COSTS GUIDEBOOK

THE LAW SOCIETY
OF NEW SOUTH WALES

LS4573

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FREQUENT REFERENCES USED WITHIN THIS GUIDEBOOK

The ***'Uniform Law'*** is a suite of legislation including:
Legal Profession Uniform Law (NSW) 2014 (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)

The **Uniform Law** applies to instructions first received from your client on or after 1 July 2015 (Schedule 4, s.18 LPUL).
The **Uniform Law** applies for proceedings commenced on or after 1 July 2015 (Reg.59 LPULAR).

Law Practice for law firm, firm, practice
Legal Practitioner for solicitor, lawyer, practitioner
Ordered Costs for party/party costs
Law practice/client for solicitor/client
Uniform law costs for solicitor/client costs

For individual Chapter references refer to the commencement of each Chapter.

CHAPTER 1
CLIENT ENGAGEMENT

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Handy links:
Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

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 legal practitioner's retainer (the contract between the legal 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) 2014* (NSW) 2014 (LPUL), 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 legal practitioner and client is clearly documented. Clear communication with the client and the use of plain language will help to achieve this. The Legal Profession Uniform Law Australian Conduct Rules 2015 (Solicitors' Conduct Rules) provide guidance as to establishing a sound client relationship.

The focus of this chapter is the engagement process, rather than the legal product itself. It is primarily a 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 costs 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 law practice 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 legal practitioner? Personal 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 practice in the matter before seeking to engage you, and have they ceased instructing that law practice? 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 legal practitioner–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 your client 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 are to 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 clear 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 set 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 set out what the client can expect from the law practice, such as the name of the legal practitioner 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 legal 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 legal 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
- believes the work was to be done free of any charge to the client. Use of the words "pro bono" can be confusing and should be avoided
- 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 party 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 fees
- 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 AND WHO WILL PAY THE COSTS

As in any contract, it is important to establish at the outset the identity of the client and who or what will pay the legal costs. 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 legal practitioner'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 (if both the company and its directors are 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 and ensure that instructions from the company have been authorised by the directors.

This problem can be exacerbated when there is more than one company and the question arises which (if not all) of the corporations is to be the client.

A similar problem arises in family matters (for instance, in settling a deed of family arrangement or similar transaction).

There may be a number of family members involved. The issue of which of them (if not all) is the client is not only one which gives rise to the risk of not being paid for services rendered, but also risk associated with a legal practitioner's professional responsibility.

In all cases, it is a good policy, and is in any event often a legal requirement, 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 s.12E *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 way which 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 to be registered or recorded, including any evidence supporting the verification of a party's identity. The Conveyancing Rules mirror the Participation Rules made under the *Electronic Conveyancing National Law* (ECNL). The Verification of Identity (VOI) Standard and the VOI Rules are a Schedule to the ECNL. As some 98% of all conveyancing dealings have now to be transacted electronically and verifying the identity of the client is required before a legal practitioner subscriber to an electronic conveyancing platform can lodge a document for registration or undertake any conveyancing transaction in that platform, it is mandatory for legal practitioners to verify the identity of a client in a significant majority of cases.

Verification of Identity is also an important step in the continuing struggle to combat fraud. A person intending to commit a fraud is very unlikely to want to pay the costs that person incurs with you and your law practice.

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 LPUL 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 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 particularly 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 legal 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 law practice'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) LPUL 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, together with an estimate of the total legal costs. Those disclosures must also be made to any person or entity liable (such as a director guarantor where instructions are taken from a client company) to pay the legal costs to the law practice (an associated third-party payer).

There is also an obligation to update the client and such a third-party payer as soon as practicable after any significant change to anything previously disclosed. The requirements of the LPUL place the onus on law practices to hone their skills at estimating the value of their professional work.

It may be tempting to underestimate the costs which are likely to be incurred, this is unwise and not recommended. If a costs assessor determines that the estimate of total legal costs is not genuine, the cost agreement will be void for non-compliance with the costs disclosure requirements of the LPUL.

Section 179 LPUL 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 ss.181 and 182 LPUL. 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 law practice 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 – these 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 FREE or "PRO BONO" WORK

Party/party costs, if awarded by an order to one of the parties, (now referred to as 'ordered costs') 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 ordered costs, 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.

On the other hand, if a law practice is truly going to do the work without charge, then use clear plain English to say that "this work will be done without charge". The words "pro bono" (or, more fully "pro bono publico" or "for the public good") are often used to mean the legal practitioner will act without charge without any general public benefit being present, (effectively a form of private legal aid), and have been used to mean that no charge will be made at this point, but a charge may be made later. The term can therefore mean different things to different people and should be avoided.

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.

In addition, s.174(1)(b) of the Uniform Law requires that the law practice must notify the client of any substantial changes.

The Solicitors' Conduct Rules 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 be thoroughly acquainted with the Solicitors' Conduct Rules. In addition, in litigation matters law practices should 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 correspondence
- 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.

Under the LPUL, 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).

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

If a decision is taken to terminate the matter, 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 costs agreement and the agreement should have 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
- there is a change in the entity providing legal service – for example, from one company to another, in which case one contract should be capable of termination, and the new contract should be dealt with as a fresh engagement with the changed entity
- other reasonable cause.

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 correspondence with a précis of the discussion and making sure that nothing more is expected by the client.

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.

CHAPTER 2
DISCLOSURE, COSTS AGREEMENTS AND BILLING

2.1 INTRODUCTION

2.2 DISCLOSURE

2.3 COSTS AGREEMENTS

2.4 BILLING

The ***'Uniform Law'*** is a suite of legislation including:
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Legal Profession Uniform Law Application Regulation 2015 (LPULAR)
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Handy links:

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (SCR)
Law Society Ethics and Compliance Precedents
Motor Accidents Compensation Regulation 2020 (MACR)
Motor Accidents Injuries Regulation 2017 (MAIR)
Workers Compensation Regulation 2016 (WCR)
Independent Legal Assistance and Review Service under Schedule 5, Part 5 *Personal Injury Commission Act 2020* (ILARS)

2.1 INTRODUCTION

This chapter outlines the regulation of law practices' costs under the *Legal Profession Uniform Law (NSW) 2014* (LPUL). Regulation of law practices' costs may be grouped into three areas: disclosure, costs agreements and billing.

2.2 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 LPUL).

The obligation to disclose is ongoing: the legal practitioner must notify the client in writing of any substantial change to anything included in a disclosure (ss.174(1) and (6) 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 LPUL), then Part 4.3 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:

2.2.1 DISCLOSURE OBLIGATIONS AND PRECEDENTS?

The disclosure obligations are set out at s.174 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 costs agreements on the Law Society website at https://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/costs/useful-forms.

2.2.2 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 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) LPUL) or has already paid all or part of those legal costs under such an obligation (s.171(1)(a)(ii) LPUL).

A third party payer is "associated" if the legal obligation is owed to the law practice (s.171(1)(b)) LPUL). An associated third party payer to whom disclosure must be made can include a guarantor where the client is a company, a litigation funder, where the funder agrees to pay the law practice directly, a parent where the work is being done for their child. 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) LPUL).

Section 176 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, sufficient information to allow them to consider making "if thought fit", an application for assessment (s.198(6) LPUL).

2.2.3 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) LPUL)
- an estimate of the total legal costs (174(1)(a) LPUL). The estimate must be an estimate for the whole of the fees, expenses and GST for the whole of the work to be done, and must be appropriately revised (see 2.2.5 below)
- 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) LPUL)
- their right to:
  - negotiate a costs agreement with the law practice (s.174(2)(a)(i) LPUL)
  - negotiate the billing method (s.174(2)(a)(ii) 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) 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) 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) LPUL)
- a reasonable estimate of any contributions towards those costs likely to be received from another party (s.177(1)(b) 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) LPUL.

Section 6 LPUL defines legal costs as including fees that a person has been or may be charged, including disbursements, and so 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 motor accidents, work injury damages and personal injury matters, which may be affected by cost caps (see 2.2.6 below).

2.2.4 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 LPUL) disclose to the client the details specified in s.174(1), in addition to any information that must be disclosed under s.174, including:

- the basis on which legal costs will be calculated and an estimate of the total legal costs (s.174(1)(a) 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) LPUL).

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

2.2.5 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) LPUL) and disclosure must be made "in writing" (s.174(6) LPUL).

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

It is not enough to send bills at regular intervals. Disclosure must be prospective not retrospective. It is not enough to say how much more in legal costs will be incurred. The obligation is to disclose the total legal costs – the total fees, expenses and GST for the whole of the work to be done. Best practice is to indicate the whole estimate, and indicate how much has been billed and paid and what of the estimate remains to be paid for the work then expected to be carried out. If there is any failure to revise an estimate appropriately, it cannot later be corrected, and consequences of a failure to disclose will follow (see 2.2.9 below).

The same disclosure rules apply in relation to an associated third party payer (s.176 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) LPUL). The disclosure to the third party payer must be made in writing (s.176(2) LPUL) and must be made at the time the disclosure to the client is required (s.176(2)(a) 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) LPUL) the obligation.

2.2.6 WHAT DISCLOSURE IS REQUIRED FOR PERSONAL INJURY DAMAGES MATTERS?

2.2.6.1 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 LPULAA and Schedule 1 LPULAA – see Chapter 7 below).

Schedule 1, cl.2 LPULAA provides that where the amount received for personal injury damages does not exceed $100,000, the maximum costs for legal services provided is to be capped at 20% of the amount recovered or $10,000, whichever is the greater ('the statutory cap').

Schedule 1, cl.4 LPULAA permits law practices and clients to contract out of this statutory cap through a costs agreement that complies with Division 4, Part 4.3 LPUL.

However, 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.

- Clause 28 LPULAR, specifies the disclosure requirements regarding costs agreements entered into in accordance with Schedule 1, cl.4 LPULAA. These requirements include:
- a statement that Schedule 1 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 or prospective client in connection with the claim
- 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
- particulars as to 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 or prospective client, so that, in the event that costs are recoverable against the other party, the maximum costs recoverable are determined by Schedule 1 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 reg.28 LPULAR has serious consequences: the law practice will not be entitled to the benefit of Schedule 1, cl.4 LPULAA, which means the law practice cannot contract out of the maximum costs cap or charge more than the maximum costs cap.

In the recent case of *Todorovska v Brydens Lawyers Pty Ltd* [2022] NSWCA 47 (*Todorovska*) involving a personal injury matter, the NSW Court of Appeal found that the conditional costs agreement provided by the law practice to their client was ineffective to contract out of the statutory cap under Schedule 1, cl.2 LPULAA.

In *Todorovska*, Basten JA (with whom Justices Leeming and White concurred) stated that whether a costs disclosure was effective was to be determined by the context in which it occurred. Their Honours found that the disclosure was ineffective due to several factors, including:

1. Disclosure itself was unclear and imprecise.
2. The documents gave the impression that the client had no choice but to enter into a costs agreement.
3. The law practice provided the client with a large bundle of documents which would have been confusing.
4. The client was not given a meaningful explanation of her right to negotiate a costs agreement and seek independent legal advice.

Legal practitioners must remember that it is the obligation of the law practice to "take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed…costs" (s.174(3) LPUL).

Disclosing costs must be meaningful and the obligation to disclose is not necessarily discharged just by sending out forms to the client.

Legal practitioners who act for clients in personal injury matters where damages are not likely to exceed $100,000 should provide clients with certainty about costs including:

1. A clear explanation that entering into the agreement means that the costs will not be capped in accordance with the Act at $20,000, but will be greater than that.
2. That the client may want to seek independent legal advice on the meaning and effect of the agreement.
3. An estimate of the costs that may be incurred if the costs agreement is entered into.
4. A statement that the client may negotiate the terms of the costs agreement.

The above advice should ideally be provided separately to the costs agreement itself.

The disclosure must be real and meaningful.

See precedents prepared for NSW legal practitioners here: https://www.lawsociety.com.au/practising-law-in-nsw/ethics-and-compliance/costs/useful-forms.

2.2.6.2 IN MOTOR VEHICLE ACCIDENT INJURY CLAIMS

In addition to s.61 LPULAA, both reg.6 Motor Accidents Compensation Regulation 2020 (MACR) and Clause 22 Motor Accidents Injuries Regulation 2017 (MAIR) fix maximum legal costs for work done in a motor vehicle accident injury claim to those set out in Schedule 1 to the relevant Regulation.

Clause 8 MACR and Clause 25 MAIR permit a law practice to contract out of the maximum costs provisions (regulated costs) if they make a disclosure.

Disclosure of the intention to contract out must occur:

- prior to entering into a costs agreement, and
- in a separate written document.

For further information on contracting out of the regulated costs in motor vehicle accident injury claims see Chapter 9 of this Guidebook.

2.2.6.3 IN WORK INJURY DAMAGES CLAIMS

In addition to s.61 LPULAA, reg.92 Workers Compensation Regulation 2016 (WCR) fixes maximum legal costs for work done in or in relation to a claim for work injury damages to those set out in Schedule 7 to the Regulation.

Clause 93 WCR permits a law practice to contract out of the maximum costs provisions (regulated costs) if they make a disclosure.

Disclosure of the intention to contract out must occur:

- prior to entering into a costs agreement, and
- in a separate written document.

For further information on contracting out of the regulated costs in motor vehicle accident injury claims see Chapter 8 of this Guidebook.

2.2.7 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 cl.18 LPUL).

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

- a law practice (s.170(2)(a) LPUL)
- a public or foreign company, or its subsidiary, or a registered Australian body (s.170(2)(b)(i) LPUL)
- a liquidator, administrator or receiver (s.170(2)(b)(ii) LPUL)
- a financial services licensee (s.170(2)(b)(iii) 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) 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 s170(3) LPUL (s.170(2)(b)(v) 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) 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) LPUL)
- a body or person incorporated in a place outside Australia (s.170(2)(e) 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) LPUL)
- a government authority in Australia or in a foreign country (s.170(2)(g) LPUL)
- a person specified in, or of a class specified in, the LPUGR (s.170(2)(h) LPUL).

Note: Disclosure is required in ALL other circumstances including where costs are paid by a third party or under a fully regulated costs scheme such as the Independent Legal Assistance and Review Service under Schedule 5, Part 5 *Personal Injury Commission Act 2020* **(ILARS), MAIR and WCR.**

2.2.8 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) LPUL). A summary of these issues can be found at https://www.lawsociety.com.au/practising-law-in-NSW.

2.2.9 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) LPUL)
- in any event, any costs agreement or disclosure document is no longer prima facie evidence that the rates are fair and reasonable (s172(4) 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) 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) 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) 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) LPUL)
- a costs assessor must require that the law practice pay the assessor's costs of assessment
- the assessor may not allow interest on unpaid costs, because the client is not required to pay the costs until they have been assessed (see above).

Section 178(2) 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) LPUL)
- recovery proceedings can be maintained against the one to whom the disclosure was made (s.178(2)(b) LPUL).

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

Some comfort is given to law practices by the addition of reg.72A LURG, 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.

2.2.9.2 EXTERNAL GRANTS OF LEGAL ASSISTANCE – NO EXCEPTION

Where a client of a law practice is eligible for a grant of legal assistance from an external organisation such as Legal Aid NSW or Independent Legal Assistance and Review Service (ILARS), the need for formal disclosure as to legal costs remains mandatory. In each case the law practice's obligations are set out in the application form and the formal communication of the grant.

2.3 COSTS AGREEMENTS

Information on costs agreements is as follows:

2.3.1 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 LPUL).

A costs agreement must be written or evidenced in writing (s.180(2) LPUL). The offer can be accepted in writing or by "other conduct" (s.180(3) 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 SCR and add an appropriate clause in the costs agreement.

2.3.2 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 LPUL and the costs agreement doesn't contravene Division 4 LPUL (which concerns requirements for costs agreements) (s.172(4) LPUL).

2.3.3 WHO CAN MAKE A COSTS AGREEMENT?

A costs agreement may be made between:

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

2.3.4 IS A COSTS AGREEMENT REQUIRED?

Where costs are always paid under a funding scheme, or by an unassociated third party payer under a fully regulated arrangement and not the client, and where there is no ability to 'contract out' of the scheme or regulated costs, there is a requirement for disclosure but not necessarily a costs agreement.

Examples of such circumstances are:

- claims for statutory benefits under the workers compensation legislation (NSW) where costs are paid pursuant to:
  - Schedule 6 WCR by the insurer upon success for exempt workers or
  - Part 5, Clause 9 *Personal Injury Commission Act 2020* by ILARS for 'non-exempt workers', or
  - Clause 25 and Schedule 2 LPULAR 2015 for coalminers (as defined in the workers compensation legislation)
- claims for statutory benefits under the *Motor Accidents Injuries Act* 2017 (MAIA) where costs are paid by the insurer.

2.3.5 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 LPUL) and in others, it is used in contradistinction to the term "conditional costs agreement" (for example, s.180(3) 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) LPUL).

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

2.3.6 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) 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 (25%) (s.182(2) LPUL).

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

Note: in some legislative arrangements an 'uplift' is referred to as a 'premium' and an uplift is further restricted or prohibited in some areas of practice within NSW.

2.3.7 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) 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) 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) LPUL).

A law practice that has entered into a costs agreement in contravention of s.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).

2.3.8 FORMAL REQUIREMENTS OF 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, Useful Forms, 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) LPUL)
- set out the circumstances that constitute the successful outcome of the matter to which it relates (s.181(2)(b) LPUL)
- be signed by the client (s.181(3)(a) 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) 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) LPUL)

When entering into a costs agreement where payment is conditional on "success", law practices should carefully consider the definition of "success". Points to consider include the scope of the retainer and the expectations of the client. The case of *Musgrave as Executor of the Estate of Mark Musgrave v SRM Lawyers Pty Ltd* [2023] NSWDC 242 provides useful considerations. Also, Professor G E Dal Pont's "Law of Costs" at [2.51] notes that *"Speculative fee agreements are often described as 'no win no fee'. Aside from an express definition in the retainer, such a phrase is open to be interpreted as the solicitor saying, in effect: 'You will not have to pay me any fees except out of whatever I recover for you'"*: see, for instance, *David Brady v Bale Boshev Solicitor* [2009] NSWDC 387.

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) LPUL). The law practice may not recover any uplift fee (s.181(5)(b) LPUL).

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

A conditional costs agreement may relate to any matter, except a criminal matter (s.181(7)(a) LPUL) or a family law matter (s.181(7)(b) 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) LPUL). Also, a law practice that has entered into a costs agreement with an uplift fee in contravention of s.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) 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) LPUL).
- The uplift fee must not exceed 25 per cent of the legal costs (excluding disbursements) (s.182(2)(b) LPUL).
- The basis for the calculation of the uplift fee must be identified in the agreement (s.182(3)(a) 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) LPUL).

Exceptions to general uplift requirements:

- In motor vehicle accident injury claims a conditional costs agreement cannot include an uplift. (reg.8 MACR; reg.25 MAIR)
- In work injury damages claims a conditional cost agreement cannot include a 'premium' or uplift of more than 10% (reg.93 WCR).

2.3.9 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' ss.179 to 185 LPUL is void (s.185(1) LPUL).

If a costs agreement is void due to any 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) 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) 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 s.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) LPUL).

A law practice that has entered into a costs agreement in contravention of the prohibition on contingency fees in s.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) LPUL).

2.3.10 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) 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 ss.172(1) and 172(2) LPUL , or
- in accordance with any fixed costs provision (s.172(3) LPUL).

2.3.11 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) LPUL).

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) LPUL). The bill, however, must have included a statement that interest was payable, including the rate of interest (s.195(3) LPUL).

The rate of interest charged, whether under LPUL or under a costs agreement, must not exceed the rate prescribed under reg.75 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 https://www.rba.gov.au/) plus 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) LPUL).

A costs assessor may allow interest, disallow interest and may specify the rate of interest. If there has been any failure to disclose matters about legal costs, the costs assessor may likely disallow any interest on unpaid costs (see 2.2.9 above).

2.3.12 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 LPUL).

2.4 BILLING

Information on billing is as follows:

2.4.1 Tax invoice/bill of costs
2.4.2 Commencement of recovery proceedings
2.4.3 Definitions of bills
2.4.4 Request for an itemised bill

2.4.1 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 law practice and a client) have been incorporated into the Uniform Law.

2.4.2 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) 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) LPUL) or
  - the date on which the person receives an itemised bill following a request made in accordance with s.187 (s.194(2)(b)(ii) LPUL).

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

2.4.3 DEFINITIONS OF BILLS

Regulation 5 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.

2.4.4 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) 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) LPUL).

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

2.4.5 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) 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) 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) 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) LPUL).

See the precedent billing notices on the Law Society website.

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 legal practitioner's responsibility in relation to bills of costs prepared by employed staff. Clients cannot be charged for the provision of a bill of costs or a subsequent itemised bill of costs (s.191 LPUL).

2.4.6 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) LPUGR)
- by post to the client or an agent (reg.73(1)(b) LPUGR)
- by leaving a copy of the bill at the usual or last known business or residential address (reg.73(1)(c) LPUGR)
- by DX (reg.73(1)(d) LPUGR)
- by fax (reg.73(1)(e) LPUGR)
- by email or mobile phone (reg.73(1)(f) 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) LPUGR).

2.4.7 CONTENT OF A BILL

- Itemised bills should include:
- date of task/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.

2.4.8 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) 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) 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) 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) LPUL.

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

2.4.9 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 s.292 LPUL (reg.74(1) 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.

CHAPTER 3
UNIFORM LAW AND COSTS ASSESSMENTS

The ***'Uniform Law'*** is a suite of legislation including:
Legal Profession Uniform Law (NSW) 2014 (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)

The **Uniform Law** applies to instructions first received from your client on or after 1 July 2015 (Schedule 4, s.18 LPUL).
The **Uniform Law** applies for proceedings commenced on or after 1 July 2015 (Reg.59 LPULAR).

Handy links:
Legal Profession Act 2004 (LPA)
Legal Profession Regulation 2005 (LPR)
Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (SCR)
Civil Procedure Act 2005 (CPA)
Costs Assessment Rules Committee Guideline 2016 (revised Oct 2023) (CARCG)

3.1 UNIFORM LAW AND COSTS ASSESSMENTS

The transitional provisions of the Uniform Law include the following:

- Schedule 4 cl.18 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 *Legal Profession Act 2004* (LPA) and the Legal Profession Regulation 2005 (LPR) continue to apply.
- Regulation 59 LPULAR provides that the LPA 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 ordered costs (previously party/party costs), where proceedings commenced after 1 July 2015, the Uniform Law applies. The relevant procedures are found in ss.198 to 201 LPUL, ss.63 to 80 LPULAA and regs.32 to 58 LPULAR.

For uniform law costs (that is costs between a law practice and a client) the Uniform Law applies *unless* instructions were first received on or prior to 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) LPUL). Reference is however made to the judgment in *Dive Lawyers Pty Ltd t/as Dive Lawyers & Notaries v The Manager, Costs Assessment* [2024] NSWSC 721, where a decision of the Manager, Costs Assessment that an application for assessment by a law practice was out of time, was set aside.

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) LPUL.

The Costs Assessment Rule Committee (CARC) may provide rules for application for assessment. As yet no such rules have been determined. CARC has provided guidelines as to rates for costs (in Ordered costs matters) in 2016, updated in 2023 (CARCG).

3.1.1 APPLICABLE TEST

"*Uniform law costs*" is now the term for costs between a law practice and a client, formerly referred to as "*solicitor/client costs*".

"*Ordered costs*" is the new term for costs ordered by a Court or Tribunal, formerly referred to as "*party/ party costs*". Assessment of ordered costs is set out in the next chapter.

Under the Uniform Law, ordered costs must be "*proportionately and reasonably incurred*" and "*proportionate and reasonable in amount*" (s.172 LPUL).

Factors to be considered in a costs assessment are set out in s.200 LPUL, which states that in considering whether legal costs are fair and reasonable, the costs assessor must apply the principles in s.172 so far as they are applicable.

3.1.2 INTEREST

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

3.1.3 REVIEWS

Uniform law costs: an application for review (s.205 LPUL) must be lodged within 30 days (**s.83** LPULAA) after the relevant certificate of determination was sent to the parties.

Ordered costs: an application for review must be lodged within 30 days after the relevant certificate of determination was sent to the parties (s.83 LPULAA).

3.2 INTRODUCTION

The costs assessment scheme is conducted in accordance with the LPUL, LPULAA, LPULAR and LPUGR The process for assessment is found in ss.198 to 201 LPUL, ss.63 to 80 LPULAA and clauses 32 to 58 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. Under the modified changes to registry services you can file a costs assessment application or review by emailing a scanned copy of your application and any supporting attachments to sc.emailfiling@justice.nsw.gov.au.

If your document is very large, you may need to split it across multiple emails. If you need to do this, please clearly indicate this in the subject line, for example, "Case number 2020/123456, Sample Applicant v Sample Respondent, PART 1 OF 2". If this is not feasible, you can post or DX your documents to the Court.

Further information is provided below.

3.3 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 (s.198 LPUL), or by parties to proceedings in state courts or tribunals who have the benefit of costs orders in their favour (s.74 LPULAA, ordered costs).

The prerequisites for the costs assessment process are set out in ss.66 to 68 LPULAA and reg.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 reg.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) NSW SC 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 (s.395A) however this has no equivalent in 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 (reg.37 LPULAR). Under s.298 LPUL and s.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 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 law practice to disclose s.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 and client relationship.

Law practices should also be aware of s.204 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.

3.4 ASSESSMENT BETWEEN LAW PRACTICES AND CLIENTS

3.4.1 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 (s.178 LPUL). The assessment is usually at the law practice's expense (s.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 (s.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 until 30 days after the delivery of a bill of costs (s.194 LPUL and Chapter 2 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) LPUL. Reference however is made to the judgment in *Dive Lawyers Pty Ltd t/as Dive Lawyers & Notaries v The Manager, Costs Assessment* [2024] NSWSC 721, where a decision of the Manager, Costs Assessment that an application for assessment by a law practice was out of time was set aside.

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 referral costs assessor (reg.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 (s.69 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 (s.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 thatshould be disclosed (s.200 LPUL).
- whether a costs agreement exists, and its terms (s.199 LPUL).

Under s.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 (s.199 LPUL) and may have regard to disclosures made, in the assessment (s.200 LPUL).

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

- whether the law practice and any legal practitioner associate or foreign lawyer associate involved in the work complied with the LPUL and the LPUGR;
- 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);
- 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;
- 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 s.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.

3.4.2 FAILURE TO DISCLOSE: EFFECT ON A COSTS AGREEMENT

Pursuant to s.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.

3.4.3 APPLICATIONS BY CLIENT TO SET ASIDE COSTS AGREEMENTS

Pursuant to s.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.

3.4.4 APPLICATIONS BY CLIENTS SEEKING TO ASSESS COSTS OF A 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 subs.(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 s.45A Corporations Act 2001.

3.4.5 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 (see s.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] NSWCA 185).

Under s.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 (s.198 LPUL).

A law practice that has retained another law practice on behalf of a client may apply for assessment of that other law practice's legal costs (s.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 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 (reg.34 LPULAR). The procedure set out above in relation to law practice/client assessments is then undertaken.

Section 81 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 s.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 may be charged on legal costs which remain unpaid 30 days after giving the client the bill (s.195 LPUL). A costs assessor may allow or disallow interest, or make a finding as to the applicable interest rate.

3.5 COSTS OF ASSESSMENTS

Under s.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 any failure in relation to disclosure or the costs of the law practice are reduced by 15% or more (s.204 LPUL). This means that either a client or a law practice can be ordered to pay the costs of a uniform law assessment.

Offers made prior to or in the course of the assessment may be relevant and should generally be provided to the assessor prior to the completion of the review. It is unlikely an assessor will separately determine these costs at any later time.

The certificate of determination will identify which of the parties is liable to pay the costs of the assessment and/or the proportions. The assessor may also find that one party to an assessment must pay the costs of another party, usually by addition or deduction from the amount of costs in the main costs certificate.

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) (reg.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.

3.6 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 (ss.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) *Civil Procedure Act 2005* (CPA) 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 CPA 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".

3.7 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 (s.201 LPUL regarding uniform law costs and reg.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."
>
> [62] "In my opinion, this fell short of providing a statement of reasons for the panel's determination as required by s.208KG LPA, 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
> b. 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
> c. 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 Willougby City Council* [2009] NSWDC 118 and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 681.

These cases concerned appeals about decisions of the review panel, but the principles discussed are relevant to the reasons given by the costs assessor. In both matters, the court held that failure to give adequate reasons is a matter of law allowing an appeal as of right (s.384 LPA). Current provisions for appeal in s.89 LPULAA are from review panels and are as of right regardless of issues if the dispute reaches threshold requirements, otherwise leave is required (s.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.

3.8 MISCELLANEOUS

A costs assessor can issue a pre-completion certificate (s.70(2) LPULAA) A costs assessor can correct an error in a certificate (reg.43 LPULAR).

Where the costs are unpaid, it may be appropriate for a law practice to request the issue of a pre-completion certificate of costs in respect of that part of the costs that is not disputed by the client.

A costs assessor can correct an inadvertent error in a certificate (reg.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 s.73 LPULAA.

3.9 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 LPULAA and Part 6, Division 3 LPULAR. The review panel will comprise two costs assessors (s.82 LPULAA).

The application must be made within 30 days of the certificate of determination being forwarded by the Manager, Costs Assessment (s.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 (reg.45 LPULAR). The Manager, Costs Assessment, has the discretion to extend the time (s.83 LPULAA) and the initial determination is suspended pending the review (s.86 LPULAA). Four copies of applications for review (with annexures) must be filed.

In *Kells v Mulligan & Anor* [2002] NSWSC 769, a decision on the review process under the *Legal Profession Act 1987*, Master Malpass, 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.

In *Wende v Horwath (NSW) Pty Ltd (No 2)* [2015] NSWCA 416, the Court made observations about what was involved in the review. What is required is not fixed and must be taken in part from the way in which the applicant for review chooses to frame the application. A review panel may adopt and affirm the whole or part of the reasons of the costs assessor.

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 reg.51 LPULAR.

On lodging a review, the assessor's determination is suspended. The review panel has the power to lift the whole or part of that suspension in an appropriate case.

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 (reg.53 LPULAR).

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

If a decision of the assessor is affirmed, a certificate must issue to this effect (reg.50 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 ss.87 and 88 LPULAA).

Pursuant to s.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 (reg.54 LPULAR), this does not apply if costs are waived.

Mirus Australia Pty Ltd v Wilson [2023] NSW SC 1432 now provides that a review panel may find that one party pay the other party's costs of review.

The review panel also has the power to correct an inadvertent error and issue a certificate that sets out the new determination (reg.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.

3.10 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 s.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.

Where an appeal against a decision of the review panel under s.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: (s.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 (Randall) and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 68 (Dunn) 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 LPA and the decision of Davies J in *Dunn* concerned the provisions of the *Legal Profession Act 1987*.

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 (s.89 LPULAA).

Appeals on matters other than questions of law 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.

CHAPTER 4
ORDERED COSTS (PARTY/PARTY) ASSESSMENTS

The ***'Uniform Law'*** is a suite of legislation including:
Legal Profession Uniform Law (NSW) 2014 (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)

The **Uniform Law** applies to instructions first received from your client on or after 1 July 2015 (Schedule 4, s.18 LPUL).
The **Uniform Law** applies for proceedings commenced on or after 1 July 2015 (Reg.59 LPULAR).

Handy links:
Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (SCR)
Civil Procedure Act 2005 (CPA)
Uniform Civil Procedure Rules 2005 (UCPR)
Legal Profession Act 2004 (LPA)
Legal Profession Regulation 2005 (LPR)

The Uniform Law applies for proceedings commenced on or after 1 July 2015 (reg.59 LPULAR).

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

4.1 OVERVIEW

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 (s.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 - see *Coshott v Barry & Anor* [2012] NSWSC 850. As with judgments, parties have 12 years in which to enforce costs orders.

Legal 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 (reg.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 or itemised tax invoice; 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 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, Costs Assessment.
- 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 whether to add more time for objections.
- It is important that the costs 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 of 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. Alternatively, such as an email sent by the other party shortly before the commencement of the assessment, a letter with an address on it sent by that party, or an ASIC search in relation to a company may assist the assessor to be satisfied that a reasonable opportunity has been given to the respondent in 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.

4.2 INTEREST

Ordered costs: interest must be included in a determination of ordered costs in accordance with s.101 *Civil Procedure Act 2005* (CPA), 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 s.101 CPA.

4.3 FEE PAYABLE

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

4.4 CONSIDERATIONS

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 ss.172(1) and (2) LPUL (see s.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
  - the quality of the work done
  - the retainer and the instructions (express or implied) given in the matter (s.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 (s.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 (s.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 (s.70(3) LPULAA).

In an assessment of ordered costs, the costs assessor must issue a certificate including interest unless the Court has made an order to the contrary (s.70(1)(c) LPULAA). Interest is normally payable under s.101 CPA. Interest is payable from the date of judgment.

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 s.101(4) CPA prior to 24 November 2015 and the transitional provisions in Schedule 6 CPA). If such an order was made, then a costs assessor is to include interest in a determination.

Interest is calculated at the prescribed rate as from the date the order was made or any other date ordered by the Court s.101(4) CPA. The Application for Assessment (Form A3) requires a party to calculate interest to a convenient date. The prescribed rate of interest is found in rule 36.7 *Uniform Civil Procedure Rules* 2005 (UCPR).

4.5 COSTS OF ASSESSMENTS

Under s.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.

In an ordered costs assessment, reg.40 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.

Offers made prior to or in the course of the assessment may be relevant and should generally be provided to the assessor prior to the completion of the review. It is unlikely an assessor will separately determine these costs at any later time.

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) (reg.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.

4.6 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 (ss.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 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 CPA and UCPR.

See link below in Step 10 of "10 Steps to an Ordered (Party/Party) Costs Assessment" to "Guide to registering a Certificate of Determination".

4.7 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 (s.201 LPUL regarding uniform law costs and reg.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."
>
> [62] "In my opinion, this fell short of providing a statement of reasons for the panel's determination as required by s.208KG *Legal Profession Act 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
> b. 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
> c. 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 Willougby City Council* [2009] NSWDC 118 and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 681.

These cases concerned appeals about decisions of the review panel, but the principles discussed are relevant to the reasons given by the costs assessor. In both matters, the court held that failure to give adequate reasons is a matter of law allowing an appeal as of right (s.384 LPA). Current provisions for appeal in s.89 LPULAA are from review panels and are as of right regardless of issues if the dispute reaches threshold requirements, otherwise leave is required (s.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.

4.8 MISCELLANEOUS

A costs assessor can issue a pre-completion certificate (s.70(2) LPULAA).

A costs assessor can correct an error in a certificate (reg.43 LPULAR).

Where the costs are unpaid, it may be appropriate for a law practice to request the issue of a pre-completion certificate of costs in respect of that part of the costs that is not disputed by the client.

A costs assessor can correct an inadvertent error in a certificate (reg.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 s.73 LPULAA.

4.9 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 LPULAA and Part 6, Division 3 LPULAR. The review panel will comprise two costs assessors (s.82 LPULAA).

The application must be made within 30 days of the certificate of determination being forwarded by the Manager, Costs Assessment (s.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 (reg.45 LPULAR). The Manager, Costs Assessment, has the discretion to extend the time (s.83 LPULAA) and the initial determination is suspended pending the review (s.86 LPULAA). Four copies of applications for review (with annexures) must be filed.

In *Kells v Mulligan & Anor* [2002] NSWSC 769, a decision on the review process under the *Legal Profession Act 1987*, Master Malpass, 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.

In *Wende v Horwath (NSW) Pty Ltd (No 2)* [2015] NSWCA 416, the Court made observations about what was involved in the review. What is required is not fixed and must be taken in part from the way in which the applicant for review chooses to frame the application. A review panel may adopt and affirm the whole or part of the reasons of the costs assessor.

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 reg.51 LPULAR.

On lodging a review, the assessor's determination is suspended. The review panel has the power to lift the whole or part of that suspension in an appropriate case.

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 (reg.53 LPULAR).

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

If a decision of the assessor is affirmed, a certificate must issue to this effect (reg.50 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 ss.87 and 88 LPULAA).

Pursuant to s.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 (reg.54 LPULAR), this does not apply if costs are waived.

Mirus Australia Pty Ltd v Wilson [2023] NSW SC 1432 now provides that a review panel may find that one party pay the other party's costs of review.

The review panel also has the power to correct an inadvertent error and issue a certificate that sets out the new determination (reg.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.

4.10 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 s.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.

Where an appeal against a decision of the review panel under s.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 (s.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 (*Randall*) and *Dunn v Jerrard & Stuk Lawyers* [2009] NSWSC 68 (*Dunn*) 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 *Legal Profession Act 1987*.

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 (s.89 LPULAA).

Appeals on matters other than questions of law 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.

4.11 APPLICATION FOR ORDER IN A SPECIFIED GROSS SUM

The determination of ordered costs is usually dealt with under the assessment process. However, a party can make an application under s.98(4)(c) CPA at any time before costs are referred for assessment for the court to make an order for costs in a specified gross sum.

The principles to be considered in a gross sum costs order are set out in *Harrison v Schipp* [2002] NSWCA 213 (*Harrison)* and *Hamod v State of New South Wales* [2011] NSWCA 375 (*Hamod*) at [813]–[820].

Courts have been more likely to make a gross sum order in very large scale litigation (*Poulos v Eberstaller) (No 2)* [2014] NSWSC 235; *Chaina v Presbyterian Church (NSW) Property Trust (No 26)* [2014] NSWSC 1009 or when the assessment of costs would likely be protracted and expensive: *Idoport Pty Ltd v NAB Ltd* [2005] NSWSC 1273; see also *Hancock v Rinehart (Lump sum costs)* [2015] NSWSC 1640 (*Hancock*), but a gross sum order now may be made in a wide variety of circumstances, including where there has been particularly difficult conduct by a party (*Zepinic v Chateau Constructions (Aust) Pty Ltd (No 2)* [2013] NSWCA 227; *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99), or where the party ordered to pay costs has little capacity to pay.

4.11.1 QUANTUM

While the court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment, in *Harrison* Giles JA at [22] states "specification of a gross sum is not the result of a process of taxation or assessment of costs. As was said in *Beach Petroleum NL v Johnson* (No 2) (*Beach Petroleum)* (1995) 57 FCR 119 at 124 (*Beach Petroleum*), the gross sum "can only be fixed broadly having regard to the information before the Court"; in *Hadid v Lenfest Communications Inc and others* [2000] FCA 628 (*Hadid*) at [35] it was said that the evidence enabled fixing a gross sum "only if I apply a much broader brush than would be applied on taxation, but that ... is what the rule contemplates".

The approach taken to estimate costs must be logical, fair and reasonable (*Beach Petroleum* at 123; *Hadid* at [27]). The power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available (*Wentworth v Wentworth* (CA, 21 February 1996, unreported, per Clarke JA)." See also: *Hamod* at [819], citing *Smoothpool v Pickering* [2001] SASC 131; *Hadid* at [35].

It is not unusual for the court to consider the various components of the costs, including the rates and hours billed per legal practitioner: see *Zepinic v Chateau Constructions (Aust) Ltd (No 2)* [2014] NSWCA 99. A discount is often, but not always, applied by the court: see *Hancock* at [57]–[59]; *Beach Petroleum* at 164 -165; *In the matter of Beverage Freight Services Pty Ltd* [2020] NSWSC 797 at [24], [36].

4.12 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 on the Supreme Court website).

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

4.13 6 STEPS FOR OBJECTING TO AN ORDERED (PARTY/PARTY) COSTS ASSESSMENT

Ordered 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 is payable, 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: see s.101(4) CPA. 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: s.101(4) CPA. The application for assessment (Form A3) requires a party to calculate interest to a convenient date. The prescribed rate of interest is found in rule 36.7 UCPR.

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 costs 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 ss.63 to 80 LPULAA and in particular, regs.32 to 34 and 36 to 43 LPULAR.

CHAPTER 5
GOODS AND SERVICES TAX

Handy links:

Australian Tax Office GST definitions
A New Tax System (Goods and Services Tax) Regulations 2019 (Cth)
Goods and Services Tax Ruling (GSTR) 2001/4
Federal Court Costs Practice Note (GPN-COSTS)
Retail Leases Act 1994 (NSW)
Goods and Services Tax Determination (GSTD) 2000/3: Transitional arrangements
Goods and Services Tax Determination (GSTD) 2000/37: Disbursements
Goods and Services Tax Determination (GSTD) 2003/1: Payment of judgment interest
Goods and Services Tax Advice (GSTA) TPP 043: Reimbursement to a lawyer
Practice Statement Law Administration 2009/09

5.1 INTRODUCTION

Goods and Services Tax (GST) is a tax that is generally payable on goods and services provided after 1 July 2000.

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

You must register for GST:

- when your business or enterprise has a GST turnover (gross income from all businesses minus GST) of $75,000 or more
- when you start a new business and expect your turnover to reach the GST threshold (or more) in the first year of operation.

The ATO provides a list of definitions of some of the commonly used terms with respect to GST including Taxable sale/supply and Input tax credit.

5.2 LAW PRACTICE AND OWN CLIENT

5.2.1 DISCLOSURE AND COSTS AGREEMENTS

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

- to a consumer must be clearly stated on a GST inclusive basis e.g. $1,100.00 (incl GST); and
- 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.

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 filing fees and stamp duty).

5.2.2 TAX INVOICES

For tax invoices and bills/itemisation of costs, itemised charges and subtotals can all be GST exclusive; however, unless you are not required to be registered for GST then 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).

5.3 DISBURSEMENTS

Generally, disbursements (e.g. counsel's fees, transcript fees, courier fees) 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 Section 81-15.01 in Chapter 4 *A New Tax System (Goods and Services Tax) Regulations 2019* that outlines fees and charges which do not constitute consideration.

5.4 APPLICATIONS FOR ASSESSMENT OF LAW PRACTICE/CLIENT COSTS

Section 200(3) 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.

5.5 PARTY/PARTY COSTS (ORDERED 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 ordered costs.

5.5.1 GST on costs orders

Reimbursement: Ordered costs are merely a reimbursement of the costs and disbursements incurred by the party with the benefit of the costs order. A party that holds a costs order in its favour may seek reimbursement for any GST paid subject to:

- **A party that is registered for GST should claim a GST exclusive amount for ordered 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 party unregistered for GST should claim a GST inclusive amount for ordered 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.

As ordered costs are not a taxable supply, a party with a costs order in their favour or the law practice instructed by that party should not issue a tax invoice to the party who is required to pay the costs pursuant to the costs order, or that party's law practice.

Section 70 LPULAA provides 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.

5.5.2 For matters in the Federal Court

The Federal Court Costs Practice Note (GPN-Costs) dated 25 October 2016 addresses how GST is to be dealt with in the Court scale and for disbursements. Where a party is able to claim an input tax credit, then no GST can be claimed from another party. A Bill of Costs requires a disclosure as to GST status; in its absence, the Court will proceed with costs processes on the basis that an input tax credit is claimable.

All scale items are inclusive or exclusive of GST. However, where a party is not able to claim an input tax credit:

- Scale items that are based on time or that expressly requires or permits the application of item 1 (e.g. items 3, 4, 5, 8) may include GST but must not exceed the cap listed item 1.
- Disbursements are claimable on an inclusive of GST basis.

The same position applies to the application of the Court scale for costs in the High Court of Australia.

5.6 PRO BONO WORK

Pro bono work may be done for no fee, for a small contribution, or at a reduced fee.

- Where there is no fee charged then there is no GST that can be claimed as 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.
- Where the client pays a contribution towards the pro bono work, or pays at a substantially reduced rate of fees, then GST will be payable on that amount. The legal 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.
- Where 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.

5.7 GST AND LEASES

The lessor's law practice issues the tax invoice to the lessor for payment of the legal services, including or excluding GST as the case may be. Depending on the terms of the agreement between the parties, the lessor in the case of commercial leases, usually claims its costs from the lessee. In the case of retail leases, the lessor cannot charge the lessee for the costs of the lease. The *Retail Leases Act 1994* provides that the landlord pays the full cost of preparing the lease, including the mortgagee consent fee.

5.8 GST AND MORTGAGES

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

5.9 GST ON FIXED COSTS

Clause 27 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, regs. 24, 25 and 26).

5.10 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. 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?
e. Practice Statement Law Administration 2009/9: Goods and Services Tax, regarding the recovery of legal costs.

CHAPTER 6
COSTS ORDERS AGAINST PRACTITIONERS

The '***Uniform Law***' is a suite of legislation including:
Legal Profession Uniform Law (NSW) 2014 (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)

The **Uniform Law** applies to instructions first received from your client on or after 1 July 2015 (Schedule 4, s.18 LPUL).
The **Uniform Law** applies for proceedings commenced on or after 1 July 2015 (Reg.59 LPULAR).

Handy links:
Civil Procedure Act 2005 (NSW)
Federal Court of Australia Act 1976 (Cth)
Federal Court Rules 2011 (Cth)
Uniform Civil Procedure Rules 2005 (NSW)

6.1 INTRODUCTION

The focus of this chapter is on the exposure of a legal practitioner to personal costs orders.

The court has power to order costs against a legal practitioner in certain circumstances, which are summarised below.

The decision in *Young v King (No 11) [2017] NSWLEC 34* is a comprehensive review of the case law dealing with the Court's discretion to make a personal costs order against a legal practitioner.

6.2 REASONABLE PROSPECTS OF SUCCESS

Under the Uniform Law, a legal practitioner may be exposed to a personal costs order where they are found to have acted for a client in a proceeding which does not have reasonable prospects of success.

The "reasonable prospects" requirement was introduced in section 62 *Legal Profession Uniform Law Application Act 2014* (NSW) (LPULAA).

Schedule 2 LPULAA sets out the provisions relating to costs in civil claims where there are no reasonable prospects of success and applies to all proceedings with a damages component cl.2(1). This applies to all types of claims for damages and is applicable both to plaintiffs and defendants.

Before commencing proceedings, or filing a defence, a legal practitioner must certify that the proceedings (or defence) have reasonable prospects of success. Schedule 2, cl. 4(2) LPULAA sets out the requirement for certification and the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) forms provide the required certification clause.

The legislative intent of this requirement was to regulate the conduct of the legal profession, not that of the client.

The definition of "no reasonable prospects of success" was seen in *Degiorgio v Dunn (No 2) [2005] NSWSC 3* to be akin to a case "*so lacking in merit or substance as to not be fairly arguable*".

The Supreme Court in that case followed the five elements set out in *Momibo Pty Ltd v Adam* (Judge Neilson District Court NSW unreported, 31 August 2004 paras 83 - 88) that would be necessary to satisfy the obligation under section 198M LPA 1987 (Schedule 2 cl. 4(2) LPULAA). These elements were:

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

Legal practitioners should also be aware of the following decisions dealing with the principles governing the application of the phrase "*reasonable prospects of success*" and that these principles apply in the Supreme, District and Local Courts:

- *Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt* [2004] NSWCA 45
- *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. Limited v. Synnerdahl & Anor.* [2002] NSWCA 368
- *European Hire Cars Pty Ltd v Beilby Poulden Costello* [2009] NSWSC 526
- *Whyked Pty Limited v Yahoo!7 Pty Limited* [2008] NSWSC 477 at [12]–[20] per McDougall J
- *Keddie & Ors v Stacks Goudkamp Pty Ltd* [2012] NSWCA 254
- *De Costi Seafoods (Franchises) Pty Limited and Anor v Wachtenheim and Anor (No 5)* [2015] NSWDC 8

6.3 LIABILITY OF A PRACTITIONER FOR UNNECESSARY COSTS

Most NSW courts are empowered pursuant to Section 99 *Civil Procedure Act 2005* (NSW) (CPA) to disallow costs to a party, or to direct a legal 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 legal practitioner, or improperly, or without reasonable cause, in circumstances for which a legal practitioner is found to be responsible.

Note that the courts which have this power are listed in **Schedule 1** to the CPA.

Section 99 CPA was considered by the Supreme Court in *Karwala v Skrzypczak 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 in the terms set out in Briginshaw v Briginshaw [1938] HCA 34;*
> - *facts must be proved to establish serious neglect, serious incompetence or serious misconduct in the handling of the case and*
> - *these facts justify the making of an order.*"

This wide power to award costs personally against legal practitioners is in accordance with the guiding principles and overriding purpose as set forth in sections 56–60 CPA.

A legal practitioner has a duty to assist the client to ensure that proceedings are conducted efficiently, expeditiously and cost-effectively.

In *Mark Gerard Ireland as Executor of the Estate of the late Charles Stuart Gordon v Sandra Jane Retallack & Ors (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 the circumstances called for an order disallowing some of the costs and disbursements claimed pursuant to Section 99(2)(a) CPA and proceeded to make fixed-sum costs orders pursuant to Section 98(4) CPA.

Liability for 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

6.4 FEDERAL JURISDICTION

The Federal Court has emphasised that the duty to comply with the "overarching purpose" contained in sections 37M and 37N *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 *Federal Court Rules 2011* (Cth) (FCR) allows the court to order a legal practitioner to pay costs or disallow costs to that legal 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 legal practitioner is responsible for same.

Rule 31.22 FCR states that, for the commencement of certain migration litigation, a certificate certifying "*that there are reasonable grounds for believing the migration litigation has a reasonable prospect of success*" must be signed by the lawyer and filed.

Modra v State of Victoria [2012] FCA 240 makes clear that a failure to properly to plead a claim may be regarded as a failure to comply with the overarching purpose.

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

6.5 FURTHER JUDICIAL COMMENT

The courts have regularly stated that the power to make personal costs orders is not to be used by legal practitioners as a tool of intimidation against opponents. In *Degiorgio v Dunn (No 2)* [2005] NSWSC 3 Barrett J held that the legislation should not be seen as "*an instrument of intimidation*".

In a paper delivered on Appellate Advocacy to the New South Wales Bar Association, Sydney CPD Conference, on the 27 March 2015, the then 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 226, especially at [38] and stated:

> "*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.*"

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 Christ of Latter-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): 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)."

Legal 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 legal practitioner and client for the recovery of that component of the costs.

CHAPTER 7
REGULATED COSTS & MAXIMUM COSTS

The 'Uniform Law' is a suite of legislation including:

Legal Profession Uniform Law (NSW) 2014 **(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)

The **Uniform Law** applies to instructions first received from your client on or after 1 July 2015 (Schedule 4, s.18 LPUL).
The **Uniform Law** applies for proceedings commenced on or after 1 July 2015 (Reg.59 LPULAR).

Handy links:

Civil and Administrative Tribunal Act 2013 (NSW) (CATA)
Community Land Management Act 2021 (NSW)
Industrial Relations Act 1996 (NSW)
Law Society of NSW: Precedent letter to contract out of regulated costs regime
Legal Profession Regulation 2005 (NSW)
Local Court Practice Note CIV 1 (CIV1)
Local Court Rules 2009 (NSW)
Public Notaries Act 1997 (NSW)
Public Notaries – Recommended Fees
Strata Schemes Management Act 2015 (NSW) (SSMA)
Supreme Court Rules 1970 (NSW)
Uniform Civil Procedure Rules 2005 (NSW) (UCPR)
Victims' Rights and Support Act 2013 (NSW)

7.1 INTRODUCTION

Legal costs in New South Wales are regulated by the *Legal Profession Uniform Law 2014* (NSW) (LPUL) as set out in the Chapters above. However, in some situations, costs are fixed, limited or otherwise regulated by other statutory provisions.

The limitations that are provided by these regulations can be in respect of the costs which may be billed to a client, or only those that may be recovered from another party pursuant to a costs order. The specific instances are outlined below.

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

7.2.1 GENERAL APPLICATION

In proceedings where the amount recovered on a claim for personal injury damages does not exceed $100,000 (excluding post-judgment interest), the legal costs recoverable on a party/party basis are limited by the *Legal Profession Uniform Law Application Act 2014* (NSW) (LPULAA) (Part 6 (Legal Costs – Particular Kinds of Costs, s.61 and Schedule 1).

These capped costs also apply to law practice/client costs unless the solicitor and client contract out of the fixed costs by complying with the LPUL, including Schedule 1 LPULAA. To contract out of the fixed costs:

- A law practice must comply with the disclosure requirements of the LPUL. If the disclosure to the client is not in accordance with the LPUL, and your costs are assessed, your costs agreement may be set aside by a costs assessor which would mean that the client is only liable to you for the fixed costs.
- The costs agreement must specify that the client has contracted out of the regulated costs regime. There is a precedent letter which you may provide to the client available on the Law Society website.

7.2.2 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 15 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) (Schedule 1 cl.2(1)(a) and 3 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 15 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) (Schedule 1 cls.2(1)(b) and 3 LPULAA)
- maximum costs do not include disbursements; for example, medical and expert reports, filing fees and photocopying (Schedule 1 cl.2(5)(b) LPULAA)
- if more than one practitioner (which could be multiple solicitors, multiple barristers, or a solicitor and barrister, for example) 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, (Schedule 1 cl.7 LPULAA)
- the "*amount recovered*" includes any amount paid under a compromise or settlement of a claim (whether or not any legal proceedings have been instituted) (Schedule 1 cl.8(1) LPULAA)
- the "*amount recovered*" for the purposes of calculating the $100,000 limit does not include any amount attributed to costs or post-judgment interest (Schedule 1 cl.8(2) LPULAA)
- GST cannot be added to these costs. Whilst reg.27 LPULAR provides that a cost fixed by Part 5 LPULAR may be increased by the amount of any GST payable in respect of the legal or other service to which the cost relates, these costs fall under Part 6 LPULAA, and not Part 5 LPULAR (as required for reg 27 LPULAR to apply).

7.2.3 EXCEPTIONS

The maximum fixed costs apply on the ordinary basis unless:

- costs are awarded on an indemnity basis for costs incurred after failure to accept an offer of compromise (Schedule 1 cl.5 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 (Schedule 1 cl 6 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.

7.2.4 VERDICT FOR THE DEFENDANT

If a plaintiff is unsuccessful in a claim for personal injury damages, there is no "*amount recovered*". As such, the costs cap in 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 Ltd* [2006] NSWCA 100).

7.3 MOTOR ACCIDENT COSTS

See Chapter 9 of the Costs Guidebook for further information on Motor Accidents.

7.4 WORKERS COMPENSATION COSTS

See Chapter 8 of the Costs Guidebook for further information on Workers Compensation.

7.5 PROBATE AND LETTERS OF ADMINISTRATION

Practitioners acting in probate matters should be aware that there is a scale of fixed costs for the various stages of probate, depending on the value of assets remaining at the time of the application.

Clause 26 LPULAR provides the prescribed costs for probate and administration matters pursuant to s.59(1)(f) LPULAA. Schedule 3 LPULAR provides for legal services for probate and administration matters.

The fixed costs in Schedule 3 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 Schedule 3 LPULAR, extra costs are allowed in relation to obtaining for the first time a grant of administration (Part 1 Schedule 3) or resealing letters of administration (Part 2 Schedule 3). The extra costs, which are in addition to the fixed costs in Parts 1 or 2 of Schedule 3 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 (NSW).

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.27 LPULAR.

7.6 DEFAULT JUDGMENTS AND ENFORCEMENT OF JUDGMENTS

Subsections 59(1)(d) and (e) LPULAA and Schedule 1 LPULAR (pursuant to reg.24 LPULAR) regulate the plaintiff's costs for obtaining default judgments and the enforcement of default judgments. The scales of costs are contained in Schedule 1 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 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 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 *Uniform Civil Procedure Rules 2005* (NSW)).

GST and disbursements may be added to these costs (see cl.27 LPULAR).

It is important to note that s.59(2) 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.

7.8 PUBLIC NOTARIES

Fees for services carried out by public notaries are set by the Society of Notaries in accordance with s.12 *Public Notaries Act 1997* (NSW). The recommended scale is published from time to time in the NSW Government Gazette and is available at https://notarynsw.org.au/recommended-fees/.

7.9 LOCAL COURT

Costs awarded on a party/party basis in the Small Claims Division are governed by rule 2.9(2) *Local Court Rules 2009* (NSW). The maximum costs that may be awarded are those allowed upon entry of a default judgment under Schedule 1, Part 3 LPULAR and s.59(1)(c) LPULAA (fixing the costs payable for legal services provided in connection with small claims applications (within the meaning of s.379 *Industrial Relations Act 1996*)).

The Local Court Practice Note CIV 1 (CIV 1) (last amended 3 June 2024) provides limitations on costs and disbursements on a party/party basis, applicable to amounts claimed of $50,000 or less and includes proceedings that are transferred from the Small Claims Division to the General Division.

Where the amount claimed is between $20,000 and $50,000, costs (including solicitor and barrister) are subject to cl 38 CIV 1, which provides discretion to order costs:

- of the plaintiff – up to 25 per cent of the amount awarded by the Court plus any amount that might be allowed in relation to costs incurred up to the filing of the first defence in the proceedings.
- If the defendant is successful then the maximum costs that can be awarded to the defendant is 25% of the
- amount claimed by the plaintiff.

Matters transferred from the Small Claims Division to the General Division are subject to the limitation of cl 38.2(c) CIV1. This states that the maximum cost recoverable by the successful party is $5,000, including GST and disbursements. Under cl 38.3 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 (cl 37.6 CIV 1) and refer to Chapter 12 of the Costs Guidebook regarding Security for Costs, Offers of Compromise and Costs on Discontinuance.

Under cl 38.9 CIV 1 the costs of a cross-claim apply as if proceedings have been separately commenced.

7.10 NSW CIVIL & ADMINISTRATIVE TRIBUNAL

Section 60 *Civil and Administrative Tribunal Act 2013* (NSW) (CATA) governs the costs consequences of proceedings in the NSW Civil and Administrative Tribunal (NCAT). Costs do not generally follow the event at NCAT, with each party paying its own costs: s. 60(1) CATA. Orders for costs would only be made where NCAT is satisfied there are "*special circumstances warranting an award of costs*": s.60(2) (CATA). This power is discretionary: *Gaynor v Burns* [2015] NSWCATAP 150 at [60]. Subsection 60(3) CATA provide a list of considerations which NCAT "*may*" consider in determining whether there were special circumstances, and includes: the complexity of the matter; whether parties were vexatious; and whether parties acted reasonably. Where an NCAT proceeding was removed from NCAT to a court, then the cost provisions of NCAT would not apply to the proceedings now removed to the court: *Sobalirov v Bullen* [2020] NSWSC 1643.

NCAT has been given a wide jurisdiction to "*settle*" disputes with respect to strata under s.232 *Strata Schemes Management Act 2015* (NSW) (SSMA), but notwithstanding this there are still remedies not capable of being ordered by NCAT, particularly equitable remedies such as declarations. There is provision in the SSMA (see s.253) where it expressly confirms access to these rights and remedies are undisturbed.

However, should a party, with a matter relating to strata, seek remedies at a court at first instance (and not with NCAT) then regardless of the outcome of the proceedings the plaintiff is to pay the defendant's costs unless the remedy sought by the plaintiff was one which NCAT had inadequate powers to make: s.253(2) SSMA. There are equivalent provisions to ss.232 and 253 SSMA with respect to community, precinct and neighbourhood schemes: ss193 & 213 *Community Land Management Act 2021* (NSW) respectively.

In the decision of *EB 9 & 10 Pty Ltd v The Owners SP 934 (No 2)* [2018] NSWSC 546, which was upheld at appeal: *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* [2018] NSWCA 288, it was determined that it would be insufficient to deviate from s.253 SSMA where a plaintiff succeeded in seeking a remedy against a defendant not available to NCAT – in that case declaratory relief – but where the remedy available to NCAT had a similar effect: see *EB 9 & 10 Pty Ltd v The Owners SP 934* (No 2) [2018] NSWSC 546 at [33] – [34].

7.11 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 law practice/client basis, but not on a party/party basis.

For further information, refer to:

- Chapter 10 of the Costs Guidebook (Costs in Family Law matters), and
- Chapter 11 of the Costs Guidebook (Costs in the Federal Court).

CHAPTER 8
COSTS UNDER WORKERS COMPENSATION LEGISLATION

Handy Links:

Workers Compensation Act 1987 (in force as at 30/1/2012) (Former 1987 Act)
Workers Compensation Act 1987 (current) (1987 Act)
Workplace Injury Management and Workers Compensation Act 1998 (1998 Act)
Workers Compensation Regulation 2016 (WCR)
Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987 (WCBFERS Act)
Personal Injury Commission Act 2020 (PIC Act)
Independent Review Office (IRO)

- ILARS Funding Guidelines
- SIRA Workers Compensation Publications
- Legal Profession Uniform Law Australian Legal Practitioners' Conduct Rules 2015

8.1 INTRODUCTION

Costs in the NSW workers compensation scheme have been highly regulated since the commencement of the *Workers Compensation Act* 1926 (NSW) (1926 Act). The judgment of Neilson DCJ in the case of *Ritson v State of New South Wales (No. 2)* [2022] NSWDC 347 provides a comprehensive review on the development of the law concerning the "*esoteric question*" of workers compensation costs since the 1926 Act.

Costs are determined based on the 'type' of claim – 'statutory compensation', 'work injury damages' or 'common law damages' - and category of claimant.

8.2 COSTS IN STATUTORY COMPENSATION CLAIMS

8.2.1 HISTORY

For statutory compensation claims until 2012 costs generally 'followed the event' and were met by the employer/insurer. From 1926 until 2012, workers compensation legislation prevented a claimant's legal practitioner from recovering "any costs" ('legal practitioner/client' costs now called 'law practice/client costs') from their client; or from claiming a lien in respect of such costs; or deducting such costs from the sum awarded, ordered, or agreed as compensation. (s.56 1926 Act; s.122 *Workers Compensation Act 1987* (1987 Act) (now repealed); s.116 *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act).

For the same period, a legal practitioner could only recover costs as ordered by the relevant tribunal (Compensation Court, Workers Compensation Commission (WCC), Supreme Court (for matters determined in the residual jurisdiction of the District Court) (most recently s.341 1998 Act).

From 1995 until 2012 costs could be ordered to be paid by an unsuccessful claimant if it could be shown that the "*application for compensation was frivolous or vexatious, fraudulent or made without proper justification*". Such costs orders were rare. Costs were payable under the *Legal Profession Act* in force at the time. In addition, various amendments to the workers compensation legislation between 1995 and 2001 added further restrictions on the payment of legal costs by limiting recovery of costs "unreasonably incurred" (s.119 1987 Act; s.115 1998 Act) and giving power to the tribunal to order costs be paid by a legal practitioner whose "*serious neglect, serious incompetence or serious misconduct delays, or contributes to delaying, the matter.*" (s.344 1998 Act)

In December 2001, a scale of costs applicable to statutory benefit claims was regulated in the Workers Compensation (General) Regulation 1995 (1995 Reg) by insertion of Part 23 and Schedule 6. The workers compensation legislation had long provided that the regulations could make provision for or with respect to fixing maximum costs for legal services provided to a worker, an employer, or an insurer in any workers compensation matter and for the fixing of maximum costs for various disbursements such as expenses for witnesses, medical report fees etc.

Schedule 6 came into operation on 1 April 2002 coinciding with the closure of the Compensation Court and commencement of the WCC. It provided a new method of determining the quantum of costs to apply to 'new claims' and 'existing claims for which there was no pending application for determination by the Compensation Court' as at 1 April 2002. Costs in some matters remained recoverable under, and regulated by, other legislation (including regulations under the *Legal Profession Act 2004*).

Regulation 108 (1995 Reg) stated "*the maximum costs recoverable for legal services in relation to a claim for compensation are those set out in Schedule 6*" and contained notations:

- "The effect of this clause is that a legal practitioner or agent cannot recover any costs in relation to a claim for compensation unless those costs are set out in Schedule 6, except as otherwise provided in this Part": reg.108.
- "Division 2 of Part 11 of the Legal Profession Act 1987 requires barristers and legal practitioners, before providing any legal services to a client, to provide the client with a written disclosure of the basis of the costs (or an estimate of the likely costs) of legal services concerned": reg.108(4).

Schedule 6 set out that costs were to be determined by reference to activities or events in connection with a matter. The events and activities were defined by type of claim and the stage of resolution. The WCC retained the power to assess costs as between claimant and insurer.

On 1 September 2003, the 1995 Reg was repealed and replaced by the Workers Compensation Regulation 2003 (2003 Reg). Part 19 of the 2003 Reg replaced the former Part 23; reg.84 replaced the former reg.108 in the same terms as the former clause. Schedule 6 remained unchanged.

On and from 1 November 2006, the 2003 Reg was amended with respect to Part 19 and Schedule 6. Whilst reg.84 was not amended, Schedule 6 was modified in form and substance to set the maximum legal costs payable for claimants and insurers.

The Schedule contained three parts:

- Part A contained definitions, described how the Tables operated and in some cases modified the operation of the Tables.
- Part B contained four tables:
  - Table 1 set out the phases at which claims and disputes may resolve and the costs that applied for the resolution at each phase.
  - Table 2 set out the types of resolutions that applied to Table 1 and indicated the level of costs (ie 75% or 100%) that would apply to that resolution type.
  - Table 3 set out alternate or "special" resolution types and the applicable costs for each party. Tables 1 and 2 did not apply to these "special" resolution types.
  - Table 4 set out additional legal services and other factors that may result in an increase to the costs claimable under Table 1.
- Part C listed regulated disbursements

In October 2006, the 2003 Reg was repealed and replaced by the Workers Compensation Regulation 2006 (2006 Reg). Schedule 6 was retained in the same format and has not been substantially amended since 2006 save for two incremental increases to the monetary values in 2012 and 2021. The present regulation is the Workers Compensation Regulation 2016 (WCR).

8.2.2 2012 REFORMS TO WORKERS COMPENSATION LEGISLATION

In 2012, substantial amendments to the workers compensation legislation led to the creation of 'categories' of workers. For those workers affected by the amendments ('non-exempt workers') the costs provisions were dramatically changed by removal of 'follow the event'; removal of the power of the WCC to award costs; and the requirement that a party must bear its own legal costs. The current provision reads:

> *"**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."*

The provision only applies to matters involving workers covered by the 2012 amendments. The Personal Injury Commission (the Commission), which assumed the functions of the WCC in 2021 under the *Personal Injury Commission Act 2020* (PIC Act), is prohibited from making any orders as to costs for workers compensation matters relating workers covered by the 2012 amendments. There is a prohibition on the charging of law practice/client costs other than in modified common law claims referred to as "work injury damages claims" within the workers compensation legislation, or coalminers' common law claims. The 2012 amended costs provisions regulate legal practitioners acting for any affected party to a claim.

Whereas insurers will always meet their legal practitioner's costs, it was recognized that workers do not have the same means to meet their legal costs. An 'ombudsman-like' Independent Review Officer was created in 2012 in a new 'agency' known then as the Workers Compensation Independent Review Office, now the Independent Review Office (IRO). Within that office, an administrative service designed to meet the legal costs of workers covered by the 2012 amendments was established and became known as the 'Independent Legal Assistance and Review Service' (ILARS). The Officer assumed responsibility for meeting the legal costs of injured workers through the creation of an administrative scheme funded out of the Workers Compensation Operational Fund.

From 1 March 2021 and pursuant to Schedule 5 PIC Act the IRO was established as an independent agency with the Officer appointed under the PIC Act as responsible for managing and administering ILARS.

ILARS provides grants of funding to lawyers approved by the IRO to enable injured eligible workers (in this Guidebook referred to as non-exempt workers) to obtain independent legal advice, assistance, and representation with respect to their rights and entitlements to workers compensation benefits provided under the workers compensation legislation. Grants of funding cover professional fees, counsel's fees, medical report fees and the cost of other disbursements and incidental expenses reasonably necessary to investigate a claim or to pursue a dispute about a claim. IRO's procedures and requirements are found at www.iro.nsw.gov.au. An application must be made to become an approved legal services provider before a grant of funding can be sought.

Legal costs are paid under Part 6 of the ILARS Funding Guidelines based on stage of resolution and outcome. It is not necessary that a worker be successful in their claim for legal costs to be paid. In addition, officers of the IRO can provide assistance with the early investigation of claims and complaints about insurers.

ILARS does not meet insurer's legal costs nor does it cover the legal costs of workers exempt from the 2012 amendments. Costs in work injury damages are dealt with separately below.

Statutory compensation claims include claims for weekly benefits, medical treatment, rehabilitation or domestic care, and lump sums for permanent impairment. Costs for workers' statutory benefit claims have been fully regulated since 1 January 2002.

As a consequence of the many major reforms of the workers compensation scheme, particularly in 2012, there exists today four different 'scales' for determining the quantum of costs applicable to legal practitioners representing workers dependent solely on the categorisation of the worker. The four 'scales' operate on different bases. There are only three costs 'scales' for determining the quantum of costs applicable to insurer legal representatives as ILARS does not apply to insurers.

8.2.3 CATEGORISATION OF WORKERS TO DETERMINE WHICH COSTS REGIME APPLIES

Workers in the NSW workers compensation scheme can be placed into three categories each of which determines the appropriate scale to determine when, how and by whom legal costs are paid. The three categories are:

1. Where the worker is subject to the 2012 amendments to the workers compensation legislation (Non-Exempt Workers).
2. Where the worker is "exempt" from the 2012 amendments (Exempt Workers) pursuant to either:
    a. Schedule 6, Part 19H, cl.25, 1987 Act (police officers, paramedics, or firefighters),
    b. Schedule 6, Part 19H, cl.4, 1987 Act and the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* (WCBFERS Act) (volunteer bush firefighters, lifesavers, and emergency services personnel), or
    c. The *Police Regulation (Superannuation) Act 1906* (PRS Act) (which applies to NSW police officers who were attested prior to 1 April 1988 and who contributed to the Police Superannuation Fund).
3. Where the worker is a coal miner as defined in the 1987 Act (Schedule 6, Part 19H, cl.26, 1987 Act) (Coal Miners).

8.2.3.1 NON-EXEMPT WORKERS

Where the worker is subject to the 2012 amendments to the workers compensation legislation s.341 reads 'Each party to bear its own costs' and the Commission has no jurisdiction to award or determine costs.

Worker's legal costs are paid in accordance with the ILARS Funding Guidelines.

ILARS provides that to receive payment of legal costs a legal practitioner has to be an 'Approved Lawyer' and must apply for a 'grant ' of funding.

Costs are paid regardless of outcome in accordance with the ILARS Funding Guidelines.

There is no equivalent of ILARS for insurer's legal representatives where the worker is 'non-exempt'. Costs are paid by the insurer pursuant to Schedule 6 WCR.

8.2.3.2 EXEMPT WORKERS

In the case of police officers, firefighters and paramedics as identified in Schedule 6, Part 19H, cl. 25 1987 Act legal costs are governed by Schedule 6 WCR. For this cohort of workers, Part 8 to the 1998 Act is preserved as if it had not been amended in 2012. Section 337 provides that maximum costs and disbursements can be fixed by regulation and a legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by the regulations. The Commission has full power to determine by whom and to what extent costs are to be paid but cannot order payment of costs by a claimant unless it "*is satisfied that the claim was frivolous or vexatious, fraudulent or made without proper justification*".

In relation to volunteer bush firefighters, lifesavers, and emergency services personnel, section 32(1)(l) WCBFERS Act has the effect of adopting Schedule 6 WCR for the determination of legal costs payable in respect of claims that are resolved without Court proceedings being commenced. Where a claim is disputed, proceedings are commenced in the residual jurisdiction of the District Court. For District Court claims, costs are payable in accordance with s.112 1998 Act and s.142K *District Court Act 1973* (DCA).

For police officers who were attested prior to 1 April 1988 and who contributed to the Police Superannuation Fund, legal costs are governed by the *Police Regulation (Superannuation) Act 1906* (PRS Act). Section 21 PRS Act provides that those 'aggrieved by a decision' made under the Act may apply to the Residual Jurisdiction of the District Court for a determination in relation to the decision. Where this occurs, costs are governed by s.21 PRS Act and s.142K DCA. Costs cannot be ordered against an applicant unless the Court finds that the application 'was frivolous or vexatious or was made fraudulently or without proper justification'. Where claims are unsuccessful or resolved without proceedings being commenced, costs are unregulated.

8.2.3.3 COAL MINERS

Schedule 6, Part 18 1997 Act exempts 'coal miners' from the 2012 amendments. Coal miners' claims for statutory compensation are determined by preserved provisions of the 1987 Act prior to amendments made in 1998 and 2001.

The District Court inherited exclusive jurisdiction to 'examine, hear and determine' all coal miner matters pursuant to s.105(4A) 1998 Act (referred to as the' residual jurisdiction'). Practice Note DC (Civil) No 12 Coal Miners' Workers Compensation List applies to all coal miner statutory benefit claims.

Coal Miners Insurance (CMI) is the sole insurer for the NSW coal mining industry. Costs follow the event and will be paid by CMI where the worker is successful.

Worker's and insurer's legal costs are paid under Schedule 2 LPULAR. Schedule 2 costs were set in 1995 and have not undergone indexation or increase since that time.

8.2.4 SCHEDULE 6, WORKERS COMPENSATION REGULATION 2016

The latest and current version of the WCR is Workers Compensation Regulation 2016 which commenced on 1 September 2016.

Schedule 6 sets out the maximum costs in compensation (statutory benefit) matters. Costs includes **professional fees** and **disbursements**.

Schedule 6 contains three Parts as follows:

Part 1
Contains definitions, describes how the Tables operate and in some cases modifies the operation of the Tables.

Part 2
Contains four tables:

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

Part 3
Lists regulated disbursements.

Disbursements regulated under Part 3 are limited to loadings for travel, conduct money, medical report fees, medico-legal and independent medical examiner report fees, provision of health provider clinical notes and financial advice. Counsel's fees are not a regulated disbursement and are not recoverable.

Section 339 1998 Act provides that the Authority (State Insurance Regulatory Authority (SIRA)) can publish orders fixing maximum fees for the provision by health service providers of medical reports and for appearing as a witness before the Commission or a Court in a claim for statutory compensation or work injury damages.

Pursuant to s.339 SIRA publishes the *Workplace Injury Management and Workers Compensation (Medical Examinations and Reports Fees) Order* (Fees Order) at the commencement of every calendar year. The Fees Order sets out the definition of medical reports and services provided by Health Service Providers (not treatment related services) for which a maximum fee is set. Under s.339(3) 1998 Act a Health Service Provider is not entitled to be paid or recover any fee for providing a service that exceeds the maximum fee fixed for the provision of that service by the Fees Order.

Schedules A and B to the Fees Order provide the maximum fees allowed for the purposes of Items 4 and 5 of the disbursements regulated by Part 3 Schedule 6 WCR.

The "maximum" amounts set out in Parts 2 and 3 apply both on an ordered costs (formerly party/party costs) and legal practitioner or agent and client (formerly solicitor/client costs) basis. This means all legal practitioners are affected.

Regulation 86 WCR provides that certain costs are not regulated. These include:

(a) costs for legal services provided for an appeal under s.353 1998 Act (Appeal against decision of Commission constituted by Presidential member),
(b) fees for investigators' reports or for other material produced or obtained by investigators (such as witness statements or other evidence),
(c) fees for accident reconstruction reports,
(d) fees for accountants' reports,
(e) fees for reports from health service providers (except as provided in item 4, Part 3, Schedule 6 WCR),
(f) fees for other professional reports relating to treatment or rehabilitation (for example, architects' reports concerning house modifications),
(g) fees for interpreter or translation services,
(h) fees imposed by a court or the Commission,
(i) travel costs and expenses of the claimant in the matter for attendance at medical examinations, a court, or the Commission,
(j) witness expenses at a court or the Commission.

Counsel's fees are not listed in reg.86 nor in Part 3 Schedule 6 WCR and are not recoverable. Counsel are essential to the dispute resolution process due to the complexity of the workers compensation legislation. Counsel's fees, where Schedule 6 applies, are 'absorbed' into the professional fees payable thereby reducing the legal costs received by a legal practitioner.

Schedule 6 has not undergone amendment to the resolution types or 'phases' since 2006 despite numerous changes to the workers compensation legislation and dispute resolution processes. As a consequence, Schedule 6 does not reflect current practices in the Commission or resolution types.

8.2.5 INDEPENDENT LEGAL ASSISTANCE AND REVIEW SERVICE (ILARS)

ILARS Funding is only available to lawyers representing non-exempt workers. Insurer's costs where the worker is non¬exempt remain regulated by Schedule 6.

The ILARS Funding Guidelines provide comprehensive information in relation to the funding principles. Costs are paid at the conclusion of a matter and are determined by reference to the Professional Fees and Disbursements Schedules within Part 6.

The funding amounts are determined by stage (similar to the phases of resolution in Schedule 6 WCR) and resolution type. Unlike Schedule 6, ILARS meets Counsel's Fees.

The ILARS procedures require legal practitioners to be an Approved Lawyer to apply for grants of funding and to adhere to the Guidelines for Approval as an IRO Approved Lawyer.

Approved Lawyers regularly update ILARS as to the status of the matter and to obtain extensions of grants of funding to advance matters to the Commission.

The IRO has in 2024 commenced to issue 'practice notes' and guidance material including factsheets to inform approved lawyers of process upgrades and improve the administration of grants.

8.3 MEDICAL REPORT AND EXAMINATION FEES

Section 339 1998 Act provides that SIRA can, by published order, fix maximum fees provision by health service providers (service as defined in the *Health Care Complaints Act 1993*) of the following services:

(a) provision of any report for use in connection with a claim for compensation or work injury damages,
(b) appearance as a witness in proceedings before the Commission or a court in connection with a claim for compensation or work injury damages.

Section 339(3) 1998 Act provides that a health service provider is not entitled to be paid or to recover any fee for providing a service that exceeds the maximum fee fixed under the Fees Order.

The relevant Fees Order is the *Workplace Injury Management and Workers Compensation (Medical Examinations and Reports Fees) Order.* Legal practitioners should not pay in excess of the maximum amounts specified in the Fees Order as they cannot recover as costs amounts paid in excess of the maximum fees specified in the Fees Order. The Fees Order is indexed and reissued every calendar year. All Fees Orders can be found on the SIRA website under 'Workers Compensation Publications'.

The Fees Order applies to claims for statutory compensation and work injury damages for exempt and non-exempt workers. It does not apply to coal miner claims. The Fees Order does not fix maximum fees for health service providers where they are engaged outside the purposes specified in items 4 and 5, Part 3, Schedule 6 WCR.

8.4 CONTRACTING OUT

Section 234 1998 Act prevents contracting out in statutory compensation claims.

Regulation 93 WCR provides for contracting out in work injury damages claims and requires a law practice to:

(a) make a disclosure: refer to Chapter 2 of this Guidebook
(b) enter into a costs agreement (other than a conditional costs agreement that provides for the payment of a premium of more than 10% of the costs otherwise payable under the agreement on the successful outcome of the matter concerned).
(c) before entering into the costs agreement, advise the party (in a separate written document) that, even if costs are awarded in favour of the party, the party will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the 1998 Act in the absence of a costs agreement.

8.5 WORK INJURY DAMAGES CLAIMS

Part 5 1987 Act sets out the law applicable to claims for damages against a worker's employer in respect of an injury that was caused by the negligence or other tort (including breach of statutory duty) of the worker's employer, or a breach of contract by the worker's employer. The 1987 Act sets thresholds for the pursuit of these claims modifies the common law, referring to these claims 'work injury damages' claims.

These claims are governed by of Part 6 of Chapter 7 1998 Act.

The relevant costs provisions are set out in Part 8 1998 Act and s.334 specifically provides that Part 8 prevails over the Uniform Law to the extent of any inconsistency.

Section 337 1998 Act allows for regulations to fix the maximum costs to be charged for legal services provided to either a worker or insurer.

Division 3, Part 17 WCR sets out the costs recoverable in work injury damages claims, providing that the maximum costs for legal and other services are those set out in Schedule 7 WCR.

A crucial difference between work injury damages and statutory benefit claims is the ability to contract out of the regulated costs scheme (reg.93 WCR) (See 8.3 and Chapter 2). If the law practice does not contract out Schedule 7 applies.

Schedule 7 sets out costs based on stages of resolution of a work injury damages claim. Set out in the Schedule are fixed sums for certain work undertaken (in some circumstances – nil) and party/party costs determined by reference to the amount of the settlement or award of damages. The fees are contingent on the amount of the award or settlement. The more the worker receives, the higher the costs payable.

Division 4 WCR provides for the assessment of costs recoverable by law practices and for party/party costs. In addition, it places restrictions on the awarding of ordered costs.

The Act sets out the procedure for claims to be managed and if they are not resolved at mandatory mediation, they proceed for determination in the District Court which has jurisdiction with respect to the making of cost orders.

8.5.1 CONTRACTING OUT OF THE REGULATED COSTS BETWEEN LEGAL PRACTITIONER AND CLIENT

Regulation 93 WCR provides for contracting out in work injury damages claims in a form modelled on the *Motor Accidents Compensation Regulation 2020* and requires a legal practitioner to:

(a) make a disclosure (See Chapter 2),

(b) enter into a costs agreement (other than a conditional costs agreement that provides for the payment of a premium of more than 10% of the costs otherwise payable under the agreement on the successful outcome of the matter concerned), and
(c) before entering into the costs agreement, advise the party (in a separate written document) that, even if costs are awarded in favour of the party, the party will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the 1998 Act in the absence of a costs agreement.

This disclosure is in addition to the disclosure required under the LPULAA (See Chapter 2).

If you fail to contract out correctly, you will be limited to claiming the regulated costs set out in Schedule 7 WCR and not what might be regarded as "fair and reasonable".

8.5.2 RESTRICTIONS ON AWARDING PARTY/PARTY COSTS

Under the WCR, the worker obtains ordered 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 (reg.94 WCR).

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 (reg.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 (reg.97).

Except as provided above, the parties "to court proceedings for work injury damages are to bear their own costs" (reg.96).

8.6 ASSESSMENT OF COSTS

Division 4 of the WCR deals with the assessment of costs.

The provisions can only apply in statutory compensation claims for exempt workers (where costs are determined under Schedule 6) and to costs in work injury damages matters.

The Commission retains the power to assess costs in the following circumstances:

- Application by client for assessment of law practice/client or agent/client costs
- Application by instructing law practice or agent for assessment of law practice/client or agent/client costs
- Application by billing law practice or agent for assessment of law practice/client or agent/client costs
- Application for assessment of ordered costs (party/party costs) - compensation matters
- Application for assessment of ordered costs (party/party costs) - work injury damages matters

The Commission must decline to assess a bill of costs where the disputed costs are subject to a costs agreement that complies with of Part 4.3 Division 4 LPUL and the costs agreement specifies the amount of the costs or the dispute relates only to the rate specified in the agreement for calculating the costs.

Division 4 of the WCR effectively adopts the model for assessment under the LPULAA. The tests of fairness and reasonableness remain the same, as do the discretionary factors.

Application to the Commission is made by approved form. Given the Commission conducts operations online, the form should be accessed through the Commission's Portal. The Commission must give reasons and a Certificate of Determination which 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 (reg.125 WCR).

8.7 CONCLUSION

The workers' compensation costs regime is complex and bureaucratic. It requires a clear understanding of the nature of the work to be conducted and the nuances of the different point-in-time versions of the workers compensation legislation.

Costs over and above those regulated under the legislation are prohibited in all but work injury damages cases where disclosure (contracting out) is required. As a consequence of full regulation of costs in statutory compensation claims, disclosure may be sufficient in engaging a client.

CHAPTER 9
COSTS IN MOTOR ACCIDENT CLAIMS

Handy Links:

Motor Accidents Compensation Act 1999 (MACA)
Motor Accidents Injuries Act 2017 (MAIA)
Motor Accidents Compensation Regulation 2005 (MACR 2005)
Motor Accidents Compensation Regulation 2015 (MACR 2015)
Motor Accidents Compensation Regulation 2020 (MACR 2020)
Motor Accident Injuries Regulation 2017 (MAIR)
Claims Assessment Guidelines (CAG)
Personal Injury Commission Rules 2021
SIRA CTP Green Slips/Motor Accidents Publications

9.1 INTRODUCTION

This chapter outlines the costs provisions for motor accident claims under the compulsory third-party (CTP) insurance schemes in NSW.

There are currently two distinct CTP schemes in NSW:

1. *Motor Accidents Compensation Act 1999* (MACA)
2. *Motor Accidents Injuries Act 2017* (MAIA)

Each of these two schemes has separate provisions relating to costs which will be covered by this Chapter.

[The Guide omits reference to the earlier CTP scheme Motor Accidents Act 1988 (NSW) on the basis that although theoretically a claim might still be available as the Act continued to have effect until October 1999, from a practical point of view, any claims outstanding are extremely rare.]

9.2 COSTS UNDER THE *MOTOR ACCIDENTS COMPENSATION ACT 1999* (MACA)

9.2.1 COVERAGE OF THE MACA

MACA commenced on 5 October 1999 and governs accidents occurring from **5 October 1999** to **30 November 2017** inclusive.

MACA applies in respect of common law claims for damages arising from the death of or injuries to a person that is caused by the fault of the owner or driver of a motor vehicle (as defined in s.3A MACA). Chapter 1, Part 1.2 MACA also covers certain 'No Fault Claims' for children and 'blameless accidents'.

9.2.2 COSTS FRAMEWORK UNDER MACA

Chapter 6 MACA deals with costs in motor accident injury claims, where the accident occurred between 5 October 1999 and 30 November 2017 (inclusive). Section 148 MACA provides that the Chapter applies "*to and in respect of costs payable on a party and party basis, on a solicitor and client basis or on any other basis*".

MACA provides that the regulations can fix maximum costs for legal services to a claimant and insurer and non-legal services related to any proceedings in any motor accident matter, for example, expenses for investigations, for witnesses or for medical report.

Section 149(2) MACA provides that a legal practitioner is "not to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by the regulations under this section."

Section 149(3) prohibits recovery of costs "unreasonably incurred" and sub s.(4) provides that the Act and the regulations made under it prevail to the extent there is any inconsistency with the legal costs legislation (as defined in s.3A LPULAA).

Sections 149 and 150 MACA contain the regulation-making power to set maximum costs recoverable by legal practitioners and medical practitioners undertaking medico-legal work in connection with a claim.

There are 'penalty' provisions contained within MACA where a claimant does not accept a certificate of assessment of damages, proceeds to court, and does not achieve a result as set out in s.151 MACA.

Regulations have been made since the commencement MACA which govern costs in motor accident matters under MACA.

9.2.3 THE REGULATIONS UNDER MACA

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

- Motor Accidents Compensation Regulation 1999
- Motor Accidents Compensation Regulation 2005 (MACR 2005) (noting that the amount of costs and fees was increased in 2008)
- Motor Accidents Compensation Regulation 2015 (MACR 2015)
- Motor Accidents Compensation Regulation 2020 (MACR 2020)

Costs under MACA are now provided for in the Motor Accidents Compensation Regulation 2020 (MACR 2020), commencing 1 September 2020. The MACR 2020 replaced the Motor Accidents Compensation Regulation 2015 (MACR 2015) which was repealed on 1 September 2020 by s.10(2) of the *Subordinate Legislation Act 1989*.

The MACR 2020 applies to all new claims lodged on or after 1 September 2020 in respect of injuries covered by MACA, except for the cost disclosure provisions.

For claims made before 1 September 2020, only the costs incurred by a claimant after the commencement MACR 2020 are to be allowed in accordance with the revised amounts prescribed in the MACR. The MACR 2015 continues to apply to costs incurred before 1 September 2020. The MACR 2020 contains saving and transitional provisions in Schedule 4, the effect of which is that reg.8 MACR 2015 will continue to apply to existing claims in respect of costs incurred before the commencement MACR 2020.

The Motor Accidents Compensation Regulation 2005 (MACR 2005), amended in 2006, 2008 and 2010 applied to all claims made before midnight on 1 April 2015 at which time it was repealed and replaced by the MACR 2015.

MACR 2005 was amended by the Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2008 and the Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010. The amended MACR 2005 applies to claims made under MACA after 1 October 2008 and **before** 1 April 2015.

MACR 2005 was not updated to take into account the enactment of the Legal Profession Act 2004 (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 MACR 2015 and MACR 2020 both take into account the enactment of the LPA 2004 and the LPUL.

Reference to regulations, unless otherwise stated, refer to the MACR 2020.

9.2.4 MAXIMUM COSTS AND FEES

Clauses 6 and 11 provide for the fixing of maximum legal costs and maximum medico-legal fees (including witness expenses) in claims under the MACA.

Schedules 1 and 2 MACR provide the relevant fee schedules:

- Schedule 1 sets out the maximum costs for **legal services** by reference to certain stages of a matter.
- Schedule 2 sets out the maximum costs for **'medico-legal' services** including health practitioner witness expenses, medical report fees and cancellation fees based on the service provided.

Schedule 1 applies to ordered costs and law practice/client costs except in the following circumstances:

- where a legal practitioner has contracted out of Schedule 1 (reg.8), or
- where the claim is exempt from assessment under s.92 MACA (reg.7(1) in which case the Schedule does not extend to any costs incurred before the matter became exempt (reg.7(2)).

To allow for GST, practitioners may increase their fees allowed under Schedule 1 by an amount up to the amount of GST payable on the supply of the service to which the fee relates (reg.18).

Costs not regulated are set out in reg.4 (reg.13 excepted, which relates to assessment of costs by the Commission).

9.2.5 EFFECT OF THE MACR 2020

The MACR 2020 has the following effects:

For accidents that occurred on or after 5 October 1999 to 30 November 2017

- it applies fee schedules which limit recoverable costs and disbursements
- it allows a grace period from 5 October 1999 to 17 December 1999, where costs were not affected by the fee schedule if they were already paid or billed (reg.5)
- provides for contracting out of the fee schedules.

Rolls up expenses usually separately claimed

The fee schedule regulates the maximum amounts for both legal practitioner costs and barrister's 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 LPULAA).

This means "costs" is an inclusive term that includes legal practitioner costs and barrister's fees (reg.5(2)) and the expenses that are usually separately charged, such as copying, faxes, phone, and travel.

Allows legal practitioner's costs based on banding

Legal practitioner's costs based on banding lump sums are allowed, depending on the stage of the matter reached and the amount awarded (regardless of variables, such as hearing time, or other expenses, such as copying, faxes, etc).

If the claimant changes legal practitioners, the lump sum amount is apportioned between them (reg.6(2) MACR 2020).

Restricts advocate's costs at assessment in the Commission

- **Before 1 April 2015:** A conference directly related to an assessment of the claim is allowed at a maximum amount of $170 per hour (or part of an hour). (MACR 2005)
- **Between 1 April 2015 to 31 August 2020:** A conference directly related to an assessment of the claim or a court hearing is allowed at a maximum amount of $300 per hour (or part of an hour). (MACR 2015)
- **After 1 September 2020:** A conference directly related to an assessment of the claim is allowed at a maximum amount of 3 monetary units ("MU") per hour (or part of an hour).
- **Before 1 April 2015:** The cost of representation at an assessment conference under s.104 MACA is a flat fee of up to $530 plus up to $170 per hour in excess of two hours. (MACR 2005)
- **After 1 April 2015:** The cost of representation at an assessment conference under s.104 MACA is a flat fee of up to $1,250 plus up to $300 per hour in excess of two hours. (MACR 2015)
- **After 1 September 2020:** The cost of representation at an assessment conference under s.104 MACA is a flat fee of up to 12.5 MU plus up to 3MU per hour in excess of two hours.

Schedule 3 MACR 2020 allows for adjustment of fees based on CPI over an 'adjustment year', which is the 12 months commencing 1 October. For the adjustment year –2024-2025, the MU is $120.02

Country loadings are allowed in accordance with Schedule 1. There is no allowance for drafting documents or preparation time to be billed.

Restricts advocate's costs in court

If the matter is not exempted the following restrictions apply:

- **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. (MACR 2005)
- **Between 1 April 2015 to 31 August 2020:** 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. (MACR 2015)
- **After 1 September 2020:** The cost of representation in court is 25 MU per day for an advocate, other than senior counsel, and 35.5 MU 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.

Fixes maximum costs and fees

Even where a claimant's legal practitioner contracts out of Schedule 1 costs, the maximum costs recoverable in the matter on a law practice/client basis are fixed at the amount calculated by subtracting $50,000 from the 'amount paid in resolution of the claim'.

The 'amount paid in resolution of the claim' includes any costs payable on a ordered basis (reg.8(3)). The maximum costs includes all legal services provided in the course of the claim during the period commencing on the acceptance of the retainer and ending on the resolution of the claim (reg.8(4)).

These restrictions do not apply to an insurer's legal practitioner's costs

Fixes medico-legal fees

The scale fixes maximum amounts for medico-legal services (for reports and attending as witnesses). Section 150 MACA also provides that a health practitioner is not entitled to be paid or to recover more than any maximum fee fixed under the section.

Schedule 2 applies even if the matter is otherwise exempt under s.92 MACA, as reg.7(1) only refers to Schedule 1 and not to both Schedules 1 and 2.

Limits costs for legal services associated with medical disputes and special assessments

- **For applications lodged before 1 April 2015** – Costs associated with medical disputes are allowed at up to $670 for each medical dispute under Part 3.4 MACA, but not exceeding $1,600 for any one claim, regardless of the number or kind of disputes. (MACR 2005)
- **For applications lodged between 1 April 2015 to 31 August 2020** Costs associated with medical disputes are allowed at up to $1,000 for each medical dispute under Part 3.4 MACA, but not exceeding $2,500 for any one claim, regardless of the number or kind of disputes. (MACR 2015)
- **For applications lodged after 1 September 2020** – Costs associated with medical disputes are allowed at up to 10 MU for each medical dispute under Part 3.4 MACA, but not exceeding 25 MU for any one claim, regardless of the number or kind of disputes.

Limits expert witness' fees

MACR 2020 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) MACA. In that case, two experts will be allowed (reg.12 MACR).

The Commission Member, or court, retains a discretion to allow a greater number of expert witnesses. The costs of only two experts of any other kind will be allowed. Schedule 2 appears to apply even if the matter is otherwise generally exempt under s.92 MACA (reg.7(1)).

Identifies unregulated costs

Regulation 4 (reg.13 excepted, which relates to assessment of costs by the Commission) sets out unregulated costs as follows:

(a) fees for accident investigators' reports or accident reconstruction reports,
(b) fees for accountants' reports,
(c) fees for reports from health practitioners, other than medical practitioners,
(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 for attendance at the Commission or a court.
(h) witness expenses at the Commission or a court.

Sets out exemptions

Schedule 1 fees do ***not*** apply to any matter exempted under s.92 MACA.

Section 92 provides that a claim can be exempt in two ways:

- if the claim is of a kind that is exempt under the regulations ('mandatory exemption', s.92(1)(a)), or
- the Commission has made a preliminary assessment of the claim and has determined (with the approval of the President) that the claim is not suitable for assessment ('discretionary exemption', s.92(1)(b)).

Section 92 must be read in conjunction with the Claims Assessment Guidelines (CAG) made under the MACA. The current version of the CAG takes into account the establishment of the PIC.

Chapter 8.11 CAG sets out, for the purpose of s.92(1)(a) MACA, that the Principal Claims Assessor (PCA) or now the Division Head of the Personal Injury Commission's Motor Accidents Division (Division Head) *shall issue* a Certificate of Exemption if the PCA or Division Head is satisfied that, at the time of the consideration of the application, the claim involves one or more of the following circumstances:

(a) ability is expressly denied by the insurer, in writing, but only in circumstances where liability is denied because the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is denied,
(b) the claimant, or in a claim for an award of damages brought under the *Compensation to Relatives Act* 1897 one of the dependents, is a 'person under a legal incapacity'.
(c) The person against whom the claim is made is not a licensed or other CTP insurer.

(d) the insurer has notified the claimant, and the owner or driver of the motor vehicle against which the claim has been made under the third-party policy provided for in s.10 MACA, in writing, that it declines to indemnify that owner or driver; and/or
(e) the insurer alleges that the claim is a fraudulent claim in terms of the circumstances of the accident giving rise to the claim.

Chapter 14.16 CAG sets out, for the purpose of s.92(1)(b) MACA what the assessor or PCA or now the Commission Member (Member) or Division Head can have regard to as at the time of consideration of the claim to exempt a matter, including but not limited to:

(a) whether the claim is exempt under s.92(1)(a) MACA because the claim involves one or more of the circumstances set out in Chapter 8.11 CAG,
(b) the heads of damage claimed by the claimant and the extent of any agreement by the insurer as to the entitlement to those heads of damage,
(c) whether the claim involves complex legal issues,
(d) whether the claim involves complex factual issues,
(e) whether the claim involves complex issues of quantum or complex issues in the assessment of the amount of the claim including but not limited to major or catastrophic, spinal or brain injury claims,
(f) whether the claimant has been medically assessed and is entitled to non-economic loss pursuant to s.131 MACA and the claim involves other issues of complexity,
(g) whether the claim involves issues of liability including issues of contributory negligence, fault and/or causation,
(h) whether the claimant or a witness, considered by the Assessor (now Member) to be a material witness, resides outside New South Wales,
(i) whether the claimant or insurer seeks to proceed against one or more non-CTP parties, and/or
(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.

The CAG repeats what is also contained in Rule 99 Personal Injury Commission Rules 2021 which also applies.

9.2.6 CONTRACTING OUT

While it is possible to contract out of MACR 2020 (generally see the decision of *Todorovska v Brydens Lawyers Pty Ltd* [2022] NSWCA 47 (29 March 2022) particularly [49]-[58]), reg.8 MACR 2020 mandates stringent requirements be met.

Regulation 8(1) MACR 2020 permits a legal practitioner to contract out of the maximum costs set in Schedule 1 MACR 2020 where a legal practitioner:

(a) makes a disclosure under Part 4.3 Division 3 LPUL to a party to the matter with respect to the costs, and
(b) enters into a costs agreement with that party as to those costs in accordance with Part 4.3 Division 4, and
(c) before entering into the costs agreement, advises the party in a separate written document that, even if costs are awarded in favour of the party, the party will be liable to pay the amount of the costs provided for in the costs agreement that exceeds the amount that would be payable under the Act in the absence of a costs agreement, and
(d) where the party is a claimant - provides to the Authority, at the time and in the way approved by the Authority, a costs breakdown in relation to the claim when the claim is finalised, and
(e) the amount paid in resolution of the claim by way of settlement or an award of damages is more than $50,000.

It must be noted that under ss.181 and 182 LPUL (which came into force for instructions after 1 July 2015), conditional costs agreements may provide for the payment of an uplift fee. However, reg.8(5) MACR 2020 specifically provides that a costs agreement for work under MACR is only enforceable if there is **no** uplift fee included (described in reg.8(5) as "*payment of a premium on the successful outcome of the matter concerned*.").

The maximum amounts in the Schedule apply to both law practice/client and ordered costs unless the legal practitioner contracts out of the scale. Accordingly, legal practitioners will be limited to the scale, unless they properly contract out of it.

To contract out, the legal practitioner must give prior, separate, written advice that the client will be liable for the "gap" between ordered costs and law practice/client costs. This is in addition to the disclosure required under of Part 4.3 Division 3 LPUL.

The advice must be in a separate document to the costs agreement. 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, particularly in complex claims and 'exempt matters' where the gap will be substantial and could significantly affect the client's "in hand" result.

Exceptions to disclosure are contained in s.174(4) LPUL. In effect, there are now no exceptions to the requirement for disclosure in motor accident claims under MACA.

Legal practitioners are reminded that disclosure under the LPUL also requires that an estimate be given and be updated.

The legal practitioner must enter into a costs agreement within the meaning of the LPUL. This means the agreement must be in writing.

Even if there is a viable contracting out disclosure, the amount paid in resolution of the claim must be more than $50,000.

Where a legal practitioner enters into a conditional costs agreement containing a success premium, the practitioner will be limited to the Schedule fees.

9.2.7 MAXIMUM COSTS

Even where a claimant's legal practitioner contracts out of Schedule 1 costs, the maximum costs recoverable in the matter on a law practice/client basis are fixed at the amount calculated by subtracting $50,000 from the 'amount paid in resolution of the claim'.

The 'amount paid in resolution of the claim' includes any costs payable on an ordered costs basis (reg.8(3) MACR 2020). The maximum costs includes all legal services provided in the course of the claim during the period commencing on the acceptance of the retainer and ending on the resolution of the claim (reg.8(4) MACR 2020).

These restrictions do not apply to an insurer's legal practitioner's costs.

9.2.8 ASSESSMENT OF COSTS

Section 94A MACA applies to claims made on or after 1 October 2008 and empowers the Commission to assess costs.

Regulation 13 provides that the Commission can assess costs for legal services referred to in Schedule 1 and fees for medico-legal services set out in Schedule 2.

9.3 COSTS UNDER THE *MOTOR ACCIDENTS INJURIES ACT 2017* (NSW)

9.3.1 COVERAGE OF THE MAIA

The *Motor Accidents Injuries Act 2017* (MAIA), which commenced on 1 December 2017, applies to accidents occurring on or after 1 December 2017 (s.1.8 MAIA).

MAIA applies in respect of the death of or injuries to a person that is caused by the fault of the owner or driver of a motor vehicle (as defined in Part 1, Division 1.3 MAIA). Unlike MACA, MAIA provides for both:

- statutory benefits claims, and
- claims for damages.

9.3.2 COSTS FRAMEWORK UNDER MAIA

9.3.2.1 MAXIMUM COSTS

Part 8 MAIA provides for regulations that can:

- fix maximum costs for legal services to a claimant and insurer (s.8.3(1)(a))
- fix maximum costs for non-legal services related to any proceedings in any motor accidents matter, for example, expenses for investigations, for witnesses or for medical reports (s.8.3(1)(b))
- declare that *no costs* are payable for legal services or other matters of a kind specified in the regulations (s.8.3(1)(c))
- fix maximum costs for legal services provided to a claimant by reference to the amount recovered by the claimant (s.8.3(2))

- fix maximum fees for the provision by health practitioners of the provision of any medical report for use in the assessment of a claim, for use in court proceedings in connection with a claim, for use in a medical assessment by a medical assessor or in a merit review under the Act
- fix maximum costs and expenses recoverable by a claimant in a statutory benefits claim (including any matters for which no costs and expenses are recoverable from the insurer) (see s.8.10(2)).

Section 8.3(6) MAIA provides that the regulations fixing maximum costs prevail over the legal costs legislation (as defined in s.3A LPULAA), to the extent of any inconsistency.

9.3.2.2 CLAIMS FOR STATUTORY BENEFITS

Section 8.10 MAIA provides that in relation to statutory benefit claims:

- The regulations may make provision for or with respect to fixing the maximum costs and expenses recoverable by a claimant (including any matters for which no costs and expenses are recoverable from the insurer).
- A claimant for statutory benefits is (subject to the section) entitled to recover from the insurer against whom the claim is made the reasonable and necessary legal costs, and other costs and expenses (including the cost of medical and other tests and reports), incurred by the claimant in connection with the claim but only where the payment of those costs is permitted by the regulations or the Commission.
- The Commission can permit payment of legal costs incurred by a claimant but only if satisfied that the claimant is a person under legal incapacity, or **exceptional circumstances** exist that justify payment of legal costs incurred by the claimant.
- An insurer is not entitled to recover any legal costs, or other costs and expenses, in relation to the claim, from a claimant for statutory benefits.

Examples of where exceptional circumstances have been found are:

> *Koster v NRMA* [2021] NSWCommission 484, involving a dispute as to the positioning of the insured's vehicle on the road. Due to a lack of independent witnesses the matter required review of a substantial body of material consisting of 243 pages and robust cross-examination which was determined to satisfy exceptional circumstances.
>
> *Radford v QBE Insurance (Australia) Limited* [2021] NSWCommission 477, involving a dispute as to the positioning of the insured's vehicle. It was determined that there were exceptional circumstances in this case as there was a significant factual dispute and failing to give the claimant an opportunity to question the insured driver and the witness would deny the claimant an opportunity to test the evidence of those witnesses and possibly constitute a denial of procedural fairness.

9.3.3 THE REGULATIONS UNDER MAIA

The relevant regulation is the Motor Accident Injuries Regulation 2017 (MAIR). Reference to clauses, unless otherwise stated, refer to the MAIR.

Part 6 deals with costs. Schedules 1, 2 and 3 set out the maximum costs and fees permissible in claims under MAIA.

Regulation 22 provides that Schedule 1 sets out maximum costs recoverable by legal practitioners and claims for legal services provided to a claimant and insurers and other non-legal services related to a motor accidents matter.

Regulation 22(2) provides that costs are to be apportioned where there is a change in legal practitioner retained by a claimant or insurer in a motor accidents matter. Disputes over apportionment are to be determined by the Commission.

Regulation 23 prohibits payment of costs for legal services provided to a claimant or insurer in connection with an application for internal review (under Part 7 MAIA).

Regulation 24 provides that Schedule 1 maximum costs do not apply to a claim that is exempt from assessment under s.7.34 MAIA. The exclusion extends to costs incurred before the matter became exempt (reg.24(2)).

Maximum costs for claims for damages made by minors are provided in Clause 26. Determination of the maximum is determined by the amount paid in resolution of the claim (see reg.26(5) and (8)). Where the amount of resolution is more than $75,000 the maximum amounts specified do not apply.

Regulation 28 limits costs for medical practitioners for medical reports and appearance as a witness.

Regulation 33 fixes the amount recoverable by claimants to attend a medical assessment arranged by the Commission or an insurer's health related examination, rehabilitation assessment, functional and vocational capacity assessment, or any other assessment under s.6.27 MAIA to $0.66 per kilometre.

Regulation 35 permits increase of Schedule 1 fees by an amount up to the amount of GST payable on the supply of the service to which the fee relates.

Costs not regulated by Part 6 are set out in reg.20 and include:

(a) fees for accident investigators' reports or accident reconstruction reports,
(b) fees for accountants' reports,
(c) fees for reports from health practitioners (other than medical practitioners),
(d) fees for other professional reports relating to treatment or rehabilitation (for example, architects' reports concerning house modifications),
(e) fees for clinical records of treating health practitioners (including medical practitioners),
(f) fees for interpreter or translation services,
(g) fees for police reports,
(h) fees or charges under the *Government Information (Public Access) Act* 2009,
(i) court fees,
(j) travel costs and expenses of the claimant for attendance at the Commission or a court,
(k) witness expenses at the Commission or a court.

Regulation 25 permits contracting out of Schedule 1 (not Schedule 2) costs under certain conditions for claims for damages only. Contracting out for claims for statutory benefits is prohibited (s.8.3(4) MAIA and reg.25(5)) (see below).

Schedule 1 sets out maximum costs for legal services for statutory benefits claims and claims for damages in two parts:

- Part 1 - Dispute Resolution (set out by type of dispute, type of assessment or method of resolution) in respect of which cls.1, 2, 3 and 6 apply to statutory benefits claims and the balance applies to claims for damages.
- Part 2 - Additional cost for claims for damages.

Schedule 2 sets out maximum fees for health practitioner provided services including appearances as witnesses, medical report fees and cancellation fees.

Schedule 3 provides for adjustment of maximum costs and fees for inflation.

9.3.3.1 Schedule 1 Maximum costs for legal services

Schedule 1, Part 1 sets out maximum costs defined by the dispute resolution method or dispute type. A maximum number of *monetary units* are assigned depending on the categorisation of the dispute and/or matter.

Matters are defined as:

1. ***regulated merit review matters*** including ***reviews of decisions by a review panel*** (Schedule 1, Part 1, 1)
2. ***medical assessment matters*** including ***referrals for further assessment*** and ***reviews by a medical review panel*** (Schedule 1, Part 1, 2)
3. ***regulated miscellaneous claims assessment matters*** (Schedule 1, Part 1, 3)
4. ***claims assessment matters*** (Schedule 1, Part 1, 4)
5. ***Court proceedings*** (Schedule 1, Part 1, 5)
6. ***Compensation matter applications*** (Applications involving federal jurisdiction to be made to the District Court) (Schedule 1, Part 1, 6)

Categories numbered 1, 2 and 3 are related to statutory benefits disputes whereas categories 4 and 5 relate to damages claims. Category 6 applies to both statutory benefits and damages disputes.

The Schedule provides the maximum monetary units (or a range of monetary units) and the conditions under which legal services will be paid for claimants and insurers. For adjustment year 2023 - 2024, a monetary unit for the purposes of MAIR is $119.96. (refer Schedule 3, 2)

Schedule 1, Part 2 sets out the ***maximum additional costs for claims for damages*** based on the stage at which the matter resolves to be paid in addition to the maximum costs set out in Schedule 1, Part 1. Table A sets out the maximum costs for stages of resolution of claim - general, and Table B sets out the maximum costs for stages of resolution of claim where the legal practitioner is first retained after claims assessment.

Schedule 1, Part 2, 3 sets out ***country loadings*** for advocates required to travel in respect of hearings of proceedings outside of the area where a legal practitioner has principal chambers or offices. Part 2, 4 sets out ***interstate loadings*** where travel is required in respect of proceedings heard in another state or territory.

Regulation 23A declares that law practice/client costs are not payable in a *compensation matter application* which relates to federal jurisdiction disputes in the District Court.

Schedule 1 includes maximum fees for Counsel but only in court proceedings.

9.3.3.2 Schedule 2 Maximum fees for medico-legal services

Schedule 2 sets out the maximum costs for medico-legal services provided by health practitioners including appearance as a witness, medical reports and cancellation fees based on monetary units. Travel allowance for appearance as a witness can be charged at $0.66 per kilometre. A medical practitioner can charge $1.00 per page for copying medical reports. (Item 9).

For adjustment year 2024 - 2025, a monetary unit for the purposes of MAIR is $124.53, (refer Schedule 3, 2 for all adjustment years)

9.3.3.3 Schedule 3 Adjustment of maximum costs and fees for inflation

Schedule 3 sets out the calculation method for determination of the value of a monetary unit for the purposes of the regulation. Adjustments are calculated on 1 October each year.

Schedule 3, 3 specifies that the amount of maximum costs or fees by reference to a monetary unit is to be rounded to the nearest dollar (and an amount of 50 cents is to be rounded down).

9.3.4 EFFECT OF THE MAIR

The MAIR has the following effects:

For accidents that occurred on or 1 December 2017

- it applies fee schedules which set maximum recoverable costs and medico-legal fees
- provides for contracting out of the Schedule 1 costs in claims for damages only
- exempts certain types of matters from maximum costs.

Rolls up expenses usually separately claimed

The fee schedule regulates the maximum amounts for both legal practitioner costs and counsel's fees. It also affects medico-legal and expert fees (see below).

Section 8.1(2) MAIA expressly provides that expressions in Part 8 (Costs and fees) (and consequently expressions used in Part 6 MAIR) have the same meaning when used in relation to legal costs in the legal profession legislation (as defined in s.3A LPULAA) except where otherwise provided. This means "costs" is an inclusive term that includes legal practitioner costs and counsel's fees and the expenses that are usually separately charged, such as copying, faxes, phone, and travel.

Bases legal practitioner's costs on dispute or assessment type

Costs for legal services are based on the dispute or assessment type regardless of variables, such as complexity of the issue, or time taken.

If the claimant changes legal practitioners, costs for legal services are to be apportioned between them.

Restricts maximum costs and fees

In claims for damages, where a legal practitioner properly contracts out of Schedule 1 costs, and where the amount paid in resolution of the claim' is more than $75,000, Schedule 1 does not apply. Where the amount paid in resolution of the claim is equal or less than $75,000 the maximum costs recoverable in the matter on a law practice/client basis are fixed at the amount calculated by subtracting $75,000 from the 'amount paid in resolution of the claim'.

The 'amount paid in resolution of the claim' includes any costs payable on an ordered costs basis (reg.25(3)). The maximum costs includes all legal services provided in the course of the claim during the period commencing on the acceptance of the retainer and ending on the resolution of the claim (reg.25(4)).

These restrictions apply both to a claimant's and insurer's legal practitioner.

Allows no costs for certain matters

For internal reviews and some types of matter no costs for legal services are permitted.

A legal practitioner is not entitled to be paid or recover any amount for a legal service or other matter of a particular kind if the regulations declare that no costs are payable for a service or other matter of that kind: s.8.3(3) MAIA.

A legal practitioner is not entitled to be paid or recover legal costs for any legal services provided to a party to a claim for statutory benefits (whether the claimant or the insurer) in connection with the claim unless payment of those legal costs is permitted by the regulations or the Commission.

Fixes medico-legal fees and witness' fees

Schedule 2 fixes maximum amounts for medico-legal services (for reports and attending as witnesses). Section 8.4(2) MAIA provides that a health practitioner is not entitled to be paid or to recover more than any fixed maximum fee.

Schedule 2 applies even if the matter is otherwise considered a matter exempt from assessment under s.7.34 MAIA, as cl.24(1) refers only to Schedule 1.

Limits costs for legal services for medical disputes and miscellaneous claims assessments within a claim

Costs associated with medical disputes are allowed a maximum of 16 MU for each dispute under Divisions 7.5 and 7.6 MAIA, to a maximum of 60 MU per claim, regardless of the number or kind of disputes.

Sets out exemptions

Regulation 24 provides that Schedule 1 fees do ***not*** apply to any matter exempted under s.7.34 MAIA.

Section 7.34 MAIA provides that a claim can be exempt in two ways:

- if the claim is of a kind that is exempt under the regulations ('mandatory exemption', s.7.34(1)(a)), or
- the Commission has made a preliminary assessment of the claim and has determined (with the approval of the President) that the claim is not suitable for assessment ('discretionary exemption', s.7.34(1)(b)).

Regulation 14 provides that the following are mandatorily exempt matters:

(a) a claim in respect of which the claimant is a person under legal incapacity,
(b) a claim involving an action under the *Compensation to Relatives Act* 1897 brought on behalf of a person under legal incapacity,
(c) a claim made against a person other than an insurer,
(d) a claim in connection with which the insurer has, by notice in writing to the claimant, alleged that the claimant has engaged in conduct in contravention of s.6.41 (Fraud on motor accidents injuries scheme) of the Act,
(e) a claim in respect of which the insurer has, by notice in writing to the claimant and to the owner or driver of the motor vehicle to which a third-party policy relates, declined to indemnify the owner or driver under the third-party policy.

Rule 99 Personal Injury Commission Rules 2021 provides that the Commission may consider (but is not limited to) the following when determining whether to exempt a matter from assessment:

(a) whether the claim involves complex legal or factual issues, or complex issues in the assessment of the amount of the claim,
(b) whether the claim involves issues of liability, including contributory negligence, fault, or causation,
(c) whether a claimant or witness, considered by the Commission to be a material witness, resides outside the State,
(d) whether a claimant or insurer seeks to proceed against one or more non-CTP parties,
(e) whether the insurer alleges 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.

Sets maximum costs for claims made by minors

Where the claimant is a minor or an associate of a minor (except in an *exempt minor claim*) and where the amount paid in resolution of the claim is $75,000 or less, reg.26 sets maximum costs for legal services based on the amount paid in resolution of the claim.

Requires mandatory disclosure of costs to the Authority

Where a legal practitioner contracts out it is a condition of Schedule 1 not applying that the practitioner (but only if the party is a claimant) provides to the Authority (SIRA) a costs breakdown in relation to the claim when the claim is finalised. The costs breakdown is to be given in the manner and time prescribed by SIRA: reg.25(1)(d) MAIR

Provides for contracting out in claims for damages only

A legal practitioner cannot contract out of Schedule 1 costs in statutory benefits claims. (See Contracting out below)

9.3.5 CONTRACTING OUT

The requirements under MAIA and MAIR are more onerous than under MACA.

The 'contracting out' provisions only apply to claims for damages. Section 8.3(4) MAIA and reg.25(5) MAIR specifically prohibit contracting out in any matter involving a claim for statutory benefits.

Regulation 25(1) provides that Schedule 1 does not apply to costs in a motor accidents matter to the extent that the costs are payable on a practitioner and client basis if:

(a) "an Australian legal practitioner makes a disclosure under Division 3 of Part 4.3 of the LPUL to a party to the matter with respect to the costs, and
(b) the practitioner enters into a costs agreement (other than a conditional costs agreement, within the meaning of that Part, that provides for the payment of a premium on the successful outcome of the matter concerned) with that party as to those costs in accordance with Division 4 of that Part, and
(c) the practitioner, before entering into the costs agreement, advises the party (in a separate written document) that, even if costs are awarded in favour of the party, the party will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the Act in the absence of a costs agreement, and
(d) the practitioner (but only if the party is a claimant) provides to the Authority, in the manner and time approved by the Authority, a costs breakdown in relation to the claim when the claim is finalised, and
(e) the amount paid in resolution of the claim by way of settlement or an award of damages is more than **$75,000**."

Under ss.181 and 182 LPUL, conditional costs agreements may provide for the payment of an uplift fee. However, reg.25(1)(b) MAIR specifically provides that a costs agreement is only enforceable if there is **no** uplift fee included (described in reg.25(1)(b) MAIR as "*payment of a premium on the successful outcome of the matter concerned*").

The maximum amounts in Schedule 1 apply to both law practice/client and ordered costs unless the legal practitioner contracts out of the scale. Accordingly, practitioners will be limited to the scale, unless they properly contract out of it.

To contract out, the legal practitioner must give prior, separate, written advice that the claimant will be liable for the "gap" between ordered costs and law practice/client costs. This is in addition to the disclosure required under Division 3 of Part 4.3 LPUL.

The advice must be in a separate document to the costs agreement. 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, particularly in complex claims and 'exempt matters' where the gap will be substantial and could significantly affect the client's "in hand" result.

The legal practitioner must enter into a costs agreement within the meaning of the LPUL. This means the agreement must be in writing. See the Decision of *Todorovski v Brydens Lawyers Pty Ltd* [2022] NSWCA 47 for a detailed consideration of the high expectations placed on a legal practitioner when explaining the costs agreement.

Even if there is a viable contracting out disclosure, the "amount paid in resolution of the claim" must be more than $75,000 (cf $50,000 under MACA). Regulation 25(3) MAIR defines "amount paid in resolution of a claim" as including any amount "payable in connection with a claim on a party and party basis" (i.e. Schedule 1 costs and Schedule 2 fees).

The legal practitioner must provide a costs breakdown to SIRA in the approved form when a claim is finalised.

Where a legal practitioner enters into a conditional costs agreement which contains a success premium, the practitioner will be limited to the Schedule fees.

Legal practitioners are reminded that disclosure under the LPUL also requires that an estimate be given and be updated.

9.3.6 ASSESSMENT OF COSTS

Section 8.6 MAIA provides that the regulations may make provisions for or with respect to the assessment or taxation of costs.

Regulation 22 authorises the President of the Commission to determines disputes relating to Schedule 1 costs:

- if the dispute arose in a matter involving a claim for statutory benefits, by a merit reviewer, or
- if the dispute arose in a matter involving a claim for damages, by a member of the Commission assigned to the Motor Accidents Division of the Commission.

Rule 118 Personal Injury Commission Rules 2021 permits a merit reviewer to include an assessment of the legal costs for a merit review matter arising in a statutory benefits claim in the certificate of determination and statement of reasons used under s.7.13(4) MAIA.

9.4 MANDATORY REPORTING OF COSTS TO AUTHORITY

From 1 October 2015, a legal practitioner representing a claimant with a CTP claim where there has been contracting out of schedule costs for legal services must provide SIRA with a breakdown of costs when the claim is finalised.

Why must this information be reported?

The reporting of costs is required by regs.8(d) and 24 MACR, and regs.25(1)(d) and 40 MAIR. Legal practitioners must comply with this requirement under the Regulations. The information is used to determine efficiency of the schemes and SIRA can publish statistics produced from the information provided.

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 timeframe will be monitored by SIRA.

What should you 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.

CHAPTER 10
COSTS IN FAMILY LAW MATTERS

The following legislation is relevant to this Chapter:
Legal Profession Uniform Law (NSW) 2014 (NSW) (LPUL)
Family Law Act 1975 (Cth) (FLA)
Federal Circuit and Family Court of Australia Act 2021 (Cth) (FCFCOA Act)
Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) (FCFCOAR)
Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 (Cth) (FCFCOA2R)
Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021 (Cth)

Prior legislation referred to:
Legal Profession Act 2004 (NSW) (LPA 2004)
Legal Profession Regulation 2005 (NSW) (LPR)
Family Law Rules 2004 (Cth) (FLR)

Handy links:
Federal Circuit and Family Court of Australia: Costs - Procedure for quantification and assessment of party/party costs orders and Legal Costs in Family Law Matters
Federal Circuit and Family Court of Australia: Form for Itemised Costs Account
Federal Circuit and Family Court of Australia: Chapter 12 Costs Notice

10.1 INTRODUCTION

The Federal Circuit and Family Court of Australia (FCFCOA) is fundamentally different to almost all other courts and tribunals in Australia because costs do not follow the event in family law matters. Rather, s.117(1) *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 FCFCOA 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 has the power to award costs if the circumstances warrant such an order. Section 117(2A) 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.

10.2 COURT MERGER AND RELEVANT LEGISLATION

On 1 September 2021, the Federal Circuit Court of Australia and the Family Court of Australia merged forming the FCFCOA. A common set of Court rules and forms was created for family law matters and the following legislation was enacted:

- *Federal Circuit and Family Court of Australia Act 2021* (Cth) (the FCFCOA Act)
- *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) (FCFCOAR)
- *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth)

The FCFCOA consists of two divisions, being

1. Division 1: Family Court of Australia, dealing with family law matters only
2. Division 2: Federal Circuit Court of Australia, dealing with family law, migration and other general federal law proceedings.

Chapter 19 *Family Law Rules 2004* (Cth) (FLR) (which came into effect on 1 July 2008) was superseded on 1 September 2021 when the FCFCOAR took effect.

The rules governing costs in family law matters are set out in Chapter 12 FCFCOAR (formerly Chapter 19 FLR) and Part 4 *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (Cth) (FCFCOA2R).

10.3 LAW PRACTICE/CLIENT COSTS

The FCFCOA does not oversee a client's private fee arrangement with their legal practitioner however 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 *Legal Profession Uniform Law 2014* (NSW) (LPUL) and a costs agreement that complies with this Act. See Chapter 2 of the Costs Guidebook which deals with Disclosure, Costs Agreements and Billing. A precedent for costs disclosure and costs agreement can be found in the Appendices and on the Law Society's website.

Chapter 12 FCFCOAR (and rule 12.01(1)(b) specifically) creates a duty for lawyers to give information about costs to their clients. Chapter 12 also contains disclosure requirements with respect to costs as between law practice and client.

1. 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 12.05).
2. Unless the Court otherwise orders, practitioners are required to provide a Costs Notice to a client prior to all court events, except in an appeal to which Chapter 13 applies (rule 12.06(1)).
3. Not less than 1 day before each court event, practitioners must give the client written notice of the actual costs and expenses incurred to date, the anticipated future costs and details of any expenses paid or payable to an expert witness, or an estimate of the expenses (rule 12.06(2)).
4. Not less than 1 day before each court event, practitioners must serve the notice on the other party/other party's lawyers (rule 12.06(3).

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 3 of the Costs Guidebook which deals with assessment of uniform law costs (formerly known as law practice/client costs).

If a practitioner does not disclose as required in a matter in New South Wales, costs will be assessed in accordance with the provisions of s.172 LPUL, according to the fair and reasonable value of the legal services provided.

10.4 PARTY/PARTY COSTS

10.4.1 PARTY/PARTY COSTS

Disputes between parties about costs are dealt with by the Court Registrars. The procedure for quantification and assessment of party/party costs is set out in Chapter 12 FCFCOAR. Information published by the court can be found at https://www.fcfcoa.gov.au/fl/costs and https://www.fcfcoa.gov.au/fl/pubs/legal-costs.

Part 12.4 FCFCOAR also imposes some overriding principles for the management of legal costs such that legal costs are to be fair, reasonable and proportionate (rule 12.08). A list of the matters to be taken into account by the court when making such a determination are also set out in rule 12.08. Rule 12.08(5) expressly states that in an application for ordered costs, a cancellation fee charged by a legal practitioner is taken not to be reasonable.

10.4.2 HOW ARE COSTS CALCULATED

Costs on party/party basis

Amounts payable under a costs order, unless the court orders otherwise, are calculated:

1. For costs in Division 1: the scale of costs in Schedule 3 FCFCOAR.
2. For costs in Division 2: the scale of costs in Schedule 1 FCFCOAR, or the scale of costs in Schedule 3 FCFCOAR.

The court can 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: Rule 12.17 FCFCOAR.

Division 12.4.2 of Chapter 12 FCFCOAR provides for the court to make maximum costs orders in certain circumstances upon the filing of an Application in a Proceeding supported by an affidavit.

Costs on indemnity basis

While neither ss. 117(2) or 117(2A) 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 12.17(1)(b) FCFCOAR provides that the court may make an order that a party is entitled to costs assessed on a particular basis including "*solicitor and client or indemnity*". In either case, the costs set out in Schedule 3 FCFCOAR may not apply, and such costs are usually allowed in accordance with any costs agreement between the law practice and client.

Costs consequence of a failure to comply with orders and other obligations that affect children

Section 70NDC FLA is listed within Division 13A of Part VII and states that if the Court does not make an order under s70NDB (order compensating a person for time lost) then the Court may make an order that the person who brought the proceedings pay some or all of the costs of another party or parties to the proceedings.

10.5 COSTS ASSESSMENT PROCESS

10.5.1 ITEMISED COSTS ACCOUNTS

Bills of costs in the FCFCOA are known as Itemised Costs Accounts. The form for an Itemised Costs Account is on the FCFCOA 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 appears at the front of the Itemised Costs Account.

Rule 12.35 FCFCOAR sets out the requirements for an Itemised Costs Account.

10.5.2 SERVING AN ITEMISED COSTS ACCOUNT

An Itemised Costs Account is served on the person liable to pay the costs **within four months** after the end of the case (rule 12.34 FCFCOAR). Time is therefore of the essence when preparing an Itemised Costs Account.

A lawyer must give a Costs Notice when serving an Itemised Costs Account (rule 12.34(2)). The Costs Notice can be found at https://www.fcfcoa.gov.au/fl/pubs/ch12-costs

10.5.3 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 Notice Disputing Itemised Costs Account (rule 12.36 FCFCOAR). If no Notice Disputing Itemised Costs Account is received, and the costs are not paid, the person entitled to the costs can seek a costs assessment order (rule 12.50).

Rule 12.37 FCFCOAR 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 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 15.06 FCFCOAR, 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 Itemised Costs Account (rule 12.39). The court may fix a date for a settlement conference to facilitate negotiations and where the parties will identify the issues in dispute (rule 12.41).

The relevant forms can be found at https://www.fcfcoa.gov.au/fl/forms

10.5.4 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 12.42 FCFCOAR). If there is no objection to the amount assessed, the Registrar will make a costs assessment order for this amount (rule 12.44).

10.5.5 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% 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 12.43 FCFCOAR).

Assessment principles in family law matters

Principles applicable to party/party costs are set out in Chapter 12 FCFCOAR.

Rule 12.47 FCFCOAR 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 FCFCOAR and Part 2 of Schedule 3 relating to counsel's fees: Rule 12.18 FCFCOAR

If the court has ordered costs on an indemnity basis, the Registrar must allow, as set out in rule 12.47(2) FCFCOAR, all costs reasonably incurred and of a reasonable amount having regard to, among other things:

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

An assessment hearing is heard before the Registrar (rule 12.45). The Registrar must:

- determine the amount (if any) to be deducted from each item included in the Notice Disputing Itemised Costs Account
- 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 1 under rule 12.45(3) states: "*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*."

10.5.6 REVIEW

A party may seek a review of a costs assessment order by filing, within 14 days of the costs assessment order, an Application for Review. The form must be supported by an affidavit stating the item number of the Itemised Costs Account to which the party objects to the Registrar's decision, the reason for the objection and the decision sought from the court (rules 12.52 and 12.53 FCFCOAR).

10.5.7 COSTS OF ASSESSMENT

Registrars have the power at an assessment hearing to make an order for costs (rule 12.46 FCFCOAR).

The party objecting to a preliminary assessment may be ordered to pay the other party's costs of the assessment from the date of giving written notice of the objection to the Registrar and other party, unless the Itemised Costs Account is assessed with a variation in the objecting party's favour of at least 20% of the preliminary assessment amount (rule 12.43).

CHAPTER 11
COSTS IN THE FEDERAL COURT

Handy links:

- *Bankruptcy Act 1966 (Cth)*
- *Corporations Act 2001 (Cth)*
- Costs Practice Note (GPN-COSTS)
- *Fair Work Act 2009* (Cth) (FWA)
- *Federal Court Act 1976* (Cth) (FCA)
- Federal Court Rules 2011 (Cth) (FCR)
- Federal Court (Bankruptcy) Rules 2016 (Cth)
- *Legal Profession Uniform Law (NSW) 2014* (NSW) (LPUL)
- *Native Title Act 1993* (Cth)

11.1 INTRODUCTION

The Federal Court of Australia does not have jurisdiction over costs between a law practice and a client but the *Federal Court Rules 2011* (Cth) (FCR) make provision for the Court to order the taxation or assessment of costs as between party and party or to fix the sum of costs payable as a lump sum.

The Chief Justice issued a practice note that applies to proceedings in the Court on 25 October 2016, Costs Practice Note (GPN-COSTS).

GPN-COSTS applies to all proceedings in the Federal Court but states at 2.2 that in certain areas, specific considerations may apply in respect of costs including:

(a) in relation to costs generally – see s.43 *Federal Court Act 1976* (Cth) (FCA);
(b) Class Actions – see for example ss.43(1A), 33ZJ, 33V(2) and 33ZF FCA;
(c) Fair Work matters - see for example s.570 *Fair Work Act 2009* (Cth); and
(d) Native Title matters - see for example s.85A *Native Title Act 1993* (Cth).

11.2 LAW PRACTICE/CLIENT COSTS

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 *Legal Profession Uniform Law 2014* (NSW) (LPUL) and a costs agreement that complies with this Act. See Chapter 2 of the Costs Guidebook that deals with Disclosure, Costs Agreements and Billing. A precedent for costs disclosure and costs agreement can be found in the Appendices and on the Law Society's website.

A dispute between a practitioner and a client about costs charged by the practitioner in a Federal Court 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 3 of the Costs Guidebook, which deals with costs assessment under the uniform law costs (formerly known as law practice/client costs).

11.3 PARTY/PARTY COSTS

11.3.1 PART 40 FEDERAL COURT RULES – PARTY/PARTY COSTS

Disputes between parties about costs are dealt with by the Federal Court Registrars, in accordance with the provisions in Part 40 FCR.

GPN-COSTS states that the Court recognises that the procedure for determining the quantum of costs should not be delayed and should be as inexpensive and as efficient as possible and the Court expects the parties to make genuine effort to resolve costs by negotiation. The Court will encourage parties to utilise different costs orders and procedures including lump sum orders (see below), consolidated costs orders (see below), estimate processes and alternative dispute resolution.

General costs principles are set out in paragraphs 3.13 to 3.17 of GPN-COSTS and notes that the purpose of a costs order is to compensate the successful party rather than to punish the unsuccessful party. Parties should be realistic in their claims for cost and neither party should seek to obtain a windfall from any costs process.

The procedure for quantification and taxation or assessment of party/party costs ordered by the Federal Court, where a lump-sum costs order has not been made, is set out in Part 40 FCR.

11.3.2 HOW ARE COSTS CALCULATED

11.3.2.1 Party/party costs

Unless the court orders otherwise, party/party costs are calculated in accordance with scale of costs at Schedule 3 FCR. The court can also order that a party is entitled to costs an indemnity basis, be awarded as a lump-sum or be determined other than by taxation (including be reference to a costs assessment process operating under the law of a State or Territory).

Costs as between party and party are defined in the Dictionary in Schedule 1 to the FCR as being only the costs that have been fairly and reasonably incurred by the party in the conduct of the litigation.

11.3.2.2 Indemnity costs

Rule 40.02 FCR provides that the court may make an order that a party is entitled to costs on an indemnity basis.

Costs on an indemnity basis are defined in the Dictionary to mean costs as a complete indemnity against the costs incurred by the party in the proceeding, provided that they do not include any amount shown by the party liable to pay them to have been incurred unreasonably in the interests of the party incurring them.

In this case, the costs set out in Schedule 3 FCR do not apply, and such costs are usually allowed in accordance with any costs agreement between the practitioner and client.

11.3.2.3 Bills of Costs

An itemised or long form bill of costs should be prepared in accordance with Form 127 and the example bill of costs on the Federal Court website.

A guide to preparing a bill of costs is set out in Annexure B to GPN-COSTS.

A bill of costs is a court document and must specify each item of costs and disbursements claimed with copies of invoices for disbursements incurred annexed. The bill must contain a statement or disclosure as to whether the Costs Applicant has an entitlement to claim GST – see paragraphs 6.2 to 6.8 of GPN-COSTS.

Rule 40.18 sets out the requirements for an itemised bill of costs.

Short form bills of costs may be filed in respect of:

(a) an application to wind up a corporation under the *Corporations Act 2001* (Cth) (rules 40.41 and 40.42 FCR);
(b) appeals from a judgment of the Federal Circuit and Family Court of Australia (Division 2) relating to a migration decision (rule 40.43 FCR); and
(c) a creditor's petition under the *Bankruptcy Act 1966* (Cth) (rule 13.03 Federal Court (Bankruptcy) Rules 2016 (Cth)).
(d) Short form bills of costs claim lump sum amounts allowed under items 13, 14 or 15 of the scale of costs at Schedule 3 FCR and disbursements.

11.3.3 FILING AND SERVING A BILL OF COSTS

A bill of costs is filed in the Registry and a filing fee paid.

The Costs Applicant must serve the bill on each party interested in the bill (as defined in the Dictionary to the FCR as a party or a person in whose favour or against whom an order for costs has been made) as soon as practicable after it has been filed and advise the Registry in writing of the same.

11.3.4 ESTIMATE OF COSTS PROCESS

A summary of the estimate process is set out from paragraph 5.11 of GPN-COSTS.

When an itemised bill of costs is filed, it will be allocated to a Registrar of the Court to make an estimate of the approximate total for which, if the bill was taxed, would be allowed. This process must take place before any taxation hearing can occur (rule 40.20(1)).

The Court will endorse the bill and inform the parties of the anticipated date by which the Registrar will provide the estimate. The estimate is done in the absence of the parties and without any submissions from either party, generally within about 30 to 60 days from the filing of the bill. The estimate is not a line-by-line assessment or determination of the costs claimed in the bill but rather is a single figure amount that would be the likely outcome if the bill was taxed.

The Court will send a letter to the parties informing them of the amount of the estimate once done. If the parties accept the estimate, the amount of the estimate is the amount for which a certificate of taxation will be issued: Rule 20.40.20(4) FCR.

If a party interested in the bill wants to object to the estimate, they must, within 21 days after the issue of the notice of the estimate, file a notice of objection in accordance with Form 128 and pay an amount of $2,000 into the Litigant's Fund (managed by the Court) as security for the costs of the taxation of the bill: Rule 40.21.

The Registrar will usually, upon receipt of such notice of objection and payment, direct the parties to attend before a Registrar for a confidential conference. The purpose of the conference is to identify the real issues in dispute and reach a resolution of the dispute and is usually conducted in the same manner as a mediation.

The Registrar may, in exceptional circumstances, direct that a provisional taxation be conducted or that the matter be set down for a taxation hearing without a confidential conference.

11.3.5 PROCEDURE FOR TAXATION OF COSTS

If a costs dispute is not resolved by negotiation at the confidential conference, the Registrar will give notice to the parties that the matter is to be set down for a taxation hearing.

Upon receipt of such notice, a party on whom the bill has been served and who wants to object to any item in the bill, must file and serve a notice of objection on the parties interested in the bill no later than 14 days before the date of the taxation. This notice must be in accordance with Form 130 and identify the item disputed and the basis of the objection: Rule 40.25.

The party who filed the bill, must file and serve a notice of response to a notice of objection stating whether each objection is admitted or opposed and the basis of the opposition. The notice of response must be filed and served on the party who has given a notice of objection within 5 days before the date of the taxation hearing: Rule 40.26.

If no notice of objection is filed in accordance with Rule 40.25, then only the party who filed the bill may attend the taxation hearing. If a notice of objection is filed, only the party who filed the notice of objection and the party who has filed the notice or response may attend. Each party is bound by the notice of objection and notice of response and each party is usually allowed to make oral submissions to the Registrar: Rule 40.27.

At the taxation hearing, which is held in person (or on Teams), the Registrar has power to administer oaths, examine witnesses and direct the production of documents (usually the file material of the party claiming costs) The Registrar will tax the bill in accordance with the provisions of Part 40 FCR and upon completion, issue a certificate of taxation: Rules 40.27 and 40.28.

The party who files an objection to the estimate under Rule 40.21 must pay the costs of the taxation unless they better their position on taxation by 15% or more (from the amount of the estimate). A party may apply to the Registrar to be relieved of this obligation in certain circumstances: Rule 40.33.

If either party is dissatisfied with the outcome of the taxation, they may apply to the Court for a review of the taxation and any consequential orders: Rule 40.34.

11.4 LUMP-SUM COSTS

11.4.1 LUMP-SUM COSTS – USUAL PROCEDURE

As outlined in paragraph 4 of GPN-COSTS, the Court's preference where it is practical and appropriate to do so, is to make a lump-sum costs order, however this will always be at the discretion of the Judge.

The intention of the lump-sum process is to streamline and expedite the determination of the quantum of costs question and not to replicate the taxation process. Parties are encouraged to co-operate and attempt to narrow the issues in dispute and resolve the costs by negotiation if possible.

In lengthy and complex matters, the costs hearing dealing with lump-sum costs should take place within 6 weeks of the determination of the entitlement to costs. In some simpler matters, it may be appropriate to address lump-sum costs matters before or immediately after the determination of the entitlement to costs.

The Court will usually engage the assistance of a Registrar of the Court and fix a timetable for the filing of the relevant material. In some cases, the Registrar may sit with the Judge at the costs hearing and in other cases the Registrar may be appointed as a Referee.

There is no formal application for a lump-sum costs order and the usual documents relied on by the parties are set out below.

The Costs Applicant files an affidavit in support of the lump-sum claim called a "Costs Summary". This affidavit is often sworn by the solicitor with carriage of the proceeding for the Costs Applicant. The Costs Summary must be clear and concise and set out the claim for costs. It should not resemble a bill of costs and should not contain submissions on the law.

The deponent of the Costs Summary affidavit must verify that they have read the GPN-COSTS, that they are not claiming more costs than the Costs Applicant is liable to pay, GST entitlement and that the calculations are correct. The Costs Applicant must state if the Costs Summary was prepared with the assistance of a costs expert. The matters to be addressed are set out in Annexure A to GPN-COSTS "Guide for Preparing a Costs Summary".

The Costs Summary is generally no longer than 5 pages (omitting formal parts) and in more complex cases, up to 10 pages. Source material such as invoices or time records are not exhibited to the Costs Summary but must be available at the costs hearing.

The Costs Respondent may file an affidavit responding to the claims in the Costs Summary – this document is called a "Costs Response" and must also be clear and concise and should not resemble a notice of objections nor contain submissions. The usual page limit for a Costs Response is 4 pages (omitting formal parts) or 8 pages in a large or complex matter. The affidavit annexing the Costs Response is often made by the solicitor with the carriage of the proceeding for the paying party.

In some instances, the timetable may permit the Costs Applicant to file an affidavit in reply briefly addressing the Costs Response. Parties are usually permitted to file short written submissions addressing the law of not more than 3 pages.

In some cases, there will be a formal costs hearing and in other cases, particularly where a Registrar has been appointed as a Referee, a determination will be made on the papers.

If you are not familiar with the lump-sum process, it is recommended that you obtain the assistance of a costs expert to help.

11.4.2 LUMP-SUM COSTS – GENERAL PRINCIPLES

As outlined above, the Court's preference, wherever it is practicable and appropriate to do so, is for the making of a lump-sum costs order. As it was said in *Innes v AAL Aviation Limited (No 2)* [2018] FCAFC 130 per Tracey, Bromberg, and White JJ:

> "12. The general power of the Court to award costs is found in s 43(1) of the *Federal Court of Australia Act* 1976 (Cth) (the FCA Act). Section 43(3)(d) contains an express power to award a party costs "in a specified sum". In addition, r 40.02 of the Federal Court Rules 2011 (Cth) (the FCR) permits a person entitled to costs to apply for an order that the costs "be awarded in a lump sum, instead of, or in addition to, any taxed costs". The purpose of these provisions is the avoidance of the expense, delay and aggravation involved in protracted litigation arising out of taxation: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119 at 120; *Paciocco v Australia and New Zealand Banking Group Ltd (No 2)* [2017] FCAFC 146; (2017) 253 FCR 403 at [15].

Various rules under Part 40 of FCR set out the relevant matters for consideration.

Where the Court fixes costs on a lump sum basis, the authorities make it clear that it is not to conduct a detailed taxation. The task is not one of "arithmetic calculation or precision"; rather, it requires "the application of a much broader brush than that applied on taxation", and must be approached in a way that is "logical, fair and reasonable": *Nine Films & Television v Ninox Television Ltd* [2006] FCA 1046 at [8] per Tamberlin J.

However, when considering costs on a lump-sum basis, Rule 40.29 (Costs to be allowed on taxation), Rule 40.30 (Costs not to be allowed on taxation) and Rule 40.31 (Exercise of a taxing officers discretion) are all relevant considerations. For instance, it is open to the Court, when considering such an order, to have regard to any applicable scale of costs which regulates the recoverable amount on a party/party basis (see *Seven Network Limited v News Limited* [2007] FCA 2059 at [25(iv)-(v)] per Sackville J). It would be contrary to s.37M FCA if the more expeditious process contemplated by the lump sum procedure resulted in either a successful or an unsuccessful party being exposed to an assessment of costs which simply ignores or overrides the basic principles applicable to a taxation of costs.

Although an impressionistic discount of the costs actually incurred or estimated may be applied in undertaking this broad- brush approach in order to take into account the contingencies that would be relevant in any formal cost assessment, it is crucial that the court be "astute not to cause an injustice": see *Bitek Pty Ltd v IConnect Pty Ltd* [2012] FCA 506 at [12].

It is also to be appreciated that a lump sum costs order is of considerable benefit to the party seeking the costs, and this provides a reason for adopting a conservative approach in reaching a figure that is fair: *Armstrong Strategic Management and Marketing Pty Limited v Expense Reduction Analysts Group Pty Ltd (No. 10)* [2017] NSWSC 16 per Ball J.

Ultimately, the Court must examine how the evidence before it relates to the charges and estimates made by the successful party's legal representatives. A range of materials and observations, guided by experience, is relevant to the exercise of the discretion. That would include, for instance, taking into account the nature of factual and legal issues in the relevant dispute and broadly, the general course and conduct of litigation to which the costs relate.

11.5 CONSOLIDATED COSTS ORDERS

Paragraphs 3.6 to 3.9 of GPN-COSTS refer to the use of consolidated costs orders where a proceeding has a mix of costs entitlements, often where interlocutory and final costs orders favour opposing parties.

In such circumstances, and if considered appropriate by the Judge, the Court may make a consolidated costs order offsetting one party's costs entitlement against another and awarding the balance in one global costs order on a percentage basis. This will have the effect of avoiding competing costs disputes.

No formal application for such a costs order is required but the party seeking such an order should give written notice to the Court and other parties in advance of any hearing at which the request will be made.

CHAPTER 12
SECURITY FOR COSTS, OFFERS OF COMPROMISE, COSTS ON DISCONTINUANCE

12.1 SECURITY FOR COSTS

12.2 OFFERS OF COMPROMISE

12.3 DISCONTINUANCE

Handy links:

Children and Young Persons (Care and Protection) Act 1998 (NSW)
Corporations Act 2001 (Cth)
Federal Court of Australia Act 1976 (Cth) (FCA)
Legal Profession Act 2004 (NSW) (LPA 2004)
Federal Court Rules 2011 (Cth) (FCR)
Uniform Civil Procedure Rules 2005 (NSW) (UCPR)

12.1 SECURITY FOR COSTS

This chapter provides guidance on:

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

12.1.1 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 *High Court Procedure Act 1921* (Cth):

"*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.*"

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 *Corporations Act 2001* (Cth).

This chapter will concentrate on the NSW and federal jurisdictions:

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

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.

12.1.2 PRINCIPLES FOR DETERMINING WHEN SECURITY WILL BE ORDERED

Under rule 42.21 UCPR, the court may, but need not, order security for costs if:

- 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
- 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 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.

See rule 42.21(1A) 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 impecuniosity or the lack of lack of apparent funds is not itself sufficient to justify ordering security: *Cowell v Taylor* (1885) 31 Ch D 34 at [38] (see rule. 42.21(1B) UCPR). Also see In the matter of 77738930144 Pty Limited (*in liquidation*) (ACN 103 983 777) (*formerly known as Commercial Indemnity Pty Limited*) [2019] NSWSC 626 where the court refused to order security on grounds the plaintiff's impecuniosity was caused by the defendant.

Section 1335(1) *Corporations Act* represents a departure from the common law rule that the impecuniosity 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).

The costs of the application for security should generally be excluded from the costs sought as security – see *Elip Pty Ltd v Arch Finance Pty Ltd* [2020] NSWSC 752 at [99].

Under rule 19.01 FCR, the court may order security in any case but, in deciding whether to do so, the court will consider the following, which the respondent's evidence should address (rule 19.02):

- 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

or any other relevant matter.

In *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* [1995] FCA 56, 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 which is the plaintiff (or in substance the plaintiff such as a defendant joining a third party as a cross-claim defendant) and an order ought not to be made against parties that are defending themselves and thus forced to litigate.

12.1.3 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) UCPR, rule 19.01(1)(a) FCR and s.56(2) FCA), but in practice, is generally payment of a sum into court or into a solicitor's trust account within a stipulated time period. However, an order may be made for a bank guarantee – see *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* [2021] QCA 198.

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).

12.1.4 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 UCPR rules 50.8 and 51.50 (*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 FCR (see rule 36.09 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.

12.2 OFFERS OF COMPROMISE

12.2.1 OFFERS OF COMPROMISE IN NSW AND FEDERAL JURISDICTIONS

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

This caution about offers of compromise under UCPR rule 20.26 was repeated by Garling J in *Farmer v Broadspectrum (Australia) Pty Ltd (No. 3)* [2024] NSWSC 53.

The UCPR (as amended 7 June 2013) 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) 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) 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 UCPR for the cost consequences of offers of compromise.

Offers of compromise in the federal jurisdiction are governed pursuant to Part 25 FCR.

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 of the greater clarity resulting in it being easier to obtain a costs order using an offer of compromise.

12.3 DISCONTINUANCE

12.3.1 WHEN AND HOW A PARTY MAY DISCONTINUE

Under rule 12.1 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 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) FCR).

12.3.2 WHO PAYS THE COSTS ON 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 UCPR; rule 26.12(7) FCR; *Inground Constructions Pty Ltd v FCT (1994)* ATR 513).

Assessment of costs pursuant to a discontinuance is permissible under section 74 (1) *Legal Profession Uniform Law Application Act 2014* (NSW) (LPULAA) which notes an application for assessment may be made by a person who has received or is entitled to receive costs: cf s353(1) and s367A LPA 2004 where a costs order was required. Further, section 75 LPULAA provides "*(1) An assessment of ordered costs must be made in accordance with (a) the terms of the order, rule or award under which the costs are payable*".

The court may, in the exercise of its discretion, 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. (See 12.3.3 below)

Another exception is found in the case of an appeal to the District Court under section 91 *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) UCPR).

12.3.3 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."*
> *"The Court cannot (assess costs where there has been no hearing on the merits by trying) a hypothetical action."*
> *"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."*
> *"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."*

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) [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.