

A new costs regime in the Court of Appeal

by Colin Fife, Judge's Clerk at the Court of Appeal

The Court of Appeal (Civil) Amendment Rules (No 2) 2008 come into force on 1 July 2008. The rules introduce a new costs regime, closely modelled on the High Court costs rubric, but with only two categories of proceeding: standard appeals and complex appeals. The amendment introduces new rr 53 – 53J into the Court of Appeal (Civil) Rules 2005 and re-enacts the discretion of the Court of Appeal to make orders concerning costs and disbursements. The discretion will usually be guided by the principles set out in the new rr 53A – 53F and will closely correspond to the approach taken in the High Court. The general principle in the Court of Appeal, as in other civil proceedings, is that costs should follow the event, and the party who fails on an appeal should pay costs to the party who succeeds.

Current practice in the Court of Appeal is that a successful party is entitled to costs of \$6,000 per hearing day, with proportions thereof awarded for shorter hearings. The successful party is also entitled to “usual disbursements”, which includes disbursements as defined in r 48H of the High Court Rules and the reasonable travelling and accommodation expenses of counsel. Under the new costs regime, costs awards will reflect the complexity and significance of an appeal. Proceedings will be classified by the Court as being either “standard” (an appeal of average complexity requiring counsel of skill and experience considered average in the Court of Appeal) or “complex” (an appeal which because of its complexity or significance requires senior counsel): see the new r 53A(a) and (b).

Costs in the Court of Appeal will now be calculated by reference to an appropriate daily recovery rate, which is linked to the current rate prescribed by the High Court Rules. Standard appeals are classified as “category 2” proceedings and complex appeals as “category 3” proceedings for the purposes of the High Court Rules. For complex appeals the Court of Appeal may order an uplift of up to 50% on the category 3 daily rate if deemed appropriate. Once the appropriate daily recovery rate is determined, one must then calculate the time allocated for each step taken on the appeal. As in schedule 3 to the High Court Rules, the new Court of Appeal costs rules divide proceedings into steps and assign a time allocation for each day or part-day. For example, preparation of case on appeal is allocated as one day, while preparing for and attending a case management conference is 0.3 days.

The assessment of costs for a particular step is calculated by applying the appropriate time allocations (set out in the new schedule 2). There are two bands in the new Court of Appeal regime, not three as in the High Court. The time allocations for each step are listed in two bands according to the complexity of the particular step: band A, if a normal amount of time for the particular step would be reasonable in the case, or band B, if a comparatively large amount of time for the particular step is considered reasonable.

A costs award will be for an amount equal to the sum of each step in the proceeding at the appropriate daily rate, plus any reasonable disbursements. (See worked example in text

Example: a straightforward appeal as of right. Under the current regime, the costs award in the Court of Appeal would have been \$6,000. Under the new rules, the order would simply be “costs on a 1A basis” to indicate that it was a standard appeal (\$1,600 per day) and the reasonable time for each step was band A. The effect of such an order would be:

Step	Description	Days
7(a)	Commencement of appeal:	1.5
8	Prep of case on appeal:	1
9	Prep for hearing:	3
10	Appearances:	1
TOTAL		6.5 x \$1600 = \$10,400

box.) As in the High Court, the actual costs incurred by the party are not relevant to the determination of costs, save to the extent that any costs award should not exceed the actual costs incurred by the party seeking costs.

The Court of Appeal will continue to make costs awards as part of the substantive judgment. Other than in rare cases, the Court will not reserve

costs and await submissions, as often happens in the High Court. In light of this, counsel are reminded to include their submissions on costs (if any) as part of their substantive submissions: see r 41(1)(c).

Practitioners should also note the new r 53G, which effectively codifies current practice as to costs on leave applications. The rule sets out the applicable principles, including as to when such orders are made immediately and when they are reserved. Schedule 2 also provides time allocations for such applications.