



New Costs Procedure in the Federal Court - Important Changes for Insolvency Practitioners

Date : January 11, 2017

By Bonnie McMahon a Solicitor of Matthews Folbigg, in our Insolvency, Restructuring and Debt Recovery Group

On 25 October 2016 the Federal Court of Australia ("**the Court**") released a new practice note relating to costs, entitled the "Costs Practice Note" ("**the Practice Note**"). It is important for all insolvency and legal practitioners to be aware of this Practice Note, as it will be the main guide for Federal Court judges and registrars when they are considering costs related issues.

The Practice Note makes two things very clear:

- Firstly that taxation of costs will only be used as a last-resort, in exceptional cases; and
- Secondly that the Court's preference will be to make a lump-sum costs order, wherever it is practicable and appropriate to do so.

Lump-sum Costs Order Procedure

If parties wish to utilise the lump-sum costs order procedure, they are expected to notify the court of this as soon as possible. Parties do need to need to file a formal application for this, unless they are requested to do so by a judge. Parties can argue for or against the use of a lump-sum costs order, although it will ultimately be at the discretion of the judge, as to whether this order is utilised.

A party or non-party who seeks a costs order in their favour, the "Costs Applicant", can file a Costs Summary in support of their lump-sum claim. The Costs Summary will essentially be an affidavit explaining to the Court the basis for the lump-sum amount claimed and detailing any factors that the Court should consider, when deciding to make the lump-sum costs order sought by the Costs Applicant. A party or non-party potentially liable to pay costs, the "Costs Respondent", will be able to file an affidavit in reply to the Costs Applicant's Costs Summary, this will be known as a "Costs Response".

In most cases, the costs hearing will take place within 6 weeks after the Court determines who is entitled to costs. In short and simple cases, the costs hearing will take place during the closing submissions at the final hearing or as soon as possible thereafter.

But what about a Bill of Costs?

The Court will still require the preparation of a bill of costs in certain matters, although this will be



much less frequent than in the past. The Court will still allow the filing of short form bill of costs in applications to wind up a corporation and creditor's petitions. Long form bill of costs are likely to become rarely used, with the Court stating in the Practice Note that the process "may result in a lengthier and more costly process than the lump-sum process."

If a long form bill of costs is filed the matter will be allocated to registrar to conduct an estimate, which will be made in the absence of the parties. If the amount estimated by the registrar is objected to, the parties are encouraged to resolve the dispute by way of a "confidential conference", before the court will allow any taxation process to take place.

Fard v Secretary, Department of Immigration and Border Protection [2016] FCAFC 155

The recent Full Court decision of *Fard v Secretary, Department of Immigration and Border Protection* [2016] FCAFC 155 ("**Fard**"), is a useful example as to how the Court may apply the Practice Note in future cases. Prior to the commencement of the appeal in *Fard*, the appellant had paid \$15,000 into the Court as security for the respondent's costs ("**the Department**"), on the basis of an estimate provided by the Department as to their likely costs. At the end of the hearing, the Department sought to have their costs taxed, as they had incurred additional expenses since the appellant had paid the \$15,000 into the Court. The Department did not provide the Court with any evidence to support their claim. The Court followed the Practice Note and refused to allow a taxation of the Department's costs, noting that:

"Taxation of the Department's costs would require the parties to consume additional time and incur additional expenditure, in prolongation of this already protracted litigation. We do not consider that this approach would promote the objectives of efficiency and cost-saving stipulated in s 37M of the Federal Court Act (cf Chen v Monash University (No 2) [2016] FCAFC 93 at [19]).

The appropriate order is that the costs of the respondent be paid by way of a lump sum fixed in the amount already paid by the appellant as security" (at [47]-[48]).

It is clear from the decision in *Fard* that the Court will follow the Practice Note and make an order for lump sum costs, unless there is clear evidence as to why this should not occur.

GST

The Practice Note also provides parties with some useful clarification regarding whether GST should be claimed, when applying for a costs order. If a party is entitled to claim input tax credits, then costs and disbursements should be claimed in accordance with Schedule 3 of the *Federal Court Rules 2011* (Cth) ("**the Scale**") and exclusive of GST. If a party is not entitled to claim input tax credits, then disbursements and costs recoverable in accordance with Scale item 1.1, should be claimed inclusive of GST. Parties must disclose whether they are registered for GST purposes and entitled to claim input tax credits, in their Costs Summary.



What will be the effect of all these changes?

By issuing this Practice Note, it appears the Court is seeking to make the process of quantifying costs recoverable by a party, quicker, cheaper and easier. Whilst it is not yet clear whether the Practice Note will achieve these goals, it is clear that parties will need to ensure they are aware of the lump-sum costs procedure in the Practice Note, in order to ensure that they recover the highest amount possible under a lump-sum costs order.

Read the Costs Practice Note [here](#).

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact Bonnie McMahon at bonniem@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au.