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Hunter Valley Family Law Seminar

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Costs Agreements and the Implications of the Legal Profession Act

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Introduction

1. This is a timely topic because of the changes made to the *Family Law Rules* in 2004 and the proposed¹ changes to the *Legal Profession Act*. It is however, a big and complex issue and I do not propose to even try and cover all of the different rules and ramifications thrown up by these two legislative provisions.

The Family Law Rules costs agreements and disclosure

2. The changes introduced to the Family Law Rules in 2004 are significant in the procedure (eg it encourages out of court settlements), duties on practitioners (eg as to disclosure) and the law (eg the provisions as to the type and amount of work to be specified in the costs agreement).

General provisions

3. In *r 19.03* (Duty to inform about costs) there are some general provisions that apply to clients who will be charged in accordance with the Schedule and for clients that will be covered by a costs agreement. These are that “*when the lawyer receives instructions to act*” certain disclosure and documents need to be made or given to the client. They are,

1. A costs notice

¹ At the time of writing the Legal profession Act was not in operation.

2. A written advice about the basis for calculating the costs
3. an estimate or range of estimates of the total costs
4. the effect of party/party costs orders
5. the use of other experts such as another lawyer or other expert and their estimated costs.

These requirements are in addition to other disclosures that have to be made during the course of the retainer.

Specific provisions for costs agreements

4. The general need for the disclosure to take place when the instructions are received (previous paragraph) is consistent with the specific requirement that when entering into a costs agreement the client has to be given the *costs notice* and be advised to obtain independent legal advice about the costs agreement “*at the time of making a costs agreement*”. However, it is likely that both this general and this specific provision can be satisfied if the disclosure is done as soon as practicable thereafter as this would recognise the particular difficulty encountered in urgent matters and allow for a court to exercise a discretionary element².

2 If there is no discretion to exercise the rule would be outside the powers of the Judges to make (*Twigg v Rutherford (1996) FLC 92-691*). The previous version of the *Rules* specifically provided for compliance “within a reasonable time after” [*O 38 r 27 (4)*].

5. Specific provisions for costs agreements are found under *Part 19.4* under the heading “*Lawyer and Client Costs*”³ and specifically in *r 19.14 (2)* and say that the costs agreement *must:*

A. specify the **type** and **amount of work** to be done by the lawyer;

B. set out:

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(i) the costs payable by the client for the work as a **lump sum**; or

(ii) the **basis on which the costs will be calculated**;

C. state whether a partner, employed lawyer or clerk will work on the case and, if so, that person's charge out rate;

D. be **fair** and **reasonable**; and

E. be signed by the lawyer and the client.

F. The costs agreement may:

(a) relate to part only of a case; and

(b) be amended by written agreement.

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But some of the rules under this Part also apply to Schedule 3 clients.

- G. The costs agreement **must not include** a provision:
- a. preventing the client from taking civil action (including liability for negligence) against the lawyer;
 - b. by which all or part of the costs payable for work done are calculated by reference to:
 - (i) an amount ordered by the court;
 - (ii) the amount of an agreed settlement or consent order; or
 - (iii) the value of the property or money that may be recovered in a case to which the work relates; or
 - c. that makes the costs payable only if the outcome of the case is in the client's favour.

6. Dealing with *some* of these provisions individually in some detail below but, briefly, (E 5) is usually not much of a problem though it is not unknown for the client not to sign and return the costs agreement; F is pretty straight forward, G (a) is only common in disclosure documents by counsel and I have never seen a provision like it in a solicitor's costs agreement and as for G (b) and G (c) I have not seen in any family law costs agreement and is likely to be a cure for a theoretical disease rather than a real one.

The type work to be done

7. As to the *type* of work to be done I would suggest that the costs agreement should set out a list and avoid using general descriptions like “acting for you in family law proceedings”. The latter is the most common formulation but a detailed schedule can have significant information benefits for the lawyer as well as for informing the client. It will benefit the lawyer in getting to know his/hers work practices eg what steps in the litigation process are taking up the most time, are there steps that can be done by a less experienced solicitor or a paralegal employee? By such an analysis one can identify ways and means of doing the work more efficiently and in a less expensive way while at the same time providing information that will help in complying with the requirements of the *Rules*.

The amount of work to be done

8. Like the question as to the *type* of work this one is also to yet receive judicial attention but seems to me to call for the quantification of the work hours to be done by the lawyer for each of the *type* of work identified in the costs agreement as (reasonably) necessary to be done so that by the expediency of multiplying it with the charge out rate client will be in a position to work out how much the proceedings are going to cost and make an informed decision to enter into the costs agreement or not as the case may be. The client needs to know this at the time he is about to enter into the costs agreement so that the rule is not satisfied by saying that the client can extrapolate the answer from the information in the account.

Lump sum costs

9. One of the intentions behind a costs agreement is to spell out how much the client will have to pay for the legal services to be provided but for the most part it can be fairly said that they

have been a complete failure in this regard because they have studiously avoided given any meaningful guidance to the client by setting out such low estimates of the expected costs that the final costs had no relationship what-so-ever to the estimate. The current version of the *Rules* should go some way to remedy this situation. The lawyer is now given the opportunity to charge a lump sum. This is likely to sound difficult and no doubt it is, at least in the beginning, but by the process of working out the various *types* of work done (in detail) and keeping statistics on the *amount* of work done then, by the time a reasonable number of cases have been analysed in this way, it should be a relatively painless exercise to work out the lump sum. But do bear in mind that if unusual events occur that will impact on the costs the agreement can be amended to take them into account.

Basis for calculating the costs

10. The alternative to giving the client a lump sum figure is to spell out *how the costs are going to be calculated*. At first sight this might appear to be the easier of the two means but careful consideration will show it to present the same difficulties as working out the lump sum and the same way out ie, work out the details of the *type and amount* of work to be done.
11. Why is giving the basis for calculating the costs are difficult thing to do? Is not the only thing needed to give the hourly rate? It is a difficult exercise because merely giving the hourly rate is insufficient to calculate the costs. Any equation to calculate the costs needs at least two integers ie it needs the hourly rate and the number of hours. I cannot see any other way out. Importantly, both of these integers need to be made known to the client at the time of entering into the costs agreement otherwise he will not be in a position to decide whether to enter into it or not and he /she cannot decide, at that time, whether this particular term of the costs

agreement is a reasonable one or not.⁴ If it is difficult to give the basis for calculating the costs then **the only option** is to give a lump sum. I would not be surprised if this was not the intention behind this sub-rule (see below) . I have come to this point because the hourly rate regime has been under scrutiny for some time now and a provision for lump sum charging could be seen as the best means away from it. Thus, while there is no doubt that these two requirements (*type and amount* of work) pose a very onerous initial burden on a practitioner the practitioner will have to find a way of satisfying them.

Giving an estimate of costs

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12. It is interesting to note that giving the client an estimate or a range of estimates of the total costs, in it self, will not satisfy the requirements for a costs agreement. Thus, while the client has to be given this information if the costs agreement mentions an estimate or a range of estimates it must also give a lump sum or the basis for calculating the costs to be a valid costs agreement. In other words if the costs agreement mentions the estimate or range of estimates and nothing else it does not satisfy the requirements of the Rules.

Fair and reasonable

⁴One looks at the reasonableness of the terms of a costs agreement at the time the agreement is entered into and not at the result that it produces later.

13. The word fair and reasonable refer respectively to the way the agreement was obtained and to the reasonableness of the terms. Using this dichotomy I will now turn to the question of fairness.

14. As stated above *r 19.14(2)* sets out some of the conditions that a costs agreement has to satisfy and one of these requirements is that it has to be fair and reasonable. A further rule that is relevant in this context is *r 19.17* which sets the grounds on which a costs agreement can be put aside and the absence of fairness and terms that are not reasonable are some of the grounds so turning to that *r 19.17* it will be seen that it says that the court may set aside a costs agreement if:

- i. it is unfair or unreasonable;
- i. it does not comply with this Part;
- iii.. the client was subject to undue influence or misrepresentation, or was fraudulently induced to enter the agreement; or
- iv. the lawyer has not complied with rule 19.03⁵, subrule 19.14 (2)⁶ or

⁵R 19.03 sets of the solicitor's duty to give the client (1) a costs notice (2) basis on which the costs will be calculated (3) an estimate or range of estimates (4) advise about party/party costs (5) whether another lawyer or expert will be used and an estimate of his costs (6) when sending an account or itemised account to include a costs notice etc.

⁶R 19.14(2) requires the costs agreement to (1) specify the type and amount of work to be done (2) give the costs payable by the client as a lump sum or (3) the basis on which the costs will be calculated (4) state who will do the work and the charge out rate (5) be fair and reasonable and (6) be signed by the lawyer and the client.

(4)⁷ or rule 19.15⁸.

15. Fairness has to be assessed in the context of the special relationship that exists between a solicitor and client. This special relationship that carries the presumption of *undue influence* and the onus rests on the solicitor to negate it. Usually this is done by ensuring that the client does not sign the costs agreement the minute it is given to him nor do it in the presence of the solicitor but, instead, he is given the opportunity to go away and think about⁹.
16. Another and preferable way by which unfairness can be negated is to send the costs agreement and the *costs notice* to the client with a letter drawing his attention to the costs being charged as against the costs available under the Schedule¹⁰,¹¹. The covering letter needs to specifically draw the attention of the client to the difference between costs agreement costs and do so in a *meaningful way* (*Weiss v Barker Gosling supra*) and not in a perfunctory one.

⁷R 19.14(4) provides that the costs agreement must not include (1) a prohibition against taking civil action against the lawyer (2) that the costs are not to be calculated by reference to the amount of the order, an agreed amount (3) the value of property or money or (4) an outcome in the client's favour.

⁸R 19.15 provides that at the time of making the agreement the client is to be given a costs notice and advise to get independent legal advice

⁹ Weiss v Barker Gosling (1993) FLC 92-398.

¹⁰ Weiss v Barker Gosling (1993) FLC 92-398

¹¹Old rule provided that the solicitor "must" give the client the pamphlet prepared by the Principal Registrar and advise the client of the availability of independent legal advice and in considering its application the court held that these requirements were not mandatory but the power to dispense is to be "exercised sparingly" and save in the most unusual

The *costs notice* is necessary in order to comply with *r 19.15*.

17. As evidence of fairness costs agreements routinely carry an acknowledgement that the client was advised that independent legal advice “is available”. Under the present *Rules* this acknowledgment is going to prove to be insufficient. The new requirement, *r 19.15 (b)*, is for the client to be advised “*to obtain*” independent legal advice thus, it is a more direct requirement to comply with.

Reasonableness

18. Both the Family Court and the Supreme Court ¹² have spoken against a uniform hourly rate for work . The argument is that it is not reasonable to charge the same rate for all work because not all work places the same demands on the practitioner. For example, the demands, both intellectually and emotionally, placed by an appearance in court is not the same as that in reading/writing an email or waiting or travelling to and from court, or doing research and should not be compensated at the same rate.
19. Aside from the uniform hourly rate a solicitor should be alert to the possibility that the client could argue that some of the work could have been done a practitioners (within the firm) whose charge out rate was lower than the one actually charged. For example, charging at the

circumstances the requirement is to be adhered to (*Twigg & anor v Rutherford (1996) FLC 92-691*).

¹²*Schiliro and Gadens Ridgeway (1994-1995) 19 Fam LR 197; Weiss v Barker Gosling (No 2) (1994) FLC 92-474 ; NSW Crimes Comm v Fleming & Heal (1991) 24 NSWLR 116 and see the speech by Spigelman CJ of NSW Opening of Term Dinner 2004 dated 2/2/2004.*

rate for, say, a partner to do something that could have been done by an employee solicitor at a lower rate. This is a particular problem for large firms that tend to involve junior solicitors for the day to day running of the case and partners get involved in relatively routine steps but charge their time at a higher rate.

20. It is worth remembering that *r 19.12* [which is a rule of general application]¹³ prohibits a practitioner from charging for work done for the administration of the lawyer's office but accounts commonly include charges of this nature. Also, experience shows that some costs agreements do not make provision for clerical/secretarial work but this type of work is being charged out at the solicitor's rate.
21. Some costs agreements that I have come across include provision to charge for research at the same hourly rate as court work. Depending on the hourly rate being charged there can be cases where the charge out rate is so high that it can be argued that it is unreasonable to charge for research and/or that it is unreasonable to charge for research for matters that do not involve novel or complex elements.
22. Some provisions in costs agreements can have a misleading element in it. One provision that would fall in this category would be, in my view, one where the costs agreement specifies the hourly rate as "subject to GST" or "exclusive of GST". There is authority that the GST amount needs to be specified in dollars or be GST inclusive otherwise it will breach the *Trade Practices Act (ACCC v Signature Security Group (unreported Federal Court BC 200300010))*. The costs agreement should say either, for example, \$220 per hour inclusive of GST or \$200 per hour and \$20 GST.

23 Be alert for costs agreements that require payment of disbursements “on request” but not, after consultation with the client about incurring an (significant ?) expense. It is commonly accepted that it is reasonable to consult with for the client before counsel is engaged and one would have thought that it would reasonable to consult with the client before incurring the costs of a valuer or an accountant or similar. Moreover, having regard to the need to warn¹⁴ the client about the costs of incurring certain expenditure it would be more than reasonable to make provision in the costs agreement to consult with the client when any significant disbursement is being contemplated.

Recovery of costs

24. I now want to turn to something slightly different but likely to have been encountered by practitioner at least as a hypothetical because question of recovering fees are reasonably common. There are limitations on commencing recovery proceedings in *r 19.13*. These are the same for clients with a costs agreement and for clients under *Schedule 3*. By this *rule* a solicitor is prohibited from seeking to recover costs until,

- i. an account and,
- ii. a *costs notice* has been served on the client and

¹³ *see r 19.14 (b)* - a costs agreement that does not comply with this **Part** can be set aside.

¹⁴ *R 19.12 (3) and Re Blyth and Fanshawe; ex parte Wells* (1882) 10 QBD 207.

iii. no request for an itemised account has been made or

iv an itemised account has been served and no *Notice Disputing Itemised Costs Account (Form 15)* has been served by the client and if served has been resolved or otherwise determined or resolved.

25. I do not want to spend too much time on this but I do want to cover the situation where there is a costs agreement and practitioner has commenced recovery action in the Local Court or is contemplating doing it. Where does the practitioner stand? The answer depends on whether the client falls back on the *Rules* or not. If the client is within time to dispute the account he has two choices. The first is to go to the Family Court for a taxation or to set aside the costs agreement or if he is out of time or simply does not want to avail itself of the taxation process then he can defend the action in the Local Court. But if the client adopts this course then, in my view, *it cannot rely on any defence based on the Rules*. This is because the *Family Law Rules* are an exclusive code for the determination of costs in family law proceedings (*Hall and Hall and Barrett (1982) FLC 91-216; Re Ps Bill of Costs (1982) FLC 91-250*) and a State court exercising State jurisdiction cannot do so.

26 In the Local Court the client can rely on his common law rights and put the plaintiff/solicitor to the test like any defendant can do:

“ a client who is sued by his solicitor for the amount of his charges is entitled to challenge the reasonableness of the sum claimed, notwithstanding that the period during which he may apply for an Order for taxation ...has expired”

(*Turner & Co v Palomo SA [1999] a All ER 353*). See also *Thomas Watts & Co (A firm) v Smith [1998] EWCA Civ 468* and *Titan v Romamo & Co (2000) FCA 431*. In

the latter case, *not a family law matter so that it might be limited to its particular facts and legislation*, the Full Court of the Federal Court set aside the decision of a magistrate who denied the client the right to defend a costs claim because the client did not avail itself of its rights to a taxation.

27. If the prevailing situation is that the Local Court proceedings were commenced after the time to dispute the costs under the *Family Law Rules* had expired the practitioner should bear in mind that the client may still be in time to dispute the enforceability of the costs agreement if the specified period in the *Limitation Act* has not expired (*Symonds v Raphael 24 Fam LR 20*).

The interplay of costs agreements with the Legal Profession Act 2004

28. The best way to understand the interplay of the *Legal Profession Act* and the *Family Law Rules* regarding costs agreements is to recognise that the *Legal Profession Act* is State legislation, that family law is federal legislation and that the *Rules* represent an exclusive code for disputing costs. Thus, to the extent that the *Legal Profession Act* purports to regulate family law costs it is inconsistent with the federal provisions and has to give way to it.
29. Having said this it is of note that the *Legal Profession Act* can and does and does apply to some family law proceedings.
30. To better understand how the *Legal Profession Act* interplays with family law proceedings it is important to distinguish between proceedings initiated in the Family Court and family law proceedings in general. Costs incurred in the Family Court are the exclusive domain of that Court whereas costs incurred in family law proceedings are not exclusive to the Family Court if undertaken in the Federal Magistrates Court. This comes about because the *Magistrates*

Court Rules do not regulate practitioner and client costs and any dispute about them falls to be determined under the State system (*FMCR r21.09*)¹⁵ . Thus, costs for work done for proceedings before a federal magistrate are covered by the *Legal Profession Act* and the costs assessment procedure administered by the Supreme Court and not the taxation procedure of the federal system.

31. What the preceding paragraphs show is that we may have a national family law we do not have a national regime for the determination of family law costs disputes. This will present practitioners with choices as to which court to use but also with additional costs of having separate and distinct costs agreements or fairly long and complex ones that try to catch all eventualities. This split system results into five different costs disputing regimes thus, one can be,

- i. In the Family Court pursuant to the *Family Court Rules* for solicitor/client disputes.
- ii. In the Family Court pursuant to the *Family Law Rules* for party/party disputes.
- iii. In the Magistrates Court pursuant to the *Family Law Rules Schedule 3* for party/party disputes following on proceedings conducted in the Federal Magistrates Court (*FMC Rules r 21.02 (2) (c)*).
- iv. In the Supreme Court Costs Assessment system for solicitor/client costs

¹⁵ Similarly for Child Support proceedings.

disputes for proceedings conducted in the Federal Magistrates Court (*FMC Rules r 2.09*).

v. In the Family Court pursuant to the *Family Law Rules* and in the Supreme Court Costs Assessment system for disputed solicitor/client costs for proceedings partially done in the Family Court and partially in the Federal Magistrates Court.

Clearly, this structure will have an impact on the running of the practice because one needs to be alert to the particular fees circumstances of the case and not rely on some generic costs agreement.

Disclosure under the Legal Profession Act

32. With the preceding regimes in mind it is appropriate to consider , as was done for costs agreements under the *Family Law Rules*, what disclose the practitioner¹⁶ must make under the *Legal Profession Act (s 309)*,

- i. The basis for calculating the costs including whether a fixed costs provision applies to any of the costs.
- ii. The client's rights to negotiate a costs agreement and to receive a bill and to ask for an itemised bill and to be notified of any substantial change to the matters disclosed.

¹⁶The Legal Profession Act now talks about the "law practice" instead of practitioner.

- iii. An estimate or a range of estimates of the total costs and an explanation of any major variables that will affect the calculation.
 - iv. How often the client will be billed.
 - v. The rate of interest on overdue costs.
- vi. For litigious matters an estimate of the range of costs that may be recovered from the other party or paid to the other party if the client is unsuccessful.
 - vii. The right to get progress reports.
- viii. The details of the person whom the client can contact in relation to costs.
- ix. In case of disputes about the costs the availability of costs assessment, the setting aside of costs agreements and mediation.
 - x. Any time limits that apply for the steps in ix.
 - xi. The law of this jurisdiction applies to the matter.
- xii. Information about the client's rights to sign under a "corresponding law" an agreement with the "law practice" that the "corresponding law" provisions apply or
- xiii. To notify under the "corresponding law" the law practice that the client

requires the “corresponding law” provisions to apply.

xiv. That any costs order in favour of the client will not necessarily cover the whole of the client’s costs and

xv. That disbursements may be payable by the client even if there is a conditional costs agreement.

Time for disclosure

33. Disclosure is to be in writing and made before or as soon as practicable after the practice has been retained and except in urgent circumstances a second law practice has to make written disclosure before it is retained (*s 311*).

Exception to need for disclosure

34. This is covered in *s 312*. The main exceptions are,

xvi. if the total costs don’t exceed \$750;

xvii. the client received a disclosure in the last 12 months and

xviii. if the principle of the firm on reasonable grounds and having regard to previous disclosures and any relevant circumstances determines that further disclosure is not warranted. If the last mentioned exception is relied a written record must be kept of the decision.

Disclosure before settlement

35. Before settlement is executed the law practice must disclose a reasonable estimate of the legal costs payable by the client and a reasonable estimate of any costs likely to be recovered from the other party (*s. 313*)

Disclosure of uplift fee

36. If the costs agreement has provision for an uplift fee it must be disclosed to the client in writing (the law practice usual fees, the uplift fee as a percentage of those fees) and the reasons why the uplift fee is warranted (*s 315*).

Form of Disclosure

37. Disclosure have to be in writing and in plain language and may be in a language other than English (*s 315*) save that if the client cannot read the disclosure can be given orally in addition to writing.

Failure to disclose

38. Failure to disclose “anything” required by the Act means that,
- i. the client does not have to pay the costs unless assessed;
 - ii. the client can apply to set aside the costs agreement,

iii. That the law practice cannot maintain recovery proceedings unless the costs are first assessed and

iv. it can be unsatisfactory professional conduct or professional misconduct (s 317).

39. If costs have to be assessed and the law practice has not made proper disclosure then the law practice has to pay the costs of the assessment and of the costs assessor (s369).

Making costs agreements

40. The making of costs agreements are governed by the provisions in s 322 and they are,

i. The agreement has to be in writing or evidenced in writing.

ii. It may be consist of a written offer that is accepted in writing or by conduct in which case.

iii. It must state that it is an offer and that the client can accept it in writing or other conduct and specify that conduct.

iv. The costs agreement cannot provide that the costs are not subject to assessment.

v. It must set out what constitutes acceptance of the costs agreement.

Conditional costs agreements

41. There can be conditional costs agreements as to any matter except family law and criminal proceedings. It is of interest to note that the Family law Rules say nothing about this.

42. A conditional costs agreement must (s323) ,

i. Set out the circumstances that constitute the successful outcome

ii. May provide that disbursements are payable irrespective of the outcome

iii. Be in writing and clear plain language and be signed by the client.

iv. Must carry a statement that the client has been informed of the right to seek independent legal advice and

v. A *cooling off period* of not less than 5 clear business days. The client can terminate it in writing but any “reasonably necessary” legal services performed to preserve the client’s rights can be recovered .

43. A conditional costs agreement relating to a claim for damages cannot have an uplift fee (s 324) but otherwise have an uplift fee be included but is not to exceed 25% of the legal costs (excluding unpaid disbursements). A costs agreement entered in

contravention of this section carries 100 penalty points.

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Setting aside of costs agreements

44. Costs agreements can be set aside on application by the client to a costs assessor on the grounds that it is not fair, just or reasonable (s328) and also on the ground that the law practice did not make the necessary disclosure (s 317). In deciding whether the costs agreement should be put aside the costs assessor can have regard to;

i. Whether it was entered into by fraud or misrepresentation.

ii. Whether the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in relation to the provisions of the legal services to which the agreement relates.

iii. Whether the law practice failed to make the necessary disclosures

iv. The time at which the agreement was made.

45. If the costs agreement is set aside the costs assessor can order what fees should be paid.

46. As pointed out in paragraph 44 a costs agreement can be set aside on application to a costs assessor. The costs assessment system is a paper driven system and is to be contrasted with the court system under the *Family Law Rules*. Thus, it is both simpler and cheaper.

Bills

47. A bill has to include or be accompanied by a written statement setting out the client's rights to an assessment, **to set aside the costs agreement** , the availability of

mediation and the time limits that apply to the taking of action under any of these rights (s 333).

48. *The need to disclose that the client can apply to set aside the costs agreement in s 309 will, together with the requirement in s 333 for the bill to inform the client that in case of a dispute over the costs one avenue available to it is to apply to set aside the costs agreement will most likely generate more applications to set aside a costs agreement than at present.*