



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

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THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 1 CLIENT ENGAGEMENT

Costs Guidebook 7th Edition (revised) – Foreword

September 2017

This edition of the Costs Guidebook is the 7th edition since first published in 1994 .

The Law Society of NSW thanks Neil Oakes and FMRC for their kind permission to reference FMRC material in this practitioner guide.

The 7th edition is the result of a collaboration of a number of dedicated experts in the area of costs and all members of the Costs Committee of the Law Society of NSW. It has taken countless hours of sustained work and I believe the Profession owes them a debt of gratitude as do I.

Terence Stern
Chair, Costs Committee
Law Society of NSW

- 1.1 INTRODUCTION
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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](#)).

1.1. INTRODUCTION

The purpose of this chapter is to guide law practices in initiating and managing a client engagement. In this sense, “engagement” has a far wider meaning than a practitioner’s retainer (the contract between the practitioner and the client). When a law practice enters into an engagement with a client, it brings into play a range of rights, expectations and responsibilities for both parties that, once embraced, may be difficult to alter or terminate. Merely supplying a written costs disclosure that complies with the requirements of the [Legal Profession Uniform Law](#) (NSW) (the “Uniform Law”), and completing a costs agreement, is not sufficient. Other issues need to be considered and, as in the case of all contracts, it is important that the agreement between practitioner and client is clearly documented. Clear communication with the client, and the use of plain language, will help to achieve this.

The focus of this chapter is the engagement process, rather than the legal product itself. It is primarily the law practice’s responsibility to manage the engagement process. The issues that must be considered are detailed in the following sections.

1.2 ASSESSING THE SUITABILITY OF THE ENGAGEMENT

Difficulties arise when law practices do not manage client engagement properly from the outset. This does not mean immediately signing a costs agreement or providing a written disclosure. It might mean refusing the work, not because of any lack of technical competence, but because accepting the engagement is not appropriate for the firm at that time. The law practice should ask itself these questions before embarking on a new engagement:

- Is the matter suitable given the current and future workload of the law practice and the practitioner? Maternity leave and long service leave may also affect staff availability within the practice.
- Is there sufficient time to undertake the matter and also manage proper communication with the client?
- Did the client instruct another law firm in this matter before seeking to engage you, and have they ceased instructing that firm? If so, it would be wise to try to find out why the client was dissatisfied with the other law practice as this may reveal unreasonable expectations on the client’s part.
- Does the client understand the amount of time they may have to devote to the matter, and are they committed to the task? Specifically, is the client aware of what will be expected of them?
- Does the law practice have the technical expertise and resources to undertake the matter?
- Does the matter or the client pose any risk to the law practice. For example, would accepting instructions give rise to a conflict of interest?
- Can the law practice meet the client’s objectives and expectations, and has the client made these clear?
- Does the client agree to the terms of engagement, including payment, or do they appear reluctant to sign the costs agreement and disclosure?

The law practice should also consider the client’s likely expectations of the engagement. The client may expect that:

- the law practice is going to solve their problems
- the service will be delivered in a timely fashion
- the fee will reflect true value to the client
- the law practice is there to serve them and to solve their problems
- there will be a high level of lawyer–client communication.

In some situations it is reasonable and prudent to decline to undertake work for a prospective client. You may simply feel that the prospective client is likely to be difficult or unpleasant to work for, and is unlikely to be happy with whatever work you may do. If you are unable to handle a matter, it is far better to refer the client to another law practice than risk the possibility of a matter being handled badly. An analysis of Lawcover claims indicates that reluctance to decline work is a source of complaints and claims.

If you decide to decline a matter, explain to the client why you have made that decision. It may be because of existing work pressures or a possible conflict, or because it is outside the law practice’s expertise. A client may recognise the logic in what you say and be happy to return for subsequent work.

If you do enter into an engagement, you should serve the client competently and diligently. You should be acutely aware of the fiduciary nature of the relationship with your client, and always deal with them fairly, free of the influence of any interest that may conflict with their best interests. You should maintain the confidentiality of your client's affairs, but give them the benefit of all the information you have that is relevant to their affairs. You should obviously not engage in, or assist conduct that is calculated to, circumvent justice, or otherwise be in breach of the law.

1.3 THE IMPORTANCE OF COMMUNICATION

The Uniform Law dictates the way law practices establish client engagements, manage client expectations, vary or terminate engagements and communicate with clients.

Carefully and sensibly implementing the requirements of the Uniform Law with regard to disclosure and costs agreements will help ensure a high standard of practice and a high level of professionalism. It will also reduce the number of complaints and claims from clients.

The cornerstone of a successful engagement is good communication between the law practice and the client throughout their association. The agreement that the law practice enters into with the client involves two-way communication. It should spell out what the practice will do for the client (and also, where appropriate, what work the law practice will NOT do – such as providing financial advice). It should also spell out what the client can expect from the law practice, such as the name of the lawyer who will be handling the matter, the likely duration of the matter, the likely cost and billing arrangements, how the retainer can be terminated, and how progress on the matter will be communicated to the client.

The genesis of many complaints or claims is the start of an engagement. They may arise because the client:

- misunderstands what is likely to happen in the matter, and has unreal and/or unjustified expectations
- in litigation matters, does not properly appreciate the possibility that they will be unsuccessful, and the costs that may be payable as a result
- feels that the practitioner is not readily available to speak to them or is not advising them of progress at reasonable intervals
- does not understand why there is a delay or why the matter is taking more time than expected
- feels they have been “shunted” about the law practice, from one practitioner to another
- is not given adequate information about costs and when these are payable
- is surprised when costs and expenses are more than they were led to believe
- is not informed that they may be entitled to legal aid
- does not understand what has happened to money given to the law practice and does not understand the law practice's bill or statement of account
- feels there is a long delay in recovering costs from the other party
- does not understand why the other side should not pay all their costs when the case has been won
- does not know that a barrister has been briefed, and as a result objects to paying the barrister's fee
- is not given genuine estimates of legal costs to be or being incurred.

Always ensure the client understands the difference between a costs estimate and a costs quotation, and explain why costs can increase. Always update costs estimates where appropriate.

The Law Society finds that giving adequate information to clients early on in a matter can prevent complaints arising.

1.4 IDENTIFYING THE CLIENT

As in any contract, it is important to establish the identity of the client at the outset. This is particularly important when acting for a business entity rather than an individual or individuals, or when acting for a number of persons in the same matter. It is essential that the costs agreement or disclosure document properly lists the correct client. For example, it is not uncommon for the directors of a corporate client that becomes insolvent to refuse to pay the company's legal fees on the basis that the solicitor's

retainer was with the company and not the directors personally. At the outset, the law practice should consider clearly naming both the company and the directors as clients or obtaining a personal guarantee from the directors that they will pay the law practice's fees and disbursements in the event that the company becomes insolvent. You should also conduct the appropriate searches to ensure that anyone purporting to be a director of a company is in fact a director of that company.

In all cases, it is a good policy to require new clients to provide you with photo identification and other proof of identity to ensure you are acting for the person or persons they claim to be.

The [Conveyancing Rules](#), which were made pursuant to [section 12E](#) of the Real Property Act 1900 (NSW), came into effect on 1 May 2016. These rules require a representative (defined as an Australian Legal Practitioner, a Law Practice or a Licensed Conveyancer who acts on behalf of a client) to take reasonable steps to verify the identity of each client or each of their client's agents and persons to whom certificates of title are provided. Law Practices working in this area of law should carefully read the Conveyancing Rules – which include details of the [Verification of Identity Standard](#) – and verify the identity of a person in some other way that constitutes the taking of reasonable steps. It should also be remembered that the Conveyancing Rules require a representative to retain the evidence supporting the dealing for at least seven years from the date of lodgement of the dealing that is registered or recorded, including any evidence supporting the verification of a party's identity.

When acting for both spouses in any transaction, it is advisable to make it clear in writing, preferably in the costs agreement or disclosure document, that:

- each spouse is considered the agent for the other for the purposes of giving instructions binding on both (if that is appropriate for the clients)
- if a conflict of interest arises at any time between the spouses, you will terminate the retainer, and the parties will be liable to pay your costs up to that time.

1.5 DEFINING AND DOCUMENTING THE ENGAGEMENT

A client's expectations of the legal system need to be realistic. If they are not, the client will be dissatisfied, and a complaint or a claim may follow. The law practice must take the time to properly determine the client's expectations, to make sure they do not have an inflated idea of the law practice's ability to make some event occur or to win a case. By properly communicating what is possible, the client can make an informed decision about whether to proceed with a matter. Once a decision is taken to proceed, it should be clearly documented in writing.

[Section 174](#) of the Uniform Law sets out the disclosure obligations of a law practice and should be carefully read and implemented. In the case of litigious matters, there are additional disclosure obligations regarding settlements ([s. 177](#) of the LPUL).

A costs agreement should document the shared understanding between the law practice and client about objectives, scope, timing and costs. It should also identify how and when variation and/or termination might occur. It can provide a reminder to clients to seek changes to the terms of engagement when necessary. Without such a written document, it is difficult to defend a complaint or a claim and also difficult to recover the costs owing to the law practice. It is therefore very much in the law practice's interest that a proper costs agreement and disclosure document is prepared and accepted by the client.

A good costs agreement can also be a useful management tool for the legal practice – for reviewing the progress of a matter. It can also be used by the partners of the law practice who supervise matters handled by employed practitioners.

A good costs agreement can also prevent problems before they arise. It can be used as an early warning device by either the client or the law practice. If a matter is not progressing according to plan, or a substantial increase in costs appears likely, or the client is not paying the firm's bills, this can be dealt with at an early stage. Remedial action, such as reviewing the costs estimate, revising the scope of the instructions or terminating the retainer, can then occur.

1.5.1 COSTS

Section 174(1) of the Uniform Law provides that a law practice must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated, and an estimate of the total legal costs. There is also an obligation to update the client as soon as practicable after any significant change to anything previously disclosed. The requirements of the Uniform Law place the onus on law practices to hone their

skills at estimating the value of their professional work.

[Section 179](#) of the Uniform Law provides that a client of a law practice has the right to require and to have a negotiated costs agreement with the law practice. [Section 180](#) provides that the costs agreement must be in writing or evidenced in writing, and may consist of a written offer that is accepted in writing or (except in the case of a conditional costs agreement) by other conduct. It is recommended that the law practice requires the client to confirm acceptance of the agreement in writing rather than relying on “other conduct”.

If the retainer is accepted on the basis that some or all of the legal costs payable are conditional on the successful outcome of the matter to which the costs relate, then the costs agreement must comply with the requirements set out in [section 181](#) and [section 182](#) of the Uniform Law. A conditional costs agreement must be in writing and signed by the client.

Conditional costs agreements are not permitted in relation to a matter involving criminal proceedings, or proceedings under the [Family Law Act 1975 \(Cth\)](#).

If a law practice is seeking to recover the costs of paralegal and secretarial services from the client, it is essential that these services are specified in any disclosure document or costs agreement provided to the client. Similarly, if the firm intends to seek the cost of miscellaneous items that cannot be correctly classified as disbursements – such as charges for telephone calls, facsimile transmissions, photocopying and postage – this should be specified in any disclosure document or costs agreement, and the rate should be specified. It should be clearly shown whether the amount includes or excludes GST.

Law practices should also maintain records that identify the charges raised so that if there is a challenge, the records will verify claims.

1.5.2 PRO BONO WORK

Party/party costs, if awarded by an order to one of the parties, indemnify that party (in part) against the payment of their law practice’s costs. If there was never, under any circumstances, a liability to pay costs to that party’s law practice, then, as no costs have been incurred, they cannot recover costs on a party/party basis, even if there was an award of a court or tribunal.

If a law practice wishes to preserve the client’s entitlement to an indemnity for costs, it should issue a conditional costs agreement.

1.6 MANAGING VARIATIONS AND TERMINATION

An agreement should make it clear under what circumstances the engagement may be varied or terminated. It should also include a clear statement that the client will be liable for the law practice’s costs in those circumstances.

Also, [s. 174\(1\)\(b\) of the Uniform Law](#) requires that the law practice must notify the client of any substantial changes.

The [Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015](#) deal with some of the issues around terminating a retainer – for example, when it can be terminated, providing appropriate notice, and the retention of documents. It is important that the client understands at the outset that they need to assist the law practice to resolve their matter.

1.6.1 VARYING THE ENGAGEMENT

Legal matters frequently change as they progress, for a range of reasons. For example:

- the scope or character of a matter may change, in which case the client should be informed of the changes and the impact of those changes on costs
- there may be a subtle but definite change in the matter, such that it becomes an entirely new engagement – for example, when a failed mediation leads to litigation or a contract settlement leads to rescission.

If there is good, ongoing communication between the law practice and the client, variations in the engagement that would change the client’s expectations or understanding of the work to be done will be handled as a matter of course. It would still be useful to pause at this point to re-address the matters that were raised by both the client and the law practice at the outset of the engagement.

Professional obligations and risk management issues must be kept in mind. Hurried, undocumented and uncommunicated changes could easily turn into a contested bill of costs, a complaint or a claim via Lawcover.

1.6.2 TERMINATING THE ENGAGEMENT

Risk management issues arise when a law practice seeks to withdraw from a matter before it is concluded. Law practices are advised to read the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and, in litigation matters, be aware of the relevant court rules and practice notes, which have specific notice and documentary requirements. It is important for law practices to recognise and react to signals that indicate that the law practice should disengage. These might include that:

- the client refuses to take advice given
- the client fails to answer letters
- the client fails to pay the law practice's bills
- the matter extends beyond the competence of the law practice
- the law practice's position is being compromised by a conflict of interest.

When situations of this sort occur, it is important to communicate with the client and discuss options.

If a decision is taken to terminate the matter, then a law practice must establish a clear and reasonable basis for doing so, and confirm this in writing for the client.

Once again, the grounds for termination should have been spelt out in the agreement, and included a provision for payment of costs up to the termination.

Potential causes for termination may include that:

- the client fails to pay any fee or other monies requested by the law practice, in accordance with the agreement
- the client fails to provide the law practice with proper instructions (including information) as requested by the law practice within a specified reasonable time frame
- the client refuses to accept, contrary to the law practice's advice, an offer of settlement that the law practice considers reasonable
- a conflict of interest arises or is discovered, which prejudices the performance of the law practice and their obligations to the client
- the client requires the law practice to conduct the matter in an improper or unreasonable manner
- the client gives the law practice misleading information relating to the matter
- the client fails to co-operate with the law practice, to appear for any medical or other expert examination, or to attend a court hearing without good reason
- the client changes representation or decides to act as a litigant in person – particularly important in conditional costs agreements.

If the client believed that more work was to be done, a letter from the law practice closing the matter and enclosing a final bill may rectify this misunderstanding. Even if the client sees the law practice for a brief consultation, it may be appropriate for the practice to write to the client, documenting the matters discussed. This could be done by sending a letter with a précis of the discussion and making sure that nothing more is expected by the client.

Under the Uniform Law, where instructions are received on or after 1 July 2015, Applications for Assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – [see ss. 198 \(3\) and \(4\)](#) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an Application for Assessment to have costs assessed.

1.7 CONCLUSION

Entering into an engagement with a client brings into play responsibilities, expectations and rights for both parties. These should be documented in an agreement as soon as a mutual understanding of the matter is reached, so that the parties understand what is required of each of them. Like any contract, a costs agreement should be carefully and clearly drafted.

The existence of a costs agreement gives the law practice authority to carry out the terms of the agreement, and implied authority to do all things incidental to achieving the objectives of the agreement. The existence and terms of the agreement, and the appearance of the agreement to third parties, will dictate the extent to which a law practice is able to bind the client.

Finally, it is the existence of the agreement that leads the law to superimpose fiduciary duties on the law practice, and the terms of that agreement dictate the extent or scope of those duties.

1.8 FURTHER INFORMATION

Law practices are becoming increasingly aware of risk management issues. The Risk Management Education Program (RMEP) conducted by Lawcover has helped to bring engagement issues into sharp focus, and law practices are encouraged to use the opportunity offered by the RMEP and similar facilities to develop their skills and knowledge in this area. Further information is available from Lawcover at <http://www.lawcover.com.au/risk-management-education-program/>

The Ethics Committee of the Law Society is available to consider general ethical issues and concerns relating to the practice of law and the Solicitors' Conduct Rules. The Ethics Committee includes the Law Society's Senior Ethics Solicitor and members of the profession who are committed to upholding high ethical standards within the profession. Further information is available from the Ethics section of the Law Society's website: www.lawsociety.com.au/ethics



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CHAPTER 2

SUGGESTIONS FOR SETTING COSTS IN A DEREGULATED ENVIRONMENT

- 2.1 INTRODUCTION
- 2.2 ASSESSING THE SUITABILITY OF THE ENGAGEMENT
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- 2.5 DEFINING AND DOCUMENTING THE ENGAGEMENT
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- Legal Profession Act 2004 ["LPA 2004"]
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The Uniform Law applies for proceedings commenced on or after 1 July 2015 ([LPULAR clause 59](#)).

2.1 INTRODUCTION

The purpose of this chapter is to give practitioners a convenient basis for determining what costs to charge in relation to legal work under the [LPUL](#).

Much of the information in this chapter is based on the experience of others. Recommendations for setting charge-out rates are provided by FMRC Legal.

However you determine an appropriate charge-out rate, the fundamental prerequisite is that you comply with the requirements for disclosure in the LPUL. Failure to comply with the LPUL (Chapter 4, Part 4.3 Legal Costs, Division 3) may effectively negate any fees raised, however “reasonable” they may be. Provided there is disclosure in accordance with the LPUL, the method of charging is effectively a matter for you to negotiate directly with the client.

Time billing is still the most effective means of invoicing clients for legal services. Setting an appropriate hourly rate that provides a reasonable return will be a function of the costs of running a legal practice. These are individual matters and will vary widely from practice to practice.

If you do not have the requisite accounting skills or expertise, it is important to consult your accountant to obtain independent advice about the costs of running your business, likely expenses and profitability.

Similar principles apply whether you are trading as a sole practitioner, corporation or partnership. It is essential to understand the administrative cost of running a practice, and any additional burden imposed by regulatory compliance.

2.2 DEREGULATION DOES NOT MEAN NO REGULATION

Apart from the mandatory disclosure requirements under the LPUL (see Chapter 4, Part 4.3), fees and charges are deregulated in all areas of practice, except for regulated costs in areas such as workers compensation, personal injury actions under the State Insurance Regulatory Authority legislation, probate fees and some litigation matters (see Costs Guidebook Chapter 6 *Regulated Costs*).

Under the LPUL, clients other than commercial or government clients (see LPUL, [s. 170](#)) can ask for an assessment of any practitioner’s bill. In determining the charges that should apply, costs assessors are obliged to apply the test detailed in [section 172](#) of the LPUL, which states that in determining if the costs are “fair and reasonable in all the circumstances” they must also be “proportionately and reasonably incurred and proportionate and reasonable in amount”. (See [Bouras v Grandelis \(2005\) NSWCA 463](#); [Jefferson v National Freight Carriers plc \[2001\] EWCA Civ 2082](#); [Lownds v Home Office \[2002\] EWCA Civ 365](#); [April Fine Paper –v Moore Business Systems \[2009\] NSWSC 867](#).)

It is important that practitioners price their services effectively, correctly budget for revenue and expenses, and control debtors so that they comply with the estimates, and disclosures given to clients.

Practitioners should note that if charges are to be based on a minimum unit of time, this should be made clear to the client in the disclosure document or costs agreement. If it is not done, the practitioner will only be able to charge for the actual time spent.

As work progresses through various stages, costs estimates may need to be amended to meet the practitioner’s obligation to disclose where there is any significant change to anything previously disclosed (LPUL, [s. 174\(1\)\(b\)](#)). Clients may apply for an assessment of the bill up to 12 months after receiving it, even if the bill has been paid (LPUL, [s. 198\(3\)](#)). A client or third-party payer may apply to the designated tribunal for an extension of time to make an application outside the 12-month period, pursuant to [s. 198\(3\)](#) of the LPUL. However, there is no provision for a law practice to obtain an extension of time, and solicitors should be aware of the strict time restriction imposed by [s. 198\(3\)](#). The strict period of 12 months for an Application for Assessment also applies to retaining law practices.

2.3 GST

Practitioners will be aware that GST is not part of the “costs” rendered for legal services. As such, if GST is to be recovered, it must be specifically identified in the costs agreement provided to the client – that is, GST will be added both to fees and to applicable disbursements.

In relation to costs fixed by Regulation, [clause 27](#) of the LPULAR sets out that GST may be added to costs, including fixed costs payable for the legal service to which they relate.

If you fail to note in writing that GST is payable, you cannot recover it.

See Chapter 5 of the Costs Guidebook on GST and the discussion re: [Boyce v McIntyre \(2009\) NSWCA 185 \(20 July 2009\)](#).

Also, see the standard form of costs agreement on the Law Society website ([under Professional Responsibility/Costs/Precedents and Forms](#)).

2.4 THE PROCESS OF SETTING CHARGE-OUT RATES

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2.4.1 COSTING AND PRICING LEGAL SERVICES

Knowing the cost of production for each fee earner in the practice is an essential component of determining how you set your fees. This applies equally to hourly rates and fixed-fee matters.

If your practice operates with a profit motive, you need to know what your cost of production is and add an appropriate profit margin. The components of the cost of production are:

- staff salaries (support and fee earners)
- the non-salary overheads of the practice
- the notional salary of the principals in the practice.

This is illustrated below:

\$150	Profit	The average profit margin of a legal practice after considering the notional salaries of principals is 10–15 per cent. This example shows that the cost of production for a blended chargeable hour in the practice is \$130, and the firm sells its time at a blended rate of \$150.
\$130	Staff salaries	
	Non-salary overheads	
	Principals' notional salaries	

Based on the above example, there are two implications for the practice:

- To generate the desired profit, the firm must charge and recover \$150 for every chargeable hour it produces.
- The cost of producing fixed-fee work will be entirely dependent on the time it takes to conduct the matter. For example, if it takes five hours to complete a conveyance, it will cost the practice \$650 (5 hours × \$130). If the firm were to take 10 hours to complete the conveyance, it would cost \$1,300.

The above example is based on a firm-wide cost of production; however, cost of production attaches itself to an individual, not an activity. When determining the cost of production in the practice, it is appropriate that the fee earners absorb all practice costs – their own salaries, support staff salaries and non-salary overheads. Some people will have a higher cost of production than others due to their higher salaries, or their longer working hours (full-time vs. part-time).

The following information provides a methodology for calculating the cost of production for each fee earner in your practice. This information can be used for setting fixed-fee work, as well as being a tool for determining individual fee budgets.

SAMPLE PRACTICE

STEP 1: DETERMINE FEES REQUIRED TO RETURN A PROFIT AND TO BREAK EVEN

	Retail		Break even	
Profit	\$300,000			
Salaries	\$450,000*		\$450,000*	
Overheads	\$300,000		\$300,000	
Principal salary	\$200,000		\$200,000	
Total fees required	\$1,250,000	1	\$950,000	2

NOTES:

- Profit: Insert the amount of profit you wish to earn in excess of notional salaries paid to principals.
- *Salaries: Include salaries for all employees in the practice (support and fee earners). For the above example: Practitioner salaries are \$150,000, paralegal salaries \$30,000, and support staff salaries \$270,000. Total employee salaries: \$450,000.
- Overheads: Total non-salary overheads.
- Principals' salaries: Provide a notional salary for all equity principals in the practice.

STEP 2: DETERMINE BASE COST OF CHARGEABLE HOURS

	A	B	C = A/B	D	E = C × D
Fee earners only Do not include support	Salary (\$)	Work hours	Cost per work hour (\$)	Chargeable hours	Cost of chargeable hours (\$)
Partner	100,000	2,000	50.00	1,200	60,000
Partner	100,000	2,000	50.00	1,200	60,000
Practitioner	60,000	1,800	33.33	1,100	36,667
Practitioner	50,000	1,800	27.78	1,100	30,556
Practitioner	40,000	1,600	25.00	1,100	27,500
Paralegal	30,000	1,500	20.00	1,000	20,000

Base cost of chargeable hours 234,722 (3)

NOTES:

- Fee earners: List the fee earners only.
- Salary: Salary of the particular fee earner.
- Working hours: This is the annual hours spent at work. Multiply hours per day by number of days per week by 46 weeks of the year, e.g. 9 hours x 5 days x 46 weeks = 2070 hours.
- Cost per working hour: Divide column A by column B (salary divided by working hours).

- Chargeable hours: Budgeted annual chargeable hours. Calculate as per working hours above, e.g.: 5.5 hours x 5 days x 46 weeks = 1265 hours.
- Cost per chargeable hour: Multiply column C by column D.
- Base cost of chargeable hours: Sum of column E.

STEP 3: DETERMINE THE OVERHEAD FACTOR (OHF)

	Retail		Break even	
Fees required	\$1,250,000	(1)	\$950,000	(2)
Base cost of chargeable hours	\$ 234,722	(3)	\$234,722	(3)
Overhead factor (OHF)	5.33	(1/3)	4.05	(2/3)

NOTES:

- Fees required: As per calculated fees for retail and break even in Step 1. Note the references to items 1 and 2.
- Base cost of chargeable hours: As calculated in Step 2 at item 3.
- Overhead factor: Divide fees required (1 and 2) by the base cost of chargeable hours (3).

STEP 4: DETERMINE RATES AND BUDGETS

Fee earners only	Charge rates		Fees budget	
	Column C x OHF Retail	Column C x OHF Break even	Column D x rate Retail	Column D x rate Break even
Partner	\$266	\$202	\$319,527	\$242,840
Partner	\$266	\$202	\$319,527	\$242,840
Practitioner	\$178	\$135	\$195,266	\$148,402
Practitioner	\$148	\$112	\$162,722	\$123,669
Practitioner	\$133	\$101	\$146,450	\$111,302
Paralegal	\$107	\$81	\$106,509	\$80,947
			\$1,250,000	\$950,000

NOTES:

- Charge rates: For each fee earner, multiply their result in column C at Step 2 by the retail or break-even overhead factor calculated at Step 3.
- The retail rate will show the rate that needs to be charged at the number of budgeted chargeable hours (column D, Step 2) to generate the desired total practice income.
- The break-even rate is the cost of production for each fee earner.
- Fees budget: For each fee earner, multiply their result in column D at Step 2 by the retail or break-even charge rates you have just calculated. This will indicate the fees to be generated by each fee earner.

NOW COMPLETE THE DETAILS FOR YOUR PRACTICE

STEP 1: DETERMINE FEES REQUIRED TO RETURN A PROFIT AND TO BREAK EVEN

	Retail	Break even
Profit	\$	
Salaries	\$	\$
Overheads	\$	\$
Principal salary	\$	\$
Total fees required	\$ (1)	\$ (2)

NOTES:

- Profit: Insert the amount of profit you wish to earn in excess of notional salaries paid to principals
- Salaries: Include salaries for all employees in the practice (support and fee earners).
- Overheads: Total non-salary overheads.
- Principals' salaries: Provide a notional salary for all equity principals in the practice.

STEP 2: DETERMINE BASE COST OF CHARGEABLE HOURS

Fee earners only	A	B	C = A/B	D	E = C × D
Do not include support	Salary (\$)	Work hours	Cost per work hour (\$)	Chargeable hours	Cost of chargeable hours (\$)

Base cost of chargeable hours _____ (3)

NOTES:

- Fee earners: List the fee earners only.
- Salary: Salary of the particular fee earner.
- Working hours: This is the annual hours spent at work. Multiply hours per day by number of days per week by 46 weeks of the year e.g., 9 hours x 5 days x 46 weeks = 2,070 hours
- Cost per working hour: Divide column A by column B (salary divided by working hours).
- Chargeable hours: Budgeted annual chargeable hours. Calculate as per working hours above, e.g.: 5.5 hours x 5 days x 46 weeks = 1,265 hours.
- Cost per chargeable hour: Multiply column C by column D.
- Base cost of chargeable hours: Sum of column E.

STEP 3: DETERMINE THE OVERHEAD FACTOR (OHF)

	Retail		Break even	
Fees required	\$	(1)	\$	(2)
Base cost of chargeable hours	\$	(3)	\$	(3)
Overhead factor (OHF)	\$	(1/3)	\$	(2/3)

NOTES:

- Fees required: As per calculated fees for retail and break even in Step 1. Note the references to items 1 and 2.
- Base cost of chargeable hours: As calculated in Step 2 at item 3.
- Overhead factor: Divide fees required (1 and 2) by the base cost of chargeable hours (3).

STEP 4: DETERMINE RATES AND BUDGETS

Fee earners	Charge rates		Fees budget	
	Column C x OHF Retail	Column C x OHF Break even	Column D x rate Retail	Column D x rate Break even

NOTES:

- Charge rates: For each fee earner, multiply their result in column C at Step 2 by the retail or break-even overhead factor calculated at Step 3.
- The retail rate will show the rate that needs to be charged at the number of budgeted chargeable hours (column D, Step 2) to generate the desired total practice income.
- The break-even rate is the cost of production for each fee earner.
- Fees budget: For each fee earner, multiply their result in column D at Step 2 by the retail or break-even charge rates you have just calculated. This will indicate the fees to be generated by each fee earner.

2.5 ALTERNATIVES TO TIME BILLING

The “billable hour” is facing a challenge from fixed fees, project costing and negotiated budgets as a basis for determining client fees. This is because charging by the hour may not be the best way for a practice to charge costs to a client. It is only one of the factors that will determine a fee. For example, it may be that the time spent in completing a matter is excessive, or the total costs are excessive in relation to the value of the matter. Ultimately, there is discretion over the fee, and it will depend on the circumstances of the retainer.

The fundamental issue is to know and understand the hourly expense and charge-out rate of each fee earner in your practice. This is crucial management information that will contribute to what billing option you choose.

The vast majority of bills rendered annually by legal practices in New South Wales use time billing. Research supports the view that this form of billing is preferred in this state. Very few of these bills result in practitioner–client assessment or referral to the Legal Services Commissioner. Therefore, experience suggests that time billing works.

Commercial and government clients (formerly referred to as “sophisticated clients”) often prefer time billing to other methods because it gives them a means of assessing both the time spent on a matter and the hourly rate charged for the service. The definition of a commercial or government client should be carefully considered under [s. 170](#) of the LPUL which states that Part 4.3 does not apply to commercial or government clients apart from provisions relating to conditional costs agreements and contingency fees (see [ss. 181\(1, 7 & and 8\)](#), [182](#), [183](#) and [185 \(3, 4 & and 5\)](#) of the LPUL).

Time billing depends on accurate time recording. Several time-recording software packages are available, but all depend on accurate input. There is always going to be “leakage” – that is, where events occur, or where legal work performed is not accurately recorded or omitted. The aim of the practice should be to minimise leakage.

On average, approximately 15 per cent of time worked is never recorded. This should be considered in setting the appropriate hourly rate for the practice. For this reason, it may be useful to analyse the type of work in your practice and calculate the “average” the cost of doing a particular style of legal work. It may give you some indication of the time “usually” taken for a matter to be completed.

This approach may not work so well for litigation, where uncertainties of time and preparation can lead to a variation in costs. In the case of litigation, you will have to continually review costs as a matter progresses. The LPUL requires that costs be reviewed where initial estimates provided to a client have significantly changed (LPUL, [s. 174\(1\)\(b\)](#)).

Hourly rates and time billing should not be confused with the client’s (and the practitioner’s) determination of “value” in the billing process. This is clearly a very discretionary matter and can be resolved by a discussion between both parties.

It is no longer practical to refer to a “common price” for certain work. The “price” will very much depend on the size, style and location of the practice, and its clientele.

To help you think about how you might “package” your fees, some alternatives are described below.

2.5.1 HOURLY RATE

Definition: A fee charged for every hour worked by a firm in relation to a matter. The charge-out rate might be for practitioners only, and include all overheads and support staff salaries, or rates might be established for every person who works on the matter, including clerks and paralegals. Discounts might be offered for high-volume or regular clients. It is important to ensure that only actual time spent is charged according to the work done. The unit of time should be small enough to record actual time spent accurately. The unit of time can vary from one minute up to six minutes or pro rata. Software packages can be adjusted accordingly. As suggested above, care should be taken in the input process, and some training is required for new time recorders, particularly having regard to the common leakage rate experienced across practices.

Suitable for: That depends on the client’s relationship with the firm. With this proviso, it will be more suitable for firms in matters where the extent of work required is unknown at the outset of the retainer (for example, in complex litigation).

Advantages: Recovery of expenses with a profit margin for all work performed, provided the set hourly rate reflects adequately the costs of the practice.

Disadvantages: Possibility of disputes over the number of hours worked. Focus on charging rather than value for the client. It may breed inefficiency and lead to the perception that a legal service is not value for money. The use of hourly rates needs to be carefully managed, and must be transparent from the client's perspective. The client may need to be encouraged to focus on aspects other than "time", such as results and outcomes.

2.5.2. FIXED FEES

Definition: Standard fee for common defined services; may be collected in a lump sum in transactional matters, up front or on completion.

Suitable for: Any matter where the steps in the transaction are well understood by the practitioner (for example, Local Court appearances) or where the transaction consists of standard steps (such as with conveyancing, incorporation and wills). Consequently, it is useful where the firm specialises and can estimate the work involved in a type of matter with some certainty.

Advantages: A high level of consumer acceptance, and a low potential for client disputes if the fee and the service to be provided are adequately communicated. The profitability for the firm is defined for each service. It rewards efficiency.

Disadvantages: Reduced profitability for the firm if the service subsequently becomes complex. This may become apparent in litigation, where a fixed fee may not take account of all contingencies, some of which may be unknown.

2.5.3 PROJECT RATE

Definition: Similar to a fixed fee, but an agreed fee for a particular service. The fee is established and agreed on at each occasion. It may be more suitable for commercial work.

Suitable for: Any matter where the steps and work can be defined at the outset of the matter (for example, in drafting contracts).

Advantages: See fixed fee.

Disadvantages: See fixed fee. It may prove inaccurate if contingencies are unknown when the rate is set.

2.5.4 HOURLY RATE WITH CAP

Definition: As for hourly rates, but with the client and practitioner agreeing to a maximum total bill.

Suitable for: As with hourly rate, but where the work required can be estimated with some certainty. Requires a careful definition and disclosure of what work is to be done so that a charge can be levied for any additional work outside the original brief.

Advantages: Client costs disputes are less likely than with a straight hourly rate. It rewards efficiency.

Disadvantages: Requires that the firm estimates the maximum work required or builds in a margin for uncertainty. Any inefficiency reduces profit.

2.5.5 BLENDED HOURLY RATE

Definition: A uniform hourly rate averaged amongst the staff associated with a project; depending on the time each is likely to be involved. It may result in a reduced recovered hourly rate for litigation work, where following the assessment of a party/party bill, there is a reduction for items such as supervision and attendances where multiple staff members have been involved.

Suitable for: See hourly rate.

Advantages: Possible marketing perception that lower hourly rates will apply when "averaged", and simplification of billing.

Disadvantages: See hourly rate. Also, the overall quality of work could be affected if assigned to less qualified staff members, without senior supervision. Profitability may decrease if senior staff members are required for longer than estimated. Upon review, a test of what is "fair and reasonable" may result in disallowance of multiple attendances by multiple staff, so careful management is required.

2.5.6 CONDITIONAL FEES

Definition: A fixed fee, established at the start of a matter, payable only on “successful completion”, which must be defined. [Section 181\(7\)](#) of the LPUL specifies that a conditional arrangement is not permitted in criminal proceedings or family law proceedings. There is also preclusion in motor accident matters (see [clause 8 of the Motor Accidents Compensation Regulation 2015](#)) and a limit in work injuries damages matters (see [clause 103 of the Workers Compensation Regulation 2010](#)). It should be remembered that the maximum premium the practitioner can charge in litigation matters only is 25 per cent on the legal costs (excluding disbursements) otherwise payable (see LPUL, [s. 182\(2\)](#)). The limitation to 25 per cent does not apply in non-litigious matters.

It is important that the conditional costs agreement clearly defines what will be regarded as “success”. The practitioner should also decide and agree with the client whether disbursements are to be paid by the client, even if fees are not to be charged.

Suitable for: Litigation; certain insurance matters.

Advantages: For the client: if there is no win, there is no payment to the practitioner. It allows deserving cases to be heard, with less risk for the client. For the practitioner: it develops business which might not otherwise have been generated. Results are rewarded.

Disadvantages: There is no certainty of income or recovery of expenses in a case. The practitioner bears a proportion of the risk. There may be a significant delay between the time work is performed and payment is received. Careful management is required to ensure that large amounts of work in progress are ultimately recoverable, with a premium for interest, to reflect cost and managing the practice. These considerations should undoubtedly be reflected in the hourly rate where time billing is the preferred option.

2.6 DEBTOR CONTROL

Remember, you cannot claim interest on your outstanding unpaid fees and disbursements unless:

- your disclosure document or costs agreement provides for the charging of interest
- your bill refers to the right to charge interest and the rate of interest.

However, if the costs agreement does not deal with the charging of interest but the bill includes a claim for interest and has been given in accordance with Chapter 4, Part 4.3 of the LPUL, interest can be charged on unpaid costs 30 days after the bill is given.

Interest is not recoverable unless your bill is issued within six months of a matter concluding (see LPUL, [s. 195\(5\)](#)). This and the law practice’s liability for GST makes it vital that practitioners introduce an effective mechanism for debtor control. Possible ways to achieve this include:

- billing quickly after the work has been done
- billing on an interim basis (perhaps monthly) rather than at the end of the transaction
- obtaining money in advance for disbursements and counsel’s fees
- quickly taking steps to apply for assessment of costs or issuing debt recovery proceedings if bills remain unpaid for an unacceptable period of time.

Under the Uniform Law, where instructions are received on or after 1 July 2015, Applications for Assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – [see ss. 198 \(3\) and \(4\)](#) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an Application for Assessment to have costs assessed.

2.7 CONCLUSION

As already indicated, the hourly rate is being challenged by other forms of billing. You need to exercise care when considering alternatives to hourly rates, to ensure your agreement accurately assesses the likely outcomes and associated expenses, and includes the potential for variation or further negotiation.

Setting appropriate hourly rates is relatively straightforward once your cost structure is understood. No-one has so far provided a consistently better means of costing work, especially for litigation.

Whatever method you ultimately adopt, or support, your agreement should accurately reflect the costs to operate your own business. It should comply if it is not covered by the exceptions, and it should clearly state the method for determining the fee.

Under [s. 174\(3\)](#) of the LPUL, if a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

Whatever method you adopt for setting fees, it is important to review your operating costs annually. This enables you to consider any increases in fixed overheads, such as wages and rent, as well as any increases in operating expenses occasioned by the growth of the practice or changes in the commercial environment. For smaller practices, it may be useful to do this in conjunction with your accountant. Together you can review the recent history of the practice to ensure that billing rates are accurate and that they reflect the costs of running the practice and providing a return to the proprietors.



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 3

DISCLOSURE, COSTS AGREEMENTS AND BILLING

- 3.1 INTRODUCTION
- 3.2 DISCLOSURE
- 3.3 COSTS AGREEMENTS
- 3.4 BILLING

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](#)).

3.1 INTRODUCTION

This chapter outlines the regulation of law practices' costs under the [Legal Profession Uniform Law \(NSW\)](#) (LPUL). Regulation of law practices' costs may be grouped into three areas: disclosure, costs agreements and billing.

3.2 DISCLOSURE

First, and most importantly, disclosure is mandatory. LPUL imposes significant obligations to disclose information to the client, and failure to comply has serious consequences, including disciplinary action and voiding of the costs agreement, if any (s. 178 of the LPUL).

The obligation to disclose is ongoing: the practitioner must notify the client in writing of any substantial change to anything included in a disclosure (ss. 174(1) and (6) of the LPUL). There are exceptions, particularly relating to “a government or commercial client”. If your client falls within the definition of “a government or commercial client” (s. 170 of the LPUL), then Part 4.3 of LPUL, including disclosure and billing obligations, does not apply.

It is important to consider the obligations for disclosure and costs recovery/assessment in conjunction with the legislation in effect at the time the retainer is agreed.

As this is a guide to the legislation only, please read the relevant legislation and regulations carefully.

Additional information on disclosure is as follows:

- 3.2.1 Disclosure obligations and precedents
- 3.2.2 Who is the recipient of the disclosure?
- 3.2.3 What information do you have to disclose?
- 3.2.4 What do you disclose if another law practice is to be retained?
- 3.2.5 What is the form and timing of disclosure?
- 3.2.6 What disclosure is required for personal injury damages matters under section 61 LPULAA?
- 3.2.7 When is disclosure not required?
- 3.2.8 Disclosure reasonable steps
- 3.2.9 What are the consequences of failure to disclose?

3.2.1 DISCLOSURE OBLIGATIONS AND PRECEDENTS?

The disclosure obligations are set out at section 174 of LPUL (s. 174 of the LPUL).

The Costs Committee has prepared both “standard” and “conditional” costs disclosure and costs agreement documents, all of which include the requirements for disclosure. The documents also enable the law practice and the client to create a binding agreement. See link to costs agreements at <https://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/costs/useful-forms>

3.2.2 WHO IS THE RECIPIENT OF THE DISCLOSURE?

Disclosure must be made to the client and an associated third party payer, if applicable.

The client is defined as including “a person to whom or for whom legal services are provided” (s. 6 of the LPUL).

A person is a “third party payer” if they are not the client and are “under a legal obligation to pay all or any part of the legal costs for legal services provided to the client” (s. 171(1)(a)(i) of the LPUL) or has already paid all or part of those legal costs under such an obligation (s. 171(1)(a)(ii) of the LPUL).

A third party payer is “associated” if the legal obligation is owed to the law practice (s. 171(1)(b) of the LPUL). A “non-associated” third-party payer is one who is obliged to indemnify another for legal costs; that is, by a contractual obligation, such as a lease or mortgage (s. 171(1)(c) of the LPUL).

[Section 176](#) of the LPUL provides that where a law practice is required to make disclosure to a client, there is an obligation to make the same disclosure to an associated third party payer.

This disclosure, however, only relates to the details or matters that are relevant to the associated third party payer, and to the costs they are obliged to pay.

A law practice is not obliged to disclose to a non-associated third party payer, but is obliged to provide the third party payer, on their written request, with sufficient information to allow them to consider making and, “if thought fit”, to make an application for assessment ([s. 198\(6\)](#) of the LPUL).

3.2.3 WHAT INFORMATION DO YOU HAVE TO DISCLOSE?

The following information must be disclosed by the law practice to the client (and any associated third party payer):

- the basis on which legal costs will be calculated and an estimate of the total legal costs ([s. 174\(1\)\(a\)](#) of the LPUL)
- when or as soon as practicable after there is any significant change to anything previously disclosed, information disclosing the change, including information about any significant change to the legal costs that will be payable by the client ([s. 174\(1\)\(b\)](#) of the LPUL).
- their right to:
 - negotiate a costs agreement with the law practice ([s. 174\(2\)\(a\)\(i\)](#) of the LPUL)
 - negotiate the billing method ([s. 174\(2\)\(a\)\(ii\)](#) of the LPUL)
 - receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised ([s.174\(2\)\(a\)\(iii\)](#) of the LPUL)
 - seek the assistance of the designated local regulatory authority (in NSW the Office of the Legal Services Commissioner) in the event of a dispute about legal costs ([s.174\(2\)\(a\)\(iv\)](#) of the LPUL).

If the matter is litigious, the following information must be provided:

- Where the law practice negotiates a settlement on behalf of a client, the law practice must disclose to the client, before the settlement is executed:
 - a reasonable estimate of the amount of legal costs payable by the client, if the matter is settled (including any legal costs of another party that the client is to pay ([s. 177\(1\)\(a\)](#) of the LPUL)
 - a reasonable estimate of any contributions towards those costs likely to be received from another party ([s. 177\(1\)\(b\)](#) of the LPUL)
- If a law practice enters into a conditional costs agreement that involves an uplift fee, it must disclose to the client the basis on which the uplift fee is to be calculated. It must include an estimate of the uplift fee or, if that is not reasonably practical, a range of estimates for the uplift fee and an explanation of the major variables that may affect the calculation of the uplift fee ([s. 182\(3\)](#) of the LPUL)

As LPUL ([s. 6](#) of the LPUL) defines legal costs as including fees that a person has been or may be charged, including disbursements, they must also be disclosed. It is particularly important to disclose whether the fees are inclusive or exclusive of GST. If they are exclusive of GST, the law practice must disclose that there will be an additional amount for GST.

Additional disclosure is required if a law practice proposes to charge more than the regulated costs for matters associated with motor accidents, work injury damages and personal injury, which may be affected by cost caps (see 3.2.6 below).

3.2.4 WHAT DO YOU DISCLOSE IF ANOTHER LAW PRACTICE IS TO BE RETAINED?

If a law practice intends to retain another law practice (for example, a barrister or a practitioner agent) on behalf of the client, then it must ([s. 175](#) of the LPUL) disclose to the client the details specified in [section 174\(1\)](#), in addition to any information that must be disclosed under [section 174](#), including:

- the basis on which legal costs will be calculated and an estimate of the total legal costs ([s. 174\(1\)\(a\)](#) of the LPUL)
- when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant

change to the legal costs that will be payable by the client (s. 174(1)(b) of the LPUL).

The “second law practice” is obliged to provide information under section 175(2) of the LPUL to the “first law practice” so that the retaining law practice can disclose the required information to the client.

3.2.5 WHAT IS THE FORM AND TIMING OF DISCLOSURE?

A law practice must disclose to the client costs and the retention of another law practice “when or as soon as practicable after instructions are initially given in a matter” (s. 174 (1) of the LPUL) and it must be made “in writing” (s. 174(6) of the LPUL).

A significant change to anything previously disclosed (for example, a change in the estimate of costs) must be made “when or as soon as practicable” (s. 174(1)(b) of the LPUL).

The same disclosure rules apply in relation to an associated third party payer (s. 176 of the LPUL) but only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs that are payable by the associated third party payer in respect of legal services provided to the client (s. 176(1) of the LPUL). The disclosure to the third party payer must be made in writing (s. 176(2) of the LPUL) and must be made at the time the disclosure to the client is required (s. 176(2) (a) of the LPUL). If the law practice only afterwards becomes aware of the obligation of the associated third party payer to pay the legal costs of the client, disclosure must be made as soon as practicable after becoming aware (s. 176(2)(b) of the LPUL) the obligation.

3.2.6 WHAT DISCLOSURE IS REQUIRED FOR PERSONAL INJURY DAMAGES MATTERS UNDER SECTION 61 OF THE LPULAA?

There are special requirements for disclosure in relation to legal services provided for personal injury damages claims, where the amount recovered does not exceed \$100,000 (s. 61 of the LPULAA and Schedule 1 of the LPULAA) – see Chapter 7 below.

In addition to the general disclosure required, a law practice must also disclose information about the effect a costs agreement may have on maximum fixed costs for personal injury damages claims, where the judgment or settlement is less than \$100,000.

The additional disclosure (cl. 28 of the LPULAR) must include:

- a statement that Schedule 1 of the LPULAA (maximum costs in personal injury damages matters) would, but for the costs agreement, limit the maximum costs for legal services provided to the client
- particulars as to how those maximum costs are calculated
- a statement that the costs agreement would have the effect of excluding the operation of that schedule
- an explanation of how the costs will be calculated under the costs agreement
- a statement that the costs agreement relates only to the costs payable between the law practice and the client. If costs are recoverable against the other party, the maximum costs recoverable are determined by Schedule 1 of the LPULAA

This disclosure must be made in writing before, or as soon as practicable after, the law practice is retained in the matter, but before the costs agreement is entered into.

The intention of this additional disclosure is to show the difference between the recovery from another party under Schedule 1 and the costs that the client will have to pay under the costs agreement.

Failure to disclose the information required by clause 28 of the LPULAR has serious consequences: the law practice will not be entitled to the benefit of clause 4 of Schedule 1 of the LPULAA, which means the law practice cannot contract out of the maximum costs cap or charge more than the maximum costs cap.

See the precedent letters drawn up by the Costs Committee in relation to contracting out of the maximum costs caps. See link to contracting out letters at <https://www.lawsociety.com.au/practising-law-in-nsw/ethics-and-compliance/costs/useful-forms>

3.2.7 WHEN IS DISCLOSURE NOT REQUIRED?

Disclosure is not required in the following circumstances if the total legal costs, excluding disbursements, are not likely to exceed \$750 (\$825 including GST) (s. 174(4) and Schedule 4 clause 18 of the LPUL).

Disclosure is not required where the client is a “commercial or government client” defined by s. 170(2) of the LPUL as:

- a law practice (s. 170(2)(a) of the LPUL)
- a public or foreign company, or its subsidiary, or a registered Australian body (s. 170(2)(b)(i) of the LPUL)
- a liquidator, administrator or receiver (s. 170(2)(b)(ii) of the LPUL)
- a financial services licensee (s. 170(2)(b)(iii) of the LPUL)
- a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required (s. 170(2)(b)(iv) of the LPUL)
- a subsidiary of a large proprietary company, but only if the composition of the subsidiary’s board is taken to be controlled by the large proprietary company as provided by subsection (3) (s.170(2)(b)(v) of the LPUL)
- an unincorporated group of participants in a joint venture, if one or more members of the group are persons to whom disclosure of costs is not required and one or more members of the group are not any such persons and if all members of the group who are not such persons have indicated that they waive their right to disclosure (s. 170(2)(c) of the LPUL)
- a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company (within the meaning of the [Corporations Act 2001](#) (Cth)) if it were a company (s. 170(2)(d) of the LPUL)
- a body or person incorporated in a place outside Australia (s. 170(2)(e) of the LPUL)
- a person who has agreed to the payment of costs on a basis that is the result of a tender process (s. 170(2)(f) of the LPUL)
- a government authority in Australia or in a foreign country (s. 170(2)(g) of the LPUL)
- a person specified in, or of a class specified in, the Uniform Rules (s. 170(2)(h) of the LPUL).

3.2.8 DISCLOSURE REASONABLE STEPS

The law practice must be satisfied that the client consents to and understands the proposed course of action for the conduct of the matter and the proposed costs (s. 174(3) of the LPUL). A summary of these issues can be found at <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1041718.pdf>

3.2.9 WHAT ARE THE CONSEQUENCES OF FAILURE TO DISCLOSE?

If a law practice contravenes the disclosure obligations:

- the costs agreement concerned (if any) is void (s. 178(1)(a) of the LPUL)
- the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority (s. 178(1)(b) of the LPUL)
- it must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation (s. 178(1)(c) of the LPUL)
- it may constitute unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention (s. 178(1)(d) of the LPUL)
- it must make any application for assessment within 12 months of the bill being submitted or a request for payment being made (s. 198(3) and (4) of the LPUL). However, an application for assessment may be dealt with by a costs assessor if the designated tribunal (the Manager, costs assessment), on application from the costs assessor or the client or third party payer, determines, after having regard to the delay and the reasons for the delay, it is just and fair for the application for assessment to be dealt with after the 12month period.

[Section 178\(2\)](#) of the LPUL provides that in a matter involving both a client and an associated third party payer where disclosure has been made to one but not the other:

- the liability of the one to whom disclosure was made to pay the legal costs is not affected (s. 178(2)(a) of the LPUL)
- recovery proceedings can be maintained against the one to whom the disclosure was made (s. 178(2)(b) of the LPUL).

3.2.10 DISAPPLICATION OF (SS. 178(1) AND (2) OF THE LPUL)

Some comfort is given to law practices by the addition of [regulation 72A](#) of the LPUGR, whereby a law practice that has omitted to disclose when instructions are first received, takes all reasonable steps to comply within 14 days of becoming aware of the contravention.

3.3 COSTS AGREEMENTS

Information on costs agreements is as follows:

- 3.3.1 [Costs agreements](#)
- 3.3.2 [Costs agreement is prima facie evidence of reasonableness of costs](#)
- 3.3.3 [Who can make a costs agreement?](#)
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3.3.1 COSTS AGREEMENTS

A client of a law practice has the right to require a costs agreement and to have a negotiated costs agreement with the law practice (s. 179 of the LPUL).

A costs agreement must be written or evidenced in writing (s. 180(2) of the LPUL). The offer can be accepted in writing or by “other conduct” (s. 180(3) of the LPUL).

It is best practice to have the client sign the costs agreement as evidence of their receipt and acceptance of it. Even if invoices have been paid by the client, this may not be sufficient to protect the law practice from an allegation that the costs agreement is unenforceable.

Law practices that intend to charge for storage of files and documents should consider [rule 16](#) of the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 in relation to whether to have the client sign the costs agreement.

3.3.2 COSTS AGREEMENT PRIMA FACIE EVIDENCE OF REASONABLENESS OF COSTS

A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if costs disclosure has been given under [Division 3](#) of LPUL and the costs agreement doesn’t contravene [Division 4](#) of LPUL (which concerns requirements for costs agreements) (s. 172(4) of the LPUL).

3.3.3 WHO CAN MAKE A COSTS AGREEMENT?

A costs agreement may be made between:

- a client and a law practice (s. 180(1)(a) of the LPUL)
- a client and a law practice retained on behalf of the client by another law practice (s. 180(1)(b) of the LPUL)
- a law practice and another law practice (s. 180(1)(c) of the LPUL)
- a law practice and an associated third party payer (s. 180(1)(d) of the LPUL).

3.3.4 WHAT TYPES OF COSTS AGREEMENTS ARE THERE?

LPUL provides for two types of costs agreements:

- a standard costs agreement
- a conditional costs agreement.

In some instances, the term “costs agreement” refers to both standard costs agreements and conditional costs agreements (for example, ss. 172, 178, 179, 184, 185, 195 and 199 of the LPUL) and in others, it is used in contradistinction to the term “conditional costs agreement” (for example, s. 180(3) of the LPUL). As a result, some provisions of LPUL apply to both types of agreements, while others apply to only one.

Under LPUL, a law practice is permitted to enter into a conditional costs agreement, which provides that “the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate” (s. 181(1) of the LPUL).

The Costs Committee has prepared a pro-forma Standard Agreement which can be accessed in the Precedents under Professional Responsibility on the Law Society Website.

3.3.5 WHAT ARE UPLIFT FEES?

A conditional costs agreement may provide for the payment of an uplift fee on the successful outcome of the matter (s. 182(1) of the LPUL) (excluding unpaid disbursements).

Where a conditional costs agreement relates to a litigious matter, the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely and an uplift fee must not exceed 25 per cent (s. 182(2) of the LPUL).

The basis for calculating the uplift fee must be identified in the agreement (s. 182(3)(a) of the LPUL).

The agreement must contain an estimate of the uplift fee or, if that is not reasonably practical, a range of estimates, and an explanation of the major variables that may affect the calculation of the uplift fee (s. 182(3)(b) of the LPUL).

3.3.6 PROHIBITION ON CONTINGENCY AGREEMENTS

- A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates (s. 183(1) of the LPUL). This prohibition does not apply to the extent that the costs agreement adopts an applicable fixed costs legislative provision; for example, fixed costs for probate or motor accidents matters (s. 183(2) of the LPUL).
- A contravention of the prohibition against contingency fees by a law practice may constitute unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention (s. 183(3) of the LPUL).
- A law practice that has entered into a costs agreement in contravention of [section 183](#) is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement relates and must repay any amount received in respect of those services to the person from whom it was received (s. 185(4) of LPUL).

3.3.7 FORMAL REQUIREMENTS FOR CONDITIONAL COSTS AGREEMENTS

The Costs Committee has prepared a pro-forma Conditional Costs Agreement with provision for an uplift if required. It can be accessed in the Precedents under Professional Responsibility on the Law Society Website.

A conditional costs agreement (both with and without uplift) must:

- be in writing and in plain language (s. 181(2)(a) of the LPUL)
- set out the circumstances that constitute the successful outcome of the matter to which it relates (s. 181(2)(b) of the LPUL)
- be signed by the client (s. 181(3)(a) of the LPUL)

- include a statement that the client has been informed of their right to seek independent legal advice before entering into the agreement (s. 181(3)(b) of the LPUL)
- contain a cooling-off period of not less than five clear business days, during which the client, by written notice, may terminate the agreement, but this requirement does not apply where the agreement is made between law practices only (s. 181(4) of the LPUL)

If a client terminates a conditional costs agreement within the cooling-off period, the law practice may recover only those legal costs in respect of legal services performed for the client before that termination, and that were performed on the instructions of the client and with the client's knowledge that the legal services would be performed during that period (s. 181(5)(a) of the LPUL). The law practice may not recover any uplift fee (s. 181(5)(b) of the LPUL).

A conditional costs agreement may provide for disbursements to be paid irrespective of the outcome of the matter (s. 181(6) of the LPUL).

A conditional costs agreement may relate to any matter, except a criminal matter (s. 181(7)(a) of the LPUL) or a family law matter (s. 181(7)(b) of the LPUL).

A contravention by a law practice of provisions relating to conditional costs agreements may constitute unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention (s. 181(8) of the LPUL). Also, a law practice that has entered into a costs agreement with an uplift fee in contravention of [section 182](#) is not entitled to recover the whole or any part of the uplift fee and must repay any portion of the uplift fee to the person from whom it was received (s. 185(3) of the LPUL).

Conditional costs agreements that include uplift fees have the following additional requirements:

- Where a conditional costs agreement relates to a litigious matter, the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely, and an uplift fee must not exceed 25 per cent (s. 182(2)(a) of the LPUL).
- The uplift fee must not exceed 25 per cent of the legal costs (excluding disbursements) (s. 182(2)(b) of the LPUL).
- The basis for the calculation of the uplift fee must be identified in the agreement (s. 182(3)(a) of the LPUL).
- The agreement must contain an estimate of the uplift fee or, if that is not reasonably practical, a range of estimates, and an explanation of the major variables that may affect the calculation of the uplift fee (s. 182(3)(b) of the LPUL).

3.3.8 VOIDING OF COSTS AGREEMENTS

- A costs agreement that contravenes, or is entered into in contravention of, any provision in [Part 4.3 of Division 4](#) 'Costs Agreements' sections 179–185 of the LPUL is void (s. 185(1) of the LPUL).
- If a costs agreement is void due to a failure to comply with the disclosure obligations, the costs must be assessed before the law practice can seek to recover them (s. 178(1)) (note to s.185(1) of the LPUL).
- A law practice is not entitled to recover any amount in excess of that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received (s. 185(2) of the LPUL).
- A law practice that has entered into a costs agreement in contravention of the requirements for conditional costs agreements with an uplift fee at [section 182](#) is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in respect of the uplift fee to the person from whom it was received (s. 185(3) of the LPUL).
- A law practice that has entered into a costs agreement in contravention of the prohibition on contingency fees in [section 183](#) is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement relates and must repay any amount received in respect of those services to the person from whom it was received (s. 185(4) of the LPUL).

3.3.9 COSTS AGREEMENTS GENERALLY

In either standard or conditional costs agreements:

- it is not possible to include a provision that the legal costs to which the costs agreement relates are not subject to a costs assessment (s. 180(4) of the LPUL)
- in the event of a costs agreement being void, legal costs will be recoverable either:
 - according to whether they are fair and reasonable, in particular they are proportionately and reasonably incurred, and are proportionate and reasonable in amount, including consideration of the factors set out at in [sections 172\(1\) and 172\(2\)](#) of the LPUL, or
 - in accordance with any fixed costs provision (s. 172(3) of the LPUL).

3.3.10 CAN YOU CHARGE INTEREST ON COSTS?

A term entitling the law practice to charge interest may be included in the costs agreement (s. 195(1) of the LPUL).

However, note that LPUL allows a law practice to charge the client interest on unpaid legal costs if the costs are unpaid 30 days or more after a bill was submitted to the client (s. 195(2) of the LPUL). The bill, however, must have included a statement that interest was payable, including the rate of interest (s. 195(3) of the LPUL).

The rate of interest charged, whether under LPUL or under a costs agreement, must not exceed the rate prescribed under [regulation 75](#) of the LPUGR, which sets out that the maximum prescribed rate of interest is the Cash Target Rate (specified by the Reserve Bank of Australia and available at www.rba.gov.au) + 2%.

If you want to charge interest to your client you must bill them within 6 months after the completion of the matter (s.195(5) of the LPUL).

3.3.11 CAN YOU REQUEST SECURITY FOR LEGAL COSTS FROM THE CLIENT?

A law practice may take reasonable security from a client for legal costs (including security for payment of interest on unpaid legal costs) and may refuse or cease to act for a client who does not provide reasonable security (s. 206 of the LPUL).

3.4 BILLING

Information on billing is as follows:

- 3.4.1 Tax invoice/bill of costs
- 3.4.2 Commencement of recovery proceedings
- 3.4.3 Definitions of bills
- 3.4.4 Request for an itemised bill
- 3.4.5 Form of a bill of costs
- 3.4.6 Presenting the bill to the client
- 3.4.7 Content of a bill
- 3.4.8 Timing of a bill
- 3.4.9 Withdrawal/replacement of a bill

3.4.1 TAX INVOICE/BILL OF COSTS

In accordance with Australia's taxation legislation, law practices provide their clients with a tax invoice. The terms "bill" and "bill of costs" (referring to the formal documentation required if there is a dispute between a practitioner and a client) have been incorporated into LPUL.

3.4.2 COMMENCEMENT OF RECOVERY PROCEEDINGS

A law practice must not commence proceedings to recover legal costs from a person unless a bill has been submitted, and:

- where the legal costs are subject to a costs dispute, not before the designated local regulatory authority (the NSW Office of the Legal Services Commissioner) has closed or resolved the dispute (s. 194(2)(a) of the LPUL)
- until, or at least 30 days after, the later of:
 - the date on which the person is given the bill (s. 194(2)(b)(i) of the LPUL) or
 - the date on which the person receives an itemised bill following a request made in accordance with section 187 (s.194(2)(b)(ii) of the LPUL).

Law practices should be aware that applications for assessment of solicitor own client costs must be filed within 12 months after the bill was given to the client (s.193(3)(a) of LPUL).

3.4.3 DEFINITIONS OF BILLS

[Regulation 5](#) of the LPUGR includes the following two definitions of bill:

- “lump sum bill” means a bill that describes the legal services to which it relates and specifies the total amount of the legal costs
- “itemised bill” means a bill that specifies in detail how the legal costs are made up, so as to allow costs to be assessed.

3.4.4 REQUEST FOR AN ITEMISED BILL

If a “lump sum bill” is given by the law practice, then any person who is entitled to apply for an assessment may ask the law practice to give them an itemised bill (s. 187(1) of the LPUL).

A request for an itemised bill must be made within 30 days after the date on which the legal costs become payable (s. 187(2) of the LPUL).

The law practice must comply with the request within 21 days after the date on which the request is made (s. 187(3) of the LPUL).

If the person making the request is liable to pay only a part of the legal costs to which the bill relates, the request for an itemised bill may only be made in relation to those costs that the person is liable to pay (s. 187(4) of the LPUL).

3.4.5 FORM OF A BILL OF COSTS

A bill of costs given by a law practice or a letter accompanying the bill must be signed by a principal of the law practice designated in the bill or letter as the principal for the bill, or it must nominate a principal of the law practice as the responsible principal for the bill (s. 188(1) of the LPUL).

If a principal does not sign or is not nominated as the responsible principal for a bill given by a law practice, each principal of the law practice is taken to be responsible for the bill (s. 188(2) of the LPUL).

The bill must include, or be accompanied by, a written statement setting out:

- the avenues that are open to the client if there is a dispute in relation to legal costs (s. 192(a) of the LPUL)
- any time limits that apply to the avenues open to the client if there is a dispute in relation to legal costs (s. 192(b) of the LPUL)

See the precedent of statement in Appendix 1.

The reasons for the decision of the Court of Appeal in [Leon Nikolaidis v Legal Services Commissioner](#) [2007] NSWCA 130

contain important commentary on a practitioner's responsibility in relation to bills of costs prepared by employed staff.

Clients cannot be charged for providing a bill of costs or a subsequent itemised bill of costs (s. 191 of the LPUL).

3.4.6 GIVING THE BILL TO THE CLIENT

A bill given by a law practice to a client may be given in one of several ways, which are:

- by personal delivery to the client or an agent (reg. 73(1)(a) of the LPUGR)
- by post to the client or an agent (reg. 73(1)(b) of the LPUGR)
- by leaving a copy of the bill at the usual or last known business or residential address (reg. 73(1)(c) of the LPUGR)
- by DX (reg. 73(1)(d) of the LPUGR)
- by fax (reg. 73(1)(e) of the LPUGR)
- by email or mobile phone (reg. 73(1)(f) of the LPUGR)
- in the case of a corporation, in any manner in which service of a notice or documents may, by law, be served on the corporation (reg. 73(1)(g) of the LPUGR).

3.4.7 CONTENT OF A BILL

Itemised bills should include:

- date of attendance
- description of the task/s undertaken during the attendance
- the names of the practitioners who undertook the attendance
- the duration of the attendance
- the amount charged for the attendance.

3.4.8 TIMING OF A BILL

A law practice may give a client an interim bill covering only part of the legal service that the law practice was retained to provide (s. 193(1) of the LPUL).

Legal costs that are the subject of an interim bill may be assessed either at the time of the interim bill or at the time of the final bill (s. 193(2) of the LPUL). This means that a client who receives and pays an interim bill may apply for assessment of that bill at the conclusion of the matter. In this case, the 12-month period to apply for assessment (s. 198(3) of the LPUL) runs from the date the final bill was given to the client.

This also means that a law practice which has given an interim bill may apply for assessment of that bill at the conclusion of the matter. Law practices have 12 months from the date of the final bill in which to apply for assessment (s.198(3) of LPLUL).

If a client requests a report on costs, then the law practice must provide it at no cost to the client (s. 190(1) of the LPUL).

3.4.9 WITHDRAWAL/REPLACEMENT OF A BILL

Where a lump sum bill is given and a client requires an itemised bill and the total amount of the legal costs in the itemised bill exceeds the amount charged in the lump sum bill, the additional costs may only be recovered by the law practice if:

- (a) when the lump sum bill was given, the law practice disclosed in writing to the client that the total amount of the legal costs specified in any itemised bill may be higher than the amount specified in the lump sum bill, and
- (b) the costs are determined to be payable after a costs assessment or a binding determination under [section 292](#) of the Uniform Law (reg. 74(1) of the LPUGR).

It would be prudent to include a warning on any lump sum bill that, if an itemised bill is requested, the earlier bill may be withdrawn and the itemised bill may be for a larger amount



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 4

UNIFORM LAW AND COSTS ASSESSMENTS

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- 4.2 INTRODUCTION
- 4.3 THE SCHEME
- 4.4 ASSESSMENT BETWEEN LAW PRACTICES AND CLIENTS
- 4.5 PARTY/PARTY ASSESSMENTS
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- 4.8 REASONS FOR DETERMINATION
- 4.9 MISCELLANEOUS
- 4.10 REVIEWS
- 4.11 APPEALS

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](#)).

THIS CHAPTER WILL BE UPDATED WHEN THE UNIFORM LAW COSTS ASSESSMENT RULES ARE PUBLISHED

4.1 UNIFORM LAW AND COSTS ASSESSMENTS

The transitional provisions of the Uniform Law include the following:

Schedule 4 clause 18 of the LPUL states that the prior legislation relating to legal costs continues to apply to a matter if the client first instructed the law practice in the matter before 1 July 2015. Accordingly, the costs assessment scheme in effect under the LPA 2004 and the LPR continue to apply.

Clause 59 of the LPULAR provides that the LPA 2004 and the LPR apply to a matter if the proceedings to which the costs relate commenced before 1 July 2015.

For law practice/client costs and client/law practice costs (now Uniform Law costs), in applications for assessment where instructions were first received after 1 July 2015, the Uniform Law applies. For party/party costs (now Ordered costs), where proceedings commenced after 1 July 2015, the Uniform Law applies. The relevant procedures are found in sections 198-201 of the LPUL, sections 63-80 of the LPULAA and clauses 31-58 of the LPULAR.

Under the Uniform Law, where instructions are received on or after 1 July 2015, Applications for Assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – see ss. 198 (3) and (4) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an Application for Assessment to have costs assessed.

Under the Uniform Law, where instructions are received on or after 1 July 2015, Applications for Assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – see [ss. 198 \(3\) and \(4\)](#) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an Application for Assessment to have costs assessed.

New rules will apply to applications for assessment; however, these have not been determined. Accordingly, for the present time, the procedures set out below continue to apply, subject to changes including the following:

APPLICABLE TEST

The tests for the Uniform Law and LPA 2004 share similarities. However, one difference is that under the Uniform Law, ordered costs must be “proportionately and reasonably incurred”, whereas under the LPA 2004, consideration of proportionality resided in section 60 of the *Civil Procedure Act 2005* (“CPA 2005”). However, by virtue of section 364(2)(f) of the LPA 2004, proportionality is a matter to which a costs assessor “may” (not “must”) have regard when considering what is a fair and reasonable amount of legal costs as that section refers to “the outcome of the matter”.

Section 172 LPUL provides that costs must be proportionately and reasonably incurred and proportionate and reasonable in amount. Factors in a costs assessment are found in **section 200 LPUL** which states that in considering whether legal costs for legal work are fair and reasonable, the costs assessor must apply the principles in **section 172** so far as they are applicable.

INTEREST

Uniform Law costs: a costs assessor “may” determine interest is payable on Uniform Law costs (**section 81 LPULAA**). It should be noted the term Uniform Law costs applies to law practice/client costs and not party/party or ordered costs.

Ordered costs: interest is to be included in a determination of ordered costs in accordance with **section 101** of the CPA 2005, provided the proceedings were commenced after 24 November 2015. [Section 70\(1\)\(c\)](#) of the LPULAA states that a costs assessor “is to” issue a certificate that sets out the determination and includes any interest payable under [section 101 of the CPA 2005](#).

REVIEWS

Uniform Law costs: an application for review ([section 205 LPUL](#)) must be lodged within 30 days (**section 83 LPULAA**) after the relevant certificate of determination was sent to the parties. No prior notice is required where instructions were first received on or after 1 July 2015.

Ordered costs: an application for review must be lodged within 30 days after the relevant certificate of determination was sent to the parties ([section 83 LPULAA](#)). No prior notice is required where proceedings were commenced on or after 1 July 2015.

4.2 INTRODUCTION

The costs assessment scheme is conducted in accordance with the LPUL, LPULAA, LPULAR and LPUGR. The process for assessment is found in [sections 198-201](#) of the LPUL, [sections 63–80](#) of the LPULAA and [clauses 32–58](#) of the LPULAR.

The forms for the assessment process can be found on the Supreme Court’s website under “Cost assessments”. (Care should be taken to choose the appropriate form.) The forms must be lodged in triplicate together with the fee, which is \$100 or 1 per cent of the amount in dispute or unpaid, whichever is the greater.

Further information is provided below.

4.3 THE SCHEME

The costs assessment process is administrative in nature. Assessments between law practices and their clients (Uniform Law costs) or those between parties to litigation (Ordered costs) are not “proceedings” in the Supreme Court (see *Diemasters Pty Ltd v Meadowcorp* (Supreme Court NSW Unreported Judgment 16 July 2003, BC200306928) and [Brierley v Anthony Charles Reeves T/as Kaplan Reeves and Co and Ors \[2000\] NSWSC 305](#)).

Assessments can be lodged by law practices seeking to recover monies from their clients, or by clients and the extended definitions of clients against their practices ([section 198](#) LPUL, Uniform Law costs), or by parties to proceedings in state courts or tribunals who have the benefit of costs orders in their favour ([section 74](#) LPULAA, Ordered costs).

The prerequisites for the costs assessment process are set out in [sections 66-68](#) LPULAA and [clause 32](#) LPULAR and the costs assessment rules (yet to be published) for assessments of Uniform Law costs and Ordered costs.

In applications for assessment (see [clause 33](#) LPULAR), other than for Ordered costs applications, the filing fee is based on the amount in dispute, which can be determined by the amount that is the subject of the objection or the balance of a partly paid tax invoice.

The amount in dispute in an Ordered costs application for assessment is the whole of the amount claimed, regardless of concessions in a notice of objection. (See [Turner v Pride \(1999\) NSWSC 850 \(Master Malpass, unreported\)](#)). In this case, Master Malpass identified the difference between the provisions (in the 1987 act) in relation to applications for a bill of costs (law practice/client), which required identification of the disputed costs and an assessment inter partes. In the latter assessment, an assessor must assess the total costs claimed to determine the fair and reasonable costs.

The costs assessor is not restricted to those items of work that are the subject of the objection. (See also [O’Connor v Fitti \(2000\) NSWSC 540 \(Master Malpass, unreported\)](#)).

Law practices cannot contract out of the assessment scheme. There was an exception in relation to “sophisticated clients in the LPA 2004 (section 322(5)) however this has no equivalent in [section 180](#) LPUL.

Costs assessors are appointed by the Chief Justice from the practicing profession (solicitors and barristers). Australian legal practitioners of at least five years’ standing are eligible for appointment ([Schedule 6 LPULAA](#)).

A costs assessor holds office for a period not exceeding three years, but can be reappointed for further terms. Costs assessors are not officers of the Supreme Court when they are acting as costs assessors.

A costs assessor has wide powers to request further information and documents from the parties to an assessment, or from

any other party. If the particulars or documents are not provided, the assessment can be dealt with either on the information available or by the costs assessor declining to deal with the application. A law practice that fails (without good reason) to comply with a notice issued by a costs assessor is guilty of an offence ([clause 37 LPULAR](#)). Under [section 298 LPUL](#) and [section 165B LPULAA](#) the failure may be regarded as unsatisfactory professional conduct or professional misconduct. Charging more than what is considered fair and reasonable costs may also be regarded as unsatisfactory professional conduct or professional misconduct.

[Section 202](#) of the LPUL gives costs assessors the power to refer a matter to a designated local regulatory authority (currently the Office of the Legal Services Commissioner) if the costs assessor considers the costs charged by a law practice are not fair and reasonable, or if any other matter has been raised in the course of a costs assessment that the costs assessor considers may amount to unsatisfactory professional conduct or professional misconduct (including failure by a practitioner to disclose [section 178\(1\)\(d\) LPUL](#)).

Thus, even on an Ordered costs assessment, a law practice may be referred to the Office of the Legal Services Commissioner in relation to a law practice/client relationship.

Law practices should also be aware of [section 204](#) of the LPUL, which enables a costs assessor to determine that the law practice should pay the costs of the assessment if the costs claimed are reduced by more than 15 per cent or there is a failure to disclose. The Manager, Costs Assessment manages the process of assessments by costs assessors and reviews by review panels.

The Manager has powers to waive fees in certain cases, extend time for certain actions and apply for a review of costs assessor's fees on assessments.

4.4 ASSESSMENT BETWEEN LAW PRACTICES AND CLIENTS

4.4.1 APPLICATIONS BY LAW PRACTICES SEEKING TO RECOVER UNPAID COSTS

A law practice that has not complied with the obligations to disclose costs (Part 4.3, Division 3 Costs Disclosure LPUL) cannot recover their costs until they have been assessed ([section 178 LPUL](#)). The assessment is usually at the law practice's expense ([section 204 LPUL](#)) however note that if the costs assessor believes that it is not fair and reasonable for the law practice to pay the costs of a costs assessment they can order otherwise including that the client pay the costs of the assessment.

A law practice that has complied with the obligation to disclose may still choose to have unpaid costs assessed, rather than commence an action in court for recovery. The benefit of the assessment process is that the certificate of determination can be lodged in a court for enforcement as a judgment ([section 70 LPULAA](#)). It will be necessary to lodge the certificate of judgment with the approved form before enforcement.

A law practice cannot commence proceedings for the recovery of costs, or file an application for assessment of costs, until 30 days after the delivery of a bill of costs ([section 194 LPUL](#) and Chapter 3 for a discussion on billing). As highlighted above, under the Uniform Law, where instructions are received on or after 1 July 2015, applications for assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – see [ss. 198 \(3\) and \(4\)](#) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an application for assessment to have costs assessed.

The law practice completes the form for an application for assessment and attaches the unpaid bill of costs.

Care must be taken to correctly identify the cost respondent. Identify the parties, both the correct name/entity for the law

practice and the correct name/entity of the costs respondent.

The application is lodged with the Manager, who sends it to the cost respondent for a response. The cost respondent has 21 days to provide a response. The Manager has no power to extend the time for a response. Upon receipt of the response, or in default of any response from the client, the Manager refers the application to a costs assessor and notifies the parties of the costs assessor's appointment ([clause 34 LPULAR](#)).

The costs assessor will write separately to the parties confirming their appointment and setting out the requirements of each. A costs assessor must not determine an application for assessment unless ([section 69 of LPULAA](#)) they:

- have given both the applicant and any law practice or client, or other person concerned, a reasonable opportunity to make written submissions in relation to the application; and
- have given due consideration to any submissions made.

In considering an application, a costs assessor is not bound by rules of evidence and may consider any matter they think fit ([section 69](#) of LPULAA).

For the purposes of determining an application for assessment, or exercising any other function, a costs assessor may determine:

- whether or not disclosure has been made and whether or not it was reasonably practicable to disclose any matter that should be disclosed ([section 200](#) LPUL).
- whether a costs agreement exists, and its terms ([section 199](#) LPUL).

Under [section 172\(4\)](#) LPUL a costs agreement is prima facie evidence of disclosed costs being fair and reasonable if there is compliance with provisions as to disclosure and the costs agreement in the LPUL. The assessor must determine if a valid costs agreement exists ([section 199](#) LPUL) and may have regard to disclosures made in the assessment ([section 200](#) LPUL).

The costs assessor must apply the principles in [section 172](#) LPUL when considering whether legal costs for legal work are fair and reasonable ([section 200](#) LPUL). The costs assessor may also have regard to:

- (a) whether the law practice and any legal practitioner associate or foreign lawyer associate involved in the work complied with this Law and the Uniform Rules;
- (b) any disclosures made, including whether it would have been reasonably practicable for the law practice to disclose the total costs of the work at the outset (rather than simply disclosing charging rates);
- (c) any relevant advertisement as to the law practice's costs or the skills of the law practice or any legal practitioner associate or foreign lawyer associate involved in the work;
- (d) any other relevant matter.

The costs assessor must take into account the incidence of GST in a costs assessment.

[Section 200\(4\)](#) LPUL provides that in conducting an assessment of legal costs payable by a non-associated third party payer, the costs assessor must also consider whether it is fair and reasonable in the circumstances for the non-associated third party payer to be charged the amount claimed.

Importantly [section 197](#) LPUL provides that a Law Practice may file for assessment (within the 12-month period after the last invoice is sent) even if a complaint has been made to the Office of the Legal Services Commissioner. Once the process has been completed (Application, Objection and Response) the Manager, Costs Assessment will pause the process until the OLSC complaint is resolved.

4.4.2 APPLICATIONS BY CLIENT TO SET ASIDE COSTS AGREEMENTS

Under the LPA 2004 a costs assessor had wide-ranging powers to set aside a provision of the costs agreement or the whole costs agreement if they were satisfied that the agreement was not fair or reasonable or there was a failure to disclose (see sections 317(3) and 328). Wide ranging matters could be taken into consideration, some of which were listed in section 328.

Pursuant to [section 178 LPUL](#) any failure to disclose renders the entire costs agreement void and no payment of costs is required until those costs have been assessed. The contravention of disclosure obligations is capable of constituting unsatisfactory professional conduct or professional misconduct.

4.4.3 APPLICATIONS BY CLIENTS SEEKING TO ASSESS COSTS RENDERED BY THEIR LAW PRACTICE

Who can have costs assessed?

Any client which is a Commercial or Government client is unable to have costs assessed.

[Section 170 LPUL](#) provides that Part 4.3 LPUL (NSW) (Legal Costs) [which includes all of the disclosure and assessment sections] does not apply to Commercial or Government clients. A “Commercial or Government client” is defined as

- “(a) a law practice; or
- (b) one of the following entities defined or referred to in the [Corporations Act](#)
 - (i) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body;
 - (ii) a liquidator, administrator or receiver;
 - (iii) a financial services licensee;
 - (iv) a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required;
 - (v) a subsidiary of a large proprietary company, but only if the composition of the subsidiary’s board is taken to be controlled by the large proprietary company as provided by subsection (3); or
- (c) an unincorporated group of participants in a joint venture, if one or more members of the group are persons to whom disclosure of costs is not required and one or more members of the group are not any such persons and if all of the members of the group who are not such persons have indicated that they waive their right to disclosure; or
- (d) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company (within the meaning of the [Corporations Act](#)) if it were a company; or
- (e) a body or person incorporated in a place outside Australia; or
- (f) a person who has agreed to the payment of costs on a basis that is the result of a tender process; or

- (g) a government authority in Australia or in a foreign country; or
- (h) a person specified in, or of a class specified in, the Uniform Rules.”

The definition of a large proprietary company is found in [section 45A](#) Corporations Act 2001.

Assessment Process

The process for applications by clients is similar to the process for applications by law practices seeking to recover costs. An application may be made by a client or an associated or non-associated third party payer ([section 171 LPUL](#) for explanations of these terms).

In an application by a non-associated third party payer, the assessor is not bound to determine the application with reference to the terms of the costs agreement between the law practice and the original client (see [Boyce v McIntyre \[\(2009\)\] NSW CA 185](#)).

Under [section 198 LPUL](#), a client has 12 months after being given a bill or after the request for payment is made, to make application for assessment. If there is no bill or request, the client has 12 months after payment to make an application.

An application for assessment out of time can only be dealt with by the costs assessor if there is an application by the client, third party or costs assessor to the “designated tribunal”, who determines it is just and fair for the application to be dealt with out of time. Third party payers who would be commercial or government clients cannot apply for such an assessment ([section 198 LPUL](#)).

A law practice that has retained another law practice on behalf of a client may apply for assessment of that practice’s legal costs ([section 198\(1\) LPUL](#)). The obvious example is the retaining of counsel.

A client wishing to assess a law practice’s costs must lodge an application in the appropriate form, annexing the tax invoices or requests for payment received, and indicating any objections. A list of common objections is provided by on the Supreme Court Costs Assessment website.

The Manager then sends the application to the law practice for response. The law practice has 21 days to respond. Upon receipt of this, or in default of any response from the law practice, the Manager refers the application to a costs assessor ([clause 34 LPULAR](#)). The procedure set out above in relation to practitioner/ client assessments is then undertaken.

[Section 81](#) of the LPULAA gives a costs assessor discretion on whether to include interest in a law practice/client assessment. A party claiming interest is required to calculate the interest from the date the bill is given to a convenient date and also include a daily rate in the Application for Assessment.

The provisions for when a law practice may charge interest is held in [section 195 LPUL](#). A law practice may charge interest if the bill contains information as to interest but not if the bill of costs is given more than 6 months after completion of a matter. For the rate of interest see [rule 75 LPULGR](#).

Interest will be calculated at a maximum rate equal to 2% per annum plus the Cash Rate Target specified by the Reserve Bank of Australia. Interest is charged on legal costs which remain unpaid 30 days after giving the client the bill ([section 195 LPUL](#)).

4.5 ORDERED COSTS (PARTY/PARTY) ASSESSMENTS

A summary of the steps for applying for a costs assessment is located at the end of this chapter.

A party who has the benefit of an order from a court or tribunal, or who must pay another party's costs, may apply for an assessment ([section 74 LPULAA](#)). There is no time limit in the Uniform Law for filing of an Application for Assessment of ordered costs; however, the assessment process is a mechanism for quantification of costs only and see [Coshott v Barry & Anor \[2012\] NSWSC 850](#).

Practitioners are reminded that to recover the costs of litigation, the successful party must have an obligation to pay the costs of their law practice, otherwise the right to recover costs from another party will be hollow. This general principle was reviewed and confirmed by Patten AJ in [Wentworth v Rogers \[2004\] NSWSC 1273](#).

[Section 74 LPULAA](#) does not require the provision of a bill of costs in an application for an ordered costs assessment because the process is not a "taxation" (see [Attorney General of New South Wales v Kennedy Miller \[1999\] NSWCA 158](#) and [Turner v Pride \[1999\] NSWSC 850](#)). However, an application must be in the approved form ([clause 32 LPULAR](#)) and provide the following details (as set by Form A3):

- The proceedings for which the costs are payable, including the identities of the parties to the proceedings and their legal representatives
- The amount claimed by the party to whom the costs are payable.
- The work done and all other items for which costs are claimed.
- When the work was done or the thing acquired, as the case may be.
- Who did the work (including the professional position of that person and relevant information about his or her experience and expertise).
- The basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, on a part of proceedings basis or other basis).
- The facts relied on by the party to whom the costs are payable to justify the costs claimed as fair and reasonable.

This information may be given in the law practice/client bill of costs; however, it will be a matter of fact in each case as to whether such a document provides sufficient information for a third party, or a costs assessor, to understand the nature of the claim.

- [Clause 35](#) of LPULAR outlines the process for applications for Ordered costs assessments, which includes: The application should be completed (with sufficiently detailed information on the nature of the proceedings giving rise to the costs orders) and sent to the paying party. At this stage, it is not lodged with the Manager.
- The paying party has 21 days to respond. This time limit does not act as a default period that gives the claiming party the right to lodge late objections; it is merely the time period that the claiming party must wait before lodging the application with the Manager, Costs Assessment. It is not prudent upon receipt of an application for assessment inter partes to ignore the time specified for objections because the costs assessor has discretion to add more time to objections.
- It is important that the cost respondent is identified correctly on the application, and that the application is brought to the attention of the costs respondent. A costs assessor has no power to amend an application for assessment (see [Flexible Manufacturing Systems v Alter \[2004\] NSWSC 29](#)). As assessment is an administrative process

outside the jurisdiction in which the costs were ordered. It is not safe to assume that the law practice that acted for the unsuccessful litigant is still instructed in relation to the assessment process (see [Diemasters Pty Ltd v Meadowcorp \(Supreme Court NSW Unreported Judgment 16 July 2003, BC200306928\)](#)).

- It may be necessary to arrange delivery of the application to the respondent by registered post or even by process server. This will ensure that, in circumstances where no objection has been received, the applicant can satisfy the costs assessor that the respondent had notice of the application.
- Once an objection is received (or the 21-day period has elapsed), the applicant may prepare a response and then lodge the application with the Manager, Costs Assessment.

The fee for the application is the same as for a law practice/client application, which is \$100 or 1 per cent of the amount in dispute or the amount remaining unpaid, whichever is greater ([clause 33 LPULAR](#)).

When dealing with an application relating to costs payable as a result of an order made by a court or tribunal, the costs assessor must determine the fair and reasonable amount of costs for the work and may have regard to the factors in section 172 (1) and (2) LPUL (section 76 LPULAA). [Section 172 LPUL](#) states costs must be proportionately and reasonably incurred and proportionate and reasonable in amount.

In deciding what is a fair and reasonable amount of costs, a costs assessor may consider:

- the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
- the labour and responsibility involved; and
- the circumstances in acting on the matter, including (for example) any or all of the following:
 - the urgency of the matter;
 - the time spent on the matter;
 - the time when business was transacted in the matter;
 - the place where business was transacted in the matter;
 - the number and importance of any documents involved; and
 - the quality of the work done; and
 - the retainer and the instructions (express or implied) given in the matter ([section 172\(2\) LPUL](#)).

A costs assessor may obtain and consider a costs agreement when assessing costs, but the terms of the costs agreement are not conclusive for the purposes of determining fair and reasonable costs ([section 77 LPULAA](#)). This simply means that the costs assessor is not bound by the terms of the agreement between the successful party and their law practice.

An assessment must also be made in accordance with the rules of the relevant court or tribunal that made the order for costs ([section 75 LPULAA](#)). This section applies to the rules regarding indemnity costs and the limits on costs capped under legislation.

[Section 70 LPULAA](#) requires that a certificate of assessment of costs may be issued in relation to a single application for costs payable under multiple orders, rules or awards between the same parties in one or related proceedings provided that the certificate specifies the amount in respect of each order – [section 70\(3\) LPULAA](#).

In an ordered costs assessment, a Costs Assessor in determining costs is to issue a certificate including interest and in the determination of ordered costs [section 70\(1\)\(c\) LPULAA](#). Interest is payable under [section 101](#) of the Civil Procedure Act 2005 (“CPA 2005”).

For proceedings commenced after 1 July 2015 and prior to 24 November 2015, for interest on costs to be payable, an application for interest had to be made to the Court which heard the matter, before a Certificate of Determination was entered as a Judgment (see [section 101\(4\) CPA 2005](#) prior to 24 November 2015 and the transitional provisions in [Schedule 6](#) to the CPA 2005). If such an order was made, then a costs assessor is to include interest in a determination.

However, interest is payable on costs from the date of judgment in proceedings commenced after 24 November 2015 – [section 101\(4\) CPA 2005](#). This applies unless the court “otherwise orders”.

Interest is calculated at the prescribed rate as from the date the order was made or any other date ordered by the Court [section 101\(4\) CPA 2005](#). The Application for Assessment (Form A3) requires a party to calculate interest to a convenient date. The prescribed rate of interest is found in [clause 36.7 UCPR 2005](#).

4.6 COSTS OF ASSESSMENTS

Under [section 71 LPULAA](#) costs of the assessor and of the Manager Costs Assessment, together with who is to pay them must be determined by the assessor and a certificate issued setting out those costs.

For Uniform Law costs unless the assessor believes it is not fair and reasonable for costs to be paid, the costs of assessment are to be paid by the law practice if there is a failure in relation to disclosure or the costs of the law practice are reduced by 15% or more ([section 204 LPUL](#)). This means that either a client or a law practice can be ordered to pay the costs of a Uniform Law assessment.

In an ordered costs assessment, [clause 40 of LPULAR](#) provides the costs assessor with other criteria to determine which of the parties should pay the costs of the assessment, including:

- the extent to which the determination of the amount of fair and reasonable ordered costs differs from the amount of those costs claimed in the application for assessment,
- whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned,
- whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

The certificate of determination will identify which of the parties is liable for the costs of the assessment and/or the proportions.

The costs assessor sends their determination to the Manager and advises the parties that the assessment is complete and that certificates of determination of costs will be released upon payment of the fees (of the costs assessor) ([clause 42 LPULAR](#)). The Manager will send an invoice to the parties requiring payment of the amount of the costs assessor’s fees; this can be done by any party. If the party that is not liable pays the costs assessor’s fees, they would usually seek to recover them from the liable party.

4.7 ENFORCEMENT OF CERTIFICATES OF DETERMINATION

The certificate/s of determination can be lodged with a court with jurisdiction to order the payment of that amount. Without further action, it will be taken to be a judgment of that court for the purposes of enforcement (sections 70 and 71 LPULAA).

The claimant prepares the approved form for a certificate of judgment, accompanied by an affidavit annexing the certificate of determination and deposing that the debt has not been paid. Separate applications must be made for the certificate of determination and the certificate of determination of the costs of the assessment.

[Section 101](#) (6) CPA 2005 provides:

This section does not authorise the giving of interest on any interest payable under this section.

Once the certificate is registered, interest will run on the amount in the judgment under the provisions of the *Civil Procedure Act 2005* and *Uniform Civil Procedure Rules 2005*.

See link below in Step 10 of “10 Steps to an Ordered (Party/Party) Costs Assessment” to “Guide to registering a certificate of determination”.

4.8 REASONS FOR DETERMINATION

A costs assessor must ensure that the certificate of determination and the certificate of determination of the costs of the assessment are accompanied by a statement of reasons (section 201 LPUL regarding Uniform Law costs and clause 41 LPULAR for assessment generally).

The adequacy of reasons is frequently given for challenging determinations. Clause 41(2) LPULAR states that the reasons must include:

- the total amount of costs for providing legal services determined to be fair and reasonable,
- the total amount of disbursements determined to be fair and reasonable,
- each disbursement varied by the determination,
- in respect of any disputed costs, an explanation of:
- the basis on which the costs were assessed, and
- how the submissions made by the parties were dealt with,
- if the costs assessor declines to assess a bill of costs-the basis for doing so,
- a statement of any determination that interest is payable at a rate specified by the assessor or that no interest is payable.

In [Frumar v the Owners Strata Plan 36957 \[2006\] NSWCA 278](#), Giles J stated:

[61] “The relatively precise amount suggests a calculation or an addition of items, but this is not explained. The assessment may or may not have been by adjustment of the bill of costs, but if it was, the adjustments were not identified, and if it was not, there was no more than an end figure. The panel stated a figure as the result of its assessment and asserted that it was ‘in

all the circumstances' a fair and reasonable amount of costs, but the content cannot be seen.

[1] "In my opinion, this fell short of providing a statement of reasons for the panel's determination as required by s. 208 KG of LPA 2004, and fell short of providing the explanation required by r. 68(1)(d). If either the claimant or the opponent wished to appeal to the Supreme Court, he or it could not do so when he or it did not know:

- a. whether the panel's assessment had been by taking the itemised bill of costs and allowing, disallowing or adjusting items, or by coming to its own view about how reasonable the work was that was carried out

if the former, what items had been allowed, disallowed or adjusted and whether as to hourly rate or reasonable times or for some other reason, or

- a. if the latter, what work the panel thought reasonable and how it costed the carrying out of the work."

Since that decision, there have been many cases where the adequacy or inadequacy of the statement of the reasoning process has been discussed.- see [Randall Pty Limited v Willoughby City Council \[2009\] NSWDC 118](#) and [Dunn v Jerrard & Stuk Lawyers \[2009\] NSWSC 681](#).

These cases concerned appeals about decisions of review panels, but the principles discussed are relevant to the reasons given by costs assessors. In both matters, the court held that failure to give adequate reasons is a matter of law allowing an appeal as of right (section 384 LPA 2004). Current provisions for appeal in section 89 LPULAA are from review panels and are as of right regardless of issues if the dispute reaches threshold requirements, otherwise leave is required; section 205 LPUL allows appeals in relation to Uniform Law costs from a decision of an assessor or panel). In both matters, there was a discussion of what constitutes adequate reasons. In brief, the reasons must address the issues raised by the parties without descending into a taxation process.

4.9 MISCELLANEOUS

A costs assessor can issue an interim certificate (section 70(2) LPULAA). A costs assessor can correct an error in a certificate (clause 43 LPULAR).

A costs assessor's determination is final and binding on the parties. There is no other appeal or assessment of the determination, except as provided by the LPULAA under section 73.

4.10 REVIEWS

A party that is dissatisfied with a determination of a costs assessor can apply for a review of the determination by a review panel; see Part 7, Division 5 of LPULAA and Part 6, Division 3 LPULAR. The review panel will comprise two costs assessors (section 82 LPULAA). The application must be made within 30 days of the certificate of determination being forwarded by the Manager, Costs Assessment (section 83 LPULAA). The 30-day review period does not run from the date the certificates are received. A party applying for review files an Affidavit confirming the application has been given to the other party (clause 45 LPULAR). The Manager, Costs Assessment, has the discretion to extend the time (section 83 LPULAA) and the initial determination is suspended pending the review (section 86 LPULAA). Four copies of applications for review (with annexures) must be filed.

A decision on the review process, decided by Master Malpass under the Legal Profession Act 1987 is [Kells v Mulligan & Anor \[2002\] NSWSC 769](#) spelt out the functions of the review panel. He said the review panel must conduct a review as opposed

to entertaining an appeal. It has all the functions of the costs assessor and must determine the application in the manner that a costs assessor would be required to determine an application. Most importantly, the review panel must ensure it has examined the costs assessor's file before publishing its determination.

Section 85 LPULAA sets out the functions of the review panel; it has all functions of the costs assessor and is to determine the application in a manner that the assessor would. The review panel may affirm the determination or set it aside and substitute a new determination. The review panel must give reasons for its decision including all details referred to in clause 51 LPULAR.

The restriction which existed under section 375 LPA 2004 that the review was to be conducted on the evidence received by the costs assessor and was not to receive Submissions or fresh evidence unless the panel determined otherwise is not found in the LPULAA.

If the review panel affirms the determination of the costs assessor, it must require the party that applied for the review to pay the costs of the review. Further, if the review panel sets aside the original determination, and makes a determination in favour of the party that applied for the review, it must require the party that applied for the review to pay the costs of the review, if that party has not improved their position by more than 15 per cent (clause 53 LPULAR).

In other circumstances, the review panel has the discretion to order how the costs of the review are to be paid (clause 53 LPULAR).

If a decision of the assessor is affirmed a certificate must issue to this effect (clause 50 of LPULAR). The filing of a certificate of substituted determination or costs of the review panel in the registry of the relevant court becomes a judgment of that court (see sections 87 and 88 of LPULAA).

Pursuant to section 88 LPULAA the costs included in the certificate as to the costs of the review panel are the amount incurred by the review panel or the Manager, Costs Assessment in the course of the review, and costs related to the remuneration of the costs assessors who constitute the review panel. The certificate must specify who is to pay the costs. The panel must notify the parties the certificate is available on payment of costs (clause 54 LPULAR), this does not apply if costs are waived.

The review panel also has the power to correct an inadvertent error and issue a certificate that sets out the new determination (clause 55 LPULAR). Such a certificate replaces any certificate setting out the previous determination of the review panel. To view the procedure, see the [Supreme Court website](#).

4.11 APPEALS

In accordance with the rules of the District Court and Supreme Court, a party dissatisfied with a review panel's decision may appeal to the court against the decision under section 89 LPULAA. Where the amount in dispute is less than \$25,000, leave is required for an appeal to the District Court. Any appeal to the Supreme Court requires leave if the amount in dispute is less than \$100,000.00.

Where an appeal against a decision of the review panel under section 89 or an Application for leave is pending in the District Court either the review panel or the District Court may suspend the operation of the determination or the decision. (section 90 LPULAA). The review panel or the District Court may end the suspension or it ends when the appeal is determined or Application for leave dismissed, discontinued or is struck out or lapses. There is currently no provision for the Supreme Court to suspend the operation of the determination.

Section 205 LPUL allows appeals in relation to Uniform Law costs from a decision of an assessor or panel.

The decisions in [Randall Pty Limited v Willoughby City Council \[2009\] NSWDC 118](#) and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 68 provide useful commentary on the process of appeals and the manner in which the review/appeal processes work. Note, however, that the decision of Johnstone DCJ in *Randall* related to the provisions of the 2004 act and the decision of Davies J in *Dunn* concerned the provisions of the 1987 act.

The courts have all the functions of a review panel. The Supreme Court can remit matters to the District Court or remove matters from the District Court to be heard by it. The appeal is by way of rehearing and fresh evidence may be given with the leave of the court (section 89 LPULAA).

Appeals on matters other than questions of law and usually relate to the manner in which the costs assessor exercised their discretion. They are often difficult to conduct because they rely on identifying whether the costs assessor clearly stated their reasoning process and the manner in which they exercised their discretion.

Unless the court affirms the review panel's decision, the court is required to make its own determination. That is, it does not remit the matter back to the costs assessor.

10 STEPS TO AN ORDERED (PARTY/PARTY) COSTS ASSESSMENT

1. Costs order(s): An Ordered costs assessment quantifies costs that can be recovered when a costs order has been obtained in a court or tribunal. You should check the details of the order(s): is it for all the costs or part only; are the costs to be paid on an ordinary basis or the indemnity basis?
2. Estimate of costs and negotiation: Review the accounts file to calculate total professional costs, disbursements and counsel's fees incurred. Is your client registered for GST? If yes, then they cannot claim GST from the other side on assessment as they are entitled to an input tax credit. Prepare a letter to the other side providing a summary breakdown of the costs and disbursements and obtain instructions on making an offer to settle the costs. The efforts made to settle the costs will have an impact on who will pay the costs of the assessment.
3. Preparation of application: To prepare an Application for Assessment of Ordered costs (using form A3) you will need to complete the application, including an index, and annex a consecutively numbered itemisation of the professional costs, disbursements and counsel's fees incurred. Also annex a copy of the court order(s).
4. Delivery (service) of application: The application for assessment must be given to the Costs Respondent; the Costs Applicant must be able to establish the giving of the application. Giving to the solicitor, on the record in the substantive proceedings in which the costs order was made, is not considered adequate unless the solicitor advises they have instructions to accept the application.
5. Timing for lodgment: The Costs Respondent has 21 days to provide objections. You cannot lodge the application until after the expiration of 21 days from the date when the application for assessment was given or on receipt of objections from the Costs Respondent, whichever happens first.
6. Objections and response: If you receive objections from the Costs Respondent, consider whether you need to prepare a response to the individual or general objections made. The response can be filed with the application or forwarded directly to the costs assessor when appointed.
7. Lodging the application with the Manager, Costs Assessment at the Supreme Court:
 - (a) Before lodgment, complete paragraphs 2, 3, 4, (5 if applicable), 6 and 7 and certify the application.
 - (b) The filing fee is payable to the Supreme Court of NSW and is the greater of \$100 or 1 per cent of the total costs claimed.
 - (c) Lodge three copies of the completed application, any objections and any response and a copy of the relevant costs order at the Supreme Court Registry or by post (GPO Box 3, Sydney NSW 2001 or DX 829 Sydney).
8. Costs assessment process: The Manager, Costs Assessment notifies the parties of the appointment of a costs assessor. Both parties will then receive a letter from the costs assessor setting out the requirements for the costs assessment, inviting objections, if not already received by the costs assessor, and final submissions.
9. Determination of the Costs Assessor: The Costs Assessor will notify the parties that an assessment is complete and advise the amount of costs of the costs assessor to be paid before release of the costs assessment certificates. The Costs Assessor will also determine which party is liable for these costs and an invoice will be sent to the parties requiring payment of the amount of the costs assessor's fees. These costs must be paid to the Manager, Costs Assessment before the Determinations of the Costs Assessor and Statement of Reasons will be forwarded. Either party can pay the costs of the assessment to secure the release of the certificates. If payment is made by the party that is not actually liable, they can then seek to recover these costs from the liable party. Both parties will be sent two Certificates of Determination: the first dealing with the costs payable as a result of the court order, the other dealing with the costs payable in relation to the costs of the costs assessment.
10. Filing the certificates: The certificates of determination are filed in a court of competent jurisdiction and they are taken to be a judgment and any enforcement action can be undertaken (see [guide to registering a certificate of determination](#)).

Assessment of Ordered Costs is conducted pursuant to sections 63 to 80 LPULAA and in particular, clauses 32 to 34, 36 to 43 LPULAR. Assessment application forms can be found on the Supreme Court's website under "Costs assessments".

7 STEPS FOR OBJECTING TO AN ORDERED (PARTY/PARTY) COSTS ASSESSMENT

1. **Costs order(s):** Ordered (party/party) costs assessments quantify costs which are payable when a costs order has been obtained in a court or tribunal. You should check the details of the order(s) including the names of the parties - is the order for all the costs or part only; are the costs to be paid on an ordinary basis or the indemnity basis? Ensure you consider the exact terms of the costs order(s), so that negotiations and any assessment proceed on the correct terms.
1. **Negotiation:** When you receive an offer of settlement from a Costs Applicant, discuss it with your client, the Costs Respondent, and consider how your client's own costs compare with the claim by the Costs Applicant. Costs Respondents may see the assessment process as a way to delay payment of the costs they have been ordered to pay. However, it may be better to agree on the costs at an early stage and discuss terms for payment rather than have a dispute that your client is unlikely to win. If interest has been ordered, delaying resolution may be costly, especially if a Costs Assessor finds that your client rejected a reasonable offer. Consider whether the Costs Applicant is claiming GST but is also entitled to an input tax credit for GST incurred. The efforts made to settle the costs will have an impact on who pays the costs of assessment. Also note that interest is payable on costs from the date of judgment in proceedings commenced after 24 November 2015 - [section 101\(4\) CPA 2005](#). As set out above this applies unless the court "otherwise orders". Interest is calculated at the prescribed rate as from the date the order was made or any other date ordered by the Court [section 101\(4\) CPA 2005](#). The Application for Assessment (Form A3) requires a party to calculate interest to a convenient date. The prescribed rate of interest is found in clause 36.7 UCPR 2005.
2. **Application for Assessment:** If costs are not settled by negotiation, the Costs Applicant will prepare an Application for Assessment of ordered costs with an itemisation of the professional costs, disbursements and counsel's fees incurred. This will be given to the Costs Respondent by the Costs Applicant.
3. **Time for drawing objections:** The Costs Respondent has 21 days to provide objections to the Costs Applicant. The Costs Applicant cannot lodge the Application for Assessment until after the expiration of 21 days from the date the Application was given to the Costs Respondent or on receipt of the objections from the Costs Respondent, whichever happens first. Although it is usual for the Costs Assessor to allow a short additional time to provide objections after the Application for Assessment is filed, you should not presume that you can wait until the Costs Assessor is assigned to the costs assessment before starting work on the objections. On receipt of the Application for Assessment start preparing the objections (and before it has been lodged) as many assessors give very little time once the application has been assigned. A list of Common Objections is available on the Supreme Court website.
4. **Costs Assessment Process:** The Manager, Costs Assessment notifies the parties of the appointment of a Costs Assessor. Both parties will then receive a letter from the Costs Assessor setting out the requirements for the Costs Assessment, inviting objections, if not already received by the Costs Assessor, and final submissions.
5. **Determination of the Costs Assessor:** The Costs Assessor will notify the parties that an assessment is complete and advise the amount of costs of the costs assessor to be paid before release of the costs assessment certificates. The Costs Assessor will also determine which party is liable for these costs and an invoice will be sent to the parties requiring payment of the amount of the costs assessor's fees. These costs must be paid to the Manager, Costs Assessment before the Determinations of the Costs Assessor and Statement of Reasons will be forwarded. Either party can pay the costs of the assessment to secure the release of the certificates. If payment is made by the party that is not actually liable, they can then seek to recover these costs from the liable party. Both parties will be sent two Certificates of Determination: the first dealing with the costs payable as a result of the court order, the other dealing with the costs payable in relation to the costs of the costs assessment.
6. **Filing of the Certificates:** The Certificates of Determination are filed in a court of competent jurisdiction and they are taken to be a judgment and any enforcement action can be

Assessment of Ordered Costs is conducted pursuant to sections 63 to 80 LPULAA and in particular, clauses 32 to 34, 36 to 43 LPULAR.



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 5

GOODS AND SERVICES TAX

- 5.1 INTRODUCTION
- 5.2 SUMMARY
- 5.3 LAW PRACTICE AND OWN CLIENT
- 5.4 DISBURSEMENTS
- 5.5 APPLICATIONS FOR ASSESSMENT OF LAW PRACTICE/CLIENT COSTS
- 5.6 PARTY/PARTY COSTS
- 5.7 PRO BONO WORK
- 5.8 GST AND LEASES
- 5.9 GST AND MORTGAGES
- 5.10 GST ON FIXED COSTS
- 5.11 RULINGS AND DETERMINATIONS
- 5.12 GENERAL ROLE OF LOCAL REGULATORY AUTHORITY IN COSTS DISPUTES

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](#)).

5.1 INTRODUCTION

Costs and disbursements are generally liable to GST from and after 1 July 2000.

Practitioners must satisfy themselves as to the correct legal position on GST and are advised to obtain further information, including rulings and practice statements by the Australian Taxation Office (ATO).

For ease of reference, this chapter includes a summary (5.2) and additional information as follows.

5.2 SUMMARY

Damages: Party/party costs are part of the damages claim.

Supply: Damages do not constitute a supply.

Consideration: Payment of damages (including party/party costs) does not constitute consideration for a supply.

Tax invoice: As party/party costs are not a taxable supply, it is incorrect for the successful party or the law practice instructed by the successful party to issue a tax invoice to the unsuccessful party or the unsuccessful party's law practice.

Input tax credit: As there is no taxable supply, payment of party/party costs does not give rise to an entitlement to an input credit for the benefit of the paying party.

Reimbursement: Party/party costs are merely a reimbursement. However, as part of this the successful party may seek reimbursement for any GST paid on the successful party's legal fees (if they are not entitled to an input tax credit).

A successful party registered for GST claims a GST exclusive amount for party/party costs: This is because they are entitled to an input tax credit and accordingly already have reimbursement for the GST they have paid to their instructed law practice.

A successful party unregistered for GST claims a GST inclusive amount for party/party costs: As they are not able to claim any input tax credit, they claim a GST inclusive cost (the actual expense borne by the party) from the unsuccessful party.

Workers compensation: This is subject to the general principles outlined above.

Apportionment: Where party/party costs and other damages are rolled up into a settlement/judgment with supplies, there must be apportionment between the same on a reasonable basis to determine the correct GST liability. This is because GST is payable on taxable supplies, provided certain conditions are met, whereas no GST is payable on damages, as there is no supply and no consideration.

5.3 LAW PRACTICE AND OWN CLIENT

5.3.1 DISCLOSURE AND COSTS AGREEMENTS

Rates, charges and other costs disclosed by a law practice:

- to a business may be stated on either a GST exclusive or GST inclusive basis, provided it is clear whether or not GST is to be added to the price; or
- to a consumer must be clearly stated on a GST inclusive basis.

It is recommended that:

- where individual rates, charges, expenses or disbursements are GST exclusive, it must be clearly stated that GST of currently 10 per cent will be added and any total should be a GST inclusive amount
- where a single price is quoted, it must be a GST inclusive amount
- where an estimate is based on GST exclusive rates, it must set out the GST exclusive component, and the GST component with the total GST inclusive costs (taking into account disbursements that are GST free, such as stamp duty).

5.3.2 TAX INVOICES

For tax invoices and bills/itemisation of costs, itemised charges and subtotals can all be GST exclusive; however, the GST component must be clearly shown and the final total must be a GST inclusive sum (that is, the GST exclusive subtotal plus 10 per cent GST on the costs that are subject to GST).

5.4 DISBURSEMENTS

Generally, disbursements that fall within the definition of “taxable supply” and are paid by the law practice on behalf of the client are subject to the same GST rules. However, some payments have been exempted from the application of GST; for example, court filing fees. A comprehensive list of these payments is found in [A New Tax System \(Goods and Services Tax\) \(Exempt Taxes, Fees and Charges\) Determination 2011 \(No. 1\)](#) issued by the Minister for Revenue and Assistant Treasurer.

5.5 APPLICATIONS FOR ASSESSMENT OF LAW PRACTICE/CLIENT COSTS

[Section 200\(3\)](#) of the LPUL provides that GST payable for legal services is to be taken into account in determining legal costs that are payable in relation to the provision of those services. Refer also to the decision in *Boyce v McIntyre* (2009) [NSWCA 185](#) (20 July 2009).

5.6 PARTY/PARTY COSTS

Goods and Services Tax Ruling (GSTR) [2001/4](#) (GST consequences of court orders and out-of-court settlements) addresses the issues that arise in relation to GST and party/party costs.

The primary rule on GST is that GST can be recovered by a successful party (that is, a party that has the benefit of a costs order) from an opposing party if the successful party is not registered for GST (and therefore could not recover GST from the ATO as an input tax credit).

[Section 70 of the LPULAA](#) states that on making a determination of costs, a costs assessor is to include any GST component (that the assessor determines is payable) in the certificate that sets out the determination.

For federal matters, a practice statement was issued in November 2008 by the ATO – [PS LA 2009/9](#) – dealing with the GST implications in the recovery of legal costs where those costs are calculated by reference to a scale of costs. This applies to costs in federal jurisdictions (where the scale of costs is GST inclusive). The practice statement states that the input tax credit (GST credit) entitlement of the party being reimbursed should not be taken into account when determining the costs payable.

The practice statement is not a public ruling, but a practice direction to ATO staff that must be applied whenever the ATO is required to pay legal costs (for example, where costs are awarded against the ATO in litigation). Nonetheless, the issues raised in the practice statement will also be relevant for parties recovering or paying legal costs.

5.7 PRO BONO WORK

Pro bono work may be done for no fee, for a small contribution, or at a reduced fee. There is no GST in the first case since there is no consideration. If the law practice includes a notional charge in the accounts or treats the work done as a donation by the law practice, the supply still does not attract GST. However, where the client pays a contribution towards the pro bono work, or pays at a substantially reduced rate of fees, then the GST will be payable on that amount. The practitioner’s cost agreement should clearly indicate whether the client is liable for the GST, and if so, the bill should indicate the amount of GST payable. As pro bono work is done in the course or furtherance of the enterprise, the law practice will still be able to claim input tax credits on acquisitions/importations used to provide the pro bono service.

5.8 GST AND LEASES

The law practice of the lessor issues the tax invoice to the lessor for payment of the legal services, including or excluding GST. The lessor will have to recoup the expenses from the lessee as part of the lessor’s expenses under the contract.

5.9 GST AND MORTGAGES

Similar principles regarding the GST treatment of leases apply to mortgages.

5.10 GST ON FIXED COSTS

[Clause 27](#) of the [LPULAR](#) provides that a cost fixed by this part may be increased (by up to 10 per cent) for the amount payable for GST.

These costs include costs of enforcement of a lump sum debt or liquidated damages, enforcement of a judgment, workers compensation matters, and obtaining a grant of probate or letters of administration (see [LPULAR](#), clauses [24](#), [25](#) and [26](#)).

5.11 RULINGS AND DETERMINATIONS

The following determinations, advice and practice statements may also be of assistance to practitioners:

- a. Goods and Services Tax Determination (GSTD) [2000/3](#) Goods and Services Tax: transitional arrangements: to what extent is the supply of services made on or after 1 July 2000, where the supply spans that date?
- b. GSTR [2000/37](#) regarding disbursements
- c. GSTD [2003/1](#) Goods and Services Tax: Is the payment of judgment interest consideration for a supply?
- d. Goods and Services Tax Advice (GSTA) [TPP 042](#): Goods and services tax: Is a payment to a lawyer by a client to reimburse the lawyer for a payment of a tax, fee, or charge (tax) that is excluded from the GST by a determination of the Treasurer consideration for a taxable supply by the lawyer if the lawyer paid the tax in their own right?
- e. GSTA [TPP 043](#): Goods and services tax: Is a client's reimbursement to a lawyer for a payment of a tax, fee, or charge (tax) that is not subject to GST consideration for a taxable supply by the lawyer if the lawyer paid the tax as an agent for the client?
- f. PS LA [2009/9](#): Goods and services tax, regarding the recovery of legal costs.

5.12 GENERAL ROLE OF LOCAL REGULATORY AUTHORITY IN COSTS DISPUTES

[Section 291](#) of the LPUL allows for the NSW Commissioner to deal with a costs dispute in the same manner as other consumer matters if:

- a. the total bill for legal costs is less than \$100,000 (indexed) payable in respect of any one matter; or
- b. the total bill for legal costs equals or is more than \$100,000 (indexed) payable in respect of any one matter, but the total amount in dispute is less than \$10,000 (indexed).

[Section 294](#) of the LPUL provides that the amounts payable by way of GST in respect of legal costs are to be disregarded when determining the total bill or amount as referred to in [LPUL](#), sections [291](#), [292](#) or [293](#).



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CHAPTER 6

COSTS ORDERS AGAINST PRACTITIONERS

- 6.1 INTRODUCTION
- 6.2 REASONABLE PROSPECTS OF SUCCESS
- 6.3 OBLIGATION OF PRACTITIONER
- 6.4 WHAT ARE REASONABLE PROSPECTS?
- 6.5 NOT FAIRLY ARGUABLE
- 6.6 LIABILITY OF A PRACTITIONER FOR UNNECESSARY COSTS
- 6.7 FEDERAL JURISDICTION
- 6.8 FURTHER JUDICIAL COMMENT

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6.1 INTRODUCTION

Costs orders can be made against practitioners in a number of circumstances. Such orders are within the discretion of the court. See [Young v King \(No. 11\) \[2017\] NSWLEC 34](#).

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 *Legal Profession Act 1987* ["LPA 1987"] continue to apply. This chapter considers the following range of matters related to costs orders.

6.2 REASONABLE PROSPECTS OF SUCCESS

Under the [Uniform Law](#), the "reasonable prospects" requirement is introduced in [section 62](#) of the LPULAA.

[Schedule 2](#) of the LPULAA contains provisions relating to costs in civil claims where there are no reasonable prospects of success.

[Division 10 of Part 3.2](#) of the LPA 2004 and [Schedule 2](#) of the LPULAA, which is headed "Costs in civil claims where no reasonable prospects of success", applies to all proceedings with a damages component. It is, therefore, not restricted to personal injury damages and is applicable both to plaintiffs and defendants.

In addition, a practitioner or barrister is not to act for a client, aside from preliminary legal work ([s. 346](#) of the LPA 2004), unless there are reasonable prospects of success ([s. 345](#) of the LPA; [Schedule 2 cl. 2](#) of the LPULAA). To do otherwise makes a practitioner liable to costs orders ([s. 348](#) of the LPA 2004; [s. 62](#) and [Schedule 2 and cl. 5\(1\)](#) of the LPULAA).

Practitioners under the [LPULAA](#) and the LPA 2004 are required to certify that:

"... a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success." ([s. 347\(2\)](#) of the LPA and [Schedule 2 cl. 4](#) of the LPULAA).

The [Uniform Civil Procedure Rules](#) forms must be signed prior to filing the initiating or defending process. Under [Schedule 2](#) of the LPULAA, the [Uniform Law](#) contains similar provisions (applicable both at first instance and on appeal). Compare section 345 of the LPA and [Schedule 2 clause 2](#) of the LPULAA; section 346 of the LPA and [Schedule 2 clause 3](#) of the LPULAA; and section 347 of the LPA and [Schedule 2 clause 34](#) of the LPULAA; and Regulation 118 of the LPR.

While these concepts have relevance to summary judgment applications, the focus of this chapter is where the solicitor can be laid open to a personal costs order.

Practitioners should be aware of the following decisions dealing with the principles governing the application of the phrase "reasonable prospects of success", and that they apply not just in the Supreme Court but also in the District Court and Local Court (*Knaggs v J A Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476 at 485):

- [Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt \[2004\] NSWCA 45](#)
- [Degiorgio v Dunn \(No 2\) \[2005\] NSWSC 3](#)
- [Lemoto v Able Technical Pty Ltd & 2 Ors \[2005\] NSWCA 153](#)
- [Eurobodalla Shire Council v Wells & 2 Ors \[2006\] NSWCA 5](#)
- [Groth v Audet \[2006\] NSWCA 48](#)
- [Firth v Latham & Ors \[2007\] NSWCA 40](#)
- [Haydon Fowler Corbett Jessop v Toro Constructions Pty Ltd \[2008\] NSWCA 178](#)
- [Bon Appetit Family Restaurant Pty Ltd v Patricia Mongey \[2009\] NSWCA 14](#)
- [European Hire Cars Pty Ltd v Poulden \[2009\] NSWSC 526](#).
- [Whyked Pty Ltd v Yahoo 7 Pty Ltd \[2008\] NSWSC 477 at \[12\]–\[20\] per McDougall J](#)
- [Keddie & Ors v Stacks/Goudkamp Pty Ltd \[2012\] NSWCA 254](#)

6.3 OBLIGATION OF PRACTITIONER

The legislative intention of the requirement to file a certificate for reasonable prospects was to regulate the conduct of the legal profession, not that of the client. In *Groth v Audet* (2006), the Court of Appeal held that a breach of section 198L(2) of the LPA 1987 (s. 345 of the LPA 2004 and Schedule 2 cl. 2 of the LPULAA) did not invalidate or nullify proceedings. However, the court went on to say that it may still have power to strike out proceedings if the default is not rectified by the defaulting practitioner.

Practitioners should note that an application filed to commence a matter in the Federal Circuit Court was determined not to be a pleading, nor court documentation, and therefore, section 198L of the LPA 1987 (s. 345 of the LPA 2004) did not apply. It should be noted that the court did not decide whether section 198L applied to matters in the Federal Circuit Court, if pleadings were filed (*Fuller v Baptist Union of NSW* [2004] FMCA 789).

Other types of “commencing documents” or originating processes that are subject to the overriding obligation as to reasonable prospects, and susceptible to strike out, include Fast Track Statements and Responses in the Federal Court (see 6.7 below).

In *Lemoto v Able Technical Pty Ltd* (2005), the Court of Appeal discussed the discretionary nature of section 198M of the LPA 1987 (s. 348 of the LPA 2004) and the fact that a practitioner who is facing a claim for indemnity of costs must be given procedural fairness to rebut the presumption in section 198M.

6.4 WHAT ARE REASONABLE PROSPECTS?

The definition of “no reasonable prospects of success” was seen in *Degiorgio v Dunn* (No. 2) to be akin to a case “so lacking in merit or substance as to not be fairly arguable”. The Supreme Court followed the five elements set out in *Momibo Pty Ltd v Adam* (unreported, 31 August 2004) that would be necessary to satisfy the obligation under section 198M of the LPA 1987 (s. 348 of the LPA 2004; Schedule 2 cl. 4(2) of the LPULAA). These elements were:

- a practitioner’s subjective reasonable belief includes the four other elements, and a proposition that there is a logically arguable case
- the reasonable belief must be based on an objective opinion, formed from material at the time of commencement of proceedings
- the available material must form a basis for alleging each relevant fact
- the claim must be managed according to a reasonably arguable view of the law
- there must be reasonable prospects as to the recovery of some damages.

In *Lemoto v Able Technical Pty Ltd* (2005), the Court of Appeal stated that the question for the practitioner is whether they hold a reasonable belief that the provable facts, and a reasonably arguable view of the law, mean that the prospects of recovering damages or defeating a claim are “fairly arguable”.

In *Haydon Fowler Corbett Jessop v Toro Constructions Pty Ltd*, the Court of Appeal held that a fact is provable if the practitioner reasonably believes that the available material provides a proper basis for alleging that fact.

In *Eurobodalla Shire Council v Wells & 2 Ors*, the Court of Appeal ordered that the plaintiff’s practitioner and counsel indemnify their client for the defendant’s costs for their practitioners, in relation to the plaintiff’s application for leave to appeal and the appeal. The court held that section 198M of the *Legal Profession Act 1987* (s. 348 of the LPA 2004) applied to appeal proceedings against “an award of damages”.

The Court of Appeal held in *Bon Appetit Family Restaurant Pty Ltd v Patricia Mongey* that the obligation pursuant to section 345 exists in appeal cases (in accordance with s. 344(1)). The court also provided a warning to practitioners that the obligations as to certification remained, despite the wishes or instructions of the client (in accordance with s. 345(3)).

That decision should be read with *European Hire Cars Pty Ltd v Beilby Poulden Costello*, where Bryson J found that the respondent practitioners had breached their statutory obligation. However, no adverse finding was made against them because the plaintiff client had significantly contributed to the “disastrous outcome of the litigation”.

6.5 NOT FAIRLY ARGUABLE

In [Keddie & Ors v Stacks/Goudekamp Pty Ltd \[2012\] NSWCA 254](#) at [58], applying [Degiorgio v Dunn \(No 2\) \[2005\] NSWSC 3; 62 NSWLR 284](#), the court held that the phrase “without reasonable prospects of success” in sections 345 and 348 of the LPA 2004 means “not fairly arguable”. This more recent case also confirms the duty of a solicitor to exercise at least a measure of independent judgment in relation to advice received from counsel: [Davy-Chiesman v Davy-Chiesman \[1984\] Fam 48](#). Orders for costs against the solicitors were also made under [section 99](#) of the *Civil Procedure Act 2005* [“CPA”].

In [Firth v Latham & Ors](#), the NSW Court of Appeal upheld the trial judge’s finding that the plaintiff’s practitioner properly held a reasonable belief, based on provable facts and the law, that his client’s claim, against the second defendant, had reasonable prospects of success at the commencement of proceedings. The Court of Appeal also upheld the trial judge’s finding that, at the time of the commencement of the trial, there was a lack of evidence against the second defendant and that the plaintiff’s case was “without reasonable prospects of success” against the second defendant. The obligation, therefore, imposed by [section 345](#) is a continuing one, meaning that there is an ongoing need by plaintiff and defendant practitioners to ensure that on the “basis of provable facts and a reasonably arguable view of the law” their client’s claim of defence has reasonable prospects of success.

In [Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt](#), Palmer J noted that the responsibility for “changing the culture of litigation” rests with the profession and the courts. Although these comments were obiter, they underpin the practice of civil litigation in NSW, namely “to facilitate the just, quick and cheap resolution of the issues” (as set out in [s. 56](#) of the CPA). Practitioners may, therefore, need to revise their view and the merits of their client’s case during the conduct of the proceedings.

The courts have regularly stated that the power to make personal costs orders is not to be used by practitioners as a tool of intimidation against opponents. In [Degiorgio v Dunn \(No 2\)](#), Barrett J held that the legislation should not be seen as “an instrument of intimidation”.

6.6 LIABILITY OF A PRACTITIONER FOR UNNECESSARY COSTS

NSW courts are empowered by the provisions of [section 99](#) of the CPA to disallow costs to a party, or direct a practitioner to pay costs, if it appears to the court that costs have been incurred by the serious neglect, serious incompetence or serious misconduct of the practitioner, or improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible. This wide power to award costs personally against legal practitioners is in accordance with the overriding purpose as set forth in [sections 56–60](#) of the CPA, and which requires the parties and their representatives to assist the court to further the just, quick and cheap resolution of the real issues in the proceedings: [Furlong v Wise & Young Pty Ltd \[2016\] NSWSC 647](#), Stevenson J [Lemoto](#) at [92] and [Ideal Waterproofing Pty Ltd v Buildcorp Australia Pty Ltd \[2006\] NSWSC 155](#).

Also potentially relevant to concerns for solicitors is the Anton Piller order obtained by a client over a solicitor’s hard disk in a fees dispute: see [Ho v Fordyce \[2014\] NSWSC 1404](#), where there is a dispute between solicitor and client in relation to fees.

[Section 99](#) of the CPA was considered by the Supreme Court in [Karwala v Skrzybczak Re Estate of Ratajczak \[2007\] NSWSC 931](#), where at [9], Windeyer J found that when dealing with an application for costs pursuant to that section: “the proper approach is that determined by Sully J in [Ideal Waterproofing Pty Limited v Buildcorp Australia Pty Limited & Ors \[2006\] NSWSC 155](#), namely that:

- the onus of proof is on the applicant
- the standard of proof is the civil standard understood in the terms set out in [Briginshaw v Briginshaw \(1938\) HCA 34](#), so that reasonable satisfaction as to proof of an issue is not produced by inexact evidence
- facts must be proved to establish serious neglect, serious incompetence or serious misconduct in the handling of the case, which caused costs to be incurred that ought not to have been incurred
- these facts justify the making of an order.

Section 99 causes the court to take into account the overriding purpose of [sections 56\(3\), \(4\) and \(5\)](#) of the CPA, which require the parties and their representatives to assist the court to further the just, quick and cheap resolution of the real issues in the proceedings (see [Kendirjian v Ayoub \[2008\] NSWCA 194](#)) and also not to cause another party to be unnecessarily burdened with unreasonable costs. The practitioner has a duty to assist the client to ensure that proceedings are conducted efficiently, expeditiously and cost-effectively, and may end in a personal costs order directed against the solicitor.

In [Ireland v Retallack \(No 2\) \[2011\] NSWSC 1096](#), Pembroke J was highly critical of the conduct of a will construction suit where the solicitors for the plaintiff/executor tendered irrelevant evidence (unnecessary expert reports) and wasted expenditure that was incurred on behalf of the estate. His Honour considered whether the circumstances called for an order disallowing costs pursuant to [Section 99\(2\)\(a\)](#) of the CPA, and indicated that whether or not he made a section 99 order, he would make fixed-sum costs orders pursuant to [Section 98\(4\)](#) of the CPA. His Honour gave leave for the plaintiff's solicitors to be separately represented by senior counsel. His Honour also described the evidence sought from the expert as "an accountant's nirvana"; that the evidence provided was set out in excruciating and labyrinthine detail; that none of it was necessary for the proceedings, or useful, or facilitated the resolution of the real issues in dispute, namely the questions of construction arising out of certain clauses of the will. Further, that there was insufficient ongoing supervision by the solicitors over the work being undertaken by the accountants.

[18] "No satisfactory attempt was made, while the work was being carried out, to ensure that the accountants were working to the initial estimate. There was insufficient scrutiny and inadequate oversight. There was not the same level of prudence and circumspection that one would expect from a reasonable person of business looking after his or her own affairs."

[29] "I have by now made clear that, as costs of the proceedings, the estate should not be burdened with so much of (the solicitors) with the costs associated with the tender of the irrelevant factual evidence. These costs are not proportionate to the complexity of the issues in dispute. They were incurred without reasonable cause. It was simply not reasonable to carry out the work to which they relate."

[33] "Worse however, the expense was all the greater because the combined efforts of the solicitors and accountants were channelled into the creation of unnecessary written reports. Necessarily, those reports were compelled to comply with all of the expectations of due care, and the requirements as to form and content, that are applicable to expert reports to be tendered in proceedings in the court. This substantially increased the expense. As is well known, a fullblown expert report, prepared for tender in proceedings in the court, is vastly more expensive than advice given in conference or by a summary letter."

The Judicial Commission has also listed some older examples: [Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd \[2008\] NSWCA 243](#) at [8]; [Araf Capital Funding Pty Ltd v Megaloudis \[2006\] NSWSC 1255](#) at [10]; [Ashmore v Corporation of Lloyds \[1992\] 2 All ER 486](#); [Whyte v Brosch \(1998\) 45 NSWLR 354](#) (late submissions).

Conduct that has been held to justify an order that a practitioner personally pay the costs includes:

- abuse of process: [Cahill v Ekstein](#) (unreported, 5/6/98 NSWSC)
- raising untenable defences for the purpose of delay: [Deputy Commissioner of Taxation v Levick \(1999\) 168 ALR 383](#) at [34]; [Helljay Investments Pty Ltd v Deputy Commissioner of Taxation \(1999\) 166 ALR 302](#)
- signing a certificate on a false affidavit of discovery: [Myers v Elman \[1940\] AC 282](#)
- repeatedly putting untenable submissions: [Buckingham Gate International v ANZ Bank Ltd \[2000\] NSWSC 946](#)
- attempting to reargue previously decided issues: [Vasram v AMP Life Ltd \[2002\] FCA 1286](#); see also [Gersten v Minister for Immigration and Multicultural Affairs \[2000\] FCA 922](#); [Kendirjian v Ayoub](#) at [208–216]
- ignorance of the rules: [Riv-Oland Marble Co \(Vic\) Pty Ltd v Settef SPA \(1989\) 63 ALJR 519](#)
- unpreparedness resulting in a hearing date being vacated, or in time being wasted during the hearing: [Stafford v Taber](#) (unreported 31/10/94, NSWCA)

- liability for these costs may extend to the firm as well as to the solicitor on the record: *Kelly v Jowett* (2009) 76 NSWLR 405 and *Kelly v Jowett* [2009] NSWCA 278.

Other relevant cases include:

- [Lemery Holdings Pty Limited v Reliance Financial Services Pty Ltd; School Holdings Pty Ltd v Dayroll Pty Ltd \[2008\] NSWSC 1114](#)
- [Puruse Pty Limited v Council of the City of Sydney \[2009\] NSWLEC 163](#)

6.7 FEDERAL JURISDICTION

The Federal Court has emphasised that the duty to comply with the “overarching purpose” contained in sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) has had a significant impact on the obligations of parties to civil proceedings and their lawyers. [Rule 40.07](#) of the Federal Court Rules 2011 also allows the Federal Court to order a practitioner to pay costs or disallow costs to that practitioner, if those costs were incurred improperly, without reasonable cause, or were wasted by undue delay or other misconduct, and it appears to the court that the practitioner is responsible for same.

The Federal Court Rules 2011 state that, for the commencement of certain migration litigation ([Rule 31.22](#)), a certificate certifying “that there are reasonable grounds for believing that this migration litigation has a reasonable prospect of success, in accordance with Form 70, must be signed by the applicant’s lawyer” and filed. Interestingly, the certificate requires the applicant’s practitioner to sign; however, legislation provides that a person must not encourage a litigant to commence proceedings that do not have reasonable prospects of success.

In applications for summary judgment, the Federal Court legislation provides that a proceeding does not have to be “hopeless or bound to fail” for it to have no reasonable prospects of success (see [s. 31A\(3\) Federal Court of Australia Act 1976](#) (Cth), [s. 25A\(3\) Judiciary Act 1903](#) (Cth) and [s. 17A\(3\) Federal Circuit Court of Australia Act 1999](#) (Cth)). The federal courts have interpreted this definition as “lowering the bar” (*White Industries Aust. Ltd v Commissioner of Taxation* [2007] FCA 511) and “softening the test” (*J F Keir Pty Limited v Sparks* [2008] FCA 611) for the making of summary judgment and dismissal orders.

More recently, *Modra v State of Victoria* [2012] FCA 240 makes clear that a failure properly to plead a claim may be regarded as a failure to comply with the overarching purpose. The content of the duty of a legal practitioner in the Federal Court has been significantly changed by the introduction of sections 37M and 37N.

Liability may also extend to an order for such costs to be paid on an indemnity basis: *Mitry Lawyers v Bamden* [2014] FCA 918.

6.8 FURTHER JUDICIAL COMMENT

In a paper delivered on Appellate Advocacy to the New South Wales Bar Association, Sydney CPD Conference, on the 27 March 2015, the President of the Court of Appeal, the Hon. Justice M J Beazley AO discussed [Re Felicity; FM v Secretary, Department of Family and Community Services \(No 3\)](#), [2014] NSWCA 19, especially at [38] and stated:

[48] “As the costs order made against the solicitor in that case reminds advocates, a failure to competently identify legal error before bringing an appeal may expose a legal practitioner to liability for costs under section 99 of the [Civil Procedure Act 2005](#).”

See also *Ireland v Retallack (No 2)* [2011] NSWSC 1096 discussed above.

There have been a number of decisions and pronouncements regarding the costs incurred in the preparation of materials for “judge’s bundles” and disproportionate costs.

In *SDW v Church of Jesus of Letter-Day Saints* [2008] NSWSC 1249, Simpson J excluded from the general costs orders any costs associated with the preparation, photocopying and presentation of seven lever arch folders of documents.

Her Honour concluded:

[35] “To my observation, it has become too common a practice for legal practitioners to produce to the court copies of every document that has come into existence associated with the facts the subject matter of the litigation. It denotes, at best, the exercise of no clinical legal judgment and the abdication of the responsibility that lies upon legal practitioners to apply thought and judgment in the selection of the material to be presented to the court. A common example is the photocopying and presentation of hospital files, from which every page is reproduced, and copied multiple times – documents such as histology reports, x-ray reports, nursing notes, and quite irrelevant charts and print outs of complex investigations. This case is no different. The costs to the parties are astronomical. The practice casts immense burdens on the legal representatives of the opposing party, who are obliged to read all of the material, further increasing the costs.”

[36] “The practice must cease. If legal representatives will not voluntarily accept the responsibility of making appropriate selections of the material to be put before the court, then judicial officers must act to ensure that they do. One appropriate sanction, in cases of excess, is an order that, no matter what the outcome of the proceedings, no costs be recoverable from the losing party in respect of the excess, and, further, no costs be recoverable by the practitioner from the client for the excessive copying. I propose to make such an order.”

In *Tobin v Ezekiel - Ezekiel Estate* [2008] NSWSC 1108, Palmer J expressed his concern that the time of the trial and the number of witnesses were disproportionate to the subject matter. He noted:

[39] “Unrestrained and prolific issuing of subpoenas by a litigant may constitute an abuse of the Court’s process. The terms of the subpoenas, considered individually, may not be too wide or oppressive in themselves, but if the number of subpoenas is large and the issues to which they relate are peripheral to the decisive issues for trial, not only are many non-parties to the litigation unnecessarily inconvenienced and put to expense, but a great deal of unnecessary costs will be incurred in the proceedings, bringing the proceedings to trial will be delayed, and the time for trial will be unnecessarily expanded by the raising of false or peripheral issues. All of these mischiefs the Court must be astute to prevent, in accordance with [section 56](#) of the *Civil Procedure Act 2005* (NSW). It has ample power to do so, both in its inherent jurisdiction to control its own process and under the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (UCPR): see e.g. *Southern Pacific Hotel Services Inc v Southern Pacific Hotel Corporation Ltd* (1984) 1 NSWLR 710, at 719; *Compsyd Pty Ltd v Streamline Travel Service Pty Ltd* (1987) 10 NSWLR 648; *Botany Bay Instrumentation & Control Pty Ltd v Stewart* (1984) 3 NSWLR 98.”

[40] “None of the propositions I have enunciated is revolutionary. All are enshrined in the [Civil Procedure Act 2005 \(NSW\)](#) and in the [Uniform Civil Procedure Rules](#). The obligation to ensure that litigation is conducted justly, quickly and cheaply is placed equally upon the Court, the litigant and the legal profession (see CPA [Part 6 Division 1, s. 56\(2\), \(3\)](#) and

(4). The Court must ensure that issues in litigation are resolved in such a way that the cost to parties is proportionate to the importance and complexity of the subject matter (CPA s. 60). Amongst the objects which the Court must achieve is the efficient use of available judicial and administrative resources to ensure the timely disposal of all proceedings in the Court (CPA s. 57(1)(c) and (d)). The Court is given ample power to ensure that a trial is conducted, with due regard to these principles (CPA s. 62).”

Practitioners should be aware that specific costs orders may be made against them for the costs of preparation of materials, or that their clients may be deprived of costs. This opens an avenue for a dispute between the practitioner and client for the recovery of that component of the costs.



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 7

REGULATED COSTS

- 7.1 INTRODUCTION
- 7.2 PERSONAL INJURY MATTERS (EXCLUDING MOTOR VEHICLE ACCIDENT AND WORK INJURY CLAIMS)
- 7.3 MOTOR ACCIDENT COSTS
- 7.4 WORKERS COMPENSATION COSTS
- 7.5 PROBATE AND LETTERS OF ADMINISTRATION
- 7.6 DEFAULT JUDGMENTS AND ENFORCEMENT OF JUDGMENTS
- 7.7 VICTIMS COMPENSATION TRIBUNAL
- 7.8 PUBLIC NOTARIES
- 7.9 LOCAL COURT
- 7.10 JURISDICTIONS OUTSIDE NSW

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.



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CHAPTER 8

WORKERS COMPENSATION

- 8.1 INTRODUCTION
- 8.2 STATUTORY COMPENSATION CLAIMS
- 8.3 STRUCTURE OF THE REGULATIONS
- 8.4 METHODOLOGY FOR DETERMINING COSTS
- 8.5 GENERAL COMMENTS ON COSTS REGULATED UNDER PART 17
- 8.6 COMPENSATION CLAIMS
- 8.7 WORK INJURY DAMAGES CLAIMS
- 8.8 ASSESSMENT OF COSTS

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](#)).

8.1 INTRODUCTION

There have been significant reforms to workers compensation costs since 2001. The Compensation Court of NSW, and the system of costs that existed under it, was abolished in December 2001. On 1 January 2002, the Workers Compensation Commission of NSW commenced operation and a new system of costs regulation was introduced, alongside very significant reforms to the system for resolving compensation disputes. In late 2006, the costs regime under the Workers Compensation Commission was substantially altered.

In June 2012, further significant changes were introduced to the Workers Compensation Scheme in NSW. These amendments also changed the costs provisions, prohibiting the making of any costs order in commission proceedings.

A new office of the Workers Compensation Independent Review Officer (WIRO) was established. WIRO may make recommendations that are binding on insurers and WorkCover. WIRO may also investigate complaints regarding insurers and make non-binding recommendations.

On 1 September 2015, the regulatory and insurance functions of WorkCover were assumed by three new discrete organisations: the State Insurance Regulatory Authority (SIRA) for workers compensation regulation; SafeWork NSW for work health and safety regulation; and Insurance & Care NSW (icare) for workers compensation insurance.

A new Independent Legal Assistance and Review Service (ILARS) was established in the office of WIRO. This service deals with applications for funding from injured workers who are seeking resolution of their dispute. It also provides grants of legal assistance to approved legal service providers to pursue meritorious claims for injured workers.

WIRO's role is to ensure that funding is made available for approved legal service providers at an early stage of the process to enable supporting material to be obtained. An application to become an approved legal service provider can be made by completing the application forms available at www.wiro.nsw.gov.au.

8.2 STATUTORY COMPENSATION CLAIMS

For claims lodged from 1 January 2002, costs were regulated under the Workers Compensation (General) Amendment (Costs) Regulation 2001. The Workers Compensation (General) Amendment (Costs in Compensation Matters) Regulation 2003, effective from 28 February 2003, increased some of the items in the scales in Schedule 6, and also permitted the recovery of certain travelling and accommodation expenses. A few extra items of costs were also introduced.

For claims lodged (or matters resolved without recourse to the commission) from 1 November 2006, a new costs regime was introduced by the Workers Compensation Amendment (Costs) Regulation 2006 (and then incorporated into the Workers Compensation Regulation 2003).

The Workers Compensation Regulation 2010 (2010 Regulation) took effect from 1 February 2011, replacing the Workers Compensation Regulation 2003.

The 2010 Regulation was automatically repealed on 1 September 2016 under [section 10](#) of the *Subordinate Legislation Act 1989*. The [Workers Compensation Regulation 2016](#) (2016 Regulation) commenced on 1 September 2016. The 2016 Regulation remade, with minor amendments, the Workers Compensation Regulation 2010.

Reference to clauses, unless otherwise stated, refer to the Workers Compensation Regulation 2016.

On 1 October 2012, Division 3 of Part 8 of the *Workers Injury Management and Workers Compensation Act 1998* (NSW) (WIM Act) was significantly amended with respect to party/party costs. Section 341 of that act now states:

341 Costs

- (1) Each party is to bear the party's own costs in or in relation to a claim for compensation.
- (2) The commission has no power to order the payment of costs to which this Division applies, or to determine by whom, to whom, or to what extent, costs to which this Division applies are to be paid.

This section applies to matters commenced in the commission after 31 March 2013.

An injured worker's legal costs for work done in respect of a claim for compensation are now paid by WIRO to the worker's practitioner as outlined above. These costs are not paid by the insurer as party/party costs.

8.3 STRUCTURE OF THE 2016 REGULATION

The structure of the 2016 Regulation assists in understanding how costs are regulated. Costs are dealt with in Part 17 as follows:

Division 1 – Preliminary deals with definitions and costs that are not regulated by Part 17.

Division 2 – Costs recoverable in compensation matters indicates the maximum costs recoverable in “compensation matters” for legal services or costs that are related to a claim (see Schedule 6). This Division also deals with maximum costs recoverable for medical or related treatment or health services fees.

Division 3 – Costs recoverable in work injury damages matters indicates the maximum costs recoverable in “work injury damages matters” for legal services or costs that are related to a claim (see Schedule 7), “except as otherwise provided by this Part”. Clause 93 allows a legal practitioner to contract out of the maximum costs on a practitioner/client basis (that is, a practitioner cannot contract out of the application of Schedule 7 to party/party costs). Clauses 94–99 set out certain restrictions on the awarding of costs.

Division 4 – Assessment of costs applies to assessment of costs, both in compensation matters and work injury damages matters. It explains how an application is made, what test is applied to the determination of costs, and avenues of appeal in relation to the Registrar's determinations.

Division 5 – Goods and services tax provides that GST may be added to fixed costs.

Division 6 – Miscellaneous provides that bills of costs must be in the approved form, and permits a Registrar to make a costs order in connection with certain events.

Schedule 6 sets out **maximum costs in compensation matters**. [Schedule 6](#) contains Parts 1, 2 and 3 as follows.

[Part 1](#) contains definitions and describes the application and operation of the tables in [Schedule 6](#).

[Part 2](#) contains four tables:

- **Table 1**, which sets out the phases during which claims and disputes may be resolved, and the costs that apply for the resolution at each phase.
- **Table 2**, which sets out the types of resolutions that apply to Table 1, and indicates the level of costs (that is, 75 per cent or 100 per cent) that will apply to that resolution type.
- **Table 3**, which sets out alternate or “special” resolution types and the applicable costs for each party. Tables 1 and 2 do not apply to these “special” resolution types.
- **Table 4**, which sets out additional legal services and other factors that may result in an increase to the costs claimable under Table 1.

[Part 3](#) lists regulated disbursements.

8.4 METHODOLOGY FOR DETERMINING COSTS

[Part 1](#) of Schedule 6 of the 2016 Regulation explains the methodology for determining costs as:

- When a claim or dispute is resolved, legal practitioners or agents representing the parties will need to determine what type of resolution has been reached and when. By applying these factors to [Schedule 6](#) of the 2016 Regulation, the legal practitioners or agents will be able to ascertain the costs to be recovered.
- If a claim or dispute involves a number of resolution types that are resolved concurrently, or within a specified time frame, the costs to be recovered are restricted to the resolution for the highest amount of costs payable.
- The costs to be recovered will be either:

- 8 a maximum flat, predetermined figure; or
 - 9 in the case of certain “special resolutions”, a maximum amount establishing a range within which the parties may negotiate their costs entitlement.
- If a claim or dispute (other than a claim or dispute resolved by special resolution) includes “additional legal services” or involves “factors” as referred to in [Table 4](#) of the 2016 Regulation, there may be an additional allowance that can be added to the entitlement to costs.

8.5 GENERAL COMMENTS ON COSTS REGULATED UNDER PART 17

8.5.1 APPLICATION

The regulated amounts cover costs for legal services or agent services provided in, or in relation to, a claim for “compensation” or “work injury damages”, and costs for “matters that are not legal or agent services, but are related to a claim for compensation” (cls. [88](#) and [92](#)). The amounts set out in schedules [6](#) and [7](#) of the 2016 Regulation are the “maximum” costs.

[Schedule 6](#) of the 2016 Regulation applies both on a party/party and practitioner or agent and client basis. This means all practitioners practising in this area are affected.

8.5.2 CONTRACTING OUT

It is not possible to contract out of the regulated costs provisions in compensation claims. You can contract out in work injury damages claims.

8.5.3 COSTS

Costs are dealt with under Part 8 of the WIM Act and Schedule 7 of the 2016 Regulation. Under the 2016 Regulation, the meaning of “costs” is as per the legal costs legislation (as defined in section 3A of the [LPULAA](#)). This means “costs” also include practitioners’ and barristers’ expenses and disbursements, as well as their fees.

It also means the lump sum amounts allow for practitioners’ “costs”, including previous add-ons such as agents’ fees or practitioners’ travel costs. Faxes and copying can no longer be separately claimable. They are now rolled up into the lump sums for individual activities/events.

8.5.4 UNREGULATED COSTS

Costs that are not regulated for statutory compensation are listed in [clause 86](#) as the following:

- for an appeal under [section 353](#) (“Appeal against decision of the Commission constituted by Presidential Member”) of the WIM Act
- fees for investigators’ reports or for other material produced or obtained by investigators (such as witness statements or other evidence)
- fees for accident reconstruction reports
- fees for accountants’ reports
- fees for reports from health service providers (note: under [s. 339](#) of the WIM Act, the WorkCover Authority has, from 4 November 2003, fixed maximum fees for reports and appearances of health service providers before the commission)
- fees for other professional reports relating to treatment or rehabilitation (for example, architects’ reports concerning house modifications)
- fees for interpreter or translation services
- fees imposed by a court or the commission
- travel costs and expenses of the claimant in the matter for attendance at medical examinations, a court or the commission
- witnesses’ expenses at a court or the commission.

8.5.5 GST

GST may be added to compensation costs as well as work injury costs ([cl. 129](#)).

8.6 COMPENSATION CLAIMS

WIRO will pay costs based on the amounts prescribed in [Schedule 6](#) of the 2016 Regulation for approved work done (not dependent on success). WIRO will also consider paying for disbursements for medical reports of the kind identified in the original Application for Grant of Assistance. WIRO will not reimburse for GST paid on a medical report requested by the practitioner.

A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in [Schedule 6](#) and [clause 88](#) of the 2016 Regulation. The maximum costs that can be recovered are set out in this Schedule.

If a party changes legal representation, the relevant costs under [Schedule 6](#) of the 2016 Regulation are to be apportioned ([cl. 88](#)).

8.6.1 NO LEGAL COSTS FOR WORK CAPACITY DECISION REVIEW PROCESS FOR WORKER OR INSURER

[Section 44\(6\) of the Workers Compensation Act 1987](#) stated:

“A legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer.”

Clause 9, Schedule 8 of the [Workers Compensation Regulation 2010](#) states:

“A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to an insurer in connection with an internal or other review in relation to a work capacity decision of the insurer.”

However, no such prohibition exists under the Workers Compensation Amendment (Legal Costs) Regulation 2016. [Section 44BF](#) of the Workers Compensation Act has the effect of allowing a legal practitioner to be paid by the Insurer providing legal service to a worker in connection with the Application or proposed Application for a Merit Review of a Work Capacity Decision with SIRA’s Merit Review Service. If the application is successful then a fee payable by the insurer to the legal practitioner is \$1,800.00. In any other case the fee payable by the insurer to the legal practitioner is \$1,200.00. This regulation takes effect in respect to work capacity decisions made after 16 December 2016.

8.6.2 COSTS ALLOWED BY SCHEDULE 6

The Workers Compensation Amendment (Further Transitional) Regulation 2012 inserted a new rates schedule in Schedule 6 of the Workers Compensation Regulation 2010. The new rates apply to all resolutions on or after 1 October 2012.

Under [Schedule 6](#) of the 2016 Regulation, practitioner’s costs are based on a type of banding, which allows lump sums for categories of tasks grouped in the following stages:

- a. **Maximum amount for an individual activity/event:** Rather than claiming, for example, separate phone calls and letters to an examining specialist, the legal practitioner is allowed a maximum amount for this category of work (activity/event). Although there is a maximum amount for an individual activity/event, there is also a cap on the amount for a type of activity/event. The amounts for an activity/event are set out in the Compensation Costs Table in [Schedule 6](#).
- b. **No fee unless included in [Schedule 6](#):** If work does not fall within a description of an activity/event in the table, it does not attract a fee, unless it is not regulated (see above).
- c. **Hourly rates:** While certain work is stated to be at an hourly rate, the table places caps that limit costs recovery, regardless of the amount of work done. In the limited situations where a separate allowance is made to instruct a barrister, the practitioner’s hourly rate is lower.
- d. **The table is divided into parts or stages:** [Part 1](#) relates to making a claim for permanent impairment or pain and

suffering, while [Part 2](#) relates to activities undertaken until the dispute is referred or an order is sought. [Schedule 6](#) Table 4 covers the filing of an application/response to the determination of the dispute by the commission constituted as an arbitrator. Certain parts are subdivided into activities/events undertaken exclusively on behalf of either a claimant or an insurer.

- e. **Barrister's fees:** There is no separate provision for a barrister's fees until Part 6 (referral of a question of law to the president). An allowance is also made under Table 4 (appeals to presidential member). Under these parts, various allowances are made for obtaining a barrister's advice and on hearing when an amount is allowed for a practitioner instructing a barrister and also for a barrister.
- f. **Multiple claims or disputes for an injury treated as a single claim or dispute:** This means that unless there is a 12-month gap between claims or disputes, or the commission or Registrar orders otherwise, the maximum costs for a type of activity or event for an injury is the maximum set out in the table "regardless of how many times the activity or event is carried out" ([Schedule 6](#), para. 2).
- g. **Multiple insurers party to claim:** In this instance, the costs as per the table are increased by 50 per cent per party (other than the party that made the claim). Payment is shared equally among the insurers who are parties ([Schedule 6](#), para. 4).
- h. **Minimum costs for medical disputes and disputes about weekly payments of compensation where award or agreement is for less than \$1,000:** The maximum costs are \$200 "despite any other provision of this Schedule" ([Schedule 6](#), para. 7).
- i. **Certain agents not entitled to costs:** An agent who does not fall within the definition of agent in [section 356\(6\)](#) of the WIM Act "is not entitled to be paid or recover any costs" ([Schedule 6](#), para. 16). Legal practitioners who are agents can recover costs.

8.6.3 TRAVEL COSTS AND OTHER MISCELLANEOUS COSTS

Certain travel and accommodation costs, and a few extra items of costs, are permitted by [Schedule 6](#) of the 2016 Regulation. Barristers' fees are not allowed in addition to the lump sums, other than in limited circumstances. This means if a barrister is retained outside the specific allowed attendances, their fees must be met out of the lump sum. In certain circumstances, WIRO will consider providing a grant of funding in relation to counsel, providing advice on evidence, appearing at a teleconference, or appearing in the Workers Compensation Commission for the purpose of a conciliation conference/arbitration hearing.

8.6.4 COMPLEX MATTERS

The [2016 Regulation](#) allows additional costs for complexity. See Part 2, Table 4, items 4 and 5 of [Schedule 6](#).

8.6.5 DISCLOSURE

The notes to the clauses that relate to maximum costs remind practitioners that they have to disclose ([cl. 88](#)).

8.7 WORK INJURY DAMAGES CLAIMS

The objective of the Workers Compensation Regulation was to fix “maximum costs and disbursements recoverable by a legal practitioner”. Accordingly, the regulated costs act as a ceiling on what can be obtained.

An important difference between work injury damages and statutory compensation claims is the ability to contract out of the scale for work injury damages claims. The Workers Compensation Regulation also provides for the assessment of costs by the Registrar of the Workers Compensation Commission. In addition, it places restrictions on the awarding of party/party costs in court proceedings for work injury damages.

8.7.1 APPLICATION

The regulated amounts cover costs for legal services or agent services, provided in, or in relation to, a claim for “work injury damages”, and costs for “matters that are not legal or agent services, but are related to a claim for compensation” (cl. 92).

8.7.2 SKILL, CARE AND RESPONSIBILITY

There is no separate discretionary allowance for complexity. The only relevant discretion is whether a practitioner is entitled to a maximum total or part thereof, for a type of activity. The only relevant discretion is to allow less, not more.

8.7.3 COSTS SCHEDULE

A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in [Schedule 7](#) of the 2016 Regulation (cl. 102). The maximum costs that can be recovered are set out in the Schedule.

If a party changes legal representation, the relevant costs under [Schedule 7](#) of the 2016 Regulation are to be apportioned (cl. 92(2)).

8.7.4 DISCLOSURE

The notes to the clauses remind practitioners of their obligation to disclose under [Division 3](#) of Part 4.3 of the LPUL, and to provide a client with information disclosing the basis on which legal costs will be calculated and an estimate of the total legal costs, as soon as practicable after instructions are given in relation to any matter (cl. 92 of the 2016 Regulation).

8.7.5 APPLICATION

Under [Schedule 7](#) of the 2016 Regulation, regulated amounts apply on a party/party and on a practitioner or agent and client basis, “or on any other basis” (cl. 91). This means all practitioners practising in this area are affected. While it is possible to contract out of the scale, there are strict formal requirements that if not met, mean the regulated amounts will continue to apply (see below).

8.7.6 SCHEDULE 7

Costs are set out in [Schedule 7](#). A legal practitioner or agent cannot recover any costs for a claim, unless those costs are set out in [Schedule 7](#) (cl. 92). The maximum costs that can be recovered are set out in [Schedule 7](#).

If a party changes legal representation, the relevant costs under [Schedule 7](#) are to be apportioned (cl. 92(2)).

The tables in [Schedule 7](#) use banding and stages to set costs. Lump sums for costs are calculated depending on the stage reached and amount obtained. Where settlement amounts to more than \$20,000, costs are based, in part, on a sliding percentage of the settlement amount.

GST may be added to the costs to be recovered in work injury damages matters (cl. 129).

8.7.7 BARRISTERS' FEES

Barristers' fees are not allowed in addition to the lump sums, other than in limited circumstances. This means if a barrister is retained outside the specific allowed attendances, their fees must be met out of the lump sum.

Barristers' fees are only separately allowed under the Other Work Injury Costs Table in [Schedule 7](#). Fees are only allowed for advice on settlement (\$500) and representation in court (\$1,500/day for junior counsel and \$2,200/day for senior counsel). Senior counsel's fees, or fees for more than one advocate, will not be included unless the court so orders (cl. 2, [Schedule 7](#))

8.7.8 CONTRACTING OUT OF THE REGULATED COSTS BETWEEN SOLICITOR AND CLIENT

This is modelled on the Motor Accidents Compensation Regulation. To contract out of [Schedule 7](#) of the 2016 Regulation, the legal practitioner must follow the steps set out in [clause 93](#), which are to:

- give prior separate, written advice that the party (even if awarded costs) will be liable to pay the “gap” between the costs, as per the agreement, and “the amount that would be payable under the 1998 Act [WIM Act]”
- disclose, as required under [Division 3](#) of Part 4.3 of the LPUL. If disclosure has not been properly made, the agreement to contract out is likely to have no effect. Practitioners should be particularly careful to disclose barristers' fees, as these are often overlooked because they are usually incurred some time after the initial retainer; and
- enter into a costs agreement. In contracting out, the practitioner cannot enter into a conditional costs agreement that charges a success premium of more than 10 per cent ([cl. 93\(1\)\(b\)](#)). [Section 181](#) and [Section 182](#) of the LPUL also deal with conditional costs agreements that may provide for the payment of an uplift fee.

If you fail to contract out correctly, you will be limited to claiming the regulated costs set out in [Schedule 7](#) of the 2016 Regulation and not what might be regarded as “fair and reasonable”.

8.7.9 RESTRICTIONS ON AWARDING PARTY/PARTY COSTS

The worker obtains party/party costs if they obtain an order or judgment that is “no less favourable” than the terms of the claimant's final offer of settlement in mediation under the act ([cl. 94](#)).

The worker must pay the insurer's costs if the former is less successful than the insurer's final offer, or if the insurer is found not liable ([cl. 95](#)).

There are provisions for a deemed offer when the worker obtains an order or judgment where the insurer has denied liability and there is consequently no mediation ([cl. 97](#)).

Except as provided above, the parties “to court proceedings for work injury damages are to bear their own costs” ([cl. 96](#)).

These limitations do not apply to ancillary proceedings, where the costs are to be awarded in accordance with the rules of the court ([cl. 98](#)).

8.8 ASSESSMENT OF COSTS

Costs disputes (practitioner or agent and client basis or party/party) are dealt with by the Registrar of the Workers Compensation Commission. This relates to both work injury damages and statutory compensation claims.

[Division 4](#) of the 2016 Regulation effectively adopts the model for assessment under the LPULAA. The tests of fairness and reasonableness remain the same, as do the discretionary factors.

Similarly, assessment appears to remain paper-driven. The Registrar must give reasons and a certificate of determination becomes, on filing in a court of competent jurisdiction, a judgment of that court for the amount of unpaid costs.

Appeals are only allowed for a matter of law. Such appeals are made to the commission constituted by a presidential member ([cl. 125](#)).

The main elements are:

- Practitioner or agent own client: Bills must include a description of the legal or agent services and an identification of each activity, event or stage specified in [Schedule 6](#) or [Schedule 7](#) of the 2016 Regulation, “by reference to the item number of the activity, event or stage, that was carried out” and the amount sought ([cl. 103](#)).
- The parties are to be given a reasonable opportunity to make written submissions for an application for assessment. The Registrar is not bound by the rules of evidence. The Registrar may determine whether proper disclosure has been made, and if a costs agreement exists and its terms ([cl. 109](#)).
- Practitioner own client: If a practitioner has failed to disclose and so would be liable to pay the costs of the costs assessment ([s. 178](#) of the LPUL), the Registrar must determine the amount of those costs and deduct them from the costs payable under the bill of costs. The practitioner must also pay the costs of the Registrar ([cl. 111\(4\)](#) of the 2016 Regulation).
- Under the LPUL, costs cannot be assessed if there is a costs agreement that complies with that act and that agreement is for a lump sum, or the dispute only relates to the rate specified for calculating costs (unless the rate is found to be unjust) ([cls. 113-114](#) of the 2016 Regulation).
- Party/party: There are no formal requirements for a “bill” and an application for assessment is to be made in the form approved by the commission ([cl. 116](#)).
- In party/party assessments, the Registrar may obtain and have regard to a copy of the costs agreement. However, the costs agreement must not be applied in determining appropriate fair and reasonable party/party costs ([cl. 118](#)).



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 9

MOTOR ACCIDENTS

- 9.1 INTRODUCTION
- 9.2 *MOTOR ACCIDENTS ACT 1988*
- 9.3 *MOTOR ACCIDENTS COMPENSATION ACT 1999*
- 9.4 EFFECTS OF THE REGULATION
- 9.5 NOTES

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](#)).

NOTE: THE RELEVANT MOTOR ACCIDENTS LEGISLATION IN THIS CHAPTER IS CURRENTLY UNDER REVIEW

9.1 INTRODUCTION

This chapter outlines the two statutes governing costs for motor accident claims in NSW and the effects of the [Motor Accidents Compensation Regulation 2015](#) (“MACR”). This regulation repealed and replaced the Motor Accidents Compensation Regulation 2005, which would otherwise be repealed on 1 September 2015 by [section 10\(2\)](#) of the [Subordinate Legislation Act 1989](#).

The MACR commenced on 1 April 2015 and applies to all new claims lodged on or after 1 April 2015, except for the costs disclosure provisions.

As some claims to be assessed were made before 1 April 2015, only some of the costs incurred by a claimant are to be allowed in accordance with the revised amounts prescribed in the MACR. The [Motor Accidents Compensation Regulation 2005](#) still applies to some costs for claims lodged before 1 April 2015.

Some of the new provisions also apply to existing claims where a specified event occurs on or after 1 April 2015.

9.2 MOTOR ACCIDENTS ACT 1988 (NSW)

The [Motor Accidents Act 1988](#) governs motor accidents that occurred before 5 October 1999. Costs relating to these claims are not regulated. Practitioner/client costs will depend on written disclosure statements or costs agreements. In accordance with the relevant provisions of the LPUL, party/party costs must be based on the concept of fairness and reasonableness.

9.3 MOTOR ACCIDENTS COMPENSATION ACT 1999 (NSW)

The [Motor Accidents Compensation Act 1999](#) (NSW) (“MACA”), which commenced on 5 October 1999, governs accidents occurring on or after 5 October 1999.

9.3.1 LEGISLATIVE FRAMEWORK

There are a number of sections of the MACA (as amended) that are relevant to the assessment of costs by the Claims Assessment and Resolution Service (CARS).

[Section 94A](#) applies to claims made on or after 1 October 2008 and empowers a claims assessors to assess costs. The source of the claims assessor’s power to assess costs made before 1 October 2008 is [clause 12](#) of the MACR.

Sections [149](#) and [150](#) of the MACA contain the regulation-making power for the maximum costs recoverable by legal practitioners and medical practitioners undertaking medico-legal work in connection with a claims assessment

9.3.2 THE REGULATIONS

Since the passage of the MACA, the Australian Parliament has enacted the following regulations to cover, among other things, the assessment of costs for claims in the scheme:

- a. Motor Accidents Compensation Regulation 1999
- b. [Motor Accidents Compensation Regulation 2005](#) (noting that the amount of costs and fees was increased in 2008)
- c. [Motor Accidents Compensation Regulation 2015](#).

The [Motor Accidents Compensation Regulation 2015](#) applies generally on and after 1 April 2015; however, the following savings and transitional provisions require careful consideration:

- a. The amounts provided for in tables A and B apply only to claims made on or after 1 April 2015.
- b. Costs for Medical Assessment Service (MAS) matters apply only to **referrals** to the MAS on or after 1 April 2015.
- c. Costs for special assessments apply only to **referrals** to the CARS (CARS Form 5A) lodged on or after 1 April 2015.
- d. Fees for medico-legal reports apply only to **services requested** in writing on or after 1 April 2015.
- e. Costs for assessment conferences representation (including loadings) apply only to assessment conferences occurring on or after 1 April 2015.

When providing a schedule of disbursements to the claims assessor before the assessment conference, your submissions in respect of disbursements claimed in accordance with the MACR should refer to the transitional or savings provisions and in particular state:

- a. the date the claim was made
- b. the date any referral to MAS occurred
- c. the date of any CARS assessment or other conference
- d. the date any report was requested in writing from a medical practitioner.

Submissions concerning disbursements should include copies of accounts for all disbursements claimed.

The earlier regulation was the [Motor Accidents Compensation Regulation 2005](#), which was amended in 2006, 2008 and 2010. The 2005 regulation applies to all claims made after 1 September 2005 and **before** 1 April 2015.

The 2005 regulation was amended by the Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2008 and the [Motor Accidents Compensation Amendment \(Costs and Fees\) Regulation 2010](#), and it is the amended regulation that applies to claims made after 1 October 2008 and **before** 1 April 2015.

The 2015 regulation applies to all claims made on or after 1 April 2015.

The 2005 regulation was not updated to take into account the enactment of the [LPA 2004](#), so it refers to sections of the [Legal Profession Act 1987](#), some of which do not have equivalents in the LPA 2004 (for example, [s. 180](#)). The 2015 regulation takes account the enactment of the LPA 2004 and the [LPUL](#).

The MACA and its regulations prevail over the legal costs legislation (as defined in [s. 3A](#) of the LPULAA), when there is any inconsistency ([s. 149\(4\)](#) of the MACA).

Reference to clauses, unless otherwise stated, refer to the MACR.

Practitioners instructed in motor accident claims, where the accident occurred on or after 5 October 1999, are governed by the scale. The scale relates back to the MACA (ss. [149](#) and [150](#)) and [clause 6](#) of the regulation, which provide for fixing maximum costs recoverable by legal and medical practitioners. A scale has also been introduced for medical witnesses and medical reports in [Schedule 2](#) of the regulation. [Section 150](#) of the MACA forbids medical practitioners from charging above scale for medico-legal services.

The maximum costs recoverable do not apply to practitioner/client costs ([cl. 8](#)). The scale applies to party/party costs. In accordance with [clause 7\(1\)](#) of the MACR, the scale does not apply to a claim that is exempt from assessment under [section 92](#) of the MACA.

The scale does not extend to any costs incurred before the matter became exempt ([cl. 7\(2\)](#)).

To allow for GST, practitioners may increase the fees allowed under the scale by an amount up to the amount of GST payable on the supply of the service to which the fee relates ([cl. 18](#) of the MACR).

For all claims, apart from exempt claims under [section 92](#) of the MACA, costs may be calculated using the costs calculator provided by the State Insurance Regulatory Authority (SIRA). The current costs calculator is for both the 2005 and 2015 regulations, and is available on the SIRA website at <http://www.sira.nsw.gov.au/motor-accidents/for-professionals/fees-costs-and-charges>. Scroll down the page until reaching the heading “Claims cost disclosure”. Here, you will find the “damages and costs calculator”. Click the link to upload the calculator. It is an Excel document. Please note, the calculator is revised when necessary. The scale does extend to costs incurred on a further assessment referred by the court under [section 111](#) of the MACA, after the issue of a certificate under [section 94](#) of the MACA ([cl. 12\(2\)](#) of the MACR).

It is **strongly** recommended that **all** practitioners use this costs calculator.

The main features of the costs provisions relevant to CARS are as follows:

[Clause 4](#) – Costs not regulated: certain fees are unregulated; for example, accident investigation reports, court fees and witnesses’

expenses. Disbursements that are in reality treatment (or diagnostic) expenses (for example, CT or MRI scans and reports about those scans obtained at the request of a solicitor and not by way of a referral from a doctor) are not likely to be allowed as disbursements. [Clause 4\(g\)](#) of the MACR relates to the **claimant's** travel costs and expenses for attending CARS or are court calculated at the rate of \$0.55 per kilometre.

[Clause 6](#) – Maximum costs recoverable by legal practitioners: fixes the maximum costs recoverable by legal practitioners listed at [Schedule 1](#).

[Clause 7](#) – Excluded matters: excludes matters exempted from the maximum costs set out in [Schedule 1](#) (but [Schedule 2](#) applies).

[Clause 8](#) – Contracting out: the maximum costs recoverable do not apply to practitioner/client costs.

[Clause 9](#) – Medico-legal fees and expert witnesses: maximum fees recoverable by medical practitioners for medical reports and appearance as witnesses.

[Clause 11](#) – Limit on costs for expert witnesses: limits the costs of expert witnesses recoverable by medical practitioners for medical reports and appearance as witnesses.

[Clause 12](#) – Assessment of costs by claims assessor: contains the power for a CARS assessor to assess costs.

[Clause 17](#) – Private motor vehicle travel expenses incurred by injured persons: relates to the travel expenses incurred by the **claimant** in attending the insurer's medico-legal examinations and MAS examinations calculated at the rate of \$0.55 per kilometre.

[Clause 18](#) – GST: GST may be added.

9.3.3 SCHEDULES

[Schedule 1](#): The maximum costs for legal services to be determined by reference to certain stages, depending on whether the practitioner was retained before the assessment was conducted (Table A), or after the assessment was finalised (Table B). It also provides for country and interstate loadings.

[Schedule 2](#): The maximum fees for medico-legal services.

9.4 EFFECTS OF THE REGULATION

The MACR has the following effects:

- (a) **For accidents that occurred on or after 5 October 1999:**
- it applies a scale, which limits recoverable costs and disbursements
 - it allows a grace period from 5 October 1999 to 17 December 1999, where costs were not affected by the scale if they were already paid or billed ([cl. 5](#) of the MACR).

(b) **Rolls up expenses usually separately claimed**

The scale regulates the maximum amounts for both practitioner costs and barrister fees. It also affects medico-legal and expert fees (see below).

The MACR expressly provides that the meaning of “legal costs” is in accordance with the legal profession legislation (as defined in [s. 3A](#) of the LPULAA. This means “costs” is an inclusive term that includes practitioner costs and barrister fees ([cl. 5\(2\)](#) of the MACR).

This is very important as it means that the lump sum amounts allowed for the costs of practitioners and barristers include expenses that are usually separately charged, such as copying, faxes, phone and travel.

- (c) **Allows practitioner's costs based on banding**
 Practitioner's costs based on banding lump sums are allowed, depending on the stage of the matter reached and the verdict (regardless of variables, such as hearing time, or other expenses, such as copying, faxes, etc).
 If the claimant changes practitioners, the lump sum amount is apportioned between them ([cl. 6\(2\)](#) of the MACR).
- (d) **(i) Restricts advocate's costs at CARS**
Before 1 April 2015 – A conference directly related to a CARS assessment of the claim or a court hearing is allowed at a maximum amount of \$170 per hour (or part of an hour).
After 1 April 2015 – A conference directly related to a CARS assessment of the claim or a court hearing is allowed at a maximum amount of \$300 per hour (or part of an hour).
Before 1 April 2015 – The cost of representation at a CARS assessment conference under [section 104](#) of the MACA is a flat fee of \$530 plus up to \$170 per hour in excess of two hours.
After 1 April 2015 – The cost of representation at a CARS assessment conference under [section 104](#) of the MACA is a flat fee of \$1,250 plus up to \$300 per hour in excess of two hours.
 Country loadings are allowed in accordance with [Schedule 1](#).
 There is no allowance for drafting documents or preparation time.
- (e) **(ii) Restricts advocate's costs in court**
Before 1 April 2015 – The cost of representation in court is \$2,110 per day for an advocate, other than senior counsel, and \$2,950 per day for senior counsel.
After 1 April 2015 – The cost of representation in court is \$2,500 per day for an advocate, other than senior counsel, and \$3,550 per day for senior counsel.
 An amount for the fees for senior counsel, or for more than one advocate, are not to be included unless the court so orders.
- (f) **Fixes medico-legal fees**
 The scale fixes maximum amounts for medico-legal services (for reports and attending as witnesses). [Section 150](#) of the MACA also provides that a medical practitioner is not entitled to be paid or to recover more than any maximum fee fixed under this section.
 This part of the scale ([Schedule 2](#)) applies even if the matter is otherwise exempt from the scale under [section 92](#) of the MACA, as [clause 7\(1\)](#) of the MACR only refers to [Schedule 1](#) and not to both schedules 1 and 2.
- (g) **Sets lump sum costs associated with medical disputes and special assessments**
For MAS applications lodged before 1 April 2015 – Costs associated with MAS disputes are allowed at up to \$670 for each medical dispute under [Part 3.4](#) of the MACA, but not exceeding \$1,600 for any one claim, regardless of the number or kind of disputes.
For MAS applications lodged after 1 April 2015 – Costs associated with MAS disputes are allowed at up to \$1,000 for each medical dispute under [Part 3.4](#) of the MACA, but not exceeding \$2,500 for any one claim, regardless of the number or kind of disputes.
For applications lodged before 1 April 2015 – Costs associated with a dispute (special assessment) referred to in [section 96](#) of the MACA, as allowed by the claims assessor, are up to \$800 for any one claim, regardless of the number or kind of disputes.
For applications lodged after 1 April 2015 – Costs associated with a dispute (special assessment) referred to in

section 96 of the MACA, as allowed by the claims assessor, are up to \$1,200 per dispute and up to \$2,500 per claim (excluding s. 96(1)(e)-(g) disputes).

(h) Limits expert witnesses' fees

The MACR limits the costs of expert witnesses, both by limiting their number and the amounts paid to them. The costs of only one medical expert in each specialty will be allowed, unless there is a "substantial issue" as to a matter referred to in section 58 (1)(d) of the MACA. In that case, two experts will be allowed (cl. 11).

The claims assessor, or court, retains discretion to allow a greater number of expert witnesses. The costs of only two experts of any other kind will be allowed. This part of the scale (Schedule 2) appears to apply even if the matter is otherwise generally exempt from the scale under section 92 of the MACA (cl. 7(1) of the MACR).

(i) Identifies unregulated costs

Costs not regulated in accordance with clause 4 of the MACR (cl. 12 excepted, which relates to assessment of costs by claims assessor) are:

- a. fees for accident investigators' reports or accident reconstruction reports
- b. fees for accountants' reports
- c. fees for reports from health professionals
- d. fees for other professional reports relating to treatment or rehabilitation (for example, architects' reports concerning house modifications)
- e. fees for interpreter or translation services
- f. court fees
- g. travel costs and expenses of the claimant in the matter for attending medical examinations, the CARS or a court
- h. witnesses' expenses at the CARS or a court.

(j) Establishes requirements for contracting out of the scale

While it is possible to contract out of the scale, requirements still need to be met as set out below; in particular, clause 8 of the MACR, which provides that conditional agreements are only enforceable if they do not charge a success premium. Under the LPA 2004, conditional agreements for matters involving claims for damages are prohibited in any event. Under sections 181 and 182 of the LPUL (which came into force for instructions after 1 July 2015), conditional costs agreements may provide for the payment of an uplift fee.

The maximum amounts apply to both practitioner and own client and party/party, unless the practitioner contracts out of the scale (cl. 8 of the MACR). Accordingly, practitioners will be limited to the scale, unless they properly contract out of it.

To contract out, the practitioner must give prior, separate, written advice that the claimant will be liable for the "gap" between party/party recovery and practitioner own-client costs (see Appendix).

The advice must be in a separate document to the costs agreement (cl. 8 (c) of the MACR). To allow clients time to fully consider its contents, the letter should be forwarded some time before the costs agreement. Special care should be taken in giving the advice, because in borderline section 92 exempt matters, it is likely that the gap will be substantial and could significantly affect the client's "in hand" result.

The MACR expressly provides that the practitioner must also disclose as required under the LPUL, and enter into a costs agreement (cl. 8(a)). Practitioners are advised to disclose costs as required under Division 3 Part 4.3 of the LPUL.

Exceptions to disclosure are contained in section 174(4) of the LPUL. The effect of the MACR means that there are now no exemptions to the need to give disclosure in motor accident matters.

Practitioners are reminded that disclosure under the [LPUL](#) also requires that an estimate be given and be updated.

The practitioner must enter into a costs agreement within the meaning of the [LPUL](#). This means the agreement must be in writing.

In contracting out, the practitioner cannot enter into a conditional costs agreement that charges a success premium. The scale will apply if the costs agreement provides for the payment of a premium on the successful outcome of the matter, ([cl. 8\(b\)](#)).

See the Appendix for a model costs agreement complying with [clause 8](#) of the MACR.

(k) Sets out exemptions

The scale in relation to practitioner costs and barrister fees does not apply to any matter exempted under [section 92](#) of the MACA. However, the scale continues to apply to regulated maximum fees for medical reports.

A claim is exempt from assessment if it is exempt under the [MACA Claims Assessment Guidelines](#) (“the Guidelines”) or the MACR. [Section 92\(1\)\(a\)](#) exemptions are mandatory exemptions. Similarly, a claims assessor can determine that the matter is not suitable for assessment pursuant to [section 92\(1\)\(b\)](#) (with the approval of the principal claims assessor). [Section 92\(1\)\(b\)](#) exemptions are discretionary.

[Section 92](#) must be read in conjunction with the [MACA Claims Assessment Guidelines](#).

For the purpose of [section 92\(1\)\(a\)](#), the principal claims assessor (PCA) shall issue a certificate of exemption if the PCA is satisfied that, at the time of the consideration of the application, the claim involves one or more of the following circumstances:

- a. The insurer denies fault of its owner or driver of a motor vehicle in the [section 81](#) notice.
- b. The insurer makes an allegation in its [section 81](#) notice that the claimant was at fault or partly at fault, and claims a reduction of damages of more than 25 per cent.
- c. The claimant is a “person under legal incapacity”.
- d. The insurer alleges that the claim is fraudulent; for example, it is alleged that the accident may have been staged, or where a person claiming to have been a passenger in the vehicle is alleged to have been the driver of the vehicle.

(See [MACA Claims Assessment Guidelines](#) 1 May 2014 in relation to [section 92\(1\)\(a\)](#) at 8.11.)

Matters to be considered when applying for a discretionary exemption under [section 92\(1\)\(b\)](#) include, but are not limited to:

- a. complex legal issues
- b. complex factual issues
- c. complex issues of quantum (including but not limited to major or catastrophic spinal or brain injury claims)
- d. entitlement to non-economic loss and the claim involves other issues of complexity
- e. complex issues of causation
- f. whether injuries are likely to stabilise within three years of the accident
- g. whether there are issues of indemnity or insurance
- h. whether a material witness resides out of the jurisdiction
- i. whether the matter involves non-CTP parties
- j. whether the insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident giving rise to the claim.

9.5 NOTES

- (1) If an insurer makes an allegation of “fraud” in terms of the circumstances of the accident, the matter will be exempt under [section 92\(1\)\(a\)](#) and [clause 8.11.6](#) of the Guidelines.
- (2) If an insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident, the insurer may be required to provide particulars in writing of the general nature of any such allegation under [clause 17.13](#), and an assessor may then consider whether a matter is not suitable for assessment under [clauses 14.11–14.16](#), particularly in light of [clauses 14.16.11](#) of the Guidelines.

(See [MACA Claims Assessment Guidelines](#) 1 May 2014 in relation to [section 92\(1\)\(b\)](#) at [clauses 14.16.1–14.16.11](#).)

MANDATORY REPORTING OF COSTS

Legal professional obligations

From 1 October 2015, any legal professional representing a claimant with a CTP claim must provide SIRA with a breakdown of costs for that claim when the claim is finalised.

What is required?

Sometime after claim settlement, when the insurer has finalised the claim, you will receive an email from SIRA, which will contain a secure link to an online form. Note the following:

- You will have 20 days from the date of the email to complete and submit the online form to SIRA.
- The online form requires all mandatory fields to be completed.
- On submission, you will receive a confirmation email containing a PDF copy of the completed form.
- Compliance with the time frame will be monitored by SIRA.

What should I do?

Ensure you provide a correct and current email address to the insurer at the time of claim settlement, and after the claim is settled, respond to the email from SIRA.

What is required?

You must report a breakdown of costs, including:

- the ordered (party/party) costs
- other legal fees, including barrister fees and previous lawyers’ fees, and deductions, including solicitor/client legal costs
- all disbursements, such as medical report and expert fees, and all other deductions, including prefunds to Centrelink, Medicare, workers compensation, and private health and income protection insurers
- unpaid treatment fees
- [Section 83](#) payments
- the amount paid to the claimant.

Why must this information be reported?

This disclosure of costs is required under [clauses 8\(d\)](#) and [23](#) of the MACR. Legal professionals must comply with this requirement of the regulation from 1 October 2015.



THE LAW SOCIETY
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COSTS GUIDE 7TH EDITION

CHAPTER 10

COSTS IN FAMILY LAW MATTERS

- 10.1 INTRODUCTION
- 10.2 LAW PRACTICE/CLIENT COSTS
- 10.3 PARTY/PARTY COSTS
- 10.4 COSTS IN FEDERAL CIRCUIT COURT – FAMILY LAW PROCEEDINGS

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](#)).

10.1 INTRODUCTION

The Family Court of Australia is fundamentally different to almost all other courts and tribunals in Australia because costs do not follow the event. Rather, [section 117\(1\)](#) of the [Family Law Act 1975](#) (Cth) (FLA), sets out the general principle that each party to proceedings bears their own costs. This is intended to make access to the Family Court as easy as possible, and to forestall parties being put off by the possibility of having to bear another party's costs.

While the general principle is adhered to, the court does have the power to award costs if the circumstances warrant such an order. [Section 117\(2A\)](#) of the FLA sets out the criteria that the Family Court should consider when deciding whether such an order should be made. As a general rule, an order that one party pay another party's costs will only be made where the conduct of one of the parties has led to an increase in costs for the other party or an unreasonable prolongation of the proceedings, or where a party has been wholly unsuccessful or an offer of settlement was unreasonably refused.

The [Family Law Amendment Rules 2008](#) were proclaimed on 23 April 2008 and the relevant parts amending [Chapter 19](#) of the Family Law Rules 2004 (FLR) came into effect on 1 July 2008.

The amendments to the [FLR](#) transferred all practitioner/client costs assessments from the Family Court to the different state systems. [Chapter 19](#) of the FLR now outlines the rules governing party/party costs.

10.2 LAW PRACTICE/CLIENT COSTS

10.2.1 COSTS FOR MATTERS WHERE INSTRUCTIONS WERE GIVEN OR THE APPLICATION WAS MADE BEFORE 1 JULY 2008

The Family Court assessed and taxed solicitor/client costs disputes for those matters where instructions were first taken on or before 30 June 2008.

These costs were calculated in accordance with any valid costs agreement between the lawyer and the client for the work, or if there was no costs agreement, in accordance with the scale of costs in [Schedule 3](#) of the FLR.

The former provisions of Chapter 19 are contained in [Schedule 6](#) of the FLR, titled: "Costs – rules before 1 July 2008".

Information about costs for matters that fall within this category is contained in earlier editions of the *Costs Guidebook*.

10.2.2 COSTS FOR MATTERS WHERE INSTRUCTIONS WERE GIVEN AFTER 1 JULY 2008

Law practices are required to disclose costs issues to their clients in accordance with the relevant state legislation. In NSW, this will require mandatory disclosure under [Division 3 of Part 4.3](#) of the "Uniform Law", and a costs agreement that complies with this act (see [Chapter 3](#)). A precedent for costs disclosure and costs agreement can be found in the Appendices and on the Law Society's website.

[Chapter 19](#) of the FLR contains two requirements with respect to costs as between law practice and client.

Practitioners are required to inform the client of the costs incurred to date and anticipated costs to complete the case, should a settlement offer be made by the other side ([rule 19.03](#)).

In addition to this, practitioners are required to provide the client with written notice of the actual costs and expenses incurred to date and anticipated future costs at certain court events, including the conciliation conference and the first day of the trial ([rule 19.04](#)).

A dispute between a practitioner and a client about costs charged by the practitioner in a family law matter will be dealt with in accordance with the state or territory legislation governing the legal profession in the state or territory where the practitioner practices. See [Chapter 4](#), which deals with costs assessment.

10.2.3 SCHEDULE 3 – SCALE OF COSTS NO LONGER APPLIES TO PRACTITIONER/CLIENT COSTS

[Rule 19.18](#) of the FLR was amended in 2008 so that the scales of costs set out in [Schedule 3](#) only apply if the court orders that costs are to be paid and does not fix the amount.

If a practitioner does not disclose as required in a matter in NSW, costs will be assessed in accordance with the provisions of [section 172](#) of the Uniform Law, according to the fair and reasonable value of the legal services provided.

10.3 PARTY/PARTY COSTS

10.3.1 CHAPTER 19 OF THE FAMILY LAW RULES – PARTY/PARTY COSTS

Disputes between parties about costs are dealt with by the Family Court Registrars, in accordance with the provisions in [Chapter 19](#) of the FLR.

The procedure for quantification and assessment of party/party costs ordered by the Family Court is set out in [Chapter 19](#) of the FLR.

10.3.2 HOW ARE COSTS CALCULATED

Party/party costs

Unless the court orders otherwise, party/party costs are calculated in accordance with [Schedule 3](#) of the FLR. The court can also order that a party is entitled to costs of a specific amount; that they be assessed on a practitioner and client basis or an indemnity basis; or be calculated in accordance with the method stated in the order.

Indemnity costs

While neither ss. [117\(2\)](#) or [117\(2A\)](#) of the FLA expressly state that the Court can order payment of costs on an indemnity basis, the court is empowered to make “such orders as to costs ... as the Court considers just”.

[Rule 19.18\(1\)\(b\)](#) of the FLR provides that the court may make an order that a party is entitled to costs assessed on a practitioner and client basis, or an indemnity basis. In either case, the costs set out in [Schedule 3](#) of the FLR may not apply, and such costs are usually allowed in accordance with any costs agreement between the practitioner and client.

Bills of costs in the Family Court are known as itemised costs accounts. The form for an itemised costs account is on the Family Court website.

An itemised costs account is a court document and must specify each item of costs and disbursements claimed. The profit costs and disbursements are claimed together in chronological order, rather than disbursements appearing at the end of the bill. The summary to the account appears at the front of the itemised costs account.

[Rule 19.22](#) sets out the requirements for an itemised costs account. A lawyer must give a costs notice to a client when serving an account or an itemised costs account ([rule 19.21](#)).

10.3.3 SERVING AN ITEMISED COSTS ACCOUNT

An itemised costs account is served, together with the costs notice, on the person liable to pay the costs **within four months** after the end of the case ([rule 19.21](#)).

Time is therefore of the essence when preparing a Family Court itemised costs account.

10.3.4 DISPUTING AN ITEMISED COSTS ACCOUNT

If the paying party disputes the costs, they have 28 days from receipt of the itemised costs account to serve a Form 15 Notice Disputing Itemised Costs Account ([rule 19.23](#)). If no Form 15 is received, and the costs are not paid, the person entitled to the costs can seek a costs assessment order ([rule 19.37](#)).

The parties disputing the costs must make a reasonable and genuine attempt to resolve the dispute. If this fails, then either party may file the Form 15 within 42 days after the Form 15 was served. The notice must be served on each person claiming the costs ([rule 7.04](#)).

[Rule 19.24](#) requires the parties to a dispute to make a reasonable and genuine attempt to resolve the dispute and if they are

unable to resolve the dispute, either party may ask the court to determine the dispute by filing in the filing registry of the court where the case was conducted the itemised costs account and the Notice Disputing Itemised Costs Account no later than 42 days after the Notice Disputing Itemised Costs Account was served.

Under [rule 1.14](#) of the FLR, a party may apply to the court for an extension of time to serve an itemised costs account to dispute an itemised costs account or to request that the court determine the dispute.

Once the documents are filed, the court will usually appoint a time for a preliminary assessment. The date fixed must be at least 21 days after the filing of the Form 15 ([rule 19.26](#)). The court may fix a date for a settlement conference to facilitate negotiations and where the parties will identify the issues in dispute ([rule 19.28](#)).

10.3.5 PRELIMINARY ASSESSMENT OF COSTS

At the preliminary assessment, the Registrar will, in the absence of the parties, calculate the likely cost of the costs assessment order. The parties are notified in writing of the preliminary assessment amount ([rule 19.29](#)). If there is no objection to the amount assessed, the Registrar will make a costs assessment order for this amount ([rule 19.31](#)).

10.3.6 DISPUTING PRELIMINARY ASSESSMENT AMOUNT AND ASSESSMENT HEARING

If either party is unhappy with the preliminary assessment amount, they can object in writing to the Registrar and to the other party. They have 21 days after receiving written notice of the preliminary assessment amount to do so. An amount equalling 5 per cent of the amount claimed must be paid to the court as security for the cost of the assessment. On receiving the objection and the payment of security, the Registrar will fix a date for the assessment hearing ([rule 19.30](#)).

An assessment hearing is heard before the Registrar ([rule 19.32](#)). The Registrar must:

- determine the amount (if any) to be deducted from each item included in the Form 15
- determine the total amount payable for the costs of the assessment (if any)
- calculate the total amount payable for the costs allowed
- deduct the total amount (if any) of costs paid or credited; and
- calculate the total amount payable for costs.

At the end of the assessment hearing, the Registrar must:

- make a costs assessment order; and
- give a copy of the order to each party.

Note under [rule 19.32](#): “At an assessment hearing, the onus of proof is on the person entitled to costs. That person should bring to the hearing all documents supporting the items claimed.”

10.3.7 REVIEW

A party may seek a review of a costs assessment order by filing, within 14 days of the costs assessment order, a Form 2 Application in a Case. The form must be supported by an affidavit stating the item number of the itemised costs account that the party objects to, the reason for the objection and the decision sought from the court (rules [19.54](#) and [19.55](#)).

Assessment principles in family law matters

Principles applicable to party/party costs are set out in [Chapter 19](#) of the FLR.

[Rule 19.34](#) of the FLR sets out the assessment principles that the Registrar must apply when assessing costs. The Registrar must not allow:

- costs incurred because of improper, unnecessary or unreasonable conduct by a party or a party’s practitioner
- costs for work (in type or amount) that was not reasonably required to be done for the case; or
- unusual expenses.

Unless the court orders otherwise, costs are calculated in accordance with [Schedule 3](#) and [Schedule 4](#) of the FLR. Part 2 of [Schedule 3](#) sets counsels' fees.

If the court has ordered costs on an indemnity basis, the Registrar must allow, as set out in [rule 19.34](#), all costs reasonably incurred and of a reasonable amount, after considering among other things:

- the scale of costs in [Schedule 3](#)
- any costs agreement between the party to whom costs are payable and the party's practitioner; and
- charges ordinarily payable by a client to a practitioner for the work.

10.3.8 COSTS OF ASSESSMENT

Registrars have the power at an assessment hearing to make an order for costs ([rule 19.33](#)).

The party objecting to a preliminary assessment may be ordered to pay the other party's costs of the assessment from the date of their objection, unless the itemised costs account is assessed with a variation in the objecting party's favour of at least 20 per cent of the preliminary assessment amount ([rule 19.30](#)).

10.4 COSTS IN FEDERAL CIRCUIT COURT– FAMILY LAW PROCEEDINGS

The Federal Circuit Court was established with the aim of handling less complex matters in family law and general federal law. It shares jurisdiction with the Family Court and the Federal Court.

The Federal Circuit Court can hear most family law matters with the exception of applications for adoption, nullity or validity of marriage.

The FLR does not apply to costs in family law matters in the Federal Circuit Court, unless a judge makes a costs order that specifically refers to [Chapter 19](#) of the FLR (although [s. 117](#) of the FLA does apply to proceedings in the Federal Circuit Court).

Unless the court orders otherwise, party/party costs are determined according to the event-based scale in [Schedule 1](#) of the [Federal Circuit Court Rules 2001](#). If the court makes an order that the costs be assessed in accordance with [Chapter 19](#) of the FLR, the same procedure applied by the Family Court as outlined above is followed by the Federal Circuit Court.



THE LAW SOCIETY
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COSTS GUIDE 7TH EDITION

CHAPTER 11

SECURITY FOR COSTS, OFFERS OF COMPROMISE, COSTS ON DISCONTINUANCE

- 11.1 SECURITY FOR COSTS
- 11.2 OFFERS OF COMPROMISE
- 11.3 DISCONTINUANCE

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](#)).

11.1 SECURITY FOR COSTS

11.1.1 INTRODUCTION

Courts are given wide discretion to order security for costs on the application of a defendant/respondent/cross-respondent after considering all the circumstances of a particular case. In *King v Commercial Bank of Aust* (1920) 28 CLR 289; [1920] HCA 62 at 292, Rich J said, with respect to section 35 of the *High Court Procedure Act*:

“No rules can be formulated in advance by any Judge as to how the discretion shall be exercised. It depends entirely on the circumstances of each particular case.”

While similar general principles apply for granting an order for security, each jurisdiction has its own discrete rules for failure to provide security. For example, the Supreme Court of Victoria may dismiss the proceedings ([rule 62.04](#) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*).

The court has three distinct sources of power to order a plaintiff to provide security for the defendant’s costs, which are:

- its inherent power to stay proceedings to ensure the proper and effective administration of justice
- the rules of the court
- section 1335 of the [Corporations Act 2001 \(Cth\)](#).

This chapter will concentrate on the NSW and federal jurisdictions:

- In NSW, the [Uniform Civil Procedure Rules 2005](#) (“UCPR”) provide that the proceedings will be stayed until security is given ([rule 42.21\(1\)](#) of the UCPR), and if the plaintiff fails to provide security, the proceedings may be dismissed ([rule 42.21\(3\)](#) of the UCPR)
- The [Federal Court Rules 2011](#) (“FCR”) provide that the proceedings may be stayed or dismissed ([rule 19.01\(1\)](#))
- The [Federal Court of Australia Act 1976 \(Cth\)](#) (“FCA”) provides that the proceedings may be dismissed if security is not given ([s. 56\(4\)](#)).

A key case considering an application to dismiss the proceedings upon non-compliance with a security for costs order is *Idoport Pty Ltd v National Australia Bank Ltd* [2002] NSWSC 18 (upheld on appeal at [2002] NSWCA 271). See also *Porter v Gordian Runoff Ltd (No. 3)* [2005] NSWCA 377 in the appellate context.

This chapter provides guidance on:

- security for costs
- offers of compromise
- costs on discontinuance.

11.1.2 PRINCIPLES FOR DETERMINING WHEN SECURITY WILL BE ORDERED

Under [rule 42.21](#) of the UCPR, the court may, but need not, order security for costs if:

- a plaintiff is ordinarily resident outside Australia
- the address of a plaintiff is not stated or is misstated in their originating process, and there is reason to believe that the failure to state an address, or the misstatement of the address, was made with the intention to deceive
- after the commencement of proceedings, the plaintiff has changed addresses, and there is reason to believe that the change was made with a view to avoiding the consequences of the proceedings
- the plaintiff is a corporation and there is reason to believe that it will be unable to pay the costs of the defendant if ordered to do so (see, for example, *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; [1995] FCA 1093)
- the plaintiff is suing for the benefit of someone else and there is reason to believe that they will be unable to pay the costs of the defendant if ordered to do so
- there is reason to believe the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings.

Under [rule 19.01](#) of the FCR, the court may order security in any case but, in deciding whether to do so, the court may consider:

- whether there is reason to believe that the applicant will be unable to pay the respondent's costs if so ordered
- whether the applicant is ordinarily resident outside Australia
- whether the applicant is suing for someone else's benefit
- whether the applicant is impecunious
- any other relevant matter.

In *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*, Beazley J (as Her Honour then was) set out what she described as well-established guidelines, which the court typically takes into account in determining any such application. The guidelines are:

- that such an application should be brought promptly
- that the strength and bona fides of the applicant's case should be considered
- whether the applicant's impecuniosity was caused by the respondent's conduct, which is the subject of the claim
- whether the respondent's application for security is oppressive, in the sense that it is being used merely to deny an impecunious applicant a right to litigate. (See also *Singer v Berghouse* (1993) 114 ALR 521; [1993] HCA 35; *Cowell v Taylor* (1885) 31 Ch D34, 38; [Chen v Keddie](#) [2009] NSWSC 762; *Fiduciary Limited v Morningstar Research Pty Ltd* (2004) 208 ALR 564; [\[2004\] NSWSC 664](#))
- in the case of a company, whether any person is standing behind the company who is likely to benefit from the litigation, and who is willing to provide the necessary security. If so, whether that person has offered any personal undertaking to be liable for the costs, and if so, the form of any such undertaking
- that security will only ordinarily be ordered against a party that is in substance the plaintiff, and an order ought not to be made against parties that are defending themselves and thus forced to litigate.

See [rule 42.21\(1A\)](#) of the UCPR for a full list of factors the court will take into account in considering an application for security for costs.

When the plaintiff is a natural person, the general rule is that poverty is not itself sufficient to justify ordering security: *Cowell v Taylor* (1885) 31 Ch D 34 at 38 (see [rule. 42.21\(1B\)](#) of the UCPR).

[Section 1335\(1\)](#) of the Corporations Act represents a departure from the common law rule that the poverty of a plaintiff should not become a bar to litigation. It provides:

“Where a corporation is a plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.”

A foreign corporation or a plaintiff resident outside the jurisdiction, with no assets within the jurisdiction, is likely to face great difficulty in avoiding an order for security for costs (see [PS Chellaram & Co Limited v China Ocean Shipping Co \(1991\) 102 ALR 321; \[1991\] HCA 36](#)).

11.1.3 AMOUNT AND APPLICATION OF SECURITY

The court does not set out to indemnify a defendant against costs. It is up to the defendant to provide evidence to the court as to the costs and disbursements to be incurred in preparing the action for hearing (and may include the costs for the trial period), so that the court can determine a reasonable amount to fix for security.

Where the plaintiff is resident overseas, and that is the only reason to require security, the defendant may only be able to obtain (by way of security) the costs of enforcing any judgment in the place where the plaintiff resides.

Security is to be given on the terms directed by the court ([rule 42.21\(2\)](#) of the UCPR, [rule 19.01\(1\)\(a\)](#) of the FCR and [s. 56\(2\)](#) of the FCA), but in practice, is generally payment of a sum into court or into a solicitor's trust account within a stipulated time period.

A party can reapply to the court for additional security in circumstances where the original order for security was made on a limited basis; for example, costs up to a certain stage of the proceedings. Security may extend to both future costs and costs already incurred (Gordon J in *Norcast S.ar.L v Bradken Limited & Ors* [2012] FCA 765).

11.1.4 APPEALS

An order for security for the costs of proceedings in the Court of Appeal may be made in special circumstances, such as:

- when an appeal involves an apparent abuse of process
- when an appeal is manifestly groundless
- when there is a risk the appeal will involve unnecessary costs
- when there has been great delay in prosecuting the appeal
- when the appellant is a foreigner with few resources in Australia or elsewhere, whose general impecuniosity is of his own making, but who has been able to fund legal services to conduct litigation.

See rules 50.8 and 51.50 of the UCPR (*Mazzei v Industrial Relations Commission of New South Wales* (2000) 97 IR 457; [2000] NSWCA 104).

An order for security for the costs of an appeal proceeding in the Federal Court may be made on similar grounds to [rule 19.01](#) of the FCR (see [rule 36.01](#) of the FCR). See *Equity Access Ltd v Westpac Banking Corp* (1989) ATPR 40972 for the criteria to be considered by the court in granting any order for security.

11.2 OFFERS OF COMPROMISE

11.2.1 OFFERS OF COMPROMISE IN NSW AND FEDERAL JURISDICTIONS

Be careful to follow the rules precisely if making an offer of compromise.

NSW amended the rules (effective 7 June 2013) relating to offers of compromise under the Uniform Civil Procedure Rules (Amendment No 59) (NSW) 2013. The amendments provide that an offer of compromise must not include an amount for costs and is not to be expressed to be inclusive of costs (see [rule 20.26\(2\)\(c\)](#) of the UCPR). The rules enshrine the effect of remaining silent about costs.

In one exception to the above, an offer may propose (under [rule 20.26\(3\)](#) of the UCPR):

- a judgment in favour of the defendant with no order as to costs or an order that the defendant will pay the plaintiff a specified sum in respect of the plaintiff's costs
- that the costs as agreed or assessed up to the time the offer was made will be paid by the offeror
- that the costs as agreed or assessed on an ordinary basis or on an indemnity basis will be met out of a specified estate, notional estate or fund.

Therefore, from 7 June 2013, offers of compromise can, in certain circumstances, use words to the effect of “plus costs as agreed or assessed”.

Offers of compromise made prior to 7 June 2013 are subject to the UCPR that was current prior to that date. The Court of Appeal in *Whitney v Dream Developments Pty Limited* (2013) 84 NSWLR 311; [2013] NSWCA 188 confirmed that *Old v McInnes and Hodgkinson* [2011] NSWCA 410 was correctly decided. The rule prior to 7 June 2013 was that an offer of compromise expressed to be “plus costs agreed or assessed” was not valid, and could not be treated as a Calderbank offer.

See [Part 42, Division 3](#) of the UCPR for the cost consequences of offers of compromise.

Offers of compromise in the federal jurisdiction are governed pursuant to:

- the Federal Court of Australia – [Part 25](#) of the Federal Court Rules 2011
- the Family Court of Australia – [Part 10.1](#) of the Family Court Rules 2004.

The principles of Calderbank are available in Australian jurisdictions, even where statutory offers of compromise are available. Generally, where a statutory offer of compromise is available, that option is preferable to a Calderbank letter because it is easier to obtain a costs order using an offer of compromise.

11.3 DISCONTINUANCE

11.3.1 INTRODUCTION

What costs, if any, apply from discontinuance?

11.3.2 WHEN AND HOW A PARTY MAY DISCONTINUE

Under [rule 12.1](#) of the UCPR, a party may only discontinue with the consent of all parties involved or with the leave of the court. The notice of discontinuance must bear a certificate to the effect that the discontinuing party does not represent any other person. Unless it is filed with the leave of the court, it must be accompanied by a notice (which is normally endorsed on the notice of discontinuance) recording each party's consent to the discontinuance. If the discontinuance is on terms, for example, such as costs, those terms must be incorporated in the notice. If the originating process has not been served, the plaintiff must also file an affidavit to that effect.

Similar principles apply under the FCR, except that a party has a right to file a notice of discontinuance up until the first return date fixed on the originating application or, if the case proceeds on pleadings, up until the time pleadings are closed ([rule 26.12](#) of the FCR). If the discontinuing party represents another party, the discontinuing party may only discontinue with the leave of the court. Similarly, a winding-up application may only be discontinued with the leave of the court ([rule 26.12\(5\)](#) of the FCR).

11.3.3 WHO PAYS THE COSTS FOR DISCONTINUANCE?

Normally the party that discontinues must pay the other party's costs, unless the parties agree otherwise, or the discontinuance is with the leave of the court, or the court makes some other order in relation to costs ([rule 42.19](#) of the UCPR; [rule 26.12\(7\)](#) of the FCR; *Inground Constructions Pty Ltd v FCT* (1994) ATR 513).

The court may make a different costs order when:

- the discontinuance is a consequence of succeeding in relation to the claim
- the costs have been significantly increased by the unreasonable conduct of the opposing party
- both parties have acted reasonably but the proceedings have been rendered futile by circumstances beyond their control.

Another exception is found in the case of an appeal to the District Court under [section 91](#) of the [Children and Young Persons \(Care and Protection\) Act 1998 \(NSW\)](#). In this case, the plaintiff was not liable to pay the costs of discontinuance, unless there were special circumstances justifying such an order ([rule 42.19\(3\)](#) of the UCPR).

11.3.4 EXERCISE OF THE COURT'S DISCRETION

A number of cases have considered the issue of costs, where the leave of the court has been sought to discontinue and the proceedings have been resolved without a hearing on the merits. The starting point is often taken to be the judgment of McHugh J in *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia: Ex Parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6.

In this case, His Honour pointed out:

“The power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule (whether under the general law or by statute) the successful party is entitled to his or her costs ... When there has been no hearing on the merits, however, a Court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.”

His Honour continued:

“The Court cannot [(assess costs where there has been no hearing on the merits by trying] a hypothetical action.”

His Honour continued:

“In some cases ... the Court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.”

His Honour continued:

“In some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried.”

By way of caution, His Honour noted that such cases were likely to be rare.

His Honour also stated that if the parties had both acted reasonably in commencing and defending the proceedings, and in conducting them until resolution, the proper exercise of the costs discretion would usually mean that the court would make no order as to the costs of the proceedings.

In *Chapman v Luminis Pty Ltd* [2003] FCAFC 162, the Full Court of the Federal Court of Australia, repeating the proposition that there should not be something in the nature of a hypothetical trial, noted that sometimes the court could make an order for costs without engaging in that exercise. The court instanced two ways in which that could happen: one involved an examination of the reasonableness of the conduct of the parties and the other involved the court being confident that one party was almost certain to have succeeded if a matter had been fully tried (see also [Owner's Strata Plan 63094 v Council of the City of Sydney \(2009\) 165 LGERA 17](#); [2009] NSWSC 141; [Owners Strata Plan 62327 v Vero \[2009\] NSWSC 908](#); [Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission \(NSW\) \(2006\) 153 IR 386](#); [2006] NSWCA 129 (in this last case, both parties had acted reasonably, but the proceedings had been rendered futile by circumstances beyond their control) and [Bitannia Pty Ltd v Parkline Constructions Pty Ltd \[2009\] NSWCA 32](#)).

Subject to the terms of any consent to discontinuance, or any leave to discontinue, in accordance with the relevant rules, a discontinuance of proceedings associated with a plaintiff's claim for relief does not prevent the plaintiff from claiming the same relief in fresh proceedings.

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