

Cost Assessment Arrangements

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

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.² 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.³

Who can apply for a costs assessment?

A client, a third party payer, the law practice or the second law practice retained on behalf of a client can apply for the assessment of costs.⁴

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.⁵

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 local tribunal decides it is just and fair to do so.⁶

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.⁷

The application of GST must be taken into account.⁸

Non-associated third party payers

If requested, 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.⁹

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.¹⁰

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.¹¹

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.¹² 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.¹³

An assessment may proceed and be determined in the absence of a party who is notified and does not participate in the costs assessment.¹⁴

Duties of the costs assessor

A costs assessor must determine whether a valid costs agreement exists¹⁵ and whether the costs are fair and reasonable and the amount payable.¹⁶ 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 Uniform General Rule 72A are made out.¹⁷

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To the extent that costs are not fair and reasonable, the assessor must determine the amount of legal costs (if any) that are payable.¹⁸ In assessing whether costs are fair and reasonable, the assessor must apply the principles of proportionality and reasonableness as set out in s 172.

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.¹⁹

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;
- any advertisement as to costs or skills of the law practice or legal practitioner involved;
- any other relevant matter.²⁰

Reasons must be given

A costs assessor must provide reasons to the parties and may determine the form in which reasons are given.²¹

Costs of a costs assessment

A costs assessor determines the costs of a costs assessment and by whom they are payable.²²

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 per cent or more on assessment.²³

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.²⁴ In Victoria, an appeal from a determination by the Costs Court lies to the Trial Division of the Supreme Court of Victoria.²⁵ In NSW, a party may seek a review of the costs assessment by a review panel with a further appeal to the District Court.²⁶

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.²⁷

Disciplinary action

A contravention of the duty not to charge more than is 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; and
- whether or not s/he has actual knowledge of the bill or its contents and that the legal costs were unfair or unreasonable.²⁸

Referral for disciplinary action

A costs assessor can refer a matter for disciplinary action if they consider:

- the costs are not fair and reasonable; and/or
- the legal costs charged, or any other issue raised in the assessment, may amount to unsatisfactory professional conduct or professional misconduct.²⁹

Previously, a costs assessor could only refer a matter if the assessor considered the costs to be 'grossly excessive'.³⁰

Determinations of costs assessors are admissible in disciplinary proceedings as evidence as to the fairness and reasonableness of legal costs.³¹

Legal costs the subject of a complaint

Legal costs that are or have been the subject of a costs dispute under Chapter 5 Consumer Matters of the Uniform Law 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.³²

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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.³³

For more information

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- 1 Legal Profession Uniform Law, s 196
- 2 Above, note 1 s 199(1)
- 3 Legal Profession Uniform Law Application Act (2004) (NSW), s 91, Schedule 6
- 4 Above, note 1 s 198
- 5 Above, note 1 s 170, Uniform General Rules, r 71
- 6 Above, note 1 s 198(3)(4)
- 7 Above, note 1 s 198(5)
- 8 Above, note 1 s 200(3)
- 9 Above, note 1 s 198(6)
- 10 Above, note 1 s 198(10), s 171(c)
- 11 Above, note 1 s 198(7)
- 12 Above, note 1 s 198(8)
- 13 Above, note 1 s 198(9)
- 14 Uniform General Rules, r 76
- 15 Above, note 1 s 199(2), an agreement may be void for contravention of disclosure or a costs agreement provision
- 16 Above, note 1 s 199(2)(a)
- 17 Above, note 5 r 72A came into effect on 22.04.2016
- 18 Above, note 1 s 199(2)(b)
- 19 Above, note 1 s 172(1)(2), s 200(1)
- 20 Above, note 1 s 200(2)
- 21 Above, note 1 s 201
- 22 Above, note 1 s 204(1)
- 23 Above, note 1 s 204(2)
- 24 Above, note 1 s 205
- 25 Supreme Court Act 1986 (Vic), s 171
- 26 Above, note 4 s 67, s 81-87
- 27 Above, note 1 s 206
- 28 Above, note 1 s 207
- 29 Above, note 1 s 202
- 30 Above, note 4 s 393, Legal Profession Act (2004) (Vic), s 3.4.46
- 31 Above, note 1 s 203
- 32 Above, note 1 s 197
- 33 Above, note 1 schedule 4 s 18