

27 August 2021

The Hon Peter Quinlan
Chief Justice of Western Australia
Chief Justice's Chambers
Supreme Court of Western Australia

By email: chief.justice.chambers@justice.wa.gov.au

Dear Chief Justice

PROVISIONAL ASSESSMENTS

I am writing to raise the Law Society's concerns regarding the current processes adopted by Taxing Officers in relation to provisional assessments pursuant to part 4.7.2 of the Supreme Court of WA's Consolidated Practice Directions attached ("CPD 4.7.2").

It appears that recently there has been a change in approach to Provisional Assessments by some Taxing Officers compared to the previous process as outlined below. At the time of issuing a notice for a provisional assessment, some Taxing Officers have been making directions requiring the parties to undertake detailed and time-consuming tasks, similar to those tasks that would be required for a full assessment hearing. For example, the Society is aware of directions having been issued requiring the parties to:

1. Cross reference each item in the accounts to the file. In some cases, this task can take days, or in substantive matters, weeks;
2. Draft similar documents to objections and replies;
3. Draft submissions relating to the costs.

Directions from the Taxing Officer that result in significant work for the solicitors is contrary the Purpose as it increases, rather than reduces, the costs for the parties. Further, if the Provisional Assessment is ultimately objected to by one of the parties, the documents drafted and provided to the Taxing Officer for the purposes of the Provisional Assessment can no longer be used or referred to in the ultimate assessment taxation hearing (before the substituted Taxing Officer).

In light of the above, the Law Society is concerned that directions requiring the parties to undertake costly and time-consuming tasks could very well lead to an increase in assessment hearings in the Court, as the parties will have already incurred a substantial amount of costs in the Provisional Assessment, and there is in effect 'nothing to lose' in objecting to the Provisional Assessment and proceeding to the assessment hearing, before a different Taxing Officer.

Accordingly, this could actively lead to a decrease in the resolution of costs issues at the provisional assessment stage and an increase in costs assessment hearings in the future, which is costly for litigants and burdensome for the Court.

Purpose of the Provisional Assessment Process

Provisional assessments were introduced to avoid the costly and time-consuming process of proceeding to an assessment hearing. Historically, costs hearings have been considered as being at risk of becoming 'satellite' or 'parasitic litigation',¹ with the parties incurring substantial costs and burdening the public purse in lengthy assessment hearings which were described as far back as 1959²

¹ *Heartlink Ltd v Jones as liquidator of HL Diagnostics Pty Ltd* (in liq) [2007] WASC 254 (S) at [20]

² *Cruickshank v Producers Market Cooperative* [1960] WAR 184 at 194

as an 'uneconomic, troublesome and expensive process...which wastes so much of the lawyers' time, which is virtually unproductive, and which is ultimately paid by the litigant". This history of avoiding unnecessary costs and delays is also noted in the 'Background' note at clauses 1 and 2 of the CPD which describes the purpose of the process ("the Purpose") as follows:

*"1. A taxing officer may, prior to a bill of costs being listed for assessment, make a provisional assessment of the amount at which the bill should be allowed. **This procedure is intended to reduce the number of bills that proceed to assessment and result in a saving of costs for parties.** The procedure operates in the manner set out below.*

2. This procedure applies principally to party and party bills drawn pursuant to the scale. There is no reason, however, why it cannot also be applied, at the sole discretion of the taxing officer, to party and party bills drawn on a legal practice and client basis or on an indemnity basis and to legal practice and client bills drawn pursuant to the Legal Profession Act 2008 (WA)."

Historical Approach to Provisional Assessments

In the experience of Law Society members, Taxing Officers have historically adopted a 'global approach' towards Provisional Assessments. In party and party taxations, regard was had to the court documents file held by the Court, in addition to the claims within the Bill of Costs. Conversely, in legal practice and client *Legal Profession Act* (LPA) applications, provisional assessments have historically been undertaken having regard to the relevant law practice's tax invoices, the costs agreement and often, where requested by the Taxing Officer, the law practice's file. As noted from CPD 4.7.2, no additional material is required for the purposes of a Provisional Assessment unless the Taxing Officer specifically requests it.

Furthermore, historically any additional document requests were rarely made, however for solicitor and client LPA assessments, the file was often volunteered by the law practice for non-litigious matters where there was no court file. In those cases, Taxing Officers would formalise the request for the file.

The benefit of the historical approach towards Provisional Assessments is that it fulfills the Purpose in that it provides an indication to the parties of the likely assessment amount without requiring the parties to incur substantial legal costs. Following the issue of the Provisional Assessment, the parties must then undertake a commercial risk assessment, as the parties will then, if objecting, most likely incur substantial legal costs in proceeding to an assessment hearing (if the confidential conference also fails).

Request

The Law Society respectfully requests that the Court consider these matters, and consider a global approach to Provisional Assessments, consistent with the approach that until recently was historically undertaken. Such an approach is consistent with the Purpose, is beneficial in promoting settlements between the parties, and has the effect of easing any pressures on the Court and the public purse.

The Law Society and representatives from the Law Society Costs Committee would be happy to discuss these concerns with you further if it was thought a meeting would be useful.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



Jocelyne Boujos
President