



# **Costs Practice Note**

**2008 Edition**

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## GLOSSARY

<b>Expression</b>	<b>Description</b>
<b>Act</b>	Corporations Act 2001
<b>Applicant</b>	The body (either ASIC or APRA) which has made Application to the Board under s1292 of the Act
<b>Application</b>	An application made to the Board under s1292 of the Act
<b>APRA</b>	Australian Prudential Regulation Authority
<b>ASIC</b>	Australian Securities and Investments Commission
<b>ASIC Act</b>	Australian Securities and Investments Commission Act 2001
<b>Board</b>	Companies Auditors and Liquidators Disciplinary Board
<b>Hearing</b>	The hearing of an Application by a Panel of the Board
<b>Panel</b>	A Panel of the Board
<b>Practice Note</b>	This Costs Practice Note
<b>Registrar</b>	The Registrar of the Board
<b>Respondent</b>	The auditor or liquidator in respect of whom the Applicant has made an Application to the Board
<b>Rules</b>	Federal Court Rules 1979, as amended

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## **COSTS PRACTICE NOTE**

This Practice Note is issued for the guidance of parties and their advisers as to the award of costs in Hearings before a Panel of the Board.

An additional purpose of this Practice Note is to provide guidance to practitioners when advising clients on their possible costs liability if a case is defended. It also outlines the circumstances in which the Panel will exercise its discretion to require payment of costs. It also sets out the procedure for taxing costs before the Panel.

### **1. AWARD OF COSTS**

#### **1.1 Power of the Panel**

Under s. 223 of the ASIC Act, the Panel may require either the Respondent or the Applicant to pay all or part of the costs of the Hearing or all or part of the costs of the other party or both.

The power to award costs is discretionary.

#### **1.2 Against the Respondent**

A requirement to pay costs may only be made by the Panel against the Respondent if the Panel:

- (a) cancels or suspends the registration of the Respondent as an auditor, as a liquidator or as a liquidator of a specified body corporate, as the case requires; or
- (b) deals with the Respondent by:
  - (i) admonishing or reprimanding the Respondent, or
  - (ii) requiring the Respondent to give an undertaking to engage in, or to refrain from engaging in, specified conduct.

Generally, if proceedings against a Respondent are successful, the Respondent will be required to pay some or all of costs. Circumstances which may affect the exercise of the discretion by the Panel may include whether there is evidence that the Applicant as the successful party raised contentions it had no entitlement to raise or did something connected with the institution or conduct of the Application to occasion unnecessary litigation or expense, eg. the lengthening of the Hearing.

#### **1.3 Against the Applicant**

A requirement to pay costs may only be made against the Applicant if the Panel refuses to:

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- (a) make an order cancelling or suspending the registration of the Respondent as an auditor, as a liquidator or as a liquidator of a specified body corporate, as the case requires; and,
  - (b) deal with the Respondent by:
    - (i) admonishing or reprimanding the Respondent, or
    - (ii) requiring the Respondent to give an undertaking to engage in, or to refrain from engaging in, specified conduct.

Generally, if proceedings brought by the Applicant are unsuccessful, it will be required to pay costs. Circumstances which may affect the exercise of the discretion by the Panel may include whether there is evidence that the Respondent as the successful party raised by way of defence matters which in the result turn out to furnish no defence or did something connected with the institution or conduct of the proceedings to occasion unnecessary litigation or expense, eg. the lengthening of the Hearing.

## **2. COSTS WHICH MAY BE ORDERED TO BE PAID**

### **2.1 Power of the Panel**

In the exercise of its discretion, and depending on the outcome of the Hearing, the Panel may require either the Respondent or the Applicant to pay an amount specified by the Panel, being all or part of:

- (a) the costs of and incidental to the Hearing;
- (b) the costs of the successful party in relation to the Hearing; or
- (c) the costs mentioned in paragraph (a) plus the costs mentioned in paragraph (b).

### **2.2 Costs of and incidental to the Hearing: ss. 223(1)(c), 223(2)(c) and 223(3) ASIC Act**

These costs are those of the Board of and incidental to the Hearing. The amount of such costs whether required to be paid by the Respondent or by the Applicant, may be recovered in a court of competent jurisdiction as a debt due to the Commonwealth.

### **2.3 Costs of the successful party in relation to the Hearing: s. 223(4) ASIC Act**

These costs are those of the successful party incurred in relation to the Hearing.

The amount of such costs may be recovered in a court of competent jurisdiction as a debt due. This is regardless of whether the Panel also orders payment of the costs of and incidental to the Hearing.

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### **3. AMOUNT OF COSTS**

#### **3.1 Quantification of costs**

Before costs can be recovered as a debt, the amount of the costs must be quantified. Quantification of costs can occur in one of three ways:

- (a) the Panel may specify the exact amount of the costs (in which case it is the amount specified);
- (b) the amount of the costs to be paid may be agreed (in which case it is the amount agreed);
- (c) the costs may be taxed.

#### **3.2 Federal Court scale**

In relation to costs orders made by the Panel unless:

- (a) the Panel specifies the exact amount of the costs to be paid; or
- (b) any provision of this Practice Note is inconsistent with it,

the amount of such costs ordered shall be calculated by reference to Schedule Two of the Rules ("Federal Court scale"). The operation of Order 62 rule 12 of the Rules shall be excluded to the extent it purports to limit a taxing officer's discretion to allow higher than scale fees but only where special circumstances are shown to exist to the satisfaction of the Panel and prior to any order being made.

#### **3.3 Federal Court Rules**

If costs ordered to be paid by the Panel cannot be agreed upon, such costs are to be taxed by the Panel. The Panel may request the Registrar to investigate and assess costs and make appropriate recommendations. For those purposes the Registrar shall be taken to be the "taxing officer".

Except to the extent that any provision of this Practice Note is inconsistent with them, the rules to apply to any taxation of costs ordered by the Panel, shall be by reference to the Rules. Any reference to the "court", in the Rules, shall be deemed to be a reference to the Panel.

#### **3.4 Method and review of taxation of costs**

The Panel or the Registrar may elect to assess costs either by way of:

- (a) estimate of costs (Rules Order 62 rule 46(3));
- (b) provisional taxation (Rules Order 62 rule 46(4));
- (c) a full taxation (Rules Order 62 rule 41).

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If an estimate of costs or provisional taxation has been undertaken by the Panel or a Registrar under Order 62 rule 46 of the Rules, objection to the estimate or requirement for a full taxation may be made as per rule 46.

Where there has been a full taxation of costs under Order 62 rule 41 of the Rules, a party may apply for reconsideration of a decision of the Panel or a Registrar as per Order 62 rules 42 and 43.

Every recommendation of a Registrar shall be subject to review by the Panel.

### **3.5 Bill of costs**

A bill of costs shall contain:

- (a) in short dated items, a chronological description of the work done by the solicitor, his or her servants and agents. The item shall be of sufficient detail to explain the nature and purpose of the attendance;
- (b) at the beginning of each item, a consecutive number and the scale item number;
- (c) beside each item, the amount claimed for the work described in the item;
- (d) where an amount is claimed for "General Care and Conduct", in short paragraphs, a description of the work done justifying the allowance of the amount; and
- (e) disbursements made.

There shall be endorsed on the bill a certificate signed by a solicitor verifying the additions in it, and there shall be attached to it or otherwise filed with it in a convenient manner adding machine or computer slips or working papers together with originals or legible copies of receipts for disbursements, or if a disbursement has not been paid, copies of all relevant accounts.

### **3.6 Assessment procedures**

The following Rules shall not apply namely Order 62, rules 46(3)(d), 46(5) and 46(7).

## **4. BASIS OF AWARD OF COSTS**

### **4.1 Power of the Panel**

The Panel has a wide discretion as to the basis of an award for costs. The most common type of costs likely to be ordered to be paid by a party to proceedings is party and party costs. However there are other bases, such as indemnity, solicitor and client, trustee and common fund. Costs may also be ordered as a gross sum, specified in the order for costs.

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Unless there are unusual circumstances, the costs order made by the Panel against an unsuccessful party to a Hearing, would be likely to be on a party and party basis. Unless otherwise specified at the time, the costs order made by the Panel will be on a party and party basis.

#### 4.2 Party and party costs: definition

Party and party costs are generally only a partial indemnity of the total costs incurred by a party to proceedings. The extent to which party and party costs act as an indemnity depends on how the party who is entitled to the costs has conducted their side of the proceedings. Work done which is viewed as over-cautious or constituting over preparation, will not be allowed on a party and party basis against the party liable to pay costs.

The definition of party and party costs is those costs, charges and expenses as appear to have been necessary or proper for the attainment of justice or for maintaining or defending the rights of any party. Except as against the party who incurred them, costs shall not be allowed which appear to have been incurred or increased:

- (a) through over-caution, negligence or misconduct;
- (b) by payment of special fees to counsel or special charges or expenses to witnesses or other persons; or
- (c) by other unusual expenses.

Generally, to be claimable party and party costs must relate to the issues as relevant between the parties. Further the work done in relation to the relevant issues must be "necessary".

#### 4.3 Party and party costs: guidelines

The types of work that will be allowed as party and party costs depends on the circumstances of the individual case. The following are general guidelines as to the categories of work which may not be claimed as party and party costs.

- (a) **Relevance:** Work done which is not used (such as a report not served) because it represented a possible claim or defence which was not ultimately argued, will rarely be party and party. The exception to this is if the party liable to pay the costs conceded the point or by some other act caused work done by the successful party not to be used (eg. by amending a claim or defence).
- (b) **Necessity:** Work which was not necessary will not be allowed party and party. This primarily occurs where tasks are duplicated. For example a letter is written to confirm the contents of a phone call, or a solicitor checks the draft of a document prepared by counsel. Only one of the attendances in each instance would normally be allowed party and party.

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- (c) **Unusual or Special Expenses:** A party ordered to pay party and party costs is only liable for the usual expenses to be expected in the circumstances applying to the relevant proceedings. Examples of when unusual or special expenses may arise are:
- (i) counsel or witnesses are used whose services or standing are not "usual" for the task they are used for (eg, the use of senior counsel in a routine matter); or
  - (ii) when fees are agreed to be paid to counsel or witnesses which are unusually high.
- (d) **Costs after the Proceedings are Concluded:** Party and party costs only relate to the actual proceedings in which they are ordered.

## 5. COSTS OF THE PANEL

The Panel has a wide power to recover its own costs of and incidental to Hearings.

Generally, however, as a matter of policy, the Panel limits recovery of the Panel's costs to certain of its disbursements. These are likely to include transcript fees, interpreter's fees and venue costs.

## 6. THE APPLICANT'S COSTS

### 6.1 General categories

The work done by the Applicant which will comprise its costs in relation to the Hearing, also includes the investigative work (subject to its relevance to the proceedings), which necessarily precedes a decision to proceed with an Application to the Panel.

The usual costs of the Applicant for Hearings fall into several categories:

- (a) Work done by its in-house legal officers;
- (b) Work done by its in-house staff other than legal officers, including staff experts; and
- (c) Disbursements incurred for amongst other things, outside investigative reports, expert evidence and the like.

### 6.2 Costs of investigative and other work

At least a portion of the investigative and other relevant work in relation to the Respondent will necessarily be undertaken prior to any decision to proceed by the Applicant.

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Neither the fact that:

- (a) at the time action had not commenced, nor
- (b) the immediate object in incurring the costs was to ascertain the chances of success,

will per se be sufficient to exclude the costs of such investigative and other work, from being part of the Applicant's costs in relation to the resultant Hearing before the Panel.

The test is whether the costs were properly or reasonably incurred in relation to what subsequently became defined as the matters in dispute.

Costs are recoverable for work done prior to the filing of the Application for the preparation of materials for use in the case, for work done relevant to the issues to be determined and for work fairly attributable to the conduct of the other side.

### **6.3 The Applicant's staff experts**

The Applicant may use a staff expert for the preparation of expert reports and evidence, rather than briefing an outside expert.

In such circumstances, if appropriate, an allowance may be made for both the staff expert and the relevant legal officer to undertake work on the matter.

In considering whether work done by either the legal officer or the staff expert forms part of the costs of the Applicant in relation to the Hearing, there shall be no distinction between a staff expert and an outside expert.

This recognises that the staff expert and the legal officer may, in exercising their separate functions, partially duplicate each other's work. However no allowance shall be made for legal officers and staff experts to review and check each other's work.

### **6.4 Legal officers**

Work done by the Applicant's legal officers will be allowed in accordance with the Federal Court scale (Schedule Two of the Rules).

### **6.5 In house staff other than legal officers**

#### **(a) Guidelines**

Work done by the Applicant's staff other than legal officers shall be allowed in accordance with the *Guidelines For Costing of Government Activities*, as issued by the Commonwealth Department of Finance dated July 1991 ("Guidelines"). To the extent that the Guidelines are

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inconsistent with the Federal Court scale (save as provided in point (ii) below), the Guidelines shall prevail.

The allowance of an hourly charge-out rate as per the Guidelines, is subject to the exercise of the discretion of the Panel or the Registrar. Without limiting the generality of the foregoing, factors to be taken into account are whether:

- (i) the difficulty and nature of the work required a person of the staff member's seniority and expertise; and
- (ii) the work undertaken by a non-legal officer, has already been claimed as part of a scale allowance (as per the Federal Court scale), in respect of work undertaken by a legal officer. For example typing of correspondence where the scale amount for letters includes the typing of same.

(b) **Method of calculation**

The Guidelines provide a method of calculating charge out rates for the Applicant's non-legal staff labour. It operates by applying a set multiple to an employee's salary and converting it to an hourly basis. The set multiple takes into account both direct and indirect overheads and on-costs attributable to the officer, such as:

- (i) administrative/operational expenses;
- (ii) compensation and legal expenses;
- (iii) accommodation;
- (iv) superannuation; and
- (v) corporate support.

The current multiplier applying to the Applicant's non-legal officers and other non-legal staff, is 2.544.

## **7. THE RESPONDENT'S COSTS**

### **7.1 General categories**

The work done by or on behalf of the Respondent which will comprise costs in relation to the Hearing, also includes any investigative work prior to commencement of proceedings (subject to its relevance to the proceedings).

The usual costs of the Respondent for Hearings are:

- (a) professional fees charged by the Respondent's legal representatives;

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- (b) disbursements incurred for amongst other things, outside investigative reports, expert evidence, witnesses' expenses and the like; and
  - (c) depending on the circumstances, loss of the Respondent's professional time. A Respondent may be entitled to be present at a Hearing at the Applicant's expense where contested issues of fact concerning the Respondent's own actions, knowledge or behaviour are involved.

A Respondent not legally represented at a Hearing, is not entitled to charge any fees for their time except as a witness or in accordance with (c) above. Such a Respondent is however, entitled to charge for any relevant disbursements.

## **7.2 Costs of investigative work**

Some investigative work on behalf of the Respondent may be undertaken prior to the filing of any Application by the Applicant.

Neither the fact that:

- (a) at the time the Application had not been filed, nor
- (b) the immediate object in incurring the costs was to ascertain the chances of success,

will per se be sufficient to exclude the costs of such investigative and other work, from being part of the person's costs in relation to the resultant Hearing.

The test is whether the costs were necessarily or properly and incurred in relation to what subsequently became defined as the matters in dispute.

Costs are recoverable for work done prior to the filing of the Application for the preparation of materials for use in the case, for work done relevant to the issues to be determined and for work fairly attributable to the conduct of the other side.

## **8. DISBURSEMENTS**

### **8.1 Allowance generally**

Generally all disbursements shall be allowed to the extent that they have been properly and reasonably incurred and paid.

Disbursements will not be allowed if they have not been paid prior to the issue of a certificate of taxation. Unless the solicitor for a party entitled to costs, signs an undertaking before a certificate of taxation is made. Annexure A to this Practice Note contains the form of the undertaking. Order 62 rule 20 of the *Federal Court Rules* shall not apply.

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## **8.2 Certification**

Any disbursement may be certified by the Panel in its discretion. Any application for certification must be supported by sufficient particulars. Such particulars must show how the disbursement is calculated, to the extent necessary to enable the Panel to form an opinion as to whether it has been properly and reasonably incurred.

In relation to witnesses' expenses and report fees and counsel's fees, necessary particulars include:

- (a) the relevant dates and times claimed;
- (b) a breakdown of what work was done on those dates and in those times;
- (c) sufficient details of the work done to enable its relevance to the case to be determined;
- (d) an explanation of how the fees were made up eg. relevant hourly rates etc; and
- (e) any relevant details of the status or other relevant details of the witness or expert or counsel, which justify the hourly rates, salary etc claimed.

## **9. WITNESSES' FEES AND ALLOWANCES FOR EXPENSES**

### **9.1 General rules for entitlement**

Generally, a witness must be present in a Hearing:

- (a) during the whole time claimed; and
- (b) only for as long as reasonable (eg. not after addresses have commenced).

A witness may be allowed who was not called. Such allowance relates to whether the witness was otherwise necessary, but was not called as the other side either conceded the issue or the matter settled.

Witnesses are to be disallowed if their attendance is unnecessary or merely to supervise the conduct of proceedings.

### **9.2 Fees for attendance on Hearing**

The Federal Court scale shall not apply to witnesses' fees. In accordance with s.218(4) of the ASIC Act, Regulation 12 and Schedule 2 of the *Australian Securities and Investments Commission Regulations* shall apply.

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### **9.3 Expert reports and qualifying fees**

Such amount shall be allowed as is reasonable and has been properly incurred and paid.

In making such allowance regard shall be had to:

- (a) the difficulty of the work and whether it required a person of the expert's seniority and expertise;
- (b) the seniority, expertise and standing of the expert in their profession; and
- (c) the actual fees paid.

### **9.4 Allowances for expenses**

The Federal Court scale shall not apply to witnesses' allowances for expenses. Where a witness incurs expense for travel, meals or accommodation in connection with a Hearing before the Panel, such expenses shall be allowed in accordance with Regulation 12 and Schedule 2 of the *Australian Securities and Investments Commission Regulations*.

## **10. COUNSEL'S FEES**

### **10.1 General rule**

Generally, the Federal Court scale shall not apply to counsel's fees. Order 62 rule 31(a) of the Rules shall not apply.

### **10.2 Senior counsel**

The costs of briefing senior counsel shall not be allowed on any taxation of costs, unless the Panel otherwise orders.

Where the Panel makes an order allowing the briefing of senior counsel, it may direct the amount to be allowed for their fees.

In the absence of a direction specifying the amount of senior counsel's fees, or agreement between the parties, the amount will be determined by taxation.

The fee allowed for senior counsel will depend on the difficulty of the work, the seniority, expertise and standing of counsel and the amount actually paid.

### **10.3 Counsel**

The costs of briefing more than one counsel (notwithstanding that none is Queen's Counsel or Senior Counsel), will not be allowed on any taxation of costs, unless the Panel otherwise orders.

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The Panel may direct the amount for counsel's fees.

In the absence of a direction specifying the amount of counsel's fees, or agreement between the parties, the amount shall be determined by taxation.

The fee allowed for counsel shall depend on the difficulty of the work, the seniority, expertise and standing of counsel and the amount actually paid.

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## ANNEXURE A

### UNDERTAKING TO PAY DISBURSEMENT

#### UNDERTAKING

I undertake to the Panel that, out of any money received at any time and from time to time by me or from or on behalf of my client in payment of the costs which are the subject of my bill, I will, subject to any appropriation by the payer, within 21 days of receipt pay:

*[if there is only one unpaid disbursement]* - to *[name]* his fee or, if the money received is less than his fee, the amount received, until his fee is paid.

*[or, if there is more than one unpaid disbursement]* to *[name]*, *[name]* and *[name]* their fees or, if the amount received is less than their fees, to each of them that proportion of the amount received as his fee bears to the total fees, until their fees are paid.

Date:

Solicitor: