Assessment of body corporate recovery costs – "an intermediate test"?

Brendan Mark Pitman[1]

I Introduction

Bodies corporate have a duty to recover unpaid contributions from owners.[2] The legislative scheme allows a body corporate to recover unpaid contributions and the costs reasonably incurred by a body corporate in recovering this amount, as a debt.[3] How to properly assess the costs reasonably incurred under the body corporate regulation modules, and their interplay with the court rules, is an issue that courts (and practitioners) have grappled with for over a decade.

The focus of this paper is evaluating the principles applied by the courts when assessing costs reasonably incurred under body corporate regulation modules in the context of broader policy considerations. This paper considers the body corporate legislative scheme and court rules in terms of the incentives these create, and the powers vested in the courts regarding costs assessments. Leading cases will be examined to identify the principles applied by courts when assessing body corporate recovery costs and whether these principles are consistent with Parliament's intention.

It is suggested that the test to be applied for the assessment of body corporate recovery costs should not include investigation into the reasonableness of the amounts of costs or any consideration of the principle of proportionality.

II Legislative Scheme

An important question to be considered is whether the body corporate regulation modules have the effect of overriding the courts' usual discretion as to costs.[4]

A *Body Corporate Legislation*

The *Body Corporate and Community Management Act* 1997 (Qld) (**Act**) provides for the creation of bodies corporate. These bodies corporate administer and manage property collectively owned by owners of lots in a community titles scheme.[5] This is made possible by a mechanism of fixing amounts to be paid by owners and imposing consequences if those payments are not made.

The Act provides that the applicable regulation module can make financial arrangements for the levying of contributions, discounts and penalties relating to the payment of contributions, and the

---

[1] Associate (MBA Lawyers), LLB (Hons), BBusMan, GDLP, LLM (TC Beirne School of Law, University of Queensland, Student), Sessional Teaching Fellow (Bond University), Management Committee of Research and Policy House.

[2] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) ('*Standard Module*') s 145(2); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 143(2); *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) s 79(2); *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) s 104(2). In *Mount Saint John Industrial Park CTS 18632 v Superior Stairs & Joinery Pty Ltd* [2018] QCA 173, the Queensland Court of Appeal considered the effect of the provision requiring bodies corporate to commence proceedings within 2 years and 2 months of a contribution falling due and whether that provision had the effect of a limitation date. The Court decided that provision imposed a duty only. See also, Hayden Dunnett and Tristan Lockwood, 'An "outstanding contribution": Body Corporate for Mount Saint John Industrial Park Community Title Scheme 18632 v Superior Stairs and Joinery Pty Ltd' (August 2018) *Australian Property Law Bulletin* 102.

[3] The right to recover reasonable recovery costs also extends to costs reasonably incurred in recovering unpaid penalty interest that accrues on the unpaid contributions: *Standard Module* s 145(1).

[4] This question was impliedly observed by His Honour McGill QC DCJ in *Body Corporate for Sunseeker Apartments CTS 618 v Jasen* [2012] QDC 51, [25]. See further, *Owners of Strata Plan 36131 v Dimitriou* [2009] NSWCA 27.

[5] Explanatory Notes, Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld), 1-2; *Body Corporate and Community Management Act 1997* (Qld) ('*BC Act*') s 94(1).

recovery of unpaid contributions.[6] One of these regulation modules is the *Body Corporate and Community Management (Standard Module)* 2008 (Qld) (**Standard Module**).[7]

These financial arrangements are made in sections 141 to 145 of the Standard Module. Section 141 requires a body corporate to fix the amount of the contribution levied on owners and the date for when payment of the contribution is required. The amount of the contribution levied on owners must be proportionate to the contribution schedule lot entitlement attaching to the lot. Section 142 of the Standard Module requires the body corporate to give a notice to each owner at least thirty days before payment of the contribution is required stating, *inter alia,* the amount of the contribution and the date for payment of the contribution. It is the combined operation of sections 141 and 142 of the Standard Module that triggers the liability of the owner to pay the contribution.

Sections 143 and 144 of the Standard Module introduce a "carrot and stick" approach to incentivise owners to pay their contributions. A body corporate is empowered under section 143 of the Standard Module to fix a discount of no more than 20% of the contribution amount if a contribution is paid on time.[8] This "carrot" is not insignificant. A body corporate is also empowered by section 144 of the Standard Module to fix a penalty in the form of simple interest of no more than 2.5% for each month a contribution is unpaid (which equates to 30% per annum). This "stick" is also not insignificant, and continues to grow the longer a contribution remains unpaid.[9]

It appears the incentives created by this approach were not sufficiently inducing the desired behaviour of having timely payments by owners, so an additional "stick" was introduced regarding recovery costs.[10] Amendments were made in 2003 to the regulation modules that included imposing a duty on bodies corporate to commence recovery proceedings against owners within a specified time period and, importantly, empowered bodies corporate to recover costs reasonably incurred in recovering unpaid amounts as a debt.[11] The key provision amended to introduce the concept of recovering reasonable recovery costs into statute was section 97(1)(c) of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld) (which is identical to the current section 145 of the Standard Module).[12]

The ability to treat the reasonable recovery costs as a debt allows the amount to be summarily recovered as a fixed amount and avoids the need to prove an unliquidated claim in detail.[13] Curiously, the regulation modules do not state from whom the recovery costs may be recovered. This however may be due to the liability to pay the reasonable recovery costs being enforceable against multiple persons, including certain former lot owners, the current lot owner and mortgagees in possession.[14]

The reasonable recovery costs "stick" has created a practical burden for law practices that offer body corporate debt recovery services. Under the *Legal Profession Act 2007* (Qld) (**LPA**) third party payers

---

[6] *BC Act* s 150(2).

[7] The provisions contained in the Standard Module relevant to the recovery of unpaid contributions are identical in all other body corporate regulation modules. By operation of the *Statutory Instruments Act 1992* (Qld) the Standard Module expires 2019. The QUT Law Research Centre authored an Options Paper for *Body corporate governance issues: By-laws, debt recovery and scheme termination* (2017) proposing recommendations for reform of the body corporate regulation modules.

[8] For example, if an owner's annual contribution of $4,000.00 is payable by four $1,000.00 instalments, and that owner pays each instalment on time, that owner gains the benefit of an $800.00 discount on the amount of the contribution.

[9] The regulation modules acknowledges that a degree of flexibility needs to be built into the legislative scheme to account for varying circumstance, and so the body corporate has a discretion to reinstate the discount and/or waive the penalty interest under the regulation modules (see, for example, *Standard Module* s 145(6)).

[10] Explanatory Notes, Body Corporate and Community Management Legislation Amendment Regulation (No. 1) 2003, 65.

[11] *Westpac Banking Corporation v Body Corporate for the Wave CTS 36237* [2014] QCA 73.

[12] The *Building Units and Group Titles Act 1980* (Qld) was the predecessor to the BC Act and was silent on recovery costs. A mechanism was adopted by bodies corporate of including provision in the by-laws enabling the recovery of costs.

[13] *The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton & Ors* [2013] QCATA 55, [13] - [14].

[14] Standard Module s 145(3).

are granted certain rights, including to make a costs application for the assessment of the law practices' costs.[15] Section 301(1) of the LPA provides that, to be a third party payer, the payer must have an obligation to pay all or part of the legal costs for legal services provided. Section 145 of the Standard Module arguably puts an obligation on a lot owner to pay the reasonable recovery costs. This obligation is owed to the body corporate and not the law practice, as it is the body corporate that has the right to recover the reasonable recovery costs and not the law practice, making the lot owner a non-associated third party payer.[16] The combined effect of these provisions is that a lot owner is arguably a third party payer and is entitled to sufficient information to allow the third party payer to consider making a costs application.[17]

The totality of these body corporate debt recovery provisions appears to provide a favourable position for bodies corporate, which is not an unexpected response give the importance of contributions to the fulfilment of a body corporate's functions.[18]

B *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**)

The rights granted regarding reasonable recovery costs in the Act must, however, be reconciled with a court's general discretion as to costs and the two bases for the assessment of costs provided in the UCPR. Rule 680 of the UCPR has the effect of limiting the entitlement of a party to a proceeding to recover costs of that proceeding to the mechanisms under the UCPR or by an order of the court.

The two express bases for the assessment of costs of a proceeding under the UCPR are standard and indemnity costs.[19] While costs usually follow the event, a court has the discretion to order costs in whatever way the court considers fair, having regard to the circumstances of the case.[20] This discretion is subject to, for example, rules 360 and 361 of the UCPR which provide a statutory mechanism for the awarding of costs to a party based on offers of compromise made and the outcome of the litigation.[21]

The regulation of costs of a proceeding by statute has resulted in Parliament giving a wide discretion to the courts. This discretion allows the courts to control the costs of litigation and to allocate costs according to the circumstances of the case.[22] It is important to appreciate that the early common law courts gained the ability to award costs of a proceeding through the enactment of the *Judicature Act*. The narrow approach taken by courts on the question of costs since the *Judicature Act* was arguably a key consideration when making the scope of rules 680 and 681 of the UCPR so wide.

Balanced with this are the policy considerations for the introduction of the reasonable recovery costs provisions, namely to encourage bodies corporate to recover unpaid contributions. It is not common for an entity to be under a statutory duty to recover money, which will at times necessitate the litigation process. It is not surprising that if Parliament has, in effect, committed bodies corporate to a litigious process, that Parliament would not also provide a favourable mechanism to recover the costs of that litigation. This approach is supported by the often unstated feature of bodies corporate is that they cannot carry on a business.[23] This means that there is no profit component to the contributions levied on owners. Any amount not paid by an owner must be carried by all other owners in the body corporate.

On balance, if Parliament intended to override the courts' general discretion as to costs, it would have done so in clear language. No such language exists in the body corporate regulation modules. The historical context of the regulation of costs by courts favours this approach.

---

[15] *Legal Profession Act 2007* (Qld) s 335.
[16] Ibid s 301(3).
[17] Ibid s 335(7).
[18] Regulatory Impact Statement, Body Corporate and Community Management Regulation 2008 (Qld), 29.
[19] *Uniform Civil Procedure Rules 1999* (Qld)('*UCPR*') r 702 (standard costs) and r 703 (indemnity costs).
[20] UCPR r 681; Bernard Cairns, *Australian Civil Procedure* (Lawbook Co, 9th ed, 2011) 641.
[21] The Court's discretion is maintained in the phrase "unless the court orders otherwise".
[22] *Fordyce v Fordham* (2006) 67 NSWLR 497, 508-513.
[23] *BC Act* s 96.

This would appear to be consistent with the implied approach taken by the Queensland Court of Appeal in *Warren & Ors v Body Corporate for Buon Vista*.[24] The case commenced in the Magistrate Court, where an order was made for the defendant lot owner to pay the plaintiff body corporate costs on a "solicitor and own client"[25] basis pursuant to a by-law. An appeal of that decision was dismissed by the District Court and an amount of costs was awarded, which curiously was not pursuant to the by-law or commensurate with any assessment under the UCPR or body corporate regulation modules.

The Queensland Court of Appeal also dismissed an application to appeal the decision of the District Court, and in doing so, ordered that the costs be assessed. While not expressed in the written reasons, the Court of Appeal could only have made that order regarding costs of the appeal if it arrived at a position that the by-laws (noting at the time of the Court of Appeal decision the body corporate regulation modules had been amended to include the reasonable recovery costs provisions) did not have the effect of overriding the court's usual discretion regarding costs.

A question not directly considered by the District Court in *Body Corporate for Sunseeker Apartments CTS 618 v Jasen*[26] is whether the court has the power to order costs of a proceeding on a basis contained outside of the UCPR. The seminal case that is authority for the UCPR providing the exclusives bases for costs assessment is the Supreme Court case of *Bottoms v Reeser*.[27] In the *Bottoms* case, His Honour de Jersey CJ considered an order made regarding costs after the enactment of the UCPR which was expressed as "solicitor and own client" costs. After a careful consideration of English authorities, it was concluded that "solicitor and own client" costs was not a basis for assessment provided under the UCPR and that the order should be treated as awarding indemnity costs.

It is implicit in the District Court's formulation of "an intermediate test" that a court can order costs be assessed on a basis outside of the Rules, otherwise the "intermediate test" would be of no worth. How then is the decision of His Honour McGill QC DCJ of the District Court reconciled with that of His Honour de Jersey CJ of the Supreme Court?

Support for the court's power to award costs outside of the UCPR is found in rules 680 and 701 of the UCPR, and the later decision of Her Honour White J of the Supreme Court in *LF v RA (No 2)*.[28] Rule 680 of the UCPR provides that a party can only recover costs of a proceeding[29] from another party under the UCPR or by order of the court. The use of the word 'or' contemplates an order of the court regarding costs other than under the UCPR. Rule 701 of the UCPR has the effect of making Division 2 of the Rules (which contains provisions for the standard and indemnity basis of costs assessment) applicable to costs in a proceeding that are payable by one party to another 'under an Act'. The Act is included in the definition of an 'Act'.[30] A default position of assessing costs on the standard basis is established, unless otherwise ordered by the court,[31] and the court is given power to award indemnity costs.[32]

The pervading reference to an order of the courts coupled with the court's general discretion as to costs, leads to a reasonable interpretation that an order for costs may be made outside the UCPR. In the *LF v RA* case, Her Honour White J considered, among other things, the ability of the Supreme Court to make an order for costs under the *Property Law Act* 1974 (Qld) (**Property Act**). Her Honour White J observed that the Property Act outlined a different costs regime to that of the UCPR, but

---

[24] [2004] QCA 104.
[25] Often considered as referring to the indemnity basis. See *Sunseeker*, above n 4, [32].
[26] [2012] QDC 51.
[27] [2000] QSC 413. See also, Paul Garrett, 'Assessment of indemnity costs under Rule 704 of the Uniform Civil Procedure Rules' (August 2005) *Proctor* 17.
[28] [2006] QSC 072.
[29] Rule 701-704 refers to "costs in a proceeding" (emphasis added) but nothing is considered to turn on this different use of preposition.
[30] *Acts Interpretation Act* 1954 (Qld) s 6(1).
[31] *UCPR* r 702(1).
[32] Ibid r 703.

nevertheless considered that it was within the court's power to make costs order under that regime, notwithstanding Division 2 of the UCPR (or its then equivalent).[33]

The corollary to this is that, if the courts' usual discretion regarding costs is maintained, but bodies corporate have a statutory right to reasonable recovery costs, what purpose does section 145(1)(c) of the Standard Module serve? Magistrate Hay[34] considers there to be four advantages, namely that the test under the regulation modules is more generous than standard costs, a body corporate cannot rely on always being granted indemnity costs (which is more generous again than in the regulation modules), the court still maintains discretion to order the indemnity costs basis, and recovery costs is a broader concept than costs under the UCPR. A suggested fifth advantage is that placing a costs provision in the Act, particularly immediately following the sequence of financial arrangement provisions, has a practical effect of being broadcast to a larger audience through the various published guides in the body corporate industry.

III An Intermediate Test

A settled limitation of the costs recoverable by a body corporate are that the costs must be incurred to recover unpaid contributions and penalty interest. This is the first threshold. Any costs not incurred for this purpose immediately do not form part of the costs to be assessed.

The "intermediate test" for assessment of reasonable recovery costs formulated by His Honour McGill QC DCJ in the *Sunseeker* case is the same as the test to be applied for indemnity costs, save for one key difference regarding the onus of proof. That is, it is for a plaintiff body corporate to prove that the costs were reasonably incurred rather than for the defendant lot owner to prove that the costs were unreasonably incurred. The practical difference this creates was explained as:[35]

> "If the party claiming the costs has the onus of showing that they are reasonable, then such costs will not be recovered; but if the question is whether the costs are shown to be unreasonable, then such costs will be recovered." (emphasis added)

The central feature adopted from the test for indemnity costs is the interpretation of "costs reasonably incurred" as being costs "reasonably incurred and reasonable in amount". While this interpretation appears to be settled law,[36] it also appears to misplace the focus of the provisions in the regulation modules to something other than what Parliament intended.

A Reasonable in Amount?

In formulating the intermediate test, the District Court drew heavily from the reasons of the decision of the New South Wales Court of Appeal in *Dimitriou*.[37] The New South Wales equivalent of Queensland's section 145(1)(c) of the Standard Module stated:

> "An owners corporation (ie. body corporate) may recover as a debt a contribution not paid…together with any interest payable and the expenses of the owners corporation incurred in recovering those amounts." (emphasis added)

The first observable difference is the use of the word "expenses" instead of "costs". The term "expenses" was unanimously interpreted as extending to legal costs and disbursements incurred, which brings symmetry between the provisions of the respective States. More relevantly, the second observable difference is the omission of the word "reasonably" in the above provision as a qualifying word for the type of expenses incurred that may be recovered (ie. legal costs and disbursements). This

[33] *LF v RA (No 2)* [2006] QSC 072, [5] - [6].
[34] *Body Corporate for the Sunshine Towers v Keevers* [2019], File no 2438 of 2017 (Unreported). Copy available on request.
[35] *Sunseeker*, above n 4, [34].
[36] *Sunseeker* [43]; *Ramzy v Body Corporate for GC3 CTS 38396 & Anor* [2012] QDC 397, [28]; *Thompson v Body Corporate for Arila Lodge CTS* [2017] QDC 134, [27] – [29], [42].
[37] *Owners of Strata Plan 36131 v Dimitriou* [2009] NSWCA 27. See also, Allan Blank, 'Owners corporations seeking to recover legal costs' (October 2010) *Law Society Journal* 56.

may at first seem semantic, but arguably impacted the reasoning of the New South Wales Court of Appeal.

From the extracts of the Magistrate's decision included in the Supreme Court of New South Wales decision of *Dimitriou*,[38] no reference is made to the expenses incurred as being required to be reasonable in amount. The relevant provision was considered to allow the recovery of legal costs and disbursements that have been "properly and reasonably incurred".[39] This qualification was concluded not to be the result of any express Parliament intention (as no second reading speech existed) but rather an assumed intention that Parliament could not be considered as wishing a "patent injustice"[40] on a lot owner. The relevant provision, absent any qualifying phrase, could be literally interpreted as providing a full indemnity of the costs incurred by the body corporate, being greater than any bases for costs assessment currently available. It seems apparent that the Magistrate thought that by focusing the qualifier on the incurring of the costs, rather than the amount of the costs, was appropriate to achieve a result that fulfilled the purpose of the provision.

In *Dimitriou*,[41] the New South Wales Court of Appeal considered the proper measure for recovery of costs, under that State's applicable statute, by a body corporate. The unanimous decision of the Court is that "expenses incurred" is to be treated as "expenses reasonably incurred and of a reasonable amount". This however does not appear to be a result of any reasoned conclusion but rather an acceptance of the purported decision of the Magistrate at first instance. However, the Magistrate did not refer to expenses as being required to be "reasonable in amount".

This could be for at least three reasons. First, a desire to assimilate the test for body corporate recovery costs under the relevant act with that of the New South Wales test for party and party costs. Under section s76 of the *Legal Profession Uniform Law Application Act* 2014 (NSW) a costs assessor must determine what is a "fair and reasonable amount" of costs for the work performed when assessing ordered costs (ie. party and party costs). This provision is directed to cost assessors and seems to deliberately point cost assessors' attention to the amount of the costs rather than the reason the costs were incurred.

Second, a desire to bring an objective test to body corporate recovery costs and to address the Magistrate's "hope that…the parties…[agree] to a sum that will resolve all issues once and for all".[42] Third, without any limitation on the amount of the costs incurred, lot owners could be facing recovery claims for outlandish[43] amounts of costs, which would be more favourable than could be expected by any usual party to litigation. It is difficult to analyse the development of the limitation focussed at the amount of costs further in any meaningful way without there being expressed reasons of the Court for such a development.

What then of the Queensland body corporate regulation modules that do already contain an express qualifier, being costs "reasonably incurred"?

It is arguable that Parliament has already turned its mind to the issues of how costs ought to be limited and considered that a limitation directed at the work that generates the costs, rather than the amount of the costs, as being sufficient. On this approach, it would not be appropriate for the courts to interfere with this intention. It is open on the face of the Explanatory Note to conclude that if Parliament thought that it was a "significant issue [that] contributions can be in arrears for a number of years" and that "arrears…can cause severe financial hardship for [bodies] corporate",[44] Parliament also thought that a limitation on the amount that a body corporate may recover could contribute to the very financial hardship that the provision intended to address.

---

[38] *Dimitriou v Owners of Strata Plan 36131* [2008] NSWSC 116, [12] – [14].
[39] Ibid [13].
[40] Ibid [19].
[41] *Owners of Strata Plan 36131 v Dimitriou* [2009] NSWCA 27.
[42] Ibid [14].
[43] See *Bottoms v Reeser* [2000] QSC 413 regarding test for indemnity costs does not include "outlandish amounts".
[44] Explanatory Notes, above n 5, 65.

It is not surprising that Counsel for the Respondent in *Thompson v Body Corporate for Arila Lodge*[45] pressed for an interpretation that "reasonably incurred" does not require investigation as to whether costs are reasonable in amount.[46] The thrust of the District Court's rejection of this argument is that of assumed policy and hypothetical unjust eventualities.[47] This is not the preferred way for the law to develop, however unless a higher State court reconsiders these issues, the current state of the law is that the regulation modules require costs to be reasonably incurred and reasonable in amount.

B Proportionality

A common chord played by defendant lot owners facing proceedings by a body corporate is that the recovery costs claimed are not reasonable as they are disproportionate to the amount claimed. The important question is whether the principle of proportionality should have a voice when considering the reasonableness of the costs claimed by a body corporate under the regulation modules.

The Queensland legal music sheet is unsettled about whether proportionality is a relevant consideration for the assessment of the reasonableness of recovery costs. Proportionality is usually a reference to the quantum of a claim compared with the costs to be recovered.[48] The nature of the body corporate recovery costs is that the costs form part of the substantive claim rather than being contingent on the result of that claim. In this context, if proportionality is considered relevant it can only refer to the amount of the costs incurred in pursuing the unpaid contributions and penalty interest compared with the amount of the actual unpaid contributions and penalty interest.

The District Court in *Sunseeker* did not accept that the concept of proportionality existed in the law of costs in Queensland,[49] including in any assessment of costs under the regulation modules.[50] However, a contrary position was taken in *Thompson*, where the same Court applied principles of proportionality when assessing recovery costs under the regulation modules. In *Thompson* the District Court considered that the principle of proportionality was not irrelevant to the assessment of costs under the regulation modules.[51] The primary issue for determination in *Thompson* was whether the Magistrate misapplied the test in *Sunseeker* regarding the assessment of costs particularly in relation to the burden of proof borne by the body corporate. It is therefore arguable that any comments by the Court in *Thompson* regarding relevant considerations when assessing costs under the regulation modules are *obiter*.

In any event, the comments made by the District Court in *Thompson* regarding proportionality are not sound for four reasons. First, the District Court drew heavily on the Supreme Court decision of *Amos v Monsour Legal Costs Pty Ltd*.[52] In *Amos*, the Supreme Court was considering whether the concept of reasonableness when assessing costs on the indemnity basis involved considerations of proportionality. For the reasons discussed in *Sunseeker,* indemnity basis is a different approach to that under the body corporate regulation modules. Second, the reasons in *Amos* on the question of the applicability of the principle of proportionality are conflicting. That is, the District Court acknowledged that cases from other jurisdictions are of limited assistance to determine whether proportionality is a relevant consideration for assessing indemnity costs,[53] yet immediately concludes that an approach of introducing proportionality to the assessment of indemnity costs is supported by cases in alternate jurisdictions.

---

[45] [2017] QDC 134.
[46] Ibid [25]
[47] Ibid [26].
[48] Bret Walker SC, 'Proportionality and Cost-Shifting' (2004) 27(1) *University of New South Wales Law Journal* 214; Honourable Justice Paul Brereton, 'Costs – The Proportionality Principle', Paper delivered to the CLE Legal Conference (Sydney, New South Wales, 31 August 2007); Peter Rosier, 'A new order or same old, same old? 'Reasonable' and 'Proportionate' tricky concepts to enforce' (2016) 137 *New South Wales Proctor* 38.
[49] This is consistent with the District Court in *Smith v Lucht* [2014] QDC 302, [25].
[50] *Sunseeker* [45].
[51] *Thompson* [44].
[52] [2007] QCA 235.
[53] *Federal Court Rules 2011* r 1.31(2); *Civil Procedure Act 2005* (NSW) s 60.

Third, the requirement to consider proportionality was consequent on the need to consider the relevant court's scale of fees, not by any other aspect of the test for indemnity costs. This requirement is not present under the test for assessment of costs under the regulation modules. Fourth, a need to consider the Court's scale of fees arguably assists in assessing unreasonable or outlandish costs rather than to an exercise of comparing the amounts claimed with the costs incurred.

It is foreseeable that the application of the principle of proportionality would thwart the purpose for which the recovery costs provisions were enacted. Parliament's intention was to reduce the length of time in which contributions were in arrears by encouraging the pursuit of those arrears. The less time that contributions remain unpaid, the lower the quantum of the unpaid amounts. Subject to the decision to commence recovery being reasonable, any recovery costs incurred would likely be disproportionate to the amount of the claim. It is difficult to accept that Parliament would impose a statutory duty on bodies corporate to recover unpaid amounts and at the same time only allow the recovery of those costs that were proportionate to the unpaid amounts.

IV Conclusion

It is permissible for a Court to assess body corporate recovery costs on a basis other than under the UCPR. The current test to be applied when assessing costs under the body corporate regulation modules is contained in the District Court case of *Sunseeker*. This test includes a requirement that the costs be reasonably incurred and reasonable in amount, although the investigation into the amount of the costs has a limited policy or judicial basis. While the question of proportionality is presently open, the preferred approach when assessing recovery costs is to disregard any consideration of proportionality.