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An overview of the law relating to costs assessment appeals and costs orders

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The commencement of the *Legal Profession Uniform Law Application Act 2014* (LPULAA) and associated legislation introduces significant changes to the law relating to costs assessment and appeals from costs assessments. The purpose of this paper is to provide an overview of the current state of the law relating to costs appeals — and suggestions as to how judges when making costs orders can, at best, facilitate the assessment process or, at least, not unduly complicate it.

Background

The new legislative architecture includes the *Legal Profession Uniform Law* (LPUL) — a scheme for the regulation of the legal profession, at this stage in NSW and Victoria, which commenced on 1 July 2015. In NSW, it is given force of law by LPULAA 2014. The LPUL makes provision with respect to assessment of costs, as between practitioner and client. The LPULAA not only applies LPUL as a law of NSW, but enacts complementary and supplementary provisions, including with respect to the assessment of costs as between party and party (which it calls “ordered costs”, distinguishing them from “Uniform Law costs”). Some of the detail is provided by LPUL Application Regulation 2015.

Part 4.3 Div 7 of LPUL applies to practitioner-client costs (unfortunately described as “costs payable on a solicitor-client basis”) only.² The LPUL does not apply of its own force to “party/party” assessments, but is made applicable by LPULAA.

Assessments of legal costs are to be conducted by costs assessors in accordance with Pt 4.3 of LPUL, the Legal Profession Uniform Rules and “any applicable jurisdictional legislation”.³ On a costs assessment, the costs assessor must determine whether or not a valid costs agreement exists;⁴ whether the legal costs are fair and reasonable and, to the extent they are not fair and reasonable, the amount of legal costs (if any) that are to be payable.⁵

- 1 The author wishes to acknowledge the considerable assistance derived from a paper prepared by Her Honour Judge Gibson of the District Court of NSW, “Sections 384 and 385 Legal Profession Act Costs Appeals” available on the Conference Paper Database through JIRS.
- 2 LPUL s 196.
- 3 LPUL s 199.
- 4 A costs agreement can be void under LPUL s 178 (Non-compliance with disclosure obligations) or LPUL s 185 (agreements entered into in contravention of Pt 4.3 Div 4, which relates to costs agreements).
- 5 LPUL s 199.

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In considering whether legal costs for legal work are fair and reasonable, the assessor must apply the principles in s 172 of LPUL, so far as they are applicable.⁶ The principles referred to in s 172 are:

- A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are proportionately and reasonably incurred, and proportionate and reasonable in amount.
- In considering whether legal costs satisfy subsec (1), regard must be had to whether the legal costs reasonably reflect—
 - (a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and
 - (b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
 - (c) the labour and responsibility involved; and
 - (d) the circumstances in acting on the matter, including (for example) the urgency of the matter; the time spent on the matter; the time when business was transacted in the matter; the place where business was transacted in the matter; the number and importance of any documents involved; and
 - (e) the quality of the work done; and
 - (f) the retainer and the instructions (express or implied) given in the matter.
- In considering whether legal costs are fair and reasonable, regard must also be had to whether the legal costs conform to any applicable requirements of this Part, the Uniform Rules and any fixed costs legislative provisions.
- A costs agreement is *prima facie* evidence that legal costs disclosed in the agreement are fair and reasonable if the provisions of Div 3 relating to costs disclosure have been complied with; and the costs agreement does not contravene, and was not entered into in contravention of, any provision of Div 4.⁷

The most notable feature of this section, when compared to the former legislation, is the increased emphasis on proportionality of work and quantum.

In distinction from the former scheme, there is greater flexibility for costs assessors in respect of the costs of the assessment, including a power to award costs against the client. Unless the costs assessor believes that in all the circumstances it is fair and reasonable for the costs to be paid otherwise, the costs of a costs assessment are payable by a law practice if the law practice has failed to disclose a matter required to be

disclosed by Div 3 of Pt 4.3; or the law practice has failed to disclose a matter required to be disclosed in the manner required by Div 3; or the law practice's costs have been reduced by 15% or more on assessment.⁸

An applicant for assessment or the law practice concerned may, in accordance with applicable jurisdictional legislation, appeal against or seek a review of a decision of a costs assessor in the jurisdiction for which the costs assessor exercised his or her functions in relation to the decision. The court or tribunal hearing the appeal or reviewing the decision may make any order it considers appropriate on the appeal or review.⁹

The LPULAA deals with costs assessment in Pt 7. It supplements LPUL in relation to practitioner-client costs, and makes provision with respect to party/party costs. As originally enacted in 2014, it did not address recommendations of the Chief Justice's Review.¹⁰ It was amended in June 2015, before its operation commenced, including to address a number of the recommendations, and other reforms of the costs assessment scheme. Generally speaking, it applies to matters in which first instructions were given on or after 1 July 2015 (as the *Uniform Law costs*), or proceedings were commenced on or after that date (as to ordered costs). It contemplates that detail will be provided by rules to be made by the Cost Assessment Rules Committee (CARC). The Regulations largely mirror the former Regulations, and are intended to be replaced by Rules, once made.

A costs assessor must give an applicant, and any law practice or client or other person concerned, a reasonable opportunity to make submissions to the costs assessor in relation to the application, and give due consideration to any submissions so made. A costs assessor may hold an oral hearing for the purposes of an application, in accordance with the costs assessment rules.¹¹ In considering an application, a costs assessor is not bound by the rules of evidence and may inform himself or herself on any matter in the manner he or she thinks fit.¹²

The assessor is to issue a certificate setting out the determination of costs and including:

- the amount of costs determined (including any GST the assessor determines is payable)
- the costs of the assessment under s 78 of LPULAA, or s 204 of LPUL; and
- interest determined under s 81 of LPULAA, or payable under s 101 of the *Civil Procedure Act 2005* (CPA).¹³

⁶ LPUL s 200(1).

⁷ LPUL s 172. The first two subsections, but not the last two, are made applicable to assessments of "ordered costs": LPULAA s 76(2).

⁸ LPUL s 204.

⁹ LPUL s 205.

¹⁰ *Report of the Chief Justice's Review of the Costs Assessment Scheme*, 7 September 2011, at www.lawlink.nsw.gov.au, accessed 11 July 2016.

¹¹ This means that oral hearings will now be permissible, but it is expected that they will be exceptional.

¹² LPULAA s 69(2).

¹³ LPULAA s 70(1). Under LPULAA s 78, the assessor is to determine the costs of the assessment of ordered costs, and by whom they are payable. LPUL s 204, discussed above, makes provision in this respect. Under LPULAA s 81, the assessor may determine that interest is payable in respect of Uniform Law costs (at a rate not exceeding that referred to in s 195(4) LPUL), or that no interest is payable. Under s 101 CPA, a court that makes a costs order may order that interest is payable in respect of an order for costs.

It is important to note that, as is the case with the former legislation, the certificate is of amount of costs determined for the work done, and not of the amount (if any) that is unpaid, or the amount that has been paid. The provision confers jurisdiction to determine whether or not GST should be allowed. GST should always be allowed as between practitioner and client. In respect of ordered costs, GST should be allowed where the receiving party is not entitled to an input tax credit, but not otherwise. It is reasonable for assessors to require the receiving party to provide evidence that it is not entitled to an input tax credit, where there is doubt.

Section 70 of LPULAA removes any remaining doubt as to the power to include interest in a certificate.¹⁴ In respect of ordered costs, where interest is payable under CPA s 101, there is no discretion. In respect of Uniform Law costs, while there is a discretion under s 81 of LPULAA, that discretion should be exercised conformably with the way courts award pre-judgment interest, so that where there is a contractual entitlement under the costs agreement, interest should be allowed unless it would be unjust to do so. Such cases are likely to be very rare, because interest is simply the time value of money in the wrong pocket. Awareness that interest will routinely be allowed will also create an incentive for payment and settlement.

The assessor may issue one certificate in relation to a single application for assessment of costs payable under multiple orders between the same parties, so long as the certificate separately specifies the amount determined for each order.¹⁵ A single application may be made in respect of costs payable under multiple orders between the same parties.¹⁶

Any amount paid in excess of the certified amount may be recovered as a debt in a court of competent jurisdiction.¹⁷ Upon being filed in a court of competent jurisdiction, a certificate is deemed to be judgment for the amount that has not been paid.¹⁸ It is not for the assessor to determine or certify the amount that has been paid, but only to determine the amount of the costs for the work done.

The assessor is to separately determine and certify the costs incurred by the assessor and the Manager, Costs

Assessment, and the assessor's remuneration, and by whom they are payable. The certificate upon filing is taken to be a judgment against the party by whom those costs are payable in favour of a party who has paid those costs, for the amount paid, and the Manager, Costs Assessment, for any unpaid amount.¹⁹ This addresses the controversy as to whether a party who has paid the assessor's costs in order to uplift the principal certificate can enforce this certificate.

The assessor must determine what is a fair and reasonable amount of costs for the work concerned, and in doing so may have regard to the factors referred to in LPUL s 172(1) and (2).²⁰ The assessor may obtain and have regard to a costs agreement, but a costs agreement is not conclusive as to what is fair and reasonable.²¹ Thus in an assessment of ordered costs, the same factors are relevant as apply to Uniform Law costs, except the provision that a costs agreement is not *prima facie* evidence of reasonableness. However, the terms of a costs agreement are a relevant but not conclusive consideration.

Costs assessment appeals

In considering costs appeals for the foreseeable future, three different regimes have potential application: that under the *Legal Profession Act 2004* (LPA04), that introduced by LPULAA when it first came into operation; and that substituted by the *Courts and Other Justice Portfolio Legislation Amendment Act 2015*.²²

Which regime is applicable?

The first decision which has to be made is which regime applies.

The LPA04 arrangements continue to apply to practitioner/client (and third party) assessments (and appeals) where the client first instructed the law practice before 1 July 2015,²³ and to party/party assessments and appeals where the proceedings to which the costs relate were commenced before 1 July 2015.²⁴

The initial LPULAA arrangements apply to Uniform Law (formerly practitioner/client) assessments (and appeals) where the client first instructed the law practice on or after 1 July 2015,²⁵ and to "ordered costs" (formerly

14 As to which see *Coshott v Barry* [2015] NSWCA 257.

15 LPULAA s 70(3). While only one certificate is required, it must separately specify the amount referable to each order. Where necessary, the assessor should require the applicant to specify the amount claimed and work referable to each order.

16 LPULAA s 74(4).

17 LPULAA s 70(4).

18 LPULAA s 70(5). The Uniform Civil Procedure Rules Committee currently has under consideration an amendment to Uniform Civil Procedure Rules (UCPR) so as to require an accompanying affidavit in every case — not just where a payment has been made — so that a party filing a certificate will have to depose either that none of the amount certified has been paid, or as to how much has been paid.

19 LPULAA s 71(3).

20 LPULAA s 76.

21 LPULAA s 77.

22 Indeed, there may additionally be matters which remain covered by the *Legal Profession Act 1987*.

23 LPUL, Sch 4, Pt 3, Div 3, cl 18.

24 *Legal Profession Uniform Law Application Regulation 2015*, reg 59.

25 LPUL, Sch 4, Pt 3, Div 3, cl 18.

party/party) assessments and appeals where the proceedings to which the costs relate were commenced on or after 1 July 2015.²⁶

The revised LPULAA arrangements commenced on 24 November 2015.²⁷ In the absence of any specific transitional provision, they should be considered to apply to appeals and applications for leave to appeal instituted on or after that date, in respect of assessments to which LPUL and/or LPULAA otherwise apply.

Appeals under LPA04

In cases to which it applies, the LPA04 provides an appeal as of right from a decision of a costs assessor (and a review panel) as to a matter of law, to the District Court.²⁸

This is a “narrow” right of appeal, confined to a question of law.²⁹ Questions of law include denial of procedural fairness,³⁰ failure to give adequate reasons,³¹ and whether there was a retainer (at least if the facts are not in dispute).³²

In an appeal on a question of law alone, the court’s function is limited to identifying an error of law; while the court can “correct” any such error and substitute its own decision,³³ it cannot engage in fact-finding or receive further evidence.³⁴ The assessment will not be disturbed on the ground of an error of law unless the error is material to the determination.³⁵ Although the section provides that on a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given, that applies not to the court’s determination of the appeal, which is one on a question of law only, but only to a redetermination by an assessor on remitter.³⁶

The LPA04 also gives a party to an application for costs assessment an appeal by leave against the determination of the application by a costs assessor (including a review panel).³⁷ The appeal lies, in the case of a practitioner/client assessment, to the District Court,³⁸ and in the case of a party/party assessment, to the court or tribunal that made the costs order.³⁹ If leave is granted, the appeal is a hearing *de novo*.⁴⁰

Appeals under LPULAA

The LPULAA, as originally applicable,⁴¹ provides an appeal as of right from a decision of a review panel as to a matter of law, and an appeal by leave from the decision of a review panel generally. In both cases, the appeal lies to the District Court. The appeal is by way of rehearing with fresh evidence or evidence in addition to or in substitution for the evidence before the review panel or costs assessor being permissible with the leave of the court.

The LPULAA thus introduced some significant reforms. First, there is no longer a direct appeal from a first instance assessor, but only from a review panel. Thus parties are required to exhaust their review rights before appealing to a court. Secondly, the appeal is now by way of rehearing, and not *de novo*. This reflects the circumstance that the appeal to the court is a second review, after the review panel, which renders a *de novo* hearing inappropriate.

Appeals after 23 November 2015

Under the post-November 2015 LPULAA arrangements, a party to a costs assessment that has been the subject of a review may appeal against a decision of the review panel to:

- the District Court, but only with the leave of the court if the amount of costs in dispute is less than \$25,000, or
- the Supreme Court, but only with the leave of the court if the amount of costs in dispute is less than \$100,000.⁴²

26 LPUL Regulation, reg 59.

27 *Courts and Other Justice Portfolio Legislation Amendment Act 2015*, Sch 1.13.

28 LPA04 s 384.

29 *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR(NSW) 304 at [31]; *Vumbaca v Sultana* (2012) 15 DCLR(NSW) 375 at [36]; *Sweeney & Vandeleur Pty Ltd v Angyal* [2006] NSWSC 246 at [5].

30 *Levy v Bergseng* (2008) 72 NSWLR 178; *Lang v Back & Schwartz* [2009] NSWDC 180; but cf *Madden v NSW Insurance Ministerial Corp* [1999] NSWSC 196.

31 *Nassour v Malouf* [2011] NSWSC 356; *Bobb v Wombat Securities Pty Ltd* [2013] NSWSC 757 at [36]; *Frumar v Owners SP 36957* (2006) 67 NSWLR 321 at [62]. *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674 at [171]; *Randall Pty Ltd v Willoughby City Council* (2009) 9 DCLR(NSW) 31 at [56].

32 *Mohareb v Horowitz & Bilinsky Solicitors* (2011) 13 DCLR(NSW) 245. If the facts are in dispute, it may be a mixed question of fact and law: *Lyons v Wende* [2007] NSWSC 101 at [33].

33 LPA04 s 384(2): The court may, unless it affirms the costs assessor’s decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.

34 *B&L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481; *Madden v NSW Ministerial Insurance Corp* [1999] NSWSC 196.

35 *Gorzynski v AWM Dickinson & Son* [2005] NSWSC 277 at [22]; *Honest Remark Pty Ltd v Allstate Explorations NL* [2008] NSWSC 439 at [24]; *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR(NSW) 304 at [16].

36 *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674 at [65], [89].

37 LPA04 s 385.

38 LPA04 s 385(1).

39 LPA04 s 385(2).

40 LPA04 s 385(4); *A Goninan & Co Ltd v Gill* (2001) 51 NSWLR 441 at [26].

41 LPULAA, historical version for 2 July 2015 to 23 November 2015, s 89.

42 LPULAA s 89(1).

The Supreme Court may remit the matter to the District Court, and may remove proceedings from the District Court. The appeal is by way of a rehearing, with fresh evidence permissible by leave of the court. The review panel or the court may suspend the operation of the decision pending appeal.⁴³

This thus involves a number of additional reforms. First, the discriminator for when leave to appeal is required, or where there is an appeal as of right, is now a quantum-based test, in substitution for the former arid law/fact distinction. This is consistent with the emphasis on proportionality. Secondly, the appellate and supervisory role of the Supreme Court is restored, consistent with its traditional responsibilities in this area.

Time for appeal

An appeal must be instituted, or application made for leave to appeal, within 28 days of the date on which notice of the assessor's or review panel's decision is given to the appellant.⁴⁴ The court may extend this time, and an application for an extension of time to appeal may be included in the summons.⁴⁵

Leave to appeal

Under the LPA04, and under the pre-November 2015 form of LPULAA, leave to appeal is required except in the case of an appeal from a decision as to a matter of law. In appeals in matters to which LPULAA applies instituted since 24 November 2015, leave to appeal is required (a) in the District Court, if the amount of costs in dispute on the appeal is less than \$25,000, and (b) in the Supreme Court, if the amount of costs in dispute is less than \$100,000.

The purpose of imposing a requirement for leave to appeal is to provide a "filter" so as to avoid burdening the resources of the courts and the parties with inappropriate appeals.⁴⁶ The post-November 2015 provisions have the additional purpose of encouraging appeals to be brought in the appropriate jurisdiction. While there is a very wide discretion,⁴⁷ leave should not be too readily granted.⁴⁸ There is no exhaustive description of the factors relevant to a grant of leave to appeal, other than the overall justice of the case.⁴⁹ However, the existence of a seriously arguable case of error, and the quantum in dispute (or differently put, considerations of proportionality) are usually highly relevant.⁵⁰ In appeals in matters to which the LPA04 applies, an additional relevant consideration is whether the applicant has, and if not should, first exhaust

rights of review by a review panel. Other than in post-November 2015 appeals under LPULAA, it is relevant if there is an appeal as of right to which the issues on which leave is required are related.⁵¹

Removal and remitter

Under the post-November 2015 form of LPULAA, the Supreme Court is empowered to remove proceedings from and remit proceedings to the District Court. It can be anticipated that this power will be exercised to remove into the Supreme Court matters in which important questions of principle are involved, and to remit matters below the \$100,000 threshold which do not involve issues warranting the attention of the Supreme Court.

Stays pending appeal

Under all regimes there is provision for the court to suspend the operation of the decision under appeal,⁵² and to end that suspension.⁵³ The assessor or review panel appealed from can also suspend the operation of the decision,⁵⁴ and the court as well as the assessor or review panel can end a suspension that it has made.⁵⁵

Making costs orders

Judges make costs orders in a very high proportion of civil cases. Except where a gross sum order is made, such orders will trigger a requirement for assessment, which process itself involves additional time and cost. The way in which costs orders are made and framed can significantly influence the complexity, duration and cost of the ensuing assessment process.

There is much to be said, where it is possible to do so, for dispensing with the assessment process completely, by making a gross sum order. This has the attraction to the receiving party of avoiding the delay and cost associated with having costs assessed, and it should have the attraction to the party liable of offering some discount from the amount that would be allowed on assessment. The art in framing such an order is to strike a figure that allows a sufficient discount to the party liable to be an attractive alternative to the delay associated with assessment, while not so great as to be unjust to the receiving party. Evidence by the party entitled of the amount of the costs incurred — even their solicitor-client bills — can be a very useful starting point.

43 LPULAA s 90.

44 UCPR r 50.2, 50.3(1)(a), (c); 50.12(1)(a), (c).

45 UCPR r 50.3(2).

46 *Chapmans Ltd v Yandell* [1999] NSWCA 361 at [11].

47 *ibid* at [12].

48 *Wende v Horwath (NSW) Pty Ltd* [2008] NSWSC 1241; *Lyons v Wende* [2007] NSWSC 101.

49 *Busuttill v Holder* (NSWSC, Bell AJ, 7 November 1996); *Chapmans Ltd v Yandell* [1999] NSWCA 361 at [12].

50 *Aktas v Westpac Banking Corp Ltd* [2013] NSWSC 1451 at [21].

51 *Chapmans Ltd v Yandell* [1999] NSWCA 361 at [12]; *Levy v Bergseng* (2008) 72 NSWLR 178 at [50].

52 LPA04 s 386(1), LPULAA s 90(1).

53 LPA04 s 386(2), LPULAA s 90(2).

54 LPA04 s 386(1), LPULAA s 90(1).

55 LPA04 s 386(2), LPULAA s 90(2).

It avoids complexity in assessment if the number of costs orders made in a matter can be minimised, as each order requires independent assessment of the amount payable under that order. Where possible, a single order that covers the whole of the proceedings is optimal. This can be achieved by, when making the final order in proceedings, setting aside all unpaid interlocutory costs orders and substituting an *en globo* order covering all the costs. Where the orders all run one way, this presents no difficulty. Where there are orders in both directions, it is more problematic.

The making of costs orders in respect of discrete issues should be avoided. Such orders require the assessor to attribute work done to particular issues in the case (or between them, as work is often attributable to multiple issues). Where it is desirable to award a party part but not all of the costs of proceedings, on the basis that it has failed on some issues, then the preferable approach is to make an order for a proportion (or percentage) of the costs of the proceedings. Thus, if the view were taken that the plaintiff had succeeded on issues that represented about 70% of the costs of the litigation, but had needlessly and unsuccessfully pursued issues that represented the other 30%, an order that the defendant pay 40% of the plaintiff's costs of the proceedings might be appropriate — although it would also be appropriate to take into account the plaintiff's overall success, and its extent. A broad-axe approach to apportionment is entirely acceptable. A number of aids can be used to allocate costs between issues — although all have shortcomings and none are more than aids — such as time spent, transcript pages, and quantum in dispute relative to each issue.

Interest on costs

Until 23 November 2015, interest did not run in respect of a party/party costs order until the costs were assessed and the certificate filed, unless an order was made under CPA s 101, for interest on costs. The power to make an order for interest on costs is now exercised quite frequently, in particular in cases in which substantial costs are paid by the party entitled as the matter proceeds. In this regard, the formula initially used in *Lahoud v Lahoud*⁵⁶ is typically employed. However, such orders though perfect in principle are productive of great complexity in practice, requiring as they do, the attribution of payments between client and solicitor to particular parts of the party/party bill, and multiple interest calculations, from different dates.

With effect from 24 November 2015, CPA s 101 was amended⁵⁷ so as to provide that, unless the court orders otherwise, interest is payable on an amount payable under an order for the payment of costs;⁵⁸ and such interest is to be calculated at the prescribed rate or at any other rate that the court orders, as from the date the order was made or any other date that the court orders.⁵⁹

Thus — in proceedings to which the new provision applies⁶⁰ — the default position is that interest is payable in respect of costs, at the rate prescribed for interest on judgment debts, from the date on which the costs order was made. This default position, which adopts the *incipitur* rule, is a deliberate compromise, intended to apply in the ordinary case, and to reduce the frequency of post-judgment applications for orders under s 101. The court retains a discretion to otherwise order, and presumably will readily enough do so where a party has paid substantial amounts on account well prior to the final costs orders. However, while it must always depend on the circumstances of each case, where possible it is preferable, if there is to be an “otherwise order”, to select a single specific mid-date from which interest is to run, so as to avoid the complexities associated with a *Lahoud* order.

Conclusion

The 2015 amendments represent the most extensive reforms since the introduction of the costs assessment scheme in 1993. They resolve a number of issues which have caused difficulties under the former legislation. They clarify that there can be a single assessment covering multiple costs orders in a proceeding, confirm that an assessor can allow interest as between practitioner and client, and provide for costs orders to bear interest from the date of the order, which should reduce the incidence of applications for interest on costs under CPA s 101. In respect of costs assessment appeals, they simplify the appellate system, require parties first to exhaust their rights of review by a review panel, substitute a quantum-based criteria for an appeal as of right for the unsatisfactory “matter of law” test, and replace the more cumbersome *de novo* appeal with an appeal by way of rehearing.

The amendments reflect the principles expressed by the Chief Justice's Review of the Costs Assessment Scheme, that detailed formal procedures akin to traditional taxation are unaffordable, and a more robust approach, albeit at cost of precision and perfection, is required; and that as a party liable is incentivised to delay, the process should promote early resolution by removing incentives for delay and providing incentives for early resolution, even at a discount. Judges can facilitate the work of costs assessors, and reduce the cost and complexity of the process, by making gross sum orders; by minimising the number of costs orders in a proceeding; by using percentage orders, rather than making orders which require the allocation of costs between issues; and, when making an interest on costs order, specifying a mid-date from which interest is to run, so that a single calculation is required, rather than making a *Lahoud* order.

56 [2006] NSWSC 126.

57 *Courts and Other Justice Portfolio Legislation Amendment Act 2015*, Sch 1.2[2].

58 CPA s 101(4).

59 CPA s 101(5).

60 The amendments do not extend to proceedings commenced before 24 November 2015, which continue as if those amendments had not been enacted: CPA, Sch 6.