
LAW OF COSTS

LLB210

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Introduction

1. IMPORTANCE OF COSTS

WHY ARE COSTS IMPORTANT?

- Costs as a barrier to an access to justice
- Tool to promote settlements
- Strong deterrent to litigation

General Rule

Costs follow the event. When the court orders costs in the end the loser pays the winner's costs and this is because you have been to court and you have vindicated your rights so you should get your costs paid.

An event

The items on the scale look at the various events that occur during litigation.

For example, discovery, there is a scale amount which is the maximum amount that can be charged.

There can be an argument for **costs thrown away**. That is, where work was done but due to the other party's circumstances/actions that work is thrown out or useless (for example; submitting a statement of claim and receiving a response from the OP but then changing the statement of claim. The OP's work to respond would go towards costs thrown away)

There is no limit to the number of events that can occur. The point to this is

The winner

The winner is the winner at the end of the litigation.

When are costs paid?

Supreme Court – interlocutory orders

Other courts – by the end of the litigation

STATUTORY POWER

The jurisdiction to award is statutory and despite the rule, it is discretionary.

Example discretion: to award the costs against the lawyer

A wide range of statutes can impact on costs order

Corporations Act, Trustees Act, Workers Compensation Act, Motor Vehicle accidents

It is a public policy decision to limit costs in some areas (Workers Comp, motor vehicles). The reason is because of the insurance agencies and their ability to lobby the government.

COSTS IN FAMILY COURT

There was originally no party/party costs. However there is now schedule in the Act that gives the discretion to award costs (usually given when someone behaves badly or the done something wrong).

FCA s 327/FLA s 117 – Costs

OTHER SPECIFIC SCALES

Magistrates Court Scales

They are more generous than they used to be. It has a no cost jurisdiction.

Work cover has its own scale

Official prosecutions – criminal costs – you can get costs in a criminal matter but rarely.

2. ETHICAL DUTIES

Ethical duties owed to the client – no conflict rule *Hospital Products v United State Surgical Corporation (1984)*

Fiduciary duty – no conflict rule

The solicitor and client relationship is one of the strongest relationships known to the law

“A solicitor shall not in any way whatever in respect of the subject of any transactions in the relations between him and his client make gain to himself at the expense of his clients, beyond the amount of the just and fair professional remuneration to which he is entitled” *Tyrell v Bank of London (1862)*

Balancing between being profitable in business but also upholding the overarching ethical duties owed to the client

Statute

Heavily regulated professional *Legal Professional Act 2008 (WA)*

Overarching ethical duties are reflected in the *Legal Profession Conduct Rules 2010*

Where the bill is examined as it does not add up the assessor must alert the Legal Professional Complaints Committee (Professional Misconduct, SAT, Strike off Roll)

Any restriction on access to justice is an undermining of the Rule of Law. Access to justice is a right of every citizen and not a privilege *Ocean Sunline Shipping Company Inc & Fay (1988)*

Court continually express concern as to the high rates of cost and impact on access to justice

2. TIME BASED BILLING

The usual method of charging where solicitors charge an hourly rate, either according to a scale (default rate) or the cost agreement.

The solicitor will charge in 6 minutes units for work performed. If the work is under a 6 minute block the solicitor is permitted to ‘round up’ as long as it is outlined in the costs agreement.

The main problem that arises is that of an inefficient lawyer (doing more work just to get more money).

3. COSTS AGREEMENTS

Where the costs agreement is drafted incorrectly, it will be ineffective and the rate will be charged according to scale.

Freedom of contract: Client and lawyer are free to enter into an agreement charging a particular hourly rate.
Agreement is enforceable on the same principles as any other contract LPA s 286

BUT there is a presumption of 'undue influence' *Clare v Joseph (1907)* because the client is in an inferior position in comparison to the lawyer so both general law and statutes have protected vulnerable clients with safeguards.

LPA s 301: Reasonableness of the amount of legal fees charged is a consideration for a taxing officer.

Courts are very strict in their application of the principle of fairness and reasonableness of charging. The courts view is that part of their work is to survey the client/lawyer costs to ensure that only fair amounts are charged
Redfern v Mineral Engineers Limited (1987)

The assessment is a fundamental principle of reasonableness *Weiss v Barker v Gosling (1993)*. What is reasonable is what is reasonable in the circumstances of the case. In most cases the it is generally unreasonable where it is more than twice the scale rate.

LPA s 282: Making a costs agreement – offer, evidenced in writing, cannot contract out of a costs agreement

LPA s 283: Conditional costs agreement – must set out circumstances of what constitutes a successful outcome, must be in writing in clear plain language

LPA s 284: Conditional costs agreement involving an uplift fee – calculation of percentage of uplift must be separately identified in the agreement, must include variables of uplift and the circumstances which may change the percentage. If it is a litigious matter the success must be likely and the maximum percentage of 25%

LPA s 285: Contingency fees are strictly prohibited (cannot base the fee on the damages awarded)