DATED 12 July 2012

Date of Document: The 28th day of November 2012

Filed on behalf of: The Plaintiff
Prepared by:
SBM LEGAL PTY
PERTH WA 6000

<table>
<thead>
<tr>
<th>Index</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Bill of Costs for Taxation (pursuant to the Legal Practitioners (Supreme Court)(Contentious Business) Determination 2010)</td>
<td>2-4</td>
</tr>
<tr>
<td>2. Schedule A: Getting Up As above</td>
<td>5-6</td>
</tr>
<tr>
<td>No.</td>
<td>Date</td>
</tr>
<tr>
<td>-----</td>
<td>---------------</td>
</tr>
<tr>
<td>1.</td>
<td>26/01/2010</td>
</tr>
<tr>
<td>2.</td>
<td>12/03/2010</td>
</tr>
<tr>
<td>3.</td>
<td>17/03/2010</td>
</tr>
<tr>
<td>4.</td>
<td>20/04/2010</td>
</tr>
<tr>
<td>5.</td>
<td>25/05/2010</td>
</tr>
<tr>
<td>6.</td>
<td>29/8/2010</td>
</tr>
<tr>
<td>7.</td>
<td>various</td>
</tr>
<tr>
<td>8.</td>
<td>6/01/2011</td>
</tr>
<tr>
<td>9.</td>
<td>27/03/2011</td>
</tr>
<tr>
<td>10.</td>
<td>08/05/2011</td>
</tr>
<tr>
<td>11.</td>
<td>28/08/2001</td>
</tr>
<tr>
<td>12.</td>
<td>13/09/2011</td>
</tr>
<tr>
<td>13.</td>
<td>27/10/2011</td>
</tr>
<tr>
<td>14.</td>
<td>10/01/2012</td>
</tr>
<tr>
<td>15.</td>
<td>various</td>
</tr>
<tr>
<td></td>
<td>Date</td>
</tr>
<tr>
<td>---</td>
<td>------------</td>
</tr>
<tr>
<td>16.</td>
<td>25/01/2012</td>
</tr>
<tr>
<td>17.</td>
<td>04/02/2012</td>
</tr>
<tr>
<td>18.</td>
<td>13/02/2012</td>
</tr>
<tr>
<td>19.</td>
<td>17/04/2012</td>
</tr>
<tr>
<td>20.</td>
<td>18/04/2012</td>
</tr>
<tr>
<td>21.</td>
<td>17/04/2012</td>
</tr>
<tr>
<td>22.</td>
<td>12/07/2012</td>
</tr>
<tr>
<td>23.</td>
<td>18/07/2012</td>
</tr>
<tr>
<td>24.</td>
<td>03/05/2004</td>
</tr>
<tr>
<td>25.</td>
<td>Various</td>
</tr>
<tr>
<td>26.</td>
<td>Various</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Disbursements

<table>
<thead>
<tr>
<th>Date</th>
<th>Description and Payee</th>
<th>Amount Inclusive of GST</th>
<th>Taxed Off</th>
</tr>
</thead>
<tbody>
<tr>
<td>14/01/2010</td>
<td>Supreme Court filing fees</td>
<td>$265.00</td>
<td></td>
</tr>
<tr>
<td>28/09/2010</td>
<td>Tony Tooley, CPA, (consider and advise on accounts)</td>
<td>$175.00</td>
<td></td>
</tr>
<tr>
<td>01/10/2010</td>
<td>Debtor’s Ledger Service (process servers)</td>
<td>$49.50</td>
<td></td>
</tr>
<tr>
<td>01/02/2012</td>
<td>Debtor’s Ledger Service</td>
<td>$77.00</td>
<td></td>
</tr>
<tr>
<td>03/02/2012</td>
<td>DOLA search</td>
<td>$11.00</td>
<td></td>
</tr>
<tr>
<td>21/01/2012</td>
<td>Supreme Court filing fees</td>
<td>$800.00</td>
<td></td>
</tr>
<tr>
<td>08/08/2002</td>
<td>Acme Accounting Services</td>
<td>$2100.00</td>
<td></td>
</tr>
<tr>
<td>various</td>
<td>Rapid Print</td>
<td>$353.05</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Supreme Court, Taxation Fee, fixed</td>
<td>$379.00</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>$4209.55</strong></td>
<td></td>
</tr>
</tbody>
</table>

Amount of Bill $75,949.91

<table>
<thead>
<tr>
<th>Taxed-off</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
</tr>
<tr>
<td>$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Taxing fee (Ad Valorem component)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Attendance at Taxation</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Allowed at</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
</tr>
</tbody>
</table>
I certify that the above costs have been taxed and allowed in the sum of $

DATED the                                           day of                                          2012

__________________________________________

Taxing Officer

Take Notice that I have appointed the day of 2012 at o’clock in the noon at the Supreme Court Perth as the date, the time and the place at which the Bill of Costs is to be taxed.

__________________________________________

Listing Clerk
**Schedule 1: Other Work (Getting Up)**

**Item 33**

1. **Client Correspondence:** Correspondence between client and SBM Legal. This includes written correspondence, telephone attendances and face to face meetings.

<table>
<thead>
<tr>
<th>Practitioner</th>
<th>Hourly rate</th>
<th>Total time spent</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>SGS</td>
<td>$297</td>
<td>475 mins</td>
<td>$2351.25</td>
</tr>
<tr>
<td>SBM</td>
<td>$429</td>
<td>517 mins</td>
<td>$3696.55</td>
</tr>
<tr>
<td>KJT</td>
<td>$297</td>
<td>208 mins</td>
<td>$1029.60</td>
</tr>
<tr>
<td>CAM</td>
<td>$297</td>
<td>282 mins</td>
<td>$1395.90</td>
</tr>
<tr>
<td>Clark</td>
<td>$209</td>
<td>10 mins</td>
<td>$34.80</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Sub-Total</strong> $8508.10</td>
</tr>
</tbody>
</table>

2. **Correspondence with Defendant:** Written correspondence, telephone correspondence and face to face meetings between SBM Legal and the solicitors for the defendant.

<table>
<thead>
<tr>
<th>Practitioner</th>
<th>Hourly rate</th>
<th>Total time spent</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>SGS</td>
<td>$297</td>
<td>250 mins</td>
<td>$1237.50</td>
</tr>
<tr>
<td>SBM</td>
<td>$429</td>
<td>172 mins</td>
<td>$1229.80</td>
</tr>
<tr>
<td>KJT</td>
<td>$297</td>
<td>105 mins</td>
<td>$519.75</td>
</tr>
<tr>
<td>Clerk</td>
<td>$209</td>
<td>96 mins</td>
<td>$334.40</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Sub-Total</strong> $3321.45</td>
</tr>
</tbody>
</table>

288
3. Correspondence with Supreme Court, including written and telephone correspondence

<table>
<thead>
<tr>
<th>Practitioner</th>
<th>Hourly rate</th>
<th>Total time spent</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>SGS</td>
<td>$297</td>
<td>250 mins</td>
<td>$1237.5</td>
</tr>
<tr>
<td>SBM</td>
<td>$429</td>
<td>172 mins</td>
<td>$129.80</td>
</tr>
<tr>
<td>KJT</td>
<td>$297</td>
<td>105 mins</td>
<td>$519.75</td>
</tr>
<tr>
<td>Clerk</td>
<td>$209</td>
<td>180 mins</td>
<td>$627.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Sub-Total</strong> $2514.05</td>
</tr>
</tbody>
</table>

4. Correspondence with third parties, including written, telephone and personal attendances

<table>
<thead>
<tr>
<th>Practitioner</th>
<th>Hourly rate</th>
<th>Total time spent</th>
<th>Charge</th>
<th>5975.66</th>
</tr>
</thead>
<tbody>
<tr>
<td>SGS</td>
<td>$297</td>
<td>475 mins</td>
<td>$2351.25</td>
<td></td>
</tr>
<tr>
<td>SBM</td>
<td>$429</td>
<td>517 mins</td>
<td>$3696.55</td>
<td></td>
</tr>
<tr>
<td>Clark</td>
<td>$209</td>
<td>250 mins</td>
<td>$870.83</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Sub-Total</strong> $6918.63</td>
<td></td>
</tr>
</tbody>
</table>
5. Consideration of Evidence and Law: Consideration of relevant evidence and law, including the Trustees Act and legal precedents and affidavits filed by the defendant. Also including preparation of Court documents not allowed for elsewhere.

<table>
<thead>
<tr>
<th>Practitioner</th>
<th>Hourly rate</th>
<th>Total time spent</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>SGS</td>
<td>$297</td>
<td>850 mins</td>
<td>$4207.5</td>
</tr>
<tr>
<td>SBM</td>
<td>$429</td>
<td>172 mins</td>
<td>$1229.80</td>
</tr>
<tr>
<td>KJT</td>
<td>$297</td>
<td>105 mins</td>
<td>$851.40</td>
</tr>
<tr>
<td>Clerk</td>
<td>$209</td>
<td>212 mins</td>
<td>$738.47</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Sub-Total</strong></td>
</tr>
</tbody>
</table>

**Total Getting Up: $26,289.35**
Annexure 3: The mechanics of costs assessment in New South Wales.

A3.i: Overview

As was noted in the Annexure 1, the processes of a legal dispute that carried through to completed litigation do not differ a great deal between the Western Australian and the New South Wales jurisdictions. The process of engaging a lawyer is much the same in both states. The relationship between the litigant and the legal practitioner that ensues is no different in Western Australia than it is in New South Wales. It is usually governed by a costs agreement and always by the relevant Legal Profession Act. The litigation itself would typically follow much the same course in either jurisdiction. In both jurisdictions a winning litigant (in this example Mr Smith) would have the benefit of an order that the losing litigant (Mr Johnston) pay his costs as part of that win.¹

Despite the essential similarity in the way the substantive matter is adjudicated, the mechanisms available to the various parties for resolving further disputes as to costs differ markedly between the two jurisdictions. Annexure 2 described the two different routes to costs assessment that Mr Smith would use if the costs disputes arose in Western Australia. As noted, if Smith could not come to an agreement with Johnston about the costs Johnston owed him on the party/party costs order, Smith could have those costs determined as a continuation of the original Smith v Johnston dispute. If Smith had a dispute as to the fees his own practitioner had charged him he could have those fees assessed for reasonableness by way of a new application under the Legal Profession Act 2008 (WA) to the Western Australian Supreme Court.² Alternately, if Smith simply refused to pay, his practitioner could make the application for assessment, again to the Supreme Court by way of the Legal Profession Act 2008 (WA).³

¹ As discussed in the body of the thesis, both jurisdictions have a general rule that costs follow the event; as such the winning litigant will usually be granted an order that the losing litigant pay his or her costs. As with all general rules there are exceptions, but in the hypothetical Smith v Johnston dispute that is being used to illustrate the assessment processes Smith has the benefit of such an order.
² Legal Profession Act 2008 (WA) s 295(2).
³ Ibid s 297(1).
In New South Wales, where costs assessment is no longer in the purview of the courts, all applications for assessment are filed with the Manager, Costs Assessment, and are assessed by way of an administrative process that is separate from the courts. The fee paid on filing an application for assessment is the greater of ‘$100 or 1% of the unpaid bill or 1% of the total costs in dispute’. There is a further charge of $192.50 per hour for the costs of the assessor, who does the assessment, but those costs are not determined until the assessment is finalised. The forms for application are available online.

We will track Smith’s two disputes through the assessment process below. For the purposes of this illustration we will continue to assume that Smith’s lawyers, SBM Legal, have charged him a total of $100,000.00 for the conduct of his litigation against Johnston and that Smith has the benefit of a costs order that makes Johnston liable for the costs of the Smith v Johnston litigation.

The assessment mechanisms as described below are current (July 2013), but it should be noted that if the recommendations provided in the Chief Justice’s Review of the Costs Assessment Scheme (Draft Report) (2013) are adopted the mechanisms of costs assessment in New South Wales will change profoundly.

---

4 Applications for costs assessment are filed in triplicate at the registry of the Supreme Court of New South Wales.
5 Supreme Court of New South Wales, Costs Assessments Forms and Fees (3 May 2012) <http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_costsassessment/sco2_costsassess_formsfees.html#costs_assessment_fees>. An applicant who is unable to pay the filing fee can ask to have the fee either waived or postponed. The form used for such an application can be found at http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/SCO2_forms/SCO2_forms_subject/fee_postpone_waiver_reduction.html.
6 Ibid.
7 For party/party assessments the costs assessor has a discretion to award the costs of assessment to either of the parties, subject to any relevant order from the court or tribunal that awarded the costs (Legal Profession Act 2004 (NSW) s 369(3)(b)). In an own practitioner dispute where the firm rendering the bill has failed in the costs disclosure regime, the costs are paid by the defaulting firm (Legal Profession Act 2004 (NSW) s 369(3) (a)). In a situation where the bill has been reduced by 15% or more, the assessor can order that the firm that provided the services pay the costs or assessment, or the costs assessor can award the costs against whichever party or parties he or she determines should pay them (Legal Profession Act 2004 (NSW) s 369(3)(c)). See discussion in note xxx at Chapter 3.14.2 as to how this may arguably operate in relation to party/party assessments.
8 Supreme Court of New South Wales, Schedule of Fees for Costs Assessment Applications <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_costforms#Sch>.
9 The New South Wales Costs Assessment Scheme also accepts practitioner/practitioner assessments, where the dispute is between a practitioner who has retained another practitioner, such as a solicitor engaging a barrister.
10 For discussion of those recommendations see Chapter 3.13.2.2 through to 3.14.

In our example, Smith has the benefit of a costs order from the Smith v Johnston litigation. That award will usually be expressed as ‘costs to be agreed or assessed’. The parties to the dispute will usually have made some real efforts to agree costs, and most parties do agree those costs and do not require an assessment. However, if they cannot reach an agreement the application process starts with one of the parties filing for assessment. Either party can make an application to have party/party costs assessment, but it is more usual that it is the party that is owed costs does so. We will consider that in this case it is the winning litigant, Mr Smith, through his solicitors, that commences the process. He does so by filing ‘Form 3 Application for Assessment of Party/Party Cost’ and paying the filing fee as set out above. We will assume that Mr Johnston has not made any payment to Smith and that the dispute relates to the full amount that Smith is claiming that he is owed as costs.

There is a fundamental difference between what Smith will claim he is owed in this example as compared to what he claimed in the example provided in Annexure 2 (the Western Australian example). In New South Wales, Smith is not restricted to recovering the amounts allowed by a scale of costs. Smith can claim all the money he has (reasonably) spent on the conduct of the litigation, and that amount is likely to be close to or the same as the amount SBM Legal has charged him for conducting that litigation. As was described in Annexure 2, there are circumstances where a client instructs his or her solicitor to do work over and above what is reasonably necessary for the conduct of litigation. While the practitioner can charge the client for that extra work the client cannot in turn recover those charges from the losing litigant. For the purposes of this illustration we will assume that Smith did push SBM Legal to do extra work that was not strictly necessary for the efficient conduct of his matter. For that reason the bill SBM Legal drew up for the party/party assessment was for (say) $90,000.00 rather than for the full $100,000.00 that they had charged Smith.

---

11 The paying party is much less likely to commence assessment as they are not usually in any rush to obtain a determination that can be enforced against them. That said, the paying party may be obliged to pay interest on the costs the winning litigant expended from the date of expenditure, and it may be in his or her interest to commence the assessment process. See G E Dal Pont, Law of Costs (LexisNexis Butterworths, 2003) 660.
12 An approved form in accordance with the Legal Profession Regulations 2005 (NSW) cl 120(1).
13 At A2.2.5.
A3.ii.a: Commencing the application for assessment

SBM Legal is not required to draw up a bill of costs in any particular format in order to file for party.party assessment. Instead, on Smith’s behalf, SBM Legal will fill out Form 3, the requisite form for commencing a party.party assessment in New South Wales. Form 3 requires the applicant to provide the basic information about the matter, including the parties’ names, the source of the liability for costs, and the amount in dispute, as well as service details. The form also requires more specifics about the dispute, and if the paying party is the applicant he or she must serve the form on the party who is seeking payment so that party can provide those details before the form is filed. The required specifics include the following:

(a) Details of the proceedings in respect of which the costs are payable, including the identity of the parties to the proceedings and of their legal representatives;
(b) The total amount of costs payable;
(c) The relevant work done in those proceedings and the period over which that work was done;
(d) The identity of the person/s who did that work (including the position of the person/s e.g. partner, associate, etc);
(e) The basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, on a part of proceedings basis or other basis);
(f) The facts relied on to justify the costs charged as fair and reasonable by reference to the above, the practitioner’s skill, labour and responsibility, the complexity, novelty or difficulty of the matter, the quality of work done or any other relevant matter.

The information that is required can be provided in a separate statement or by way of the bill in dispute, if the bill is drawn in a way that provides the information. The form also requires copies of any objections to the bill (as set out by the party who is refusing to pay it) and any response to those objections. The costs applicant also provides an authority for the costs assessor to ‘have access to, and to inspect all my documents that are held by me, or by any barrister or solicitor

---

14 See Supreme Court of New South Wales, above n 5.
15 Ibid. See Form 3, ‘Application for assessment of party.party costs’.
concerned, in relation to this matter’.\textsuperscript{16} This allows the costs assessor to have the SBM Legal file that records all the work done for \textit{Smith v Johnston}. Lastly, the applicant must attest to the fact that there ‘is no reasonable prospect of settlement of the matter by mediation’.\textsuperscript{17}

Smith’s lawyers, SBM Legal, may draw up the bill for assessment in a suitable form and provide responses to Johnston’s objections if required. Alternately, SBM Legal may call in a specialist costing firm to provide those services. Johnston’s lawyers will usually have provided him with advice during the negotiations towards settling the costs that occurred before the assessment process and will provide objections to the bill as filed. Those objections should clarify the parts of the bill that are unreasonable and why that is so. If the costs are high enough to warrant it, Johnston’s lawyers may also brief specialist representation.

If both parties are represented the bill should contain adequate explanation of the amounts charged and Johnston’s objections to those charges should be set out in some detail. It may be that Johnston’s representatives, be they the practitioners that ran his defence or specialists brought in for the costs disputes, will narrow the objections to some parts of the bill rather than to the bill in its entirety. However, if Johnston is not represented his submission may be simply that the bill is too high.

SBM Legal will file the application with the costs assessment scheme and will pay the application fee, in this instance,\textsuperscript{18} as we are assuming that Johnston is objecting to the entire bill, which is $900.00 (1\% of $90,000.00).

The Manager Costs Assessment, having received the application, then determines which assessor should take conduct of the assessment and forwards the complete file on for assessment.\textsuperscript{19} There

\textsuperscript{16} Ibid. The ‘me’ in the sentence refers to the applicant. This authorisation is designed so that the costs assessor has full access to the files that evidence the work carried out for the winning litigant. It does not really make sense for an applicant who is charged with paying costs to provide this authorisation as his or her files are not usually relevant to the assessment. As noted above, in real terms it is likely to be the party that wants paying who makes the application, and who thus has possession of the relevant files. Even if the paying party had applied it would make little sense for the respondent to refuse to hand over the files that provide evidence to support the bill of costs.

\textsuperscript{17} Ibid.

\textsuperscript{18} The fee is $100.00 or 1\% of the unpaid fees or 1\% of the amount in dispute, see Supreme Court of New South Wales, above n 8.
are usually around 60 assessors under appointment at any one time,\textsuperscript{20} and where possible the Manager Costs Assessment assigns files in accordance with the individual assessor’s areas of practice so that the assessor has real knowledge about the area of law that was the substance of the matter.\textsuperscript{21}

**A3.ii.b: The assessment**

Once the costs assessor has all the relevant documents he or she requires, including the submissions provided by the parties, the assessment will take place. The assessor carries out this task with a discretion that is very similar to the one granted to an assessor in Western Australia, but without a scale of costs to provide a yardstick to what is reasonable. The *Legal Profession Act 2004* (NSW) (the Act) sets out the task as follows:

In conducting an assessment of legal costs, the costs assessor must consider:

(a) whether or not it was reasonable to carry out the work to which the legal cost 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 legal costs in relation to the work, except to the extent that section 361 or 362 applies to any disputed costs.\textsuperscript{22}

The Act also gives guidance on how to determine what is reasonable, and for party/party assessments the assessor may consider:

---

\textsuperscript{19} *Legal Profession Act 2004* (NSW) s 357(1).

\textsuperscript{20} Supreme Court of New South Wales, ‘Report of the Chief Justice’s Review of the Cost Assessment Scheme’ (Draft Report, 12 March 2013) 30. See Chapter 1, Current Operation of the Scheme, 1.3.1, 30. In 2005 there were 82 active assessors.

\textsuperscript{21} There is some dispute about this actually happening, as can be seen from the submission provided to the *Chief Justice’s Review of the Costs Assessment Scheme* (2011) and the discussion about this issue in the draft report from that review at Chapter 6.3, Assessors, 104-106. Despite submissions complaining that some assessors lack experience in the substantial law underlying bills they assess, one costs assessor’s submission was that assessors ‘accept assignments only in the areas in which they have practiced’: Ibid 105. See Chapter 6, Other Matters, 6.36.

\textsuperscript{22} *Legal Profession Act 2004* (NSW) s 363(1). Section 361 relates to own-practitioner assessments pursuant to a costs agreement and s 362 to costs fixed by statute or regulation. Neither section is relevant to this particular example of a party/party assessment.
(e) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or the Australia-registered foreign lawyer responsible for the matter,

(f) the retainer and whether the work done was within the scope of the retainer,

(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,

(k) any other relevant matter.23

In making a determination as to what is reasonable the costs assessor is not bound by the rules of evidence.24 The assessor may have the costs agreement that Smith entered into with SBM Legal but for a party/party assessment he or she may consider the costs agreement and have regard to it25 but must not apply it.26 If the matter is one where the costs are fixed by statute or regulation then the assessor must assess the costs accordingly.27 The costs assessor is also bound by any court order that quantifies costs28 and if the court has ordered that costs are to be awarded on an indemnity basis the costs assessor must assess the costs accordingly.29

---

23Ibid s 363(2).
24Evidence not bound
25Legal Profession Act 2004 (NSW) s 365(1).
26Ibid s 365(2). This seems an odd situation. As this is a party/party assessment the yardstick against which all costs must be measured is that of reasonableness. In a party/party assessment the assessor does not need to determine if a costs agreement is reasonable, and must use his or her own discretion as to what are reasonable costs in all the circumstances. However, if the assessor has the agreement and can have regard to it, the costs agreement is reasonable, and the purpose of the exercise is to ensure that the winning litigant recovers reasonable costs, it seems that using the reasonable costs provided for in the costs agreement would be the sensible way to achieve that goal.
27Ibid s 362. For example, costs for matters that fall under Division 9 of the Legal Profession Act 2004 (NSW) (Maximum costs in personal injury damages matters) will be governed by that division regardless of what a winning litigant has actually spent for costs.
28For example, if at some interlocutory application during the Smith v Johnston litigation there had been an order that the costs of the occasion be fixed at (a particular amount) then the costs assessor would be obliged to award the costs that were relevant to the application at that amount regardless of what he or she thought was reasonable in all the circumstances.
29Legal Profession Act 2004 (NSW) s 366.
The costs assessor is also restricted to dealing only with the costs in a bill that are actually challenged, but otherwise has a wide discretion to determine costs as he or she thinks reasonable. If the assessor believes any part of the challenged costs are not reasonable he or she may substitute an amount that is. The average return rate for party/party assessments of bills in the $70,000.00 to $99,999.00 range in New South Wales (in 2005) was 78%, and as we have considered Smith v Johnston to be an average matter in every other respect we will consider that the assessor determined that the reasonable value of the work SBM Legal has done and the amount that Johnston should pay for that work is $70,200.00. In doing this, the assessor will have gone through the SBM Legal matter file and checked that the work charged for was done, that it was reasonable to do it, and that the charges levied for it were also reasonable. In our example, Smith, who was charged $100,000.00 for the conduct of his matter, has recovered only 70% of what he spent in his litigation with Johnston. As will be seen below, he may also have to pay for his own and Johnston’s costs for the assessment process.

A3.ii.c: The costs of assessment

In a party/party costs assessment the assessor has a limited discretion to award the costs of the assessment process to one of the parties. Those costs include the application fees, the costs parties’ preparation and the assessor’s charges for time spent working on the matter.

The assessor charges for the time spent doing the assessment at an hourly rate, and as was seen in Chapter 4, there is a direct correlation between how large the quantum of a party/party bill is and how long it takes to assess such a bill. Given that the overall time recorded for each assessment includes the time spent dealing with the costs assessment scheme office, requesting documents, reading and considering objections and replies, the time spent doing the actual assessment is generally not that long. We have postulated the Smith v Johnston bill at $90,000.00, and the average time taken to assess a bill in that value range (in 2005) was around

30 Ibid s 367(2).
31 Ibid s 367(1).
32 In these circumstances, for Smith this is the time SBM Legal has spent getting the file ready for assessment, as well as the time working through and responding to Johnston’s objections to the bill and any other time SBM Legal has spent dealing with the assessment application. It may also include the costs of specialist representation if SBM Legal has sought such representation.
33 At Chapter 4.7.2.
We determined that the fee paid on application for assessment was $900.00. The assessor’s costs will be $1203.25.

The assessor’s discretion in awarding the costs of the assessment process is guided by the following considerations:

(a) the extent to which the determination of the amount of fair and reasonable party/party costs differs from the amount of those costs claimed in the application for assessment,

(b) whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned,

(c) whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

We have always assumed that the parties to the Smith v Johnston litigation were diligent and reasonable in their conduct of the matter, and we will assume that their conduct of the assessment process was the same. For that reason the second two of the three criteria above have no bearing on the costs of the assessment process. However, in awarding the costs of assessment the Act does allow a costs assessor to award costs against the receiving party if the bill is reduced by more than 15%. Therefore as the first of the criteria above supports such an award it may be that in this instance the costs of the matter would be awarded against Smith. If that is the case Smith will have to pay the filing fee, the assessor’s hourly rates and any reasonable costs that Johnston has incurred in the preparation and conduct of the assessment. If however Johnston had made an offer to settle costs that was below what the costs were eventually assessed at, it is likely that Smith would instead be awarded the costs of the assessment, even though the bill was reduced by more than 15%.

---

34 At Chapter 4.7.2.
35 Being 6.25 X $192.50.
36 Legal Profession Regulations 2005 (NSW) cl 126.
37 Legal Profession Act 2004 (NSW) s 369(1) (c) operating in conjunction with s 369(3) (c).
A3.ii.d: The certificate of determination

The costs assessor can issue interim certificates determining that parts of a bill are to be paid by a particular party at a particular rate,\(^{38}\) or can issue a single final certificate at the end of the assessment.\(^{39}\) In our example we have assumed that Johnston disputed the whole bill so that there would be only one certificate issued at the end of the process. The certificate will set out what amount the bill was allowed at and will also specify who is to pay the costs of the assessment. The certificate of determination will be sent to the Manager Costs Assessment and the assessor will also notify the parties that it can be collected from the Manager Costs Assessment once the fees owing for the application are paid.\(^{40}\) If the determined costs are unpaid, the certificate of assessment can be executed as if it were a judgment of the court.\(^{41}\) The costs assessor will also provide a short written explanation of his or her reasons for decision,\(^ {42}\) setting out ‘the basis on which the costs were assessed and how the submissions made by the party were dealt with’.\(^ {43}\) He or she may also include further information that will help to clarify how the final amount was arrived at.\(^ {44}\) Smith will pay the assessor’s fees to the Manager Costs Assessor and may then use the determination to ensure that Johnston pays him what the assessment process has determined he is owed. The Manager Costs Assessment will pay the assessor for the time spend doing the

---

\(^{38}\) Ibid s 368(2). For example, if the bill is unpaid and the dispute is for only part of the bill, the assessor can issue a certificate for the undisputed part so that the party owed the money can recover that part of the bill without waiting until the end of the entire process.

\(^{39}\) Ibid s 368(1).

\(^{40}\) Ibid s 368(6). In this instance this is not problematic. Smith wants the certificate so that he can be paid his costs, and the costs have been awarded against him so he will pay them in order to get the certificate. It would be more problematic if the costs had been awarded against Johnston, as he would not be particularly motivated to pay them so that the determination could be executed against him. In such cases Smith may choose to pay the costs in order to have possession of the determination and to then recover those further costs from Johnston.

\(^{41}\) Ibid s 368(5). This will usually be the case in a party/party assessment, although as will be seen below, in own-practitioner assessments it may be that the result of the assessment is that the party paid costs (usually the practitioner) may have to refund some part of the costs to the payer (usually the client). A guide to registering a determination for execution can be found at [http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_costsassessment/SCO2_register_costsassessment.html](http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_costsassessment/SCO2_register_costsassessment.html).

\(^{42}\) Legal Profession Act 2004 (NSW) s 370(1).

\(^{43}\) Legal Profession Regulations 2005 (NSW) cl 128(1).

\(^{44}\) Ibid cl 128(2).
assessment\textsuperscript{45} and the matter (and with it the entirety of the *Smith v Johnston* litigation) may at this point be over.

A simplified illustration of the party/party assessment process to this point is provided below:

![Figure A3.1: Party/party assessment in New South Wales](image)

**Figure A3.1: Party/party assessment in New South Wales**

### A3.iii: Internal Review of costs assessment

If any of the parties is dissatisfied with the results of an assessment there is an internal review process. Smith may feel that he has not recovered enough of what he has spent, but for our purposes we will assume that Johnston feels that his objections have not been properly dealt with and that he has been made to pay too much. His representatives will go through the reasons for determination with care, and attempt to identify some error or evidence of misunderstanding.

Johnston has 30 days from the day the Manager Costs Assessment forwards the determination

\textsuperscript{45} *Legal Profession Act 2004 (NSW)* s 369(8). The Manager Costs Assessment pays the costs assessor regardless of whether or not one of the parties pays the fees specified in the determination, and may take action against a party to recover those fees if they remain unpaid: at s 369(9).
(and with it the written reasons for determination) to apply for a review of that determination.\(^{46}\) If he chooses to do so he must give Smith notice that he intends to do so at least 7 days before he files for review.\(^{47}\) If Johnston does decide to apply for a review the original determination is stayed for the duration of that process.\(^{48}\)

A review is instituted by way of Form 4: Application for Review of Determination(s) of a Costs Assessor and by paying the filing fee of $275.00.\(^{49}\) Form 4 asks the applicant to provide the general information necessary to identify the parties and the dispute, and to certify that there is no chance of the matter being settled by negotiation, as well as to provide reasons as to why the determination was in some way flawed.\(^{50}\) The Manager Costs Assessment forwards the application to a panel of two senior assessors, neither of whom may have been involved in determination in question or have any interest in the outcome of that determination.\(^{51}\) The review process is not by right a hearing de novo, as the assessors are entitled to rely on the materials provided to the costs assessor who made the determination.\(^{52}\) However, the review panel does have the right to seek further evidence if it sees fit.\(^{53}\) The review panel may either affirm the original determination or set it aside and make a fresh determination if its members consider it appropriate to do so.\(^{54}\)

The review panel issues a certificate of determination that sets out its decision,\(^{55}\) and a separate certificate to deal with the costs of the review.\(^{56}\) The determination is accompanied by short

\(^{46}\) Ibid s 373(1). The Manager Costs Assessment also has a write to institute a review of a determination on his or her own motion: at s 373A.
\(^{47}\) Ibid s 373(5).
\(^{48}\) Ibid s 377(1). However, the review panel may end the suspension by either affirming the original determination or if it otherwise considers that it is appropriate to do so: at s 377(2).
\(^{49}\) Form 4, which specifies the filing fee, can be accessed online. See Supreme Court of New South Wales, above n 5.
\(^{50}\) Ibid.
\(^{51}\) Legal Profession Act 2004 (NSW) s 374.
\(^{52}\) Ibid s 375(3).
\(^{53}\) Ibid s 376.
\(^{54}\) Ibid s 375(1). A costs assessor’s determination is a matter of discretion, and a broad review of the appeals from review decisions shows that, as expected, a review panel is likely to affirm an assessor’s decision, and the court will in turn be likely to affirm a review decision. This is not to say that single assessors and review panels do not make the types of errors that allow a successful challenge to an administrative decision, but that as is generally the case, challenging a discretionary decision is usually difficult.
\(^{55}\) Ibid s 378(1).
reasons for decision.\textsuperscript{57} If a review panel either affirms the original determination or does not vary the quantum of that determination by more than 15\% the review applicant is liable for the costs of the review process.\textsuperscript{58} Otherwise the review panel can award the costs of the review as it considers appropriate, and it may consider it appropriate to share the costs of the review between the parties.\textsuperscript{59} The certificate of determination can be registered as if it were a judgement and then executed.\textsuperscript{60} If the original determination is set aside the original determination ceases to have effect and if it has been registered as a judgement that judgement too ceases to be in effect and any enforcement actions that have occurred can be reversed.\textsuperscript{61}

An internal review of the costs assessment process can be expensive, as while the hourly rate for the assessors remains the same there are two assessors working through the review. The expense will to some extent depend on how clear the objections to the original determination are, and the extent to which the review panel needs to depart from considering the original assessor’s reasons for decision. Nonetheless, in 2009 8\% of costs assessments (a total of 155) went on to review.\textsuperscript{62}

\textit{A3.iv: Judicial review of costs assessment.}

Johnston did have another avenue of appeal against the original costs assessor’s determination. A dissatisfied party to a costs assessment can appeal to the District Court as a matter of right if the appeal is on a matter of law or with leave otherwise.\textsuperscript{63} In essence, the right to judicial review of a costs assessor’s determination and the right to judicial review of an internal review panel’s determination are the same. A dissatisfied party does not have to use the internal review process.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{56} Ibid s 379(5).
\item \textsuperscript{57} Ibid s 380.
\item \textsuperscript{58} Ibid s 379(2).
\item \textsuperscript{59} Ibid s 379(3).
\item \textsuperscript{60} Ibid s 379(3) (b).
\item \textsuperscript{61} Ibid s 379(3) (c). However, if the costs have been paid and must be refunded the overpayment is recoverable in a competent court as a debt: at s 379(3) (a).
\item \textsuperscript{63} Legal Profession Act 2004 (NSW) ss 384, 385. A costs assessor can be made a party to any such appeal: at s 387.
\item \textsuperscript{64} As it may be cheaper to seek judicial review than to apply for internal review by a panel this has proved problematic (see discussion in Chapter 3 at 3.8.3). If the recommendations of the Chief Justice’s Review of the Cost
If the appeal to the District Court appeal is on a matter of law the court can either make a new determination or remit the matter back to the original costs assessor with an order that he or she re-determine the matter.\(^{65}\) If there is an order for a redetermination the new assessment is done de novo.\(^{66}\)

If the appeal was by way of leave, the District Court hears it de novo\(^{67}\) and the court will either affirm the original determination or make a new determination as it considers just.\(^{68}\) Alternately, the District Court can refer an appeal by way of leave to the Manager Costs Assessment with an order that the appeal be heard by way of internal review, and if it does so that referral is deemed to be a valid application for review.\(^{69}\)

At this point we will consider that the party/party bill from *Smith v Johnston* has run its course. There are rights of appeal against the District Court of New South Wales’s judgments as to the costs of a matter, and arguably a party/party costs dispute could eventually find itself being heard in the High Court of Australia. To date the High Court has not considered the New South Wales costs assessment regime, and hopefully it will never have to do so. However, as is seen below, despite Smith having eventually being paid whatever either the costs assessment scheme or the courts of New South Wales consider he is owed under the costs order that was made in his favour in *Smith v Johnston* he may still have further disputes as to costs to contend with.

**A3.v: The client/solicitor assessment.**

As was seen above, that party/party dispute resulted Smith recovering $70,200 of the $100,000.00 he spent on the litigation, but he had to pay both his own and Johnston’s costs of the party/party assessment process. Despite Smith having received adequate cost disclosure, which included a realistic assessment of what he would recover as party/party costs if he won, it is easy to see why he could be disgruntled with SBM Legal and what they have charged him. For our

Assessment Scheme (above n 20) are adopted judicial appeal will only be available for review decisions and not available directly from an original determination.

\(^{65}\) *Legal Profession Act 2004* (NSW) s 384(2).

\(^{66}\) Ibid s 384(3).

\(^{67}\) Ibid s 385(4).

\(^{68}\) Ibid s 385(5).

\(^{69}\) Ibid s 389.
purposes we assume that once the party/party dispute is over Smith has decided that SBM Legal
has overcharged him and has applied for assessment.\textsuperscript{70}

In New South Wales a costs assessor dealing with a practitioner’s bill of costs to his or her own
client does so in a way that is generally the same as is used for party/party assessments as
described above. However, there are some threshold issues that arise with client/solicitor or
solicitor/client assessments\textsuperscript{71} that do not arise in party/party assessments.

The retainer between a practitioner and his or her own client is usually set out in a costs
agreement, and that agreement will typically set out the hourly rates the client will be charged or
any other fee arrangement that is agreed to.\textsuperscript{72} Cost agreements are governed by the Act,\textsuperscript{73} and a
client can apply to have a costs assessor set aside a costs agreement set aside if it does not
conform to the Act.\textsuperscript{74}

A costs assessor in New South Wales who receives an own-practitioner costs file will determine
whether or not there is a costs agreement, and, if he finds that one exists, what the terms of the
costs agreement are.\textsuperscript{75} If there is a costs agreement the assessor must assess the bill in accordance
with it.\textsuperscript{76} The costs assessor can also determine if legal practice has conformed with the costs
disclosure regime and if he or she finds it has not done so can reduce the costs payable under the
agreement ‘by an amount considered by the costs assessor to be proportionate to the seriousness
of the failure to disclose’.\textsuperscript{77} The costs assessor is not bound by the rules of evidence in making
such determinations.\textsuperscript{78}

\textsuperscript{70} The likelihood of an application for an own-practitioner applicant going through to a full assessment is highly
dependent on whether the client or the practitioner initiates the assessment, see discussion in Chapter 4 at 4.7.1.
\textsuperscript{71} For the purposes of this thesis and this annexure, a client/solicitor dispute refers to a situation where the client has
requested assessment. The term solicitor/client dispute is used when it is the solicitor who has initiated the
assessment process. The assessment process is much the same in either situation.
\textsuperscript{72} For our purposes we have assumed that Smith was paying an hourly rate, but a costs agreement could be for a
lump sum payment or any other form of payment agreed between the parties.
\textsuperscript{73} Costs agreements are governed by Division 5 of Part 3.2 of the \textit{Legal Profession Act 2004} (NSW).
\textsuperscript{74} Ibid ss 317(2), 328(1).
\textsuperscript{75} Ibid s 359(3) (b).
\textsuperscript{76} Ibid s 361(1). A costs agreement will not operate to over ride any limits to costs provided by regulations or other
statutory instruments: at s 362.
\textsuperscript{77} Ibid s 317(4). A client who believes that the practitioner has not given adequate costs disclosure can apply to have
the costs agreement set aside: at s 317(3).
\textsuperscript{78} Ibid s 359(2).
For the purposes of this illustration, the issues above do not arise. Although our imaginary litigant, Mr Smith has decided that his own legal representative, SBM Legal, has overcharged him, we assume that SBM Legal has handled his retainer competently. SBM Legal set out the terms of the retainer in a costs agreement which provided adequate costs disclosure. The costs agreement was valid in all respects. As such was the case the costs assessor who deals with Smith’s application must assess SBM Legal’s bills against the costs agreement, and must use the hourly rates set out in the costs agreement as the basis for working out the charges for the work in the bill.\(^7\)

SBM Legal billed Smith on a monthly basis throughout the course of the retainer, and Annexure 1 provided examples of both lump sum\(^8\) and itemised bills for one of those months. Had Smith received a lump sum bill he would have had a month to request that it be reissued as an itemised bill.\(^9\) In either case the bill would have included a notification of his rights as a client.\(^10\) Smith has one year from receipt of a bill to seek assessment of the contents of that bill,\(^11\) but as those bills are interim bills he has an overarching right to seek assessment of all the bills that relate to the \textit{Smith v Johnston} retainer up to a year after he received the final bill for that matter.\(^12\) In our example Smith retained SBM Legal in 2010 and the matter went to trial in 2011. However, the retainer would not be finalised until the costs due under a party/party determination (discussed above) were recovered in (say) June 2012. Smith still had the right to initiate an assessment of all the bills he had received up until June 2013, a year after he receives that final bill. After that date he can apply to have time enlarged for assessment if he has good reason for doing so.\(^13\)

\(^7\) Ibid s 361(1).
\(^8\) A law practice in New South Wales may issue a lump sum bill in accordance with the \textit{Legal Profession Act 2004 (NSW)} s 332.
\(^9\) Ibid s 332A. As our illustration only has Smith deciding he was overcharged at the end of his matter, he may have paid lump sum bills with no complaint and without seeking itemisation.
\(^10\) Ibid s 333. The form prescribed by the \textit{Legal Profession Regulations 2005 (NSW)} c1 11A can be found at Schedule 3 of those regulations. See \url{http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/sch5.html}. The bills may also have provided a link to the Law Society of New South Wales information on legal fees available at \url{http://www.lawsociety.com.au/cs/groups/public/documents/internetcostguidebook/008748.pdf}.
\(^11\) \textit{Legal Profession Act 2004 (NSW)} s 350(4).
\(^12\) Ibid s 334(2).
\(^13\) An ‘unsophisticated’ client or a costs assessor can apply to the Supreme Court for an enlargement of time to initiate assessment and the court will grant that enlargement if it is ‘just and fair’ for it to do so: Ibid s 350(5).
Smith may choose to engage separate legal representation to take conduct of his costs dispute with SBM Legal, and in New South Wales there are firms that specialise in that area of law. However, for our purposes we will assume that Smith has decided to seek assessment without separate representation. He commences the process by filing out a ‘Form 1 - Application by client for assessment of costs (other than party/party costs)’. Form 1 is very straightforward and includes information about avenues for resolving his dispute without having to initiate an assessment. It also provides basic information about the assessment process. Form 1 requires Smith to attach a copy of the bill or bills he is disputing and any costs agreement that governs the retainer in question. It asks that he explain why he disagrees with what he is being charged and prompts him include any contention he may have about problems with the costs agreement or any failure in the costs disclosure provisions. The form also requires him to give the costs assessor who takes conduct of the assessment permission to access any documents relevant to his matter and to attest that there is no reasonable chance of the matter being resolved through negotiation.

Form 1 also requires Smith to provide details for relevant service and a fee of whichever is the greater of $100.00, 1% of the costs in dispute, or 1% of the unpaid costs. We have assumed that Smith’s bills totalled $100,000.00 so the application fee for his assessment would be $1,000.00.

A3.v.a: The key differences between own-practitioner and party/party assessment.

Once Smith files his application the costs assessment process mirrors the process described above for the party/party dispute with two main differences.

Firstly, in our example the costs agreement was valid and reasonable so the assessor will apply the hourly rates specified in that agreement to the work that SBM Legal has done for Smith, (rather than the rates he or she thought were reasonable in all the circumstances as was the case in the party/party assessment). This does not mean that he or she will simply agree with SBM Legal’s charges. In Annexure 1 we noted that the practitioner in charge of the matter spent a great deal of time on research. If that were so, the assessor may consider that the time spent was

86 See Supreme Court of New South Wales, above n 5.
unreasonable. For example if the costs agreement specified that the practitioner was charged out at $280.00 an hour and the bill had charged for 20 hours of research, the assessor may consider that a reasonable time for research in the matter was 5 hours and he or she would reduce the bill by $4,200.00 for that reason.

The second difference relates to the question of ‘whether or not it was reasonable to carry out the work to which the legal costs relate’. That question is one of the three key determinants that a costs assessor must consider in deciding what costs to allow, as was discussed above for the party/party assessment. In a party/party matter work must be reasonably necessary to forward the litigation for a costs assessor to find that the answer to the question is yes and the charge for the work can be allowed. In an own-practitioner assessment the answer to that question will still be yes if the work was not reasonably necessary but was done on the instructions of the client.

There is one further difference that will have a bearing on the assessment process, and in particular on cost of that process. We assumed that Smith had not sought specialist representation, and for that reason his objection to the bill, rather than being refined, was that he had simply been charged too much. An assessor in such cases does not have the advantage of well reasoned objections to the bill and a pointed reply to those objections. For that reason the task of assessing will be broader, in that the assessor will have to consider the whole bill, and for that reason it will take longer and cost more.

Aside from the two key differences in the assessment process, and the fact that it will take longer than would a party/party assessment, there is one more difference once the assessment is finished. The assessor issues a certificate of determination, much as he or she does in a party/party assessment, but there is less discretion available in deciding who will bear the costs of the assessment process. If Smith’s bill is reduced by more than 15% the assessor must order

---

87 *Legal Profession Act 2004* (NSW) s 363(1) (a).

88 This is much the same as it is in Western Australia, for both party/party and own-practitioner assessments. That said, a practitioner who receives instructions to do work that is unnecessary should always confirm those instructions in writing, and that confirmation should include the client’s acknowledgement that they have been informed that the work is not required but that the client wishes it done in any event.
that SBM Legal bear the costs of the assessment process. This means that SBM Legal would have to pay the application fee and the assessor’s fees as well as the reasonable costs of Smith’s specialist representation if he had sought such representation. If the bill is not reduced by at least 15% the assessor may choose not to award Smith the costs of the process but in no circumstances is the assessor able to award the costs of the process to SBM Legal.

A3.v.b: The end of the client/solicitor assessment.

Once the assessment process is finished and the assessor has issued the certificate of determination the enforcement mechanisms and the appeal processes available to the parties are the same as are described above for party/party assessments. In this example we will consider that the initial costs assessment is the end of Smith’s own-practitioner dispute. We have imagined Smith’s various disputes as being ‘average’ so we will assume that he has had the average outcome.

Smith’s bill from SBM Legal was for $100,000. The average return on a bill of that value in New South Wales (in 2005) was 78%. This means that after costs assessment Smith’s final liability to SBM Legal would have been fixed at $78,000.00. As this was a reduction of more than 15% SBM Legal would have paid the costs of the assessment process, being the filing fee of $1,000.00 and the assessor’s fees of (say) $1,636.25. In this instance Smith is likely to be very pleased with the costs assessment system and very sure that SBM Legal had been deliberately overcharging him.

---

89 *Legal Profession Act 2004* (NSW) s 369(3) (c). The assessor will also award the costs of the process against the firm involved if there has been a failure in the costs disclosure regime: at s 369(3) (a).

90 The average time taken to assess a client application of a bill in that value range in New South Wales in 2005 was approximately 510 minutes. See Chapter 4 at 4.7.2. If Smith has already paid the SBM Legal bills the certificate of determination creates a debt recoverable in a court of competent jurisdiction rather than a judgment: *Legal Profession Act 2004* (NSW) s 368(4).
A simplified illustration of the client/solicitor assessment process to this point is provided below:

![Simplified illustration of the client/solicitor assessment process](image)

**Figure A3.2 Client/solicitor assessment in New South Wales**

**A3.vi: Conclusion**

As the example given above works through overall, Smith was left with a difference of somewhere in the vicinity of $8,000.00 between what he paid out for his litigation and what he recovered from the losing litigant, Johnston. Using the same example in Western Australia, the gap between what Smith spent on the litigation and recovered on the costs order was approximately $18,000.

This is consistent with the findings in the main body of the thesis; successful litigants in New South Wales do recover a greater portion of what they spend on their litigation. However, that said, the ‘average’ result set out above should be read with some caution. Overall, most litigation does not result in a costs assessment of either the party/party or the own-practitioner costs. The return rates used for these examples may well be averages, but costs assessments are not themselves a common or average thing. Nonetheless, we know from the data presented in Chapter 4 of the thesis that party/party bills do generally see some significant reduction if they
are assessed. We also know that when own-practitioner costs disputes go to assessment the usual result is that they are found to be too high.

This Annexure has followed the *Smith v Johnston* litigation through the two most likely costs disputes that would flow from it if those disputes took place in New South Wales. The assessment process is described as it exists today (July 2013). That process was created by the 1994 Reforms, when costs assessment in New South Wales became the administrative function of a specialist body. The thesis to which this procedural description is attached has argued that the New South Wales system of costs assessment is superior to the more traditional judicial system that is still used in most Australian states. The New South Wales costs assessment regime is readily accessible and easily utilised. It fulfils its functions relatively quickly. Its results are reasonably transparent and the costs of operating it are easy to determine. Some of its users think it is too expensive, but it is set up to be mostly funded by the people that use it, rather than largely subsidised by the courts (and thus the general taxpayer) as is the case in Western Australia. While this annexure is intended to provide a snapshot of how the system operates in 2013, it must be acknowledged that the New South Wales costs assessment scheme seems likely to undergo further and perhaps radical reform in the not too distant future. It is to be hoped that Reforms made in the interests of expediency do not detract from the laudable transparency and fairness of the scheme as it currently operates.
Bibliography

1) Articles, Books, Reports

Articles:


Pattison, Susan, To review or not to review? That is indeed the question’ (2001) 39(4) Law Society Journal 43


Books:


Danziger, D, & Gillingham, J, 1215 The Year of the Magna Carta (Hodder & Stoughton 2003)

Dickens, Charles, Bleak House, The complete works of Charles Dickens Vol. 18 (P.F. Collier and Son) (Date Unknown)


Tomasic, Roman, Lawyers and the Community (The Law Foundation of New South Wales, 1978)
Reports:


Chief Justice of the Supreme Court of New South Wales’ Review of the Costs Assessment Scheme (7 September 2011) <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/e154dd079de60d044a2565fa0012aa89/8033b251bc23bf6ca257904002af5e7/$FILE/Assessment%20Terms%20of%20Reference%207.9.11.pdf>


Law Council of Australia, Blueprint for a National Profession (July 1994) <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2F019E0B-1E4F-17FA-D26D-4336EDE0F9&siteName=lea>

Law Reform Commission of Western Australia, Project Summary: Review of the Criminal and Civil Justice System, Project No 92 (1997-1999)

Law Society of New South Wales, Submission to the Supreme Court of New South Wales, The Chief Justice’s Review of the Costs Assessment Scheme, 27 October 2011


National Competition Policy Review of the Legal Profession Act 1987


Office of the New South Wales Legal Services Commissioner, Annual Report 2010-2011

Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) (NSW 1997)

Supreme Court of New South Wales, Annual Review 2005

Supreme Court of New South Wales, Annual Review (2009)

2) Cases

Attorney-General & Anor v Kennedy Miller Television Pty Ltd & Anor (1998) 43 NSWLR 729

Beach Petroleum NL v Johnson (No. 2) (1995) 57 FCR 119
Brown v Talbot and Olivier (1993) 9 WAR 70
May v Hullah & NRMA Ltd & Anor (Unreported, Supreme Court of New South Wales, Greenwood M, 22 October 1996)
Cable v Sinclair (1788-1814) SR (NSW) 2/8147
Cachia v St George Bank Ltd (Unreported, Supreme Court of New South Wales, Malpass M, 26 October 1995)
Christopoulos v Angelos [2005] NSWSC 1029
CSR v Eddy (2008) NSWLR 725
DCL Constructions v Di Lizio [2007] NSWSC 653
Featherstone v Westar Engineering Pty Ltd (1999) 23 SR (WA)
Gilles and Eliades v Giakoumelos [2008] NSWSC 70
Gilles v Gakoumelos [2008] NSWSC 70
Herbert v Tamworth City Council (No. 4) [2002] NSWSC 394
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
Kennedy Miller Television v Lancken and Anor (Unreported, Supreme Court of New South Wales, Sperling J, 1 August 1997)
Lange v Back & Schwartz (Unreported, District Court of New South Wales, Norrish QC DCJ, 12 June 2009)
Lewin v Thomson, Court of Civil Jurisdiction Proceedings, 1788-1814, SR (NSW) 2/8150
Madden v NSW-IMC (Insurance Ministerial Corporation) [1999] NSWSC 196
May v Hullah & NRMA Ltd & Anor (Unreported, Supreme Court of New South Wales,
Greenwood M, 22 October 1996)  
McElwaine v Bulmer (Unreported, Supreme Court of New South Wales, Malpass M, 26 June 1998)  
Mossensons (A Firm) v Coastline Associates (Unreported, Supreme Court of Western Australia, Pigeon, Ipp and Templeton JJ, 12 December 1997)  
Nassour v Malouf (t/a Malouf Solicitors) [2011] NSWSC 356  
Newcastle City Council v McShane (No.3) [2005] 65 NSWLR 155  
Porter v John Fairfax Publications [2001] NSWSC 680  
R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256  
Re Brickman; Ex parte Pickering (1860) 1 QSCR 14  
Re Evill (1951) 2 TLR 25  
Satchinthanantham v Jackson Smith Lawyers Pty Ltd [2011] NSWSC 412  
Singleton v Macquarie Broadcasting Holding Ltd (1991) 24 NSWLR 103  
Stanizzo v Grpcevski [2005] NSWSC 1185  
State Planning Commission v Della Vedova (1992) 7 WAR 81  
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118  
Ventouris Enterprises Pty Ltd v D B Group Pty Ltd (No.4) [2011] NSWSC 720  
Westpac Banking Corporation v The Bell Group Ltd (In Liq) [No 3] [2012] WASCA 157

3) Legislation:

An Act for Establishing a Court of Civil Judicature 1832 (WA), 2 Gul 4  
An Act to amend the Law regulating the admission of Barristers 1876 (NSW), 50 Vict 31  
An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and the points adjacent 1787 (UK), 27 Geo III 2  
An Act to make Provision for the Better Administration of Justice in the Supreme Court of Western Australia 1880 (WA), 44 Vict 10  
An Act to regulate the admission in certain cases of Barristers 1876 (NSW), 45 Vic 1  
An Act to regulate the taxation of Attorney’s Bills of Costs and the Practice of Conveyancing 1847 (NSW), 11 Vict 33  
An Ordinance for the Recovery of Small Debts and Demands 1863 (WA), 27 Vict 2  
An Ordinance to Facilitate the Performance of the Duties of Justices of the Peace Out of Sessions within the Colony of Western Australia with Respect to Summary Convictions and Orders 1850 (WA), 114 Vic 5  
An Ordinance to provide for the more effectual administration of justice by establishing a Supreme Court 1861 (WA), 24 Vict 15  
An Ordinance to Regulate Divorce and Matrimonial Causes 1863 (WA), 27 Vict 19  
An Ordinance to regulate the admission of Attorneys and Solicitors 1865 (WA), 29 Vict 9  
Australian Courts Act 1828 (UK), 9 Geo IV 83  
Barristers Board Act 1889 (WA), 53 Vict 6  
Civil Liability Act 2002 (NSW)  
Constitution Act 1889 (WA)  
Constitution Act 1902 (NSW)  
Courts and Crimes Legislation Amendment Act 2008 (NSW)
Courts and Legal Services Act 1990 (UK)
Courts Legislation Amendment Act 2001 (NSW)
Courts Legislation Amendment and Repeal Act 2003 (WA)
Courts Legislation Miscellaneous Amendments Act 2002 (NSW)
Dust Diseases Tribunal Act 1989 (NSW)
Legal Practice Act 2003 (WA)
Legal Practitioners (Solicitors Remuneration) Amendment Act 1984 (NSW)
Legal Practitioners Act 1983 (WA)
Legal Practitioners Act 1898 (NSW)
Legal Practitioners (Solicitors Remuneration) Amendment Act 1984 (NSW)
Legal Practitioners Act 1893 (WA)
Legal Practitioners Act 1898 (NSW)
Legal Profession Act 1987 (NSW)
Legal Profession Act 2004 (NSW)
Legal Profession Act 2004 (Vic)
Legal Profession Act 2006 (ACT)
Legal Profession Act 2006 (NT)
Legal Profession Act 2007 (Qld)
Legal Practitioners Act 1981 (SA)
Legal Profession Act 2007 (Tas)
Legal Profession Act 2008 (WA)
Legal Profession Amendment (Costs Amendment) Act 1998 (NSW)
Legal Profession Amendment Act 1996 (NSW)
Legal Profession Amendment Act 2005 (NSW)
Legal Profession Further Amendment Act 2006 (NSW)
Legal Profession Reform Act 1993 (NSW)
Motor Accidents Act 1988 (NSW)
Motor Accidents Compensation Act 1999 (NSW)
Motor Vehicle (Third Party Insurance) Act 1943 (WA)
Mutual Recognition Act 1992 (Cth)
New South Wales Charter of Justice (UK)
Public Sector Management Act 1988 (NSW)
Supreme Court Act 1935 (WA)
Victims Support and Rehabilitation Act 1996 (NSW)
Workers Compensation and Injury Management Act 1981 (WA)
Workplace Injury Management and Workers Compensation Act 1998 (NSW)

4.) Delegated legislation

Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 (WA)
Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012
Legal Profession Conduct Rules 2010 (WA)
Rules of the Supreme Court 1971 (WA)
Rules of the Supreme Court of Western Australia 1909 (WA).
Supreme Court of Western Australia Consolidated Practice Directions 2009 (WA)
The Rules of the Supreme Court 1888 (WA)
The Supreme Court Ordinances 1861 (WA)

5.) Other

New South Wales, Parliamentary Debates, Legislative Assembly, 29 April 1987
New South Wales, Parliamentary Debates, Legislative Assembly, 18 September 1993
New South Wales, Parliamentary Debates, Legislative Council, 28 October 1993
New South Wales, Parliamentary Debates, Legislative Assembly, 9th November 1993
New South Wales, Parliamentary Debates, Legislative Assembly, 10 November 1993
New South Wales, Parliamentary Debates, Legislative Assembly, 19 November 1993
New South Wales, Parliamentary Debates, Legislative Assembly, 1 May 1996
New South Wales, Parliamentary Debates, Legislative Assembly, 26 May 1998
New South Wales, Parliamentary Debates, Legislative Assembly, 28 May 2002
New South Wales, Parliamentary Debates, Legislative Assembly, 29 May 2002,
New South Wales, Parliamentary Debates, Legislative Assembly, 9 June 2005
New South Wales, Parliamentary Debates, Legislative Assembly, 5 April 2006
New South Wales, Parliamentary Debates, Legislative Assembly, 27 October 2006
New South Wales, Parliamentary Debates, Legislative Assembly, 6 June 2008
New South Wales, Parliamentary Debates, Legislative Council, 22 May 1984
New South Wales, Parliamentary Debates, Legislative Council, 16 September 1993
New South Wales, Parliamentary Debates, Legislative Council, 27 October 1993
New South Wales, Parliamentary Debates, Legislative Council, 28 October 1993
New South Wales, Parliamentary Debates, Legislative Assembly, 9 November 1993
New South Wales, Parliamentary Debates, Legislative Council, 5 June 1998
New South Wales, Parliamentary Debates, Legislative Council, 24 June 1998
Western Australia, Parliamentary Debates, Legislative Assembly, 21 October 1987
Western Australia, Parliamentary Debates, Legislative Assembly, 12 November 1987
Western Australia, Parliamentary Debates, Legislative Assembly, 24 October 2007
Western Australia, Parliamentary Debates, Legislative Assembly, 20 November 2007
Western Australia, Parliamentary Debates, Legislative Assembly, 24 October 2007
Western Australia, Parliamentary Debates, Legislative Council, Thursday 8 May 2008

Grace Meertes ‘Legal Fees: How much should we pay?’ The West Australian (Perth), 3
September 1997.