Costs Agreements

and

Complying with the Uniform Law

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1. Legal Profession Uniform Law (NSW)

The legislation commenced on 1 July 2015 - the *Legal Profession Act* 2004 ("**LPA**") and the *Legal Profession Regulation* 2005 were repealed and replaced with 4 separate pieces of legislation:

- The *Legal Profession Uniform Law (NSW)* ("**LPUL**") at http://www5.austlii.edu.au/au/legis/nsw/consol_act/lpul333/
- The *Legal Profession Uniform Law Application Act* 2014 ("**LPULAA**") at http://www5.austlii.edu.au/au/legis/nsw/consol_act/lpulaa2014406/
- The *Legal Profession Uniform General Rules* 2015 ("**the Rules**")at http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2015-246.pdf and
- The *Legal Profession Uniform Law Application Regulation* 2015 [NSW] ("**the Regulation**") at http://www8.austlii.edu.au/cgi-in/viewdb/au/legis/nsw/consol_reg/lpular2015497/

Note the transitional provisions – Clause 18 of Schedule 4 to the LPUL – deals with legal costs – if a client first instructs the law practice before 1 July 2015 – the LPA will continue to apply

Part 4.3 deals with legal costs

Section 169 lists the objectives of Part 4.3 as:

(a) To ensure that clients are able to make informed decisions about legal options and costs involved;

(b) To provide that law practices must not charge more than fair and reasonable costs; and

(c) To provide a framework for solicitor client cost assessment.

Note that the whole of Part 4.3 does not apply to commercial of government clients

Section 170 defines commercial or government clients – similar to definitions for sophisticated clients under the LPA –

"commercial or government client" is a client of a law practice where the client is-

(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.

Part 4.3 does not apply to these clients although there are some exceptions in relation to costs agreements under sections:

- 181(1): dealing with conditional costs agreements
- 181(7): prohibition on conditional costs agreements involving family or criminal matters
- 181(8): contravention of requirements for conditional costs agreements may have disciplinary sanctions
- 182: conditional cost agreements involving uplift fees in litigious matters
- 183: contingency fees are prohibited
- 185(3,4 & 5): effect of entering into costs agreements in contravention of provisions

As the part does not apply to these categories of clients, it is not clear how disputes as to costs will be resolved between a law practice and such clients.

Commercial and government clients cannot "contract in" to the LPUL assessment provisions – see the recent Victorian decision of *Jasmin Solar Pty Ltd v Fitzpatrick Legal Pty Ltd* [2017] VSC 220 (27 April 2017)

Section 172 – legal costs must be fair and reasonable.

This section deals with legal costs charged by a law practice – the LPA dealt with costs allowed on assessment under section 363. Therefore section 172 of LPUL has a wider application.

A law practice must not charge more than fair and reasonable costs in particular that are:

(a) Proportionately and reasonably incurred; and
(b) Proportionate and reasonable in amount.

In considering these costs, regard is had to similar criteria as that in section 363 of the LPA but in addition to these criteria is;

- "experience, specialisation and seniority"
- "extent to which the matter involved a matter of public interest"
- "number and importance of any documents involved"

Section 172(4) provides that a costs agreement is prima facie evidence that legal cost disclosed are fair and reasonable if:

(a) Provisions of Division 3 in relation to disclosure are complied with; and
(b) The costs agreement does not contravene any provision of Division 6 or 4.

Section 173 introduces another new obligation that a law practice must not act in a way that unnecessarily results in increased legal costs and in particular must act to reasonably avoid unnecessary delay resulting in increased legal costs. It is unclear how this will play out in practice

Division 3 – Disclosure

Sections 174 to 178 deal with disclosure

Section 174 sets out disclosure obligations to clients:

(a) **Main disclosure requirements** – must inform the client of basis costs will be calculated and estimate of total legal costs and notification of significant change to anything disclosed.

Note: the estimate of total legal costs must be a single figure – no longer appropriate to use a range of estimates – the estimates can be staged.

(b) **Additional information** – clients' rights, now has the right to negotiate the billing method with the practitioner and has right to sufficient and reasonable amount of information about the impact of the change on the legal costs to allow the client to make informed decisions about the future conduct of the matter.

(c) **Clients consent and understanding** – 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.

Note: See Law Society fact sheet – Costs Disclosure Reasonable Steps

(d) **Communication** – obligation on practitioner to provide good clear communication of timely advice to the client, assist in understanding the legal issues and making informed choices

(e) Disclosure must be in writing

(f) **No disclosure for costs under the lower threshold** – does not include GST or disbursements – likely to be $750

(g) **Lesser disclosure for costs below the higher threshold** – will be $3,000 – the requirements for these matters not yet know until the rules are drafted.

Note: the Law Society Costs Committee recommend that full disclosure is provided in all matters just in case the costs go over the threshold amounts

Where total legal costs exceed either the lower or higher threshold, client is to be informed and the requisite disclosure given

Some details which required disclosure under LPA are no longer required under LPUL;

- Details of the intervals at which the client will be billed
- Disclosures in relation to party/party costs
- Contact persons details
- Law of jurisdiction which applies to the matter
- Disclosure of corresponding laws which apply to the matter

Section 175 – **engagement of another law practice** – the second law practice must disclose the information required for the first law practice to comply with section 174(1)

Section 176 – **disclosure to associated third party payers**, same as LPA except right of associated third party payer to "progress reports" has been removed

Section 177 – **disclosure regarding settlement of litigious matters –** must give a client before settlement:

(a) 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); and

(b) a reasonable estimate of any contributions towards those costs likely to be received from another party.

Section 178 – **non-compliance with disclosure obligations** – different to the LPA provisions

(a) The costs agreement is void; and

(b) Client not required to pay costs until assessed; and

(c) Law practice not able to commence or maintain proceedings for recovery until costs assessed; and

(d) Contravention is capable of being misconduct or unsatisfactory professional conduct (same as LPA).

(e) Uniform Rules may provide that these subsections do not apply or apply with modification – nothing yet regulated

The former section 317(4) of the LPA that which allowed a costs assessor to reduce the costs by an amount they consider to be commensurate with the failure to disclose no longer applies.

Note that – rule 72a of the Rules was introduced in to the legislation in early 2016

72A NON-COMPLIANCE WITH DISCLOSURE OBLIGATIONS--DISAPPLICATION OF SECTION 178 (1) AND (2) OF THE UNIFORM LAW

(1) This rule applies where a law practice has contravened the disclosure obligations of Part 4.3 of the Uniform Law in relation to a particular matter.

(2) Section 178 (1) and (2) of the Uniform Law do not apply in relation to the law practice (so far as they would otherwise apply to the matter concerned) in circumstances where the relevant authority, a costs assessor, a court or a tribunal is satisfied that:

(a) the law practice took reasonable steps to comply with the disclosure obligations of Part 4.3 of the Uniform Law before becoming aware of the contravention, and

(b) the law practice, no later than 14 days after the date on which it became aware of the contravention, rectified the contravention, as far as practicable, by providing the client with the necessary information required to be disclosed under

Division 3 of Part 4.3 of the Uniform Law (including, where relevant, an estimate or revised estimate of the costs), and

(c) the contravention was not substantial and it would not be reasonable to expect that the client would have made a different decision in any relevant respect.

(3) Subrule (2) (b) applies even though the information or estimate is not provided at the times required by the disclosure obligations of Part 4.3 of the Uniform Law.

(4) In this rule:
"client" includes (where relevant) an associated third party payer.
"relevant authority" means the designated local regulatory authority for section 178 of the Uniform Law.

Division 4 – costs agreements

Section 179 – client has a right to require and to have a negotiated costs agreement with the law practice.

Under the LPA, a costs agreement was not mandatory.

Section 180 – making costs agreements – must be written and may consist of a written offer that may be accepted in writing or by conduct but not if conditional costs agreement and cannot contract out of costs assessment

A costs agreement may be made:

(a) between a client and a law practice retained by the client; or

(b) between a client and a law practice retained on behalf of the client by another law practice; or

(c) between a law practice and another law practice that retained that law practice on behalf of a client; or

(d) between a law practice and an associated third party payer.

Section 181 – **requirement for conditional costs agreements** – cannot relate to criminal or Family law proceedings; must be signed and include a statement of client's rights to seek independent legal advice, contain a cooling off period of not less than 5 days

Section 182– **conditional costs agreements – provide for an uplift fee of up to 25% in litigious matters,** LPUL removes LPA prohibition on uplift fees in a claim for damages.

As such, there appears to be no restriction on an uplift fee in a non-litigious matter.

A costs agreement must include an estimate of the uplift fee, range of estimate and explanation of major variables affecting calculation

Section 183 – contingency fees remain prohibited – penalty and conduct

Section 184 – a costs agreement may be enforced in the same way as any other contract.

Section 185 – void costs agreements

- costs agreements are void if contravene any provision of Division 4
- if the agreement contravenes section 182 re the uplift fee – law practice must repay the uplift fee;
- if contingency fee provision is contravened, practitioner is no longer entitled to recover fees and must repay all amounts received on account of matter
- practitioner not entitled to recover legal costs in excess of what would have been recovered had the agreement not been void

2. Estimates

Must be expressed as a single figure but they can be staged.

Must notify the client as soon as reasonably practicable of any significant change to anything disclosed, including the estimate.

No need for a new costs agreement, just need to inform the client in writing of the change.

3. Fixed Fees

If charging a fixed fee, you still need to keep a record or evidence of what work has been done. This record will be needed if an order for party/party or ordered costs is made or there is a dispute with a client and the client requests an itemised bill.

The client has the right to request an itemised bill under the provisions of **section 187** of the LPUL – the request must be made within 30 days after the date on which the costs become payable.

Might consider including hourly rates in the costs agreement if the client requests itemisation?

4. Assessment – involves the consideration of details of a law practice's costs

If there is any dispute as to costs, whether a solicitor and client, barrister and solicitor or between parties to litigation, then the costs will be assessed.

Assessment is started by application and is conducted on the papers. In NSW generally there is no opportunity for oral submissions and often costs assessed without access to the file material.

As such, need to put your best foot forward. An itemised bill should stand alone and tell the story of the matter.

In NSW, costs assessors are practitioners and there are currently about 60. As such, in the event of a dispute, your costs could be determined by a peer with little experience of the type of work required to be performed.

An "itemised bill" is no longer defined – it is now simply a bill which specifies in detail how the legal costs are made up in a way so as to allow costs to be assessed.

In our experience, best format is the traditional format – if time costed, allocating a time and charge to each task or group of tasks performed by each fee earner.

5. Issues on assessment

Work is disallowed or the costs reduced when an assessor considers that is not fairly or reasonably incurred – some things that we see come up regularly:

- Description of the task is not adequate – you need to include enough information to substantiate the costs charged – words such as taking instructions and advising, strategy etc;
- Duplication of work between the different fee earners;
- Supervision of experienced fee earners;
- Internal emails, conferences and attendances often reduced or disallowed;
- Costs disallowed where there is a lack of supporting documentation – that is there is no file note or record of time spent;
- Work that might be less than 1 unit of time charged for separately;
- Research;
- Unsuccessful telephone calls – generally shouldn't be charged for;
- Over reliance on Counsel and comparison of solicitor's work with that of Counsel; and
- Work in relation to costs as between solicitor and client is not allowed.

6. Usual procedure for Assessment of Solicitor/Client Costs

Set out below is the usual procedure for assessments of costs as between practitioner and client pursuant to the provisions of the LPUL where instructions were first given after 1 July 2015. This procedure applies to all practitioner/client assessments of costs relating to legal work done in New South Wales, including work done in federal jurisdictions.

1. **Serve** a signed copy of the itemised Bill of Costs on the client.

2. You must then **wait** 30 days.

3. After 30 days, **file** a Form A2.1 *"Application for Assessment of Costs Law Practice v Client"* and the Bill of Costs at the Supreme Court in triplicate together with the filing fee which is the greatest of:

   (a) $100.00; or

   (b) 1% of the costs unpaid at the time of the application; or

   (c) 1% of the costs in dispute at the time of application.

4. The Court will then send a copy of your application to the client, with a notice giving the client 21 days in which to object or respond.

5. If the objections are received, the Court will then send them on to you, the Solicitor. **Respond** by drawing Responses to Objections within 21 days.

6. **File** your Responses to Objection at the Supreme Court.

7. The matter will then be allocated to a Cost Assessor for assessment. The Assessor may contact you requiring further information (which you must provide), or may simply go ahead and assess the matter.

8. Once the costs of the assessment have been paid, both parties will then receive two Certificates of Determination*:* the first detailing the amount payable by either the client or the solicitor and the other dealing with the costs payable in relation to the costs assessment.

9. File the Certificates of Determination and register as a judgment in a court of competent jurisdiction. In the case where the solicitor owes money to the client, there is a different procedure.