



Party-Party Costs

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In Australia the underlying rationale to Party-Party costs stems from the indemnity rule. This rule provides that the successful party to litigation is entitled to seek an order that the other party pay their costs. There is, however no guarantee of complete indemnity, as the system recognises responsibility for one's own and another's legal costs as a significant encumbrance. Outcomes vary according to how the court exercises its discretion and, in particular, what might be necessary or proper to attain justice or enforce or defend a successful party's rights.

Value in compromise

While it is usual for the court to make an unsuccessful party pay a successful party's costs, Australian courts have an unfettered discretion in making costs orders in the matters before them.

An offer of compromise might therefore pose a reasonable or strategic alternative. Rejecting a realistic offer of compromise may have serious consequences, including an adverse costs order. This leaves the avenue open for an unsuccessful party to make their own costs order application and seek costs on the higher indemnity basis.

When an offer is served in the initial proceedings, there may be inadequate detail available for the opponent to make a realistic decision on whether to accept or reject the offer. The court may therefore take this into consideration when exercising its discretion in making a later costs order.

Costs entitlement

Court rules provide specific jurisdiction for the making of orders in relation to Taxation of costs and determination of fixed amounts payable by one party to the other. These are intended to:

- encourage saving of private costs and avoid inherent litigation risks;
- save public costs incurred in unnecessary litigation; and
- indemnify the party who made a reasonable offer against costs subsequently incurred.

In a majority of matters, the court determines the basis on which costs will be taxed but there may also be statutory implications as to how those costs are quantified.

Party-Party costs are usually determined by whether they are considered to be necessary or proper. That is, given all the circumstances of the proceeding, are the costs demonstrable as having been necessarily and properly incurred for the attainment of justice. Generally costs that are not considered necessary or proper in conducting litigation will be disallowed. This includes where certain costs have been incurred simply for convenience. A cost is at risk wherever the practitioner has not used the most economical alternative.

Seeking the correct costs order is therefore critical to the determination of costs necessarily and properly incurred. A suitable costs order may impact significantly on the Party-Party costs recovered at Taxation. For example, without certification, counsel's fees will revert to scale in the County Court.

The court's assessment is dependent on the reasonableness of the costs sought. If the parties are unable to reach agreement as to costs, an order may be made based on the outcome of a costs review. The result is a debt against the adverse party, enforceable from the date of offer acceptance or court order.

Basis for taxation

In Victoria, the method by which recoverable costs and disbursements are determined is referred to as Taxation. The court delegates this specialist function to the Taxing Master or Registrar, depending on the relevant jurisdiction, who is responsible for careful examination of the detailed Bill of Costs. Determination is made as to the necessity and propriety of costs, given all the circumstances of the matter, by reference to the relevant scale.

The Bill of Costs must be set out in a form as required by the court. This includes chronological ordering and detailing of each costs item together with the allocation of costs and disbursements in separate columns. A number of administrative considerations impact on the allowance of costs items detailed in the Bill of Costs on Taxation. These include but are not limited to:

- evidence of disbursements incurred, including provider details, fee, date and service;
- comprehensive file notes which record date and time of attendances, travel, participants;
- production of counsel's copy brief and marked backsheets;
- certification as to payment of counsel's fees;
- inclusion of witness attendance notes;
- original or copies of all correspondence.

A Bill of Costs is more likely to be upheld when prepared by a specialist in the area of legal costs. This explains to an extent why costing expertise is more readily utilised in Australian Party-Party proceedings. It also follows that selection of an experienced costs consultant is essential to defend or oppose the Bill of Costs.

Due to the problematic and subjective nature of making determinations as to costs, decisions vary from one jurisdiction to another. This is a major factor in proposed changes to the jurisdiction of the Taxing Master and/or Registrar together with the introduction of the Victorian Costs Court.

The challenge for the future will be a realistic application of the indemnity rule, one which achieves a balance between ensuring adequate recovery of the costs incurred by a successful party while not imposing an unreasonable burden on their opponent.

