



Solicitor-Client Costs

(under the Legal Profession Act 2004)

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Legal costs impact on every dimension of the legal fraternity. All practices are dependent on fees and very few transactions occur without a cost consequence.

In Victoria, legal costs between a practitioner and their client are subject to the statutory provisions of the Legal Profession Act 2004 (as amended) (“the Act”). This provides the regulatory framework under which is to be established:

- the existence of a relationship between the solicitor and client;
- the appropriate costs disclosures and estimates to be made;
- if a Costs Agreement made between the parties is valid;
- dispute resolution procedures including taxation of detailed bills of costs.

Establishing the relationship

In the case of a solicitor and client, payment entitlement flows from a contractual arrangement known as the Retainer. Retainers apply to work performed in a professional legal capacity and do not extend to other services.

Assuming a valid retainer exists, the requirement most likely to impact on a solicitor’s ability to recover fees is disclosure. Disclosure obligations commence immediately on being retained and are an ongoing requirement throughout the retainer.

Costs disclosure compliance

Under Division 3 Part 3.4 of the Act it is incumbent upon practitioners to make full disclosure as to the estimated costs which may be incurred over the term of the matter as soon as practical after being retained.

Further, disclosures are an ongoing obligation throughout the course of the retainer as practitioners are required to advise the client when they become aware of any substantial change to an earlier disclosure. A new estimate must be provided to the client:

- should any fee estimates be exceeded, whether that relates to professional costs or disbursements;
- each time new counsel is engaged, and
- whenever counsel’s scope and/or fees alter.

While failure to update is a common cause of complaint, other aspects likely to create conflict include revision of counsel fees and disclosure before a negotiated settlement.

The Act makes specific allowances to clients where estimates have been exceeded. As the repercussions of a failure to disclose may significantly delay or affect a solicitor’s remuneration, argument in favour of instructing a specialist costs lawyer or costs consultant intensifies with the matter complexity. Failure to comply may have recovery consequences and, importantly disclosure is an essential element in upholding the validity of a Costs Agreement.

Costs Agreement Validity

A Costs Agreement is essential where a practitioner, including counsel, intends to charge their client at a level other than the relative scale or subject to a remuneration order. Division 5 Part 3.4 of the Act provides the statutory framework for an enforceable contract.

As the Costs Agreement is an independently enforceable contract, establishing validity is critical in the event of a costs dispute. LPA 3.4.32 details circumstances under which a Costs Agreement may be set aside. Generally validity is jeopardised by some legally

recognised factor such as misrepresentation, improper conduct, failure to comply with provisions of the Act or the agreement is not fair or reasonable.

In circumstances where a Costs Agreement is void or set aside, legal costs are recoverable in accordance with the relevant scale, remuneration order or according to the fair and reasonable value of the legal services provided. Provision for administrative tasks or practice overheads is not allowed.

Bill of Costs

In Victoria, solicitors may issue a Bill of Costs in lump sum or itemised form. Pursuant to LPA 3.4.34(2) bills should be signed by the solicitor or their representative and be served in accordance with LPA 3.4.34(4).

Commencement of recovery proceedings must be delayed following the issue and service of a Bill of Costs in accordance with Part 3.4.36 of the Act. During this time, and within 30 days of receipt of a lump sum bill, the client is entitled to request an itemised account without further cost. An itemised Bill of Costs must contain sufficient detail for the client to seek advice and decide on further action such as:

- an application to set aside the Costs Agreement;
- a costs review by the Taxing Master or Registrar;
- launch a costs dispute/civil complaint.

Solicitor-Client Costs Disputes

In the event of a costs dispute and assuming the Costs Agreement is enforceable, the following avenues are available to practitioners:

- commence recovery proceedings in the Court or VCAT subject to preconditions

such as the correct issue of Bill of Costs, resolution of any client initiated dispute or costs assessment and costs review for disclosure deficiency and LPA compliance;

- refer a costs dispute or civil complaint to the Legal Professional Tribunal within the designated time limit, where costs do not exceed \$25,000 and no notice of dispute has been received;
- application to the Taxing Master for a costs review under Division 7 of the Act.

Since these alternatives are not without additional cost, the practitioner's decision to pursue recovery proceedings should be carefully considered against other options. An Offer of Compromise, for example may limit exposure to the costs of a review by the Taxing Master or Registrar since the Act provides those costs would otherwise be payable by the practice where:

- costs are reduced by 15% or more as the result of a review; or
- there is a determination the practice failed to comply with Division 3.

While the primary purpose of Taxation is to investigate the fairness and reasonableness of Solicitor-Client costs, to some extent the Taxation process provides the comfort of an independent arbiter to all parties in the event of a dispute. There are, however significant pitfalls for practitioners should statutory provisions of the Act be overlooked. Disclosure, for example requires diligent attention right throughout the progress of a matter.

Solicitor-Client fees are the very lifeblood of a practice and all lawyers depend upon their recovery for remuneration. Legal costs are one of the most time consuming and expensive areas of practice.

The combination of complex regulatory conditions and steady, subtle change have made fee recovery and loss exposure two of the biggest issues facing practitioners today and has increased reliance on experts such as costs lawyers and costs consultants specialising in this practice area.

