

GUIDE TO PRO FORMA “COSTS AGREEMENT”

Important notice

The Costs Agreement is based on documents prepared pro bono at the request of the ACT Law Society. The Costs Agreement is not legal advice and should not be relied upon as legal advice. Further, legislation and case law change from time to time and this will affect Costs Agreements. Neither the ACT Law Society nor the Law Society Northern Territory accepts any responsibility for relying upon the information contained in the Costs Agreement.

Practitioners and law practices must stay apprised of relevant law and take their own legal advice when notifying clients of their rights, issuing bills and seeking to recover legal costs.

It is strongly recommended that Costs Agreements be settled by a partner in the law practice or by someone with sufficient expertise in both the relevant field of law and legal costs.

Without significant amendment, the Costs Agreement is not suitable for Costs Agreements between a law practice and a third party payer, or between a law practice and another law practice (eg. an agreement between a firm of solicitors and a barrister).

Further, as various provisions of the *Legal Profession Act 2006* (“the Act”) do not apply to ‘sophisticated clients’, you should consider amending the Costs Agreement if you wish to use it for a ‘sophisticated client’.

Unless otherwise stated, all section numbers in this Guide refer to the the Act.

Application to family law practitioners

The Family Court has repealed Rules dealing with solicitor / client costs, including costs disclosure obligations contained in those Rules. This repeal affects the following:

- fresh applications after 30 June 2008;
- under a new client / lawyer agreement entered into after 30 June 2008;
- under a retainer entered into after 30 June 2008.

In relation to other matters from 1 December 2007 until 1 July 2008, in matters which are to be litigated in the Family Court, practitioners will need to comply with costs disclosure obligations under the Act *as well as* under Chapter 19 of the Family Law Rules. The two systems are similar. The Society will provide separate guidance for Family Law matters.

Family Law Rules regarding costs agreements will continue to apply to matters which commence before 1 July 2008. **For new matters that commence after 1 July 2008, only Part 3.3 of the Act in relation to costs disclosure and assessment will apply.**

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Complete names and client's address for correspondence where indicated.

Preliminary

'Legal costs' is also defined in the Part 1.1 Section 4 of the *Legal Profession Act 2006*.

Also refer to S 317 of the Act (re. making Costs Agreements).

Clause 1 – Work to be Done

Complete details as indicated.

Clause 2 – Our Professional Charges

Complete where necessary, and delete whichever paragraphs do not apply.

If you wish to apply the first option, the percentage of the scale of costs may exceed 100%.

If you wish to use the second option and intend to perform additional work not covered by the original instructions, you should seek instructions and agreement as to your rates from your client prior to doing any further work.

Note that under S 327 clients can ask for an itemised bill, unless the bill is for less than the 'threshold amount' of \$1,500 (excluding disbursements).

Be aware of SS 247 – 248 (re. use of trust or controlled moneys for payment of professional charges and / or disbursements); S 254 (re. withdrawing trust money for legal costs); and Regulation 68 (re. withdrawing trust money for legal costs).

Clause 3 – Our Disbursements

Complete where necessary.

See sections referred to under Clause 2, which also affect disbursements.

Clause 4 – Counsel's Fees

Refer to SS 303 – 306 [Re. general costs disclosure obligations and disclosure where another law practice (including Counsel) is retained]. In particular, you must be aware, and remember, that the Costs Agreement ordinarily requires you to obtain instructions and give an estimate of Counsel's fees before retaining Counsel. Costs disclosure must be made before retaining Counsel or, in urgent circumstances, as soon as practicable afterwards.

If you make disclosure orally in urgent circumstances it must be confirmed in writing as soon as practicable afterwards.

Clause 6 – Costs Payable to other Parties

Note when settling litigious matters the requirements of S 307 apply regarding costs payable to other parties (if any).

Clause 8 – Your Right to a Bill of Costs

Refer to Part 3.3 Division 6 (re billing) and S 327 (re client's right to ask for an itemised bill). Note that S 306(1) provides that client's right to an itemised bill does not apply if the lump sum bill is for an amount not exceeding the 'threshold amount'. Subsection 306(1) (a) provides that the 'threshold amount' is \$1500 (excluding disbursements) or a higher amount as prescribed by the Legal Profession Regulations. As of February 2008, there were no regulations under S 306(1) (a) but it is up to you to ensure that you modify your costs agreement in line with any regulations made.

Clause 9 – Disputed Legal Costs / Failure to Pay Our Costs or to Secure Anticipated Disbursements

Refer to Part 3.3 Division 7 (Mediation of Costs Disputes) and Division 8 (Costs Assessments).

Clause 10 – Interest on Unpaid Costs

Refer to S 303(1) (e) (re. disclosing the rate of interest charged) and S 316 (re. interest on unpaid legal costs). The interest rate is prescribed under Regulation 80D of the Legal Profession Regulations, Table 2.3. As of 12 November 2007, this rate was 9.0% (the Reserve Bank Cash Target Rate plus 2%). You should monitor changes to the cash target rate and amend your Costs Disclosure Statement should this rate change.

In relation to S 303(1)(e) the rate may be specific or benchmarked. See subsections 303(2) and (3) in relation to benchmarked interest rates.

Clause 11 – Trust Monies

Refer to Part 3.1 generally (re. the handling of trust, controlled and transit money).

For clause 11(i), refer to S 247 (1)(b).

For clause 11(ii), refer to S 254 and Regulation 68(3).

Clause 12 – Termination of this Costs Agreement

Ensure that any termination of a retainer complies with the Law Society Northern Territory *Rules of Professional Conduct and Practice*.

Clause 13 – Lien

Refer to *The Rules of Professional Conduct and Practice*.

Clause 14 – Destruction of Documents

Refer to *The Rules of Professional Conduct and Practice*. Practitioners must retain client documents for the duration of the retainer and at least seven years thereafter, or until such time as the practitioner gives them to the client or another person authorised by the client to receive them or the client instructs the practitioner to deal with them in some other manner.

Clause 15 – Governing Law

Refer to SS 297, 298 and 303(1) (k) (re. applicability of the law relating to legal costs).

Clause 17 – Independent Legal Advice

There is a significant body of case law concerning the fiduciary duty owed by solicitors to their clients, and some of the matters, which must be disclosed to the client before costs agreements are entered into. This clause attempts to deal with such issues.