

# Legal Costs under the Uniform Law

## 1. Legislation

AA *Legal Profession Uniform Law Application Act 2014* (NSW)

UL *Legal Profession Uniform Law* (NSW)

UGR *Legal Profession Uniform General Rules 2015*

<http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2015-246.pdf>

AR *Legal Profession Uniform Law Application Regulation 2015* (NSW)

<http://www.legislation.nsw.gov.au/maintop/epub> and go to week of 22/6/2015 (as made)

superseding

LPA *Legal Profession Act 2004* (NSW)

LPR *Legal Profession Regulation 2005* (NSW)

## Main costs provisions

- UL Pt 4.3 (ss 169 – 208); UGR Pt 4.3 (rr 70 – 76), Sch 1 – Legal costs – deals with costs between clients and their own lawyers (and, where relevant, third party payers)
- AA Pt 7 (ss 63 – 93G); AR Pt 6 (cll 31 – 59) – Costs assessment – applies to ‘Uniform law costs’ and ‘ordered costs’
- AA Pt 6 (ss 59 – 62); AR Pt 5 (cll 24 – 30), Sch 1, 2, 3 – Particular costs regimes (fixed costs, personal injury damages, workers’ compensation, etc), little changed

Previous law – mostly in and under LPA 2004 Pt 3.2.

Future developments – Both AA and the recent amending Act (*Legal Profession Uniform Law Application Legislation Amendment Act 2015* (NSW)) have almost completely missed the opportunity to implement recommendations of the Chief Justice’s Review of the Costs Assessment Scheme. According to the Attorney-General’s second reading speech (27/5/2015), these ‘remain under consideration, to be progressed at a later time.’

Transitional – UL Sch 4 cl 18 – application of UL Pt 4.3 turns on date of first instructions to the solicitor, even if barrister is instructed later – but payment in advance provisions are not in Pt 4.3 and will have to comply with the new law (small window – AR cl 16).

## 2. *Disclosure*

### Solicitor to Client

- Basis of charging – s 174(1)(a) – asap (‘as soon as practicable’) after instructions
- Estimate of total legal costs – s 174(1)(a) – includes barristers’ fees and other disbursements; GST inclusive – asap after instructions
- Client’s rights – s 174(2)(a) – asap after instructions
- Significant changes to any of the above – ss 174(1)(b), 174(2)(b) – asap after change
- Obligation to take ‘all reasonable steps’ re understanding and consent – s 174(3)
- Basis of charging in relation to barrister – s 175(1) – time limit implied as none express
- Estimate of total legal costs in relation to barrister – s 175(1) – time limit implied
- Significant changes in relation to barrister – s 175(1), 174(1)(b) – time limit implied
- Form: in writing – s 174(6) (no express equivalent in s 175)
- Modified re own professional fees below lower threshold, higher threshold – s 174(4), (5), (7), (8); UGR 72 (NB – not applicable to a conventionally retained Barrister)
- Not required for ‘commercial or government clients’ – s 170; UGR 71

### Barrister to Solicitor

- ‘Information necessary’ re basis of charging – s 175(2) – timing implied
- ‘Information necessary’ re estimate of total legal costs – s 175(2) – timing implied
- Significant changes re either of above – s 175(2) – timing implied

### Barrister to direct access Client – s 174 – cf above re Solicitor to Client

### Law Practice to Associated Third Party Payer – ss 171, 176

### Barrister or Solicitor who ‘negotiates’ a settlement to Client

- Estimate of Client’s own ‘legal costs payable’ – s 177(1)(a)
- Estimate of Client’s party/party costs liability – s 177(1)(a)
- Estimate of other-party contribution to either of the above – s 177(1)(b)
- All before the deal is ‘executed’
- Qualified barrister let-out – s 177(2)

### 3. *Costs Agreements*

- ‘Costs agreement’ is not defined
- Parties – s 180(1) – including (c), conventional Barrister and Solicitor agreement
- Client’s right to ‘require’ a ‘negotiated costs agreement’ with ‘the law practice’ – s 179 – What does this mean? What impact on barristers?
- No contracting out of assessment (except commercial or government) – s 180(4), 170 – drafting error excludes c or g client from assessment rights – a law practice is c or g if it is the client, but instructing solicitor as such is not a client – cf s 171(3)
- Contingency fees forbidden – s 183
- Interest – s 195(1), (4), (5), UGR 75, AA s 81 – rate cap: CRT + 2 at issue of bill
- Form – s 180(2), (3) - writing, etc
- ‘Conditional costs agreement’ is semi-defined and regulated
  - Terms – s 181(1), (6) – ‘some or all’ of the costs
  - Cooling-off period – s 181(4), (5) – n/a between law practices
  - Exclusions – s 181(7) – crime, family
  - Uplifts permitted (s 182(1)) and capped (s 182(2)); basis, estimate and explanation of major variables must be in the agreement (s 182(3)) – note policy reversal re damages claims (LPA s 324(1))
  - Must be ‘signed by the client’ and include a rights statement, even if there is no uplift – s 181(2), (3) – consider what this means for barristers – insist that the client counter-sign a barrister/solicitor costs agreement
- Effect – ss 172(1), (4), 178, 184, 207 – if compliant, rebuttable presumption of fair and reasonable charge; only fair and reasonable charges recoverable; subject to that, contractually enforceable (contrast LPA s 319 etc) – quare effect of post-contract contravention of s 174(1)(b), s 177 – passive voice in s 172(4)(a)
- Non-compliance
  - Disciplinary – s 181(8), 182(4), 183
  - Agreement void – s 185(1)
  - Can’t recover, must repay relevant excess, uplift, or (re s 183) whole fee – s 185(2)–(5) – less draconian than LPA s 327 re s 324(1)

#### **4. *Barristers and trust money; Payments in advance***

Payments in advance are still ‘trust money’ (s 129). A law practice is forbidden to receive trust money unless a principal holds a practising certificate that authorises such receipt or the law practice is so authorised under the Uniform Rules (UL s 150); on this basis, barristers are generally forbidden to receive trust money.

Exception: UL s 133; AR cl 15. Payment in advance is still ‘trust money’, but receipt by a Barrister is permitted on specified conditions.

- Only available in direct access situations – still does not apply if there is an instructing solicitor, even one without a trust account.

the other main requirements are more stringent than LPR cl 106A. The Barrister must:

- Maintain a sole-purpose ‘trust money account’ with no overdraft, offset or credit linkage, deposit promptly, and keep the payment in the account until billed etc;
- Notify the account to Bar Association within 14 days of opening;
- Issue detailed receipts and keep copies (7 years / end of matter);
- Appoint a qualified examiner, undergo annual examinations (years to 31 March), submit examination reports to Bar Council (21 days).

Transitional: The trust money provisions are not in Pt 4.3 and take effect immediately, subject to a small window in AR cl 16. Barristers who have held money in advance under repealed LPR cl 106A must notify the Bar Association. See Billing Checklist.

A Barrister must maintain a ‘register of financial interests’ if a ‘legal practitioner associate’ (this catches the Barrister him/herself) has a financial interest in an entity (listed and shelf companies excepted) that engages in any dealing with trust money received by the Barrister, but only to the extent that the interest ‘is relevant to the legal services provided by the barrister’ or the dealing ‘occurs in the course of the work of a barrister’ – UGR 95.

## 5. *Recovery and assessment*

### Billing – ss 186 - 193

- Itemised vs lump sum bill – must be one or the other (UL s 186) – not defined in UL – UGR 5(1) ‘a bill that specifies in detail how the legal costs are made up in a way so as to allow costs to be assessed’ (whatever that means) vs ‘a bill that describes the legal services to which it relates and specifies the total amount of the legal costs’ – most barristers’ bills are itemised – recipient may request itemised bill within 30 days of becoming payable, biller must comply within 21 days (s 187)
- UGR 74 contemplates that an itemised bill may exceed an earlier lump sum bill. The excess is recoverable only if the biller gave appropriate written warning at the time of the lump sum bill and only after assessment etc.
- Signature required – s 188
- The bill must contain a statement of client’s rights – s 192
- Service on client – s 189; UGR 73 – manner of service between law practices (conventional bill from Barrister to Solicitor) is not regulated
- Progress reports (unbilled work) – s 190 – applies to Barrister on request of Solicitor
- No bill for the bill – s 191
- Interest – s 195(3) – to be claimed, the bill must say so and include ‘a statement ... of the rate of interest’

Suing – s 194 – requirements before action: compliant bill, any ‘costs dispute’ process before DLRA (LSC) closed or resolved, 30 days post service of bill / properly requested itemised bill – see also s 195 re interest

### Costs assessment – UL ss 196 – 205, AA Pt 7 (ss 63 – 93G), AR Pt 6 (c11 31 – 59)

- Applies to costs ‘payable on a solicitor-client basis’ – s 196 – undefined, but not its technical meaning – see also AA Pt 7 with respect to ‘Uniform Law costs’; AA ss 63, 65.
- The time limit for a Solicitor to seek assessment of a Barrister’s bill is now the same as between Client and Solicitor: 12 months from bill or from payment without bill (s 198).

- A complaint to the DLRA (LSC) under UL Pt 5.2 involving a ‘costs dispute’ (s 269(2)) can side-track or delay assessment (s 197). The DLRA must reject a costs dispute if the total bill is under \$100K or the amount in dispute is under \$10K (figures indexed, ex GST): ss 291, 294. Within those limits, the DLRA may make a binding determination (s 292) or decline to do so (s 293). If the DLRA rejects or declines a costs dispute, the impediment to assessment disappears. Separately from the above, the DLRA has power (as at present) to institute a costs assessment ancillary to a disciplinary investigation (s 284).
- AA Pt 7 and AR Pt 6 mostly reproduce the present structure under LPA Pt 3.2 Div 11.
- Hardly any of the recommendations of the Chief Justice’s Review have been implemented. Among the few is the removal of appeal rights from a first-instance decision of a costs assessor; an appeal will now lie only from a review panel. Contrary to the Review recommendations, the District Court is the only appeal venue. Judicial review remains (*Supreme Court Act 1970* s 69) but may be difficult to justify, given that there are also appeal rights.
- Interest on costs is to be assessed and certified – AA ss 70(1)(c), (4), (5), 75, 81
- AA Pt 7 provides for Costs Assessment Rules to be made by the Costs Assessment Rules Committee and laid before Parliament as a disallowable instrument. The Committee has not yet been constituted.

MLB, 29/6/2015