

## Costs agreements

The Uniform Law commenced on 1 July 2015 in Victoria and NSW. This information sheet summarises the costs agreement provisions.

### Client's right to a costs agreement

A client has the right to a negotiated costs agreement.<sup>1</sup>

### Making a costs agreement

A costs agreement can be made between:

- a client and a law practice retained by the client
- a client and second law practice retained on the client's behalf
- a law practice and a second law practice retained on behalf of the client, or
- a law practice and an associated third party payer.

The costs agreement must be in writing, or be evidenced in writing and may consist of a written offer and acceptance or be accepted by other conduct (except in the case of a conditional costs agreement).<sup>2</sup>

The parties to a costs agreement cannot agree to opt out of the costs assessment process.<sup>3</sup>

A costs agreement is enforceable in the same way as a contract.<sup>4</sup>

### Conditional costs agreements

A costs agreement for payment of some or all of the legal costs can be made conditional on the successful outcome of a matter and may also provide for disbursements to be paid, irrespective of the outcome.<sup>5</sup>

### Written in plain language

Agreements must be written in plain language, set out what constitutes a successful outcome, be signed by the client and include a statement that the client has been informed of his or her rights to obtain independent legal advice before entering into the agreement.<sup>6</sup>

Conditional costs agreements are not permitted in matters involving criminal proceedings or proceedings under the *Family Law Act 1975* (Cth).<sup>7</sup>

### Cooling off period

A five business day cooling off period applies to conditional costs agreements, except where the agreement is between two law practices. The client can terminate the agreement within that period by written notice to the practice.<sup>8</sup>

If an agreement is terminated within the cooling off period, the practice can only recover legal costs for services performed under the instructions of the client before the agreement was terminated if the client understands such services would be delivered. No uplift fee can be recovered.<sup>9</sup>

### Uplift fees are permitted

An uplift fee is an additional amount under a costs agreement payable on the successful outcome of the matter the subject of the agreement.<sup>10</sup> The uplift fee compensates the practitioner for the risk in entering a conditional agreement.

The agreement must identify the basis on which the uplift fee is calculated and include an estimate of the uplift fee. If it is not reasonably practical to include an estimate of the uplift fee, then the agreement must include a range of estimates for the uplift fee and an explanation of the major variables that may affect the calculation of the uplift fee.<sup>11</sup>

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In litigious matters, the agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely. The uplift fee must not be more than 25% of legal costs payable (excluding disbursements).<sup>12</sup>

A law practice must not enter a costs agreement that contravenes the uplift provisions.<sup>13</sup>

### Contingency fees are prohibited

A law practice must not enter a costs agreement where the amount payable depends on the amount of any award or settlement or the value of property recovered in the proceedings.<sup>14</sup>

### Non-compliance

A costs agreement that contravenes Division 4 of the Uniform Law is void.<sup>15</sup> A law practice is entitled to recover costs that would have been payable if the agreement was not void and must repay any excess amount received.<sup>16</sup>

If an agreement contravenes s 182 (conditional costs agreements involving an uplift fee), the law practice cannot recover the whole or any part of the uplift fee. Any amount received by the law practice in respect of the uplift fee must be repaid.<sup>17</sup>

If an agreement includes a contingency fee, the law practice cannot recover any amount for legal services and must repay any amount that has been paid.<sup>18</sup>

A person is entitled to recover as a debt any amount that the law practice is required to repay.<sup>19</sup>

If the law practice fails to comply with its disclosure obligations, any costs agreement is void and costs must be assessed or determined before they are required to be paid and before the law practice can bring proceedings to recover them.<sup>20</sup> Uniform General Rule 72A applies in limited circumstances to mitigate the effect of a failure by a law practice to disclose its costs. See our information sheet on Legal Costs and Costs Disclosure Obligations which further describes these requirements.

In the case of a commercial or government client only selective aspects of the cost agreement provisions apply.<sup>21</sup>

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<sup>1</sup> Uniform Law, s 179

<sup>2</sup> Uniform Law, sub-ss 180(1) to (3)

<sup>3</sup> Uniform Law, sub-s 180(4)

<sup>4</sup> Uniform Law, s 184

<sup>5</sup> Uniform Law, sub-ss 181(1) and (6)

<sup>6</sup> Uniform Law, sub-ss 181(2) and (3)

<sup>7</sup> Uniform Law, sub-s 181(7)

<sup>8</sup> Uniform Law, sub-s 181(4)

<sup>9</sup> Uniform Law, sub-s 181(5)

<sup>10</sup> Uniform Law, s 6, sub-s 182(1)

<sup>11</sup> Uniform Law, sub-s 182(3)

<sup>12</sup> Uniform Law, sub-s 182(2)

<sup>13</sup> Uniform Law, sub-s 182(4)

<sup>14</sup> Uniform Law, sub-s 183(1)

<sup>15</sup> Uniform Law, sub-s 185(1)

<sup>16</sup> Uniform Law, sub-s 185(2)

<sup>17</sup> Uniform Law, sub-s 185(3)

<sup>18</sup> Uniform Law, sub-s 185(3)

<sup>19</sup> Uniform Law, sub-s 185(6)

<sup>20</sup> Uniform Law, sub-s 178(1)

<sup>21</sup> Uniform Law, sub-s 170(1)