COMPARATIVE RESEARCH PAPER ON LEGAL COSTS

By Nessa Cahill BL, February 2005

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Part I  Introduction

This Paper considers the legal costs’ regimes of a number of different jurisdictions. Each of these jurisdictions has some unique rules and systems, while there are certain topics and themes that are common to all. The Paper aims to highlight any aspect of the approach of these legal systems’ towards legal costs, which may be regarded as novel, innovative, or which has attracted particular scrutiny. However, it is beyond the scope of this Paper to analyse every aspect of each jurisdiction’s regime for legal costs. Therefore, with regard to the more common themes, such as the taxation of costs, these are only addressed where there are particularly established or well thought-out systems in place. There are other dimensions to the topic of legal costs that, while significant, are also considered to be beyond the scope of this Paper. Among these are the considerable economic and statistical analyses that have been conducted of the relative benefits of different approaches to allocating, awarding and charging legal costs.

There are certain concepts and rules that have a bearing on legal costs in other jurisdictions, and which need to be understood for the purposes of this Paper. In particular the topics of contingent fees and conditional fees have attracted considerable scrutiny in other jurisdictions. For the purposes of the Paper, the definition of these concepts which were applied by Schiemann L.J. in Awwad v. Geraghty & Co. will be adopted:

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“There are three categories of reward for success: (1) where the lawyer will recover some of the client’s winnings; (2) where the lawyer will recover his normal fees plus a success uplift; (3) where the lawyer will only recover his normal fees. They used all to be described as contingent fee but, in what Judge Cook in his book on Costs (3rd Ed., 1998) refers to as a triumph of semantics, situations (2) and (3) have in recent years been given the name of conditional fees whereas situation (1) is still described as a contingent fee…. The present case is concerned with situation (3), which I shall call a conditional normal fee case to distinguish it from situation (2), which I shall call the conditional uplift case.”

According to this definition, there are essentially three means of recovery of legal fees that are linked to the success of the client’s case. First, there are contingent fees, which involve the lawyers recovering a share of the successful client’s award. Secondly, conditional fees arise where the lawyer recovers his normal fees in the event of a successful outcome, but not otherwise. Finally, there are conditional fees with an uplift, which involve the lawyer recovering the normal fees, plus a success fee, not related to the scale of the award.

Another concept that should be examined by way of background to this Paper, involves the allocation of costs. In England and Wales, among other jurisdictions, there is a concept referred to as “fee shifting”, which basically refers to the rules of certain legal systems according to which the payment of legal costs by a party may

depend on the outcome of the matter for which legal services were sought. What is known as the “English Rule” is that the successful party should recover his costs from the unsuccessful party. This applies, with some variations, in every jurisdiction examined in this Paper, with the exception of the United States. In the United States, what is known as the “American Rule” generally dictates that each party bears their own costs irrespective of the outcome.

The jurisdictions whose approaches to legal costs are examined in this Paper are England and Wales, New Zealand, New South Wales, Ontario, the United States and Germany.
Part II  England and Wales

A. Introduction

The legal costs of civil proceedings have attracted very extensive scrutiny in England and Wales. Lord Woolf presented two papers that were central to this discourse. The first, the Interim Report on Access to Justice (“the Interim Report”), was presented to the Lord Chancellor in June 1995. The Final Report on Access to Justice (“the Final Report”) was presented in July 1996.

In these reports, Lord Woolf analyses closely the civil justice system in England and Wales as it existed in the mid 1990’s and recommends a thorough re-appraisal of this system. Effect has been given to many of these recommendations. It is beyond the scope of this paper to analyse the papers and all of their implications in depth. However, as the issue of legal costs was central to many of the recommendations made and changes introduced, the papers are an important starting point in an examination of the current rules governing legal costs in England and Wales.

In the Interim Report, Lord Woolf emphasised the importance of legal costs in the following terms: “The problem of cost is the most serious problem besetting our litigation system.”

In the Final Report, Lord Woolf reiterated this assessment, elaborating upon it as follows:

“Costs are a significant problem because:
(a) litigation is so expensive that the majority of the public cannot afford it unless they receive financial assistance;
(b) the costs incurred in the course of litigation are out of proportion to the issues involved; and
(c) the costs are uncertain in amount so that the parties have difficulty in predicting what their ultimate liability might be if the action is lost.”

With a view to addressing these infirmities, Lord Woolf described the intentions underlying the Final Report as being to:

“(a) reduce the scale of costs by controlling what is required of the parties in the conduct of proceedings;
(b) make the amount of costs more predictable;
(c) make costs more proportionate to the nature of the dispute;
(d) make the courts’ powers to make orders as to costs a more effective incentive for responsible behaviour and a more compelling deterrent against unreasonable behaviour;
(e) provide litigants with more information as to costs so that they can exercise

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greater control of the expenses which are incurred by their lawyers on their behalf."  

In order to appreciate fully the nature of the reforms recommended, and introduced, in relation to legal costs in England and Wales, it is necessary to have some understanding of an important structural change that has been introduced to the overall civil litigation system in the aftermath of the Interim and the Final Report on Access to Justice. This change in the litigation system involved the introduction of a three-track system for civil litigation, with a “small claims track”, a “fast track” (for personal injury claims of between £1,000 and £15,000 and other claims between £5,000 and £15,000) and a “multi-track” (for all claims worth over £15,000 and certain complex cases of a lower value).

This development has many implications for legal costs. In the Final Report Lord Woolf described the essential costs’ implications of the three-track system as follows:

“(a) There will be fixed costs for cases on the fast track.
(b) Estimates of costs for multi track cases will be published by the court or agreed by the parties and approved by the court.
(c) There will be a special ‘streamlined’ track for lower value or less complex multi track cases, where the procedure will be as simple as possible with appropriate budgets for costs.
(d) For classes of litigation where the procedure is uncomplicated and predictable the court will issue guideline costs with the assistance of users.
(e) There will be a new test for the taxation of costs to further the overriding objective. It will be that there should be allowed ‘such sum as is reasonable taking account of the interests of both parties to the taxation’.”

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4 Chapter 7, para. 5, Final Report.
6 In the Final Report the fast track was described in more detail as follows: “14. I recognise that not all cases under £10,000 will be suitable for the fast track. The criteria for removal from the fast track must be such as can be clearly identified by litigants, advisers and the courts. It is in the interests of all that there should be certainty; I do not wish to devise criteria which will lead to endless applications to transfer. 15. I have carefully considered the responses to the consultation and the conclusions of the working group. I recommend that a case should not be included in the fast track if:
(a) it raises issues of public importance; or
(b) it is a test case; or
(c) oral evidence from experts is necessary; or
(d) it will require lengthy legal argument or significant oral evidence which cannot be accommodated within the fast track hearing time; or
(e) it will involve substantial documentary evidence.
16. There are three categories of cases which will normally be excluded because of the criteria outlined above: medical negligence cases, jury trials and cases of deceit. In those cases, the presumption should be that the case will be dealt with on the multi-track. In other types of cases, such as personal injury and other classes of professional negligence, there will be no presumption. Some individual cases will meet the criteria for transfer into the multi-track but others will not. The decision will have to be made by the district judge in the individual case, based on the information in the claim and defence and taking account of the criteria outlined above and the wishes of the parties.” (Chapter 2, paras. 14, 15, 16, Final Report).
7 See Civil Procedure Rules, Parts 43 to 48.
Other changes were introduced to the rules governing legal costs in England and Wales in the aftermath of the recommendations made by Lord Woolf in the Interim and the Final Paper.\textsuperscript{9} These include increased provision for conditional fee arrangements\textsuperscript{10} and legal expenses insurance. In the Final Report Lord Woolf noted,

“…there is the availability of conditional fee agreements and the growth in legal expenses insurance. Both of these can help to make litigation more affordable, but they cannot in themselves deal with the underlying problems of excessive and unpredictable costs. Both conditional fees and insurance are, at present, available only in limited classes of cases. They will only become more generally available if costs are firmly controlled in the ways that I am proposing.”\textsuperscript{11}

The topic of legal expenses insurance, while it is an important aspect of civil litigation in England and Wales, is not addressed specifically in this paper. The following prediction in the Final Paper is nonetheless worth noting,

“In the future, insurance could have a larger part to play in funding litigation. This could apply both to parties' own costs and to liability for the other side's costs. A rapid increase in the availability of insurance is important to greater access to the courts. It is also important to the legal profession. However the ability to assess the risks involved is important if insurers are to increase their involvement. Certainty as to costs and moderation in their amount is critical to insurers offering affordable terms.”\textsuperscript{12}

Finally, Lord Woolf’s recommendations in the Final Report in the context of legal costs should be noted,

“ (1) Orders for costs need to reflect more precisely the obligations the new rules place on parties.  
(2) The court should have power to deal with the question of costs even where all other issues have been resolved without litigation.  
(3) Where one of the parties is unable to afford a particular procedure, the court, if it decides that that procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome.  
(4) The court should be able to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case.  
(5) Benchmark costs should be established by the court with the assistance of user groups, for multi-track proceedings with a limited and fairly constant procedure.  
(6) The new standard basis of taxation should be based on the wording of the Solicitors' (Non-Contentious Business) Remuneration Order 1994, ie, that the amount allowed should be what is ‘reasonable to both parties to the taxation’. The indemnity basis should remain as it is.”

\textsuperscript{10} The system of conditional fee agreements will be addressed in more detail below.
\textsuperscript{11} Lord Woolf, “Access to Justice: Final Report” (July 1996), Section 1, para. 12.
B. Allocation of costs

One of the issues that has been examined in England and Wales in the context of legal costs is the allocation of costs between the parties to litigation (so-called “costs shifting”). The traditional rule that costs follow the event (“the indemnity principle”) is still prevalent. However, there have been increasing deviations from this principle.

The rationale behind the indemnity principle and its effects were examined in detail in the Interim Report. Lord Woolf highlighted the following advantages of the indemnity principle:

- It is fair that the successful party to litigation should recover the major proportion of his costs from the unsuccessful party.
- The rule deters unmeritorious litigation and encourages earlier settlement, as those who are not confident of success are less likely to proceed with their claims if they could face a costs penalty.

Certain arguments against the indemnity principle were also highlighted, including the following:

- It may deter meritorious as well as unmeritorious claims, as the consequences of a possible loss may be more than some litigants would risk.
- The principle favours a litigant with more resources, as they can afford to take the risk of a negative ruling on costs.
- As a result of the increased monies at stake, the rule can encourage parties to proceed with a case, rather than settle it.
- It may engender a “win at all costs” mentality.

There had been certain modifications of the indemnity principle before the presentation of the Interim and Final Report. These were set out in the Interim Report as follows:

- “In small claims the standard rule is ‘no costs’, i.e. each side bears its own legal costs. There are two primary reasons for this. First, the proceedings are designed to be conducted by the parties without the assistance of legal representation. The second reason, which is linked to the first, is that the modest sums in issue mean that the costs of legal representation would inevitably be disproportionate to the amount at stake. Recovery of expenses,
albeit on a limited scale, does however follow the event, and in addition some adjustment can be made for unreasonable behaviour in the litigation.

- The rule has effectively been disapplied in favour of those who are legally aided. While a successful assisted party may recover costs from his unassisted opponent, the converse, practically speaking, does not apply. Nor can a successful unassisted party recover costs from the legal aid fund itself, except under very limited conditions. This is a subject to which I return later.
- The rule is modified in county court litigation involving cases between £100-£3,000 by the operation of limited costs under Scale 1.
- The operation of the system of payments into court significantly reverses the application of the rule: if the plaintiff at trial does not recover more than the amount of the payment in, he is treated as the loser and pays the defendant's costs from the date of the payment in.>18

The impact of Lord Woolf's recommendations has been to increase the areas in which the indemnity principle does not operate. For instance, where cases are dealt with as small claims or fast track cases, the allocation of costs between the parties will be confined or eliminated altogether.

In relation to the rule that costs follow the event, Lord Woolf concluded, “My overall conclusion is that on balance the arguments in favour of the cost shifting rule are valid and that the rule should be retained, subject to the modifications which my other proposals will bring about.”19

This recommendation was qualified by certain criticisms of the operation of the rule in practice. In particular, Lord Woolf criticises the use of the rule as “a blunt instrument”20 that involves the winner always getting costs, which is not necessarily a fair outcome. The Report and its recommendations encourage courts to break cases down into discrete issues and to make different costs' orders in relation to the different issues. The Report also notes that the courts' jurisdiction to award costs21 could be used to “encourage co-operative conduct on the part of litigants and to discourage unreasonable conduct.”22 Lord Woolf further recommends that courts should use their full statutory discretion to award costs, “to support the conduct of litigation in a proportionate manner and to discourage excesses.”23

This recommendation was reiterated in the Final Report in the following terms:

“English courts are wedded to the dual concept that costs should be treated as a whole and that costs should follow the event. In the interim report I recommended that courts should pay greater regard than they do at present to the manner in which the successful party has conducted the proceedings and the outcome of individual issues. I suggested that the court should use its powers over costs to encourage co-operative conduct on the part of litigants and to discourage unreasonable conduct. This can apply to pre-proceedings conduct as

21 Derived from Supreme Court Act 1981, s. 51.
well as conduct after proceedings have been commenced. The court should also be more willing to identify areas where it considers that costs have been unnecessarily incurred. I suggested that running up excessive costs would continue unless the court was prepared to take action.”

The effect of this recommendation can be seen in the Civil Procedure Rules (“CPR”), which were introduced in April 1999, to govern the conduct of cases in England and Wales. Rule 44.3 states that the court has discretion as to whether costs should be payable by one party to another, the amount of such costs and when they are to be paid. Rule 44.3(2) acknowledges that the general rule remains that the unsuccessful party should pay the costs of the successful party, but states that, “the court may make a different order”. In making a costs order, the court may have regard to all of the circumstances of the case, including the parties’ conduct, the extent of the success of a party, and any payments into court or offers to settle of which the court is aware.

The relevant conduct of the parties includes the following:

“(a) Conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) Whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.”

There are a number of different costs orders that a court can make. The court can order a party to pay any of the following:

- a proportion of the other party’s costs;
- a stated amount of those costs;
- costs from or until a certain date only;
- costs incurred before the commencement of proceedings;
- costs of certain steps in the proceedings;
- costs of a distinct part of the proceedings;
- interest on costs from or until a particular date.

C. Disclosure

25 Civil Procedure Rules, Rule 44.3(1).
26 Civil Procedure Rules, Rule 44.3(2)(b). These cost rules do not apply in the context of family or probate proceedings. See Rule 44.3(3).
27 Civil Procedure Rules, Rule 44.3(4).
23 Civil Procedure Rules, Rule 44.3(5).
27 Civil Procedure Rules, Rule 44.3(5).
28 Civil Procedure Rules, Rule 44.3(5).
29 Civil Procedure Rules, Rule 44.3(6).
In both the Interim Report and the Final Report, Lord Woolf emphasised the importance of solicitors disclosing legal costs to clients.\textsuperscript{30} The Interim Report acknowledged that the problems associated with legal costs were not merely problems of scale. Lord Woolf noted that, “[i]f a client knows the basis on which his own lawyers are charging him, he is in a better position to exercise control over the costs.” He went on to recommend that,

“It should be a professional obligation for lawyers, before they are retained in connection with litigation, to explain to the prospective client how their charges for litigation are to be calculated and what the overall cost might be; and for the solicitor to give reasonable notice where that estimate is likely to be exceeded and the reason for this.”\textsuperscript{31}

The Final Report elaborated upon the disclosures that a solicitor should be required to make. Lord Woolf recommended that a client should receive the following information about costs that would remain payable by clients as solicitor and client costs:

“…it is imperative that solicitors explain their basis of charging to their clients. They must go beyond quoting an hourly rate to enable clients to appreciate their real maximum exposure. The fact that the fast track provides a greater degree of certainty as to the procedure involved should enable them to do this…. I therefore recommend that, unless there is a written agreement between the client and his own solicitor which sets out clearly the agreed terms of business, the costs payable by a client to his own solicitor should be limited to the level of the fixed costs plus disbursements. The agreement will need to set out the likely level of fixed recoverable costs, the basis of charging specifying the hourly rate actually charged, and the likely level of disbursements and expert fees. It should include the best possible information, including all the relevant figures, on the amount which the client will be liable to pay. This information should be updated in the event of a change of circumstances.”\textsuperscript{32}

The Report envisaged that the system of civil litigation recommended in it would provide sufficient certainty and predictability regarding costs to allow solicitors to furnish the information and estimates referred to above.\textsuperscript{33} However, the proposal that fixed costs should apply to cases in the fast track was not adopted by the Civil Procedure Rules. Instead, the cost arrangements that were proposed with regard to the multi-track cases were also applied to fast track cases. For this reason, some of the justification for obliging solicitors to disclose precise information about costs in fast track cases, was lost.

The Practice Direction about Costs, Supplementing Parts 43 to 48 of the Civil Procedure Rules (“the Practice Direction”) does reflect to some extent the duty of solicitors to make disclosure regarding costs. Section 6 of the Practice Direction “sets out certain steps which parties and their legal representatives must take in order to


keep the parties informed about their potential liability in respect of costs and in order to assist the court to decide what, if any, order to make about costs and about case management.”

The focus of section 6, however, is upon furnishing information about costs for the benefit of the other party to litigation, rather than for the benefit of the solicitor’s own client. This is evident by the terms of section 6.3, which states,

“The court may at any stage in a case order any party to file an estimate of base costs \(^{35}\) and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue.”

It should be noted however that the professional rules governing legal representatives do contain obligations to make disclosure regarding legal costs. Practice Rule 15, of the Solicitor’s Practice Rules 1990, for example, states that solicitors shall,

“(a) give information about costs and other, matters, and
(b) operate a complaints handling procedure
in accordance with a Solicitors’ Costs Information and Client Care Code made from time to time by the Council of the Law Society with the concurrence of the Master of the Rolls…”

The Solicitors’ Costs Information and Client Care Code 1999 contains detailed provisions regarding the duty of solicitors’ to inform clients about costs. These provisions are set out here at length, as they represent a useful example of detailed regulation of the supply of information about legal costs to clients.

“3. Informing the client about costs
(a) Costs information must not be inaccurate or misleading.
(b) Any costs information required to be given by the code must be given clearly, in a way and at a level which is appropriate to the particular client. Any terms with which the client may be unfamiliar, for example ‘disbursement’, should be explained.
(c) The information required by paragraphs 4 and 5 of the code should be given to a client at the outset of, and at appropriate stages throughout, the matter. All information given orally should be confirmed in writing to the client as soon as possible.

4. Advance costs information – general
The overall costs

\(^{34}\) Practice Direction about Costs, Supplementing Parts 43 to 48 of the Civil Procedure Rules, section 6.1.

\(^{35}\) According to section 6.2(1) “In this section an ‘estimate of costs’ means –
(a) an estimate of base costs (including disbursements) already incurred; and
(b) an estimate of base costs (including disbursements) to be incurred,
which a party intends to seek to recover from any other party under an order for costs if he is successful in the case.”
(a) The solicitor should give the client the best information possible about the likely overall costs, including a breakdown between fees, VAT and disbursements.

(b) The solicitor should explain clearly to the client the time likely to be spent in dealing with a matter, if time spent is a factor in the calculation of the fees.

(c) Giving "the best information possible" includes:
(i) agreeing a fixed fee; or
(ii) giving a realistic estimate; or
(iii) giving a forecast within a possible range of costs; or
(iv) explaining to the client the reasons why it is not possible to fix, or give a realistic estimate or forecast of, the overall costs, and giving instead the best information possible about the cost of the next stage of the matter.

(d) The solicitor should, in an appropriate case, explain to a privately paying client that the client may set an upper limit on the firm's costs for which the client may be liable without further authority. Solicitors should not exceed an agreed limit without first obtaining the client's consent.

(e) The solicitor should make it clear at the outset if an estimate, quotation or other indication of cost is not intended to be fixed.

Basis of firm's charges

(f) The solicitor should also explain to the client how the firm's fees are calculated except where the overall costs are fixed or clear. If the basis of charging is an hourly charging rate, that must be made clear.

(g) The client should be told if charging rates may be increased.

Further information

(h) The solicitor should explain what reasonably foreseeable payments a client may have to make either to the solicitor or to a third party and when those payments are likely to be needed.

(i) The solicitor should explain to the client the arrangements for updating the costs information as set out in paragraph 6.

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(k) The solicitor should discuss with the client whether the likely outcome in a matter will justify the expense or risk involved including, if relevant, the risk of having to bear an opponent's costs.

5. Additional information for particular clients

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Privately paying clients in contentious matters (and potentially contentious matters)

(b) The solicitor should explain to the client the client's potential liability for the client's own costs and for those of any other party, including:
(i) the fact that the client will be responsible for paying the firm's bill in full regardless of any order for costs made against an opponent;
(ii) the probability that the client will have to pay the opponent's costs as well as the client's own costs if the case is lost;
(iii) the fact that even if the client wins, the opponent may not be ordered to pay or be capable of paying the full amount of the client's costs; and
(iv) the fact that if the opponent is legally aided the client may not recover costs, even if successful.

Liability for third party costs in non-contentious matters
(c) The solicitor should explain to the client any liability the client may have for the payment of the costs of a third party. When appropriate, solicitors are advised to obtain a firm figure for or agree a cap to a third party's costs.

6. Updating costs information
The solicitor should keep the client properly informed about costs as a matter progresses.
In particular, the solicitor should:
(a) tell the client, unless otherwise agreed, how much the costs are at regular intervals (at least every six months) and in appropriate cases deliver interim bills at agreed intervals;
(b) explain to the client (and confirm in writing) any changed circumstances which will, or which are likely to affect the amount of costs, the degree of risk involved, or the cost-benefit to the client of continuing with the matter;
(c) inform the client in writing as soon as it appears that a costs estimate or agreed upper limit may or will be exceeded; and
(d) consider the client's eligibility for legal aid if a material change in the client's means comes to the solicitor's attention.  

D. Conditional fee agreements

A conditional fee agreement can be defined as “an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances.”

In essence a conditional fee agreement permits a legal representative and client to enter into an agreement that the lawyer will only be paid costs in the event of a successful outcome of the case. Conditional fee agreements can also contain provisions to the effect that the legal representative will receive a success fee in addition to the costs that are otherwise chargeable, in specified circumstances. The Courts and Legal Services Act 1990, s. 58, first introduced the concept of conditional fee agreements into English law. Conditional fees were initially only valid in relation to specified type of proceedings, namely personal injury litigation, insolvency litigation and cases before the European Court of Human Rights.

Section 58 was then amended by the Access to Justice Act 1999, s. 27. This provision now prohibits only criminal and family law matters from being the subject of

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36 Solicitors’ Costs Information and Client Care Code 1999 (as of March 9, 2004).
37 Courts and Legal Services Act 1990, s. 58(2)(a), as substituted by Access to Justice Act 1990, s. 27(1).
38 “[A] conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances”, Courts and Legal Services Act 1990, s. 58(2)(b), as substituted by Access to Justice Act 1990, s. 27(1). The maximum uplift that could be charged if the lawyer was successful was set at 100% of the normal fee, according to the Conditional Fee Agreements Order 2000 (SI 2000 No 823). In addition the Law Society recommended that lawyers should voluntarily limit the uplift to a maximum of 25% of the damages if that was lower than the 100% uplift of the fee.
39 Conditional fee agreements were introduced in these categories of proceedings on the 5th July, 1995 by means of regulation.
conditional fee agreements.\textsuperscript{40} Another effect of the Access to Justice Act 1999 was that it allowed the recovery in legal proceedings of the success fee that may arise pursuant to a conditional fee agreement.\textsuperscript{41} The intention behind this amendment was explained in the Explanatory Note to the Act as being to:

- “ensure that the compensation awarded to a successful party is not eroded by any uplift or premium - the party in the wrong will bear the full burden of costs;
- make conditional fees more attractive, in particular to defendants and to plaintiffs seeking non-monetary redress - these litigants can rarely use conditional fees now, because they cannot rely on the prospect of recovering damages to meet the cost of the uplift and premium;
- discourage weak cases and encourage settlements; and
- provide a mechanism for regulating the uplifts that solicitors charge - in future, unsuccessful litigants will be able to challenge unreasonably high uplifts when the court comes to assess costs.”\textsuperscript{42}

Section 58 stipulates certain requirements that must be met for a conditional fee agreement to be valid. The agreement must be in writing, it must not relate to proceedings which cannot be the subject of such an agreement and it must comply with any other requirements imposed by the Lord Chancellor.\textsuperscript{43}

The system of conditional fees agreements has been supplemented by various statutory instruments. At present, conditional fee agreements are largely governed by the Conditional Fee Agreements Regulations 2000, as amended by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003. Rules devised by the Law Society and the Bar Council also have an impact on the form and validity of conditional fee agreements.

According to the Regulations of 2000, conditional fee agreements must be in writing and signed by the client and the legal representative\textsuperscript{44} and they must meet the following requirements:

“(1) A conditional fee agreement must specify -

(a) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a
judgement or order),
(b) the circumstances in which the legal representative's fees and expenses, or part of them, are payable,
(c) what payment, if any, is due -
(i) if those circumstances only partly occur,
(ii) irrespective of whether those circumstances occur, and
(iii) on the termination of the agreement for any reason, and
(d) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client."

Where the agreement provides for a success fee, there are additional requirements imposed by regulations. Regulation 3 of the 2000 Regulations stipulates that,

“(1) A conditional fee agreement which provides for a success fee -
(a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and
(b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.”

The Regulations of 2000, as amended by the Regulation of 2003, contain particular requirements in respect of conditional agreements governing costs of court proceedings, where the success fee is expressed as a percentage. In such circumstances, the rules are as follows:

• If the fees subject to the increase are assessed and the client or the legal representative is required by the court to disclose the reasons for setting the percentage increase level in the agreement, they may do so;\textsuperscript{46}
• If such fees are assessed and any amount of the percentage increase is disallowed on the ground that the level of the increase was unreasonable in light of the facts which were or should have been known to the legal representative, that amount will cease to be payable under the agreement;\textsuperscript{47} and
• If the legal representatives and the person liable to pay the fees as a result of the proceedings agree that an amount lower than the amount payable under the conditional fee agreement should be paid, the latter amount shall be reduced accordingly.\textsuperscript{48}

The Regulations of 2003 introduced certain new provisions regarding the treatment of conditional fee agreements. These Regulations accept a legal representative and client may enter into conditional fee agreements on the premise that the legal representative’s costs and expenses will only be payable to the extent that they are recovered by the client.\textsuperscript{49} The effect of permitting the formation of such conditional

\textsuperscript{45} The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 2.
\textsuperscript{46} The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 3(2)(a).
\textsuperscript{47} The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 3(2)(b).
\textsuperscript{48} The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 3(2)(c).
\textsuperscript{49} The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 3A (as inserted by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003).
fee agreements was described in the Explanatory Note to the Regulations of 2003 as follows:

“This in effect abrogates in relation to this type of conditional fee agreement the so-called indemnity principle - the principle that the amount which can be awarded to a party in respect of costs to be paid by him to his legal representatives is limited to what would have been payable by him to them if he had not been awarded costs. Solicitors will to this extent be able to agree lawfully with their clients not to seek to recover by way of costs anything in excess of what the court awards, or what it is agreed will be paid, and will no longer be prevented from openly contracting with their clients on such terms.”

The effect of the Regulations of 2003 and the context in which they was introduced were explained in the Consultation Paper on “Simplifying CFAs” as follows:

“The amendments, in conjunction with the commencement of Section 31 of the Access to Justice Act 1999 and amendment to rule 43.2 of the Civil Procedure Rules made by rule 5(b) of the amending rules, were developed to ensure the indemnity principle is abrogated in relation to the type of CFA provided for by the amended regulations. In other words solicitors can agree lawfully with their clients not to seek to recover anything in excess of the sums recovered in the relevant proceedings and will no longer be prevented from openly contracting with their clients on these terms.”

Where a conditional fee agreement within the meaning of the Regulations of 2003, is entered, it must specify the following:

“(a)…(i) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgment or order); and
(ii) the circumstances in which the legal representative's fees and expenses, or part of them, are payable; and
(b) if it provides for a success fee -
(i) briefly specify the reasons for setting the percentage increase at the level stated in the agreement; and
(ii) provide that if, in court proceedings, the percentage increase becomes payable as a result of those proceedings and the legal representative or the client is ordered to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement, he may do so.”

The type of conditional fee agreement that is provided for by the Regulations of 2003 can be qualified to the effect that the client will be liable to pay the legal

50 Department for Constitutional Affairs Consultation Paper, “Simplifying CFAs” (A consultation on the Conditional Fee Agreement regime including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, Membership Organisation Regulations) (June 2003), para. 34.
51 The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 3A(4) (as inserted by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003).
representative’s costs and expenses, even if the client does not recover sums in the proceedings, if the client:\(^{52}\)

- fails to co-operate with the legal representative;
- fails to attend any medical or expert examination or court hearing which the legal representative requests him to attend;
- fails to give necessary instructions; or
- withdraws the legal representative's instructions.

Another rule contained in the Regulations of 2000 is that, before entering a conditional fee agreement, the legal representative must explain the effect of the agreement to the client\(^{53}\) and must furnish certain additional information to the client. This information includes:\(^{54}\)

“(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement,
(b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so,
(c) whether the legal representative considers that the client’s risk of incurring liability for costs in respect of the proceedings to which agreement relates is insured against under an existing contract of insurance,
(d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question,
(e) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract –
   (i) his reasons for doing so, and
   (ii) whether he has an interest in doing so.”

In addition, the legal representative must provide such further explanations, advice or information, as the client may reasonably require.\(^{55}\)

Conditional fee agreements have been under constant scrutiny in England and Wales since their introduction in 1990. There were two consultation papers in 1998\(^{56}\) and 1999\(^{57}\) and there was a further consultation process in 2003\(^{58}\). In the 2003 consultation process, certain criticisms were made of the conditional fee agreement system as it exists under the Regulations of 2000 (as amended). First, the Regulations have been criticised for being too stringent in the level of consumer protection they

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\(^{52}\) The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 3A(5) (as inserted by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003).

\(^{53}\) The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 4(3).

\(^{54}\) The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 4(2).

\(^{55}\) The Conditional Fee Agreements Regulations 2000 (No. 692), Regulation 4(1)(b).

\(^{56}\) “Access to Justice with Conditional Fees” (CP March 1998).

\(^{57}\) “Conditional Fees: Sharing the Risks of Litigation” (CP 7/99 - September 1999).

\(^{58}\) A Department for Constitutional Affairs Consultation Paper, “Simplifying CFAs” (A consultation on the Conditional Fee Agreement regime including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, Membership Organisation Regulations) (June 2003).
furnish. \(^{59}\) It has been noted that the high level of protection afforded is not necessary and the Regulations of 2003 reflect a somewhat lower level of consumer protection. \(^{60}\) Secondly, the system regulating conditional fee agreements is often regarded as too complicated and failing to meet the actual needs of consumers and legal representatives. \(^{61}\)

Concerns have also been expressed that conditional fee agreements may motivate legal representatives to try to win cases at all costs. In this regard, the Bar Council has issued the following guidance:

“9. Having accepted instructions to act under a CFA, a barrister shall thereafter give impartial advice to the lay client at all times and take all reasonable steps to identify and declare to the lay client and to the instructing solicitor any actual or apparent conflict of interest between the barrister and the lay client.

10. Advice and interests of lay client

During the currency of a CFA, the barrister should use his/her best endeavours to ensure that:

(a) any advice given by the barrister in relation to the case is communicated and fully explained to the lay client;
(b) any offer of settlement is communicated to the lay client forthwith;
(c) the consequences of particular clauses in the solicitor/lay client agreement and the solicitor/barrister agreement are explained to the client as and when they become relevant, particularly after an offer of settlement has been made.

This last obligation applies in particular to the financial consequences which may arise from the making of an offer to settle the case including consideration of (1) any increase in the offer of settlement; (2) “conventional” costs consequences; and (3) the success fees which are or may become payable.” \(^{62}\)

E. Fixed costs

(i) Recommendations

In the Final Report, Lord Woolf made the following recommendations: \(^{63}\)

“(1) There should be a regime of fixed recoverable costs for fast track cases.
(2) The guideline maximum legal costs on the fast track should be £2,500, excluding VAT and disbursements.

\(^{59}\) Department for Constitutional Affairs Consultation Paper, “Simplifying CFAs” (A consultation on the Conditional Fee Agreement regime including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, Membership Organisation Regulations) (June 2003).
\(^{60}\) Department for Constitutional Affairs Consultation Paper, “Simplifying CFAs” (A consultation on the Conditional Fee Agreement regime including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, Membership Organisation Regulations) (June 2003), para. 36.
\(^{61}\) Department for Constitutional Affairs Consultation Paper, “Simplifying CFAs” (A consultation on the Conditional Fee Agreement regime including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, Membership Organisation Regulations) (June 2003), Executive Summary.
\(^{62}\) “Guidance on Conditional Fee Agreements,” Conditional Fee Agreement Panel, Bar Council (4th Ed.).
(3) The costs payable by a client to his own solicitor should be limited to the level of the fixed costs plus disbursements unless there is a written agreement between the client and his solicitor which sets out clearly the different terms.

(4) The costs regime should reflect case value in two bands; up to £5,000 and up to £10,000. There should be two levels of costs within each value band, one for straightforward cases and the other for cases requiring additional work.

(5) The fixed costs should be divided into tranches relating to the stage the case reaches.

(6) There should be a fixed advocacy fee for each band payable in cases which go to trial whether the advocate is a solicitor or a barrister. A cancellation fee should be payable to the advocate to cover work undertaken on cases which settle shortly before trial.

(7) The Law Society's rule of conduct requiring a solicitor to attend trial with counsel except in specified circumstances should be revoked.

(8) The costs of interlocutory hearings, applications for interim injunctions and hearings for the court to approve a settlement should be additional to the fixed costs.

(9) The indemnity principle should be modified so that the costs recoverable are the fixed costs.

(10) There should be further detailed work to establish the levels of the fixed costs, standard fees for experts' reports and an appropriate fee for defended debt cases.

(11) The levels of the fixed costs should be reviewed each year, and the general operation of the fixed costs regime should be reviewed every three years by a committee reporting to the Lord Chancellor through the Civil Justice Council.

These recommendations were not given full effect to. It was decided that the costs of fast track cases should largely be treated on the same basis as multi track cases. However, there are fixed costs in relation to trials in the fast track. The Civil Procedure Rules also set out fixed costs in respect of certain designated types of claims.

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64 According to the Final Report, Chapter 4, para. 46, "Disbursements, including court fees, will be recoverable in addition to the fixed costs. It has been suggested that this might encourage solicitors to use solicitor agents or non-solicitors for work for which payment is included in the fixed costs and then claim the cost as a disbursement, thereby obtaining double-payment. Examples that have been given are where accountants are instructed to carry out simple mathematical calculations within a solicitor's competence, or where enquiry agents are used to interview witnesses. Disbursements will be subject to scrutiny by the court to ensure that any such claims are disallowed."

65 In the Final Report, Lord Woolf noted that, The Law Society has recommended that the same level of costs should be payable for cases valued up to £5,000 requiring additional work and straightforward cases valued between £5,000 and £10,000. I consider that this approach adds to the simplicity of the costs regime, and I therefore accept this recommendation. Thus there will be three bands of costs:

Band A £5,000 ceiling and straightforward
Band B £5,000 ceiling and additional work factors
£10,000 ceiling and straightforward
Band C £10,000 ceiling and additional work factors." (Chapter 4, para. 21)


67 See further below.
(ii) Money claims

Rule 45 of the Civil Procedure Rules sets out certain categories of cases for which fixed costs apply. Rule 45.1 provides for fixed solicitors’ costs in respect of claims for specified sums of money exceeding £25 where there is judgment in default, judgment on admission, summary judgment, the defence has been struck out for failing to disclose any reasonable grounds or the defendant pays the money claimed within 14 days of service of particulars of claim on him, together with the fixed commencement costs.\(^68\) Fixed costs also apply where the only claim is one for which the court gave a fixed date for hearing at the time of issue, and judgment is given for the delivery of goods, the value of which exceeds £25 and where a judgment creditor has taken steps to enforce a judgment or order.\(^69\)

Rule 45.2 sets out a table with the commencement costs applicable to particular cases. For instance, where the value of the claim is between £25 and £500, the claim form is served personally by the claimant and there is only one defendant, the commencement cost will be £60. This increases to £90 if the claim is worth between £1,000 and £5,000 and if the claim exceeds £5,000 the cost increases to £110. In each case, the cost for each additional defendant is £15.

Rule 45.4 contains a second table that indicates the costs payable in the event that judgment is entered on the claim. These costs are chargeable in addition to the commencement costs outlined above.\(^70\) An illustration of the types of the fixed costs provided for is that, where judgment in default of an acknowledgement of service is obtained for a claim worth between £25 and £5,000, the fixed cost for entry of judgment is £22. Where the claim is worth more than £5,000, the fixed cost is £30. Where there is judgment on admission, the fixed cost depends upon whether the claimant accepts the defendant’s proposal regarding payment. If so, and the claim is worth between £25 and £5,000, the fixed cost is £40. If, on the other hand, the court determines the mode of payment, the fixed cost for a claim of the same value is £55.

If summary judgment is entered or the defence is struck out on the application of a party, the fixed cost for a claim worth between £25 and £5,000 is £175. If the claim’s value exceeds £5,000, the fixed cost rises to £210.

A third table sets out miscellaneous fixed costs for service of documents and such charges.\(^71\) Where a document is served personally and a certificate of service prepared by a party, the fixed cost is £15. Where the document must be served out of the jurisdiction, to Scotland, Northern Ireland, the Channel Islands or the Isle of Man, the fixed cost is £65. For service to other jurisdictions, the cost is £75.

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\(^{68}\) This also extends to the following circumstances: “Where –
(a) the claimant gives notice of acceptance of a payment into court in satisfaction of the whole claim;
(b) the only claim is for a specified sum of money; and
(c) the defendant made the payment into court within 14 days after service of the particulars of claim on him, together with the fixed costs stated in the claim form.” Civil Procedure Rules, Rule 45.3(2).

\(^{69}\) Civil Procedure Rules, Rule 45.1(2).

\(^{70}\) Civil Procedure Rules, Rule 45.4(b).

\(^{71}\) Civil Procedure Rules, Rule 45.5.
The fourth table contained in Rule 45 deals with the costs of enforcement of judgments.\textsuperscript{72} It stipulates various bands based on the value of awards which are enforceable as court orders, and allocates costs accordingly. For example, where the award is worth between £25 and £250, the enforcement cost is £30.75 and where the value of the award exceeds £2,000 the cost of enforcement increases to £75.50.

(iii) Road traffic accidents

The Civil Procedure Rules set out detailed provisions regarding the fixed costs that apply to certain claims arising from road traffic accidents (“RTA”) where the claim is settled and the proceedings relate to costs only.\textsuperscript{73} These rules were the result of an agreement reached in 2003. It is expected that this will cover 90\% of all RTA cases. The cases that are covered by this fixed costs’ regime are those that meet the following criteria:\textsuperscript{74}

- The claim must arise from a RTA that occurred on or after the 6\textsuperscript{th} October, 2003;\textsuperscript{75}
- The case must be settled before the issue of proceedings;
- Agreed damages must include damages for personal injuries, damage to property, or both;
- Total value of agreed damages must be less than £10,000; and
- The claim must not have been eligible for the small claims track.

The fixed recoverable costs for these claims are calculated by reference to the amount of agreed damages which are payable to the receiving party. The criteria were set out as follows in the Practice Direction:

“In calculating the amount of these damages –
(a) account must be taken of both general and special damages and interest;
(b) any interim payments made must be included;
(c) where the parties have agreed an element of contributory negligence, the amount of damages attributed to that negligence must be deducted;
(d) any amount required by statute to be paid by the compensating party directly to a third party (such as sums paid by way of compensation recovery payments and National Health Service expenses) must not be included.”\textsuperscript{76}

The formula to be applied in calculating the fixed costs is the aggregate of the following:
(a) the sum of £800;
(b) 20\% of the agreed damages up to £5,000; and
(c) 15\% of the agreed damages between £5,000 and £10,000.\textsuperscript{77}

\textsuperscript{72} Civil Procedure Rules, Rule 45.6.
\textsuperscript{73} Costs only proceedings can be initiated under Civil Procedure Rules, Rule 44.12A. Where the recoverable costs are agreed and the only issue relates to disbursements or the success fee, the proceedings can also be commenced in accordance with Rule 44.12A.
\textsuperscript{74} Civil Procedure Rules, Rule 45.7.
\textsuperscript{75} Practice Direction about Costs, Section 25A.1.
\textsuperscript{76} Section 25A.3.
\textsuperscript{77} Civil Procedure Rules, Rule 45.9. Note that, according to the Practice Direction, Section 25A.7, “Where there is more than one potential claimant in relation to a dispute and two or more claimants
The Practice Direction furnishes the example that agreed damages of £7,523 would result in recoverable costs of £2,178.45 i.e. £800 + (20% of £5,000) + (15% of £2,523).\(^7\)

It should be noted that, according to Rule 45.12 of the Civil Procedure Rules, “the court will entertain a claim for an amount of costs (excluding any success fee or disbursements) greater than the fixed recoverable costs but only if it considers that there are exceptional circumstances making it appropriate to do so.”

In addition to the fixed recoverable costs, the receiving party is entitled to recover disbursements and a success fee.\(^7\) The disbursements that are recoverable are set out exhaustively in Rule 45.10 and a court may not allow a claim for any other type of disbursement. The recoverable disbursements are the following:

“(a) the cost of obtaining –
   (i) medical records;
   (ii) a medical report;
   (iii) a police report;
   (iv) an engineer’s report; or
   (v) a search of the records of the Driver Vehicle Licensing Authority;
(b) the amount of an insurance premium; or, where a membership organisation undertakes to meet liabilities incurred to pay the costs of other parties to proceedings, a sum not exceeding such additional amount of costs as would be allowed under section 30 in respect of provision made against the risk of having to meet such liabilities;…
(c) where they are necessarily incurred by reason of one or more of the claimants being a child or patient as defined in Part 21 –
   (i) fees payable for instructing counsel; or
   (ii) court fees payable on an application to the court;
(d) any other disbursement that has arisen due to a particular feature of the dispute.”\(^8\)

The final issue that needs to be considered in the context of RTA claims is the impact of percentage increases under conditional fee agreements. Such success fees for solicitors and counsel in all RTAs were fixed as a result of mediation between the Civil Justice Council, the Law Society, the Association of British Insurers and the main solicitors’ organisations. Under the new rules, where fixed costs are recoverable in a RTA case, there can be a 100% fee increase of the solicitor’s costs where the claim concludes at trial or a 12.5% increase where either the claim concludes before the trial has commenced or where the dispute is settled before the claim is issued.\(^8\)

\(^7\) Section 25A.5.
\(^8\) Civil Procedure Rules, Rule 45.8. The amount of the recoverable success fee, if applicable, is 12.5% of the fixed recoverable costs. Rule 45.11.
With regard to barristers’ fees, the permissible percentage increases depend on the track to which the claim has been allocated. The first rule is that there can be a 100% increase if the claim concludes at trial. Secondly, if the case is allocated to the fast track and the claim concludes 14 days or less before the date fixed for commencement of the trial, there can be a 50% increase and if the claim concludes earlier a 12.5% increase is to be allowed. Thirdly, for a claim allocated to the multi-track, there can be a 75% increase if the claim concludes 21 days or less before the date of commencement of the trial and 12.5% if the claim concludes earlier. Finally, an increase of 12.5% is also permissible where the claim concludes before it is allocated to a track and where the dispute is settled and the proceedings relate to costs only.

Where the increase allowed to the solicitor or barrister is 12.5%, a party can apply for a greater percentage increase if the damages, whether agreed or court ordered, exceed £500,000 or if the damages would have exceeded that figure but for a finding of contributory negligence.

(iv) Employer’s liability

The Civil Procedure Rules provide for percentage increases of costs in certain employer liability claims. This applies to disputes between an employer and employee, provided that the dispute relates to bodily injuries the latter suffered in the course of his employment, and provided that the employee has entered into a funding arrangement, such as a conditional fee agreement. The following claims are excluded specifically from the scope of the percentage increase regime:

- Claims arising from accidents that occurred before the 1st October, 2004;
- Claims related to diseases;
- Claims arising from a RTA;
- Claims which have been allocated to the small claims track;
- Claims for which the small claims track would be the normal track

For eligible claims, the percentage increase to which a barrister or solicitor is entitled under the terms of the conditional fee agreement or other funding arrangement, is

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82 Civil Procedure Rules, Rule 45.17(1)(a).
83 Civil Procedure Rules, Rule 45.17(1)(b).
84 Civil Procedure Rules, Rule 45.17(1)(b).
85 Civil Procedure Rules, Rule 45.17(1)(c).
86 Civil Procedure Rules, Rule 45.17(1)(d).
87 Civil Procedure Rules, Rule 45.18. The calculation of the percentage increase in such circumstances is governed by Rule 45.19.
88 “Funding arrangement” is defined in Rule 43.2(1)(k) as “an arrangement where a person has –
   (i) entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990;
   (ii) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies; or
   (iii) made an agreement with a membership organisation to meet his legal costs.”
89 Civil Procedure Rules, Rule 45.20.
90 Civil Procedure Rules, Rules 45.20(1) and 45.20(2).
determined in accordance with the rules formulated to govern percentage increases in the context of RTAs.\textsuperscript{91}

\textbf{(v) Fast Track trial costs}

Lord Woolf’s recommendations that costs should be fixed in fast track cases were not given full effect to. However, the Civil Procedure Rules do provide for fixed costs in relation to the trial of fast track cases.\textsuperscript{92} The costs are fixed as follows:\textsuperscript{93}

- For claims worth up to £3,000, the court can award fast track trial costs of £350;
- For claims worth between £3,000 and £10,000, the court can award £500;
- For claims worth more than £10,000, the court can award £750.

The court may apportion the costs awarded between the parties in accordance with their respective success at trial. Where the claim is for money only, there are particular rules for quantifying the value of a claim for the purpose of computing the fast track costs.\textsuperscript{94} Where the claim is for a remedy other than the payment of money, the value of the claim is deemed to be between £3,000 and £10,000, unless the court orders otherwise.\textsuperscript{95} The court may generally not award more or less than the fixed costs indicated above subject to certain exceptions.\textsuperscript{96} For example, the court can decides not to award fast track costs.\textsuperscript{97} In addition, if the following circumstances exist the court can award an additional £250 in respect of the legal representative’s attendance:\textsuperscript{98}

- In addition to an advocate, a legal representative of the party attends the trial;
- The court considers that the attendance of the legal representative was necessary to assist the advocate; and
- The court awards fast track trial costs to that party.

The court also the power to direct the separate trial of discrete issues and may award additional costs in that regard.\textsuperscript{99} The additional award may not exceed two-thirds of the amount payable for the claim, subject to a minimum of £350.\textsuperscript{100}

\textsuperscript{91} Civil Procedure Rules, Rule 45.16, 45.17 and 45.18. See further above. Some variations in the percentages increases allowed in employer liability cases are included in Rule 45.21 and 45.22.
\textsuperscript{92} The rule which introduces this regime, Rule 46, applies to the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track but does not include disbursements or value added tax. Rule 46.1(2).
\textsuperscript{93} Civil Procedure Rules, Rule 46.2(1).
\textsuperscript{94} Civil Procedure Rules, Rule 46.2(3) These rules are as follows: “(a) for the purpose of quantifying fast track trial costs awarded to a claimant, the value of the claim is the total amount of the judgment excluding – (i) Interest and costs; and (ii) any reduction made for contributory negligence, (b) for the purpose of the quantifying fast track trial costs awarded to a defendant, the value of the claim is – (i) the amount specified in the claim form (excluding interest and costs); (ii) if no amount is specified, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form… ; or (iii) more than £10,000, if the claim form states that that claimant cannot reasonably say how much he expects to recover.”
\textsuperscript{95} Civil Procedure Rules, Rule 46.2(4).
\textsuperscript{96} There are a number of exceptions contained in Rule 46.3, not all of which are addressed here.
\textsuperscript{97} Civil Procedure Rules, Rule 46.2(2).
\textsuperscript{98} Civil Procedure Rules, Rule 46.3(2).
\textsuperscript{99} Civil Procedure Rules, Rule 46.3(3).
Finally, the court has a discretion regarding the award of fast track costs based on the conduct of the parties. In particular, the court can award less than the fast track costs where the court believes that the party to whom the costs are to be awarded has behaved unreasonably or improperly during the trial. Conversely, if the court considers that that party who is liable to pay the fast track costs has behaved improperly during the trial, the court can award additional amounts to the other party as it considers appropriate.

F. Assessment of costs

Where a court is making an order as to costs, it may either make a summary assessment of the costs or order a detailed assessment of the costs to be undertaken by a costs officer.

(i) Detailed assessment

The general rule is that a detailed assessment of costs will not take place until the conclusion of the proceedings, but the court may order their immediate assessment. Assessment proceedings must typically be commenced by the party receiving the award of costs within 3 months of the conclusion of the substantive proceedings. If the receiving party and the paying party agree the amount of costs, either party may apply for a costs certificate to that effect. If the paying party or another party wishes to challenge the costs, they can file what is referred to as “points of dispute”. This must be done within 21 days of the notice of commencement. The receiving party may then serve a reply within 21 days of receipt of the points of dispute. Where points of dispute are served, the receiving party must file a request

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100 Civil Procedure Rules, Rule 46.3(4).
101 Civil Procedure Rules, Rule 46.3(7).
102 Civil Procedure Rules, Rule 46.3(8).
103 Civil Procedure Rules, Rule 44.7. A courts officer has all the powers of a court in this regard, with the exception of the following powers:
104 Civil Procedure Rules, Rule 47.1.
105 Civil Procedure Rules, Rule 47.7. The detailed assessment is commenced by the receiving party serving on the paying party and any other necessary parties a notice of commencement and a copy of the bill of costs (Rule 47.6)
106 Civil Procedure Rules, Rule 47.10.
107 Civil Procedure Rules, Rule 47.9(1).
108 Civil Procedure Rules, Rule 47.9(2).
109 Civil Procedure Rules, Rule 47.13.
for a detailed assessment hearing. At any time after this has been done, the court may issue an interim costs certificate in such amount as it considers appropriate. Within 14 days of the end of the detailed assessment hearing, a completed bill must be filed and a final costs certificate will then issue.

The general rule is that the receiving party is entitled to the costs of the detailed assessment proceedings, subject to the power of the court to order otherwise. In this regard, the court must have regard to all of the circumstances, including the conduct of the parties, the amount, if any, by which the bill of costs was reduced and whether it was reasonable to claim or dispute the costs of a particular item. If any party to a detailed assessment wishes to appeal the decision of the costs officer, they may do so by filing a notice of appeal within 14 days of that decision. Appeals are heard by a costs judge or a district judge of the High Court.

(ii) Summary assessment

The Civil Procedure Rules define the term “summary assessment” as follows: “Summary assessment’ means the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or ‘detailed assessment’.” The Practice Direction provides that “Whenever a court makes an order about costs which does not provide for fixed costs to be paid the court should consider whether to make a summary assessment of costs.”

The general rule is that a summary assessment of costs should be carried out at the conclusion of the trial of a fast track case or the conclusion of any other trial that lasted 1 day or less, unless there are good reasons not to do so. The type of reasons that would justify not conducting a summary assessment are the existence of substantial grounds for the paying party to dispute the sum claimed for costs, that cannot be dealt with summarily, or the lack of time to carry out an assessment. In addition, a summary assessment cannot be conducted where the costs are payable to a child or patient unless the legal representative of the child or patient has waived the right to further costs.

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110 Civil Procedure Rules, Rule 47.14. This must be done within 3 months of the expiry of the period for commencing detailed assessment proceedings.
111 Civil Procedure Rules, Rule 47.15.
112 Civil Procedure Rules, Rule 47.16.
113 Civil Procedure Rules, Rule 47.18(1).
114 Civil Procedure Rules, Rule 47.18(2).
115 Civil Procedure Rules, Rules 47.20 and 47.22.
116 Civil Procedure Rules, Rule 47.21.
117 Rule 43.3.
118 Practice Direction on Costs, section 13.1. Note that the court cannot direct a costs officer to undertake a summary assessment. If summary assessment is appropriate but the court cannot do the assessment on the day, the court must direct a further hearing on costs before the same judge.
119 In fast track cases, the assessment will relate to costs of the entire claim. In respect of other hearings, the assessment will relate to the costs of the application or matter to which the hearing related and if the hearing disposes of the claim, the assessment will deal with the costs of the whole claim.
120 Practice Direction, sections 13.2(1) and 13.2(2).
121 Practice Direction on Costs, section 13.2.
122 Practice Direction on Costs, section 13.11(1). Note, however, that the court can make a summary assessment of costs payable by a child or patient (section 13.11(2)).
Where the parties agree to an order being made on consent in respect of an application, without the attendance of any party, the parties should either agree a figure for costs to be inserted into the consent order, or agree that there should be no order as to costs. In the absence of such agreement, there must be attendance and the costs of such attendance are generally not recoverable.\textsuperscript{122}

The parties and their legal representatives must assist the judge in making a summary assessment of costs of any hearing that lasts less than 1 day.\textsuperscript{123} Towards this end, each party who intends to claim costs must prepare a written statement of the costs he intends to claim and this statement must show the following items of information in the form of a schedule:\textsuperscript{124}

(a) the number of hours to be claimed,
(b) the hourly rate to be claimed,
(c) the grade of fee earner;
(d) the amount and nature of any disbursement to be claimed, other than counsel’s fee for appearing at the hearing,
(e) the amount of solicitor’s costs to be claimed for attending or appearing at the hearing,
(f) the fees of counsel to be claimed in respect of the hearing, and
(g) any value added tax (VAT) to be claimed on these amounts.

The statement must be signed by the party and his legal representative,\textsuperscript{125} it must be filed at court and copies of it must be served on the party against whom it is intended to seek costs are sought. This must be done not less than 24 hours before the hearing date.\textsuperscript{126} If a party, without reasonable excuse, fails to comply with these requirements, this will be taken into account by the court in determining what costs order to make.\textsuperscript{127}

If the court makes a summary assessment of the costs, the court will specify the base costs and, if appropriate, additional liabilities such as solicitors’ charges, counsels’ fees, disbursements and VAT, and the amount of fast track trial costs.\textsuperscript{128}

In assessing costs summarily, the overriding rule is that the court will not approve unreasonable and disproportionate costs.\textsuperscript{129} If the order is not by consent, the judge will therefore,

“so far as possible, ensure that the final figure is not disproportionate and/or unreasonable... The judge will retain this responsibility notwithstanding the absence of challenge to individual items in the make-up of the figure sought.

The fact that the paying party is not disputing the amount of costs can however

\textsuperscript{122} Practice Direction on Costs, section 13.4.
\textsuperscript{123} Practice Direction on Costs, section 13.5(1).
\textsuperscript{124} Practice Direction on Costs, section 13.5(2).
\textsuperscript{125} Practice Direction on Costs, section 13.5(3).
\textsuperscript{126} Practice Direction on Costs, section 13.5(4).
\textsuperscript{127} Practice Direction on Costs, section 13.5(5).
\textsuperscript{128} Practice Direction on Costs, section 13.5(7).
\textsuperscript{129} Practice Direction on Costs, section 13.13.
be taken as some indication that the amount is proportionate and reasonable. The judge will therefore intervene only if satisfied that the costs are so disproportionate that it is right to do so.\textsuperscript{130}

(iii) Criteria for assessment of costs

It is a rule of assessment of costs in England and Wales that costs will not be allowed which have been unreasonably incurred or which are unreasonable in amount.\textsuperscript{131} Where costs are being assessed on a standard basis (as opposed to on an indemnity basis)\textsuperscript{132}, courts will only allow such costs as are proportionate to the matters in issue and the courts will resolve any doubt as to the reasonableness or proportionality of the costs sought in favour of the paying party.\textsuperscript{133} Where costs are being assessed on an indemnity basis, this rule is reversed, and the courts will resolve such doubts in favour of the receiving party.\textsuperscript{134} Another distinction between assessments on the standard and the indemnity bases, is that the courts will assess the reasonableness and the proportionality of costs being assessed on the standard basis, but only the reasonableness of the latter.\textsuperscript{135}

In conducting such assessments, the court must have regard to:\textsuperscript{136}

- The conduct of the parties, before and during the proceedings;
- Any efforts made to resolve the dispute;
- The amount or value of money or property involved;
- The importance of the matter to the parties;
- The complexity of the matter;
- The difficulty or novelty of the questions raised;
- The skill, effort, specialised knowledge and responsibility involved;
- The time spent on the case, and
- The place and circumstances in which the work was done.

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\textsuperscript{130} Practice Direction on Cost, section 13.13(b).
\textsuperscript{131} Civil Procedure Rules, Rule 44.4(1).
\textsuperscript{132} Note that where “the court makes an order about costs without indicating the basis on which the costs are to be assessed” or where “the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis”, the costs will be assessed on the standard basis, Civil Procedure Rules, Rule 44.4(4).
\textsuperscript{133} Civil Procedure Rules, Rule 44.4(2).
\textsuperscript{134} Civil Procedure Rules, Rule 44.4(3).
\textsuperscript{135} Civil Procedure Rules, Rule 44.4(5).
\textsuperscript{136} Civil Procedure Rules, Rule 44.4(5).
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Part III  New Zealand

A. Introduction

The Law Commission of New Zealand delivered a report in March 2004 entitled, “Delivering Justice for All- A Vision for New Zealand Courts and Tribunals”.\(^\text{137}\) This report emphasised the importance of reducing legal costs noting that, “Reducing costs to the participants in court cases must be a major focus for court reform in future years”\(^\text{138}\) and that, “[r]educing the cost for parties would be a very significant contribution to making the court system more useful and accessible.”\(^\text{139}\)

In addition, one of the recommendations made by the Commission is that, “Accessibility and simplification in order to reduce costs to the public should be recognised as a priority in all law reform initiatives, including changes to court practice and new legislation.”

An appendix to the report analysed the extent of expenditure on legal services in New Zealand and reached the following conclusions,

“…total expenditure on legal services was the most significant cost of the wider justice system (leaving aside opportunity costs), with total expenditure on legal services around $1.6b in 2002. … The legal services sector accounted for around 1.3% of GDP in NZ in 2002 and remained relatively stable as a percent of GDP over the six years for which data is available. Compared to the litigious US society, where total tort costs alone exceed $US200b annually or 2% of GDP, expenditure on legal services in New Zealand is relatively low.”\(^\text{140}\)

B. Allocation of costs

(i) General

The general rule about costs in New Zealand is that the successful party is entitled to recover two-thirds of his legal costs from the losing party. This is subject to the overriding discretion of the court.\(^\text{141}\)

The principles that govern the determination of costs are set out in the High Court Rules and are as follows:

\(^{139}\) New Zealand Law Commission, Report 85, March 2004, Part 9, para. 35.
\(^{141}\) See High Court Rules, Rule 46(1), “All matters relating to the costs of and incidental to a proceeding or a step in a proceeding are at the discretion of the Court.”
• The party who fails in a proceeding or application should pay the costs of the successful party;¹⁴²
• The award of costs should reflect the complexity and significance of the proceedings;¹⁴³
• Costs are assessed by means of a formula for calculation of the appropriate daily recovery rate;¹⁴⁴
• This rate is applied to the time considered reasonable for each step that is reasonably required in relation to the proceedings in question;¹⁴⁵
• The appropriate daily recovery rate should normally be two-thirds of the daily rate that is considered to be reasonable;¹⁴⁶
• What is considered to be a reasonable time and an appropriate rate does not depend on the skill or experience of the actual solicitor or counsel involved, the time actually spent on the matter or the costs actually incurred by the party claiming costs;¹⁴⁷
• The award of costs should not exceed the costs actually incurred by the receiving party;¹⁴⁸ and
• The determination of costs should, so far as possible, be predictable and expeditious.¹⁴⁹

The effect of these rules is that a successful party to proceedings in New Zealand should recover two-thirds of the costs that should reasonably have been incurred in relation to the case. The determination as to what is reasonable is an entirely objective one and the fact that the party may have expended considerably more on legal costs than the amount that is considered to be appropriate, will be irrelevant to the recovery of costs.

(ii) Costs orders

According to Rule 48C of the High Court Rules, the court can order the payment of increased or lower costs than the costs that would otherwise be payable under the Rules. In certain circumstances the court may also order the payment of the costs, disbursements and expenses actually incurred by the party claiming costs (known as “indemnity costs”). The court can order higher costs in a number of specified circumstances.

First, increased costs can be awarded where the proceedings or step in the proceedings require substantially more time than the maximum allocated under the Rules.¹⁵⁰ Secondly, increased costs can be awarded if the case is of general importance to persons other than the parties and it was reasonably necessary for the party claiming costs to pursue the case.¹⁵¹ Thirdly, the court can award increased costs if the court

¹⁴² Rule 47(a).
¹⁴³ Rule 47(b).
¹⁴⁴ Rule 47(c). See further below.
¹⁴⁵ Rule 47(c). See further below.
¹⁴⁶ Rule 47(d).
¹⁴⁷ Rule 47(e).
¹⁴⁸ Rule 47(f).
¹⁴⁹ Rule 47(g).
¹⁵⁰ Rule 48C(3)(a).
¹⁵¹ Rule 48C(3)(c).
considers there is a reason that justifies such an award. Finally, increased costs can be awarded where the party opposing costs has contributed unnecessarily to the time or expense of the proceedings in one of the following ways:

- Failing to comply with the High Court Rules or a direction of the court;
- Taking or pursuing an unnecessary step or an unmeritorious argument;
- Failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument;
- Failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, notice for interrogatories, or other similar requirement under these rules; or
- Failing, without reasonable justification, to accept an offer of settlement.

The court can order the payment of indemnity costs in the following circumstances:

- If the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding;
- If the party has ignored or disobeyed an order or direction of the Court or breached an undertaking given to the Court or another party;
- The party claiming costs is a necessary party to proceedings affecting a fund out of which the costs are payable and the party has acted reasonably;
- The person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding;
- The party claiming costs is entitled to indemnity costs under a contract or deed; or
- Some other reason exists which justifies the Court making an order for indemnity costs.

The court can refuse to order costs or order reduced costs in the following circumstances:

- The time required by the party claiming costs would be substantially less than the minimum time allocated under the Rules;
- The property or interests at stake were of exceptionally low value;
- The issues at stake were of little significance;
- Although the party claiming costs succeeded overall, they failed in relation to a cause of action or issue which significantly increased the costs of the other party;
- The party claiming costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by in one of the following ways: (i) Failing to comply with the High Court Rules or a direction of the court; (ii) Taking or pursuing an unnecessary step or an unmeritorious argument; (iii) Failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; (iv) Failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, notice for interrogatories, or other similar requirement under these rules; or (v) Failing, without reasonable justification, to accept an offer of settle;

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152 Rule 48C(3)(e).
153 Rule 48C(3)(b).
154 Rule 48C(4).
155 Rule 48D.
• Where there is some other reason which justifies the court refusing costs or reducing costs.

(iii) Disbursements

A court can order the payment of disbursements as part of the order for the payment of costs. A “disbursement” is defined as “an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from professional services in a solicitor's bill of costs.” Disbursements include court fees, expenses of serving documents, photocopying, faxing and telephone conference expenses. Disbursements do not however include counsels’ fee.

A disbursement can be included in the award of costs to the extent that it is approved by the court or to the extent that it comes within the definition contained in the Rules. Disbursements must also be specific to the proceedings, necessary and reasonable in amount.

B. Calculation of costs

The determination of costs in New Zealand is done by means of a formula, which is based on the category in which the proceedings in question are placed and the amount of time that it is considered reasonably necessary for the conduct of these proceedings.

(i) Category of proceedings

Proceedings must be classified into one of Category 1, Category 2 or Category 3. Category 1 proceedings are proceedings of a straightforward nature which are capable of being conducted by counsel considered junior in the High Court. Category 2 proceedings are proceedings of average complexity requiring counsel with a level of skill and experience that is considered average in the High Court. Category 3 proceedings are proceedings which “because of their complexity or significance require counsel to have special skill and experience in the High Court”.

(ii) Daily rates

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156 Rule 48H(1).
157 Rule 48H(2). See the Rules Committee Consultation Paper (4 July, 2002) regarding the amendments to allow disbursements as a recoverable costs. The Paper notes that one of the principle effects of the recoverability of disbursements is that, “Witness and expert fees will no longer be tied to the Witness and Interpreters Fees Regulations 1974. Parties will be able to recover these disbursements to the extent that they are approved by the Court and were necessary and reasonable.”
158 Rule 48H(2).
159 According to Rule 48(2), “The Court may at any time determine in advance an applicable category in relation to a proceeding. If it does, the category applies to all subsequent determinations of costs in the proceeding unless there are special reasons to the contrary.”
160 Rule 48. This system of determining legal costs was extended to cases in the District Court (which has a jurisdiction in respect of cases to a maximum value of £200,000) by means of the District Courts Amendment Rules (No 2) 2004.
The appropriate daily rates, as set out in Schedule 2 to the High Court Rules, are calculated on the basis of being two-thirds of the actual daily rates which are considered appropriate for counsel conducting proceedings in each of the three categories of cases outlined above. These daily recovery rates were increased on the 1st January, 2004, by the High Court Amendment Rules (No. 2) 2003, following a consultation process conducted by the Rules Committee. The new rates are as follows:

- For Category 1 proceedings, $970 per day;
- For Category 2 proceedings, $1,450 per day; and
- For Category 3 proceedings, $2,150 per day.

(iii) Reasonable time

The High Court Rules set out a means for determining what is a reasonable time for a step in proceedings. Towards this end, Schedule 3 to the Rules specifies certain times for particular steps in proceedings. If Schedule 3 is not directly applicable, the necessary time should be determined by analogy with the content of Schedule 3. If such an analogy is not possible, the time allocated to the step should be the time that is “likely to be required for the particular step”.

In determining what is a reasonable time, the following designations must be used:

“(a)If a comparatively small amount of time for the particular step is considered reasonable, the determination must be made by reference to band A; or
(b)If a normal amount of time for the particular step is considered reasonable, the determination must be made by reference to band B; or
(c)If a comparatively large amount of time is considered reasonable, the determination must be made by reference to band C.”

(iv) Proposals

In its report, “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals,” the Law Commission considered the different means of calculating legal costs. The Commission noted that,

“The High Court and District Court cost recovery rules (the costs awarded by the court, usually to the winning party, after the case has been disposed of) set a standard for what the Rules Committee considers a ‘reasonable charge’ for the preparation and conduct of a case. The rules could, if publicised more widely, be useful in influencing lawyers’ fees, by providing some guidance on what is considered ‘reasonable’. They include guidelines on time considered reasonable for undertaking set tasks. In New Zealand information about these rules, or even...”

161 Rule 48B.
162 Rule 48B(1)(b).
163 Rule 48B(1)(c).
164 Rule 48B(2).
the fact that they exist, is poor and in reality, lawyers’ fees bear little relationship to the rules.”

The Commission also criticised the approach towards legal costs in the High Court and District Court Rules in the following terms:

“They are designed for use by lawyers who know more or less how much work a particular matter might demand, and for judges in making costs orders, and are not written in a way that will easily inform a non-lawyer. Indeed, since the High Court Rules foresee that cost recovery will represent two-thirds of the daily rate considered reasonable in relation to the work, the rules may in fact be misleading as a guide on fee levels.”

The Commission considered other possible means of regulating legal costs. With regard to the possibility of used set scales of fees, the Commission adopted the following position:

“We do not recommend that lawyers be required to charge a set scale of rates – this is inflexible and does not recognise the wide variety of work undertaken by lawyers. There is a danger that infrequent amendment of fixed scales will either fail to keep up with market prices, or will place a floor under market prices and keep fees unrealistically high.”

The Commission also considered the possibility of direct regulation of lawyers’ fees, concluding,

“We do not advocate direct price regulation as an option. Price regulation is usually introduced where there is a monopoly or where the unregulated market does not secure specifically defined social goals (eg, where sudden supply failures allow those owning scarce goods to earn windfall profit). It has the effect of inhibiting competition and there is the danger of substituting one market imperfection for another.”

In rejecting the solution of price regulation, the Commission suggested the following approach:

“Instead of price regulation we suggest a better response is to seek to remove some of the existing barriers to the efficient operation of the market… By making more information available to the public generally and to prospective users of legal services in particular, consumers would be in a better position to know the costs involved in taking a case to court. They could also be better informed about the steps required in going to court and the procedure involved.”

170 New Zealand Law Commission, Report 85, March 2004, paras. 121 and 122. See further below regarding provision of information and recommendations made by the Law Commission in that regard.
The Commission went on to examine how lawyers calculate the charges for legal services. In this regard, the Commission noted that lawyers are free to enter into agreements with clients regarding costs. The Commission moreover noted that, “Some lawyers charge on a fixed fee basis, particularly for conveyancing since it is reasonably easy to predict the amount of work involved.” However, the Commission also acknowledged that most lawyers charge an hourly rate, which is “simple to apply and is a convenient way of setting targets for law firms,” but which “can drive costs up, especially in firms where lawyers’ performance is measured by targets of billed hours.” The Commission also criticised hourly billing on the ground that it does not inform clients about how much the services will actually cost.

The Commission observed that there was evidence of a shift away from hourly billing, towards the use of quotes, tenders and costs agreements by lawyers. The Commission concluded:

“We note this trend, and favour greater use of conditional fee arrangements, costs agreements and event-based charging which can give clients a more accurate indication of the likely costs and may also have the effect of encouraging settlement since it can act as a ‘reality check’ for the client.”

C. Disclosure

In the report on “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals,” the Law Commission focused on the importance of the provision of information regarding legal costs. The Commission emphasised that the “more informed users of legal services are about the costs involved, the better able they will be to make informed decisions.” The Commission was heavily critical of the lack of obligations on lawyers to make disclosure about legal costs, noting that, “[c]urrently, lawyers are not required to provide detailed information about how much their services will cost.”

According to Rule 3.01 of the New Zealand Law Society’s Rules of Professional Conduct lawyers must “charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner”. The New Zealand Law Society Conveyancing Guidelines recommend that the lawyer/conveyancer should offer to give a quote or estimate of likely costs, but this recommendation does not apply to any other area of legal work. The New

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176 New Zealand Law Commission, Report 85, March 2004, para. 142. The Commission also commented that if there was enhanced information available, “Even if cost does not reduce, consumer understanding and satisfaction should improve” (para. 123).
177 New Zealand Law Commission, Report 85, March 2004, para. 124. The Commission did also note that, “Many lawyers in New Zealand do provide good information to clients, and the Law Commission is convinced that all lawyers could, at little extra cost and inconvenience, give more information to potential clients” (para. 132.)
Zealand Law Society does recommend that clients enquire about the lawyer’s hourly rate and request a written estimate or quote, and that they inform their lawyer of their budget. However, as the Law Commission notes,

“this places the onus on the client to ask all the relevant questions and assumes that he or she will know what further inquiries to make, and will have the confidence to negotiate. Given the complicated nature of legal services to many outsiders, this is unlikely to be the case.”

The Commission made a number of recommendations regarding the provision of information about legal costs. These are as follows:

“R16 Amendments should be made to the Rules of Professional Conduct that place specific requirements on the amount of information lawyers must give. The following minimum information should be provided to clients.

• At the first meeting or contact the client should be given:
  - the name of the lawyer responsible for the conduct of the matter
  - details of the methods of costing, billing intervals and billing arrangements (which should include itemised billing)
  - information setting out the disclosure obligations of the lawyer
  - a statement specifying the external and internal avenues available for complaints about lawyers’ conduct or fees.

• Before the lawyer’s services are retained by a client, or as soon as reasonably practicable afterwards, either:
  - a written estimate should be given for the work, which should not be exceeded without the consent of the client (the estimate should include, so far as practicable, all likely costs involved including disbursements and court filing fees)
  - if it is not practicable to give an estimate, the solicitor should either explain why and give a forecast within a possible range of estimates or give the best possible information about the cost of the next stage or stages of the matter
  - alternatively, the client should be able to state their budget, which should not be exceeded without their consent
  - the lawyer should be required to explain the possible outcomes of the matter and their likely effect on cost (including the amount the client would likely recover in the event of success, the likely extent of the client’s liability to pay the opponent’s costs in the event of failure).

• As the matter progresses:
  - The lawyer should keep the client up to date about costs, including court fees incurred or likely to be incurred, lawyers fees, disbursements and liability for the other party’s costs. This means delivering interim bills and notifying the client in writing about any changes in circumstances that will affect costs. The extent to which this would be appropriate will depend on the level of the claim – the amount of time preparing bills should not be disproportionate nor increase cost for the client.

R17 Failure to adhere to these standards should lead to censure of the practitioner in question, and should be capable of amounting to misconduct or conduct unbecoming a barrister or solicitor.

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R19 The Ministry of Justice website should provide, with explanatory notes, information on all the costs of going to court, including the cost recovery scales. A brochure setting out this information should be sent in response to the filing of a statement of claim and statement of defence.

R20 The New Zealand Law Society, or an independent body, should assume responsibility for providing independent comparative costs information for consumers on legal fees.”

D. Fee agreements

As noted above, the Law Commission in its report, “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals”179 favoured the increased use of costs agreements between lawyers and clients. The Commission also noted that the Lawyers and Conveyancers Bill is likely to introduce a provision permitting lawyers and their clients to enter into conditional fee arrangements. The Commission observed that,

“Greater use of conditional and contingency fee arrangements should enable greater access to justice for those not qualifying for legal aid, but could be of limited application since it is likely that lawyers will only take on cases for a monetary or property-based claim with a reasonable likelihood of success.”180

The Law Commission produced a report entitled “Subsidising Litigation” in May 2001.181 This report analysed the issues of maintenance and champerty in the context of litigation.182 While maintenance and champerty are not criminal offences in New Zealand since the enactment of the Crimes Act 1961, they are still torts,183 and agreements to support litigation can be contrary to public policy by virtue of the Illegal Contracts Act 1970.

The relevance of the topics of maintenance, champerty and the report on “Subsidising Litigation” for the purposes of this Paper lies in the fact that a contingent or a conditional fee agreement that involves an uplift (whether or not the uplift is calculated by reference to the amount of the award) would be regarded as being champertous in New Zealand and would fall foul of the Illegal Contracts Act 1970 and may be actionable as a tort. The paper on “Subsidising Litigation” therefore considers the desirability of allowing the formation of so-called “augmented fee arrangements” (contingent or conditional fee agreements with uplifts).

182 These concepts essentially relate to the support, such as by full or partial funding, of a litigant by someone who is not a party to the litigation, where such subsidisation is unjustified. In the case of champerty, the person furnishing such support (the maintainer) receives a share of the benefit in the event of a successful outcome. Maintenance and champerty were formerly criminal offences at common law. In certain jurisdictions, such as New Zealand, maintenance and champerty are still torts and contracts involving maintenance can still be unenforceable on the grounds of public policy.
183 There appear never to have been any successful tort claims for maintenance or champerty in New Zealand. See “Subsiding Litigation”, New Zealand Law Commission, Report 72, May 2001 at p. 19.
The Commission recommended that a statutory provision be introduced permitting lawyers to enter contracts of retainer with clients to the effect that their remuneration is contingent on success and that an uplift will be paid in the event of a successful outcome to compensate the lawyer for the risk of non-payment and for the disadvantage of not receiving payments on account.\footnote{“Subsiding Litigation”, New Zealand Law Commission, Report 72, May 2001 at p. 28.}

The Commission imposed certain qualifications in respect of this recommendation. For example, the contract must specify with precision the circumstances in which the success uplift would apply. In addition, such a contract could not be formed in family law proceedings, criminal proceedings or immigration cases.\footnote{“Subsiding Litigation”, New Zealand Law Commission, Report 72, May 2001 at p. 32.}

**E. Wasted costs**

The issue of wasted costs has been considered in the Rules Committee in New Zealand in a preliminary consultation paper.\footnote{Preliminary Consultation Paper (26 July, 2001).} In this paper, which aimed to assess “the desirability and/or necessity of including a wasted costs provision in the High Court Rules,” the Committee considered the impact of the decision of the Judicial Committee in *Harley v McDonald*\footnote{*Harley v McDonald* (Privy Council, PC 9, 50/2000, 10 April 2000).}, in which the Committee affirmed that the High Court of New Zealand has inherent jurisdiction to award costs against barristers as well as solicitors. The order in that case was based on the view that Mrs Harley had pursued a hopeless case regardless of any instructions she may have received from her client. The Committee observed that it was dangerous to make a costs order against a lawyer on such grounds, one of the reasons being that the bringing of hopeless cases is not necessarily a reflection on the lawyer, whose client has a right to have their case presented in court. The Committee instead determined that the New Zealand courts should confine costs orders against lawyers to incidents occurring within the courtroom and therefore within judicial knowledge.

The Rules Committee advanced the following draft rule and invited comments on it:

“(1) Where the Court considers that the conduct of a barrister or solicitor has resulted in wasted costs being incurred by any party to a proceeding it may order the barrister or solicitor:

(a) to pay costs to any party who has incurred wasted costs; or

(b) to contribute to a costs order made against the barrister or solicitor’s client;

in an amount it thinks just.

(2) For the purposes of paragraph (1) ‘wasted costs’ means costs incurred as the result of any improper act or omission on the part of any barrister or solicitor and includes the failure of a barrister or solicitor:

(a) to attend in person or by a proper representative;

(b) to file any document which ought to have been filed;
(c) to deliver any document which ought to have been delivered for the use of the Court;
(d) to be prepared with any proper evidence or account;
(e) to comply with any provision of these rules or any judgment or order or direction of the Court; or
(f) otherwise to proceed.
(3) The Court shall not make an order under paragraph (1) without giving the legal representative a reasonable opportunity to be heard.”
Part IV  New South Wales

A. Background

At the Opening of the Law Term Dinner on the 2nd February, 2004, Spigelman, J., Chief Justice of New South Wales famously commented,

“In many areas of litigation, the costs incurred in the process bear no rational relationship, let alone a proportionate relationship, to what is at stake in the proceedings. The principal focus of improvement, now that delays are well on the way to being acceptable, must be the creation of a proportionate relationship between costs and what is at stake.”

The Chief Justice went on to observe that,

“One thing that has occurred over that period of ten years is that time based charging has become almost universal. I do not believe that this is sustainable. I note that last year, your past President, Robert Benjamin, published in the Law Society Journal a thoughtful piece on the tyranny of the billable hour. As I and my predecessor, Chief Justice Gleeson, have often said over the years, it is difficult to justify a system in which inefficiency is rewarded with higher remuneration. The difficulty of course is that the person providing the service, namely the legal practitioner, does not have a financial incentive to do the service as quickly as possible.”

There has been a long-standing debate over legal costs in New South Wales. Following on the speech of the Chief Justice, the costs debate was given a fresh impetus and the Legal Fees Review Panel was set up. This Panel examined the problems with legal costs’ practices and presented a discussion paper in November 2004.

B. Governing legislation

The Legal Profession Act 1987 contained the governing rules for the charging of lawyers’ legal costs. This Act contained statutory fee scales, which specified the amount that lawyers could charge for certain types of work. These scales were not mandatory and a solicitor and client could enter a written agreement providing for higher fees.

According to the Review Panel,

“The recommended scales of fees were highly complex and administratively cumbersome. They included separate charges for various activities such as taking instructions, preparing documentation, corresponding with clients and attendances. Where there were no set statutory fees lawyers and clients used other factors to set fees, including the result obtained, value of the services to the client, experience of the lawyer, and length and difficulty of the matter. The
final fee often was not determined until the conclusion of the matter.”\textsuperscript{188}

There was also a perception that “the scale-based system was anti-competitive and detrimental to the welfare of legal consumers…”\textsuperscript{189}

In 1994, the law governing legal costs in New South Wales was substantially revised by the removal of price fixing limitations on scales of fees. The Legal Profession Reform Act 1993 came into force in July 1994. It was supplemented by the Legal Professional Regulation 2002.

An aspect of the law governing costs in New South Wales that should be noted is that family law and criminal law are largely excluded from the scope of the costs rules. It should also be noted that, while New South Wales has a similar division between barristers and solicitors as exists in Ireland, the New South Wales Bar Association describes the charging of barristers’ fees as follows:

“Fees may be charged on a time basis, by the hour or by the day, or may be charged upon a fee for service basis as a ‘brief fee’. For instance, if a barrister charges a brief fee for an appearance in court, that fee might cover all preparatory work and the first day of the hearing, but additional fees may be charged for conferences, consultations and preparation. If a brief fee is charged, there may be further fees on a ‘refresher’ basis for subsequent days.

The Legal Profession Act 1987 includes requirements in relation to the legal fees which may be charged by barristers and solicitors. A barrister's fees should generally be the subject of a costs agreement, entered into in accordance with the Act. Barristers usually enter into such an agreement with the solicitor, not the client directly. The exception to this is when a client is briefing the barrister directly, without the involvement of a solicitor.”\textsuperscript{190}

C. Disclosure

Division 2 of Part 11 of the Legal Profession Act 1987 governs disclosure by legal practitioners to their clients of matters related to costs. The obligation of disclosure is imposed on barristers and solicitors\textsuperscript{191} and requires them to disclose the following to their clients:


\textsuperscript{189} Law Faculty of the University of New South Wales, “Stopping the Clock? The Future of the Billable Hour”.

\textsuperscript{190} Information available on the web site of the New South Wales Bar Association at: http://www.nswbar.asn.au/Public/aboutbarristers/#fees

\textsuperscript{191} Section 173(2) of the Act of 1987 provides that, “a reference to a barrister or to a solicitor includes:
(a) a person who was a barrister or solicitor when the legal services concerned were provided, or
(b) the assignee of a barrister or solicitor, or
(c) the executor of the will or other testamentary instrument of a barrister or solicitor, or
(d) the trustee or administrator of the estate of a barrister or solicitor, or
(e) in the case of a solicitor, the receiver of the solicitor’s property appointed under Part 8...”
• the basis of the costs of legal services to be provided to the client;\textsuperscript{192}
• the amount of the costs, if known;\textsuperscript{193}
• if the amount of the costs is not known, the basis of calculating the costs;\textsuperscript{194}
• the billing arrangements;\textsuperscript{195}
• the client’s rights in relation to requiring a review of costs;\textsuperscript{196}
• the client’s rights to receive a bill of costs;\textsuperscript{197}
• any other matter required to be disclosed by the regulation;\textsuperscript{198}
• if the amount of the costs is not to be disclosed, an estimate of the likely amount of the costs of legal services to be provided to the client;\textsuperscript{199}
• where a barrister or solicitor has disclosed an estimate of the likely amount of the costs of legal services, they must also disclose to that person any significant increase in that estimate.\textsuperscript{200}

There is a variation on these obligations that arise when a solicitor or barrister is retained on behalf of the client by another barrister or solicitor. In such circumstances, the retained solicitor or barrister is not bound by the disclosure requirements, but the disclosure made to the client by the instructing lawyer must include the costs of such solicitor or barrister.\textsuperscript{201}

With regard to timing, the general rule is that disclosure regarding costs must be made before the solicitor or barrister is retained.\textsuperscript{202} However, if this is not reasonably practicable, the disclosure must be made as soon as practicable after the solicitor or barrister is retained.\textsuperscript{203}

\textsuperscript{192} Legal Profession Act 1987, s. 175(1) (as amended).
\textsuperscript{193} Legal Profession Act 1987, s. 175(2)(a) (as amended).
\textsuperscript{194} Legal Profession Act 1987, s. 175(2)(b) (as amended).
\textsuperscript{195} Legal Profession Act 1987, s. 175(2)(c) (as amended).
\textsuperscript{196} Legal Profession Act 1987, s. 175(2)(d) (as amended). See further below.
\textsuperscript{197} Legal Profession Act 1987, s. 175(2)(e) (as amended). See further below.
\textsuperscript{198} Legal Profession Act 1987, s. 175(2)(f) (as amended).
\textsuperscript{199} Legal Profession Act 1987, s. 177(1) (as amended). This obligation arises if the actual amount of the costs is not disclosed in accordance with s 175(2)(a).
\textsuperscript{200} Legal Profession Act 1987, s. 177(3) (as amended).
\textsuperscript{201} Legal Profession Act 1987, s. 175(3) (as amended). For this purpose, s. 176 provides, "(1) A barrister or solicitor who is retained on behalf of a client by another barrister or solicitor must disclose to that other barrister or solicitor in accordance with this Division the basis of the costs of legal services to be provided to the client by the barrister or solicitor.
(2) The following matters are to be disclosed to the other barrister or solicitor:
(a) the amount of the costs, if known,
(b) if the amount of the costs is not known, the basis of calculating the costs,
(c) the billing arrangements,
(d) any other matter required to be disclosed by the regulations."
Where the amount of costs is not disclosed, the solicitor or barrister must disclose an estimate of the likely amount of the costs. Legal Profession Act 1987 (s. 177 (2)). They are also obliged disclose any significant increase in that estimate, (s. 177(3)).
\textsuperscript{202} Legal Profession Act 1987, s. 178(1) (as amended).
\textsuperscript{203} Legal Profession Act 1987, s 178(2) (as amended). Where the disclosure is of a significant increase in the estimated costs, s. 178(4) provides that such disclosure must be made as soon as practicable after the barrister or solicitor becomes aware of the likely increase.
The disclosure of costs to a client must be made in writing and must be in clear and plain language.\textsuperscript{204} If there is a costs agreement or other contract regarding the provision of legal services, the disclosure can be made in that agreement.\textsuperscript{205}

There is an exemption from the obligation to disclose costs to a client. Section 180 of the Legal Profession Act 1987 provides, “A disclosure is not required to be made under this Division when it would not be reasonable to be required to do so”. It was envisaged that regulations, barrister rules and solicitor rules could introduce, with the approval of the Attorney General, provisions regarding when it would not be reasonable to require disclosure under the Act.\textsuperscript{206}

A failure by a barrister or solicitor to disclose costs to a client in accordance with the Act of 1987 is not a breach of the Act.\textsuperscript{207} However, there are certain consequences of a barrister or solicitor failing to make the costs disclosure required by the Act of 1987. First, the client is not obliged to pay the costs until they have been assessed in accordance with the Act.\textsuperscript{208} Secondly, the barrister or solicitor cannot maintain proceedings for the recovery of costs unless they have been assessed.\textsuperscript{209} Thirdly, the barrister or solicitor is obliged to pay the costs of any such assessment.\textsuperscript{210} Fourthly, the failure to comply with the obligation of disclosure can amount to “unsatisfactory professional conduct or professional misconduct.”\textsuperscript{211}

D. Costs agreements

The Legal Profession Act 1987 permits solicitors or barristers and their clients to enter into an agreement as to costs, known as a “costs agreement”.\textsuperscript{212} A costs agreement must be in writing or evidenced in writing.\textsuperscript{213} However, a costs agreement can form part of an overall contract for legal services.\textsuperscript{214} In addition, a costs agreement can comprise a written offer that is accepted in writing or by conduct.\textsuperscript{215} The Act of 1987 states specifically that disclosure of costs in accordance with the Act may constitute an offer for the purposes of evidencing a costs agreement.\textsuperscript{216} This has the effect that the disclosure of costs to a client, followed by acceptance by the client in writing or by conduct (such as the acceptance of the legal services) of that disclosure, may be subsequently relied upon by the barrister or solicitor as a costs agreement.

The amendments introduced to the Legal Profession Act 1987 by the Legal Profession Reform Act 1993 permit a barrister or solicitor to enter into a so-called “conditional

\begin{footnotesize}
\begin{enumerate}
\item[204] Legal Profession Act 1987, s 179(1) (as amended).
\item[205] Legal Profession Act 1987, s 179(2) (as amended).
\item[206] Legal Profession Act 1987, s 181 (as amended).
\item[207] Legal Profession Act 1987, ss. 182(4) and 183(1) (as amended).
\item[208] Legal Profession Act 1987, s. 182(1) (as amended). See further below.
\item[209] Legal Profession Act 1987, s. 182(2) (as amended).
\item[210] Legal Profession Act 1987, s. 182(3) (as amended).
\item[211] Legal Profession Act 1987, s. 182(4) (as amended).
\item[212] Legal Profession Act 1987, s. 184 (as amended). If this requirement is not satisfied, the agreement is void.
\item[213] Legal Profession Act 1987, s. 184(5) (as amended).
\item[214] Legal Profession Act 1987, s. 184(6) (as amended).
\item[216] Legal Profession Act 1987, s. 184(6) (as amended).
\end{enumerate}
\end{footnotesize}
“costs agreement” with their client in relation to proceedings before a court or tribunal, other than criminal proceedings. A “conditional costs agreement” is defined as “a costs agreement under which the payment of all of the barrister’s or solicitor’s costs is contingent on the successful outcome of the matter in which the barrister or solicitor provides the legal services.”

The Act contains certain provisions regarding the content of a conditional costs agreement. First, the agreement must stipulate the circumstances that would constitute a successful outcome. Secondly, the agreement may exclude disbursements from the costs that are conditional on a successful outcome. Thirdly, a conditional costs agreement may provide for the payment of a premium above the costs otherwise payable, in the event of a successful outcome. This premium would be a specified percentage, not exceeding 25%, of the costs otherwise payable, or another specified additional amount. Fourthly, the Act of 1987 states specifically that a costs agreement cannot make costs dependent on the amount recovered in the proceedings to which the agreement relates. Costs cannot therefore be a proportion of, or vary according to, the size of a court award.

If a costs agreement contains a provision that is inconsistent with the Act, that provision will be void to the extent that it is inconsistent with the Act.

E. Bill of costs

The Legal Profession Act 1987 provides that a barrister or solicitor cannot commence proceedings against a client for the recovery of costs until at least 30 days have passed since the delivery of a bill of costs. The Act does not contain detailed provisions regarding the form and content of bills of costs, but provides that regulations may introduce such provisions. The Act does provide, however, that a bill of costs must

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217 Legal Profession Act 1987, s 186(3) (as amended).
218 Legal Profession Act 1987, s 186(1) (as amended).
219 Legal Profession Act 1987, s. 186(4) (as amended).
220 Legal Profession Act 1987, s. 186(5) (as amended).
221 Legal Profession Act 1987, s. 187(1) (as amended).
222 Legal Profession Act 1987, s. 187(3) (as amended). With regard to the 25% cap, s. 187(4) provides that, “...the regulations may vary that maximum percentage of costs. Different percentages may be prescribed for different circumstances.”
223 Legal Profession Act 1987, s. 187(2) (as amended). The premium must be separately identified in the agreement.
224 Legal Profession Act 1987, s. 188 (as amended).
225 Legal Profession Act 1987, s. 189(1) (as amended). Section 189(2) contains specific examples of provisions of costs agreements that will be void: “...any provision of a costs agreement or other agreement that purports to waive rights to an assessment of costs under this Part, or the right to receive a bill of costs in the form required for assessment under this Part, is void.”
226 Legal Profession Act 1987, s. 192(1) (as amended). This is subject to the following caveat: “The Supreme Court may make an order authorising a barrister or solicitor to commence or maintain proceedings against a person sooner, if the Supreme Court is satisfied that the person is about to leave New South Wales” (s. 192(2) (as amended)).
227 Legal Profession Act 1987, s 193(1) (as amended).
be signed by or on behalf of the person issuing it.\textsuperscript{228} The Act also stipulates the appropriate means of delivery of a bill of costs.\textsuperscript{229}

\section*{F. Fixed costs}

The system regulating legal costs in New South Wales includes fixed costs for certain types of legal services. Sections 196 and 197 are the enabling legislative provisions for the introduction of such fixed costs for legal services.\textsuperscript{230} Section 196 provides that regulations may make provisions fixing the following categories of legal costs:\textsuperscript{231}

- fair and reasonable costs in workers compensation matters;
- costs in connection with claims for damages for personal injuries;
- costs for the enforcement of a lump sum debt or liquidated sum for damages;
- costs payable for the enforcement of a judgment by a judgment creditor;
- costs payable in respect of probate or administration of estates;
- an amount of costs for a matter related to proceedings (such as expenses for witnesses), not being a legal service.

Where the costs for particular legal services are fixed by regulation in accordance with s. 196, a barrister or solicitor is not entitled to be paid an amount in excess of that fixed cost for that legal service.\textsuperscript{232}

In addition to the legal services stipulated by s. 196, s. 197 provides for the introduction of regulations to fix the fair and reasonable cost for any legal service.\textsuperscript{233} Where such a regulation has been introduced in respect of a particular legal service, a barrister or solicitor cannot recover an amount in excess of the fair and reasonable cost fixed by that regulation for the service, in the following circumstances:\textsuperscript{234} first, the liability to pay the cost must have been passed on to another person by the client; secondly, that person must not be entitled to apply for an assessment of the costs under the Act; thirdly, the barrister or solicitor must be seeking to recover the cost from that person.

\footnotesize
\begin{itemize}
\item \textsuperscript{228} Legal Profession Act 1987, s. 194(1) (as amended). The Act provides that it is sufficient compliance with this requirement if the letter accompanying the bill of costs is signed (s. 194(1)).
\item \textsuperscript{229} Legal Profession Act 1987, s. 195 (as amended) provides, “A bill of costs may be given to a person in any one of the following ways:
\begin{itemize}
\item (a) by delivering it personally to the person,
\item (b) by sending it by post to, or by leaving it for the person at, the person’s place of business or residence last known to the barrister or solicitor,
\item (c) by sending it by facsimile transmission to a number specified by the person (by correspondence or otherwise) as a number to which facsimile transmissions to that person may be sent,
\item (d) by delivering it to the appropriate place in a document exchange in which the person has receiving facilities,
\item (e) in any other way authorised by the regulations.”
\end{itemize}
\item \textsuperscript{230} Legal Profession Act 1987, s. 198(1) (as amended) defines “legal service” in the following terms: “(1) The regulations may fix a cost under this Division for a particular legal service, for a class of legal services or for any part of a legal service.”
\item \textsuperscript{231} Legal Profession Act 1987, s. 196(1) (as amended).
\item \textsuperscript{232} Legal Profession Act 1987, s. 196(2) (as amended).
\item \textsuperscript{233} Legal Profession Act 1987, s. 196(1) provides, “This section applies to a legal service of a kind prescribed by the regulations for the purposes of this section.”
\item \textsuperscript{234} Legal Profession Act 1987, s. 197(3).
\end{itemize}
There is considerable flexibility regarding the manner in which regulations introduced to fix costs in accordance with the Act of 1987, fix such costs. Section 198 provides that regulations may fix costs as a gross amount, according to specified elements of the legal services or “in any other manner.”

G. Maximum costs

In addition to providing for fixed legal costs, the Legal Profession Act 1987 also stipulates the maximum threshold of certain legal costs. Division 5B of the Act provides for maximum legal costs in actions claiming damages for personal injuries. This maximum threshold depends on the amount of the award. If the amount recovered is less than $100,000, the maximum costs allowed to the plaintiff’s lawyers will be 20% of the amount recovered or $10,000 whichever is the greater. In the case of the defendant’s lawyers, the maximum costs are 20% of the amount “sought to be recovered by the plaintiff” or $10,000, whichever is greater. This amount fixed for the payment of costs does not include disbursements. The maximum figure may be amended by regulation.

In cases to which this threshold applies, a solicitor or barrister is not entitled to recover more than the maximum fixed by the Act and a court or costs assessor cannot order costs in excess of that amount.

There are a number of exceptions to the application of the maximum costs’ rule. First, it does not apply to the extent that there is a valid costs agreement between the client and his solicitor or barrister. However, regulations may be introduced to provide that a failure by a barrister or solicitor to comply with such regulations disentitles the barrister or solicitor from relying on the benefit of this exception. Secondly, if a

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235 Legal Profession Act 1987, s. 198(2)(a) (as amended).
236 Legal Profession Act 1987, s. 198(2)(b) (as amended).
237 Legal Profession Act 1987, s. 198(2)(c) (as amended).
238 This cap does not apply to certain categories of actions, such as actions for victim support, workman’s compensation, certain motor accidents and claims before the so-called “Dust Diseases Tribunal”. Legal Profession Act 1987, s. 197C(2) (as amended).
239 Legal Profession Act 1987, s. 198H(1) provides that, “If more than one person (solicitor or barrister) provides legal services to a party in connection with a claim, the maximum costs fixed by this Division are to be apportioned between them as agreed by them or (failing agreement) as ordered by the court hearing proceedings on the claim.”
240 Legal Profession Act 1987, s. 198I(1) stipulates that, “the amount recovered on a claim includes any amount paid under a compromise or settlement of the claim (whether or not legal proceedings have been instituted).”
241 Legal Profession Act 1987, s. 198D(1)(a) (as amended).
242 According to Legal Profession Act, s. 198D(6), “If proceedings are commenced on a claim, the amount sought to be recovered by the plaintiff is taken to be the amount sought to be proved by the plaintiff at the hearing of the claim.”
243 Legal Profession Act 1987, s. 198D(1)(b) (as amended).
244 Legal Profession Act 1987, s. 198D(5) (as amended).
245 Legal Profession Act 1987, s. 198D(2) (as amended).
246 Legal Profession Act 1987, s. 198D(4) (as amended).
247 Legal Profession Act 1987, s. 198E(1) (as amended).
248 Legal Profession Act 1987, s. 198E(3) (as amended).
reasonable offer of compromise is made by one party to the claim, which the other rejects, costs may be awarded against that party based on the indemnity rule, in respect of legal services provided after the date of the offer. If it appears to a court that a client incurred increased liability for costs because of refusing a reasonable offer, and the solicitor or barrister failed to comply with regulations under this section, the court may order the solicitor or barrister to repay the whole or part of those increased costs to the client or to indemnify the other party against the whole or part of any costs payable by that party for services provided after the refusal of the offer of compromise.

A third exception to the maximum costs threshold in personal injuries actions is that a court may order certain legal costs to be excluded from that threshold where the court is satisfied that the legal services in question were provided in response to an action of the other party which was “not reasonably necessary for the advancement of that party’s case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim”.

H. Civil claims without reasonable prospect of success

A further innovation of the New South Wales costs’ system is the rule that lawyers may be made liable for the costs of an action that has no reasonable prospect of success. The Legal Profession Act 1989 (as amended) mandates that barristers and solicitors must not provide legal services on a claim for damages or a defence thereto unless they reasonably believe “on the basis of provable facts and a reasonably arguable view of the law” that the claim or defence has a reasonable prospect of success. For this purpose, a barrister or solicitor, in filing court documentation, must certify that there are such reasonable grounds for believing that the claim or defence has a reasonable prospect of success. Court documentation cannot be lodged without such certification. The provision of legal services in contravention of this rule constitutes the provision of legal services “without reasonable prospects of success.” While the provision of such services is not an offence, it can amount to professional misconduct or unsatisfactory professional conduct.

The Legal Profession Act 1987 creates a presumption that, if a court finds that the evidence does not form a basis for a reasonable belief that a claim or defence has reasonable prospects of success, any legal services that were provided were provided

249 Legal Profession Act 1987, s. 198F(2) (as amended) provides, “An offer of compromise on a claim by a party is reasonable if the court determines or makes an order or award on the claim in terms that are no less favourable to the party than the terms of the offer.”
250 Legal Profession Act 1987, s. 198F(1) (as amended).
251 Legal Profession Act 1987, s. 198G (as amended).
252 Legal Profession Act 1987, s. 198J(1) (as amended).
253 Legal Profession Act 1987, s. 198J(5) (as amended).
254 According to the Legal Profession Act 1987, s. 198L(4) (as amended), “court documentation means: (a) a statement of claim, summons, cross-claim, defence or further pleading, or (b) an amended statement of claim, summons, cross-claim, defence or further pleading, or (c) a document amending a statement of claim, summons, cross-claim, defence or further pleading, or (d) any other document of a kind prescribed by the regulations.”
255 Legal Profession Act 1987, s. 198L(2) (as amended).
256 Legal Profession Act 1987, s. 198L(3) (as amended).
257 Legal Profession Act 1987, s. 198L(5) (as amended).
without reasonable prospects of success. A barrister or solicitor who wishes to rebut this presumption bears the burden of proving that, at the time the legal services were provided, there were provable facts that provided a basis for a reasonable belief that the claim or defence had a reasonable prospect of success.

The cost implications of contravening the prohibition on providing legal services where there is no reasonable prospect of success, are as follows:

- The court may of its own motion, or on the application of any party, order the barrister or solicitor to repay to his client the whole or any part of the costs that his client has been ordered to pay to any other party;
- The court may, of its own motion, or on the application of any party, order the barrister or solicitor to indemnify any party, other than his client, against the whole or part of any costs payable by that party.

I. Assessment of costs

There are detailed provisions in the Legal Profession Act 1987 regarding the system of assessment of costs. A client, a barrister or solicitor who instructs another barrister or solicitor, a barrister or solicitor who sent out the bill of costs, or a party who is liable to pay party and party costs, can apply for an assessment of the whole or part of, a bill of costs. Where such an application is made to the Manager, Costs Assessment, it must contain a statement that there is no reasonable prospect of settlement by mediation. It must also authorise a costs assessor to have access to all documents held by the applicant or any barrister or solicitor concerned that are relevant to the application. The Manager, Costs Assessment will then refer the matter to a costs assessor. The costs assessor can, by written notice, require a person to produce any relevant documents and to furnish further particulars, in respect of the matter. The costs assessor will not determine the application until the applicant and any concerned barrister, solicitor, or other person, has had a reasonable

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258 Legal Profession Act 1987, s. 198N (as amended).
259 Legal Profession Act 1987, s. 198N(3) (as amended). According to s. 198J(2), “A fact is provable only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.”
260 Legal Profession Act 1987, s. 198M(1)(a) (as amended).
261 Legal Profession Act 1987, s. 198M(2) (as amended).
262 Legal Profession Act 1987, s. 199(4) (as amended) provides, “a client includes:
(a) any person who is a party to a costs agreement relating to legal services for which the bill of costs is given (other than the barrister or solicitor who gave the bill or provided the services), and
(b) any person, being a lessee under a lease, who is given a bill of costs, concerning legal services relating to the preparation of that lease, by a barrister or solicitor acting on behalf of the lessor, and
(c) any person, being a mortgagor under a mortgage, who is given a bill of costs, concerning legal services relating to the preparation of that mortgage, by a barrister or solicitor acting on behalf of the mortgagee.”
264 Legal Profession Act 1987, s. 203(3) (as amended).
265 Legal Profession Act 1987, s. 203(2) (as amended).
266 Legal Profession Act 1987, s. 206(1) (as amended). Section 208S(1) provides that the Chief Justice of New South Wales may appoint persons to be costs assessors under the Act. Section 208S(4) also provides that costs assessors are not, as such, officers of the court.
267 Legal Profession Act 1987, s. 207(1) (as amended).
268 Legal Profession Act 1987, s. 207(2) (as amended).
opportunity to make written submissions and such submissions have been given due consideration. The process is based entirely on written documentation and the costs assessor is not bound by rules of evidence.

(i) Assessment of bills of costs

When there is an application for the assessment of a bill of costs, the costs assessor must consider the following:

- Whether it was reasonable to carry out the work;
- Whether the work was carried out in a reasonable manner; and
- The fairness and reasonableness of the amount of costs in relation to that work.

In assessing what is fair and reasonable, the costs assessor may have regard to the following matters:

- whether the barrister or solicitor complied with any relevant regulation, barristers rule or solicitors rule;
- whether the barrister or solicitor disclosed the basis of the costs or an estimate of the costs;
- any relevant advertisement as to the barrister’s or solicitor's costs or skills;
- any relevant costs agreement;
- the skill, labour and responsibility displayed on the part of the barrister or solicitor;
- the instructions and whether the work done was within the scope of the instructions;
- the complexity, novelty or difficulty of the matter;
- the quality of the work done,
- the place and circumstances in which the legal services were provided;
- the time within which the work was required to be done.

Having considered these questions, the costs assessor’s determination may either confirm the bill of costs or, if satisfied that the costs are unfair or unreasonable, may substitute an amount that is fair and reasonable. The costs assessor must give a statement of reasons for the determination made.

With regard to the question of what constitutes “fair and reasonable” costs, Mahoney J.A. of the Court of Appeal of New South Wales stated in *Veghelyi v Law Society of New South Wales*,

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269 Legal Profession Act 1987, s. 208(1) (as amended).
270 Legal Profession Act 1987, s. 208(2) (as amended).
271 Legal Profession Act 1987, s. 208A(1) (as amended).
272 Legal Profession Act 1987, s. 208B (as amended).
273 Legal Profession Act 1987, s. 208A(2) (as amended).
274 Legal Profession Act 1987, s. 208JAA (as amended).
275 Unreported, CA (NSW), Kirby P, Mahoney and Priestly JJA, CA 40257/91, 6 October 1995, BC 9505459. That case concerned a solicitor who had overcharged a client for acting in a family law matter and had charged clients fees $1100 above the scale of costs that existed at the time. The solicitor argued that it was logically unsound for the Tribunal to assert that his fees were a gross overcharge because he charged above the scale.
“whether costs are fair and reasonable will depend upon - or at least be affected by - facts such as the size of the solicitor’s firm, the resources employed or available to be employed by it, the value which the lawyers place upon their skill and expertise, and the urgency of the client’s requirements.”

Mahoney JA then continued as follows:–

“What is fair and reasonable for a large firm may be, in the ordinary case, grossly excessive for a sole practitioner. This is to be borne in mind, for example, in any assessment of the value of the evidence of other solicitors as to whether fees which have been charged are fair and reasonable. What is fair and reasonable, though still a matter of judgment by responsible practitioners, must be determined following an appropriate analysis of the practice of the particular solicitor.”

(ii) Costs agreements

Where there is a valid costs agreement between a client and a barrister or solicitor, a costs assessor must decline to assess a bill of costs that is covered by that agreement. This does not apply if the barrister or solicitor who is party to the costs agreement failed to make the disclosure as to costs that is required by the Act of 1987.

The costs assessor does, however, have the power to consider whether terms of the costs agreement are just in the circumstances in which the agreement was made. In the exercise of this power, the costs assessor must have regard to the public interest and may have regard to the following factors:

- the consequences of compliance, or non-compliance, with all or any of the provisions of the agreement;
- the relative bargaining power of the parties;
- whether or not the provisions of the agreement were the subject of negotiation;
- whether it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the agreement;
- whether there are any conditions in the agreement that are unreasonably difficult to comply with, or that are not reasonably necessary for the protection of the legitimate interests of a party to the agreement;
- whether or not any party to the agreement was reasonably able to protect his interests because of age, physical condition or mental condition;
- the relative economic circumstances, educational background and literacy of the parties to the agreement;

276 Legal Profession Act 1987, s. 208C(1) (as amended).
277 Legal Profession Act 1987, s. 208C(4) (as amended).
278 Legal Profession Act 1987, s. 208D(1) (as amended). It should be noted that s. 208D(4) provides, “In determining whether a provision of the agreement is unjust, the costs assessor is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the agreement was made.”
279 Legal Profession Act 1987, s. 208D(2) (as amended).
• the form of the agreement and the intelligibility of the language used;
• the extent to which the provisions of the agreement and their legal and practical effect were accurately explained to the applicant and whether or not the applicant understood those provisions and their effect; and
• whether the barrister or solicitor or any other person exerted or employed unfair pressure, undue influence or unfair tactics on the applicant and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics.

(iii) Party and party costs

When a costs assessor is called upon to assess the costs awarded by a court order (on the assumption that the court has not determined the amount of the costs280), the assessor must consider whether it was reasonable to carry out the work covered by the costs and what, in his opinion, is a fair and reasonable amount of costs for that work.281 In assessing that fair and reasonable amount, the costs assessor may have regard to the following matters:282

• the skill, labour and responsibility demonstrated by the barrister or solicitor;
• the complexity, novelty or difficulty of the matter,
• the quality of the work done;
• whether the level of expertise was appropriate to the nature of the work done;
• the place and circumstances in which the legal services were provided;
• the time within which the work was required to be done; and
• the outcome of the matter.

If there is a costs agreement regarding the costs in question, the costs assessor must not apply the terms of that agreement to assess the fair and reasonable costs for the work done, where the costs were awarded by court order.283

(iv) Review / Appeal

There are three options available to a person who is dissatisfied with the determination of a costs assessor. First, they may seek a review of that determination by applying to the Manager, Costs Assessments.284 This must typically be done within 28 days of the issue of the cost assessor’s certificate containing his determination.285 The Manager will then refer this application to a panel, comprising two costs assessors, which will review the costs assessor’s determination.286 Upon completing this review, the panel may, with a statement of reasons,287 affirm the

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280 In this regard, it should be noted that the Legal Profession Act 1987, s. 208I provides, “This Division does not limit any power of a court or a tribunal to determine in any particular case the amount of costs payable or that the amount of the costs is to be determined on an indemnity basis.”
281 Legal Profession Act 1987, ss. 208F(1) and 208F(2) (as amended).
282 Legal Profession Act 1987, s. 208G (as amended).
283 Legal Profession Act 1987, s. 208H(2) (as amended).
284 Legal Profession Act 1987, s. 208KA (as amended).
285 Legal Profession Act 1987, s. 208KB (as amended).
286 See Legal Profession Act 1987, s. 208KG (as amended).
determination or set it aside and substitute it with such determination as the panel
considers should have been made.\textsuperscript{288} The general rule is that the panel should only
receive such evidence as was before the costs assessor who made the original
determination.\textsuperscript{289}

The second means of challenging the determination of a costs assessor, is to appeal
the decision to the Supreme Court as a matter of law.\textsuperscript{290} In such circumstances, the
Supreme Court may affirm the costs assessor’s decision, make the determination that
should have been made by the costs assessor, or remit the decision to the costs
assessor and order that the application be re-determined.\textsuperscript{291}

The third means of challenging the determination of a costs assessor, is to seek the
leave of the court to appeal against that determination.\textsuperscript{292} This option is open to a
party to an application relating to a bill of costs\textsuperscript{293} and to a party to an application
arising from costs payable pursuant to an order of a court or tribunal.\textsuperscript{294} Where leave
is granted, the appeal is by way of a new hearing and fresh evidence may be given.\textsuperscript{295}
Having heard the appeal, the court or tribunal may affirm the determination of the
costs assessor, or make such determination as the court or tribunal considers should
have been made by the costs assessor.\textsuperscript{296}

(v) \textbf{Conduct of barristers or solicitors}

A costs assessor has the power to examine whether costs have been incurred
improperly, without reasonable cause, and whether costs have been wasted by undue
delay or other misconduct or default.\textsuperscript{297} If the costs assessor, having considered any
written submissions on behalf of the barrister, solicitor or client, in that regard,\textsuperscript{298}
finds that costs have been so incurred or wasted, he may do the following in his
determination:\textsuperscript{299}

- Disallow costs between the barrister or solicitor and their client;
- Direct the barrister or solicitor to repay to the client costs which the client has
  been ordered by a court or a tribunal to pay to any other party; and
- Direct the barrister or solicitor to indemnify a party other than the client in respect
  of costs payable by that party.

In addition, if a costs assessor considers that “any conduct of a barrister or solicitor
involves the deliberate charging of grossly excessive amounts of costs or deliberate

\textsuperscript{288} Legal Profession Act 1987, s. 208KC(1) (as amended).
\textsuperscript{289} Legal Profession Act 1987, s. 208KC(3) (as amended).
\textsuperscript{290} Legal Profession Act 1987, s. 208L(1) (as amended).
\textsuperscript{291} Legal Profession Act 1987, s. 208L(2) (as amended).
\textsuperscript{292} Legal Profession Act 1987, s. 208M(1) (as amended).
\textsuperscript{293} Legal Profession Act 1987, s. 208M(1) (as amended).
\textsuperscript{294} Legal Profession Act 1987, s. 208M(2) (as amended).
\textsuperscript{295} Legal Profession Act 1987, s. 208M(4) (as amended).
\textsuperscript{296} Legal Profession Act 1987, s. 208M(5) (as amended).
\textsuperscript{297} Legal Profession Act 1987, s. 208P(1) (as amended).
\textsuperscript{298} Section 208P(3) requires that, “Before taking action under this section, the costs assessor must give
notice of the proposed action to the barrister or solicitor and the client and give them a reasonable
opportunity to make written submissions in relation to the proposed action.”
\textsuperscript{299} Legal Profession Act 1987, s. 208P(2) (as amended).
misrepresentations as to costs”, he must refer this matter to the Legal Services Commissioner. Deliberate charging of grossly excessive amounts and deliberate misrepresentations as to costs are each declared to be professional misconduct.

There have been cases regarding misconduct of this nature in New South Wales. In Re Veron: Ex parte Law Society of New South Wales, the court found a solicitor guilty of professional misconduct for overcharging a number of plaintiffs in simple uncomplicated personal injury matters $1500 per claim more than the average fee. The solicitor engaged in the practice of obtaining from his clients, before the completion of their claims, an authority to settle the action for a stipulated sum, together with an authority to deduct his solicitor and client costs of $1,000 or upwards. This practice was held by the court to be outrageous and “went far beyond any question of merely exceeding the statutory scales of charges”.

In relation to the authority given by the clients, the court held,

“so far as proceedings in the disciplinary jurisdiction are concerned the taking of the authorities is not only no answer to the charges of extortion and dishonourable dealings with the clients’ trust fund but is evidence to support the charges made in that behalf. If the amounts sought to be deducted by reference to these authorities were grossly excessive in amount, the mere fact that the client gave his assent to the act of the solicitor is, of itself, no answer here. Indeed, in many instances as we have said it is quite clear from the affidavit evidence and the cross-examination of the clients that many of them did not understand the true nature or effect of the documents which they were called upon to sign.”

The court held that the solicitor’s conduct, charging an arbitrary fee without reference to the difficulty of the particular case, without reference to the amount to be recovered for party and party costs and without full and frank disclosure of the exact sum received on account of the client and disbursements made from the trust account, was unacceptable.

J. Proposals for change

The Law Society of New South Wales has been heavily critical of the level of regulation of lawyers and their incomes. The President of the Society recently commented that vast regulation is to blame for the fact that solicitors’ incomes are not even keeping up with increases in average weekly wages and that “[e]scalating legal costs due to mushrooming regulations and the rising expense of litigation are depressing solicitors’ incomes.”

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300 Legal Profession Act 1987, s. 208 Q(1) (as amended). This is without prejudice to the right of the costs assessor to refer any other matters to the Commissioner. See s. 208Q(3).
301 Legal Profession Act 1987, s. 208 Q(2) (as amended).
303 Similarly, in NSW Bar Association v Amor-Smith [2003] NSWADT 239, the tribunal found a barrister guilty of professional misconduct when he overcharged his “vulnerable” clients, by devoting “an inordinate amount of time to tasks that he carried out pursuant to his retainer”, a great deal of which were clearly superfluous.
The Legislative and Policy Division of the National Competition Policy Review has observed that,

“There appears to be general agreement that deregulation has been a success (with the exception of PIAC). Nevertheless, there may be a number of imperfections in the market which may warrant legislative intervention, including regulation of third party costs and the absence of accurate information about market rates. These shortcomings appear to be compounded by the unwillingness of consumers to shop around. A community education programme to inform consumers of their rights and encourage consumers to find out information before engaging a solicitor or barrister might address this problem.

However, there are significant limitations to costs disclosure which warrant further consideration and which affect the bargaining power of clients. They include the unfettered right of a solicitor or barrister to revise an estimate of costs and the ability of practitioners to make open-ended costs agreements based on hourly rates. Further, practitioners are free to make conditional costs agreements, including an uplift of up to 25%, without informing clients of the likelihood of success in a matter.”

The other problems with the costs’ implications of the Legal Profession Reform Act 1993 which were highlighted by the National Competition Policy Review were:

• non-compliance with disclosure requirements due to widespread ignorance of the law;
• disclosure of an hourly rate only;
• the failure of consumers to compare prices;
• the incidence of lawyers charging contingency fees for cases where success is almost assured; and
• the lack of any restriction on lawyers changing their fee estimate, even in circumstances where the client would be unfairly prejudiced.

The Division recommended certain strategies for “reducing the cost of resolving costs disputes and increasing competition”, such as the following:

• abolishing the costs indemnity rule altogether;
• encouraging legal insurance schemes; or
• using alternative dispute resolution (ADR) more widely.

The Division also noted,

“It appears that time based costing is widely used within the profession. However, time based costing has the potential to encourage inefficiency. In
order to encourage efficiency, and to facilitate price comparison by consumers, it is suggested that solicitors and barristers should be encouraged to adopt event based costing by the Law Society and Bar Association.\textsuperscript{308}

\textsuperscript{308} Legislative and Policy Division of the National Competition Policy Review, “Review of the Legal Profession Act, Final Report: Costs”.
A. Introduction of contingency fee agreements

In September 2000, a committee comprising representatives from the Ontario Bar Association, the Law Society of Upper Canada and the Advocates Society submitted a Report on Contingency Fees to Ministry of the Attorney General for Ontario. The report recommended that contingency fees be permitted to improve access to justice, subject to a number of conditions and controls.

On December 9, 2002, Bill 213, the Justice Statute Law Amendment Act, 2002, received Royal Assent. Schedule A of this legislation amends the Solicitors Act to regulate contingency fee agreements. It provides in this regard that, “In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's solicitor is being compensated in accordance with a contingency fee agreement.”\(^{309}\) In addition, the Act states that, “A solicitor may enter into a contingency fee agreement with a client in accordance with this section”\(^{310}\) and that,

“A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided.”\(^{311}\)

The Act contains broad regulation-making power relating to contingency fees. It also stipulates certain requirements and controls of contingency agreements:

- All contingency fee agreements must be in writing;
- Contingency fees are not permissible in criminal, quasi-criminal and family law matters;
- Lawyers cannot collect both the pre-determined contingency fee and legal costs, unless approved by a judge;\(^ {312}\)
- A client can collect full payment for an award of costs, even if it exceeds the amount payable under a contingency fee agreement, on the condition that the award is used to pay the client's solicitor;\(^ {313}\)

\(^{309}\) Section 20.1(1) of the Solicitors Act, as inserted by section 3 of the Justice Statute Law Amendment Act, 2002.

\(^{310}\) Section 28.1(1) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act, 2002.

\(^{311}\) Section 28.1(2) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act, 2002.

\(^{312}\) See section 20.1(3) of the Solicitors Act, as inserted by section 3 of the Justice Statute Law Amendment Act 2002: “If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his, her or its solicitor and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under subsection 28.1 (8) and provides otherwise.”

\(^{313}\) See section 20.1(2) of the Solicitors Act, as inserted by section 3 of the Justice Statute Law Amendment Act, 2002. “…even if an order for the payment of costs is more than the amount payable
• Regulations may be introduced to prescribe a maximum percentage that can be charged as a contingency fee; and
• The courts can review contingency fee contracts and endorse negotiated fees above the prescribed standards where it is fair to do so.

There are certain limitations regarding the form that contingent fee agreements can take. For instances, section 4 of the Act stipulates that, “A solicitor shall not enter into an agreement by which the solicitor purchases all or part of a client's interest in the action or other contentious proceeding that the solicitor is to bring or maintain on the client's behalf.”

In addition, the Act considers the possibility of fixing maximum thresholds for contingency fee agreements. It provides that regulations may be introduced to fix a maximum percentage of the amount or value of the property recovered in an action or proceeding, which may be recovered by a solicitor under the terms of a contingent fee agreement. A contingency fee agreement may exceed this maximum threshold, if, the solicitor and client apply jointly within 90 days of the execution of the agreement to have the agreement approved by the Superior Court of Justice. In determining whether to grant such an application, the court must consider, “the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant.”

The Act also precludes lawyers and clients from entering into fee agreements, which permit the lawyer to recover the fee payable under the agreement, as well as an amount arising as a result of an award of costs or costs obtained as part of a settlement. This is qualified by the fact that the solicitor and client can apply jointly to the Superior Court of Justice for approval to include the costs, or a proportion of the costs, in the contingency fee agreement “because of exceptional circumstances”. If the judge is satisfied that such exceptional circumstances apply and approves the inclusion of the costs, those amounts will be recoverable.

The Act provides specifically that the Lieutenant Governor in Council may make regulations governing contingency fee agreements, and specifies the following as regulations which may be introduced:

by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor.”

314 Section 28 of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
315 Section 28.1(5) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
316 Section 28.1(6) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
317 Section 28.1(7) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
318 Section 28.1(8) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
319 Section 28.1(8)(a) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
320 Section 28.1(12) of the Solicitors Act, as inserted by section 4 of the Justice Statute Law Amendment Act 2002.
• Regulations governing the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee, which may include, but is not limited to:
  (i) setting a scale for the maximum percentage that may be charged for a contingency fee based on such factors as the value of the recovery and the amount of time spent by the solicitor; and
  (ii) differentiating the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action, the court in which the action is to be heard and distinguishing between causes of actions of the same type;
• Regulations governing the maximum amount of overall remuneration that may be paid to a solicitor pursuant to a contingency fee agreement;
• Regulations in respect of treatment of costs awarded or obtained where there is a contingency fee agreement;
• Regulations prescribing standards and requirements for contingency fee agreements, including the form of the agreements, terms that must be included in contingency fee agreements and terms that are prohibited in contingency fee agreements;
• Regulations imposing duties on solicitors who enter into contingency fee agreements;
• Regulations prescribing the time in which a solicitor or client may apply for an assessment of a conditional fee agreement; and
• Regulations exempting particular persons, actions, proceedings or classes of persons, actions or proceedings from this section or a regulation made under this section.

B. Regulation of contingency fee agreements

On October 1, 2004, Ontario Regulation 195/04, introduced under the Solicitors Act to govern contingency fee agreements (“the Regulation”), came into effect.

This Regulation governs various aspects of contingency fee agreements. It requires that a contingency fee agreement shall be subject to the following requirements.\(^\text{321}\)

• It must be in writing;
• It must be signed by both parties, which signatures must be verified by witnesses;
• The solicitor must furnish an executed copy of the agreement to the client and must retain such a copy; and
• The agreements shall be entitled “contingency fee retainer agreements”.

The Regulation also stipulates certain matters that the solicitor must ensure are included in the contingency fee retainer agreement.\(^\text{322}\)

• The name, address and telephone number of the solicitor and of the client;
• A statement of the basic type and nature of the matter in respect of which the solicitor is providing services;

\(^{321}\) Regulation 1.
\(^{322}\) Regulation 2.
• A statement that indicates the following:
  (i) that the client and the solicitor have discussed alternatives to contingency fee retainer agreements, including the possibility of hourly rates;
  (ii) that the client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates;
  (iii) that the client has chosen to retain the solicitor by means of a contingency fee agreement; and
  (iv) that the client understands that all usual protections and controls on retainers between a solicitor and client apply to the contingency fee agreement.
• A statement that explains the contingency that will give to the fee to the solicitor;
• A statement that sets out the method by which the fee is to be determined;
• If the fee is a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee the amount of recovery excludes any amount that is specifically awarded in respect of costs and disbursements;
• A simple example that shows how the contingency fee is calculated;
• A statement that outlines how the contingency fee is calculated, if the award is recovered by means of a structured settlement;
• A statement that informs the client of their right to ask the Superior Court of Justice to review and approve of the solicitor’s bill, including the timeframes for so doing;
• A statement setting out when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination and the manner in which the solicitor’s fee is to be determined in the event that the agreement is terminated; and
• A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter.

Where the matter governed by the contingency fee retainer agreement is a litigious matter, there are certain additional terms that must be included in the agreement and the solicitor bears the responsibility for ensuring these requirements are met:

• If the client is a plaintiff, a statement that the solicitor shall not recover fees that exceed the award that the client recovers;
• A statement in respect of disbursements and taxes, including the GST payable on the solicitor’s fees, that indicates,

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323 Note that Regulation 6 requires that, “A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.”

324 See Regulation 10, “For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor’s bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery.”

325 Regulation 3.

326 See in this regard Regulation 7, which provides, “Despite any terms in a contingency fee agreement, a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement.”
(i) whether the client is responsible for the payment of such disbursements or taxes;
(ii) if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred; and
(iii) if the solicitor pays the disbursements and taxes for which the client is responsible, during the course of the matter, the solicitor is entitled to be reimbursed for those payments, as a first charge on any award received by the client.

- A statement that explains costs and the awarding of costs and indicates specifically that,
  (i) a client is entitled to receive any costs contribution or award, on a partial or substantial indemnity scale, if the client is the party entitled to costs, unless the court orders otherwise; and
  (ii) that a client is responsible for paying any costs contribution or award, on a partial or substantial indemnity scale, if the client is the party liable to pay costs;

- If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money;

- If the client is a party under disability, the following must be included in the contingency fee retainer agreement:
  (i) a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement or a consent judgment;
  (ii) a statement that the amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement or consent judgment; and
  (iii) a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise.

The Regulation also lists certain matters that should not be included in contingency fee retainer agreements. These are as follows:

327 Regulation 9 provides in this regard, “(1) If the client is responsible for the payment of disbursements or taxes under a contingency fee agreement, a solicitor who has paid disbursements or taxes during the course of the matter in respect of which services were provided shall be reimbursed for the disbursements or taxes on any funds received as a result of a judgment or settlement of the matter. (2) Except as provided under section 47 of the Legal Aid Services Act, 1998 (legal aid charge against recovery), the amount to be reimbursed to the solicitor under subsection (1) is a first charge on the funds received as a result of the judgment or settlement.”

328 See Regulation 8, “A client who is a party to a contingency fee agreement shall direct that the amount of funds claimed by the solicitor for legal fees, cost, taxes and disbursements be paid to the solicitor in trust from any judgment or settlement money.”

329 Regulation 5 contains more detailed provisions regarding persons with disabilities. It provides, “(1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,
(a) apply to a judge for approval of the agreement before the agreement is finalized; or
(b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure.”

330 Regulation 4.
• A provision that requires the consent of the solicitor before the claim can be abandoned, discontinued or settled on the client’s instructions;
• A provision that prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors;
• A provision that permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct of the Law Society of Upper Canada.

C. Maximum thresholds

There was considerable debate in Ontario regarding the desirability of introducing maximum percentages for contingency fees[^331] and maximum overall amounts of remuneration for solicitors under contingency agreements. While the amended Solicitors Act permits regulations to be introduced setting such maximum thresholds, the Regulation that came into force on October 1, 2004, did not make provision for any maximum thresholds. The Regulation does prohibit solicitors from recovering more in costs than the client recovers by way of award of damages or settlement. However, the Regulation does not introduce a maximum percentage or overall maximum remuneration in respect of contingency fee agreements.

The debate about maximum percentages centred on a variety of arguments about the advantages and disadvantages of such a threshold. The advantages of a maximum percentage were that it would provide control on fees, it may reassure the public that lawyers will not take unfair amount of clients’ awards and fewer clients may seek to review contingency fee contracts, thereby lessening the burden on court resources.

The disadvantages of a maximum percentage included the following:

• Such an approach would be inconsistent with most other Canadian jurisdictions;
• An arbitrary number may have no rational connection to the work actually done by lawyer;
• A maximum percentage would be likely to become the norm;
• If the maximum percentage was set below the market rate, lawyers would be unlikely to take cases on a contingency basis;
• Clients were already protected by the existing assessment process and the requirement that costs be reasonable;
• It may increase the court workload if many lawyers apply to court for fee increases in complex or high risk cases; and
• Fixing a maximum percentage will not necessarily ensure low fees, where the court awards are very high[^332].

[^331]: It was noted that British Colombia was the only Canadian jurisdiction that sets maximum percentages for contingency fees: 33 1/3% for personal injury or wrongful death in motor vehicle accident cases and 40% for other personal injury or wrongful death cases.
[^332]: The example commonly cited in relation to this argument was the case of Raphael Partners v. Chester Lam, in which, on September 24, 2002, the Ontario Court of Appeal overturned the lower court and assessment officer’s determination that the contingency fee was excessive, and upheld as “fair
and reasonable” a contingency fee agreement for 15% of first million and 10% of each subsequent million in damages, plus costs, amounting to $461,313 plus GST on a $2.5M settlement.
Part VI United States

There are two aspects of the system governing legal costs in the United States that are of relevance to this Paper. First, the rule in the United States is that each party to litigation bears their own costs. The “English rule” that the costs follow the event and the successful party is entitled to recover costs, does not apply in the United States. Secondly, the United States’ legal system is notable for the prevalence of contingency agreements for the payment of lawyers’ fees. A further issue that has been examined in the United States is the method of computing legal fees, for example there has been some debate regarding the desirability of using an hourly billing system. It should be noted at the out-set however, that the emphasis in the U.S. has always been on the free operation of the market for the provision of legal services. The Supreme Court has consistently encouraged the free operation of that market.333

A. Allocation of costs

As noted, the general rule in the United States is that, unless a statute provides otherwise, parties in civil litigation are responsible for their own legal costs. Alyeska Pipeline Services Co. v. Wilderness Soc’y.334 This is not an absolute rule, however. For example, certain federal statutes provide for the payment of the successful party’s reasonable legal costs by the unsuccessful party. “Most important among these are the various federal and state statutes that entitle a successful plaintiff, though not a successful defendant, to court-awarded attorneys’ fees as part of a recovery. Similar ‘one-way’ fee-shifting policies have also been established in both federal and state courts through a combination of statutory interpretation and common law development.”335

In addition, federal and state courts in the United States can order indemnification to parties who have been the victims of abuse of process by the other party.336 There is also a procedure in the United States, similar to the common law procedure whereby a party to litigation can make a lodgement, which, if rejected, will be taken into account in allocating liability for costs.337 Accordingly, if the offer of settlement that is made, is rejected and filed in court, and the award of damages made is less than this offer, there will be partial indemnification of the offering party’s costs. In particular, the defendant will not have to pay any costs incurred by the plaintiff subsequent to the offer, and is entitled to indemnification for his own subsequent costs as well.

335 “Indemnity of Legal Fees”, Avery Wiener Katz (Georgetown University, 1999) at p. 3.
336 See, for example, Federal Rule of Civil Procedure, Rule 11 (regarding frivolous proceedings).
337 Federal Rule of Civil Procedure, Rule 68. This procedure is little-used in the U.S. However, a number of American critics have in recent years supported its expansion by extending its coverage to attorneys’ fees generally, or by making the procedure available to plaintiffs as well as defendants. See “Indemnity of Legal Fees”, Avery Wiener Katz (Georgetown University, 1999).
A final abrogation of the rule that each party bears their own costs can be seen in the fact that parties are free to agree to some level of indemnification. The rule is a default, rather than a mandatory, one. Agreements for indemnification can be entered at the commencement of the litigation or at the time of entering the contractual relations, if applicable.

B. Contingency fee agreements

The practice of charging for legal services by means of contingent fee agreements has a long history in the U.S.

Since 1814, there have been records of attorneys being paid contingent fees. Despite some prohibitions on this practice, “at an early period, it was tolerated, and has become common.”338 While there were some criticisms of the practice,339 contingency fee arrangements became increasingly popular. By a decision rendered in 1896, the Supreme Court approved the practice of using contingency fee agreements, even in respect of claims against the federal government.340 The Court held:

“By several decisions of this court,--indeed, beginning at December term, 1853,--contracts for contingent fees, by which attorneys, employed to prosecute claims against the United States, were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid.”341

In Stanton v. Embrey,342 the Court upheld claims for attorney fees arising from claims against the U.S. following the Civil War. The Court noted that attorneys “usually charged contingent fees of from twenty to twenty-five per cent, which the plaintiff's witnesses regarded as a reasonable charge.” The Court rejected the argument that such fees are improper, stating it was “beyond legitimate controversy” that such contracts are to be enforced “if they are free from any taint of fraud, misrepresentation, or unfairness.”343

In the context of tortious actions, contingency fees became particularly prevalent. Musmanno J. described the benefit of contingency fees as follows:

“If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force

339 In 1786, a Massachusetts pamphleteer criticised the “pernicious practice,” by which people “give one quarter part of their property to secure the remainder, when they appeal to the laws of their country.” Honestus [pseud. of Benjamin Austin], Observations on the Pernicious Practice of the Law (Boston, 1819), reprinted in 13 Am. J. Legal Hist. 241, 256 (1969).
341 Ball v. Halsell, 161 U.S. 72 at 80 (1896).
342 93 U.S. 548 (1876).
343 93 U.S. 548 at 556 to 557 (1876).
on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.”

Contingent fees are now almost always used by plaintiffs in personal injury and other tortious actions and are the dominant means of payment of lawyers in other actions. For example, they are common in shareholder actions, antitrust suits seeking damages, tax cases, probate cases, among many others. Research has also shown that 62% of plaintiffs in contract cases paid their lawyers on a contingency basis.

Various courts have moreover held that contingent fee agreements are presumed to be reasonable. It has also been noted that, “the best indicator of the ‘reasonableness’ of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client.” According to this approach, the courts are not obliged to accept the agreed fee as a reasonable one and may reduce a fee which is the result of the lawyer’s misconduct or incompetence. Courts may also reduce a fee where the amount of the contingency would be a “windfall” because the award is unusually large or the work required was minimal.

C. Billing systems

While contingent fees are the predominant means of charging for many classes of action in the United States, the hourly billing system has more recently caused gained prominence, having first arisen in the 1960’s. One dimension of this debate is that were there is fee-shifting, the Supreme Court has regarded a formula of costs based on an hourly rate as being a reasonable way of determining the appropriate fee.

On a general note, there has been considerable concern about the negative effects of hourly billing. First, it has been viewed as increasing the numbers of hours, and accordingly, the scale of the fee, that are charged. For example, Zoe Baird, general counsel for Aetna Life & Casualty company, told the 1992 annual meeting of the American Bar Association:

“There is no credible economic theory underlying the hourly billing method,

349 Rodriguez v. Bowen, 865 F.2d 739, 746 (6th Cir. 1989).
and for that reason, we no longer accept it as the sole, or even predominant, method of pricing legal services. In fact, hourly billing pushes economic incentives in the wrong direction -- weakening rather than strengthening the bonds between performance and pay. . . . Productivity is better measured by results.”

Secondly, hourly billing undermines any incentive towards efficiency. As noted by a Task Force appointed in the Third Circuit, an hourly billing system:

“… encourages lawyers to expend excessive hours, and, in the case of attorneys presenting fee petitions, engage in duplicative and unjustified work, inflate their "normal" billing rate, and include fictitious hours or hours already billed on other matters, perhaps in the hope of offsetting any hours the court may disallow.”

Furthermore, an hourly billing system “may unduly burden judges and give lawyers incentives to run up hours unnecessarily, ... lead[ing] to overcompensation or later litigation over fee padding.”

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Part VII  Germany

A.  Introduction

The system of legal costs in Germany was governed by the Federal Schedule of Fees for Attorneys, the Bundesrechtsanwalts-Gebührenordnung, known as “BRAGO”. This essentially determined fixed fees or scales of fees for different legal services and permitted lawyers to charge several different sets of fees to a client for the different services rendered. This applied whether the legal services concerned court proceedings or out-of-court matters. BRAGO was replaced in July 2004 by a new law, the Rechtsanwaltsvergütungsgesetz known as the “RVG” which essentially liberalised fees for legal services that did not involve court proceedings. Where the legal services are provided in connection with litigation, scales of fees and fixed fees remain.

B.  “BRAGO” system

(i)  Fixed fees

The type of fees fixed by BRAGO were fixed fees or fees within a fixed scale. Where there is a scale in operation, the lawyer can exercise his discretion in determining the amount of his legal costs within that range. Lawyers are subject to the obligation to act equitably in this regard.

The legal costs payable to a lawyer depended on two factors. First, the value of the claim was taken into account. Depending on the value of the matter, a specific fee unit was established by BRAGO. This was referred to as “one fee” (“eine Gebühr”). The second factor taken into account was the nature of the legal work done. This was sub-divided into two further broad categories, namely oral or written advice provided between the lawyer and the client; and representation of the client’s interests vis-à-vis third parties. These categories comprised the following:

(a) Advice; consultations with the clients and expertise
For oral or written advice the attorney receives a fee within the range of 1/10 or 10/10 of a fee-unit. For example, if the lawyer’s activity is limited to giving initial advice, the maximum legal cost was €180.

In normal circumstances a so-called average fee is applicable (5,5/10 of the fee-unit). If, however, a written opinion, including facts and analysis, and conclusions, is requested from the attorney, higher costs may arise depending on the extent and the difficulty of the legal work.

(b) Representing the interests of the client
If the attorney is engaged to represent the interests of a client vis-à-vis a third party, different rules apply depending on whether or not the matter involves litigation.
(i) If the work does not involve litigation, the following costs apply:

- a general fee for out-of-court work (Geschäftsgebühr) in the range of 5/10 to 10/10 of a fee-unit for preparing the matter and consulting with the client;
- a fee for out-of-court negotiations (Besprechungsgebühr) in the range of 5/10 to 10/10 of a fee-unit if the attorney discusses the substance of the matter with the opponent or a third party. This fee also applies if the matter involves assistance in drafting partnership agreements or articles of incorporation;
- a fee for evidentiary proceeding (Beweisgebühr) in the range of 5/10 to 10/10 of a fee-unit if the attorney participates in a taking of evidence in accordance with the order of a court or other public authority; and
- a settlement fee (Vergleichsgebühr) of 15/10 of a fee-unit if the attorney assists in a settlement of a disputed matter.

If a disputed matter which was handled out of court is subsequently litigated, the general fee for out-of-court work is credited against the general fee for court proceedings.

(ii) If the legal work does involve court proceedings, the lawyer usually receives between one and four complete fee units for the first instance according to the value of the matter which is fixed by the court. The categories of work that can attract legal costs are as follows:

- a 10/10 general fee for court proceedings (Prozeßgebühr) arises upon submitting a claim or defence to the court. It also covers all subsequent written submissions to the court during the proceedings;
- a 10/10 hearing or discussion fee can be charged (Verhandlungs- oder Erörterungsgebühr) when a controversial motion is filed in a hearing or when the judicial situation or the position of the case is discussed in court;
- a 10/10 fee can be charged for evidentiary proceedings (Beweisgebühr) when the court and the lawyer participate in the taking of evidence in the course of the litigation; and
- a 10/10 settlement fee (Vergleichsgebühr) arises when the litigation is settled with the assistance of the attorney.

These are the costs that are chargeable at all instances other than in appellate proceedings, in which the fee is 13/10 instead of 10/10. In case of an appeal before the court of last resort the fee may amount to 20/10 if the parties can only be represented by a lawyer admitted to the Federal High Court of Justice (Bundesgerichtshof). In addition, if the attorney is instructed to issue the execution of an enforceable instrument (such as a judgement or settlement), he is entitled to a further 3/10 of the value of the matter. A final way in which a lawyer’s legal costs may be increased under BRAGO is that, if the attorney represents more than one party in the same matter the general fee for court proceedings or for out-of-court work is increased for each additional party by 3/10 of a fee-unit up to a maximum of 30/10 of a fee-unit.

353 The Gesetz zur Modernisierung des Kostenrechts came into effect on July 1, 2004, and provide that attorneys may no longer charge an extra fee for introducing evidence into proceedings. This fee will be offset by a slight increase in the basic fee.
BRAGO also stipulated certain fixed costs for legal services such as debt collection proceedings, compulsory executions, bankruptcies, etc.

(ii) **Allocation of costs**

The German Code of Civil Procedure (Zivilprozeßordnung) provides that the ‘loser pays all’. The party who loses the lawsuit therefore has to pay all costs. This is calculated according to the proportion of the win or the loss. If the plaintiff wins the action entirely, then the defendant must pay his own costs, the plaintiff’s costs, disbursements, the costs of witnesses and experts and all of the court fees. If, on the other hand, the plaintiff is partially victorious, the burden of the costs and fees is allocated accordingly. For example, if the plaintiff is awarded 50% of the amount sought, the costs and fees are divided accordingly and each of the plaintiff and defendant will bear half the total legal costs and half of the court fees. The same rules of allocation of costs apply in respect of settlements.

(iii) **Expenses or disbursements**

In addition to the legal costs provided for by BRAGO, lawyers also received a fixed standard allowance of 15% of the fee value, up to a specified maximum limit of €20, for his expenses and disbursements such as postage, telephone and telex costs. These expenses can be billed based on actual cost or at a flat rate. A lawyer may also charge fees for extra photocopies and travel expenses according to the statutory amounts.

(iv) **Bill of costs**

Lawyers are obliged to submit detailed, verifiable, written bills. The amount of the final bill is determined by adding the various fee-units which arise plus expenses and the obligatory German value added tax of 16%.

(v) **Fee agreements**

Under the German system, lawyers were obliged to inform prospective clients of the expected costs of granting the retainer. This was generally determined by the scales set out in BRAGO. However, where the legal services did not relate to litigation, lawyers had the additional option of entering into agreements with their clients regarding legal costs, fixing costs different to the scales set out in BRAGO. They were permitted to fix costs above or below the scales set out in BRAGO. Such agreements had to be in writing. This was not permitted in respect of litigation costs. Lawyers therefore could, and increasingly did, form contracts for payment of hourly rates for legal services provided outside of court proceedings. It should be noted that German law prohibited agreements on contingency fees.

Where an hourly rate was agreed, lawyers typically used time sheets to record, in divisions of 10 minutes, the lawyer’s activity and any expenses incurred. The client

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354 § 3 BRAGO.
would receive this breakdown of services provided, together with the invoice for the legal services.

The alternative means of invoicing that were employed by lawyers in Germany, in respect of out-of-court legal activities, included the following:

- Fixed hourly fee, plus expenses and VAT;
- Fixed hourly fee, with estimate of number of hours to be spent, any excess of which would have to be notified to the client in advance;
- Fixed fee per month (or other defined time frame) based on lower hourly rate for estimated number of hours work required for such time period, and hours in excess of this number of hours being billed at the regular hourly rate; and
- Fixed fee for a fixed period of time (the more hours are expended, the more favourable the hourly rate becomes).

C. Amended cost rules

On the 1st July, 2004, the Rechtsanwaltsvergütungsgesetz, (“RVG”) was introduced to regulate the remuneration of lawyers.

(i) Agreements

The RVG contains statutory scales of fees that can be charged for legal services. It allows lawyers the option of charging negotiated legal fees. However, the negotiated fee cannot be lower than the minimum statutory fee. If a lawyer and client wish to use negotiated, rather than statutory fees, the rules of the RVG and the Bundesrechtsanwaltsordnung, the Federal Lawyers’ Act (“BRAO”) have to be complied with. Section 4 of the RVG contains certain formal requirements that apply if fees higher than the statutory scale of fees, are being negotiated.

(ii) Fixed scale of costs

The RVG contains an annex which lists individual services that may be provided by a lawyer and the rate applicable to each (the Vergütungsverzeichnis, VV). There are several different types of fees in the RVG. There can be fixed fees or fees within a fixed range. Fees within a fixed range may depend on the value in dispute. The level of these fees are set out in a fee scale in an annex to the RVG and are called Satzrahmengebühren. Alternatively, a minimum and a maximum amount may be prescribed and these are referred to as Betragsrahmengebühren.

Where the scale of fees depends on the value of the claim, the lawyer must determine in his own discretion and in an equitable manner, the appropriate fee in each individual case within this prescribed fee range. In the exercise of this discretion, he must take into account all the circumstances of the case, in particular the scope and difficulty of the legal work, the importance of the matter and the income and financial
In addition, a lawyer’s increased risk of liability may be taken into consideration.

(iii) Non-litigation legal services

Where the legal services do not involve court proceedings, the fees were completely liberalised since the 1st July, 2004. The RVG introduced a provision permitting lawyers to enter into agreements regarding such fees. If no agreement is formed, fees will be calculated on the basis of civil law. By way of example, if the client is a consumer and there is no fee agreement, the lawyer’s fee for advice and legal expertise, not involving court proceedings, must not exceed €250. The fee for the provision of initial legal advice to a consumer in such circumstances must be no higher than €190.

For non-litigation related legal services, the RVG does set a fee range for a general fee (Geschäftsgebühr). This scale is 0.5 to 2.5 of the fee scale. However, the RVG specifically states that a lawyer can only charge a fee that is higher than 1.3 if his legal work was extensive or difficult. The fee for a settlement in an out-of-court legal matter is 1.5. Settlement consists, for example, of the signing of a contract with the assistance of a lawyer, ending the dispute or uncertainty of the parties regarding a legal relationship.

(iv) Litigation-related legal services

There are two types of legal fees for litigation-related legal services. There is a fee for proceedings (Verfahrensgebühr) and a fee for the court hearings and meetings with the lawyer of the opposing party (Termingeschäft). The general fee in court proceedings is 1.3, the Termingeschäft is 1.2. If the parties reach a settlement after proceedings have been initiated, the settlement fee is an additional 1.0.

(v) Expenses

The rules regarding a lawyer’s expenses are set out in Part 7 of the annex to the RVG. With regard to expenses, it is also possible for lawyers and clients to enter into agreements instead of, or in addition to, the statutory provisions. It is considered to be generally advisable to form such agreements where the expenses are expected to be particularly high.

(vi) Allocation of costs

The rules as to allocation of costs remain unchanged. The successful party can accordingly recover costs from the unsuccessful party, in proportion to the extent of

355 § 14 (1) RVG.
356 § 612 BGB.
357 Number 2400 et seq. VV RVG.
358 Number 1000 et seq. VV RVG.
359 Number 1300 et seq. VV RVG.
the success. It should be recalled that legal costs consist of court fees and disbursements, on the one hand, and out-of-court costs, on the other. The out-of-court costs consist of lawyers’ fees and disbursements and the parties’ other costs. Court fees and disbursements are generally recoverable. As regards the lawyers’ fees, the unsuccessful party is only liable to pay the opposing lawyer’s statutory fees as set by the RVG and not any higher level of fees, which the opponent may have agreed to pay to his lawyer. The costs that can be recovered are those costs which were necessary for bringing or defending an action and these to be kept as low as possible.