



Occupational Division Guideline August 2017

Costs

What does this Guideline explain?

1. This Guideline explains:
 - a) Who pays for the costs of running a case in the Occupational Division
 - b) Who can ask for costs
 - c) Who can be ordered to pay someone else's costs
 - d) What costs can a party ask for
 - e) When can the Tribunal order someone to pay a party's costs
 - f) How does the Tribunal work out the amount of costs if it decides to make a costs order
 - g) How to ask for costs
 - h) When to ask for costs
 - i) What the Tribunal does when it gets a costs application.

Definitions

2. Definitions that explain words or concepts used in this Guideline are at the back of the Guideline.

Who pays for the costs of running a case in the Occupational Division?

3. The primary rule under s 60(1) of the Act is that each party pays their own costs. If the primary rule applies, the Tribunal will not order a person to pay someone else's costs unless there are special circumstances.
4. In this Division, because of special provisions in a Schedule to the Act (Schedule 5) or in other acts, the Tribunal can order one party pay another party's costs. A summary of these provisions is also at the back of this Guideline. Reference should be made to the relevant legislation.

Who can ask for costs?

5. If the Tribunal can make an order for costs, any party may ask for costs.

Who can be ordered to pay someone else's costs?

6. If the Tribunal can make an order for costs it may order that:
 - a) another party pays costs

- b) party joined to the proceedings pays costs.

What costs can a party ask for?

- 7. A party can ask for any of these costs:
 - a) the fees charged by the lawyer for preparing and/or running their case
 - b) the out of pocket 'disbursements' of their lawyer
 - c) The out of pocket 'disbursements' of a self-represented party.
- 8. A party *cannot* ask for any of the following costs:
 - a) their own travelling costs
 - b) lost earning of a self-represented person in preparing and running their case.

When can the Tribunal order someone else to pay a party's costs?

- 9. If the primary rule applies the Tribunal can order one party to pay the other party's costs only if it finds 'special circumstances'. The Tribunal is guided by the matters in section 60(3) in the Act in determining whether or not there are special circumstances.
- 10. Section 60(3) sets out the types of 'special circumstances' which the Tribunal can consider to decide if a party should pay another party's costs. They are:
 - a) a party has conducted their case in a way that unnecessarily disadvantages another party;
 - b) a party has been responsible for unreasonably taking too long to complete the case;
 - c) the relative strength of a party's case or whether the case was hopeless;
 - d) the nature and complexity of the case;
 - e) a party's case was frivolous, vexatious or misconceived;
 - f) a party has not cooperated with the Tribunal in providing a just, quick and cheap resolution of the real issues in dispute;
 - g) a party has not complied with Tribunal orders or directions;
 - h) any other matter the Tribunal thinks is relevant.
- 11. Section 60 of the Act applies to matters under the:
 - a) *Aboriginal Land Rights Act 1983*
 - b) *Architects Act 2003*
 - c) *Building Professionals Act 2005*
 - d) *Local Government Act 1993*
 - e) *Surveying and Spatial Information Act 2002*
 - f) *Commercial Agents and Private Inquiry Agents Act 2004*
 - g) *Passenger Transport Act 1990*
 - h) *Security Industry Act 1997*
 - i) *Tow Truck Industry Act 1998* and

j) *Wool, Hide and Skin Dealers Act 2004.*

12. The Tribunal *must* make a costs order if it finds a legal practitioner guilty of unsatisfactory professional conduct or professional misconduct, unless it finds 'exceptional circumstances'. The Tribunal *must* also make a costs order against a veterinarian if it affirms a disciplinary finding against a practitioner, finds a complaint proved, or not proved but finds the conduct sufficiently unacceptable to have warranted the making of a complaint.
13. The Tribunal *may* make a costs order if it determines a legal practitioner has not co-operated with an investigation into his/her conduct.
14. The Tribunal *may* make a costs order in disciplinary proceedings or an appeal brought under the *Health Practitioner Regulation National Law*. Costs are generally awarded to the successful party unless there are disqualifying circumstances.

How does the Tribunal work out the amount of costs if it decides to make a costs order?

15. If the Tribunal decides to make a costs order it may:
 - a) make an order for a fixed sum of money;
 - b) order that one party pay a fixed percentage of the other party's costs;
 - c) order that costs are to be paid by one party, but leave it to the parties to reach agreement on the actual sum. If the parties cannot reach agreement, the Tribunal can order that costs be assessed by a costs assessor, on a 'party and party' basis;
 - d) in exceptional circumstances make an order for 'indemnity costs'.

When to ask for costs?

16. Best practice is to make a costs application in the application to the Tribunal for interlocutory or final orders, or make an application orally or in writing prior to the conclusion of the hearing.
17. If no written or oral application for costs has been made before the conclusion of the proceedings, delay in making a costs application must be avoided. Although the Act (and other relevant legislation) does not set time limits, generally applications should be made in writing addressed to the Registrar, Occupational Division no later than 28 days after delivery of reasons for decision. A copy of the letter should be given to the other party or parties. Any further delay may be procedurally unfair and expensive for the parties and the Tribunal.

How to ask for costs?

18. When the relevant legislation permits an application for costs, that application should generally be included in the general application form when proceedings are commenced or in an application for interlocutory orders or an application for disciplinary findings and orders.
19. The costs application, whether made in writing or verbally at the hearing, should:
 - a) identify the person who is being asked to pay the costs
 - b) if the primary rule applies, set out the special circumstances that justify an order for costs

- c) identify the basis on which costs are sought such as party and party or indemnity
- d) if a fixed amount is claimed, include the actual amount of costs and provide documents such as bills, accounts, invoices and receipts.

What does the Tribunal do when it gets a costs application?

20. The Tribunal may:

- a) determine the costs application during the substantive hearing; or
- b) adjourn the costs application and list it for a separate hearing; or
- c) determine the application on the basis of the documents provided without having a hearing. That is called determining the application 'on the papers'.

21. The Tribunal may decide not to award costs and may dismiss the costs application.

What do some of the words in this Guideline mean?

- *Act: Civil and Administrative Tribunal Act 2013*
- **assessment of costs:** Assessment of costs is the way the precise amount of costs payable by one party to another party is calculated if the amount cannot be agreed. An assessment is conducted by a qualified costs assessor in accordance with the *Legal Profession Uniform Law Application Act 2014 (NSW)*.
- **Costs:** Costs are the monies charged by lawyers for their fees. Costs also include 'out of pocket' expenses (disbursements) such as Tribunal filing fees, photocopying and barrister's fees.
- **indemnity costs:** Costs that are actually incurred by one party. The Tribunal will only order indemnity costs in exceptional circumstances.
- **Party:** A person or entity involved in a particular case or joined to the proceedings under section 44 of the Act. The Tribunal calls the person or entity that brings an application 'the applicant' and the person or entity they seek orders against 'the respondent'.
- **party and party costs:** Costs that are reasonably incurred by one party and that are necessary to conduct the proceedings.
- **Registrar:** The Principal Registrar or any other person employed as a Registrar of the Tribunal
- **Rules:** Civil and Administrative Tribunal Rules 2014

This Guideline applies to:

Proceedings in the Occupational Division of the Tribunal.

Effective Date

1 August 2017

Notes

You must use the latest version of this Guideline. The latest version of this Guideline is on the [NCAT website](#).

The law about the information in this Guideline is mainly in:

- Section 60 of the *Civil and Administrative Tribunal Act 2013*
- Schedule 5 of the *Civil and Administrative Tribunal Act 2013*.

There is a copy of this Act on the [NSW Legislation website](#).

The Hon A/Judge Jennifer Boland

Deputy President

August 2017

Summary Schedule of costs provisions in the Occupational Division

Aboriginal Land Rights Act 1983

This Act gives the Tribunal power to declare vacant the office of a Board member of an Aboriginal Land Council. Neither the *Aboriginal Land Rights Act* or the Act have specific costs provisions for these applications. Section 60 of the Act applies.

Architects

Architects Act 2003

There is no provision in either the *Architects Act* or Schedule 5 of the Act dealing with costs of professional disciplinary matters. Section 60 of the Act applies.

Building - Accredited Certifiers

Building Professionals Act 2005

There is no provision in either the *Building Professionals Act* or the Act which deals with costs of proceedings involving Accredited Certifiers. The proceedings are by way of administrative review under the provisions of the *Administrative Decisions Review Act 1997*. That Act makes no provision as to costs. Section 60 of the CAT applies.

Health Professionals including medical practitioners

Health Practitioner Regulation National Law (the National Law)

The National law contains two specific provisions that provide the Tribunal may order costs against either party to proceedings (Section 175B and Schedule 5D Clause 13). The Tribunal may make an order for costs to be assessed under the *Legal Profession Uniform Law Application Law 2014* (NSW).

Legal Practitioners (Barristers and Solicitors)

Legal Profession Uniform Law Application Act 2014

Schedule 5 of the *Civil and Administrative Tribunal Act* cl 23 mandates that if the Tribunal finds a practitioner guilty of unsatisfactory professional conduct or professional misconduct, it must make an order for costs *unless* it finds exceptional circumstances

The Tribunal *may* make an order for costs if it finds certain facts proved such as failing to cooperate with the Council or the Legal Services Commissioner's investigation

The Tribunal may also make costs orders in respect of interlocutory proceedings before the conclusion of the proceedings

The Tribunal may order costs in a fixed sum or that costs be assessed.

Local Government Councillors

Local Government Act 1993

Neither the *Local Government Act* or Schedule 5 of the Act make any provision for costs of Tribunal proceedings. Therefore s 60 of the Act applies.

Veterinary Practitioners

Veterinary Practice Act

Schedule 5 of the Act provides that the Tribunal must order the payment of costs if it affirms a disciplinary finding against a practitioner, or if a complaint is proved, or not proved but the Tribunal finds the conduct sufficiently unacceptable to have warranted the making of a complaint.

Surveyors

Surveying and Spatial Information Act 2002

The *Surveying and Spatial Information Act 2002* and Schedule 5 of the Act do not make any provision for costs. Decisions before the Tribunal are for administrative review under the provisions of the *Administrative Decisions Review Act 1997*. There is no specific provision in that Act for costs. Therefore s 60 of the Act applies.

Registered valuers

The Valuers Act 2003

The *Valuers Act 2003* and Schedule 5 of the Act do not make any provision for costs. Decisions before the Tribunal are for administrative review under the provisions of the *Administrative Decisions Review Act 1997*. There are no specific provisions in that Act for costs. Therefore s 60 of the Act applies.

Various administrative review statutes

Legislation governs conduct proceedings in respect of the various occupations is included in the Occupational Division of the Tribunal. The relevant legislation is:

- *The Commercial Agents and Private Inquiry Agents Act 2004*
- *Conveyancers Licensing Act 2003, the Passenger Transport Act 1990*
- *the Security Industry Act 1997*
- *the Tow Truck Industry Act 1998 and*
- *the Wool Hide and Skin Dealers Act 2004.*

Each of the above statutes provides for review by the Tribunal under the *Administrative Decisions Review Act*. There are no costs provisions in the relevant legislation, or Schedule 5 of the Act, therefore s60 of the Act applies.