

'No win-no fee' costs agreements

Information for consumers

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Introduction

Many lawyers and law firms enter into 'no win - no fee' costs agreements with their clients, undertaking legal work on their behalf on what is sometimes called a 'speculative' (or 'spec') basis.

A 'no win - no fee' costs agreement gives people with limited finances access to justice. For people who can't afford to pay their legal costs up-front or on a 'pay as you go' basis, this type of agreement enables them to engage a lawyer to help them pursue their legal rights. They pay the lawyer only after their case is settled or otherwise decided, and only if they are successful.

As with any contract however, there can be pitfalls. You should be aware of these before entering into such an arrangement.

What is a 'no win - no fee' costs agreement?

In a 'no win - no fee' costs agreement, a lawyer agrees with a client not to charge any fees for their services unless and until the client 'wins' their case. The lawyer agrees to take the risk that the case might lose – and if this happens, the lawyer does not charge any fees. The client agrees to pay the lawyer if the case succeeds (typically, but not always, out of the money recovered from the other party).

However you should note:

- Generally the law firm is still entitled to recover their outlays (also known as disbursements). These are monies the law firm has spent in pursuing the claim and include court filing fees, the cost of expert reports and barristers' fees. The terms of the 'no win - no fee' costs agreement should state whether or not the firm can recover their outlays.
- While a lawyer may carry the risk for their own fees, it is highly unusual for them to carry any risk for the other party's legal costs. Typically, if a case is lost, the client who loses must pay the other side's legal costs, irrespective of whether or not they have a 'no win - no fee' costs agreement with their own lawyer.

'No win - no fee' arrangements are one type of what the *Legal Profession Act 2007* (the Act) calls 'conditional costs agreements'. The Act defines conditional costs agreements to be agreements which provide 'that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.'¹

In what kinds of cases can I ask for a 'no win - no fee' costs agreement?

Lawyers and their clients can enter into this type of arrangement in any case except criminal matters or family law matters.² However, law firms typically offer 'no win - no fee' terms only in cases where there is, or is likely to be, money available to pay the costs after the matter is settled.

The most common cases are personal injury claims and some types of deceased estate matters. Ask your lawyer up-front if they are prepared to enter into a 'no win- no fee' costs agreement.

¹ *Legal Profession Act 2007* s 323.

² *Legal Profession Act 2007* s 323(2).

What if my lawyer won't enter into a 'no win - no fee' costs agreement?

A law firm is not obliged to take any matter on a 'no win - no fee' basis. Some firms never offer these terms at all.

Shop around if you can. Different law firms offer different fees, funding arrangements and expertise. Ask several firms how they would approach your matter and if they will agree to a 'no win - no fee' arrangement.

If the lawyer you consult will not accept such an arrangement, find someone who will or talk to them about an alternative arrangement. For instance, some firms will require their fees to be paid whether you win or lose the case, but will not need to be paid until the end of the case.

If you cannot afford legal services and cannot find a lawyer who will act for you on a 'no win - no fee' basis, consider the following options:

- The Queensland Law Society (ph: 1300 367 757) keeps lists of lawyers who practise in a variety of fields around Queensland. Ask them to refer you to a lawyer who may consider a 'no win - no fee' arrangement.
- Free legal advice is available from your local community legal centre. Go to http://www.nalc.org.au/need_legal_help.php to search for your local centre in Queensland.
- Contact Legal Aid Queensland (ph: 1300 65 11 88) to see if you qualify for legal aid to pursue the matter.
- Some law firms offer a 'pro bono' service for certain cases (which usually mean they charge nothing or a nominal fee for services). Approach these law firms direct to see if they will take on your case under this arrangement. Most firms state on their websites if they act in pro bono matters.
- If your matter is a 'test case' or involves a matter of public interest, LawRight may help by referring you to a pro bono lawyer. Contact LawRight on 07 3846 6317.

My lawyer will take my case on a 'no win - no fee' basis. What do they have to do now?

If a lawyer and a client agree that a case will be conducted on a 'no win - no fee' basis (that is, if there is a conditional costs agreement between them), then the Act imposes certain requirements.

In particular, the agreement:

- must set out the circumstances that constitute a 'successful outcome' of the matter;
- may provide for outlays to be paid (possibly with interest) irrespective of the outcome of the matter
- may provide for payment of an 'uplift fee' (see an explanation below);
- must be in writing; in clear plain language; and signed by the client;
- must contain a statement that the client has been informed of his/her right to seek independent legal advice before entering into the agreement;
- must contain a cooling-off period of not less than five clear business days during which the client, by written notice, may terminate the agreement.

While these requirements must be observed, there is no 'standard' form of agreement.

What is an 'uplift fee'?

The fees charged in a 'no win - no fee' costs agreement can be higher than those charged in a standard costs agreement between a lawyer and client. This is because the lawyer is taking the risk that the matter might not be successful and hence that he/she may not be paid for their services.

The Act also allows a law firm to charge an 'uplift fee' in a conditional costs agreement.³ This is an additional fee over and above any fees that are otherwise payable, and it is payable only on the successful outcome in the matter. An uplift fee may be stated in dollar terms but is usually calculated as a percentage of the fees (excluding outlays) otherwise payable.

In either case however, the uplift fee must not exceed 25% of the fees otherwise payable. It must also be separately identified in the costs agreement. The lawyer must give the client an estimate of what the uplift fee is likely to be, and explain what they will take into account in deciding how much the fee will be.

Not all lawyers charge an uplift fee.

The '50/50' rule

If you have a 'no win - no fee' arrangement with a lawyer and your claim is for damages for personal injury, then the Act makes the arrangement subject to what is often referred to as the '50/50' rule.⁴

This protects a person making a claim (called the claimant) in personal injury matters by restricting the amount that a law firm can charge them. Its objective is to ensure that claimants are not worse off financially after pursuing a legitimate personal injury claim.

The rule puts an upper limit on the professional fees (including GST) that a law firm may charge in such cases. The maximum a law firm can charge (including GST) is one half (or 50%) of the settlement amount after refunds (e.g. to Medicare or Centrelink) and outlays have been deducted.⁵

³ *Legal Profession Act 2007* s 324.

⁴ *Legal Profession Act 2007* s 347.

⁵ Note that the settlement amount includes any costs that are recovered from the other party.

The formula used is roughly stated as follows:

$$\text{Maximum fees} = [\text{settlement amount} - (\text{refunds} + \text{disbursements}) \div 2]$$

An example is set out below.

There are however some important qualifications:

- The formula does not apply to any case that is not a claim for 'damages for personal injury'. For instance, it does not apply to disputed estate matters.
- There are certain types of cases that might be thought of as personal injuries cases but which, on a strict reading of the section of the Act, might not be 'caught' by it. These may include claims against insurance companies under life or disability insurance policies; claims for government benefits such as a disability pension; claims for workers' compensation benefits; and claims for criminal compensation. The courts have not yet ruled on whether these types of cases are subject to the '50/50' rule or not, so its application is uncertain.
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- The formula does not take into account the interest on any loans (whether a litigation loan or a personal loan) made in connection with the claim. This interest must be paid from the client's 'share' of the settlement or judgment.

How the 50/50 rule works

Imagine that you receive a settlement amount of \$50,000 including costs. You owe Medicare a refund of \$1,000, you owe Centrelink a refund of \$6,000 and your outlays (for medical reports and the like) total \$9,000. The 50/50 rule means that your lawyer could not charge you more than \$17,000.

The formula works like this:

Settlement amount (including costs recovered from the other party) is:

$$\begin{aligned} & \underline{\$50,000} \\ - & \$1,000 \text{ refund to Medicare} \\ - & \$6,000 \text{ refund to Centrelink} \\ - & \$9,000 \text{ outlays} \\ = & \underline{\$34,000 \text{ remaining}} \end{aligned}$$

\$34,000 divided by 2 (50/50 rule)

Total = \$17,000 to lawyer (this is a cap on the lawyer's fees)

Total = \$17,000 to client
(the remaining amount paid to the client once the lawyer's fees have been paid)

NB: If your lawyer's fees come to \$12,000, they can charge you the full amount of their fees (i.e. \$12,000), but if their fees come to \$20,000, they can charge you no more than \$17,000.

What happens if I change law firms under a ‘no win - no fee’ costs agreement?

If you change law firms during the course of your claim, both law firms may charge you legal fees. Usually, the firm that acts first will release your file to the second firm with an agreement from you, or the second firm, to pay their fees once the matter is finalised.

However, not all firms will agree to this arrangement; so carefully check your costs agreement (and speak to your lawyer, if possible) before changing firms. It is important that you know exactly what will happen if you change firms.

How does the ‘50/50’ rule work if I change law firms?

If you change firms and the ‘50/50’ rule applies to your claim, there may be a dispute as to what each firm is entitled to. Although the courts have not decided this issue as yet, the Legal Services Commission believes that the rule is designed to ensure that a client receives a fair proportion of any settlement or judgment.

The Commission's view is that the rule should cap the total costs payable by the client to both (or all) law firms which acted in the matter. How that cap is divided between those firms can be negotiated commercially between them. In most cases, this would involve the amount being divided proportionately between them, depending on the amount of work done by each firm.

What should I be aware of when considering a ‘no win - no fee’ costs agreement?

You must consider the following before you enter into a ‘no win - no fee’ costs agreement:

- Know what you’re getting into. Carefully read the terms of the agreement and understand them. If you are unsure, ask for them to be explained.
- Any ‘no win - no fee’ costs agreement must have a five-day cooling off period. Use this time to think about the terms of the agreement. Most importantly, if you’re unsure about anything, seek independent advice (for instance, from your local community legal centre).
- You have a right to independent legal advice, so use it if you are in any way unsure about what you are getting into.
- Check to see if the law firm is charging an uplift fee, and how much it is. This can heavily affect the ultimate cost of the case, and the amount you will recover.
- The law firm must give you an estimate as to how much the case will cost you. Consider the estimate carefully and ask questions if you don’t understand it.
- Remember that a ‘no win - no fee’ costs agreement for a personal injury claim is subject to the ‘50/50’ rule. This should be stated in the agreement.
- Remember that even with a ‘no win - no fee’ costs agreement with your lawyer, you will still have to pay the other side’s legal costs if you lose your claim.

What is a litigation loan?

As noted above, while a law firm accepts the risk of not being able to charge for their work under a 'no win - no fee' costs agreement, they are usually entitled to recover any outlays.

Some firms pay the outlays out of their own money, and recover them once the case is finalised; typically with an interest charge added. Where there is an interest rate charged, the rate should be stated in the costs agreement.

Other law firms may ask you to enter into a litigation loan. This is a commercial loan from a credit provider that covers the cost of the outlays while the case progresses, but which has to be paid back (with interest) once the matter is finalised.

If you are asked to enter into a litigation loan arrangement, be aware of the following:

- Any loan is separate from the 'no win - no fee' costs agreement.
- These loans sometimes carry significant interest charges and other fees; all of which must be repaid at the end of the matter. This can mean that the ultimate amount you receive in the hand can be much less than you expected.
- Before entering into a litigation loan, ensure you receive the full terms for the loan and understand the interest, fees and charges that you are taking on. Seek independent legal and financial advice before committing to such a loan.
- Some companies offer a different type of loan; one that is not used just for outlays, but which can provide cash to an injured person while their claim goes through the system. Be aware that these loans often carry significant interest charges and other fees, and they must be repaid once the matter settles. Again, this can significantly reduce the ultimate payment to you.
- Interest on a litigation loan is not counted in the '50/50' rule. It will come out of your 'share' at the end of the matter.

And finally

We repeat: if you are in any way unsure about what you are getting into, seek independent advice.