

# Regulation 89 – Cost Reports

## Policy

Version 1

April 2014

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## Information about this policy

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| Policy Statement  | <p>The Legal Services Commissioner is committed to using the functions and powers provided under the Act for the benefit of users of legal services, the legal profession and the public generally. Section s 443(1)(b) and 444 of the Act permits the Commissioner to engage a suitably qualified person to report on the reasonableness of costs charged by a law practice. Regulation 89 provides that a law practice may pay the cost of that report in certain circumstances.</p> |
| Purpose           | <p>The purpose of this document is to set out the factors which the Legal Services Commissioner will take into account when deciding:</p> <ul style="list-style-type: none"><li>(a) whether to engage a person to report on the reasonableness of fees charged.</li><li>(b) when to require a law practice to pay the costs of the cost assessment/report.</li></ul>   |
| Direct queries to | <p>Director of Investigations<br/>Manager - Compliance</p>   |
| Date Issued       | <p>11 April 2014</p>   |
| Date Reviewed     |  |
| Next Review Date  | <p>11 April 2015</p>   |

## 1. Definitions

**Act** means the *Legal Profession Act 2007*.

**Commissioner** means the Legal Services Commissioner.

**Lawyer** means an Australian Lawyer as defined by the Act.

**Report** means a report obtained pursuant to either sections 443(1)(b) or 444 of the Act.

## 2. Legislation

Section 443(1)(b) of the Act provides that the Commissioner may:

*(b) engage a person, whom the entity considers is qualified because the person has the necessary expertise or experience, to report on the reasonableness of an Australian legal practitioner's bill of costs.*

Section 444 provides:

*For the purpose of **investigating a complaint**, the entity carrying out an investigation as mentioned in section 435 or 436 may refer a matter to a person, whom the entity considers is qualified because the person has the necessary expertise or experience, to assess costs charged or claimed by a law practice.*

Section 445 then provides:

*A regulation may provide for the way in which the cost of an assessment under section 443 or 444 is to be met, including requiring an amount to be paid before the assessment or recovering the amount of the assessment as a debt.*

That regulation is regulation 89 which provides:

*89 Covering cost of assessment under s 443 or 444 of the Act*

*(1) This section has effect for section 445 of the Act.*

*(2) The commissioner may, by written notice to a complainant, require the complainant—*

*(a) to pay an amount to the commissioner, before a costs assessment is undertaken, to cover the cost of the costs, assessor; or*

*(b) to agree, before a costs assessment is undertaken, to pay the commissioner the cost of the costs assessor if the result of the assessment is that the costs charged or claimed by the relevant law practice are not to be reduced or are not to be reduced by at least 15%.*

*(3) The commissioner may, by written notice to a law practice, require it to pay the cost of a costs assessor if the result of the cost assessment is that the costs charged or claimed by the law practice are to be reduced by at least 15%.*

### 3. When will we seek a report

The Commissioner has a discretion to obtain a report and we must necessarily be selective in when we use this power. The factors which the Commissioner will take into account when considering whether or not to obtain a report include:

- (i) Whether the information received by the Commission raises a reasonable belief that client or party has been charged excessive fees;
- (ii) Whether or not there is a reasonable belief that the amount to be assessed will be greater than the 15% threshold.
- (iii) The likely cost of the assessment and how that may impact on resources;
- (iv) The seriousness of the suspected conduct;
- (v) Whether the information suggests inappropriate billing practices are systemic within the firm;
- (vi) Whether the cost assessment process provided for in Division 7 of Chapter 3 of the Act is the most appropriate means to resolve the dispute;
- (vii) Whether there is a public interest in obtaining a report;
- (viii) Whether the issue the subject of the investigation satisfies the Commissioner's regulatory priorities;
- (ix) The nature of the suspected conduct including whether or not such conduct is widespread in the legal profession;
- (x) Whether the law practice has a relevant complaint history;
- (xi) Whether the matter concerns untested issues regarding the legal costs charged by the profession;
- (xii) Has the firm refused to negotiate an outcome (But even then we might still want to proceed given size of overcharge or if it suggests systematic issues).

## 4. When will we seek payment

If the amount billed is reduced by more than 15% on assessment, the report should be sent to the principal of the law practice with an invitation to make submissions regarding the application of regulation 89. It is important that this be considered carefully to avoid any unfairness to practitioners arising from the absence of any appeal process under the Act.

When deciding whether or not to demand payment from a law practice, the Commissioner will take into account a number of factors including:

- (i) Any submissions received from the law practice regarding the report and the application of regulation 89;
- (ii) The cost of the assessment;
- (iii) Whether and how much over the 15% threshold the assessment was (eg is there a margin for error in the report);
- (iv) The seriousness of any overcharging;
- (v) Whether the report suggests inappropriate billing practices are systemic within the firm;
- (vi) Whether the public interest supports seeking payment;
- (vii) The level of cooperation shown by the respondent and/or law practice to the investigation;
- (viii) The likelihood of disciplinary proceedings arising from the report and investigation. If the matter is likely to proceed to a disciplinary hearing, the cost of the report should always be sought at the conclusion of the matter.

| Version | Notes                       | Review date |
|---------|-----------------------------|-------------|
| 1       | First version 11 April 2014 | N/A         |
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