

LAWYERS IN PRACTICE AND THE GST

Barristers at the independent bar

This article is intended merely to give a framework or overview of the new system. To achieve simplicity, it has sacrificed detail and has not been able to deal with all the issues.

And now the good news. If you know what you are doing with the GST, it will be nothing more than a nuisance. If you do not, it could be a financial disaster.

A hint to start with is to not be afraid of being charged the GST on practice costs. It is not like other taxes where you are stuck with the burden. You will generally be able to offset it and so the emphasis is on getting your record keeping and cashflow right instead of trying to avoid GST.

The effect of GST on barristers' fees

They will go up. This is an intended consequence of the wide base taxing of services as well as goods. This will not be a concern to most clients who are GST registered because they will claim a credit on the GST passed on to them. Note that financial institutions cannot claim credits in most cases but they will pass it on by increased fees. It will represent a real cost to private clients because they cannot pass it on.

Based on my calculations of the very minimal savings from the removal of sales tax and the delay or failure in removing most state taxes, and the additional compliance costs, barristers fees will need to increase by the full 10 per cent to maintain current income.

Basic Principles

This article assumes the barrister receives annual gross fees between \$50,000 and \$1,000,000 and is therefore registered for GST. It is necessary to understand some basic principles as to how the GST is intended to work. A large amount of legislation has or will be passed. The two main ones are A New Tax System (Goods and Services Tax) Act 1999 and A New Tax System (Goods and

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Services Tax Transition) Act 1999.

The GST is a tax on most taxable supplies (as defined) made by an enterprise after 1 July 2000.

A barrister's practice is an enterprise.

The concept of supply is far wider than just goods and services. The supply of legal services is a supply on which GST is paid.

The supplier, not the recipient of the supply is required to pay the GST to the ATO. So the barrister - not the solicitor or client - is required to pay 10% of the amount received for legal services. If it is not passed on in the fee, the liability still exists albeit at a slightly reduced rate.

Example

The value of an advice done in August 2000 is \$500. As the barrister will have to pay 10 per cent GST, the fee note is for \$550. The solicitor pays \$550. The barrister pays the \$50 to the ATO. If the barrister only charges and receives \$500, GST is paid on that sum (\$45.45). Note the client gets the input tax credit in either case (if the other conditions are met).

As the GST is charged and paid at each stage, not just at or near the end like the current sales tax system, the liability occurs often, at each taxable supply, and the Government will often collect the GST well before the end consumer receives the supply. So good cashflow systems will be vital to cope with the GST. Barristers will need to collect their fees quickly if they want to ensure they will not be out of pocket on the GST they have temporarily borne in added costs on such things as rent, library and

research costs, stationery, insurance, chambers fees etc.

Barristers will generally be able to claim a credit (fully or partially) for GST they bear on supplies they use (fully or partially) in practice. This is the input tax credit.

An unresolved issue at the moment is whether the supply of a barrister's legal services is to the instructing solicitor or the client. That is who gets the input tax credit? It is probably correct to say the supply from a barrister is to the client through the solicitor as agent. This is so even though the solicitor is ultimately responsible because of professional rules for paying the fees.

A barrister will be able to register as an enterprise later this year after first getting an Australian Business Number (ABN). Registration is essential before any input tax credits can be claimed.

Before 1 July 2000

The general rule is that supplies made (that is legal advice given, legal work performed) on or after 1 July 2000 will attract GST.

There are a series of complex exceptions depending on various dates and other factors. They are set out in chart form in the ATO's Fact Sheet 003, a copy of which was sent to all lawyers by Law Claims in Risk Watch for Lawyers Edition 6, July 1999. By way of example only, here are some circumstances. Assume the agreement is not reviewable and all other statutory conditions are met.

Exactly when an agreement is made between a solicitor and barrister for the purposes of GST is not absolutely clear.

If the barrister was briefed and paid in full before 2 December 1998 for all the services that will be provided both before and after 1 July 2000, there is no GST payable on any of those services. I doubt anyone is in that position.

Continued over.

If the agreement was made after 2 December 1998 but before 8 July 1999 (date of Royal Assent) and the client is entitled to full input tax credits, there is no GST payable on the supply until 1 July 2005.

If the barrister was briefed after 8 July 1999 for services to be provided before and after 1 July 2000, GST is payable on those legal services supplied after 1 July 2000 whether or not there is any agreement or facility to increase the fees to cover the GST.

There is a deeming transitional provision that the supply of services is continuous and uniform over the entire period in some circumstances. This is when the agreement is to provide periodic or progressive services over the period. For example, a retainer based on providing services as required for a set fee may attract this deeming provision. The position is different if the barrister can properly separate and charge for the legal supplies provided into pre June 30 and post 1 July 2000.

Assume the barrister receives payment after 1 July 2000 for services done entirely before. There is no GST. It does not matter when the fee note is sent.

Payment

The first due date for payment of the GST is 21 October 2000 and then quarterly. Penalties will apply to late payments.

Pro-bono work

There is no GST where there is no cost for the supply (unless to an associate of the barrister). This is because there is no consideration and so no taxable supply. Despite this input tax credits on supplies are available because the pro-bono work is done as part of practice.

Cashflow

Cashflow control depends on good timing, good record keeping, knowing when to bill, knowing when to obtain tax invoice for supplies, and good collection systems in place.

In any quarter barristers may want to collect fees as soon as possible so they can have the use of the 10 per cent until GST is payable up to three months 21 days later. It will also assist to pay for costs, which will include a loading for GST. The amount charged for the GST

is the barrister's and not required to be held for the ATO in trust. When the GST is due, from the barrister's funds, they must pay the tax.

Those clients who are on the accruals system (most enterprises other than financial institutions with turnover in excess of \$1 million), will want to get the fee note from the barrister before the date the GST is payable (which may be monthly or quarterly) because they can claim an input tax credit before they pay.

Record keeping

A barrister may be asked or expected to have to provide more details in the fee notes (if they are to be the tax invoice). This is especially so if the client needs to divide the services between different types of full input tax credits, partial credits and no credits.

It is worth noting the fee note does not have to be the tax invoice. I expect there will be rare circumstances where a barrister sends a fee note that is not a tax invoice.

Records must be kept for between two and 10 years depending on the cost of the supply.

Tax invoices are a vital part of the system and must be obtained before an input tax credit is claimed. For supplies costing less than \$50 you will not usually get a tax invoice. You will have to keep records of the date, the nature or type of supply and the cost.

A supplier is not obliged by law to provide the tax invoice unless you ask for it.

Until proper tax invoices can issue, the ATO says that a document issued before 1 July 2000 for a taxable supply after that date must contain the following information:

- the supplier's name (or trading name) and address;
- the date of issue;
- the price of the taxable supply;
- either; "(i) a statement that the price of the taxable supply includes the amount of GST expected to be payable; or "(ii) the amount of GST expected to be payable.

Disclaimer

The information contained in this paper does not constitute professional advice and must not be relied upon as such.

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Monika at William Forster Chambers

It may be long way from Germany to Australia, but that hasn't stopped law graduate Monika Trager from travelling to Darwin to spend three months with William Forster Chambers.

Since commencing work at William Forster Chambers on 28 January 2000, Ms Trager has met many local barristers and solicitors, joined the Law Society for the Opening of the Legal Year lunch in Darwin, carried out legal research, and been exposed to law in Australia.



Monika Trager, who has "been very well looked after" during her stay in Darwin.

"It is very difficult for me to understand Australian law in such a short period of time, as the law is so different from ours in Germany, but I hope to learn enough to be able to make some comparisons between the two," Ms Trager said.

Ms Trager completed her legal studies at Julius Maximilians University in Wurzburg in 1997 and spent the