Part 4.3 of the Legal Profession Uniform Law

Legal Services Council and Commissioner for Uniform Legal Services Regulation

28 June 2023

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia **3**
Acknowledgements **4**
Executive summary **4**
Recommendations **6**
Law Council concerns 6
Consultation Paper responses 8
DISCUSSION **9**
The need for, and utility of, a statutorily prescribed disclosure regime **9**
Introduction 9
Cohorts and thresholds 10
The lower threshold 12
The upper threshold 12
Commercial and government clients 14
Large proprietary companies 14
Contracting out 16
Law practices 17
Charitable and non-for-profit organisations 17
High net worth individuals 17
Law practices and corporate legal practitioners 18
Satisfying the main disclosure requirement **18**
Voided costs agreements **24**
Judicial observations 26
Out of time costs assessment applications **29**
Law practices 29
Clients 32
Record keeping **32**

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council is grateful for the contributions and assistance of the Executive Committee and members of the Law Council's Legal Practice Section in the development of this submission.

Executive summary

Legal costs is an area of substantial and complex policy and regulation. At its core is an attempt to balance competing considerations about the microeconomic benefits of choice and competition in a fee-deregulated national legal services market; the need for 'consumer-level protection' of a cohort of 'unsophisticated' or 'at risk' consumers in that market; the recognition of cohorts of users of legal services who do not need 'consumer-level' protection; and the compliance costs and burdens of the regime for law practices.

The *Consultation paper on costs disclosure thresholds* (**Consultation Paper**) seeks responses to the comparatively straightforward issue of the quantum markers, or "thresholds" pertaining to the option of using the *standard costs disclosure form.* The current markers (money thresholds <u>and</u> the statutory definition of *commercial or government client*) are inadequate and incomplete for identifying which cohorts of legal services users need the consumer-level protection of the statutory costs regime and which cohorts do not need or want that level of protection.

While a review of these markers is appropriate and overdue, practical experience in the operation of Part 4.3 of the Uniform Law has brought to the attention of the Law Council a number of more significant problems for law practices, not the least being the impacts on practitioner health and well-being that arise, including:

- The lack of authoritative certainty on what a law practice needs to do to achieve compliance with statutory disclosure obligations, expressed as concepts such as: "provide information"; "significant change"; "a sufficient and reasonable amount of information"; the "impact" of a change; and "all reasonable steps" to satisfy itself that the client has understood and given consent.
- The absence of that authoritative certainty imposes a substantial and, for many practitioners, an onerous burden in attempting to achieve compliance, coupled with significant consequences for non-compliance. These are the automatic voiding of a costs agreement for any non-compliance; the costs and delays of responding to disputes and costs assessments; the burden of paying the costs of both the practice and the client in any costs litigation; and the risk that a costs dispute may give rise to a professional conduct investigation potentially affecting a legal practitioner's reputation and entitlement to practise law.
- In addition, the above situation has fostered the development of a cottage industry that relies on the penalty (to the legal practitioner) of automatic voiding under section 178(1)(a) and burdensome risks and onerous expense to attempt to claw back legal costs that have already been settled, billed for and paid, on the grounds of 'technical' or at least arguable non-compliance, or the threatened initiation of complaints and out-of-time assessment applications.
- Legal practitioners are severely disadvantaged in such disputations by the administrative and non-remunerative cost burdens for themselves, as well as retrospective income taxation and other financial implications and the potential financial liability for not only their costs, but also the client's costs in any costs litigation.

- The inability of a law practice to seek a costs assessment legally validating the cost of the legal services provided, after the initial 12-month application period has expired, notwithstanding legitimate reasons (typically in the best interests of client and the client-practitioner relationship) as to why a law practice may not press for payment of an invoice, or all of an invoice, within the statutory 12 months limitation period.

Part 4.3 of the Uniform Law places disproportionate compliance costs, burdens and financial and other risks on law practices that need to be addressed by the Legal Services Council. The Law Council submits that these problems are attributable to the fundamental design problem that Part 4.3 makes no meaningful attempt to define and distinguish between what is and is not a “retail” or consumer-type legal service, accessed rarely or infrequently by “consumers”. There is no meaningful targeting of either the disclosure protections in Part 4.3 or the consumer matter complaints-handling and resolution provisions in Chapter 5 between those who actually need them and those for the consumer protection regime is not necessary, relevant or cost effective.

Recommendations

Law Council concerns

Recommendation 1

That the Legal Services Council develops a Uniform General Rule pursuant to section 170(2)(h) specifying that, for the purposes of section 170 of the Uniform Law, the reference to large proprietary company is a reference to a large proprietary company that satisfies any (but not all) of paragraphs 45A(3)(a) or (b) of the *Corporations Act 2001* as in force on 1 July 2007, so as to retain the threshold tests at the same level as they were on commencement of the Uniform Law (i.e. consolidated gross revenue of $25 million or more; or consolidated gross assets of $12.5 million of more; or 50 or more employees).

Recommendation 2

The Legal Services Council develop a Uniform General Rule specifying that the costs disclosure obligations in section 174 do not apply if:

(a) the client has received a disclosure under section 174 from the law practice; and

(b) the client has agreed to waive the right to disclosure; and

(c) bills have been rendered and fees have been paid in accordance with the previous disclosure or disclosures; and

(d) a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, further disclosure is not warranted.

Recommendation 3

The Legal Services Council develop a Uniform General Rule pursuant to section 170(2)(h) which provides that, for the purposes of section 170 of the Uniform Law, a *corporate legal practitioner* is a specified person or class of persons.

Recommendation 4

That the Legal Services Council develop Uniform General Rules:

(a) providing authoritative guidance which extensively reduces and simplifies the onerous disclosure obligations presently seen as necessary to satisfy the main disclosure requirements in sections 174(1)(a) and (b) of the Uniform Law; and

(b) setting out circumstances where an adequate disclosure will have been made, and the client will have been taken to have given consent in terms of section 174(3), notwithstanding that the disclosure has not been made in writing.

Recommendation 5

In addition to Recommendation 4:

(a) Section 178 of the Uniform Law be amended to ensure that the presumption that a failure to comply with costs disclosure obligations voids any underlying costs agreement may be rebutted if the relevant regulatory authority, costs assessor, court or tribunal is satisfied the law practice has taken tangible, practical, and effective steps to satisfy the essential obligation to provide the client with the information the client needs to understand and give consent to the way the matter will be conducted and the costs involved.

or alternatively

(b) Rule 72A of the Uniform General Rules be amended by inserting a new sub-rule that empowers a court, tribunal, costs assessor, or regulatory authority to disapply section 178(1) and (2) of the Uniform Law if satisfied the law practice has taken tangible, practical, and effective steps to satisfy the essential obligation to provide the client with the information the client needs to understand and give consent to the way the matter will be conducted and the costs involved.

Recommendation 6

In the absence of an urgent amendment to the Uniform Law to comprehensively correct the agreed and accepted anomaly in section 198(4):

Consideration be given to developing a Unform General Rule pursuant to section 208(2)(e) of the Uniform Law to permit a costs assessor to make an application under section 198(4), in relation to a law practice where it would be just and fair for the application for assessment to be made after the 12-month period.

Recommendation 7

Consideration be given to developing a Unform General Rule pursuant to section 208(2)(e) of the Uniform Law, setting out matters which a costs assessor should have regard to in making an application to a designated tribunal under section 198(4), to provide that no out-of-time application will be just and fair unless the applicant’s circumstances are such as to have made lodging an application under section 198(3) impossible, including due to hardship or disability

Consultation Paper responses

Consultation Question 1

(a) The *lower threshold* under the Uniform Law should be increased to at least $1500 to align with the minimum costs disclosure threshold that applies in the Legal Profession Act jurisdictions.

(b) The *lower* threshold should be reviewed by all jurisdictions to establish an amount that represents a realistic and appropriate price point where the value of disclosure to consumers in small value transactions is outweighed by the additional costs compliance costs to law practices.

Consultation Question 2

(a) The *upper threshold* be increased to at least $10,000, with the option that a client and practitioner may agree to utilise the *standard costs disclosure form* for matters where the legal costs are estimated to be above $10,000.

(b) The *upper threshold*, and the option by agreement to use of the *standard costs disclosure form* for matters above $10,000, should serve the purpose of ensuring that common, standard, and non-contentious retail legal services are not subject to the statutory main disclosure obligation where to do so would be of no particular benefit, advantage or 'protection' to the client.

Consultation Question 3

The Law Council considers that improvements to the standard costs disclosure form and information sheets should be identified through user-testing with law practices and consumers.

Consultation Question 4

(a) The Legal Services Council should develop a Uniform General Rule specifying the following as a *commercial or government client*:

- (i) a trustee within the meaning of the *Bankruptcy Act 1996* (Cth).
- (ii) an overseas-registered foreign law practice.
- (iii) a corporation that has a share capital and whose shares, or the majority whose shares, are held beneficially for the Commonwealth, a State, or a Territory.
- (iv) a person who holds an Australian credit licensee under the *National Consumer Credit Protection Act 2009* (Cth).
- (v) a high net wealth individual, defined as an individual who would satisfy the thresholds for the purposes of paragraphs (c)(i) or (c)(ii) of section 708(8) of the *Corporations Act 2001* (Cth) as in force on 1 July 2015.

(b) Further consideration should be given to an appropriate basis for identifying charitable and not-for-profit organisations that would be sophisticated, commercial-oriented uses of legal services which do not require or want consumer-level protections.

Consultation Question 5

The Law Council does not support the making of a new Uniform General Rule for solicitors about retention of costs disclosure documents. Such a rule would simply duplicate Australian Solicitors' Conduct Rule 14. A costs disclosure document is a client document for the purposes of the Rule, and the need for additional guidance is properly a matter for the Commentary to the Australian Solicitors' Conduct Rules.

DISCUSSION

The need for, and utility of, a statutorily prescribed disclosure regime

Introduction

The fundamental change brought about by the adoption of the national competition policy principles embodied in (but also predating) the 1992 *Hilmer Review* of national competition policy[1] was that the price of legal services shifted from (predominantly, but not entirely) being fixed by costs scales, to (predominantly, but not entirely) a negotiation between the client and legal practitioner, embodied in a contract (a costs agreement) about the legal services to be provided and the price of those services.

Statutory legal costs regimes akin to what we have now were introduced as a measure complementing the creation a competitive national market for legal services, to protect against market distortions or failures because of an information asymmetry disadvantage between the 'consumer' as purchaser, and the legal practitioner as provider.

Costs disclosure regimes are designed with a key aim of consumer protection and have the full support of the legal profession. The regimes do this by addressing policy questions such as:

- Who needs consumer-level protection and who does not?
- What kind of 'protection' is necessary?
- What does a consumer need to know to make informed decisions and when?
- What is the place of a negotiated agreement between a consumer and a legal practitioner about the manner in which the matter will be conducted and resolved, and the costs involved?
- In what circumstances should a negotiated agreement be set aside, and the costs independently reviewed and determined?
- What is an appropriate compliance cost of a statutory scheme, bearing in mind that the cost is ultimately reflected in the price of legal services?

Part 4.3 of the Uniform Law is the (almost) mirror-image of its predecessor, Part 4.3 of the proposed *Legal Profession National Law*, published by the COAG National Legal Profession Taskforce in May 2010. The Law Council has always maintained that Part 4.3 lacks adequate policy development. The Law Council's 13 August 2010 submission to the COAG National Legal Profession Taskforce said:

> *The legal costs framework is contained in Part 4.3 of the National Law (dealing with: legal costs generally; costs agreements; billing; unpaid legal costs; and costs assessment) and in various parts of Chapter 5 (Dispute resolution and professional misconduct) that are concerned with consumer matters.*
>
> *The Law Council considers that the legal costs framework proposed by the Taskforce in the National Law lacks coherence and needs to be substantially re-drafted. Furthermore, the Law Council considers that reforms should have strengthened the role of the costs agreement as the primary basis for the relationship between a legal*

---

[1] *National Competition Policy Review* 1992 (the Hilmer Review) and the *National Competition Policy Principles* adopted in 1995 by the Council of Australian Governments.

practitioner and client by clearly establishing that common law principles apply to the efficacy and validity of costs agreements.

By way of example, while section 4.3.14 of the draft National Law[2] *provides that a costs agreement may be enforced in the same way as any other contract, this enforceability is subject to the provisions of the National Law. The role of a costs agreement, for all but those commercial and government clients who contract out of the costs provisions, is reduced by the Taskforce proposals to being merely prima facie evidence that the costs disclosed in the agreement are fair and reasonable, and this is itself subject to the provisions of this Division relating to costs disclosure having been complied with*[3]*.*

The proposed National Law has created a legal costs framework:

(a) where there is greater uncertainty created;

(b) increased steps for compliance together with the regulatory and administrative burden for law practices; and

(c) intrudes into areas of practice where regulation is not warranted.

Cohorts and thresholds

Legal costs regimes mandate that consumers be provided with information about the legal issues involved and how their matter might be progressed and resolved, as a necessary precursor to informed decision making about not only the course of action professionally advised, but whether the price is commensurate with, and represents value for money, as against what another legal practitioner might professionally advise.

Qualitative descriptors that have been used for the cohort of clients thought to need this statutory protection include: “consumer”, “infrequent users of legal services”, “infrequent purchasers of legal services”; “clients who are otherwise poorly informed about the legal system”; “retail consumers” and “inexpensive or routine matters”.

At the same time, legal costs regimes recognise other cohorts of users of legal services where the ‘consumer-level protection’ of statutory disclosure is not necessary, relevant or cost effective.

One such cohort for whom consumer-level protection would not be appropriate or useful has been assigned qualitative descriptors such as “sophisticated client”; clients having “economic bargaining power”; “regular” or “frequent” users of legal services; “repeat purchasers”; and “commercial or government clients”.

Another cohort of users of legal services for whom it is thought that consumer-level protection is not appropriate or useful has been described as users for “small”, “low cost”, “small claims”, “routine” and (also) “inexpensive” matters. The exclusion of this cohort is based on the proposition that the matter to be resolved is so straight-forward, and the costs involved are so minimal, that the cost to the practitioner in complying with statutorily prescribed disclosure cannot be reasonably justified having regard to the value of the legal service to be provided.

Common to each of these cohorts is a lack of objective, measurable precision to define the whole of the cohort in focus. The yardsticks that presently exist (the *lower threshold*, the *upper threshold*, and the definition of *commercial or government client*) are simply proxies, or best guesses. Treating these yardsticks as Brightline boundaries is bad policy that

[2] Replicated in section 184 of the Uniform Law

[3] Replicated in section 172(4) of the Uniform Law.

produces bad practical outcomes because of inflexibility at the margins - for example, there is no apparent substantive reason why a consumer with a retail matter likely to cost $1550 requires full cost disclosure whereas, for a consumer with a retail matter likely to cost $1450, disclosure using the *standard costs disclosure form* is sufficient.

By way of contrast, the approach to costs disclosure cohorts in the non-participating (***Legal Profession Act)*** jurisdictions is to exclude the statutorily described disclosure requirement where:

(i) the total legal costs do not exceed a minimum monetary value, presently marked at $3,000 + GST; or

(ii) the client has already received one or more disclosures in the previous 12 months, has agreed to waive the requirement for further disclosures, and a principal of the law practice regards that as reasonable; or

(iii) the client is a "sophisticated client"; or

(iv) the client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice (for example, pro bono legal services).[4]

The COAG National Legal Profession Taskforce (2009–2011) took yet another approach by identifying two cohorts of users:

- retail consumers, who *tend* to be infrequent purchasers of legal services; and
- sophisticated or institutional clients who *generally* are repeat purchasers and experienced commercial operators. [5]

The (imperfect) distinction the COAG Taskforce had in mind between a "retail" and a "sophisticated or institutional" consumers was explained as:

> While sophisticated clients *usually* are able to negotiate their legal costs based on previous experience in similar matters and commercial decisions about the value of the work to their business, retail consumers *generally* have less experience or information when engaging a legal practitioner or law practice. The complex and specialised nature of legal work also means that retail consumers can have limited capacity to determine whether work is necessary or valuable.

Significantly, the COAG Taskforce said:

> This 'information asymmetry' can disadvantage retail consumers in their relationship with their lawyer—often at times when clients are in a state of heightened sensitivity and pressed to make urgent and significant life decisions. The lack of market-based or scientific methods for valuing legal costs, and the costs of changing representation, can result in retail clients being charged more than reasonable costs for legal services, or create a perception of overcharging.

The Uniform Law added a further distinction by:

- dividing retail consumers on a quantum into those for whom full disclosure is necessary, and those for whom a lesser disclosure would suffice using the *standard costs disclosure form* (the *upper threshold*); and
- subdividing *standard costs disclosure form* consumers into those who would benefit from the use of that form, and those who would benefit from the use of that form or any other form of disclosure (the *lower threshold*).

[4] *Legal Profession Act 2007* (Qld) section 311
[5] *COAG National Legal Profession Reform Discussion Paper: Legal Costs*, 4 November 2009

The Law Council submits that the lack of market-based or scientific methods for valuing legal costs, and the absence of any objective meaningful or useful descriptors of clients creates inherent uncertainty in targeting consumer protections at those who actual need them. Instead, the same regime is applied to all users of legal services apart from (to an extent) those who fit within the definition of *commercial or government client*.

The lower threshold

The reason for the adoption of a lower threshold was explained as follows:

> *At the same time, the uniform law recognises that for many inexpensive or routine matters, extensive and detailed disclosure would not be justified. For matters that are likely to cost less than a prescribed 'lower threshold' a law practice will not be required to comply with a specified form of disclosure requirement. The bill retains a lower threshold of $750 but allows for adjustment of the threshold by the Legal Services Council.*[6]

There is an incongruity between the 'no-disclosure required' threshold under the Uniform Law ($750) and the 'no-disclosure required' threshold under Legal Profession Acts ($1500) that has not been properly explained, given the underlying policy logic that there is a price point where the time and complexity involved in disclosure cannot be justified—i.e., a disclosure would achieve nothing other than increase the cost of the legal service.

It is doubtful whether consumers in the Legal Profession Act jurisdictions, where a $1500 'no disclosure required' threshold applies, are at any particular disadvantage in comparison with consumers in Uniform Law jurisdictions where a $750 'no disclosure required' threshold currently applies. Further, the difference in 'no disclosure required' thresholds simply add to the compliance burden for cross-border law practices for no apparent consumer benefit.

Recommendation 1

(a) The *lower threshold* under the Uniform Law be increased to at least $1500 to align with the minimum costs disclosure threshold that applies in the Legal Profession Act jurisdictions.

(b) The *lower* threshold be reviewed by all jurisdictions to establish an amount that represents a realistic and appropriate price point where the value of disclosure to consumers in small value transactions is outweighed by the additional costs compliance costs to law practices.

The upper threshold

On 15 August 2013 the NSW Department of the Attorney-General & Justice advised stakeholders of further modifications in the proposed Uniform Law:

- During preparation of the National Law there were ongoing discussions about the appropriate costs threshold beyond which lawyers would be required to provide clients with a full costs disclosure, including an estimate of their fees in a matter that is to be revised when changes arise. On the one hand, full disclosure is time-consuming and comes at a significant opportunity cost. On the other hand, consumers need clear and accurate information about the costs of legal services.

[6] Parliament of Victoria, *Legal Profession Uniform Law Application Bill 2015*, Legislative Assembly Hansard, 12 December 2013 [4665

- Victoria and NSW have agreed that the threshold for full costs disclosure should be raised to $3000 (excluding GST and disbursements). For matters below the threshold, a new short form of disclosure will be required in accordance with a standard form disclosure to be prepared by the Legal Services Council and drafted as part of the process of making the Uniform Rules.
- The details relating to the threshold and short-form disclosure will be incorporated in the Uniform Rules. As the Rules are the responsibility of the new Legal Services Council, the Attorneys-General of NSW and Victoria, in their collective role as the Standing Committee, intend to write to the new Council on its establishment to request that it devise draft Uniform Rules that reflect this policy decision.

In discussions with the Legal Services Council as part of the present review of the thresholds the Law Council has emphasised that the determinant of the higher threshold should be common or standard retail services, such as conveyancing transactions or Wills:

- which do not involve contested matters;
- for which the price to consumers has become settled because of competition in the legal services market;
- where is not expected that any significant variables will arise during the course of the matter; and
- where disclosure under the main disclosure requirement would be an additional compliance burden and cost, of no additional or special benefit to the consumer.

Against this background, the question the Law Council raises is whether the current $3000 upper threshold is a realistic proxy (noting, as the COAG Taskforce did, that there is a lack of market-based or scientific methods for valuing legal costs) where detailed disclosure in accordance with the main disclosure requirement is not appropriate. The upper threshold has remained at $3000 since 1 July 2015, despite long-term inflationary forces and movements in indices such as the consumer-price index and wage-price index over the past eight years. The Law Council considers the current threshold of $3,000 is now too low to be of any practical use, and that it should be increased to at least $10,000 + GST.

Recommendation 2

The *upper threshold* be increased to an amount that will exclude common or standard retail legal services, using market-based information about the price to consumers for retail transactions, where disclosure under the main disclosure obligation would be of no practical benefit or advantage to consumers over and above disclosure of clear and accurate information about the costs of legal services utilising the *standard costs disclosure form.*

An *upper threshold* of at least $10,000 + GST should apply before full costs disclosure is necessary, reflecting movements in the consumer price index and other indices since 1 July 2015.

Commercial and government clients

The disclosure requirements of the Uniform Law seek to target consumer protections at those who need them and exclude those who don't—specified as *commercial or government clients*, on the assumption that a commercial or government client is likely to be a knowledgeable, sophisticated, repeat purchaser from the legal services market, capable of knowing the value of the work to their business or organisation.

The definition of *commercial or government client* in section 170(2) of the Uniform Law includes:

- a law practice; or
- a range of entities defined or referred to in the *Corporations Act 2001* of the Commonwealth; or
- 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, etc., or
- 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
- a body or person incorporated outside Australia; or
- a person who has agreed to the basis of the costs as a result of a tender process; or
- a government authority in Australia or a foreign country.

Section 170 of the Uniform Law mirrors only some of the exceptions to consumer protection-level disclosure provided for in the Legal Profession Acts. This of itself creates interjurisdictional inconsistencies, for no apparent policy justification, between clients of law practices in the Uniform Law and Legal Profession Act jurisdictions, which in turn adds to the compliance burdens and costs to multi-jurisdictional law practices (and ultimately their clients) by having to respond to separate regulatory requirements.

Large proprietary companies

A number of entities included the definition of *commercial or government* client in section 170(2) are in turn defined by reference to the term "large proprietary company" in the Corporations Act 2001.

Section 45A(3) of the *Corporations Act 2001* (Cth) provides that a proprietary company is a large proprietary company for a financial year of it satisfies at least 2 or the following:

(a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is $25 million, or any other amount prescribed by the regulations for the purposes of paragraph (2)(a), or more;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $12.5 million, or any other amount prescribed by the regulations for the purposes of paragraph (2)(b), or more;

(c) the company and the entities it controls (if any) have 50, or any other number prescribed by the regulations for the purposes of paragraph (2)(c), or more employees at the end of the financial year.

The prescribed monetary and employee numbers ("thresholds") in section 45A(3) of the *Corporations Act 2001* have over time been adjusted by way of amendments to the Act or by regulations. When first enacted in 2001, the thresholds were $10 million, $5 million and 50 or more employees respectively.

Section 45A(3) was amended with effect from 28 June 2007 to increase the thresholds to the values that now appear in the current version of the Act; to change the revenue criteria from *consolidated gross operating revenue* to *consolidated revenue*; and to enable the thresholds to be adjusted by way of regulations.[7] The thresholds were increased again (by regulations) in 2019 to $50 million, $25 million and 100 employees[8].

The *Corporations Law* purpose of the definition of large proprietary company is to trigger a requirement to prepare and lodge with ASIC a financial report and directors' report for each financial year. The rationale for increasing the monetary and employee number thresholds is to reduce the compliance burden of reporting on *non-economically significant proprietary companies*.[9]

In contrast, the legal profession law purpose of excluding a large proprietary company (and partnerships that satisfy the *Corporations Law* definition if they were a company, etc.) is the recognition that sophisticated and institutional clients usually are able to negotiate their legal costs based on previous experience in similar matters and commercial decisions about the value of the work to their business. Thus, sophisticated and institutional clients do not require the consumer protections that the costs and costs disclosure regime provides for retail consumers who are infrequent users of legal services or otherwise poorly informed about the legal system.

The Law Council has received anecdotal evidence from practitioners that some proprietary companies arrange their affairs so as to ensure that their incomes are below the consolidated-revenue threshold but nevertheless these clients hold high-value assets. Moreover, proprietary companies with a consolidated revenue that exceeds the current threshold but with fewer than 100 employees are incentivised to ensure that assets used by, or available to, the company are not held in its name or by entities it controls so as not to be required to file publishable accounts. Such clients are undoubtedly 'sophisticated' but would fall short of the current definition of *large propriety company*.

The core issue with the use of the Corporations Law definition of large proprietary company in the Uniform Law, and the Legal Profession Act jurisdictions, is that it is not an accurate marker of 'sophistication' or alternatively, the need for consumer-level protection. Further, proprietary companies that had previously been *large proprietary companies* may be excluded from the Corporations Law definition for reasons that relate to easing Corporations Law compliance burdens, rather than as a reflection of their capability to negotiate and make commercial decisions about the value of legal work to their business.

Recommendation 3

That the Legal Services Council develops a Uniform General Rule pursuant to section 170(2)(h) specifying that for the purposes of section 170 of the Uniform Law, the reference to large proprietary company is a reference to a large proprietary company that satisfies any (but not all) of paragraphs 45A(3)(a) or (b) of the *Corporations Act 2001* as in force on 1 July 2007, so as to retain the threshold tests at the same level

---

[7] *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* (Cth) Sch 1, Part 1, sections 15-18

[8] *Corporations Amendment (Proprietary Company Thresholds) Regulations 2019* (Cth)

[9] Explanatory Memorandum to the *Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007* (Cth) [42, 43]

as they were on commencement of the Uniform Law (i.e. consolidated gross revenue of $25 million or more; or consolidated gross assets of $12.5 million of more; or 50 or more employees).

Contracting out

The Law Council disagrees with the view in the Consultation Paper that:

> *Exemptions in non-participating jurisdictions which do not relate to commercial and government clients are not considered in this paper. These include exceptions from the requirement to provide costs disclosure to Australian and foreign lawyers, repeat clients (subject to consent) and legal assisted persons and other clients paying legal fees.*

The Law Council regards the exclusion of any entitlement of a client to waive, consent, or 'contract of' the main disclosure requirements in section 174 to be a substantial deficiency of the Uniform Law, and root cause of a number of significant practical problems and compliance risks for law practices.

Neither the publicly available materials from the COAG National Legal Profession Task Force, which devised the concept of *commercial or government client* now found in the Uniform Law, nor the publicly available materials about the Uniform Law itself, explain the policy basis of omitting the entitlement for a client to contract out of the statutory disclosure regime. However, the inclusion of a general rule-making provision might be taken as an acknowledgement that the cohort of clients who do not require prescriptive consumer-level protection might be wider and less easily definable in the statute than first anticipated.

While some of the entities included in the definition of *commercial or government* client can be identified with a reasonable degree precision, within the notion of "commercial" many cannot. In any event, the defining quality of a *commercial* client for the purpose of the costs disclosure provisions is that their level of sophistication, experience, frequency and familiarity as a user of legal services is such that consumer-level protection is simply not necessary or useful.

Given the definitional difficulties and the significant risks and problems being faced by law practices because of that (and other elements of the statutory regime, discussed later in this Submission) the Law Council recommends the inclusion of the 'contracting out' option (still available in the Legal Profession Act jurisdictions[10]). This would apply where:

- the client has received a disclosure under section 174 from the law practice; and
- the client has agreed to waive the right to further disclosure in the form specified for consumer-level protection; and
- bills have been rendered and fees have been paid in accordance with the previous disclosure or disclosures; and
- a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, that further disclosure is not warranted.

[10] See for example Legal Profession Act 2007 (Qld) section 311(1)(b)

Recommendation 4

The Legal Services Council develop a Uniform General Rule specifying that the costs disclosure obligations in section 174 do not apply if:

(a) the client has received a disclosure under section 174 from the law practice; and

(b) the client has agreed to waive the right to disclosure; and

(c) bills have been rendered and fees have been paid in accordance with the previous disclosure or disclosures; and

(d) a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, further disclosure is not warranted.

Law practices

The Law Council questions the view in the *Consultation Paper* that exemption from disclosure should not apply to Australian and foreign lawyers. Paragraph 170(2)(a) of the definition of *commercial or government client* in the Uniform Law specifically includes a *law practice,* which is in turn defined in section 6 to mean a sole practitioner, a law firm, a community legal service, an incorporated legal practice and an unincorporated legal practice. Further, the definition of law firm in section 6, together with section 70 of the Uniform Law, recognise that an Australia-registered foreign lawyer may be, for example, a partner in a law firm.

Charitable and non-for-profit organisations

The Law Council questions whether every charitable and not-for-profit organisation would meet the descriptor “commercial” given that charitable and not-for-profit organisations vary substantially in size, purposes, activities, structure, governance and means by which funds are raised. Further research and analysis of this cohort would be necessary to identify a reliable basis on which to distinguish between those charitable and not-for-profit organisations that would perhaps need consumer-level protection and those that do not, particularly if the Uniform Law continues with the approach of not allowing for a client to ‘contract out’ of the statutory scheme.

High net worth individuals

The Law Council supports the inclusion of high-net wealth individuals, a policy position the Law Council adopted in response to the COAG National Legal Profession Taskforce proposals for Part 4.3. High net wealth individuals should be taken to meet descriptors such as “sophisticated”, having “economic bargaining power”; “regular”, “frequent” or “repeat” users of legal services.

However, while the proposed definition draws upon the financial disclosure provisions under Chapter 6D and Part 7.9 of the *Corporations Act 2001* (Cth) the Law Council cautions (for reasons set out above in relation to large proprietary companies) against reliance only on the monetary thresholds specified in the *Corporations Act 2001* as these will change from time to time, for reasons that having nothing to do with the sophistication or frequency of use of legal services by high net worth individuals.

Recommendation 5

In response to <u>Consultation Question 4</u>.

(a) The Legal Services Council develop a Uniform General Rule specifying the following as a commercial or government client:

(i) a trustee within the meaning of the *Bankruptcy Act 1996* (Cth);

(ii) an overseas-registered foreign law practice;

(iii) a corporation that has a share capital and whose shares, or the majority whose shares, are held beneficially for the Commonwealth, a State or a Territory;

(iv) a person who holds an Australian credit licensee under the *National Consumer Credit Protection Act 2009* (Cth);

(v) a high net wealth individual, defined as an individual who would satisfy the thresholds for the purposes of paragraphs (c)(i) or (c)(ii) of section 708(8) of the *Corporations Act 2001* (Cth) as in force on 1 July 2015.

(b) Further consideration be given to an appropriate basis for identifying charitable and not-for-profit organisations that would be sophisticated, commercial-oriented uses of legal services which do not require or want consumer-level protections.

Law practices and corporate legal practitioners

The policy rationale for the exclusion of 'sophisticated' clients from the statutory costs disclosure and assessment regime is that these clients usually are able to negotiate their legal costs based on previous experience in similar matters and commercial decisions about the value of the work to their business. Clearly the same degree of 'sophistication' applies where a law practice engages another law practice.

The Law Council considers the same policy rationale applies where the client is a corporation and the legal services to be provided and legal costs are determined as between a corporate legal practitioner (as defined in section 6 of the Uniform Law) and the law practice.

Recommendation 6

The Legal Services Council develop a Uniform General Rule pursuant to section 170(2)(h) which provides that, for the purposes of section 170 of the Uniform Law, a *corporate legal practitioner* is a specified person or class of persons.

Satisfying the main disclosure requirement

The dominant objective of the legal costs regime in Part 4.3 is "to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options"[11]. Delivering this objective is cast upon the law practice, which must take "all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs."[12]

[11] Section 169(a) of the Uniform Law.

[12] Section 174(3) of the Uniform Law

Achieving the dominant objective is an inherently uncertain exercise simply because different clients have different legal issues of varying complexity, different objectives, and different levels of knowledge and capacity to understand and make informed decisions.

Just as differentiating between cohorts of users who need and do not need consumer-level protection is not a brightline exercise, so is differentiating between clients about what needs to be disclosed, and what steps need to be taken to be satisfied there is understanding and consent on the part of the client.

The *uniform standard disclosure form* greatly assists legal practitioners in the narrow circumstances where its use is both permissible and practicable (legal services below a declared price point, for a legal matter not expected to have any significant variables in the course of the matter).

Outside of situations where the *uniform standard disclosure form* can permissibly and practicably be used, the content of the main disclosure requirement in section 174 of the Uniform Law is expressed only in generalised terms:

- *as soon as practicable* after instructions are *initially given*, provide the client with *information* disclosing the basis on which legal costs will be calculated in the matter and *an estimate* of the total legal costs; and
- when or as soon as practicable after there is *any significant change* to anything previously disclosed, provide the client with *information disclosing the change*, including *a sufficient or reasonable amount of information* about any significant change to the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter, including a sufficient and reasonable amount of information about the *impact of the change on the legal costs* that will be payable to allow the client to make informed decisions about the future conduct of the matter.

Unlike the Uniform Law, the Legal Profession Acts attempted a prescriptive approach to the disclosure requirements, specifying that disclosures include:

- the basis on which legal costs will be calculated, including whether a costs determination or scale of costs applies to any of the legal costs.
- an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs.
- if the matter is a litigious matter, an estimate of the range of costs that may be recovered if the client is successful; and the range of costs the client may be ordered to pay if the client is unsuccessful.
- if the law practice negotiates the settlement of a litigious matter on behalf of a 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); and
- a reasonable estimate of any contributions towards those costs likely to be received from another party.
- for a costs agreement involving an uplift fee; the legal costs, the uplift fee or the basis on which it will be calculated, and the reasons why the uplift fee is warranted.
- any substantial change to anything included in a disclosure already made, as soon as is reasonably practicable after the law practice became aware of that change

The rationale for the Uniform Law approach was stated by the COAG National Legal Profession Taskforce as follows:

> *A criticism of the mandatory disclosure regime is the lack of guidance about the level of detail required in disclosure documents. It is argued that practitioners are either legally required to, or regularly err on the side of, caution and provide voluminous detail in costs disclosure documents for fear of failing to meet their professional obligations. Overwhelmingly detailed disclosure does not serve the interests of either practitioner or client and was not intended when the regime was introduced.*
>
> *The aim of costs disclosure is to provide the parties with a starting point from which to begin a dialogue about costs. Written disclosure should be a high-level summary to which the client can refer when making decisions during the course of a legal matter— it is not expected to be a detailed document providing substantive legal advice on legal rights and options (although it should complement that advice when later provided). It should be made clear that practitioners are only required to take reasonable steps in providing mandatory disclosure.*

The "principles" around the content of the disclosure obligation set out by the COAG Taskforce were carried into the Uniform Law as follows:

- 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 in the matter and an estimate of the total legal costs. (section 174(1)(a))
- A law practice must, when or as soon as practicable there is any significant change to anything previously disclosed under this section, 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. (section 174(1)(b)
- Information provided must contain a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter. (section 174(2)(b)
- The law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs after being given that information. (section 174(3))

In addition, the Taskforce proposed that National Rules would provide guidance:

> Mandatory disclosure must be made in writing and should include:

- The basis on which legal costs will be calculated, including the things to be billed. (e.g., photocopying etc.).
- The client's rights in relation to costs, including the right to be notified of any substantial change to the matters previously disclosed.
- An estimate of the total legal costs if reasonably practicable, or else a range of estimates of the total legal costs and an explanation of the major variables in them.
- If a law practice intends to retain another law practice, a barrister or an expert, on behalf of a client, it must disclose that practice or person's costs and billing arrangements.

- If there will be an uplift fee, there should be disclosure of the law practice's legal costs; the uplift fee (or the basis of calculation of the uplift fee); and the reasons why the uplift fee is warranted.
- In relation to litigious matters, mandatory disclosure should also include an estimate of the range of costs that may be recovered if the client is successful in the litigation and the range of costs the client may be ordered to pay if unsuccessful.
- Where the client enters into a conditional costs agreement, the client may be required to pay the law practice's disbursements even if not required to pay legal costs

These proposed National Rules were not developed; however, the National Justice CEO's noted in September 2011:

> *Concerns were raised about the clarity of the requirement in section 4.3.6(4) of the National Law for a law practice to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs. This new approach to [legal] costs disclosure is an important reform, designed to focus on the substance rather than the form of disclosure. This will require legal practitioners to exercise their professional judgment in the circumstances of each matter. Lawyers are well placed to apply a standard of "reasonableness" in disclosing costs to clients*
>
> *The National Board, as the national standard-setter, will have the power to make National Rules providing guidance on how to satisfy the requirement if it considers it appropriate to do so.*

While the Uniform Law adopted the principles-based approach to the main disclosure obligation, the recommendations of the COAG Taskforce and National Justice CEO's about National Rules providing clarity for law practices about what matters should be addressed in the substance of the costs disclosure have not been included in the general Uniform Rules. The only matter identified as a matter for Uniform General Rules was the requirement that costs disclosures must be in writing, which was enacted as a statutory obligation in section 174(6) of the Uniform Law.

The absence of authoritative guidance on the content of a disclosure to satisfy the main disclosure requirement in section 174 of the Uniform Law is a matter of substantial concern to the legal profession that needs to be addressed by the Legal Services Council.

The issue facing the practising profession is the current onerous and technical requirements, and the absence of authoritative certainty in the form of Uniform General Rules as to the acceptable content of a costs disclosure, particularly where the need for additional disclosure arises because of "significant" changes during the course of the matter.

Additionally, at every "substantial change", there are onerous requirements to: update the original estimate (regardless of how long ago the previous estimate was given); to ensure the new estimate is given exclusively of any other fees (for example valuer or consultant fees); to ensure a new total of legal fees is given, and that the new information and client consent are both confirmed in writing, before legal services continue to be provided. This process slows down the provision of legal services, with potential harm to the client in 'fast-moving' and 'ever-changing' matters. It potentially places the practitioner's interest in ensuring compliance with the costs disclosure obligations into conflict with the client's interest in the client's legal matter.

The practical effect of the above policy is to introduce potentially lengthy steps into management of the client's case, involving processes of ongoing disclosure and repeated client consents. In practice, it requires the client to confirm in writing before the lawyer begins work where there could be said to be a 'substantial change' in the case. Otherwise, the lawyer faces the risk of fee strike down if the client subsequently disputes the fees, even where those fees have been paid without protest. These processes also tend to create for the client a sense that the lawyer's major concern is more about fees than their case. The client generally fails to comprehend such a compliance obligation.

From the Law Council perspective, the issue is not about ignoring professional standards. Practitioners and law practices seek to adhere to professional conduct responsibilities that mirror the principles underlying the statutory obligation in section 174(3) of the Uniform Law to take all reasonable steps to be satisfied the client understands and has given consent to the proposed course of action and the proposed costs.

The feedback the Law Council has received about the practising profession's experience of Part 4.3 of the Uniform Law is of a legal costs regime is that is substantially tilted toward detailed, frequent, written disclosure statements and written client consent in each and every case and for every change in the way a matter is proceeding to satisfy the technical requirements of the legislation, regardless of any consideration of the actual needs or preferences of the client, the circumstances of the relationship or the effect of frequent written disclosures and written consent in response, to the efficient and expeditious resolution of the client's matter.

Compliance with Part 4.3 is instead being driven by the risks and consequences for a law practice of technical non-compliance, not the least being practitioner health and wellbeing.

Recommendation 7

That the Legal Services Council develop Uniform General Rules:

(a) providing authoritative guidance which extensively reduces and simplifies the onerous disclosure obligations presently seen as necessary to satisfy the main disclosure requirements in sections 174(1)(a) and (b) of the Uniform Law; and

(b) setting out circumstances where an adequate disclosure will have been made, and the client will have been taken to have given consent in terms of section 174(3), notwithstanding that the disclosure has not been made in writing

The Uniform General Rules envisaged for **Recommendation 7** would need to provide certainty, at least, on:

- How the total legal costs are estimated;
- What constitutes a "significant change" to anything previously disclosed;
- What constitutes a "significant change" to legal costs that will be payable;
- What constitutes a "sufficient and reasonable amount of information about the impact of the change"; and
- When a client has made an informed decision about the future conduct of a matter.

In recommending the Legal Services Councill develop these Uniform General Rules, the Law Council notes:

- The general principle espoused as long ago as the Legal Profession Model Laws project that costs disclosure obligations should be as simple as possible, so that disclosures provide the minimum amount of information to ensure that consumers are adequately protected.
- The COAG National Legal Profession Taskforce observation that effective communication is a critical factor in reducing confusion and misunderstandings regarding legal costs, and the adoption of the principle of 'informed consent' in place of prescriptive and onerous disclosure obligations.
- The COAG National Legal Profession Taskforce also observed that rather than having to provide voluminous disclosure documents, a law practice should be required to satisfy itself that the client has understood and consented to the proposed course of action and costs involved after being given all relevant information, and that the greater focus on communication between law practices and their clients will serve to minimise disputes and complaints about costs.
- The views of the National Justice CEO's that the new approach to costs disclosure is an important reform, designed to focus on the substance rather than the form of disclosure, which will require legal practitioners to exercise their professional judgment in the circumstances of each matter and that lawyers are well placed to apply a standard of "reasonableness" in disclosing costs to clients.
- The National Justice CEO's also noted that the proposed National Board, as the national standard-setter, will have the power to make National Rules providing guidance on how to satisfy the requirement if it considers it appropriate to do so.
- The statement by the Attorney-General of Victoria in the 2nd Reading Speech to the Legal Profession Uniform Law Application Bill 2015:

  > *The specialised nature of legal work means that many clients are likely to have limited capacity to determine whether proposed legal work is necessary or valuable. Under part 4.3 of the uniform law, law practices will be required to take all reasonable steps to satisfy themselves that their client has understood and given consent to the proposed course of action for the conduct of their matter and the proposed costs.*
  >
  > *In practice, this will require law practices to make reasonable inquiries to ensure that, after mandatory written disclosure has been made, clients understand the basis on which legal costs will be charged, how the initial estimate was calculated, factors likely to alter the estimated legal costs, and their rights in relation to challenging legal costs. Legal practitioners will be expected to exercise professional judgement regarding the level of detail needed by a client to understand the options available and costs involved.*

Voided costs agreements

A serious issue facing the practising legal profession in the Uniform Law jurisdictions is section 178(1)(a) of the Uniform Law, which provides that any contravention of the disclosure obligation voids a costs agreement, and:

- relieves the client or an associated third-party payer of an obligation to pay 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.
- removes the capacity of the law practice to commence or maintain proceedings for recovery of any or all of the costs until they have been assessed, or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation.
- is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate who is involved in the contravention.

The policy rationale behind section 178(1)(a) is not immediately apparent from publicly available sources, but the Law Council understands that one of the factors taken into consideration was to alleviate the burden on consumers in having to initiate steps to have a costs agreement set aside by a court or tribunal for want of adequate disclosure by a law practice. The policy choice appears to have been that consumer interests would be better served by automatically voiding the entire costs agreement for want of adequate disclosure, followed by either a costs assessment or by the matter being resolved by the regulatory authority as a consumer dispute about costs under the complaints and disciplinary provisions.

However, the implications for law practices arising from section 178(1)(a) are disproportionate and, in a major sense, disconnected from what appears to have been the consumer protection intent of the provision, as well as the gravity of the non-compliance. This is especially the case where the contravention is alleged to have occurred a considerable time before the client matter was completed and where the legal costs have been paid in full.

By way of illustration, the hardship caused by an out-of-time application for costs assessment being granted includes:

- the likelihood that the respondent practitioner will bear the cost of the assessment itself, including the client's costs;
- it provides an incentive for a client to not seek to negotiate or compromise the amount of costs rendered by the law practice before the expiry of the 12-month application period;
- the additional unpaid and extensive administrative time needed to address that challenge, creating severe diversion from the normal client caseload of a law practice;
- the need for practitioners to gather evidence on long-concluded matters and to prepare statements and affidavits as to what written material was provided to the client about costs;
- the difficulties that arise for practitioners called upon to answer allegations about disclosure failings when documents cannot be located in time or at all and may

have been destroyed, noting that assessments may potentially occur after the minimum seven-year storage period required for client documents;

- the tax implications for practitioners, who may be required to recalculate reported income and payments previously made to the Australian Taxation Office;
- the stress caused to members of the profession when responding to what amounts to an allegation of unprofessional conduct through an (often inconsequential) failure to comply with Pt 4.3 of the Uniform Law—and the very real risk that a fee dispute could end up becoming a professional conduct matter affecting a legal practitioner's right to continue to practise law.

The Law Council has received credible reports from practitioners that the 'windfall' effect of section 178(1)(a) has led to the emergence of a practice whereby some law practices are reviewing the disclosures made to a 'new' client by the client's former law practice, principally where there might have been a "significant change", to identify technical departures from disclosure obligations. The Law Council further understands that this leads to demands to either repay legal costs already paid by the client, or to submit to a costs assessment application by the client, generally on an out-of-time basis. Such a '*cottage industry'* should be discouraged.

It is a matter of substantial concern that section 178(1)(a) places undue administrative burdens on law practices in attempting to achieve compliance with disclosure obligations (expressed in readily disputable terms such as "significant change", "a sufficient and reasonable amount of information" and "all reasonable steps") and the stop-go requirement that all disclosures and client consents must be given and received in writing in every case. This compliance focus is necessary in face of the additional unpaid and extensive administrative time needed to address a costs disclosure adequacy challenge.

This creates severe diversion from the normal client caseload and supporting services of a law practice—and the very real risk that a fee or disclosure dispute could end up becoming a professional conduct matter affecting a legal practitioner's right to continue to practise law. The voiding of a costs agreement is generally less costly to a law practice than a quantum dispute between the fees in the costs agreement and some lower scale/fee basis being applied.

Uniform General Rule 72A(2) fails to properly ameliorate the consequences of non- compliance with the disclosure obligations, even though it disapplies sections 178(1) and 178(2) where the relevant authority, a costs assessor, a court or a tribunal is satisfied that:

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

(b) the law practice, no later than 14 days after the date on which it became aware of the contravention, rectified the contravention, as far as practicable, by providing the client with the necessary information required to be disclosed (including, where relevant, an estimate or revised estimate of the costs), and

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

The Law Council considers that the automatic voiding of a costs agreement by section 178(1)(a) of the Uniform Law is leading to 'sharp' practices and adverse outcomes for law practices that are, in many cases, disproportionate to the gravity of the non-compliance and its effect on the ability of a client to make informed decisions.

Further, the Law Council does not consider Rule 72A provides sufficient discretion to a court (or tribunal, costs assessor or regulatory authority) to consider all of the facts and circumstances surrounding a contravention of any of the requirements in section 174 of the Uniform Law in deciding whether to disapply section 178.

A significant shortcoming of section 178(1)(a) in practice is that it provides a foundation for litigation on matters of form over substance, compounded by the inadequacy of the disapplication circumstances in Rule 72A.

The situation created for law practices in Uniform Law jurisdictions by the combination of section 178(1)(a) and Rule 72A does not arise in Legal Profession Act jurisdictions because, unlike the Uniform Law, costs agreements in Legal Profession Act jurisdictions are not statutorily voided for failure to satisfy any disclosure requirement.

As a matter of principle, a law practice that has taken tangible, practical and effective steps to satisfy the essential obligation to provide the client with the information the client needs to understand and give consent to the way a matter or matters will be conducted and the costs involved, should not be penalised or disadvantage for minor or technical non-compliance during that process, rather than substantial non-compliance that puts the client at a real disadvantage.

Further, once disclosure has properly been made and the client's consent obtained to proceed with the retainer, it is neither necessary, sensible, nor financially justifiable to have to continually repeat the initial disclosure process in response to any "significant change" particular in complex and fast-moving situations where external time pressures can arise as a consequence of, for example, the course of a matter being litigated before the court.

Judicial observations

The adversity produced by section 178(1)(a) is well illustrated in the decision and views expressed by Wood AsJ in *Luke Johnston v LDA Legal Pty Ltd t/as Dimos Lawyers.*[13]

In respect of this matter, the 2020 Annual Report of the Commissioner for Uniform legal Services Regulation said:[14]

> *A client was orally given an accurate total estimate of legal costs at the first meeting; and updated information about ongoing costs in the form of invoices and requests for money much later in the retainer.*
>
> *Section 174 of the Uniform Law requires a written initial estimate of total future legal costs and a regular updating of this figure when it has significantly changed and is out of date. By virtue of s 178(1)(a) and subject to Uniform General Rule 72A, a failure to comply with any of the disclosure obligations renders the costs agreement void.*
>
> *Demands for progress payments or the delivery of regular invoices for work already completed do not satisfy the disclosure obligations. The limited future estimates that were provided in writing were insufficient to satisfy s 174(1)(b). The cost agreement is therefore void.*

[13] [2019] VS 462.
[14] Accessed at https://www.legalservicescouncil.org.au/publications.html#Annual3, [50] – [51]

However, a more balanced picture emerges from the judgment by Wood AsJ:

> *On the basis of the current state of the evidence I conclude that, as at the first meeting, the applicant was given very accurate oral information about the overall potential costs. It is also clear from the affidavit of Mr Dimos that there were many conversations about future costs.*
>
> *However, the Act requires the initial estimate and updated estimates to be given in writing. There is no doubt the applicant was given updated information about costs from time to time in the form of invoices and requests for money. The Act requires updated estimates of total legal costs in writing as soon as practicable after there is significant change to information previously disclosed, that is estimates of total future costs. That did not occur until much later in the retainer.*
>
> *In the circumstances of this case a casual observer might conclude that an argument to avoid the provisions of the Family Law Cost Agreement was opportunistic given that an accurate total estimate was given at the first meeting and there would have been no reason to provide any update at all if it had been given in writing. At the hearing the respondent submitted 'This case, from start to finish, smacks of a client after the event with an eye on a potential windfall'. In the context of the numerous complimentary emails in relation to the respondent's professionalism and the applicant's gratitude sent in the course of the retainer this comment is not devoid of merit.*
>
> *There is a prevalent misconception in the profession about the estimate provisions in the Act. Demands for progress payments or the delivery of regular invoices for work already completed do not satisfy the Act. Section 174(1) requires an initial estimate of total future legal costs and a regular updating of this figure when this has significantly changed and is out of date. Section 174(6) mandates these to be in writing.*
>
> *Any failure to comply with any of the provisions in relation to disclosure in Part 4.3 of the Act renders the costs agreement void. Non-compliance therefore equals void. There is no discretion to be exercised around 'substantial' compliance. If there was, I would have exercised it given the accurate oral estimate given at the outset. Failure to comply is no longer a matter that merely amounts to a potential ground for a discount of costs at the conclusion of the taxation as was the case under the former regime in the Legal Profession Act 2004. The limited future estimates that were provided in writing in this matter were insufficient to satisfy s 174(1)(b) of the Act. The Family Law Cost Agreement is therefore void.*

The Law Council submits that these judicial observations well illustrate the significant problem that Part 4.3 has created a focus on technical compliance with the legislation, rather than a focus on what disclosure is intended to achieve. As the COAG National Legal Profession Taskforce said:

> *The aim of costs disclosure is to provide the parties with a starting point from which to begin a dialogue about costs. Written disclosure should be a high-level summary to which the client can refer when making decisions during the course of a legal matter—it is not expected to be a detailed document providing substantive legal advice on legal rights and options (although it should complement that advice when later provided). It should be made clear that practitioners are only required to take reasonable steps in providing mandatory disclosure.*[15]

Feedback the Law Council has received about the practising profession's experience of Part 4.3 of the Uniform Law is of a legal costs regime is that is substantially tilted toward

[15] COAG National Legal Profession Reform - *Discussion paper: Legal costs*, 4 November 2009.

detailed, frequent, written disclosure statements and written client consent in each and every case and for every change in the way a matter is proceeding to satisfy the technical requirements of the legislation, regardless of any consideration of the actual needs or preferences of the client, the circumstances of the relationship, or the effect of frequent written disclosures and written consent in response to the efficient and expeditious resolution of the client's matter, particularly in fast-moving matters.

Compliance with Part 4.3 is instead being driven by the risks and consequences for a law practice of technical non-compliance, not the least being practitioner health and wellbeing. This is precisely the kind of situation the COAG National Legal Profession Taskforce sought to avoid:

> *A criticism of the mandatory disclosure regime is the lack of guidance about the level of detail required in disclosure documents. It is argued that practitioners are either legally required to, or regularly err on the side of, caution and provide voluminous detail in costs disclosure documents for fear of failing to meet their professional obligations. Overwhelmingly detailed disclosure does not serve the interests of either practitioner or client and was not intended when the regime was introduced.*[16]

The Law Council has consistently supported legal costs deregulation to generate price and quality of service competition for legal services, and complementary measures to support those consumers of legal services who are at a potential disadvantage (usually labelled as 'information asymmetry') because of limited knowledge and experience in legal matters and legal processes.[17]

Also, the Law Council emphasises that the focus on protecting client interests (including in relation to the cost of legal services) is part and parcel of the ethical principles of the profession. These include commitments to act in the best interests of a client in any matter in which the solicitor represents the client; to deliver legal services competently, diligently, and as promptly as reasonably possible; to provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices, and to not engage in conduct that would bring the profession into disrepute.[18]

An approach more aligned to the realty of legal practice (as amply illustrated by the facts and circumstances in *Johnston*) is that, once the manner in which the client's matter or matters will be pursued has been settled, and the basis on which the costs involved have been agreed (i.e. the main disclosure requirement has been fulfilled), additional detailed disclosure replicating the main disclosure requirement should not be required unless the client asks for it, or the law practice considers it is necessary in the circumstances. This has been the long-standing approach taken by the Legal Profession Acts as an exception to the disclosure requirement.[19]

Recommendation 8

In addition to Recommendation 4:

(a) Section 178 of the Uniform Law be amended to ensure that the presumption that a failure to comply with costs disclosure obligations voids any underlying costs agreement may be rebutted if the relevant regulatory authority, costs assessor, court or tribunal is satisfied the law practice has taken tangible,

---

[16] COAG National Legal Profession Reform - *Discussion paper: Legal costs*, 4 November 2009

[17] See for example the *SCAG Officers Report (Chapter 11 – Costs & Costs Disclosures)* submitted to SCAG on 20 September 2002, which was strongly supported by the Law Council. Some elements of the originally devised model in that *Report* were later refined or modified.

[18] Australian Solicitors' Conduct Rules, Rules 4.1.1, 4.13, 7.1 and 5.1.2.

[19] See for example *Legal Profession Act 2007* (Qld), section 311(b).

practical, and effective steps to satisfy the essential obligation to provide the client with the information the client needs to understand and give consent to the way the matter will be conducted and the costs involved.

or alternatively

(b) Rule 72A of the Uniform General Rules be amended by inserting a new sub-rule that empowers a court, tribunal, costs assessor, or regulatory authority to disapply section 178(1) and (2) of the Uniform Law if satisfied the law practice has taken tangible, practical, and effective steps to satisfy the essential obligation to provide the client with the information the client needs to understand and give consent to the way the matter will be conducted and the costs involved.

The inquiry under either of the approaches in Recommendation 8 is whether the relevant regulatory authority, costs assessor, court or tribunal is satisfied that the client has not been materially disadvantaged because the law practice has, in fact, provided the client with the information the client needed to understand and give consent to the way the matter or matters will and are being conducted, and the costs involved. Relevant factors would include:

- the underlying contravention of disclosure obligations was not substantial;
- the law practice took reasonable steps, in writing or otherwise, to comply with the disclosure requirements in Pt 4.3 of the Uniform Law;
- the law practice took reasonable steps to comply, whether in writing or not, with the disclosure requirements in Pt 4.3 of the Uniform Law after any significant change to anything previously disclosed;
- the circumstances and the conduct of the parties before and when the agreement was made and after the agreement was made indicate that the client was aware of the information referred to in sections 174(1) and (2) of the Uniform Law;
- the client understood and gave consent (whether in writing or not) to the proposed course of action for the conduct of the matter and the proposed costs, and
- it would not be reasonable to expect that the client would have made a different decision in any relevant respect as a result of the failure to comply with disclosure requirements in Part 4.3 of the Uniform Law

Out of time costs assessment applications

Law practices

Section 198(1) of the Uniform Law provides that an application for a costs assessment may be made by:

- a client who has paid or is liable to pay the legal costs to the law practice;
- a third party payer who has paid or is liable to pay the legal costs to the law practice or the client;
- the law practice;
- another law practice, where the other law practice retained the law practice to act on behalf of a client, and the law practice has given the other law practice a bill for doing so.

Section 198(3) provides that an application for a costs assessment must be made within 12 months after a bill was given to, or a request for payment was made to the client, third party payer or other law practice; or after the legal costs were paid if neither a bill nor a request for payment was made.

Section 198(4) provides:

> (4) However, an application that is made out of time may be dealt with by the costs assessor if the designated tribunal, on application by the costs assessor or the client or third party payer who made the application for assessment, determines, after having regard to the delay and the reasons for the delay, that it is just and fair for the application for assessment to be dealt with after the 12-month period.

The Law Council considers that sections 198(3) and 198(4) are incoherent, unfair to law practices and require correction.

Section 198(3) places a 12-month time limit on a law practice making an application for a costs assessment, whereas by way of contrast, the Legal Profession Acts place no time limits on a law practice.[20] The Explanatory Memorandum that accompanied the *Legal Profession Uniform Law Application Bill 2013* (Vic) provides no explanation of the policy rationale for imposing a 12-month time limit on a law practice seeking a costs assessment.

Because the Legal Profession Acts do not place a 12-month time limit on a law practice making an application for a costs assessment, the provisions in those Acts providing for out of time applications pertain only to applications by clients and third party payers[21].

However, given that the Uniform Law does place a 12-month time limit on a law practice making an application for a costs assessment, fairness dictates that a law practice should also be entitled to make an out of time application for a costs assessment where, having regard to the delay and the reasons for the delay, it is just and fair for the application for assessment to be dealt with after the 12-month period.

It is not clear whether section 198(4) permits a law practice to make an out of time application for a costs assessment. The section provides that an application may be made to the designated tribunal for an out of time costs assessment “by the costs assessor, or the client or third-party payer who made the application for assessment.” Given that section 198(4) specifically provides that the client or third-party payer may apply to the designated tribunal for an out of time costs assessment, it is unclear on the face of the provision in what circumstances, or whose behalf, a costs assessor would make an application to the designated tribunal for an out of time costs assessment.

This problem (and the general problem that Part 4.3 focuses attention on technical compliance with the Act rather than on the circumstances and substance of the conduct of the client’s matter) was brought into sharp focus in *DLA Piper (A Firm) v Triclops Technologies PTY Ltd*[22]:

[42] The respondent argues that the applicant is unable to obtain an extension of time as they are not the client, third party payer or other law practice and omitting a law practice rom s198(4) is consistent with consumer protection legislation. The applicant argued at the hearing that they are not precluded from making an application to extend time…

[43] What is clear is that the application to extend time can be made on an application by the Costs Court (in the capacity of costs assessor), and granted by the Supreme Court if it was satisfied about the reasons for delay, extent of delay, and whether it is just and fair to do so.

---

[20] See for example *Legal Profession Act 2007* (Qld), sections 335(5) and 337
[21] See for example *Legal Profession Act 2007* (Qld), section 335(6)
[22] [2020] VSC 93

And in particular:

[48] It is of note that the Legal Services Council has recently proposed an amendment to the *Uniform Law* to make it clear that a law practice has the same ability as others to seek a cost assessment out of time. This is presumably in recognition of a perceived anomaly that exists with their exclusion from the operation of s198(4).

The reasons why a law practice might delay applying for a costs assessment include:

(i) an acknowledgement on the part of the practitioner that a client may need to await the outcome of litigation or a particular stage of litigation before paying an invoice;

(ii) the need to preserve a relationship with a client, particularly in protracted, complex or emotive litigation;

(iii) ensuring payment of instructed expert fees and instructed barristers' fees by solicitors from funds held on trust before seeking payment of their own costs;

(iv) comity between the arms of the legal profession, with barristers often relenting to ensure that solicitors are able to recover outstanding fees owing to them by clients;

(v) assurances made by clients and instructing law practices concerning payment of fees;

(vi) structured payment options agreed by solicitors and barristers to ease financial burdens on clients and fellow legal practices;

(vii) the cost and difficulty of pursuing unpaid fees either by commencing proceedings against a client or recalcitrant solicitor and a sensible reluctance by practitioners to rely on statutory demands as a means to secure payment of legal costs;

(viii) for sole practitioners, small firms with a limited client base and junior members of the Bar beholden in the early stages of their careers to a small number of solicitors for instructions, a power imbalance between the non-paying party and the law practice; and,

(ix) the inappropriateness of a practitioner pursuing a costs assessment where a complaint has been made to a designated local regulatory authority about an invoice and that complaint has yet to be resolved.

The Law Council advised the Legal Services Council by way of letter dated 26 March 2020 of its support for the proposed amendment consulted upon by the Legal Services Council in its January 2020 *Consultation Paper on the Proposed Amendments to the Legal Profession Uniform Law*. However, that proposal, if enacted, will address only one of the reasons set out above for a law practice legitimately delaying making an application for a costs assessment within the 12-month time limit.

Recommendation 9

In the absence of an urgent amendment to the Uniform Law to comprehensively correct the agreed and accepted anomaly in section 198(4):

Consideration be given to developing a Unform General Rule pursuant to section 208(2)(e) of the Uniform Law to permit a costs assessor to make an application under section 198(4), in relation to a law practice where it would be just and fair for the application for assessment to be made after the 12-month period.

Clients

The Law Council has received anecdotal reports that out-of-time applications for costs assessments are routinely granted by costs assessors, even after considerable unexplained delay on the part of the client, with no grounds provided for a dispute or out-of-time claim and even where all fees have been paid in full (sometimes several years previously).

The Law Council appreciates that the decision under section 198(4) of the Uniform Law about whether it is just and fair for an application for a costs assessment to be dealt with after the 12-month period is a discretionary decision for the designated tribunal.

However, the Law Council considers that no client out-of-time application should be made without the client providing serious grounds as to why it was not made within time and with the onus on the client to formally apply with clear grounds, supported by affidavit material, and a very high bar test applied. The client should be required, at the absolute minimum, to formally particularise its grounds for dispute and which bills and/or which part of which bills is in dispute, and provide on affidavit, evidence as to why the claim was not made within time, including any evidence of hardship and disability.

To put this into perspective, the Law Council submits that the reference in section 198(4) to 'just and fair' should clearly be to what is 'just and fair' from the perspective of both the client and the law practice.

Recommendation 10

Consideration be given to developing a Unform General Rule pursuant to section 208(2)(e) of the Uniform Law, setting out matters which a costs assessor should have regard to in making an application to a designated tribunal under section 198(4), to provide that no out-of-time application will be just and fair unless the applicant's circumstances are such as to have made lodging an application under section 198(3) impossible, including due to hardship or disability.

Record keeping

The Consultation Paper refers to an issue that has arisen about the retention of copies of written costs disclosures by barristers in direct briefing matters.

The Law Council agrees with the observation that this is not an issue that arises for solicitors, given routine client file management practices that reflect the requirements of Rule 14 of the Australian Solicitors' Conduct Rules and Uniform General Rule 91E.

Recommendation 10

The Law Council does not support the making of a new Uniform General Rule for solicitors about retention of costs disclosure documents. Such a rule would simply duplicate Australian Solicitors' Conduct Rule 14. A costs disclosure document is a client document for the purposes of the Rule, and the need for additional guidance is properly a matter for the Commentary.