

# GUIDE TO PRO FORMA “CONDITIONAL COSTS AGREEMENT”

## **Important notice**

The pro forma Conditional Costs Agreement (for use in “no win, no fee” arrangements) was prepared pro bono at the request of the ACT Law Society. It is not ready for use as it must be completed and amended wherever necessary to suit your firm’s circumstances. You must ensure that any amendments that you may make comply with the provisions of the *Legal Profession Act 2006* (“the Act”). This Guide and the pro forma Conditional Costs Agreement are not legal advice and should not be relied upon as legal advice. Further, legislation and case law change from time to time. Neither the ACT Law Society nor Law Society Northern Territory accept any responsibility for relying upon the information contained in this Guide or the pro forma Conditional Costs Agreement. Practitioners and law practices must stay apprised of relevant law and take their own legal advice when preparing costs agreements.

It is strongly recommended that Costs Agreements be settled by a partner in the law practice or by someone with sufficient expertise in both the relevant field of law and legal costs.

The “Conditional Costs Agreement” is not applicable to, and cannot be used for, a matter that involves a criminal proceeding a proceeding under the *Family Law Act 1975* (Cwlth), *Adoption of Children Act*, *Crimes (Victims Assistance) Act* and *Victims of Crimes Act*. [see S 318 (2) and Regulation 80F of the Legal Profession Regulations].

Without significant amendment, the Conditional Costs Agreement is not suitable for Costs Agreements between a law practice and a third party payer, or between a law practice and another law practice (eg. an agreement between a firm of solicitors and a barrister).

Further, as various provisions of the Act do not apply to ‘sophisticated clients’, you should consider amending the Conditional Costs Agreement if you wish to use it for a ‘sophisticated client’ [see S 318(5)].

The Conditional Costs Agreement does not provide for ‘uplift fees’. If you wish to charge an ‘uplift fee’, you must do so in accordance with S 308 and amend the Agreement accordingly.

Unless otherwise stated, all section numbers in this Guide refer to the Act.

## **Application to family law practitioners**

The Family Court has announced it proposes to repeal its Rules dealing with solicitor / client costs, including costs disclosure obligations contained in those Rules. This proposal will take effect from 1 July 2008.

From 11 December 2007 until 1 July 2008, in matters which are to be litigated in the Family Court, practitioners will need to comply with costs disclosure obligations under the Act as well as under Chapter 19 of the Family Law Rules. The two systems are similar. The Society will provide separate guidance for Family Law matters.

Family Law Rules regarding Costs Agreements will continue to apply to matters which commence before 1 July 2008. For new matters that commence after 1 July 2008, only Part 3.3 of the Act in relation to costs disclosure and assessment will apply.

### **Front page**

Complete names and client's address for correspondence where indicated.

### **Preliminary**

'Legal costs' is also defined in section 4 of the Act.

Sections 318 and 319 in particular apply to Costs Agreements and Conditional Costs Agreements.

### **Clause 1 – Work to be done**

Complete details as indicated.

### **Clause 2 – Successful Outcome of Your Matter**

Complete details as indicated. Refer to S 318(3) (a) (re. the circumstances that will constitute the successful outcome of the matter).

### **Clause 3 – When Costs are Payable by You**

Delete whichever paragraph does not apply. Refer to S 318(6) (re. costs incurred in the cooling-off period).

### **Clause 4 – Our Professional Charges**

Complete where necessary, and delete whichever paragraphs do not apply.

If you wish to apply the first option, the percentage of the scale of costs may exceed 100%.

If you wish to use the second option and intend to perform additional work not covered by the original instructions, you should seek instructions and agreement as to your rates from your client prior to doing the further work.

Note that under S 327 clients can ask for an itemised bill unless the bill is for less than the 'threshold amount' of \$1,500 (excluding disbursements).

Be aware of SS 247- 248 (re. use of trust or controlled moneys for payment of professional charges and/or disbursements); S 254 (re. exercising liens and withdrawing trust money for legal costs); S 318(6) (re. recovery of legal costs where a client terminates a Conditional Costs Agreement during the cooling-off period); and Regulation 68 (re. withdrawing trust money for legal costs).

### **Clause 5 – Our Disbursements**

Complete where necessary, and delete whichever paragraphs do not apply. See sections referred to under Clause 4, which also affect disbursements.

### **Clause 6 – Counsel’s Fees**

Refer to SS 303-306 [re. general costs disclosure obligations and disclosure where another law practice (including Counsel) is retained]. In particular, you must be aware, and remember, that the Conditional Costs Agreement ordinarily requires you to obtain instructions and give an estimate of Counsel’s fees before retaining Counsel. Costs disclosure must be made before retaining Counsel or, in urgent circumstances, as soon as practicable afterwards. If you make disclosure orally in urgent circumstances it must be confirmed in writing as soon as practicable afterwards.

### **Clause 8 – Costs Payable to other Parties**

Note when settling litigious matters the requirements of S 307 regarding costs payable to other parties (if any).

### **Clause 10 - Your Right to a Bill of Costs**

Refer to Part 3.3 Division 6 (re. billing) and S 327 (re. client’s right to ask for an itemised bill). Note that S 306(1) provides that client’s right to an itemised bill does not apply if the lump sum bill is for an amount not exceeding the ‘threshold amount’. Subsection 306(1) (a) provides that the ‘threshold amount’ is \$1500 (excluding disbursements) or a higher amount as prescribed by regulation. As of November 2007, there were no regulations under S 306(1) (a) but it is up to you to ensure that you modify your Costs Agreement in line with any regulations made.

### **Clause 11 – Disputed Legal Costs**

Refer to Part 3.3 Division 7 (Mediation of Costs Disputes) and Division 8 (re. costs assessment).

### **Clause 12 – Interest on Unpaid Costs**

Refer to S 303(1) (e) (re. disclosing the rate of interest charged) and S 316 (re. interest on unpaid legal costs). The interest rate is prescribed under Regulation 80D of the Legal Profession Regulations, Table 2.3. As of 12 November 2007, this rate was 8.75% (the Reserve Bank Cash Target Rate plus 2%). You should monitor changes to the cash target rate and amend your Costs Disclosure Statement should this rate change.

In relation to S 303(1)(e) the rate may be specific or benchmarked. See subsections 303(2) and (3) in relation to benchmarked interest rates.

### **Clause 13 – Trust Monies**

Refer to Part 3.1 generally (re. the handling of trust, controlled and transit money).

For clause 13(i), refer to S 247(1) (b).

For clause 13(ii), refer to S 254 and Regulation 68 (3).

### **Clause 14 - Termination of this Costs Agreement after the Cooling-Off Period**

Ensure that any termination of a retainer complies with the Law Society Northern Territory *Rules of Professional Conduct and Practice*.

### **Clause 15 – Lien**

Refer to *Rules of Profession Conduct and Practice*.

### **Clause 16 – Destruction of Documents**

Refer to *Rules of Professional Conduct and Practice*. Practitioners must retain client documents for the duration of the retainer and at least seven years thereafter, or until such time as the practitioner gives them to the client or another person authorised by the client to receive them, or the client instructs the practitioner to deal with them in some other manner.

### **Clause 17 – Governing Law**

Refer to SS 297,298 and 303(1) (k) (re. applicability of the law relating to legal costs).

### **Clause 19 – Independent Legal Advice**

There is a significant body of case law concerning the fiduciary duty owed by solicitors to their clients, and some of the matters which must be disclosed to the client before Costs Agreements are entered into. This clause attempts to deal with such issues. Refer also to S 318(3) (d).

### **Clause 20 – Cooling-Off Period**

Refer to S 318(3) (e) (Re. cooling-off period).