Costs agreements in New South Wales

David Aitken, Sydney

David Aitken

Introduction

Since the introduction of the Legal Profession Reform Act in 1993, a large number of Legal Practitioners are incorporating costs agreements into the management of their practices. The costs agreement is an effective tool which used effectively, can help to alleviate many costs disputes before they arise.

Costs agreements

Costs agreements are governed by the Part 11, Division 3 of the Legal Profession Act, 1987 (the "Act").

Whereas the Act provides that disclosure is mandatory, it makes entering into costs agreements optional, providing that an agreement as to costs "may be made...":s 184(1).

It is important for practitioners to note that there is a distinction between the disclosure of costs and costs agreements. The former being compulsory whilst the latter is optional.

Who may enter into costs agreements

A costs agreement may be made between:

- A solicitor and a client
- A barrister and a client
- A solicitor and a barrister, or
- A solicitor and solicitor (e.g. agency work).

Form of a costs agreement

A costs agreement must be in writing or evidenced in writing as per s.184(4) of the Act. A costs agreement which is not evidenced in writing is void.

A costs agreement may consist of a written offer that is accepted by writing or conduct. This relieves the need for the practitioner to get a copy of the agreement signed by the client. Accordingly, a client may accept the costs agreement by his or her conduct, for example continuing to instruct the practitioner to act after the costs agreement has been delivered. Whilst conduct may imply acceptance by the client, the optimum position is for the client to actually sign the agreement.

As stated above, entering into a costs agreement is not compulsory, but it may form part of a contract (retainer) for legal services: s. 184(5). In practice, many practitioners are choosing to combine the written disclosure components of beginning a matter are met within the one document. For obvious reasons of economy this is a useful way to formalize the engagement.

Conditional costs agreements

A solicitor and client may enter into a "conditional costs agreement": s. 186. This is an agreement under which the solicitor agrees that payment of costs is conditional upon the successful outcome of the matter. A conditional costs agreement must set out what constitutes success: s.186(4). Conditional costs agreements may relate to any proceedings in a Court or Tribunal with the exception of criminal proceedings: s.186(3).

Payment of premium

One difference between a standard costs agreement and a conditional costs agreement is that the latter may provide for the payment of a premium on those costs otherwise payable under the agreement. The premium is not to exceed 25%.

Form of conditional costs agreement

It was undoubtedly intended that conditional costs agreements be of the same form as "costs agreements", that is, in writing or evidenced in writing. A conditional costs agreement may exclude disbursements from the costs that are payable only on the successful outcome of the matter: s 186(5).

Contingency agreements not permitted

The US style contingency agreement is expressly prohibited by the Act. That is, a costs agreement may not provide that costs are to be a proportion of, or to vary according to, the amount recovered in any proceedings: s 188.

Costs agreement must not waive rights given under the Act

Any provision of a costs agreement that purports to waive the client's right or is otherwise inconsistent with Division 3 of the Act is void to the extent of the inconsistency.

Costs agreements in practice

Costs agreements have not been universally adopted but seem to be being used in more cases than not. In general terms there appears to be less use of costs agreements in suburban and country areas where, perhaps, the nature of the relationship between client and solicitor is of a more personal, less business-like nature. A trend can also be seen across different practice areas, with costs agreements being less likely in personal injuries matters than in commercial matters. However, this position in changing.

We are also seeing a lot of conditional costs agreements in personal injury matters. Of these most tend to include the 25% premium on costs and disbursements. Conditional costs agreements in commercial matters are rare.

The cost assessment system and costs agreements

If there is a valid costs agreement in force, the right of a client to seek to have a Practitioners costs assessed is limited. Section 208C provides that a Costs Assessor is to decline to assess a Bill of Costs if the disputed costs are subject to a costs agreement that complies with Division 3 and the costs agreement specifies the amount of costs or the dispute relates only to the rate specified in the agreement for calculating the costs.

If the client's dispute relates to any other matter, costs are to be assessed on the basis of the specified rate despite section 208A (which details those matters which a Costs Assessor must consider when assessing a Bill of Costs)

A Costs Assessor is also bound by a costs agreement which provides for the payment of a premium, which is not determined to be unjust under section 208D.

Practitioners should note that the limiting ability of section 208C does not apply to a matter where a costs assessor determines that the costs agreement is unjust pursuant to section 208D

Unjust costs agreements: s. 208D

A Costs Assessor has the power to determine whether a costs agreement is unjust. In doing so the Costs Assessor must consider not only the costs agreement itself, but also the circumstances relating to the costs agreement at the time it was made under section 208D of the Act.

Effect of costs agreements in assessment of party/party costs.

A Costs Assessor is not to take into account any costs agreement in making a determination on what costs are payable in an application for assessment of party/party costs: s. 208H. Whilst this in effect would seem to preclude a costs agreement from forming any basis upon which a costs assessor may assess costs, it is common practice for a Costs Assessor to call for costs agreements in party/party assessments, as they are certainly entitled to do: ss.207 and 208.

A reason given for requesting a copy of the costs agreement is usually founded upon an allegation by the party liable to pay the costs, that allegation being that the costs indemnity rule has been breached. The costs indemnity rule states that party/party costs are not to exceed solicitor/client costs.

Conclusion

In conclusion, the costs agreement combined with disclosure requirements can successfully be used as a tool to develop a relationship with your clientele that lessens the chances of disputes. ■

David Aitken is a Client Services Manager at D G Thompson, **phone** (02) 9251 4511, **fax** (02) 9251 4522

Victorian Alert!

John Voyage, Melbourne

John Voyage

The normal twelve month time period for reviewing decisions of the Transport Accident Commission to the Victorian Civil and Administrative Tribunal has been amended!

The *Tribunals and Licensing Authority (Miscellaneous Amendments) Act 1998* reduces from twelve months to just twenty-eight days the time for reviewing certain decisions by TAC to the VCAT - including decisions under Section 23 for rehabilitation, and Section 70 for rejecting the claim.

The TAC has yet to make changes to this effect in its notifications to claimants of decisions. At present the VCAT seems also to be unaware of the change. However, there is a compelling argument that any Applications for Review filed after twenty-eight days are without jurisdiction. In those cases Applicants who are out of time as a result of the misrepresentation of the twelve month appeal period by TAC may need to consider claiming directly upon TAC at common law. ■

John Voyage is a Partner at Maurice Blackburn & Co, **phone** (03) 9345 2700, **fax** (03) 9345 2718