



Companies Auditors
Disciplinary Board

PRACTICE NOTE 3

GUIDANCE AND PROCEDURES RELATING TO COSTS ORDERS

April 2020 Edition

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GLOSSARY

Expression	Description
<i>Defined terms appear in bold type throughout this practice note</i>	
AAT	Administrative Appeals Tribunal.
Administrative Matter	An Application to CADB with respect to an administrative complaint (see definition paragraph 4.5 of PN1).
Agreed fact	Any fact that the Applicant and Respondent agree is not, for the purposes of the CADB Proceedings , to be disputed, that is stated in an agreement signed by the Parties or their legal representatives and tendered to the CADB Panel as evidence in the CADB Proceedings .
Applicant	The body (either ASIC or APRA) applying to CADB under s1292 of the Corporations Act .
Application	An Application made to the Board under s1292 of the Act.
APRA	Australian Prudential Regulation Authority.
ASIC	Australian Securities and Investments Commission.
ASIC Act	Australian Securities and Investments Commission Act (Cth) 2001(as amended).
ASIC Regulations	Australian Securities and Investments Commission Regulations (Cth) 2001 (as amended).
CADB	Companies Auditors Disciplinary Board.
CADB Hearing	The hearing by a CADB Panel relating to an Application .
CADB Panel	A Panel convened in accordance with Section 210A ASIC Act .
CADB Proceedings	The course of the Application to CADB to its conclusion.
Case summary for Hearing	Annexure J and paragraphs 10.12-10.14 and 18.4 PN1
Chair	The Chairperson of CADB .
Conduct Matter	An Application regarding a conduct complaint (see paragraph 4.6 of PN1).
Corporations Act	Corporations Act 2001 (Cth) 2001.as amended
Deputy Chair	The deputy Chairperson of CADB .
Determination	A CADB Panel's written findings outlining the reasons for deciding whether the matters alleged in the Application have been established. A Determination will include a Preliminary Costs Determination .
Draft Costs Order	A draft consent order as to costs agreed by the Parties.
Federal Court Costs Scale	Federal Court Costs Scale in force at the time an application is commenced.
Final Decision	The CADB Panel's decision incorporating the reasons for deciding whether the matters alleged in an Application have been established.

Final Hearing	The reconvened CADB Hearing to hear Parties' submissions and evidence, to the extent relevant, on sanctions, costs and publicity
GPN-Costs	Federal Court Costs Practice Note in force at the time a CADB Application is commenced GPN Costs .
Issues Summary	A document to be prepared jointly by the Parties in accordance with paragraphs 8.2 and 8.3 PN1 which delineates the issues in dispute between them, to be provided to CADB at the pre-hearing conference and to be updated by the Parties as necessary and appropriate prior to the commencement of the CADB Hearing so that it continuously accurately reflects the disputed issues between the Parties requiring Determination at the CADB Hearing .
Mediation	A structured process for dealing with disputes and other problems in which the Parties in dispute are assisted by a third person, the mediator, to facilitate their discussions.
Member	The Chair , the Deputy Chair , or a Member of CADB .
Notice of CADB Hearing	See paragraph 10.1 and Annexure I PN1 .
Parties	The Applicant and the Respondent in CADB Proceedings .
Preliminary Costs Determination	The CADB Panel's preliminary view as to what if any costs order is appropriate and the basis of that order, included in the provided Determination .
PN1	Guidance for Parties involved in CADB Disciplinary Proceedings on Case Preparation, Hearing and Decision Procedures Practice Note
PN2	Mediation Practice Note.
PN3	This Costs Practice Note.
Pre-hearing Conference	A conference held by the Chair under s1294A of the Corporations Act .
Proposed Consent Orders	Draft orders reflecting an outcome to the Application acceptable to each Party . Proposed Consent Orders must be accompanied by the Parties' Statement of Agreed Facts .
Registered Auditor	An Auditor registered by ASIC pursuant to s1280 Corporations Act .
Registrar	The Registrar of CADB .
Respondent	The Registered Auditor the subject of an Application to CADB .
Scheme	The scheme established by Part 9.2 Corporations Act for regulating Registered Auditors in Australia.
Statement of Agreed Facts	An agreement signed by the Parties or their legal representatives and tendered to the CADB Panel as evidence in the CADB Proceedings that identifies each Agreed Fact .
Witness Summons	CADB has power to compel persons to appear at the CADB Hearing to give evidence and produce documents. See PN1 paragraphs 10.2-10.11 for details.

1. SCOPE OF CADB PANEL'S POWER TO AWARD COSTS

- 1.1 **PN3** provides guidance on **CADB's** powers to make orders for costs under Section 223 of the **ASIC Act** in relation to an **Application**. **CADB** recognises that the procedure for determining costs should be as inexpensive and efficient as possible.
- 1.2 Subject to paragraph 1.3 a **CADB Panel**, at the conclusion of a **CADB Hearing**, may order a party to pay an amount specified by the **CADB Panel**, being all or part of:
- (a) the **CADB Panel's** costs of and incidental to the **Hearing** [ss223(1)(c), ss223(2)(c) ASIC Act];
 - (b) the successful **Party's** costs in relation to the **Hearing** [ss223(1)(d), ss223(2)(d) ASIC Act].
- 1.3 An order to pay costs may only be made by the **CADB Panel**:
- (a) Against a **Respondent** - if the **CADB Panel** makes orders either cancelling or suspending the registration of the **Respondent** as an auditor, or imposes an undertaking on the **Registered Auditor**, or admonishes or reprimands the **Registered Auditor**.
 - (b) Against an **Applicant** – if the **CADB Panel** does not make any orders in relation to the **Respondent**.
- 1.4 Generally, the successful **Party** in **Proceedings** will be entitled to an order for the recovery of a proportion of their costs in relation to the **Hearing**, although a **CADB Panel** may take into account any relevant considerations before forming its final view on whether and what costs order is appropriate in all of the circumstances. Matters such as whether a **Party** took steps that added unnecessary cost either by occasioning delay or protracting the **CADB Hearing** or that contributed to narrowing the issues for **Determination** e.g. settling **Agreed Facts** prior to the **Hearing**, are examples of matters that may be relevant to the final determination of whether and what costs are payable.
- 1.5 As a matter of policy, the **CADB Panel** generally limits recovery of its own costs to disbursements incurred in the conduct of the **Hearing**. These are likely to include transcript fees, any interpreter's fees and venue costs. The **CADB Panel** will quantify these costs for the **Parties** prior to an order being made.
- 1.6 Any costs order made by a **CADB Panel** pursuant to Section 223 of the **ASIC Act** may be recovered in a court of competent jurisdiction as a debt due [ss 223(4) and 223(5) ASIC Act].

2. OUTLINE OF CADB POLICY AND PROCEDURE FOR DETERMINING COSTS ORDERS

- 2.1 **CADB's** procedure for the making of costs orders by a **CADB Panel** following a **CADB Hearing** and the **Parties'** receipt of the **Preliminary Costs Determination**

is to consider **Parties'** submissions and further evidence, including a Costs Summary and Response (see paragraphs 4.2 and 4.3 below) at the **Final Hearing** and making a decision, which will be provided to the Parties in writing, usually in conjunction with its decision on publicity.

- 2.2 Although the **CADB Panel** has a broad discretion, its usual approach, should it decide an order for costs is appropriate, is to award the costs on a party and party basis unless there is evidence of unique and specific circumstances that would support a different approach, in which case any such matters should be addressed by relevant evidence and/or submissions for the **CADB Panel's** consideration at the **Final Hearing**.
- 2.3 **CADB's** guidelines on the categories of costs typically recovered under a party and party costs order are set out in **Annexure A**.
- 2.4 Likewise, CADB's usual approach is to make fixed sum costs orders because in most cases they best serve the objectives of efficiently and cost effectively finalising outstanding matters between the **Parties** following a **CADB Hearing**.
- 2.5 An unquantified costs order will only be made by a **CADB Panel** in exceptional circumstances, for example if a **CADB Panel** is satisfied that it would be manifestly unfair for a fixed sum costs order to be made against a **Party**.
- 2.6 An unquantified costs order may subsequently be quantified at any time by agreement between the parties, or if necessary, via a process of taxing by **CADB**.

3. GENERAL APPROACH TO QUANTIFICATION OF COSTS

- 3.1 Once the **Parties** are provided with the **Preliminary Costs Determination** they are encouraged, at the earliest opportunity, to negotiate with a view to submitting a **Draft Costs Order** to the **CADB Panel** for its consideration.
- 3.2 If the **Parties** are unable to agree on a **Draft Costs Order**, the **CADB Panel** will proceed to make a quantified costs order in accordance with the procedure set out in paragraphs **4.1- 4.9** below.

4. PROCEDURE FOR QUANTIFYING FINAL COSTS ORDER

- 4.1 The **Parties** will have the opportunity to make submissions and file evidence on the appropriate quantum of the costs order to be made by the **CADB Panel** in accordance with either paragraph 14 or 15 of [PN1](#).

COSTS SUMMARY

- 4.2 The **Party** entitled to costs (**Costs Applicant**) must file an affidavit in support of the quantification of its claim (**Costs Summary**) within the timeframes set out in either paragraph 14 or 15 of [PN1](#), as applicable. The **Costs Summary** should address the matters set out in **Annexure B**. The purpose of the **Costs Summary**

is not to replicate the taxation process but to expedite the **Determination** or resolution of the costs payable. The **Costs Summary** must be clear and concise (no more than 10 pages) and should not contain submissions on the law. Although the **Costs Applicant** is not required to exhibit any source material to the **Costs Summary**, this material should be available in the event that the matter proceeds to a quantification hearing.

COSTS RESPONSE

- 4.3 The **Costs Respondent** may file an affidavit responding to the matters raised in the **Costs Summary (Costs Response)**. The **Costs Response** should be clear and concise (no more than 8 pages) and directly and briefly summarise the areas or categories of dispute in respect of the **Costs Summary**. As with the **Costs Summary**, the purpose of the **Costs Response** is not to replicate the taxation process but to expedite the determination or resolution of the costs payable.

SUBMISSIONS

- 4.4 Either **Party** may file short written submissions (no more than 3 pages) addressing any relevant law regarding the quantification of costs by the **CADB Panel**. Any submissions are to be filed at the same time as a **Party** files its **Costs Summary** or **Costs Response** as the case may be.

GENERAL

- 4.5 When engaging in the procedure for quantification **CADB** expects the **Parties** to adopt a practical approach and cooperate with each other. This includes promptly responding to any reasonable query regarding the material filed with a view to narrowing the issues in dispute.
- 4.6 If a **Costs Respondent** does not wish to oppose a **Costs Summary** or does not file a **Costs Response** within time, the **Costs Respondent** should notify **CADB** and the **Costs Applicant**
- 4.7 If a **Costs Response** is filed within time, the **CADB Panel Chairperson** may also decide to dispense with a quantification hearing and the **CADB Panel** may proceed to make a **Determination** based on the documentation filed by the Parties.
- 4.8 If, at any time prior to the quantification hearing, the **Costs Applicant** and the **Costs Respondent** resolve the costs dispute by agreement, the **Parties** must notify the **Chairperson** as soon as possible in writing and provide proposed agreed cost orders. The **CADB Panel** may make an order in accordance with the **Proposed Consent Orders** and/or any other order it considers appropriate, and may, if relevant, vacate the costs **Hearing**.

Maria McCrossin

CADB Chair

April 2020

PN3 ANNEXURE A - PARTY AND PARTY COSTS: CADB GUIDELINES

1. *Definition*

- 1.1 Party and party costs are defined as those costs, charges and expenses, necessary and proper for the attainment of justice or for maintaining or defending the rights of any party.
- 1.2 Generally, party and party costs represent only a partial indemnity of the total costs incurred by a **Party to Proceedings**. The extent to which party and party costs act as an indemnity depends on how the **Party** who is entitled to the costs has conducted their case. Work done which may be viewed as overly cautious or as constituting over preparation, will not be allowed on a party and party basis. Generally, to be claimable, party and party costs must both relate to the issues relevant between the **Parties** and have been “necessary”.

2. *General guidelines*

- 2.1 While the work that may be allowed as party and party costs depends on the circumstances of an individual case, the following general guidelines are provided:
 - (a) **Relevance:** Work performed that is not used (such as a report not served) because it represented a possible claim or defence which was not ultimately argued, would seldom be recoverable as party and party costs except if the party liable to pay the costs had conceded the point to which the report or evidence was directed or by some other act had caused work done by the successful Party not to be used (e.g. by amending a claim or defence).
 - (b) **Necessity:** Work performed that was not necessary will not be allowed on a party and party basis. This may occur where tasks are duplicated. For example, a letter is written to confirm the contents of a phone call, or a solicitor checks the draft of a document prepared by counsel. Only one of the attendances in each instance would normally be allowed on a **Party and Party** basis.
 - (c) **Unusual or Special Expenses:** A **Party** ordered to pay party and party costs is only liable for expenses usually to be expected in the circumstances applying to the relevant **Proceedings**. Examples of unusual or special expenses may include:
 - (i) counsel or witnesses retained whose services or standing are not "usual" for the task for which they are retained (e.g.: the use of senior counsel in a routine matter); or
 - (ii) fees agreed to be paid to counsel or witnesses which are demonstrably unusually high.
 - (d) **Costs after the Proceedings are concluded:** party and party costs only relate to the actual **Proceedings** in which they are ordered, so costs incurred after the proceeding has concluded will not normally be allowed.

- (e) **Disbursements:** Generally, all disbursements shall be allowed to the extent that they have been properly and reasonably incurred and paid. Disbursements will not be allowed if they have not been paid.

3. Applicant's Costs for Hearings before a CADB Panel of the Board

- (a) An **Applicant's** usual costs in relation to a **Hearing** fall into several categories:
 - (i) Work done by its in-house legal officers;
 - (ii) Work done by in-house staff other than legal officers, including experts and para legal staff; and
 - (iii) Disbursements incurred for amongst other things, outside investigative reports, expert evidence, Counsel fees and the like.
- (b) The Board's view is that it is necessary and proper for the **Applicant** to carry out Investigative and other relevant work prior to the filing of an **Application**, and that a portion of the costs incurred in respect of that work will be allowed as party and party costs. The **CADB Panel's** general approach will be to assess the work in terms of whether the costs were properly or reasonably incurred in relation to what subsequently became defined as the matters in dispute in the **Proceedings**.
- (c) The **Applicant's** costs for work done prior to the filing of the **Application** for the preparation of evidence (documentary or otherwise subsequently admitted in the **Proceedings** (e.g.: SOFAC), will also be recoverable.
- (d) Work done by the **Applicant's** legal officers will be allowed in accordance with the relevant [Federal Court Costs Scale](#) current at the time the **Application** was filed
- (e) If the **Applicant** uses a staff expert for the preparation of expert reports and evidence, rather than briefing an outside expert, if appropriate, an allowance may be made for both the staff expert and the relevant legal officer to undertake work on the matter.
- (f) Likewise, if the **Applicant** uses para legal staff for case preparation, the **CADB Panel** may make an allowance for these costs.

4. Respondent's Costs for Hearings before a CADB Panel of the Board

- (a) The usual costs of a **Respondent** include:
 - (i) professional fees charged by the Respondent's legal representatives;
 - (ii) disbursements incurred for outside investigative reports, expert evidence, Counsels' fees, witnesses' expenses and the like; and
 - (iii) depending on the circumstances, loss of the **Respondent's** professional time. A **Respondent** may be entitled to be present at a

Hearing at the **Applicant's** expense where contested issues of fact concerning the **Respondent's** own actions, knowledge or behaviour are involved.

- (b) A **Respondent** not legally represented at a **Hearing**, is not entitled to charge any fees for their time except as a witness or in accordance with (a)(iii) above. Such a **Respondent** is however, entitled to charge for any relevant disbursements.
- (c) A **Respondent** may recover a portion of professional legal costs it may incur with respect to its response to investigative work carried out by the **Applicant** prior to the commencement of **Proceedings**.

PN3 ANNEXURE B - GUIDE FOR PREPARING A COSTS SUMMARY TO SUPPORT A QUANTIFIED COSTS ORDER BY THE CADB PANEL

1. Introduction

PN3 is intended to be broadly based on principles similar to those set out in the Federal Court's current costs practice note **GPN Costs** (as in effect from time to time). Those principles underpin **CADB's** approach to quantifying costs in **CADB Proceedings**. To the extent of any inconsistency between **PN3** and **GPN Costs**, **PN3** prevails. The provisions of **GPN Costs** in effect at the date of the relevant **Application** to **CADB** are those to be referenced.]

This annexure to **PN3** sets out how to prepare a **Costs Summary** in support of a quantified costs order. The **Costs Summary** should be annexed to a statutory declaration sworn by the **Applicant** or **Respondent**. **Parties** are to reference the relevant **Federal Court Costs Scale** (i.e. that which was in effect at the date the relevant **Application** was filed) when calculating quantification of costs claimed.

Part A - Verification

The deponent must in the Statutory Declaration verify that:

1. He/she has read **PN3**; and
2. the **Costs Applicant*** [*name of party with the benefit of the costs order*] is [*entitled/not entitled*] to claim input tax credits in respect of any GST relevant to the claims in the **Costs Summary**
3. That the **Federal Court Costs Scale** in effect at the date the **Application** was filed has been applied with respect to the items claimed
4. In the **Costs Summary** (to be filed with the statutory declaration):
 - (a) the **Costs Applicant** is not claiming more than the **Costs Applicant** is liable to pay for costs and disbursements;
 - (b) the calculations made are correct;
 - (c) the matters noted are a fair and accurate summary of the costs and disbursements that the **Costs Applicant** is entitled to claim; and
5. the amounts claimed are capable of further verification through source material (such as file records, tax invoices and receipts for payment) should such material be required by the **Chairperson** of **CADB** to be produced.

Part B – Content

1. When preparing a **Costs Summary**, the deponent should succinctly set out the following information (to the extent relevant) in the **Costs Summary**:
 - (a) whether it has been prepared with the assistance of an expert as to costs (e.g. costs consultant);
 - (b) the amount of the lump-sum sought;
 - (c) how the lump-sum has been quantified (including any GST portion) and if any discounts have been applied;
 - (d) a summary of the categories of the work fairly and reasonably incurred in the conduct of the **Hearing**, including, an estimate (in percentage terms) of the proportion that each category of work constitutes of the total costs claimed (e.g. preparation of **Application** and Concise Outline /Concise Response 15%);
 - (e) in respect of each person who has performed costs work the subject of the claim:
 - (i) a summary of each person's hourly rate and total hours worked; and
 - (ii) an estimate (in percentage terms) of the proportion of the total sum claimed attributable to that person (e.g. Penny White 5%).
 - (f) a summary (with any applicable hourly and/or daily rates) of disbursements fairly and reasonably incurred in the conduct of the **Hearing**, including fees charged by counsel. Further, in respect of counsel, an estimate (in percentage terms) of the proportion of the total sum claimed attributable to counsel fees (collectively);
 - (g) clarification of the amount of any "skill, care and responsibility" claimed and how it has been calculated (including any percentage applied) and the bases for it being claimed;
 - (h) where applicable, a description of any special or unusual costs arrangements underpinning the costs claimed (e.g. conditional fee agreements *pro-bono* arrangements fixed fee arrangements per Scale item 12 etc.);
 - (i) whether the amounts claimed relevantly fall within or outside the following:
 - (i) the amounts permissible for any item under the [Federal Court Costs Scale](#) ;
 - (ii) the Federal Court's **National Guide to Counsel's Fees**;
 - (iii) the Federal Court's **National Guide to Discretionary Items in Bills of Costs**; and
 - (j) any special features of the case which may impact the assessment of costs or any other relevant and important matters not mentioned above.