



## PLAIN ENGLISH GUIDE TO LEGAL COSTS

The following information is intended to provide an easily understandable overview of legal costs, types of legal costs, costs orders and regulated costs for clients. Please note other orders may be possible in certain circumstances and some orders may not apply to your circumstances. For more information contact Carroll & O'Dea Lawyers.

**Legal costs** are costs for professional work done by a law practice and disbursements incurred. Disbursements are expenses and include report fees, witness expenses, copying fees, court filing fees and expert fees.

**Solicitor/client costs** are costs billed by a solicitor or law practice to a client. These costs are generally calculated in accordance with a Costs Agreement (a written signed agreement between a client and a law practice). Solicitors traditionally calculate their costs based on time spent for work done, at an hourly rate. Some law practices offer legal services at fixed costs, for example a fixed fee for a Divorce or a simple Will.

Solicitors are required to give written advice ('disclosure') of how costs will be calculated, the client's right to negotiate costs and a number of other matters. Solicitors are required to provide disclosure of any substantial change in their disclosure. No written disclosure is required for costs less than \$750 (excluding GST and disbursements). A short form disclosure is acceptable for costs likely to be less than \$3,000.

**Party/party costs** are costs recoverable by one party to a litigation from another party as a result of a Court order or agreement (it may be a term of a settlement that one party pay another party's costs). Generally party/party costs orders in litigation 'follow the event', meaning that the usual order made by the Court is that the unsuccessful party will be ordered to pay the successful party's costs.

**Party/party costs** are typically less than and cannot exceed solicitor/client costs. The amount can be agreed between the parties or assessed by a Supreme Court Costs Assessor. Additional costs will be incurred and time taken if it is necessary to go to assessment. Some of those costs may be recoverable from the other party but typically there will be some costs of assessment that are not recoverable.

**Prior to settlement** of a litigious matter, solicitors are required to give a **written estimate** of solicitor/client costs and party/party costs. This assists clients to properly consider a proposed settlement in terms of what they will receive clear to them, after other deductions such as medical expenses.

It is often convenient to negotiate settlement on an 'inclusive of costs' basis. The benefit of an **'inclusive of costs'** settlement is that there is no ongoing costs matter to be agreed with the other party or assessed as the party/party costs are included. Significant further time and costs can be saved as a result.

In some jurisdictions, the rules of Court allow for service of an Offer of Compromise in an attempt to settle the matter. **Offers of Compromise** must remain open for acceptance for a stated period of time, typically 28 days. More than one Offer of Compromise may be served. If an Offer of Compromise is accepted, the matter is settled on the terms of the Offer of Compromise. If the Offer of Compromise is not accepted,



**Evelyn Garnett, Associate**

Email: [egarnett@codea.com.au](mailto:egarnett@codea.com.au)

Phone: (02) 4258 8305

Location: Wollongong





and depending on the outcome of a matter, the Offer of Compromise may be relied upon at the conclusion of the matter in obtaining certain costs orders.

For example, if the plaintiff in District Court proceedings serves an Offer of Compromise before the first day of trial, which is not accepted by the defendant, and obtains a verdict not less favourable to them than the amount of the Offer, unless the court orders otherwise, the plaintiff is entitled to an order against the defendant for the plaintiff's costs (a) assessed on the ordinary basis up to the time from which those costs are to be assessed on an indemnity basis, and (b) assessed on an indemnity basis from the beginning of the day following the day on which the offer was made.

**Indemnity costs** are 'party/party' costs however rather than calculation 'on the ordinary basis' the calculation is at a higher level, intended to 'indemnify' a party for their costs. Only in certain circumstances are 'indemnity costs' awarded or agreed. Indemnity costs may apply from a certain date such as from the day after service of an Offer of Compromise.

**Regulated costs** (maximum costs) apply to some matters such as motor vehicle accident matters and work injury damages matters. The relevant regulations set out the costs restrictions. Solicitors frequently contract out of these costs restrictions by entering into a Costs Agreement. It is not possible to "contract out" of regulated costs on a party/party basis.

In **motor accident matters**, claims are assessed by the State Regulatory Authority (Claims Assessment and Resolution Service) "CARS" unless a certificate of exemption is obtained. If the claim is assessed by CARS but the claimant does not accept the amount of damages and elects to commence Court proceedings for assessment, special rules apply in relation to the costs incurred after the certificate of assessment is issued.

If the claimant obtains Court awarded damages no greater than the amount assessed by CARS, the claimant is to pay the insurer's costs incurred after the certificate of assessment was issued. The maximum amount that a claimant is liable to pay for the insurer's costs is \$25,000 (or such other amount as is determined by the Authority by order published in the New South Wales Government Gazette).

The insurer in a motor accident matter is liable to pay the claimant's costs incurred after the certificate of assessment was issued if (i) the amount of court awarded damages in respect of the claim exceeds the amount of damages specified in the certificate of assessment by at least \$2,000 or 20% (whichever is the greater), or (ii) the amount of court awarded damages in respect of the claim exceeds the amount of damages specified in the certificate of assessment by at least \$200,000.

If a certificate of exemption is issued by CARS, so that no assessment has taken place, costs will follow the event and any entitlement to party/party costs will be calculated on an ordinary basis. The rules of Court regarding Offers of Compromise apply. The costs will not be regulated, however there are maximum fees for medical reports, witness and other expenses which apply in all motor accident matters.

In **work injury damages matters**, parties are generally required to attend compulsory mediation prior to commencing Court action in relation to the claim. The final offers of each party made at mediation are lodged with the mediator. Special costs rules apply in relation to party/party costs based on the Court awarded damages and the final offers made at mediation.

If the claimant in a work injury damages matter obtains a verdict from the Court that is no less favourable than the terms of the claimant's final offer at mediation, the claimant will be entitled to party/party costs from the insurer. If a claimant is unsuccessful in Court (the Court finds the insurer has no liability for the claim) or is awarded damages of less than the insurer's final offer at mediation, the Court is to order the claimant to pay the insurer's costs on the claim assessed on a party and party basis. These party/party costs are regulated costs.

In other work injury damages cases, the parties to Court proceedings for work injury damages are to **bear their own costs** (meaning there will be no party/party costs entitlement). In Family Court proceedings, with some exceptions, the general position is that each party is bear their own costs.

For more information on Costs, contact Carroll & O'Dea Lawyers.