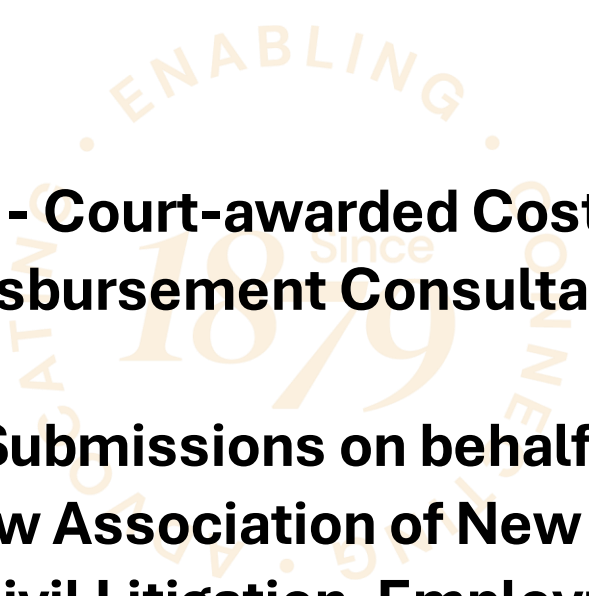




GST - Court-awarded Costs and Disbursement Consultation

**Submissions on behalf of
The Law Association of New Zealand
by the Civil Litigation, Employment Law
and Family Law Committees.**

INTRODUCTION

The Law Association of New Zealand (TLANZ) is an independent membership organisation for the New Zealand legal profession with more than 9,000 members. TLANZ maintains expert law committees that support legal review and policy advocacy on important issues. We appreciate the opportunity to submit our comments on Inland Revenue's exposure draft interpretation statement titled "GST: Court-Awarded Costs and Disbursements" (PUB00516).

These submissions are made by three specialist committees: the Civil Litigation Committee, the Employment Law Committee, and the Family Law Committee. Each committee identified aspects of the draft interpretation statement that were relevant to their respective practice areas. Given the GST-specialist nature of the analysis in the draft statement, the committees have focused these submissions on matters of practical application rather than technical GST principles.

The committees acknowledge at the outset an important limitation on scope. Inland Revenue's role in issuing this statement is to explain the GST treatment of court-awarded costs and disbursements. It is not within Inland Revenue's authority to change how courts calculate or award costs and disbursements. These submissions are made with that limitation firmly in mind. Where committee members identified issues that were properly matters of court practice rather than GST law, those have not been advanced as submission points.

EXECUTIVE SUMMARY

The committees welcome the Commissioner's initiative in issuing draft guidance on the GST treatment of court-awarded costs and disbursements and out-of-court settlements. This is an area where uncertainty has persisted for some time and where inconsistent assumptions are sometimes made by parties and, occasionally, by advisers. Clear and principled guidance is therefore both necessary and timely.

The committees are broadly supportive of Inland Revenue's analytical framework. These submissions are directed to matters of practical clarity rather than to the core GST conclusions, which are considered well-reasoned. In summary:

- The conclusion that costs awards and settlement payments for costs are compensatory and do not constitute consideration for a supply is supported and consistent with established case law.
- The Employment Court treatment at paragraph 48 acknowledging the established judicial practice of adding GST to employee cost awards is accurately described in the draft. The committees understand that this description does not alter, and is not intended to alter court practice, and have no substantive objection to its content.
- Further practical guidance would assist practitioners dealing with partially exempt litigants, including on evidentiary thresholds and the timing of GST recovery ratio disclosures.

SUBMISSIONS

Support for the Core GST Analysis

The committees support the core conclusion that court awards and out-of-court settlement payments for costs and disbursements are not consideration for a supply for GST purposes. The practical effect is that:

- the recipient is not required to return GST or issue taxable supply information;
- the payer cannot claim an input tax deduction; and
- these outcomes apply regardless of whether the award includes an amount in respect of GST that the successful party was unable to recover.

This is consistent with *Taupo Ika Nui Body Corporate v CIR*¹, *CIR v New Zealand Refining Co Ltd*², and *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*³. The analytical framework built on reciprocity as a necessary feature of consideration is sound.

The committees observe that many litigants and practitioners assume any payment between parties following litigation carries GST implications. The final statement could usefully reinforce in accessible terms that costs awards are compensatory and do not themselves create GST

¹ *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 (HC)

² *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA)

³ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282

obligations for either party. This would assist practitioners advising clients who raise this question.

Employment Law Committee – Support for the GST-Inclusive Approach

The Employment Law Committee has considered the treatment of the Employment Court at paragraphs 48 and 65 of the draft statement. The committee understands that the draft does not seek to change the position for the Employment Court, or the basis on which costs and disbursements are awarded by that court. Inland Revenue does not have authority to change the rules or policies relating to the award of costs and disbursements. The draft statement's role is limited to explaining the GST consequences of awards as they are made by the courts, and the Employment Court section should be read in that light.

On that basis, the committee has no substantive objection to the draft's treatment of the Employment Court at paragraph 48. The statement correctly describes, as background context, that the Employment Court adds GST to awards of costs and disbursements to employee litigants as a matter of course, reflecting the fact that employees are not GST-registered in respect of their employment. The committee is satisfied that this description is accurate and that the draft does not purport to alter it.

The committee is also satisfied with the explanation at paragraph 65 that these GST outcomes are unaffected by the fact that a court may include an amount in an award for GST previously incurred by an employee litigant. The compensatory characterisation of such awards remains intact, and there is no obligation on the employee recipient to return GST even where the award is calculated with reference to a GST component.

On a minor drafting issue, the phrasing in paragraph 48 that employees are "not GST-registered, or at least not in relation to the services they provide under the employment contract" is technically correct but could be simplified to reduce any risk of confusion about the relevance of registration in another capacity.

Family Law Committee – Confirmation of Consistency

The Family Law Committee has reviewed the draft and is satisfied that the analysis is consistent with the realities of family litigation. Family law proceedings are typically personal rather than

commercial in nature, and most family law litigants are not GST-registered. The general rule that costs awards are not subject to GST aligns with this position.

The committee notes that relationship property and trust disputes may involve entities that hold assets used for both personal and income-producing purposes, potentially making those entities partially exempt for GST purposes. The guidance at paragraphs 49–53 regarding partially exempt litigants is therefore potentially relevant in this context. The committee endorses the request for greater practical guidance on evidentiary requirements in those cases.

The Family Law Committee emphasises that the final statement should be capable of straightforward application by practitioners who do not specialise in GST. Clarity and accessibility are important: costs in family proceedings are often funded from personal resources, and unrecovered GST is a real expense. The statement should not require specialist tax advice to understand in ordinary cases.

Civil Litigation Committee - Clarification Required

In Civil Court, we note the guidance at paragraphs 49–53 regarding partially exempt litigants. The statement correctly identifies that such litigants should make submissions to the court explaining their GST recovery ratio so that any costs awarded on an increased costs or indemnity basis can accurately reflect the net GST cost they have borne.

Practitioners regularly act for partially exempt parties, including financial institutions, insurers, and entities with mixed-use property. Three practical points arising from paragraph 52 would benefit from further clarity:

- **Timing of the ratio:**

The committee asks that the draft be amended to clarify whether the GST recovery ratio used in costs submissions should reflect the position at the time costs were incurred or at the time of the costs hearing, particularly where there has been a material change in the litigant's taxable/exempt ratio over the litigation period.

- **Worked examples:**

The committee invites consideration of whether brief worked examples consistent with the approach taken elsewhere in the draft could illustrate how a partially exempt litigant would present its position in a costs application.

Greater precision on these evidential matters would reduce uncertainty for practitioners and courts alike.

Flowcharts

The committees observe that flowcharts are a helpful navigational tool. The committees suggest adding a note at the foot of each flowchart cross-referencing the relevant worked examples, to assist practitioners in moving between the visual summary and the underlying analysis.

CONCLUSION

TLANZ thanks Inland Revenue for the opportunity to comment on this exposure draft. The committees consider the draft statement to be a valuable and well-considered contribution to practitioner guidance in this area. The core analysis is sound, and the statement will assist litigants and their advisers to navigate the GST implications of costs awards and settlement payments with greater confidence. The committees' primary request is for additional guidance on the evidentiary requirements for partially exempt litigants and the practical mechanics where s 5(13) applies to insurance payments, as outlined above.

We are happy to discuss any aspect of this submission. Please do not hesitate to contact us through Moira McFarland, Committee Executive, at moira.mcfarland@tlanz.nz.

ACKNOWLEDGMENTS

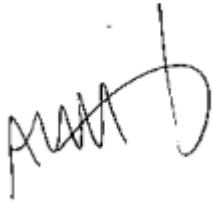
The committees wish to acknowledge the following members and advisers whose contributions made this submission possible:

- Stuart Cummings, Surrey Chambers
- Jacqueline Lethbridge, Martelli McKegg
- Alissa Bell, McVeagh Fleming
- Catherine Stewart, Barrister

- Stephen Tomlinson and Susan Ballantyne, Tomlinson Law

The committees are particularly grateful to Stephen Tomlinson and Susan Ballantyne for their specialist GST expertise and their guidance in focussing the scope of this submission.

Ngā mihi

A handwritten signature in black ink, appearing to read 'Tony Herring', with a stylized flourish at the end.

Tony Herring

President, The Law Association of New Zealand

