

Recovering your legal costs

Don't get stuck with scale costs

Is the costs clause in your standard agreements drafted in such a way that you are entitled to recover all of the costs that you will pay to your lawyers?

As you may or may not be aware, there is a big difference between party and party costs and indemnity costs. There is also a difference between indemnity costs and full indemnity costs.

Party and party costs are calculated in accordance with a court scale (depending on the court where legal proceedings are filed) and are basically the costs that the other party has to pay you when you are successful.

Indemnity costs are also calculated according to a court scale and are usually only awarded by the court where the offending party's conduct has been so offensive, or the position adopted by the offending party so meritless, that the court decides that the party should pay costs at a higher rate than the party and party scale.

Full indemnity costs, or solicitor and own client costs, are the costs that you pay your lawyer.

In the ordinary course, party and party costs will be approximately:

1. 40-50 per cent of the full indemnity costs in the Magistrates or Local Court;
2. 50-60 per cent of the full indemnity costs in the District or County Court; and
3. 60-75 per cent of the full indemnity costs in the Supreme Court.

Until recently, the courts were very reticent to award full indemnity costs pursuant to an agreement, as some courts determined that costs clauses sought to usurp the discretion of the court in relation to awarding costs.

However, a recent Court of Appeal decision in Victoria states that, where the parties clearly signify an agreement to pay full indemnity costs in their agreement, the court will follow the clear intention of the parties and make an award of full indemnity costs. The court's discretion would be preserved insofar as the court remains entitled to make its own assessment of the costs and to reject certain claims if determined to be unreasonable.

Does your costs clause clearly signify an agreement to pay full indemnity costs?

The courts have found that a provision which says *"If X is in default, he will pay any legal costs incurred by Y"* is not clear enough. In these cases, the courts found that the party seeking costs was only entitled to recover its party and party costs.

A provision which says *"If X is in default, he will pay the reasonable legal costs of that default to Y"* is also not clear enough. The courts have decided that reasonable legal costs means party and party costs.

A provision that requires a defaulting party to indemnify another party against any loss or damage, including legal costs, has been interpreted to give rise to an entitlement to party and party costs only.

A provision for the recovery of indemnity costs or costs on an indemnity basis may be limited to the scale of indemnity costs in the Court Rules, which is likely to be a proportion only of your total legal costs.

In order to ensure that you show a clear intention to be bound by an obligation to pay full indemnity costs, your contract should provide for the payment of legal costs on a full indemnity basis, or solicitor and own client basis.

This provision clearly shows an intention by the parties that any defaulting party has agreed to pay the costs that you actually pay to your lawyers.

If you would like to discuss the efficacy of your costs provisions further or have any queries about the recovery of costs (and any obligation to provide costs disclosure before seeking to recover your legal costs), please do not hesitate to contact me at rob@anderssens.com.au or on (07) 3234 3130.



[Rob Grealy](#) LL.B
Special Counsel
Commercial Dispute Resolution
Anderssen Lawyers

Phone: 07 3234 3130

Email: rob@anderssens.com.au

DISCLAIMER: *This content is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice. We attempt to ensure that the Content is current but we do not guarantee its currency. You should seek legal or other professional advice before acting or relying on any of the Content. Your use of this publication or the receipt of any information from Anderssen Lawyers is not intended to create nor does it create a solicitor-client relationship between you and Anderssen Lawyers.*