



# Capacity and costs agreements

By Sharon Drew

**T**he capacity of a client to understand and enter into a costs agreement is fundamental to its enforceability.

A costs agreement between solicitor and client is a contract; however, due to the unique position of solicitors including the fiduciary duty owed to clients, costs agreements are not treated the same as other contracts. Throughout Australia, each jurisdiction has a basic requirement that a costs agreement or the costs charged must be 'fair and reasonable'.

In addition, each jurisdiction also makes provision for disclosure to ensure that clients understand the effect of entering into a costs agreement. In most jurisdictions, disclosure is required to be made in 'clear plain language'. In NSW and Victoria, the *Legal Profession Uniform Law* requires solicitors to take all reasonable steps to satisfy themselves that the client understands and consents to the proposed action and costs involved.

There are clear examples of circumstances where a client does not have legal capacity – for example, where they are a minor or lack cognitive capacity.

There are other circumstances which require obvious additional steps to ensure the client's understanding – such as where English is not their first language or they are illiterate.

There are also clients who, through general knowledge or past experience with the legal profession, easily understand the nature and effect of a costs agreement as a binding contract.

The majority of clients – both individuals and small and medium-sized enterprises – may not fall into these categories. It is in the solicitor's interests to ensure that these clients have capacity and understand the costs agreement.

Clients can be at a disadvantage due to:

- lack of experience with the legal system;
- lack of information regarding the legal system; and
- the need to make urgent and life-changing decisions.

It is important to recognise that clients generally seek out legal services in times of stress – the client has a problem which they are looking to the solicitor to resolve, sometimes urgently; they probably find themselves in unfamiliar circumstances, and the legal/judicial process intimidating.

A person's capacity may vary over time or according to the type of decision they have to make. A client's capacity and understanding when they initially provide instructions may be affected by stress, pain, grief, medication, fear or other emotions, and perhaps also by an intimidating or unfamiliar environment (to name just a few). Clients may also have a limited capacity to determine whether work being done on

their behalf is necessary or valuable, which may lead to a perception of overcharging.

These circumstances can result in a temporary lack of capacity which could arguably render a costs agreement void.

Recognising that a client's capacity may be temporarily affected can be problematic for a solicitor who has no means of knowing what a client's 'usual' behaviour is, and no means of making a comparison. If a client's later actions cause the solicitor to doubt whether they had capacity at the time of entering into the costs agreement, the solicitor can take steps to have the costs agreement subsequently ratified.

Including a clause in a costs agreement to the effect that by signing the document a client confirms their understanding and consent does not appear to adequately address the issue of capacity. Similarly, the cooling-off period required in a conditional costs agreement goes some way towards mitigating a situation where a client will enter into a costs agreement in haste and repent later, but does not specifically address the issue of capacity.

It would be unwise to assume that a client who does not understand a costs agreement will ask the solicitor for further explanation, as they may be more likely to ask a family member or friend, or stay silent rather than risk appearing ignorant. A client may also be reluctant to ask questions if they believe the solicitor will charge fees for the extra time spent in providing explanation.

One suggested approach for solicitors is to ask the client to repeat in their own words what the effect of the costs agreement is – this requires a face-to-face or telephone conference, and may be unsuitable for clients whose preferred communication is email. It also raises the possibility of a client feeling that they are being interrogated by the solicitor.

What is fundamental is that the solicitor considers the question of the client's capacity to understand and enter into a costs agreement and to make contemporaneous notes on the issue.

Engaging in open discussion about the services to be provided and the associated costs will ensure that both the solicitor and client have similar expectations, and will provide an opportunity to improve the client's understanding of the costs agreement if necessary. ■

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