

Instructions for Completion of the Tripartite Agreement

(These instructions cover clauses: 1, 2, 3, 5, 6, and schedule 2 only)

Note:

References to the:

“LPA”, are to the **Legal Profession Act 2004**

“Regs” are to the **Legal Profession Regulation 2005**

“Costs Guidebook” are to the Law Society’s 2006 edition of the **Costs Guidebook**, available at www.lawsociety.com.au/page.asp?partid=6921.

Recitals

The purpose of the AGREEMENT is to:

- secure payment of the former solicitor’s costs,
- obtain release of the client’s file to the present solicitor.

Clause 1

Option i: if Disclosure and a Bill of Costs have been given as per the LPA.

A bill of costs may be in the form of a lump sum or itemised bill. See s 332. Notification of the client’s rights are in s 333, however a client now has the right to ask for an itemised bill: s 309(1)(b)(iii).

Option ii: if there has been Disclosure, but no bill of costs as per the LPA.

Under the **LPA** there is no entitlement to either recover costs or charge interest until 30 days after a bill is given: ss 331 & 321. Care must be taken to comply with s 321(3) and include in the bill of costs a statement that interest is payable and the rate of that interest (which must not exceed the rate stipulated under s 324(4)). Also see the Notes for Clause 6.

Option iii: if Disclosure has not been given.

In the absence of Disclosure, a practitioner does not have an actionable debt in respect of unpaid fees and must apply for assessment, if the client disputes the costs: s 317(1) **Baynes & Anor v Kalyk** [2003] NSWSC 607. In respect of interest where there is no Disclosure, use Option ii in Clause 6 and see Notes to same.

Disclosure is also a mandatory statutory prerequisite in relation to Motor Accident and Work Injury Damages. The former solicitor cannot charge more than the regulated costs *unless* validly contracted out as required by the respective Regulations.

In addition to Disclosure, other notifications must be given, prior to providing legal services, to validly contract out of the regulated amounts in Motor Accident, Work Injury Damages and those Personal Injury Damages matters covered by ss 337 – 343 as follows:.

Separate, Prior, Written Notification. To comply with legislative requirements, the practitioner must provide prior written advice of certain matters:

Personal Injury Damages: Under the 2004 *LPA* there is no requirement to give prior written notice. See Chapter 6 of the **Costs Guidebook**.

Work Injury Damages & Motor Accidents: The scale maximum amounts apply unless the practitioner contracts out of the maximum regulated costs. To validly contract out, the practitioner must give prior, separate, written advice that the claimant will be liable for the "gap" between party/party recovery and the practitioner's own client costs. The advice must be a separate document to the costs agreement. See Chapter 7 **Costs Guidebook**.

Option iv: if Regulated / Scale costs apply.

Scale or regulated costs apply in respect of Workers Compensation matters.

Scale or regulated costs also apply in Motor Accident, Work Injury Damages and (Personal Injury Damages claims as per ss 337-343) if the former solicitor did not validly contract out of the regulated amounts (see Notes to Clause 1, Option iii above).

If the former and present solicitors cannot agree on apportionment of the scale costs application for apportionment can be made by the present solicitor at the appropriate time: reg 84(3) **Workers Compensation Regulation 2003**; reg 9(3) **Motor Accidents Compensation Regulation 2005**

Option v: Victims Compensation

If the former and present solicitors cannot agree on apportionment, application at the appropriate time must be made to the Tribunal or Assessor: Rule 12(2) Victims Support and Rehabilitation Rule 1997.

Clause 2: Personal Injury Damages Matters

For those claims covered by ss 337-343 *LPA*, where the amount recovered does not exceed \$100,000, the maximum costs will apply if the former solicitor did not contract out: s 339. For the requirements on contracting out, see the Notes to Clause 1, on personal injury damages.

For the relevant rules on calculating the **reduced maximum amount** in straddle matters (where legal services are provided both before and after 7 May 2002), Schedule 8, Part 19, cl 91, **Legal Profession Act 1987**.

Clause 3: Legal Advice Prior to Entry

Section 9(2) of the **Contracts Review Act 1980** and s 328 *LPA* (which are similar), provide criteria wherein provisions of an agreement may be found to be void or unjust. Specific circumstances are where the "legal and practical effect" of the provisions are not fully explained to the client. See also *Liu v Adamson* [2003] NSWSC 74.

Clause 5: Provision of a Bill of Costs

Under the *LPA* there is no entitlement to either recover costs or charge interest until 30 days after a bill is given: ss 321 & 331 *LPA*.

Clause 6: Interest

This Clause is optional.

The solicitor should consider carefully whether the charging of interest in each particular matter is justified. In conditional costs agreements generally and in litigation matters where the client has been given the option of paying costs at the conclusion of the litigation, it may be considered unfair to charge interest, even though the costs agreement or written disclosure document contains a clause permitting it. Also, where the solicitor has terminated the retainer it may not be appropriate to charge interest.

In these situations it may be advisable to reach agreement whereby the former solicitor is reimbursed by the present solicitor with the necessary disbursements already paid by the former solicitor. What is considered a "necessary disbursement" will depend on each individual matter and it is not possible to provide comprehensive guidelines. However, a general guide is whether that expenditure was necessary and proper in progressing the client's matter.

"Disbursements" mean fees paid to third parties on behalf of the client.

Option 1: Where there is Disclosure

A solicitor can charge the client interest on unpaid costs for legal services if the costs are unpaid 30 days or more after the solicitor has given a bill of costs for those services: s 321.

However, a solicitor may only charge interest if the bill contains a statement that interest is payable and specifies the rate of interest; s 321(3).

A solicitor may also charge interest on the unpaid costs for legal services in accordance with a costs agreement. However the provisions of s 321(3) would also apply.

The rate of interest charged, whether under the *Act* or under a costs agreement, must not exceed the rate prescribed by Regulation 110A of the Legal Profession Regulation 2005 (as amended). Under the provisions of the *Legal Profession Amendment Act 2006*, the maximum interest chargeable is 9% up to the commencement of the amendment (1 July 2006). Thereafter, the maximum rate is the Cash Target Rate (increased by 2%) set by the Reserve Bank of Australia at the time of billing. See s 321(4)*LPA 2004* (as amended) and *Legal Profession Regulation 2005*, clause 110A (2) and (3) (as amended).

Option 2: Where there is no Disclosure

This option should be selected in conjunction with Clause1 Option iii.

If there is no Disclosure, there is no actionable debt and the former solicitor must apply for assessment if the client disputes the costs: *Baynes & Anor v Kalyk* [2003] NSWSC 607. Accordingly interest cannot be charged until after issue of the certificate of determination.

Option 3: Motor Accidents and Victims Compensation

This option should be selected with Clause1 options **iv** and **v**, with the exclusion of Workers Compensation matters as no interest can be claimed without an order from the Commission.

Schedule 2

Disbursements: Only payments to be made to third parties should be included under this clause. These are outgoings which do not include a profit element for the practitioner.

Charges: Where in-house services are to be supplied which include a profit element (eg copying, faxes and service companies), the charges for them should be provided separately from expenses and disbursements (which do not have a profit element for the practitioner). These costs cannot be claimed in Motor Accidents, Workers Compensation or Victims Compensation matters.

GST Exempt / Free Disbursements: Care should be taken when an estimate includes GST free disbursements (eg, stamp duty or, in certain situations, filing fees), to ensure GST is not incorrectly applied to same. Otherwise there is the possibility of misleading or deceptive conduct under the **Trade Practices Act**.

For a discussion on GST exempt / free disbursements, see **Costs Guidebook**, Chapter 5 and the *GST Guidebook 3^d Edition 2005*, heading "Disbursements". Generally, note the GST free status is dependent on either the client paying direct or the solicitor being a paying agent for the client.

Additionally, many practitioner own client costs queries about the application of GST to costs agreements, memorandum of fees/bill of costs, professional costs and disbursements are answered in the *GST Guide for Australian Lawyers 3^d Edition* (available from the Law Society's website at <http://www.lawsociety.com.au/page.asp?PartID=7401> Law Society's Frequently Asked Questions (FAQ) about the GST (available from the Law Society's website at www.lawsociety.com.au/practice/gst/faq).