



Materials for CPD seminar “Legal Costs under the new Uniform Law”

NSW Bar Association Common Room

Tuesday 14 July 2015

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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 (cll 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

Billing Checklist for Barristers

This checklist sets out some commonly encountered requirements relating to barristers' billing practices under Part 4.3 of the *Legal Profession Uniform Law (NSW)* (**UL**), the *Legal Profession Uniform General Rules 2015* (**UGR**), the *Legal Profession Uniform Law Application Act 2014* (NSW) (**AA**) and the *Legal Profession Uniform Law Application Regulation 2015* (NSW) (**AR**) applicable from 1 July 2015.

Links:

UL: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+16a+2014+cd+0+N>

UGR (as made): <http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2015-246.pdf>

AA: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+16+2014+cd+0+N>

AR (as made): <http://www.legislation.nsw.gov.au/maintop/epub>

Currency: Last revised, 26 June 2015.

1. TRANSITION TO UNIFORM LAW

1. UL Pt 4.3 – and the section of this checklist headed 'Form, Content and Service of the Bill' – apply only to matters in which the client first instructed the barrister's instructing solicitor on after 30 June 2015 and to direct access matters where the client first instructed the barrister after that date. Old law matters – where the solicitor was first instructed before 1 July 2015 or the direct access client first instructed the barrister before that date – are still governed by the *Legal Profession Act 2004* Pt 3.2 to the exclusion of UL Pt 4.3. (UL Sch 4 cl 18.)
2. Barristers need to distinguish between matters governed by UL Pt 4.3 and old law matters. Billing stationery and boilerplate text for new bills in old law matters should follow the old format. If this is thought impracticable, an alternative temporary approach in all bills is to include as *Note A* the mandatory UL notifications and as *Note B* the mandatory old law notifications, both preceded by an introductory form of words such as:

Note A applies where the client first instructed the solicitor after 30 June 2015 or, in a direct access case, where the client first instructed the barrister after that date. *Note B* applies otherwise.
3. The rules affecting payment in advance are not part of UL Pt 4.3. There is no long-tail transitional rule. Compliance is required for old law matters as well as new ones. See para 19 below.

2. PRELIMINARY MATTERS: TIME RECORDING

4. **Time recording** Most barristers bill on a time costing basis. Anyone who bills on this basis should keep contemporaneous daily records of time spent, the nature of the work done, and the brief to which the work relates. There is no set form. The barrister may, for example, keep a day book or an Excel spreadsheet, or may use proprietary accounting software with time recording features. The important thing, both in fairness to the client and solicitor and for the protection of the barrister, is to keep a reliable record sufficient to support the creation of an itemised bill.

3. FORM, CONTENT AND SERVICE OF THE BILL

5. **Content and detail of bill** The bill must be either an itemised bill or a lump sum bill (UL s 186). An itemised bill 'specifies in detail how the legal costs are made up in a way so as to allow costs to be assessed'; a lump sum bill 'describes the legal services to which it relates and specifies the total amount of the legal costs' (UGR cl 5). The traditional form of Barristers' bills has generally been accepted as sufficient for assessment. Although not repeated in the new legislation, the *Legal Profession Regulation 2005* (NSW) cl 111B(2) may provide useful guidance. It required the following particulars, set out in generally chronological order:
 - (a) short details of each item of work carried out on behalf of the client, including the method by which it was carried out (whether by letter, telephone, perusal, drafting, conference, teleconference or otherwise) if not otherwise apparent,
 - (b) the date on which each item of work was carried out,
 - (c) the amount charged for each item of work or for items of work carried out on a particular day, and particulars of the basis for calculating the amount charged.
6. UGR 74 contemplates that an itemised may exceed an earlier lump sum bill. The excess is only recoverable after assessment or binding determination and only if the biller gave appropriate written warning at the time of the lump sum bill. The warning is only appropriate in a lump sum bill. Most barristers' bills are itemised and should not contain the warning. If giving a lump sum bill, consider the following wording: 'If an itemised bill is requested, the total amount of the legal costs specified in that bill may be higher than the amount specified in the present lump sum bill.'
7. **Signature** The bill (or an attached or enclosed letter) must be signed by the barrister or sufficiently designate the barrister as 'responsible principal' (UL s 188).
8. **Statement of clients' rights** UL s 192 requires a billing law practice to 'ensure that a bill includes or is accompanied by a written statement setting out— (a) the avenues that are open to the client in the event of a dispute in relation to legal costs; and (b) any time limits that apply to the taking of any action referred to in paragraph (a).' There is no prescribed form. The legislation may fairly be criticised for imposing a positive legal obligation in only the vaguest of terms.
9. Barristers' bills are usually directed to solicitors, not clients, but the legislation is not interested in statements of instructing solicitors' rights. Assuming that a s 192 statement is required in a bill to an instructing solicitor, consider the following wording:

A client may apply to have his or her legal costs assessed by a costs assessor in the event of a dispute. For NSW, the application is made to the Manager, Costs Assessment. The application must usually be made within 12 months after the bill is given to the client.
10. It is not clear whether Parliament expects lawyers to include in every bill a reference to the complaints procedure under UL Pt 5.2 (relevant if a 'complaint about a lawyer' includes a 'costs dispute' – see s 269) and the somewhat complex time limits that apply (s 272). Consider the following wording:

A client who complains about a lawyer or law practice to the designated local regulatory authority (for NSW, the Legal Services Commissioner) may include a costs dispute in the complaint. The time limit is usually 60 days after the costs become payable or 30 days after the law practice complies with a duly made request for an itemised bill.
11. **Interest** If interest is to be claimed, the bill must include 'a statement that interest is payable and of the rate of interest' (UL s 195(3)). Interest cannot be charged above the rate prescribed under s 195(4), presently the RBA cash rate target plus 2 percentage points (UGR 75). The rate for a particular bill is fixed at the date when the bill is issued. Subsequent changes in the cash rate target have no effect. The Act does not say whether the bill must state the rate as a numeric value, or whether a descriptive statement is sufficient. Consider the following wording, which throws everything in:

Interest is payable on unpaid legal costs at the rate prescribed under the *Legal Profession Uniform General Rules 2015*, rule 195(4), being the Reserve Bank of Australia cash rate target at the date of issue of the bill plus 2 percentage points. The rule 195(4) rate is currently []% per annum.

12. **Method of service of bills** UL requires compliance with UGR. UGR does not prescribe a method for giving a bill to a solicitor. For bills given to a client, see UGR 73.
13. **Requirement before suing** A barrister cannot sue for fees without first giving a bill that complies with UL and UGR and then waits 30 days (UL s 194). If the recipient of a lump sum bill requests an itemised bill within 30 days after the legal costs become payable, the barrister must comply with the request within 21 days and cannot sue until 30 days after that person receives the itemised bill (ss 187, 194); this can be avoided by always giving itemised bills.
14. **Requirements if proceeding to assessment** A better way to recover fees is often to apply for assessment. See AA s 68 and AR cl 32, 33, 34(2). There is no express waiting time, although the application must contain a statement that there is 'no reasonable prospect of settlement of the matter by mediation' (AR 32(3)).

4. GST TAX INVOICES AND ADJUSTMENT NOTES

15. **Requirement for tax invoice** GST legislation imposes form and content requirements to qualify a document as a tax invoice. A barrister's bill does not have to be a tax invoice, but Commonwealth law requires a tax invoice to be given for a taxable supply within 28 days of request. Most barristers find it convenient to give all bills in tax invoice form.
16. **Tax invoice** The following items are based on the usual requirements for a supplier-created tax invoice for barrister's services over \$1,000 under the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*, s. 29-70. The invoice should usually set out the following:
 - a) the barrister's identity and ABN
 - b) the recipient's identity or ABN (this refers to the recipient of the supply, not the recipient of the bill; for certainty, both client and solicitor should be identified –the client is the recipient, and the solicitor has the obligation to pay)
 - c) what is supplied, including its quantity (if applicable) and price
 - d) the extent to which each supply to which the document relates is a taxable supply
 - e) the date of issue of the invoice
 - f) the amount of GST (if any) payable in relation to each supply to which the document relates
 - g) a clear indication that the document is intended to be a tax invoice
17. **Adjustment note** If a barrister has to issue an adjustment note, it must comply with s. 29-75 of the GST Act and contain certain information. See GSTR 2013/2 [12] at <<http://law.ato.gov.au/atolaw/view.htm?DocID=GST/GSTR20132/NAT/ATO/00001>>.

5. PAYMENT IN ADVANCE

18. **Payment in advance** Payments in advance are deemed to be trust money under UL 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. A qualified exception is allowed in the case of payments in advance under UL 133 if the barrister complies with AR 15. Anyone intending to rely on the exception should study AR 15 in detail. Broadly, it is only available in direct access situations – it cannot apply if there is an instructing solicitor, even one without a

trust account. It is more stringent than the *Legal Profession Regulation 2005* cl 106A. The Barrister must inter alia:

- 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 the account;
- issue detailed receipts and keep copies (7 years / end of matter); and
- appoint a qualified examiner, undergo annual examinations, and submit examination reports to Bar Council (21 days).

19. **Transitional** The trust money provisions are outside UL Pt 4.3. They apply from 1 July 2015, subject to a special transitional rule in AR 16. That rule prescribes two things:

- a) Until 1 October 2015, 'trust money may be received and held by a barrister on account of legal costs for legal services in advance of the provision by the barrister of the legal services, in the circumstances set out in clause 106A of the *Legal Profession Regulation 2005*, as in force immediately before its repeal, if the barrister held trust money in an account that complied with that clause immediately before the repeal of that clause.'
- b) Any barrister who 'held' trust money under LPR cl 106A must notify the Bar Association of the account in which the money was held as soon as practicable after 1 July 2015.

Billing boilerplate

A client may apply to have his or her legal costs assessed by a costs assessor in the event of a dispute. For NSW, the application is made to the Manager, Costs Assessment. The application must usually be made within 12 months after the bill is given to the client. A client who complains about a lawyer or law practice to the designated local regulatory authority (for NSW, the Legal Services Commissioner) may include a costs dispute in the complaint. The time limit is usually 60 days after the costs become payable or 30 days after the law practice complies with a duly made request for an itemised bill. Responsible principal: **[name of barrister]**

Interest is payable on unpaid legal costs at the rate prescribed under the *Legal Profession Uniform General Rules 2015*, rule 195(4), being the Reserve Bank of Australia cash rate target at the date of issue of the bill plus 2 percentage points. The rule 195(4) rate is currently **[numeric rate at date of issue]**% per annum.

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Precedent 1.1

Disclosure Letter From Barrister To Solicitors, S 175(2)

[date]

[Solicitors' address &c]

Dear [salutation]

Re: [Matter]

(Ref. no: [Barrister's reference no.])

I refer to [our recent discussions concerning the above matter and thank you for offering a brief in this matter.]

I shall require a costs agreement under the *Legal Profession Uniform Law* (NSW) s 180(1)(c). My proposed Costs Agreement is enclosed. It will become effective when you sign and return a copy or otherwise accept its terms by conduct, such as instructing me in relation to this matter. Please sign and return a copy at your early convenience.

[Consider whether the solicitors have all the information (preferably in documented form) necessary for them to comply with s 175(1), which requires them to disclose to the client the details in s 174(1) in relation to yourself as retained counsel. Broadly, these relate to:

- basis of calculation of fees (these are set out in the Costs Agreement);
- estimate of 'total legal costs'.

If any further information is necessary to enable the solicitors to do this (see s 175(2)), or if you consider it professionally appropriate to provide further information (whether strictly required or not), provide it here.]

I expect that the information set out above and in the enclosed Costs Agreement will suffice to enable you to comply with section 175(1) of the Uniform Law, having regard to your knowledge of the matter and your own professional expertise and experience. Let me know if you require further information. The same invitation stands if you need additional or updating information from me about my prospective fees as the matter progresses.

[If a government or commercial client exemption applies, the paragraph referring to section 175(1) may be deleted. The following may be used instead:

I note your advice that the client is a government or commercial client within s 170 of the Uniform Law {on the basis that – identify basis of exemption, if required}.]

Yours faithfully, [&c]

Precedent 1.2A

Basic Costs Agreement between Barrister and Solicitors

Between: **[name of barrister]** ('the Barrister')

Ref. No. **[Barrister's ref. no.]**

And: **[Solicitors]**, ('the Solicitors')

Re: **[Matter]**.

Date:

The Solicitors propose to retain the Barrister on behalf of a client or clients of the Solicitors. This is a costs agreement between the Barrister and the Solicitors under the *Legal Profession Uniform Law (NSW)* ('UL'), section 180(1)(c).

1. This agreement applies to legal services provided by the Barrister under retainer from the Solicitors in connection with or arising out of the above-mentioned matter.
2. The Solicitors shall pay the Barrister:
 - a) [set out basis of charging – see separate note on the Costs and Billing web page]
 - b) The cost of any [specify billable expenses – e.g. travel, accommodation and incidental expenses in connection with any attendance outside Sydney].
 - c) The amount of any applicable goods and services tax, which shall be added to each of the above.
3. Interest is charged from date of invoice until payment at the rate referred to in UL section 195(4), but interest is waived if fees are fully paid within 30 days of invoice.
4. The Barrister shall send invoices from time to time at the Barrister's discretion or upon request of the Solicitors. Each invoice is payable within 30 days.
5. The Solicitors' obligations are personal and do not depend on their being put in funds by any person.
6. The Solicitors warrant that they are authorised to receive on behalf of each client any disclosure that the barrister may be required to make to the client under the UL and shall pass on any such disclosure to the client.
7. The Barrister may from time to time by notice require the Solicitors to hold one or more amounts in trust and charged as security for payment of amounts that may become due to the Barrister under this agreement or to provide such other security as the Barrister and Solicitors may have agreed for that purpose. If the Solicitors do not so hold any such amount or provide such security by the time nominated in the notice (or within a reasonable time if no time is so nominated) they shall not by that fact alone be in breach of this agreement, but they shall immediately notify the Barrister of that fact, in which event the Barrister shall be entitled to suspend work or return the brief.
8. The Barrister may review rates of charge and other terms after six months from the date of this agreement. If the Barrister and Solicitors cannot then agree, the Barrister may return the brief.
9. 9. This costs agreement is not in itself a retainer. It governs costs for legal services but not the provision or acquisition of legal services. Advocate's immunity, where applicable, is preserved.
10. The Solicitors' agreement hereto is signified by signing below or by instructing or continuing to instruct the Barrister after receiving this document.

11. [If the case is within the *Legal Profession Uniform Law Application Act 2014 (NSW) Sch 1* relating to personal injury matters, see additional notes on the Costs and Billing web page, heading 1.3. Precedent 1.3.1 may be inserted here and 1.3.2 at the end of the document.]

.....
[name of barrister]

.....
[Solicitors]

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Precedent 1.2B

Conditional Costs Agreement between Barrister and Solicitors

Between: **[name of barrister]** ('the Barrister')

Ref. No. **[Barrister's ref. no.]**

And: **[Solicitors]**, ('the Solicitors')

Re: **[Matter]**.

Client(s): **[Client(s)]**.

Date:

The Solicitors propose to retain the Barrister on behalf of a client or clients of the Solicitors. This is a costs agreement between the Barrister and the Solicitors under the *Legal Profession Uniform Law (NSW)* ('UL'), section 180(1)(c).

12. This agreement applies to legal services provided by the Barrister under retainer from the Solicitors in connection with or arising out of the above-mentioned matter.
13. The Solicitors shall pay the Barrister:
 - a) [set out basis of charging – see separate note on the Costs and Billing web page]
 - b) The cost of any [specify billable expenses – e.g. travel, accommodation and incidental expenses in connection with any attendance outside Sydney].
 - c) The amount of any applicable goods and services tax, which shall be added to each of the above.
14. Payment [other than in respect of expenses] is conditional on the successful outcome of the matter. The circumstances constituting successful outcome are: [set out those circumstances – e.g. verdict, judgment, settlement or any other arrangement entitling the client to any relief, remedy or benefit relating to the subject matter of the proceedings (other than being relieved of an adverse party's potential claim for costs).] If the Barrister on reasonable grounds considers that the Client has unreasonably rejected a reasonable offer of compromise contrary to the Barrister's advice, this clause does not apply to legal services provided after the Barrister gives notice to that effect to the Solicitor.
15. **[If an uplift is required, comply with UL s 182: basis of uplift; estimate / range of estimates + explanation; limit of uplift. The uplift should only apply to costs the payment of which is conditional.]**
16. Interest is charged from date of invoice until payment at the rate referred to in UL section 195(4), but interest is waived if fees are fully paid within 30 days of invoice. An invoice may relate to costs that are still conditional, in which case those costs are not payable until the condition is satisfied but interest still runs from date of invoice.
17. The Barrister shall send invoices from time to time at the Barrister's discretion or upon request of the Solicitors. Each invoice is payable within 30 days.
18. The Solicitors warrant as follows:
 - a) The Solicitors are authorised to receive on behalf of each client any disclosure that the barrister may be required to make to the client under the UL, and shall pass on any such disclosure to the client.
 - b) The Solicitors have informed each client of the effect of Rule 106 of the *Legal Profession Uniform Conduct (Barristers) Rules*.

c) Each Client has been informed of the Client's right to seek independent legal advice before this agreement was entered into.

19. The Solicitors' obligations are personal and do not depend on their being put in funds by any person.
20. The Solicitors, being authorised to do so by each Client, hereby charge the Client's cause of action and any judgment, settlement or consideration in connection with the matter in which the Barrister is retained as security for any payment that may become due to the Barrister under this agreement.
21. The Barrister may review rates of charge and other terms after six months from the date of this agreement. If the Barrister and Solicitors cannot then agree, the Barrister may return the brief.
22. This costs agreement is not in itself a retainer. It governs costs for legal services but not the provision or acquisition of legal services. Advocate's immunity, where applicable, is preserved.
23. The Solicitors' agreement hereto is signified by signing below or by instructing or continuing to instruct the Barrister after receiving this document.
24. **[If the case is within the *Legal Profession Uniform Law Application Act 2014 (NSW) Sch 1* relating to personal injury matters, see additional notes on the Costs and Billing web page, heading 1.3. Precedent 1.3.1 may be inserted here and 1.3.2 at the end of the document.]**

.....
[name of barrister]

.....
[Solicitors]

Each Client hereby acknowledges, ratifies and confirms this agreement:

.....
[Client(s)]

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Personal Injury Damages Note

AA Schedule 1 limits legal costs in 'personal injury damages' cases. Clause 2 provides that 'if the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed' by the imposition of statutory maximum amounts. It also says that 'a law practice is not entitled to be paid or recover for those legal services an amount that exceeds those maximum costs', subject to cl 4. Clause 4 provides that Schedule 1 'does not apply to the recovery of costs payable as between a law practice and the practice's client to the extent that recovery of those costs is provided for by a costs agreement that complies with UL Pt4.3 Division 4.' AR 28 imposes additional requirements for 'the law practice' to make disclosure to 'the client' as a condition for engaging the protection of AA Schedule 1 cl 4. How this applies to the normal case where the client retains and enters into a costs agreement with solicitors and the solicitors retain and enter into a costs agreement with a barrister is unclear and has not been authoritatively determined.

The first question is whether AA Schedule 1 cl 2 affects the barrister's right to recover his or her fees from the solicitor (assuming in the case of a conditional costs agreement that any applicable condition has been satisfied). If so, there is a further question: are the barrister's fees capable of attracting exemption under cl 4, and by what criteria? One possibility is that costs payable by a solicitor to a barrister under a costs agreement between them can attract cl 4 if they are also payable by the client to the solicitor under a complying costs agreement between the client and the solicitor in the character of disbursements, that being within the statutory definition of costs, and that the disclosure requirements of AR 28 correspondingly address themselves to the relationship between solicitor and client. If this is so, the barrister needs to ensure that the client has received requisite disclosure from the solicitor.

Where the barrister enters into a costs agreement under UL s 180(1)(c) with instructing solicitors and wishes to take advantage of exemption under AA Schedule 1 cl 4 from the limits otherwise imposed under Schedule 1 in a personal injury case, assuming that this is legally possible where the costs agreement is between barrister and solicitor (barristers should consider this question and the legal effect of the precedent for themselves), the costs agreement may include a warranty from the solicitors that they have entered into a complying costs agreement with the client and made the necessary disclosure. The solicitor's warranty may be coupled with additional clauses added at the end of the barrister/solicitor costs agreement providing certification by the client and a collateral costs agreement between client and solicitor covering the barrister's fees.

Precedent 1.3.1

Personal injury: solicitor's warranty

[To be inserted in a barrister/solicitor costs agreement]

[clause no.] The Solicitors warrant that they have entered into a costs agreement with each client complying with the *Legal Profession Uniform Law Application Act 2014* (NSW) ('AA') Sch 1 cl 4 and that, before or as soon as practicable after they were retained in the matter but before the costs agreement was entered into, they disclosed to each client all information required to engage the operation of that clause, including the following:

- a) But for the costs agreement, AA Sch 1 would limit the maximum costs for legal services provided to the client or prospective client in connection with any claim for personal injury damages, such that, if the amount recovered on such a claim does not exceed \$100,000 (or such other amount as may be prescribed for the purposes of the Schedule), the maximum aggregate costs of all law practices that have provided legal services to the client or prospective client are limited in the case of a plaintiff to the greater of 20% of the amount recovered or \$10,000 or in the case of a defendant to the greater of 20% of the amount sought to be recovered by the plaintiff or \$10,000.
- b) For the purpose of calculating the limit, the 'amount recovered' includes any amount paid under a compromise or settlement (with or without legal proceedings), but no regard is paid to any part of the amount that is attributable to costs or interest. For the purpose of applying the limit, costs charged for disbursements (including disbursements for services provided by another person who is not a law practice) are not counted as part of the 'costs for legal services'. The limit is increased (i) if the case goes to District Court arbitration and the other party obtains an order for a partial or full rehearing or (ii) if the case is decided by the District Court is appealed by the other party. If both these things happen, there are two increases. The increase is $\frac{3}{4}$ of the original limit (subject to Regulation). Where multiple law practices (e.g. the Barrister and the Solicitors) provide legal services to the same party, the Court may by order apportion the limit between them. The Court may also order particular legal services to be excluded from the limit in certain circumstances specified in the Schedule.
- c) The costs agreement will have the effect of excluding the operation of AA Sch 1.
- d) The Barrister's costs will be calculated in accordance with this costs agreement (and the Solicitors warrant that they have given each client or prospective client particulars as to how the Barrister's costs will be calculated under the costs agreement).
- e) This costs agreement relates only to costs payable as between the Solicitors and the Barrister and therefore ultimately payable by the client or prospective client to the Solicitors so that, if costs are recoverable against the other party, the maximum costs so recoverable will be as provided by AA Sch 1.
- f) If ordinary party/party costs are ordered to be paid by one party to the other (e.g. if the Court orders the unsuccessful party to pay the successful party's costs), the maximum costs so payable as provided by AA Sch 1 are subject to the limits mentioned above even if the receiving party has a complying costs agreement with the relevant law practice and has to pay a larger amount for his or her legal services. Despite those limits, however, AA Sch 1 does not prevent a Court from ordering costs to be paid by one party to the other on an indemnity basis in respect of legal services provided to the receiving party under the costs order after that party has made an offer of

compromise to the paying party under the costs order and it turns out that the Court determines or makes an order or award on the claim in question in terms that are no less favourable to the paying party (whether plaintiff or defendant) than the terms of the offer. In those circumstances, costs payable by one party to another may exceed the limits referred to above.

Precedent 1.3.2

Personal injury client's certification and solicitor/client agreement about barrister's fees

[To be added at the end of a barrister/solicitor costs agreement incorporating a personal injury solicitor's warranty]

I certify that I have shown each client or prospective client a copy of this costs agreement, explained its terms and conditions, and explained the effect of the *Legal Profession Uniform Law Application Act 2014* (NSW) Sch 1.

(signed) Solicitors

Date:

I certify that (a) my Solicitors have shown me a copy of this costs agreement between the Barrister and my Solicitors and explained to my satisfaction its terms and conditions and the effect of the *Legal Profession Uniform Law Application Act 2014* (NSW) Sch 1 and (b) I accept those terms and conditions. By way of further costs agreement with my Solicitors, I hereby agree with to pay them the proper amount of the Barrister's costs in accordance with and subject to the conditions in the costs agreement between the Barrister and the Solicitors.

(signed) Client

Date:

Precedent 2.1

Covering letter from Barrister to direct access Client

[date]

[Client's address &c]

Dear [salutation]

Re: [Matter]

(Ref. no: [Barrister's reference no.])

I refer to [our recent discussions concerning the above matter and thank you for offering a brief in this matter.]

As a condition of acting for you, I shall require a costs agreement under the Legal Profession Uniform Law (NSW) s 180(1)(a). My proposed Costs Agreement is enclosed. It will become effective as such an agreement when you sign and return a copy. If it is acceptable to you, please do so [at your early convenience / within n days]. You have the right to seek independent legal advice before entering into a costs agreement.

I am required to disclose certain information to you about legal costs. That disclosure is made by giving you the Costs Disclosure Notice set out as Schedule 1 to the Costs Agreement.

[If a government or commercial client exemption applies, the paragraph referring to disclosure and the Costs Disclosure Notice may be omitted. If explicit reference to the exemption is desired, the following may be inserted:

I note your advice that you are a government or commercial client within the disclosure exemption under section 170 of the Uniform Law {on the basis that – identify basis of exemption, if required}.]

As you have asked to retain me directly, I also need to inform you of some important facts about direct access and to obtain your written acknowledgement that you have been so informed. The information is in the Direct Access Disclosure set out as Schedule 2 to the Costs Agreement. [Note: This paragraph assumes that instructions will be received directly from a person who is not a solicitor – see Legal Profession Uniform Conduct (Barristers) Rules 2015 r 22.]

Yours faithfully,

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Precedent 2.2

Costs Agreement between Barrister and Client

Between: **[name of barrister]** ('the Barrister')

[Ref. No.]

And: **[Client]**, ('the Client')

Re: **[Matter]**.

Date:

The Client proposes to retain the Barrister directly in the above matter. This is a costs agreement between the Barrister and the Client under the *Legal Profession Uniform Law* (NSW) ('UL'), section 180(1)(a).

1. This agreement applies to legal services provided by the Barrister in connection with or arising out of the above-mentioned matter.
2. The Client acknowledges receipt from the Barrister of:
 - a) the Costs Disclosure Notice set out as Schedule 1 to this agreement; and **[If a government or commercial client exemption applies, this sub-clause and the Schedule may be omitted.]**
 - b) the Direct Access Disclosure set out as Schedule 2 to this agreement. **[Assumes applicability of *Legal Profession Uniform Conduct (Barristers) Rules 2015 r 22.*]**
3. The Client shall pay the Barrister:
 - a) [set out basis of charging – see separate note on the Costs and Billing web page]
 - b) The cost of any [specify billable disbursements for expenses – e.g. travel, accommodation and incidental expenses in connection with any attendance outside Sydney].
 - c) The amount of any applicable goods and services tax, which shall be added to each of the above.
4. **[If the costs agreement is conditional:**
Payment of the Barrister's costs [other than in respect of expenses] is conditional on the successful outcome of the matter. The circumstances constituting successful outcome are: [set out those circumstances – e.g. verdict, judgment, settlement or any other arrangement entitling the client to any relief, remedy or benefit relating to the subject matter of the proceedings (other than being relieved of an adverse party's potential claim for costs).] If the Barrister on reasonable grounds considers that the Client has unreasonably rejected a reasonable offer of compromise contrary to the Barrister's advice, the last preceding clause does not apply to costs for any legal services provided after the Barrister gives notice to that effect to the Client.]
5. **[If the costs agreement is conditional, unless a commercial or government client exemption applies:**
The Client has been informed that the Client has the right to seek independent legal advice before entering into this agreement. The Client confirms that the Client has been so informed.]
6. **[If the costs agreement is conditional, unless a commercial or government client exemption applies:**
The Client has a cooling-off period of five clear business days during which the Client may terminate this agreement by written notice. If that happens, the Client must pay the Barrister's costs in accordance with this Agreement for legal services (if any) performed before that termination and with the Client's knowledge that the legal services would be performed during that period. Such costs are payable regardless of the outcome of the matter.]
7. **[If the costs agreement is conditional and an uplift is required, comply with UL s 182:** basis of uplift; estimate / range of estimates + explanation; limit of uplift. The uplift should only apply to costs the payment of which is conditional.]

8. Interest is charged from date of invoice until payment at the rate referred to in UL s 195(4), but interest is waived if fees are fully paid within 30 days of invoice.
9. The Barrister shall send invoices from time to time (a) at the Barrister's discretion and (b) when requested by the Client. **[If the costs agreement is conditional: An invoice may relate to costs that are still conditional, in which case those costs are not payable until the condition is satisfied but interest still runs from date of invoice.]**
10. Advocate's immunity, where applicable, is preserved.
11. The Barrister may review rates of charge after six months from the date of this agreement, but only to give effect to changes in the Barrister's normal rate for the relevant type of work. If the Barrister and Client cannot then agree, the Barrister may return the brief.
12. **[If a sophisticated client exemption applies, the following may be added:**
The Client warrants that the Client is a government or commercial client within UL s 170.
13. **[If the costs agreement is made with an entity such as an accounting firm that may be acting for its own client, the following may be added:**
The Client's obligations under this agreement are personal to the Client, regardless of any relationship that may exist between itself and any client of the Client.]
14. **[If payment in advance is required, the following may be considered (NB: such payments can only be dealt with as provided by regulations to be made for the purpose under the *Legal Profession Uniform Law Application Act 2014* s 166(2)(d), which are expected to differ from the *Legal Profession Regulation 2005* cl 106A, and breach of which can be serious misconduct):** The Barrister may from time to time notify the Client that the Barrister requires one or more specified amounts to be paid on account of costs but in advance of provision of corresponding legal services. The Barrister may specify when such amounts are to be paid. If any such amount is not paid within the specified time or (if no time is specified) within a reasonable time, the Barrister may suspend work and/or return the brief.]

.....
[name of barrister]

.....
Client

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Schedule 1 – Costs Disclosure Notice

Given under the *Legal Profession Uniform Law* (NSW) ('UL')

From: **[name of barrister]**

To: **[Client]**

Date:

1. This notice relates to legal services in the following matter, in which you have advised that you wish to instruct me:

[Describe the matter. Remember that fresh disclosure will be required if legal services are to be provided to the same client, but in a different matter.]
2. I propose that my legal costs will be calculated in accordance with the accompanying Costs Agreement document.
3. My estimate of the total legal costs for my legal services referred to in 1 above is \$.
[Consider whether and how much further elaboration is necessary or appropriate.]
Bear in mind that this is only an estimate. Actual costs may differ considerably from the initial estimate. Litigation is uncertain. New or unforeseen issues often arise. It is not possible for one party to control the actions of other parties.
4. You have the right to negotiate a costs agreement with me or with any law practice that may act for you.
5. You have the right to negotiate the billing method (for example, by reference to timing or task).
6. You have the right to receive a bill from me or any such law practice and to request an itemised bill if you receive a bill that is not itemised or is only partly itemised.
7. You have the right to seek the assistance of the designated local regulatory authority (the NSW Legal Services Commissioner) in the event of a dispute about legal costs.

5.1 Schedule 2 – Direct Access Disclosure

From: **[name of barrister]**

To: **[Client]**

Date:

You wish me to represent you at [court], in the case of [matter name] without the assistance of a solicitor.

[If advice matter – change the first paragraph to read:] You wish me to provide you with legal advice in relation to [describe matter] without the assistance of a solicitor.

A barrister is only permitted to do things that are barristers' work. That is not necessarily everything needed for a case. I need to advise you about what I can and cannot do as a barrister. You need to confirm that I have told you these things by signing the accompanying Costs Agreement or a copy of this document.

1. Barristers' work is generally:

- (a) appearing in courts on your behalf and preparation for that including research;
- (b) negotiating with the opponent to reach a compromise or settlement of the case;
- (c) representing you in a mediation or arbitration or other type of dispute resolution;
- (d) giving legal advice to you; and

(e) preparing or advising on documents to be used in relation to your case and as to things to be done in your case.

2. While I am able to prepare correspondence for you, all correspondence must be in your name and signed by you. I am only permitted to correspond in my name with my opponent in the case.

3. I can only investigate the facts by:

- (a) conferring with you, any instructing solicitor and likely witnesses or experts;
- (b) examining documents provided by you, any instructing solicitor or produced to the court;
- (c) visiting a place relevant to the case (such as the scene of an accident or a piece of land in dispute) by arrangement with you or any instructing solicitor.

4. I am able to prepare court documents to be used in the case but they must be in your name and with your address. I cannot serve them on the opposing party and this means you will have to arrange for service of the documents that have been filed (or lodged) with the court. I cannot accept service of any document for you so the opposing party will have to serve documents on you.

5. The things I am not permitted to do are things that can be done for you by a solicitor. Circumstances may arise during the case that may require you to obtain a solicitor at short notice.

6. As there are limits on the work that I am able to do, and as you may need to obtain a solicitor at short notice, you may be disadvantaged if you retain my services without the assistance of a solicitor. Whilst some of the tasks I am not permitted to do are things you may be able to do yourself (such as filing and serving court documents), there may be advantages to you in, for example, having correspondence written on your behalf by a solicitor, as that may convey to the opponent that you are serious about the enforcement or protection of your rights.

7. For your information, a fair description of my experience as an advocate is:

[insert description of advocacy experience]

Please ask me to explain anything you do not understand in this disclosure.

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* are available on the Bar Association website at www.nswbar.asn.au [the correct linking should be confirmed in due course]. Rules 11, 13 and 22 are relevant to this notice. You can ask me to provide a copy of those rules.

I confirm I have received an original of this disclosure document from my barrister, [name].

[signed] _____

[client name]

Date: