



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 7

REGULATED COSTS

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The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 ([LPUL Schedule 4 clause 18](#)).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 ([LPULAR clause 59](#)).

7.1 INTRODUCTION

Note that where first instructions are given by the client or where proceedings are commenced on or after 1 July 2015, the Uniform Law applies. Otherwise, the LPA 2004 and LPA 1987 continue to apply.

Costs are unregulated in NSW, except for those provided under the [Legal Profession Act 2004](#) as regulated by [Legal Profession Regulation 2005](#) (LPR) and the LPUL as regulated by the LPULAR. Regulated costs, which fall into two categories, are outlined in this chapter.

7.2 PERSONAL INJURY MATTERS (EXCLUDING MOTOR VEHICLE ACCIDENT AND WORK INJURY CLAIMS)

7.2.1 GENERAL APPLICATION

Under the LPA 2004 ([Part 3.2, Division 9](#)) and the LPULAA (Part 6 ([Legal Costs – Particular Kinds of Costs, s. 61](#) and [Schedule 1](#))), if the amount recovered on a claim for personal injury damages does not exceed \$100,000 (excluding interest), costs for legal services are capped. See *Williamson v State of New South Wales* [2010] NSWCA 229 for exceptions.

Note that section 2(6) of [Schedule 1](#) of the LPULAA clarifies the amount to be recovered; namely, that if proceedings commence on a claim, the amount the plaintiff is seeking is taken to be the amount they are seeking to prove.

You can contract out of the fixed costs on a solicitor/client basis, but only by complying with [section 339](#) of the LPA 2004 and [clause 116](#) of the LPR; that is, the solicitor must ensure that the costs agreement specifies that the client has contracted out of the regulated costs regime (see Chapter 3, “Disclosure, Costs Agreements and Billing” and the Appendix in Chapter 3 for precedent letters) ([Schedule 1 cl. 4](#) of the LPULAA).

The LPUL provides some clarification. When the maximum costs for legal services provided to a party are fixed by [Schedule 1 clause 2\(4\)](#) of the LPULAA, the following provisions apply (subject to [cls. 4–6](#)):

- (a) a law practice is not entitled to be paid or to recover payment for those legal services when the amount exceeds those maximum costs (and see [s. 59\(2\)](#) of the LPULAA)
- (b) a court or tribunal cannot order the payment by another party to the claim of costs in respect of those legal services in an amount that exceeds that maximum
- (c) in assessing the amount of those costs that is a fair and reasonable amount, a costs assessor cannot determine an amount that exceeds the maximum set by [clause 2\(4\)](#) (and see [s. 59\(3\)](#) of the LPULAA).

7.2.2 COMMENCEMENT OF THE CAP

Costs have been capped in personal injury damages claims since 7 May 2002.

7.2.3 SPECIFIC PROVISIONS

If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the following are the maximum costs for legal services:

- for legal services provided to a plaintiff: 20 per cent of the amount recovered or \$10,000, whichever is the greater, (plus an additional 7.5 per cent of the amount recovered or \$7,500, whichever is greater, in cases where a District Court matter that was referred to arbitration is referred to rehearing, and/or where a decision of the District Court is subject to appeal) (ss. [338](#) and [338A](#) of the LPA 2004), ([Schedule 1 cl. 2\(1\)\(a\)](#) of the LPULAA)
- for legal services provided to a defendant: 20 per cent of the amount sought to be recovered by the plaintiff or \$10,000, whichever is the greater, (plus an additional 7.5 per cent of the amount sought to be recovered or \$7,500, whichever is greater, in cases where a District Court matter that was referred to arbitration is referred to rehearing, and/or where a decision of the District Court is subject to appeal) (ss. [338](#) and [338A](#) of the LPA 2004) ([Schedule 1 cls. 2\(1\)\(b\) and 3](#) of the LPULAA)

- maximum costs do not include disbursements; for example, medical and expert reports, filing fees and photocopying ([s. 338\(5\)\(b\)](#) of the LPA 2004), ([Schedule 1 cl 2\(5\)\(b\)](#) of the LPULAA)
- if more than one practitioner (solicitor or barrister) provides legal services to a party in regard to the claim, the maximum costs apply to the costs of both practitioners. Apportionment may be either by agreement or, failing that, as ordered by the court hearing proceedings on the claim ([s. 342](#) of the LPA 2004), ([Schedule 1 cl. 7](#) of the LPULAA)
- the “amount recovered” for the purposes of calculating the \$100,000 limit does not include any amount attributed to costs or interest ([s. 343\(2\)](#) of the LPA 2004), ([Schedule 1 cl. 8\(2\)](#) of the LPULAA)
- “recovered” includes any amount paid under a compromise or settlement of a claim (whether or not any legal proceedings have been instituted) ([s. 343\(1\)](#) of the LPA 2004), ([Schedule 1 cl. 8\(1\)](#) of the LPULAA)
- GST cannot be added to these costs as they come under Division 9 (and not Division 6 to which [cl. 115](#) of the LPR applies). Compare [reg 27](#) in LPULAR, which provides that a cost fixed by Part 5 may be increased by the amount of any GST payable in respect of the legal or other service to which the cost relates, and the cost as so increased is taken to be the cost fixed by Part 5.

7.2.4 EXCEPTIONS

The maximum fixed costs apply on a party/party basis unless:

- costs are awarded on an indemnity basis for costs incurred after failure to accept an offer of compromise ([s. 340](#) of the LPA 2004), ([Schedule 1 cl. 5](#) of the LPULAA)
- the court orders certain legal services to be excluded from the maximum costs limitation, due to costs being increased by unreasonable action by the other side ([s. 341](#) of the LPA 2004), ([Schedule 1 cl 6](#) of the LPULAA). A court hearing a claim for personal injury damages may, by order, exclude from the operation of [Schedule 1](#), legal services provided to a party to the claim if the court is satisfied that the legal services were provided in response to any action on the claim by or on behalf of the other party to the claim that in the circumstances was not reasonably necessary for advancing that party’s case, or were intended or reasonably likely to unnecessarily delay or complicate determination of the claim.

Practitioners are cautioned that offers of compromise constitute an important part of the litigation process in personal injury matters, in view of the provisions of [section 340](#) of the LPA 2004 (see Chapter 11, “Security for Costs, Offers of Compromise, Costs on Discontinuance”). Furthermore, additional disclosure is required where a client receives an offer of compromise ([cl. 117](#) of LPR).

7.2.5 VERDICT FOR THE DEFENDANT

If a plaintiff is unsuccessful in a claim for personal injury damages, there is no “amount recovered” for the purposes of section 198D(1) of the *Legal Profession Act 1987* (s. 338 of the *Legal Profession Act 2004*). As such, the costs cap in section 198D will not apply to any party to the proceedings if there is a verdict for the defendant (see [Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty \[2006\] NSWCA100](#)).

Costs fixed by statutory scheme or practice note

7.3 MOTOR ACCIDENT COSTS

See Chapter 9.

7.4 WORKERS COMPENSATION COSTS

See Chapter 8 for a full treatment.

Note that [reg 25](#) of the LPULAR contains the prescribed costs for services in workers compensation matters pursuant to [section 59\(1\)\(a\) and \(g\)](#) of the LPULAA. [Reg 25](#) is subject to the [Workplace Injury Management and Workers Compensation Act 1998](#), which includes provisions in relation to costs and the assessment of costs in workers compensation matters. [Reg 25](#) applies to:

- a. costs for legal services provided in any workers compensation matter

b. costs for a matter that is not a legal service but is related to proceedings in any workers compensation matter.

The fair and reasonable costs fixed for a legal service specified in Part 1, 2 or 3 of [Schedule 2](#) of the LPULAR are the costs specified in relation to that service in that Part, calculated in accordance with that Part ([reg 25\(2\)](#) of the LPULAR). However, after calculating the costs for legal services specified in Parts 1 and 2 of [Schedule 2](#) of the LPULAR, the total of all such costs is to be reduced by 10 per cent ([reg. 25\(3\)](#) of the LPULAR). The amount of costs fixed for a service specified in Part 4 of [Schedule 2](#) of the LPULAR is the amount specified in relation to that service in that Part, calculated in accordance with that Part ([reg. 25\(4\)](#) of the LPULAR). That is, there is no percentage reduction for Part 4 costs.

7.5 PROBATE AND LETTERS OF ADMINISTRATION

[Section 329](#) of the LPA 2004 and [clause 114](#) of the LPR regulate costs for probate matters under the LPA 2004. [Schedule 4](#) of the LPR provides the scales of costs for obtaining probate or letters of administration. This sets a scale of fixed costs for the various stages of probate, depending on the value of assets remaining at the time of the application.

For Uniform Law matters, see [clause 26](#) of the LPULAR for prescribed costs for probate and administration matters pursuant to [section 59\(1\)\(f\)](#) of the LPULAA. [Schedule 3](#) of the LPULAR provides for legal services for probate and administration matters. [Schedule 3](#) of the LPULAR makes no change in the scale fees. [Schedule 4](#) of the LPR was re-enacted because the LPR were repealed on 1 July 2015, consequent upon the introduction of the Uniform Law.

The fixed costs in Part 1 of [Schedule 4](#) of the LPR and in [Schedule 3](#) of the LPULAR refer only to professional services rendered by a law practice for obtaining for the first time a grant of probate or administration, or resealing of probate or letters of administration, including obtaining any grant and resealing after first receiving instructions to uplift documents issued by the Supreme Court of NSW. The professional services include:

- instructions on obtaining a grant of probate or letters of administration
- attending to verify details of assets supplied by the executor/administrator (where required)
- preparing all Supreme Court documents
- attendance on executor/administrator to sign documents
- lodging and uplifting documents
- answering requisitions
- perusing grant and advising executor/administrator.

It is not possible to contract out of these fixed costs.

Under Part 3 of [Schedule 4](#) of the LPR and [Schedule 3](#) of the LPULAR, extra costs are allowed in relation to obtaining for the first time a grant of administration or resealing letters of administration. The extra costs, which are in addition to the fixed costs in Part 1 of [Schedule 4](#) and in [Schedule 3](#) of the LPULAR, are allowed if a law practice is required to perform any work in addition to that provided for in Part 1. The additional amount is as allowed under Table 1 in [Schedule G](#) to the Supreme Court Rules 1970.

Disbursements such as advertising, filing and valuation fees, and fees paid to any law stationer for lodging and uplifting documents, are excluded and may be charged in addition to the fixed costs.

All other professional costs for services rendered by a law practice can be charged at the normal rates of the law practice. The law practice should disclose to the client both the scale charge and the charges for all other professional costs. All other professional costs include but are not limited to:

- sorting through estate papers and items
- advising on taxation and meeting the requirements of the Australian Taxation Office, including preparation of returns
- obtaining valuations/appraisals of assets/debts
- ascertaining whether certain assets form part of the estate (for example, considering relationships, superannuation, insurance, etc.)

- advising on the rights of other parties to challenge the will
- advising on complex questions of interpretation of the will
- advising on questions of informal wills, rectification, capacity, duress, undue influence and forgery
- advising on renunciation or reservations of right to apply
- overseeing transmission applications, all transfers and realisation of assets
- conducting enquiries and research to ascertain the existence of assets
- preparing and publishing a Notice of Intended Distribution.

It would be prudent for the law practice to enquire whether the executor/administrator plans to claim a commission. If so, it would be prudent for the law practice to inform the executor/administrator that they can and should carry out additional professional services, other than advising, if they intend to apply for a commission.

GST may be added to all the costs in accordance with [reg. 115](#) of the LPR ([reg. 27](#) of the LPULAR).

7.6 DEFAULT JUDGMENTS AND ENFORCEMENT OF JUDGMENTS

[Section 329](#) of the LPA 2004 and [clause 112](#) of the LPR (and [s. 59\(1\)\(d\) and \(e\)](#) of the LPULAA and [Schedule 1](#) of the LPULAR pursuant to [reg. 24 of the LPULAR](#)) regulate the plaintiff's costs for obtaining default judgments and the enforcement of default judgments. The scales of costs are contained in [Schedule 2](#) of the LPR and [Schedule 1](#) of the LPULAR. These costs depend on the court in which proceedings are brought, and are based on the stage a matter reaches. For example, costs are fixed for the work involved in preparing and serving during the originating process, obtaining a default judgment, and preparing and serving a writ of execution.

The prescribed enforcement costs do not cover the field of likely recovery procedures. In [Schedule 1](#) of the LPULAR, there is no allowance for costs a court may award a party in obtaining a garnishee order. The practical effect of the omission of this allowance is that a party seeking a garnishee order is not awarded costs as part of that enforcement process. Further, [Schedule 1](#) provides no allowance for costs a court may award a party in respect of an application for a charging order (made pursuant to [rule 39.44](#) of the *Uniform Civil Procedure Rules 2005*).

GST and disbursements may be added to these costs (see [cl. 115](#) of the LPR and [cl. 27](#) of the LPULAR).

It is important to note that s 59(2) of the LPULAA clearly states that “(2) A law practice is not entitled to be paid or recover for a legal service an amount that exceeds the fair and reasonable cost fixed for the service by the regulations under this section”.

7.7 VICTIMS COMPENSATION TRIBUNAL

The [Victims Rights and Support Act 2013](#) (NSW) provides for the allocation of a support coordinator by Victims Services to assist with a claim; solicitors will no longer be paid for new claims by Victims Services. The act commenced on 30 May 2013 and is retrospective. Existing claims, including those already listed, are automatically transferred to the new scheme and assessed under the new criteria.

If a claim was lodged prior to 7 May 2013 and the victim is being represented by a solicitor, Victims Services will pay the legal costs for lodging the claim at the current rate, which is “up to” \$825 when an application for compensation is awarded and “up to” \$400 when an application is dismissed.

In appeals to the Victims Compensation Tribunal, costs of “up to” \$500 plus GST may be awarded in cases without a hearing and “up to” \$1,500 plus GST may be awarded in cases with a hearing.

In cases with more than one legal practitioner acting for the applicant, costs are to be apportioned as determined by the Compensation Assessor or the Tribunal.

In addition to the professional costs, disbursements of “up to” \$1,100 may be awarded, excluding counsel's fees and witnesses' expenses.

A law practice is prohibited from recovering costs in excess of those awarded by the Assessor or Tribunal.

The NSW Department of Justice is reviewing the [Victims Rights and Support Act](#) to determine whether its policy objectives remain valid and whether the terms of the act remain appropriate for securing those objectives. This review is required by [section 119](#) of the act.

7.8 PUBLIC NOTARIES

Fees for services carried out by public notaries are set by the Society of Notaries in accordance with [section 12](#) of the [Public Notaries Act 1997](#) (NSW). The recommended scale is published from time to time in the *NSW Government Gazette* and is available at www.notarynsw.org.au/fees_scale.

7.9 LOCAL COURT

Costs awarded on a party/party basis in the Small Claims Division are governed by [rule 14\(4\)](#) of the Local Courts (Civil Procedure) Rules 2005 (now repealed). The maximum costs that may be awarded are those allowed upon entry of a default judgment under [Schedule 2](#) of the LPR. See section 329(1)(b1) of the LPA 2004 and [section 59\(1\)\(c\)](#) of the LPULAA (fixing the costs payable for legal services provided in connection with small claims applications (within the meaning of [section 379](#) of the [Industrial Relations Act 1996](#))).

Disbursements are excluded.

The Local Courts website states:

“Professional costs that apply to civil proceedings in the Local Court are located on Schedule 1 of the Legal Profession Uniform Law Application Regulation 2015. This statement on the website is accurate for Uniform Law proceedings – those commenced on or after 1 July 2015. However for civil proceedings commenced prior to 1 July 2015, the prior LP Acts and the Regulated Costs in Schedule 2 LPR continue to apply

The [Local Court Practice Note CIV 1](#) (PN CIV 1) (last amended 4 March 2013 and 26 June 2017) provides limitations on costs (UCPR42.4) on a party/party basis, applicable to:

- amounts claimed of \$20,000 or less
- claims transferred from the Small Claims Division to the General Division.

Where the amount claimed is \$20,000 or less, costs are subject to [para 36 of Practice Note CIV 1](#), which provides discretion to order costs:

- of the plaintiff – up to 25 per cent of damages awarded
- of the defendant – up to 25 per cent of damages sought. This includes the costs of both solicitor and barrister.

Matters transferred from the Small Claims Division to the General Division are subject to the limitation of [para 36.2 of CIV 1](#). This states that the maximum cost recoverable by either party is \$2,500, including GST and disbursements. Under [para 36.3 of CIV 1](#), a party may apply to vary this amount. However, strict time limits apply to such an application and failure to apply in time adversely affects the client, giving rise to the possibility of a complaint about costs.

Indemnity costs may still be awarded at the court’s discretion ([para 35.6 of CIV 1](#). See Chapter 11, “Security for Costs, Offers of Compromise, Costs on Discontinuance”).

Under [para 36.9 of CIV 1](#) the costs of a cross-claim apply as if proceedings have been separately commenced.

7.10 JURISDICTIONS OUTSIDE NSW

Professional costs on a party/party basis are regulated in Commonwealth courts and tribunals. These include the:

- High Court of Australia
- Federal Court of Australia
- Family Court
- Federal Circuit Court of Australia (in part)
- Administrative Appeals Tribunal.

It is possible to contract out of the scales of costs set by the rules for each of the above courts on a solicitor/client basis, but not on a party/party basis.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333

F +61 2 9231 5809

www.lawsociety.com.au