



Costs Agreements

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Costs Agreements are an integral part of life for legal practitioners. They are intended to protect clients from excessive charging while affording practitioners access to a fair and reasonable remuneration. However, there exists a delicate balance in the lawyer client relationship given the position of knowledge and trust one holds over the other. It is therefore imperative to exercise great care in the preparation of a Costs Agreement to protect the integrity of the costs contract.

Background

There has never been a position which precludes a solicitor entering a contract with their client for the payment of legal costs. Such agreements were historically not viewed in the same way as contracts. The first statutory impact on Costs Agreements occurred in UK 1870. Since that time all Australian states have moved to introduce a statutory framework encompassing legal costs and payment thereof. While there is a consistency of regulation covering professional fee arrangements, costs disclosure obligations and recovery, significant variations occur from one jurisdiction to another. In Victoria, practitioners are subject to the Legal Profession Act 2004 (as amended) (“the Act”) where Part 3.4 sets out to:

- ensure costs disclosure;
- regulate Costs Agreements and billing; and
- provide a costs review mechanism.

Prerequisites

For a Costs Agreement to exist, a relationship must first be established between a client and practitioner. This arises out of a contractual arrangement known as a Retainer. It is from the retainer that the lawyer’s entitlement to charge the client for services and advice flows.

The retainer also implies the client’s intention and agreement to pay those costs.

As soon as possible after being retained, the solicitor is required to estimate the anticipated legal costs and disbursements during the retainer. This Disclosure Statement is a separate document from the Costs Agreement and should outline, in plain language, the client’s right to negotiate a Costs Agreement as well as billing arrangements, trading terms and avenues of redress. In accordance with the Act, disclosure is an ongoing obligation that requires clients be informed of any substantial changes to their legal costs as soon as practicable. Examples might include costs increases associated with greater complexity of the issues involved or when unanticipated disbursements are incurred.

What constitutes an agreement?

To this end, a Costs Agreement is not the equivalent of a Retainer Agreement or indeed of a Disclosure Statement. In fact, a Costs Agreement incorporated within either document is disregarded and therefore void. Further, no matter how this is evidenced, a discussion with a client as to costs does not constitute a Costs Agreement.

A Costs Agreement is an enforceable contract. It can be made between:

- a practice and its client directly;
- a practice engaged by another practice and its client;
- a practice and another practice on behalf of its client;
- a practice and a third party liable for payment of fees.

While strict requirements that agreements be signed by both parties do not apply, Costs Agreements must be in writing or evidenced in writing. Under the Act, each agreement

must state clearly it is an offer to enter into a Costs Agreement that may be accepted in writing or by the client's other conduct and what conduct might constitute acceptance.ⁱ

Costs Agreements are made in Standard and Conditional forms. Conditional Costs Agreements provide for the payment of some or all the legal costs upon the successful outcome of a proceeding. Conditional Agreements may relate to any matter other than Family Law or Criminal proceedings.

Requirements

Legal costs can be defined as the value of legal services and advice provided. The Costs Agreement therefore should specify the types of work anticipated during the course of a proceeding and attribute costs to each aspect. As statutory limitations are placed upon practitioners, it is advisable to clearly identify all tasks to be undertaken. As normal costing principles make no allowance for some administrative duties that solicitors may wish to charge out, these items must be detailed. Costs Agreements should be signed, dated and prepared in plain language. Items to be incorporated include:

- Identity of the client or the person responsible for payment of legal costs,
- Nature of the work to be undertaken by the legal practice or practitioner,
- Identification of personnel carrying out the work,
- Sliding hourly rates for personnel carrying out the work,
- Payment of disbursements
- Interim billing arrangements
- Dispute avenues available

The Act makes special provision for Conditional Costs Agreements in that their enforceability relates to whether the solicitor had reasonable grounds to anticipate success

when the agreement was made. Additional statutory requirements that apply specifically to conditional Costs Agreements includeⁱⁱ:

- Definition of successful outcome;
- Arrangements for payment of disbursements;
- Agreement in writing, using plain language, signed and dated;
- The client's right to seek independent legal advice;
- Cooling off period.

Costs Agreements generally must be in writing or evidenced in writing and should not contract out equity principles such as fairness and reasonableness. Additionally, Costs Agreements must not seek to exclude the client from making a complaintⁱⁱⁱ or request a costs review by the Taxing Master^{iv}.

Enforceability

To shelter clients from excessive legal costs, certain statutory provisions exist to modify or set aside Costs Agreements. Reviewed costs under a void agreement are recoverable according to the reasonable value of the services provided, using a scale fee baseline^v.

While enforceability mainly relates to matters of fairness and reasonableness, it is not limited to these circumstances. In Victoria, the onus of establishing grounds that a Costs Agreement is unjust, unfair or unreasonable falls to the party applying to the Court or Tribunal for relief. Costs Agreements may be set aside where^{vi}:

- The client was induced to enter into the agreement by fraud or misrepresentation of the legal practice or a representative of the legal practice;
- The solicitor is found guilty of misconduct or inappropriate conduct with respect to the services provided under the Agreement;

- The solicitor fails to comply with statutory disclosure provisions;
- Circumstances and conduct of the parties before, when and after the agreement was made;
- If and how the agreement addresses the impact on costs and billing of changed circumstances that could be anticipated during the progress of the matter;
- The agreement is deemed to be unfair, unjust or unreasonable.

Fairness relates to the manner in which the Agreement was obtained. Whether the Agreement was fully explained and the client had a clear understanding including the necessary business and legal acumen to enter the Agreement is crucial.

Reasonableness is effectively determined by what the client considers to be reasonable. This can be complicated by the client's acceptance and payment of interim accounts during the progress of a matter and disputing costs on rendering of a later or final account.

This is a matter of contention leading to some calls for further revisions to statutory provisions and more costs flexibility within the legal profession.

In the current regulatory environment, Costs Agreements are our most effective tool in protecting an individual's access to justice while reflecting a lawyer's expertise in monetary terms. Statutory provisions have ingrained costs contracts in professional life and ensured that Costs Agreements continue to form a fundamental part of the relationship between practitioners and their clients, now and into the future.

ⁱ LPA3.4.26(4)

ⁱⁱ LPA3.4.27(3)

ⁱⁱⁱ LPA4.2.1

^{iv} LPA3.4.26(5)

^v LPA3.4.31(2)

^{vi} LPA3.4.32(2)

