

## Fixed Fee Agreements

Fixed fee agreements have been in use in Western Australia for a few years and, so far, have not been a major source of enquiry or complaint. However, as it is likely that their use will increase over time, it is timely to look at the types of issues which have arisen and which may arise in the future in connection with their use.

As with any costs agreement entered into with a client, a fixed fee agreement must comply with the requirements of the *Legal Profession Act 2008 (LPA)*. One of those requirements is that, except for a sophisticated client, a costs agreement cannot provide that the legal costs to which it relates are not subject to costs assessment (s.282(5)).

Therefore, as with any other costs agreement, costs charged under a fixed fee agreement are subject to assessment. Also, itemised bills must be provided if requested in accordance with s.292.

In assessing legal costs charged under a costs agreement, the LPA provides that a taxing officer must consider:

- whether or not it was reasonable to carry out the work to which the legal costs relate;
- whether or not the work was carried out in a reasonable manner;
- the fairness and reasonableness of the amount of legal costs, which is assessed by reference to the provisions of the costs agreement if a relevant provision specifies the amount of the costs and the agreement has not been set aside. (s.301(1) & s.302(1))

Costs agreements may be set aside by the Supreme Court on application by the client if the agreement is not fair or reasonable (s.288(2)). Some of the matters which the Supreme Court may have regard to in deciding whether or not a costs agreement is fair or reasonable include:

- whether the law practice has failed to make any of the costs disclosures required by Division 3 of the LPA;
- the circumstances and the conduct of the parties before and when the agreement was made;
- whether and how the agreement addresses the effect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement;
- whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement. (s.288(3))

The Committee is not aware of any bill issued pursuant to a fixed fee agreement having been assessed. To what extent the law practice will need to justify the fairness and reasonableness of the amount of the legal costs, and what will be needed for such justification, is not clear. However, it is doubtful that it would be sufficient for a law practice to simply proffer the fixed fee agreement and argue that the bill was issued in accordance with that agreement, without there being further scrutiny. More than likely, the taxing officer will want the work carried out on the matter to be itemised in some way so that the taxing officer can give consideration to whether it was reasonable to carry out that work and whether it was carried out in a reasonable manner. In the absence of any document recording the work done on the matter (as exists when costs are charged pursuant to time records) the file would need to be relied upon to support that itemisation. At this time, it is not clear if the Court would require any value to be ascribed to each item of work and, if so, how such a value would be determined.

The issues which have been raised with the Committee regarding fixed fee agreements to date have concerned whether the full fee needed to be paid, firstly, when there had been early termination of the retainer and secondly, in light of the manner in which the work was undertaken.

In one case, the fixed fee was to be paid in two tranches and the client wished to terminate the retainer before paying the second tranche. The Committee's officers understood that the law practice had effectively only carried out half of the work covered by the retainer. As a major part of the work which was the subject of the agreement had not been carried out, the law practice agreed to forego payment of the second tranche. The Committee's view is that it is not reasonable in these circumstances for the law practice to receive the full fee. Early termination of the retainer is something that is foreseeable and should be covered in the agreement. The Committee's view is that a fair and reasonable term would permit the payment of a percentage of the full fee depending on the amount of the work carried out by the law practice prior to termination.

In another case, a law practice considered that it had completed the scope of work set out in the fixed fee agreement and was seeking to negotiate a further agreement with the client. The client disagreed that all the work required under the scope of work had been undertaken. The scope of work had been drafted quite specifically, so the issue was not so much about what was covered in the scope of work but how the law practice had undertaken work pursuant to the agreement. The law practice accepted that the scope of work had not been undertaken by the law practice in the manner in which it would have been expected to have occurred due to staff changeovers and had it done so, the scope of work would not have been exceeded.

One of the matters which a law practice should give careful attention to when drafting a fixed fee agreement is the wording of the scope of the work including what is not covered by the scope of work, for example, what foreseeable circumstances may arise which will give rise to the need to undertake additional work for which a variation of

the agreement will be required. Also, law practices should ensure they advise what, if any, disbursements are covered by the fixed fee.

For more guidance about fixed fee agreements and the conduct issues which may arise from them see the Consultation Draft entitled “Lump Sum Costs Agreements” published by the Queensland Legal Services Commissioner which is available at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au) .