THE NEW UNIFORM LAW COSTS REGIME;

DRESSING UP "FAIR AND REASONABLE" COSTS IN A NEW UNIFORM

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Introduction

1. Australian lawyers have only ever been allowed to charge what is fair and reasonable for their services. The new *Legal Profession Uniform Law* (**the Uniform Law**) restates this simple and ancient principle in new and unwieldy terms. Lawyers in private practice who like to be paid for their work should familiarize themselves with those terms - it will simplify their task in collecting payment.

2. For matters in which instructions were first given on or after 1 July 2015, a lawyer[2] can now only recover costs from a client following *either* compliance with the Uniform Law's problematic costs disclosure requirements *or* determination of a formal cost assessment/costs dispute.[3] The third possibility of lawyers recovering in accordance with pre-approved official jurisdictional rates (eg Court scales of costs) is gone.[4]

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[1] A profile of the author is attached to this paper.
[2] The Uniform Law generally refers to "law practices" rather than "lawyers" for costs purposes. The word "lawyer" has been preferred here for clarity and brevity. Similarly, rights of clients are frequently also enjoyed by "third party payers" (as to which see section 171) but such third party payers are generally not referred to expressly in this paper.
[3] See section 178(1)(c)of the Uniform Law.
[4] Compare section 178(1)(c)of the Uniform Law to its equivalent provisions under the legislation it replaces. In NSW see section 319(1)(a) of the *Legal Profession Act 2004* as it applied until 30 June 2015 which allowed recovery of legal costs, inter alia, "in accordance with applicable fixed costs provisions." The Victorian equivalent was section 3.4.19 of the *Legal Profession Act 2004.* This allowed recovery "in accordance with an applicable solicitors remuneration order or scale of costs."

Formal cost agreements are still likely to be the primary avenue for costs recovery actions but those agreements are now particularly susceptible to being rendered void because of defective costs disclosure before and/or after that costs agreement was entered. When defective costs disclosure causes an otherwise-compliant costs agreement to be rendered void, the delays of a formal costs assessment will be forced on the lawyer as a pre-condition to enforcement of the lawyer's claim for payment and (usually) the costs of that assessment as well.[5]

Overview of paper

3. This paper tackles the costs aspects of the Uniform Law under nine headings –

   a) Overview of the Uniform Law generally, its reach and its provenance;
   b) the Uniform Law's legal costs objective;
   c) Legal costs must be "fair and reasonable";
   d) Costs agreements may be (theoretically) enforced as any other contracts;
   e) Costs disclosure is key – up-front and subsequently;
   f) What precisely must your client (appear to) understand?
   g) How will costs arguments between lawyers and their clients be determined?
   h) "Cost assessment" is different between the states; and
   i) Practical tips.

4. The Uniform Law raises several related issues that are not dealt with in this paper. These issues include conditional costs agreements,[6] billing generally[7] and the potential disciplinary consequences for a lawyer who signs an excessive bill (including on behalf of others such as his/her firm)[8] and the distinctions between the requirements placed on lawyers retained by clients directly (solicitors in typical circumstances) and lawyers

[5] Section 204(2) of the Uniform Law creates a presumption that, inter alia, defective costs disclosure will make the lawyer liable for the costs of the costs assessment.
[6] See section 181 of the Uniform Law particularly as to conditional costs agreements.
[7] See sections 186 to 193 of the Uniform Law and rules 73 and 74 of the Uniform Rules particularly regarding the formalities of issuing bills to clients / third party payers.
[8] See particularly sections 188 and 207 of the Uniform Law.

retained on behalf of clients by other lawyers (eg in typical circumstances barristers, costs consultants and town agents).[9]

Overview of the Uniform Law generally, its reach and its provenance;

5. The Uniform Law commenced operation in New South Wales and Victoria on 1 July 2015. Its promoters hope that it will soon be adopted by the balance of Australia's jurisdictions with the effect that there will then be nationwide inter-jurisdictional regulatory uniformity for Australia's lawyers.[10] Until that day, however, the Uniform Law's supporters have the consolation of knowing that simply by virtue of its adoption in New South Wales and Victoria, the Uniform Law already governs more than 70 per cent of Australia's lawyers.

6. Nowhere is the Uniform Law actually a stand-alone statute. In Victoria, it is found in a schedule to the *Legal Profession Uniform Law Application Act 2014*. In New South Wales, the schedule to the Victorian legislation is adopted by reference and applies *as if* it were an Act in New South Wales.[11] In both states, parts of the Uniform Law make little sense unless read in conjunction with the both its subordinate legislation (principally but not only the *Legal Profession Uniform General Rules* (**the Uniform Rules**) and also that particular state's own *Legal Profession Uniform Law Application Act 2014*. These applications statutes are similar but not identical. (For example, Victoria has a Costs Court which is referred to in its Application Act while New South Wales has no Costs Court and different provisions in its Application Act accordingly.) The result is that the Uniform Law is not in reality the single, self-contained document its title suggests but rather the centerpiece of an unwieldly wider set of documents. It is remarkably cumbersome for a scheme that was designed from the ground up over a long gestation under the auspices of the nation's first law officers and with the input of Australia's various legal professional bodies. (For a brief blog critique of the Uniform

[9] See particularly section 175(2) of the Uniform Law.
[10] See as an example of this veiw *Lawyers Weekly*, 27 October 2015 "States have 'less excuse' to snub Uniform Law: NSW A-G"
[11] Section 4, Legal Profession Uniform Law Application Act 2014 (NSW)

Law's draftsmanship, see "Our disheveled new Uniform Law" at paulduggan barrister.com.au.)

7. The Uniform Law originates from a Council of Australian Governments proposal for national legal profession reform in 2009. It was considered on policy grounds that the increasing tendency of large law firms particularly and their clients to organize themselves on a national basis made it desirable that the legal profession be regulated uniformly across the nation. Regulatory uniformity between jurisdictions in the interests of micro economic reform (*cf* substantive legal regulatory reform) was the key objective. As of 1 July 2015, we have now ostensibly achieved this objective as between New South Wales and Victoria but the result is not genuine national regulation. Rather, it is separate but similar schemes for regulating lawyers operating in separate but similar state jurisdictions under the administration of separate but similar administering bodies (in Victoria, the Victorian Legal Services Board and Commissioner and in New South Wales, the Office of the Legal Services Commissioner). Cynics might suggest that the Uniform Law has introduced two fresh new interstate bureaucracies, (the Legal Services Council and the Commissioner for Uniform Legal Services Regulation) to augment the pre-existing (and continuing) state-based legal regulators but otherwise has changed little beyond the form of the legislation governing the profession in Victoria and New South Wales. Each of these four separate regulatory bodies is empowered[12] to issue "guidelines or directions" so the jigsaw of regulatory documentation is likely to grow over time. (So much for micro economic efficiency!)

8. The Uniform Law scheme deals comprehensively with regulation of the profession generally including issues such as qualification, admission, trust accounts and discipline. This paper is concerned only with some of the Uniform Law's costs aspects.

The Uniform Law's legal costs objective

[12] See the Uniform Law at sections 407(1), 407(2) and 408(1).

9. The Uniform Law has three stated objectives concerning legal costs:[13]

   a) to ensure that the clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and

   b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and

   c) to provide a framework for assessment of legal costs.

10. The Uniform Law's costs requirements/protections are not universal. In particular, clients and third-party payers that fall within the definition of "commercial or government client" are largely excluded from the Uniform Law's costs provisions.[14] That definition is less self-explanatory than it sounds and includes law practices themselves, liquidators and financial services licensees among others.

Legal costs must be "fair and reasonable"

11. Under the Uniform Law, lawyers must charge no more than what is "fair and reasonable in all the circumstances."[15] In substance, this is very old news that far predates the Uniform Law.

12. Lawyers negotiating fees with their clients are always necessarily acting in a direct conflict of interest with their clients. The lawyer - client fiduciary relationship is ripe with opportunity for undue influence as a result.[16] Courts have always exercised a power to sanction lawyers as officers of the Court for charging more than is fair and reasonable and to set aside offending costs agreements[17] but this ancient power now has new legislative expression in the Uniform Law.

[13] Section 169 of the Uniform Law.
[14] Section 170 of the Uniform Law but note at section 170(1) particularly the various carve-outs (eg re conditional costs agreements) to these exclusions.
[15] Section 172(1) of the Uniform Law.
[16] See the discussion in GE Dal Pont, *Law of Costs* (3rd ed) at Chapter 3.
[17] See for example *Clare v Joseph* [1907] 2 KB 369 and *Pryles & Deftros v Green* (1999) 20 WAR 541.

13. The Uniform Law requires that costs must be both proportionately and reasonably incurred and also proportionate and reasonable in amount.[18] A costs agreement is only *prima facie* evidence that the costs disclosed in it are fair and reasonable.[19] Whether costs are fair and reasonable will be judged by reference to factors including –

    a) the level of skill, experience, specialisation and seniority of the lawyers concerned;[20]

    b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involves a matter of public interest;[21]

    c) the labour and responsibility involved;[22] and

    d) the quality of the work done.[23]

Costs agreements may be (theoretically) enforced as any other contracts

14. Section 184 of the Uniform Law provides –

> *Subject to this Law, a costs agreement may be enforced in the same way as any other contract.*

15. That innocuous proviso, "Subject to this Law" conceals a potential minefield for practitioners attempting to collect payment on their costs agreements. In broad summary –

    a) The term "costs agreement" is not defined anywhere in the Uniform Law or the Uniform Rules.

[18] Section 172(1) of the Uniform Law.
[19] Section 172(4) of the Uniform Law. Note the distinction between the concept of costs "disclosure" (which is mandatory under section 174 for matters where costs are likely to exceed $750) and the concept of a "costs agreement" which is a client's right but not mandatory (see section 179).
[20] Section 172(2)(a) of the Uniform Law.
[21] Section 172(2)(b) of the Uniform Law.
[22] Section 172(2)(c) of the Uniform Law.
[23] Section 172(2)(e) of the Uniform Law.

b) A valid costs agreement is premised upon compliance with the costs disclosure obligations in Part 4.3 of the Uniform Law.[24] That disclosure is a pre-condition to the recovery of legal costs unless the costs in question "have been assessed or any cost dispute has been determined by the designated local regulatory authority[25] or under jurisdictional legislation."[26]

c) Such cost assessments are now – unlike some situations under the former regime in Victoria – required to take place *without* any money being paid into court or similar on account of the legal costs the subject of the application.[27]

d) There is a presumption[28] that the costs of any costs assessment will be paid by the lawyer if the lawyer's costs are reduced by 15% or more upon assessment or if the lawyer has failed (in either substance or form) to disclose in writing any of the numerous requirements as to both front-end and continuing cost disclosure set out in sections 174 to 178 of the Uniform Law.

Costs disclosure is key – up-front and subsequently

16. The time and cost hurdles associated with costs assessment are presumably intended to act as a spur to lawyers to perfect their compliance with costs disclosure obligations to the clients (and/or third party payers where others such as insurers, spouses etc are responsible for payment of a costs bill).[29]

17. Costs disclosure is regulated in three tiers:

a) Where total legal costs in the matter (excluding GST and disbursements[30]) are unlikely to exceed $750 no formal costs disclosure is required;[31]

[24] Section 178(1)(a) of the Uniform Law.
[25] In New South Wales the designated local regulatory authority is the Office of the Legal Services Commissioner. In Victoria it is the Victorian Legal Services Commissioner.
[26] Section 178(1)(c) of the Uniform Law. In both New South Wales and Victoria the jurisdictional legislation is that state's version of the *Legal Profession Uniform Law Application Act* 2014.
[27] Compare section 198(7)(a) of the Uniform Law with s 4.3.3 of the *Legal Profession Act 2004* (Vic).
[28] Section 204(2) of the Uniform Law.
[29] Section 176 of the Uniform Law.
[30] Note that the effect of section 175 of the Uniform Law is that fees payable to other legal practices on a client's behalf (eg barristers' fees, costing consultant's fees etc) should be considered as a component of the

b) Where total legal costs in the matter (excluding GST and disbursements[32]) are unlikely to exceed $3000 disclosure via a standard form prescribed by the Uniform Rules is permissible;[33]

c) Where total legal costs in the matter (excluding GST and disbursements[34]) are likely to exceed $3000 a comprehensive, on-going written disclosure is required.[35] This includes situations where the anticipated legal costs were previously expected to be below the $3000 threshold.[36]

18. It is this final, top tier where lawyers' initial and ongoing disclosure obligations are going to be most onerous and also most financially significant to both clients and lawyers. Conceivably, even perfect written disclosure may not of itself be sufficient. This is because the obligations on a law practice include a positive duty to "take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs." [37] This is likely to prove a particular trap for lawyers who might genuinely believe they have their client's informed understanding and agreement about the proposed course and costs of the matter but then subsequently fall out with their client and are unable to

"total legal costs" for section 174 purposes rather than as "disbursements" (which the same fees might legitimately be for other purposes).

[31] See section 174(4) of the Uniform Law. (Note that section 174(4) makes no reference to $750 but instead refers to "the amount specified in the Uniform Rules for the purposes of this subsection (the lower threshold)." As of 6 November 2015 no such amount is specified in the Uniform Rules. This omission from the Uniform Rules enlivens the transitional provisions at clause 18(3) of schedule 4 of the Uniform Law which specifies $750 as the lower threshold amount.

[32] Note that the effect of section 175 of the Uniform Law is that fees payable to other legal practices on a client's behalf (eg barristers' fees, costing consultant's fees etc) should be considered as a component of the "total legal costs" for section 174 purposes rather than as "disbursements" (which the same fees might legitimately be for other purposes).

[33] See section 174(5) of the Uniform Law. (Note that section 174(5) makes no reference to $3000 but instead refers to "the amount specified in the Uniform Rules for the purposes of this subsection (the higher threshold)." As of 6 November 2015 no such amount is specified in the Uniform Rules. This omission from the Uniform Rules enlivens the transitional provisions at clause 18(4) of schedule 4 of the Uniform Law which specifies $3000 as the higher threshold amount.

[34] Note that the effect of section 175 of the Uniform Law is that fees payable to other legal practices on a client's behalf (eg barristers' fees, costing consultant's fees etc) should be considered as a component of the "total legal costs" for section 174 purposes rather than as "disbursements" (which the same fees might legitimately be for other purposes).

[35] Section 174(8) of the Uniform Law.

[36] Section 174(3) of the Uniform Law.

[37] Section 174(1) of the Uniform Law

evidence in litigation and/or a costs assessment precisely what reasonable steps *beyond the mandatory written disclosure* they took to verify their client's perceived understanding and consent. Such an evidentiary gap in a lawyer's file might very well cause an otherwise ostensibly compliant costs agreement to be rendered void[38] and any costs recovery litigation against the client to be delayed or stayed as a consequence.[39]

19. With an eye to this issue, the Law Society of New South Wales has suggested to its members that they should ensure they make contemporaneous file notes of client engagement interviews and take care to record the actual words the client uses to describe the client's understanding of the proposed course of action and the costs. This is a worthwhile suggestion which should be followed in both New South Wales and Victoria. It should also be followed whenever the client is given the required written updates as to significant changes in their matter and/or significant changes to the legal costs which are likely to be payable by the client.[40] (Potentially even these precautions may be insufficient if there is a risk that the client might subsequently suggest that his/her apparent understanding of the disclosure was compromised by issues of education/language/physical or mental disabilities which should have been apparent to the lawyer upon reasonable investigation.)

What precisely must your client (appear to) understand?

20. Section 174(1) of the Uniform Law is headed "Main disclosure requirement". It requires all law practices to provide clients with information disclosing the basis on which legal costs will be calculated in a matter and an estimate of the total legal costs when instructions are initially given in the matter or as soon as practicable thereafter.[41] Lawyers are also required to update that information whenever there is a significant change to anything previously disclosed.[42] Formerly, equivalent provisions allowed the

[38] See section 178(1)(a) of the Uniform Law.
[39] See section 178(1)(c) of the Uniform Law.
[40] Sections 174(1)(b) and 174(6) of the Uniform Law.
[41] Section 174(1)(a) of the Uniform Law.
[42] Section 174(1)(b) of the Uniform Law.

provision of "a range of estimates" where an estimate was "not reasonably practicable."[43]

21. The requirement of "an estimate" without any alternative allowance for "a range of estimates" has been widely interpreted as meaning that the Uniform Law *does not permit* estimated costs to be expressed as a range. Indeed, Legal Services Council has published an information sheet for legal practitioners which states just that.[44] With respect, it is wrong. First, the Uniform Law still expressly permits "a range of estimates" in at least the context of conditional costs agreements (e.g. no win/no fee cost agreements and similar).[45] Second, the Uniform Law contains no express prohibition on estimates being expressed as a range. Third, nowhere in the Uniform Law is an "estimate" required to be expressed as a single figure. Fourth, the former provisions allowed "a range of estimates" where "an estimate of the total legal costs" was *not reasonably practicable*. It can scarcely have been the legislature's (two legislatures'?) intention that the new formulation compel a single figure estimate be given even when such an estimate is neither reasonable nor practicable. Fifth, the former provisions in both states used the clumsy and tautological expression "range of estimates". (After all, what is "a range" in this context if not an estimate? What therefore is "a range of estimates"?) The Uniform Law's (partial) deletion of the phrase "range of estimates" can accordingly be sensibly construed as a (partial) improvement of expression only.[46]

22. Fortunately, estimates for the purposes of section 174(1)(a) of the Uniform Law are likely to be the subject of the Legal Services Council's inaugural Guideline. Unfortunately, as of November 2015, that Guideline is still only at the consultation

[43] Section 3.4.9 of the *Legal Profession Act 2004* (Victoria) and section 309(1)(c) and *Legal Profession Act 2004* (NSW)
[44] Legal Services Council, Information Sheet for Legal)ractitioners entitled "*Key Differences Between The Uniform Law and the New South Wales and Victorian Legal Profession Acts*" (dated July 2015).
[45] Section 182(3)(b)(i) of the Uniform Law
[46] The improvement is only partial because it will be recalled that the clumsy expression "range of estimates" survives in section 182(3)(b)(i) of the Uniform Law.

draft stage[47] and, if it proceeds in its present form, will surely compound the current uncertainties rather than dispel them. Inter alia, the draft guideline states –

a) *"An estimate of total legal costs is a reasonable approximation of the total legal costs…"*

b) *"It is important to emphasise that section 174(1)(a) does not permit a simple disclosure based on a range of possible estimates with a general explanation of the major variables likely to influence the final costs."*

c) *when considering giving an estimate in* [complex matters and litigation] *giving more than one estimate linked to each stage* [of the matter] *is consistent with section 174(1)(a).*

23. The nutshell summary of the Legal Services Council's present draft interpretation hence *appears* to be something like this. It is inappropriate to express costs estimates as a range *except* in those (very frequent) situations where alternative speculative estimates are simultaneously appropriate. In those cases, it seems, it might well be inappropriate *not* to provide cost estimates as a range. (Thank heavens we have the Legal Services Council's proposed Guideline to clarify that issue!)

24. Another unsatisfactory aspect of section 174 and the Uniform Law generally is its curious failure to expressly require mention to clients in litigious matters of the possibility of costs orders for or against them in that litigation. The possibility of such costs orders was expressly referred to in the Uniform Law's predecessor legislation in both New South Wales[48] and Victoria[49] but was apparently forgotten by the Uniform Law's authors. While there is the conceptual distinction between what a client might be required to pay her *own* lawyers and what she might be required to pay towards her adversary's legal costs following an adverse costs order is obvious to litigation lawyers, it might well come as a very rude surprise indeed to some clients if they have not been advised of that possibility from the outset. This makes the Uniform Law's silence on

[47] See the consultation draft of Uniform Law Guideline G1/2015 available from the Legal Services Council's website at http://www.legaservicescouncil.org.au/Pages/uniform-rules/current-consultations.aspx
[48] Section 309(1)(f) *Legal Profession Act 2004* (New South Wales)
[49] Section 3.4.9(1)(g) *Legal Profession Act 2004* (Victoria)

the possibility of adverse costs orders both puzzling, and for lawyers who follow the Uniform Law's express requirements too literally, dangerous. This is because a lawyer who slavishly gives the disclosure expressly required by the Uniform Law *but nothing further* will potentially –

a) deprive the client of the right "to make informed choices about their legal options"[50]; and/or

b) fail to take a reasonable step[51] to ensure that the client has understood and given consent to the proposed course of action (ie prosecuting or defending the litigation in question despite the possibility of an adverse costs order); and

c) thereby contravene a disclosure obligation of Part 4.3 of the Uniform Law;[52] and

d) render an otherwise-valid costs agreement void pursuant to section 178(1)[53]; and

e) necessitate a costs assessment as a precondition to enforcing collection of the lawyer's costs;[54] and

f) be presumed to be liable for the costs of that costs assessment by reason of the (deemed) disclosure breach[55] notwithstanding strict compliance with the express disclosure requirements of the Uniform Law.

25. An analogous argument might be raised against (the often-recommended) form of disclosures which include a sequence of component estimates for each anticipated stage of a litigation. Such disclosures might be understood by the lay client as suggesting that she might conveniently embark on litigation to, say, mediation or day 1 of the trial and then abandon it if dissatisfied. Such a unilateral discontinuance is of course technically possible but it will typically precipitate an adverse costs order.[56] (Query whether the

[50] This is an objective set out by section 169(a) of the Uniform Law.
[51] Section 174(3) of the Uniform Law.
[52] Section 178(1) of the Uniform Law.
[53] As to section 178(1) and (2) of the Uniform Law, check the *Legal Profession Uniform General Rules 2015.* This is because, as of November 2015, the Legal Services Council has published a consultation draft rule 72A which provides for the "disapplication" of section 178(1) and (2) in certain circumstances involving inadvertent contravention of the disclosure obligations followed by rectification within 14 days.
[54] Section 178(1)(c) of the Uniform Law.
[55] Section 204(2) of the Uniform Law.
[56] See for example in New South Wales rule 42.19(2) of the *Uniform Civil Procedure Rules* and in Victoria rule 63.15 of both the *Supreme Court Rule* and *County Court Rule*s.

segmented costs disclosure which fails to flag the risk of only partial commitment to litigation will be breach the Uniform Law as a consequence.)

How will costs arguments between lawyers and their clients be determined?

26. Apart from implicitly recognising the possibility of arguments about costs between lawyers and their own clients being conventionally litigated[57] and some specific exceptions for costs issues likely to give rise to disciplinary matters,[58] the Uniform Law deals with costs controversies under four broad categories.

27. The first three categories are formal "costs disputes":

    a) In the financially lowest category involving disputes over no more than $10,000[59], the "designated local regulatory authority"[60] (which in New South Wales means the Office of the Legal Services Commission and in Victoria means the Legal Services Commissioner)[61] may, after attempting to resolve matter by informal means[62] and/or mediation[63] make a binding determination as between the lawyer and client for up to $10,000.[64]

    b) The middle category of "costs dispute" are those disputes which involve either a total bill of less than $100,000 *or* a larger amount with a disputed component of less than $10,000.[65] Such disputes are to be dealt with by the Office of the Legal Services Commission (in New South Wales) and the Legal Services Commissioner (in Victoria). Those bodies are again required to attempt to resolve matters by informal means[66] or mediation[67] but, failing a settlement, may *not* make a binding determination themselves. Instead they are to "inform the parties

[57] Section 184 of the Uniform Law.
[58] For example, sections 277(2) and 284 of the Uniform Law.
[59] Section 292 of the Uniform Law.
[60] See Part 5.3 of the Uniform Law generally and section 292(1)(4) particularly.
[61] see the definitions at section 10 in the respective state versions of the *Legal Profession Uniform Law Application Act* 2014.
[62] Section 287 of the Uniform Law.
[63] Section 288 of the Uniform Law.
[64] All amounts referred to here are stated by the Uniform Law to be indexed.
[65] Section 291 of the Uniform Law.
[66] Sections 287 and 291(1) of the Uniform Law.
[67] Sections 288 and 291(1) of the Uniform Law.

of the right to apply for a costs assessment or to make an application under the jurisdictional legislation for the matter to be determined."[68] This formal notification of rights is a precondition to any formal costs assessment in a costs dispute (other than the "binding determination" referred to above) unless the Office of the Legal Services Commission / the Legal Services Commissioner itself arranges for a costs assessment for disciplinary purposes.[69]

c) The third broad category of costs dispute under the Uniform Law is (by implication only) those disputes where the total bill exceeds $100,000 *and* the dispute is about more than $10,000 of that total. The Office of the Legal Services Commission / the Legal Services Commissioner are not empowered to deal with such disputes beyond issuing the formal notification which is the precondition for a formal costs assessment or an application under jurisdictional legislation from the matter to be determined.[70]

28. The fourth variety of (non-disciplinary) adjudicated costs controversy is likely to be the only type which is commonly formally commenced by lawyers rather than their clients. This is a "costs assessment" as governed by section 198 of the Uniform Law and can be commenced without any involvement of Office of the Legal Services Commission / the Legal Services Commissioner where a formal "costs dispute" has not commenced.[71]

"Cost assessment" is different between the states

29. Although it is effectively invisible to any reader of the Uniform Law alone, the process for the adjudication of costs controversies is quite different in Victoria and New South Wales. This because the Uniform Law requires the costs assessment to be made "in accordance with the applicable jurisdictional legislation"[72] and the two states' Uniform Law application statutes diverge at this point.

[68] Section 293(1) of the Uniform Law.
[69] Section 197 of the Uniform Law.
[70] Section 291(2) of the Uniform Law.
[71] Section 197 of the Uniform Law.
[72] Section 198(2) of the LPUL.

30. Victoria's *Legal Profession Uniform Law Application Act* empowers the Victorian Civil and Administrative Tribunal (VCAT) to determine costs disputes up to $25,000 *provided* the parties have first been informed by the Victorian Legal Services Commissioner of their right to make such an application.[73] By implication, costs disputes exceeding that amount are to be determined in the Costs Court of the Victorian Supreme Court.

31. In Victoria, lawyers who wish to avoid the involvement of the Legal Services Commissioner and/or VCAT (whatever the quantum in dispute) can grasp the nettle in a costs controversy with their own client and fast-track the process by making their own application for a costs assessment to the Costs Court provided they do so before the controversy develops into a formal "costs dispute."[74]

32. New South Wales' costs assessment regime is quite different. Inter alia, costs assessors previously appointed for the purpose under the New South Wales Costs Assessment Scheme will continue to determine assessments 'on the papers' in a non-court process under *Legal Profession Uniform Law Application Regulations* very similar to New South Wales' pre-Uniform Law regime under the *Legal Profession Regulations 2005.*

33. Two different assessment regimes operating simultaneously under a supposedly uniform lawyers' regulatory scheme sounds like a hiccup of micro-economic reform but the true situation is arguably even worse. The Uniform Law's costs provisions apply only in matters where instructions are first given after 1 July 2015. Matters where instructions were *first* given under the previous legislative regimes (eg pre-1 July 2015) will continue to be governed by those now-otherwise repealed regimes.[75] This means that for the next few years each state under the Uniform Law will effectively have two parallel costs dispute regimes operating in tandem in each jurisdiction. It also means

[73] Section 99 of the *Legal Profession Uniform Law Application Act 2014*.
[74] Sections 197 and 198 of the Uniform Law.
[75] Clause 18(1)(a), schedule 4, *Legal Profession Uniform Law Application Act* (both Victoria and New South Wales) 2014

Thanks to Penny Van den Berg of Mahlab Costing for her comments on a draft version of this paper.

that any comprehensive body of decided case law about the Uniform Law's costs provisions is unlikely for several years.

Practical tips

34. The Uniform Law's new legal costs provisions are simply too extensive and too uncertain to enable much detailed advice about it to be given confidently. But all Victorian and New South Wales practitioners are in the same situation. Because of this, the two states' respective legal professional bodies have been following the issue and producing, inter alia, template disclosure documents and cost agreements for matters where legal costs are likely to exceed $3000. Those documents are an excellent start for the barristers and solicitors to whom they are available.

35. Even scrupulous adherence to those template documents will not be sufficient to ensure that all legal costs earned in reliance upon them are recoverable. Following the commencement of a matter, subsequent consistent reviews and (when changes occur) updates of costs disclosure are likely to be essential to upholding the validity of your costs agreement and thereby proving that the costs you are claiming are fair, reasonable and properly recoverable as a consequence.

36. Finally, there will very frequently be circumstances where lawyers seeking payment of outstanding costs from their own clients on problematic files will be best advised not to sue those clients initially or to await the client's commencement of a formal costs dispute but rather to seek a costs assessment of their own bills under section 198 as their first step in enforcement. Such a costs assessment should be commenced by the lawyer within 12 months of the bill being given lest the assessment become statute-barred[76] in which case it seems that the client can seek a time extension but the lawyer cannot.[77]

37. British judge Lord Elmore is said to have greeted a particular 19th century legal reform with the words, "Reform! Reform! But aren't things bad enough already?" The

[76] Section198(3) of the Uniform Law.
[77] Note that section198 (4) of the Uniform Law does *not* list law practices among those permitted to seek a time extension for the purposes of a costs assessment under section 198.

introduction of the Uniform Law has been welcomed with more enthusiasm by some commentators. But not all. Time will tell whether the enthusiasts are right but in the interim it is likely to be an uncomfortable wait for some lawyers in Victoria and New South Wales.

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Paul's blog can be found at http://paulduganbarrister.com/

Before coming to the Bar in 1996 Paul had two careers:-

- A total of 4 years as a solicitor at Dunhill Madden Butler and then Arthur Robinson & Hedderwicks; and
- 6 years as a journalist with publications including 'The Herald' and 'The Age'.