COSTS DISCLOSURE AND COSTS AGREEMENTS

The Legal Profession Act 2007 (LPA) regulates the obligation to disclose legal costs to clients, their rights, and how that disclosure should be made.

The LPA enables this obligation to be met through a costs agreement or a separate notice with costs disclosure.

This regulatory guide provides an overview on issues around costs disclosure and costs agreements, including the Commission's view on some of these issues.

Costs disclosure vs costs agreement

A properly made costs agreement is a contractual agreement for the payment of legal costs. It may also deal with other rights and responsibilities between the law practice and client.

A costs disclosure is information a law practice must give to you disclosing certain information and rights about the charging of legal costs. There are two types of costs disclosure in Queensland.

In practice, the interplay between costs agreements and costs disclosure often takes the physical form of a client services agreement with an attached document providing the required costs disclosure information.

Purposes of costs disclosure and costs agreements

Part 3.4 of the LPA deals with obligations around costs disclosure and costs agreements. The purpose of these provisions are to:

- ensure law practices make disclosure to clients regarding legal costs and their rights
- regulate costs agreements
- regulate the billing of costs for legal services

These objectives sit within the broader purpose of the LPA, to protect the consumers of legal services and the public generally.

When assessing conduct issues around non-compliance with costs disclosure and costs agreement obligations, the Commission will have regard to these purposes. This aligns with the approach taken by the courts (see *Connollys Lawyers Pty Ltd v Davis* [2013] QCA 231, [21].), and the usual rules of statutory construction.

How and when costs disclosure must be made

A costs disclosure is always required when the disclosure threshold amount is likely to be or is exceeded. The disclosure threshold amount is currently set at $1500 (Excl. GST and disbursements).

If the legal costs are above the disclosure threshold amount but are less than $3,000 (Excl. GST and disbursements), the law practice must make a costs disclosure. The disclosure may be either an abbreviated costs disclosure or a detailed costs disclosure.

Where the legal costs of a matter will exceed the detailed disclosure threshold amount of $3,000 (Excl. GST and disbursements) the law practice must make a detailed costs disclosure.

A detailed costs disclosure must be made where the detailed disclosure threshold amount is likely to be exceeded, even if an abbreviated costs disclosure was previously made.

A costs disclosure can be made in a costs agreement or offer to enter into a costs agreement, but the disclosure must be in a prominent position at the beginning of the agreement or offer.

Abbreviated costs disclosure

An abbreviated disclosure to a client can be made orally or in writing. If made orally, it must be confirmed in writing as soon as practicable after the disclosure is made.

As part of an abbreviated costs disclosure, the LPA provides that a law practice must disclose to a client:

- in general terms, the legal services that will be provided,
- the basis on which legal costs will be calculated, including whether a scale of costs applies,
- an estimate of total legal costs,
- an estimate of the total amount of disbursements,
- the clients right to:
  - to negotiate a costs agreement, receive a bill from the law practice, request an itemised bill and be notified of any substantial changes to disclosed matters

Detailed costs disclosure

Detailed disclosure to clients must be made in writing before, or as soon as practicably after, the law practice is retained.

This must be expressed in plain language, and may be in a language other than English if required for the client.

The LPA provides a non-exhaustive list of disclosures that must be made to the client as part of a detailed costs disclosure, including:

- the basis on which legal costs will be calculated, including whether a scale of costs applies
- an estimate of total legal costs, if possible. If it is not possible then a range of costs with an explanation of the variables that will affect the calculation
- the client's rights, including to negotiate a costs agreement, receive a bill from the law practice, request an itemised bill and be notified of any substantial changes to disclosed matters
- details of the intervals, if any, at which the client will be billed
- the interest rate charged on overdue legal costs, and whether that interest is a stated rate or benchmark rate
- the client's right to a costs assessment and the setting aside of a cost agreement, including any time limitations
- If it is litigious matter, an estimate of the range of costs the client may recover if they are successful and the costs they may have to pay if unsuccessful. This must include that any costs order in favour of the client may not cover all the client's costs and, where applicable, that disbursements may still be payable by the client in a conditional cost agreement
- the client's right to progress reports
- the details of the person the client may contact to discuss the legal costs
- that the law of Queensland applies to the legal costs in relation to the matter

Costs disclosure when retaining a second law practice

Law practices that want to engage a second law practice on behalf of a client have additional disclosure requirements.

The definition of law practice encompasses barristers, so this typically arises (but is not limited to) where a solicitor wants to retain a barrister on a matter.

For an abbreviated costs disclosure, the first law practice needs to disclose to the client the basis on which the second law practice's costs will be calculated, an estimate of total legal costs of the second law practice, and an estimate of the total amount of disbursements.

For a detailed costs disclosure, the first law practice needs to disclose to the client the basis on which the second law practice's costs will be calculated, an estimate of total legal costs of the second law practice, and any billing interval details of the second law practice.

The second law practice (e.g. a barrister) does not have to make disclosure to the client, however they need to provide enough information to the first law practice (e.g. the solicitor) to allow it to meet its disclosure obligations to the client.

Additional costs disclosure

In certain circumstances additional disclosure will need to be made to clients:

- settling litigious matters—before settlement the law practice must provide a reasonable estimate to the client of legal costs payable by the client (including any other parties' costs)
- if the law practice charges an uplift fee—the law practice's legal costs, the uplift fee or how it is calculated, and why the uplift fee is warranted.

Ongoing disclosure

The LPA also requires that law practices must provide ongoing disclosure to a client.

This means the law practice must disclose in writing any substantial change to anything already disclosed as soon as reasonably practicable.

This is particularly important for previously disclosed estimates of total costs and disclosed ranges of total legal costs.

Where a law practice has made initial disclosure of legal costs in their costs agreement, updated estimates will be required where there has been a substantial change.

Regularly issuing invoices that total more than previously provided estimates may not be enough to comply with this requirement (Connollys Lawyers Pty Ltd v Davis) at [22].

Law practices need to proactively provide updated disclosure to clients and should not rely on clients calculating from invoices that legal costs are more than the disclosed estimates.

Law practices may make disclosure of legal costs by reference to 'stages' of work.

Where there is a substantial change to a stage, the law practice must communicate a fresh costs estimate or range of estimates for that stage (Setschnjak v Derek Geddes Pty Ltd [2017] QCAT 9, [152].)

Law practices and legal practitioners must be diligent in considering whether an initial costs disclosure for a stage is still sufficient.

Exceptions to disclosure obligations

There are some limited circumstances in which a law practice will not need to provide a costs disclosure in the form required by the LPA.

The main exemption is that costs disclosure is not required if the total legal costs of a matter (excluding disbursements and GST) are less than $1,500 (the disclosure threshold amount).

However, if no disclosure was previously made, an abbreviated or detailed costs disclosure must be made as soon as practicable after this amount is likely to be exceeded.

The LPA also contains some other exceptions to costs disclosure such as:

- disclosure was made to the client in the previous 12 months, the client waived the right to disclosure in writing and the law practice principal decided that further disclosure was not required
- where the client is a 'sophisticated client'
- where the client will not be required to pay the legal costs.

Where it becomes apparent that legal costs are likely to exceed $1500, practitioners need to be aware of the ongoing duty of disclosure and should provide an updated estimate of costs alongside full costs disclosure.

Effect of failure to disclose

A failure to comply with costs disclosure obligations may amount to unsatisfactory professional conduct or professional misconduct.

For the law practice, the effect may be that any costs agreement may be set aside.

Further, the law practice may not be able to recover any legal costs until there has been a costs assessment.

Non-compliant costs disclosure may also affect any costs assessment, as the normal rule that a cost assessor must have regard to the provisions of a costs agreement specifying the amount of the costs, or how they are to be calculated, may be displaced where cost disclosure obligations have not been met.

The costs assessor may also reduce the legal costs proportionate to the seriousness of the failure to disclose.

Requirements of costs agreements

The LPA requires that a costs agreement be written or evidenced in writing.

It must state:

- it is an offer to enter into a costs agreement
- that it may be accepted in writing or by conduct
- the type of conduct that will constitute acceptance.

Costs agreements that do not comply with these requirements are void.

Contingent costs agreements

Costs agreements which include contingency fees – fees calculated by reference to money or the value of property recovered – are prohibited.

The maximum penalty for entering into a contingent costs agreement is 100 penalty units.

Further, a law practice may not recover any amount relating to the provision of legal services under a contingent cost agreement and must repay any amounts received.

Conditional cost agreements

Commonly known as 'no win, no fee' agreements, conditional costs agreements occur where payment of all or part of the legal costs are conditional on the successful outcome of the matter.

Conditional costs agreements cannot be made for criminal proceedings or proceedings under the Family Law Act 1975.

To be valid, a conditional costs agreement (other than where the client is a 'sophisticated client' or another law practice) must:

- be in writing, be in plain language and be signed
- inform the client of their right to seek independent legal advice
- provide a cooling-off period of no less than 5 days

The agreement also needs to clearly state what a successful outcome is for the matter.

A client may be required to pay disbursements under a conditional costs agreement, regardless of outcome.

However, the costs agreement must clearly notify the client if this is the case.

A conditional costs agreement may charge an uplift fee, but where it does, the LPA requires it to:

- identify the basis for the calculation of that fee
- contain either an estimate of the fee, or if not reasonably practicable, a range of estimates for the fee and an explanation of the variable that will affect the calculation of that fee
- if the matter involves or is likely to involve proceedings in a court or tribunal, the uplift fee should not be more than 25% of the legal costs and should not include disbursements.

A law practice will not be able to recover uplift fees where it fails to comply with the LPA requirements.

Fixed fee costs agreements

Fixed fee costs agreements are costs agreements where the law practice and a client agree on a fixed price for a law practice's legal services prior to those services being supplied.

These contrast with more traditional time costed agreements where the law practice charges hourly fees (often) in increments of 5, 6 or 10 minute units of time.

Fixed fee costs agreements are not mutually exclusive with other types of costs agreement.

A costs agreement with a client may be, for example, a hybrid of both traditional time costing and fixed fee agreements for different stages of work.

Regardless of the ultimate form the fixed fee costs agreement takes, it will remain subject to the same costs disclosure obligations and costs agreement requirements as other types of costs agreement.

In particular, fixed fee costs may still be subject to a costs assessment, and itemised bills must still be provided on request.

Speculative personal injury claims

Where a law practice enters into a conditional costs agreement for a speculative personal injury claim the LPA imposes a cap on the maximum claim related costs the law practice may recover.

This is commonly called the 50/50 rule.

The 50/50 rule limits the fees a law practice can charge and recover to no more than half of what the client is entitled to receive under a judgment or settlement, after any refunds and disbursements are deduced from that amount.

Claim related costs refers to the total of the legal costs for the claim and any additional amounts for the claim.

Legal costs are the amount that a person has been or may be charged or become liable to pay to a law practice for the provision of legal services, including interest on those amounts.

They do not include disbursements and interest on disbursements.

Additional amounts include, but are not limited to:

- interest or fees paid or payable on a loan or other credit facility recommended by or obtained on the client's behalf, by the law practice,
- fees paid to another entity for obtaining instructions or preparing statements in relation to the claim, and
- other disbursement and expenses prescribed by regulation.

This means that interest and additional amounts are treated as legal costs and not as disbursements when calculating the maximum amount that may be charged and recovered.

Amounts paid to a barrister engaged for services after a notice of claim is given are not included in additional amounts.

The 50/50 rule creates a maximum amount of claim related costs that may be charged and is in addition to the other requirements for costs agreements in the LPA.

If the law practice wants to charge for claim related costs above the cap, it must apply in writing to the:

- Bar Association of Queensland if the law practice is a barrister
- Queensland Law Society.

Setting aside costs agreement

If a costs agreement is not fair or reasonable, a client may apply to court or the Queensland Civil and Administrative Tribunal to set it aside.

When determining if the costs agreement is fair or reasonable, matters the court or the tribunal may consider include, but are not limited to:

- any fraud or misrepresentation used to induce the client into accepting the costs agreement
- whether a practitioner acting for the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in providing legal services under the costs agreement
- whether the law practice provided proper costs disclosure

- the circumstances and conduct of the parties when and after the agreement was made

Further Information

This guide was published on 1 March 2024 and will be updated from time to time and should be regularly reviewed on the Commission's website (www.lsc.qld.gov.au).