

Recovering Legal Defence Costs

Introduction

1. The recovery of legal defence costs is something that is often overlooked because of the emphasis on dealing with the claim or defence rather than what happens afterwards. The right to recover costs arises when an insured (who is covered) wins its defence and the other party is ordered to pay its costs.
2. The obligation to recover legal costs may or may not fall on the insured depending on what the policy says. Since legal costs can, and often do, run into the tens of thousands and even up to the limit of cover it makes great sense for insurers to take steps to recover such costs. The initial question is who should recover the costs, and then how to go about it.
3. One of the difficulties faced by insurers, however, is that the insured may neglect to advise of the favourable costs order. Whilst one might expect that the policy would deal with this simply, by saying the insured should advise the outcome, it often does so somewhat opaquely by requiring an insured to provide “useful information” about the claim. It is suggested that these policies be amended to require the insured to advise of the outcome, and in particular any costs orders made once they are known.

	CHU	SUU
Who has the obligation to recover?	The insured must take reasonable steps to recover such fees see: CI 10	The right to recover is assigned to the insurer and may choose whether to exercise it or not see: “General Claims Procedures Relating to All Sections”
What is required?	Reasonable steps must be taken which in turn may depend on matters such as:- <ul style="list-style-type: none">○ The terms of the costs order;○ The amount to be spent on the recovery;	The insured needs to advise of the outcome and, and then it is up to the insurer.

	<ul style="list-style-type: none"> <input type="radio"/> The ability of the judgment debtor to satisfy judgment. 	
Can the insurer subrogate?	Yes, see: Cl 12	Yes, see: "General Claims Procedures Relating to All Sections"

4. Note that section 67 of the *Insurance Contracts Act 1984 (Cth)* sets out the rights with respect to monies recovered by the insurer / insured. The section contemplates that the recovery can be either by the insured or by the insurer and sets out how the amounts so recovered should be shared.
5. The court usually orders costs to be agreed or assessed. The court may also order that the costs be assessed on one of three bases: indemnity; solicitor/client; and party/party.
6. Where costs are ordered to be agreed or assessed, the process for recovering costs typically involves a negotiation with the other party. Where their parties are unable to agree on the amount of the legal costs to be paid an assessment is required. A table setting out the process for the assessment of costs can be viewed below.
7. Sometimes but less often, the court may itself fix the amount of costs to be paid at the same time as making the costs order rather than order they be agreed or assessed.

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Party/Party Costs Assessment Process – Typical Timeline in Local, District and Supreme Courts and NCAT

Court/Tribunal orders settlement or legal costs of one party to be agreed or assessed

Unsuccessful settlement attempts between parties as to amount of legal costs
Timeframe: 1-2 months

Commence costs assessment process

Note: A costs assessor will make a binding determination as to the amount of legal costs to be paid.

Consider approval of fees for costs assessment
Timeframe: 1-3 weeks

Note: A Bill of Costs sets out in detail the charges incurred by the solicitors.

A costs assessments specialist (Pattison Hardman) will prepare an application for the costs assessor which includes a Bill of Costs
Timeframe: 3-9 weeks

Note: Filing fee will be the greater of \$100 or 1% of costs in dispute.

The application is served on the opposing party for their response
Timeframe: 3 weeks

Application submitted to costs assessor with any response from opposing party

Note: A notice of determination is what the costs assessor considers the fair and reasonable amount of costs to be paid. Usually only about 50%-70% of legal costs will be awarded.

Costs Assessor issues a certificate of determination
Timeframe: depends on complexity of matter

Costs Assessor issues certificate setting out costs of costs assessment to be paid to Manager, Costs Assessment

Note: Limited grounds for appeal. If successful party doesn't do better on appeal than by more than 15%, then also liable for costs of review.

Period for review or appeal of Costs Assessor's decision
Timeframe: 30 days

IMPORTANT

- Steps shown are the usual steps only
- Time frames are estimates; actual times may be much shorter or much longer
- Limited information provided for summary only. Contact Bannermans for more information if required

If unsuccessful, certificate filed in Court/NCAT and becomes judgment

If successful, new determination made, certificate filed in Court/NCAT and becomes judgment

Seek payment of judgment debt

Enforcement of judgment debt if unpaid

Methods of enforcement: Writ for the delivery of goods or levy of property, garnishee order, examination notice, bankruptcy or winding up.



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