

## 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 and 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 independent legal advice.<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 performed. 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 that the agreement relates to.<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; provide an estimate of the uplift fee; or, if that is not reasonably practical, a range of estimates and explanation of the major variables that may affect the calculation.<sup>11</sup>

In litigious matters, the law practice must have a reasonable belief that a successful outcome is likely. The uplift fee must not be more than 25 per cent of legal costs payable (excluding disbursements).<sup>12</sup>

A law practice must not enter a costs agreement that contravenes the uplift provisions. Civil penalty: 100 units.<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. Civil penalty: 100 units.<sup>14</sup>

# Costs Agreements

## 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 (i.e. nothing in excess is recoverable) 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 an uplift fee. Any amount received in respect of an uplift fee must be repaid to the client.<sup>17</sup>

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

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

If the costs agreement is void due to a failure to comply with the costs of the disclosure obligations, costs must be assessed or determined before the law practice can seek to recover them.<sup>20</sup> Uniform General Rule 72A modifies the voiding effect of the Uniform Law in limited circumstances.

Our information sheet on Legal Costs and Costs Disclosure Obligations will assist your understanding of these requirements.

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

### For more information

[www.legalservicescouncil.org.au](http://www.legalservicescouncil.org.au)

- 1 Legal Profession Uniform Law, s 179
- 2 Above, note 1 s 180(1),(2),(3)
- 3 Above, note 1 s 180(4)
- 4 Above, note 1 s 184
- 5 Above, note 1 s 181(1),(6)
- 6 Above, note 1 s 181(2),(3)
- 7 Above, note 1 s 181(7)
- 8 Above, note 1 s 181(4)
- 9 Above, note 1 s 181(5)
- 10 Above, note 1 s 6, s 182(1)
- 11 Above, note 1 s 182(3)
- 12 Above, note 1 s 182(1)
- 13 Above, note 1 s 182(4)
- 14 Above, note 1 s 183(1)
- 15 Above, note 1 s 185(1)
- 16 Above, note 1 s 185(2)
- 17 Above, note 1 s 185(3)
- 18 Above, note 1 s 185(4)
- 19 Above, note 1 s 185(5)
- 20 Above, note 1 s 178(1)
- 21 Above, note 1 s 170(1). these include sections 181(1), (7) and (8), s 182, s 183, s 185 (3), (4) and (5)