

## Costs assessment arrangements

The Uniform Law provides for the assessment and determination of legal costs by costs assessors on a solicitor-client basis.<sup>1</sup>

Costs assessments must be conducted by costs assessors in accordance with Part 4.3 of the Uniform Law, the Uniform Rules and applicable local legislation.<sup>2</sup> The Uniform Law governs the application, conduct and determination of costs assessments. The machinery and procedure for costs assessments is dealt with by local legislation.

In Victoria, the Costs Court is responsible for undertaking the assessment of legal costs. In NSW, costs assessment will continue to be undertaken by costs assessors appointed by the Chief Justice of NSW.<sup>3</sup> In Western Australia, each taxing officer of the Supreme Court has the responsibility of conducting costs assessments.<sup>4</sup>

### Who can apply for a costs assessment?

A client, a third party payer, the law practice or another law practice retained on behalf of a client can apply for the assessment of costs.<sup>5</sup>

The costs assessment provisions of the Uniform Law do not apply where the client or third party payer is a commercial or government authority, including a State owned enterprise or corporation.<sup>6</sup>

### Time Limits

An application for a costs assessment must be made within 12 months of the legal costs being paid; or the bill being given; or a request for payment made. An application lodged out of time may be accepted if the Manager, Costs Assessment decides it is just and fair to do so.<sup>7</sup>

The provision for an out of time application is not available to a third party payer who would be a commercial or government authority if it were a client of the law practice.<sup>8</sup>

The application of GST must be taken into account.<sup>9</sup>

### Non-associated third party payers

If requested in writing, a non-associated third party payer must be provided with sufficient information to be able to decide whether or not to make an application for a costs assessment.<sup>10</sup>

The assessment of the costs payable by a non-associated third party payer does not affect the amount of legal costs payable by the client to the law practice.<sup>11</sup>

No payment into court or recovery

The costs assessment must take place without any money being paid into court on account of the legal costs which are the subject of the application.

Proceedings to recover costs cannot be commenced until the assessment is completed.<sup>12</sup>

### Assessor to notify the parties

The costs assessor must cause a copy of the application to be given to any law practice or client or any other person the assessor thinks appropriate.<sup>13</sup> A notified person:

- is taken to be a party to the assessment;
- is entitled to participate in the process; and
- if the assessor decides, is bound by the assessment.<sup>14</sup>

An assessment may proceed and be determined in the absence of a party who is notified and does not participate in the costs assessment.<sup>15</sup>

### Duties of the costs assessor

A costs assessor must determine whether a valid costs agreement exists<sup>16</sup>, whether the costs are fair and reasonable and the amount payable.<sup>17</sup> A valid costs agreement is prima facie evidence that costs are fair and reasonable. A cost agreement will remain valid in the event of a minor contravention, provided that the cost assessor is satisfied that the requirements of rule 72A of the Legal Profession Uniform General Rules 2015 are made out.<sup>18</sup>

To the extent that costs are not fair and reasonable, the assessor must determine the amount of legal costs (if any) that are payable.<sup>19</sup> In assessing whether costs are fair and reasonable, the assessor must apply the principles of proportionality and reasonableness as set out in s 172.<sup>20</sup> Factors such as the complexity and urgency of the matter, quality of the work, the instructions given and the skill and experience of the legal practitioners involved are to be taken into account.<sup>21</sup>

The costs assessor may also have regard to:

- whether the law practice or legal practitioner complied with the Uniform Law
- any disclosures made and whether disclosure of the total costs could have been made at the outset

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- any advertisement as to costs or skills of the law practice or legal practitioner involved
- any other relevant matter.<sup>22</sup>

## Reasons must be given

A costs assessor must provide reasons to the parties and may determine the form in which reasons are given.<sup>23</sup>

## Costs of a costs assessment

A costs assessor determines the costs of a costs assessment and by whom they are payable.<sup>24</sup>

Unless the assessor considers that it would be unfair or unreasonable, the costs of a costs assessment are payable by a law practice if the law practice:

- failed to make a disclosure about a matter or in the manner required by Division 3 (costs disclosure); or
- the law practice's costs have been reduced by 15% or more on assessment.<sup>25</sup>

## Right of appeal or review

The Uniform Law provides for a right of appeal or review, subject to any applicable local legislation. The court or tribunal hearing the appeal or reviewing the decision may make any order it considers appropriate.<sup>26</sup> In Victoria, an appeal from a determination by the Costs Court lies to the Trial Division of the Supreme Court of Victoria.<sup>27</sup> In NSW, a party may seek a review of the costs assessment by a review panel with an appeal to the District Court.<sup>28</sup> In Western Australia, a party to a costs assessment may apply to the Supreme Court for a review of the assessment.<sup>29</sup>

## Security for legal costs

A law practice may take reasonable security from a client for legal costs, including security for the payment of interest on unpaid legal costs.<sup>30</sup>

## Disciplinary action

A contravention of the duty to charge costs that are fair and reasonable is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of the responsible principal(s) and each legal practitioner associate or foreign lawyer associate involved in giving or authorising the bill to be given. This is so whether or not s/he knew of the bill or its contents or that the legal costs were unfair or unreasonable.<sup>31</sup>

## Referral for disciplinary action

A costs assessor:

- may refer a matter for disciplinary action if they consider that the costs are not fair and reasonable; and

- must refer a matter for disciplinary action if they consider that the legal costs charged, or any other issue raised in the assessment, may amount to unsatisfactory professional conduct or professional misconduct.<sup>32</sup>

Determinations of costs assessors are admissible in disciplinary proceedings as evidence as to the fairness and reasonableness of legal costs.<sup>33</sup>

## Legal costs the subject of a complaint

Legal costs that are or have been the subject of a costs dispute under Chapter 5 (Dispute resolution and professional discipline) may not be the subject of a costs assessment unless:

- the dispute cannot be resolved and the local authority notifies the parties of their right to apply for a costs assessment; or
- the local authority refers the matter for cost assessment when investigating a disciplinary matter.<sup>34</sup>

## Transitional arrangements

If a client first instructed the law practice prior to commencement of the Uniform Law, the provisions of the previous State Legal Profession Act will apply.<sup>35</sup>

<sup>1</sup> Legal Profession Uniform Law (**Uniform Law**), s 196

<sup>2</sup> Uniform Law, s 199(1)

<sup>3</sup> *Legal Profession Uniform Law Application Act (2014)* (NSW), s 93C, Sch 6

<sup>4</sup> *Legal Profession Uniform Law Application Act 2022* (WA), s 19

<sup>5</sup> Uniform Law, s 198

<sup>6</sup> Uniform Law, s 170; Legal Profession Uniform General Rules 2015, r 71

<sup>7</sup> Uniform Law, s 198 (3) and (4).

<sup>8</sup> Uniform Law, s 198(5)

<sup>9</sup> Uniform Law, s 200(3)

<sup>10</sup> Uniform Law, s 198(6)

<sup>11</sup> Uniform Law, ss 198(10) and 171(1)(c)

<sup>12</sup> Uniform Law, s 198(7)

<sup>13</sup> Uniform Law, s 198(8)

<sup>14</sup> Uniform Law, s 198(9)

<sup>15</sup> Legal Profession Uniform General Rules 2015, r 76

<sup>16</sup> Uniform Law, s 199(2) - an agreement may be void for contravention of a provision

relating to costs disclosure or a costs agreement

<sup>17</sup> Uniform Law, s 199(2)(b)

<sup>18</sup> Legal Profession Uniform General Rules 2015, r 72A came into effect on 22 April 2016

<sup>19</sup> Uniform Law, s 199(2)(b)

<sup>20</sup> Uniform Law, s 200(1)

<sup>21</sup> Uniform Law, ss 172(1)(2) and 200(1)

<sup>22</sup> Uniform Law, s 200(2)

<sup>23</sup> Uniform Law, s 201

<sup>24</sup> Uniform Law, s 204(1)

<sup>25</sup> Uniform Law, s 204(2)

<sup>26</sup> Uniform Law, s 205

<sup>27</sup> *Supreme Court Act 1986* (Vic), s 171

<sup>28</sup> *Legal Profession Uniform Law Application Act (2014)* (NSW), ss 82-91

<sup>29</sup> *Legal Profession Uniform Law Application Act 2022* (WA) s 149(1)

<sup>30</sup> Uniform Law, s 206

<sup>31</sup> Uniform Law, s 207

<sup>32</sup> Uniform Law, s 202

<sup>33</sup> Uniform Law, s 203

<sup>34</sup> Uniform Law, s 197

<sup>35</sup> Uniform Law, Sch 4 cl 18