COSTS AND THE NATIONAL LEGAL PROFESSION MODEL LAWS PROJECT

On 7 August 2003, the Commonwealth, state and territory attorney-generals endorsed comprehensive model provisions to be implemented in all states and territories as part of the National Legal Profession Model Laws Project. The project is designed to achieve a national legal services market by removing barriers to practising law in more than one state or territory.

The purpose of the model provisions is to 'provide for the regulation of legal practice in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally; and to facilitate the regulation of legal practice on a national basis across state and territory borders'. The provisions include standard requirements for disclosing information on legal costs to clients, so that clients and practitioners across Australia will have the same understanding of their rights and obligations.

To date, the model provisions have been enacted in New South Wales, Victoria, Queensland (in part) and the Australian Capital Territory, with Western Australia, South Australia, Tasmania and the Northern Territory yet to enact the laws.

NEW SOUTH WALES

By Phillipa Alexander

The *Legal Profession Act* 2004 (NSW) (the 2004 Act) came into force on 1 October 2005. Recent important amendments made by the *Legal Profession Amendment Act* 2006 commenced on 2 June 2006.

DISCLOSURE

While NSW practitioners have been familiar with the concept of mandatory 'disclosure' since the introduction of deregulated costs on 1 July 1994, division 3 of part 3.2 of the 2004 Act substantially increases the practitioner's disclosure obligations for matters in which instructions were first received after 1 October 2005.

Before the 2004 Act, practitioners had to disclose to their clients the amount of costs or the basis on which costs would be calculated; the billing arrangements; and the clients' right to receive a bill of costs and assess the costs. Section 309 in the 2004 Act goes further, requiring the disclosure of matters relating to the application of a fixed-costs provision; the provision of estimates; the contact person for the client to discuss the costs; the avenues open to the client in the event of a dispute; the client's rights to negotiate a costs agreement; to request an itemised bill; to be notified of any substantial change; to receive progress reports; and to contract under a corresponding law in another jurisdiction or to notify that a corresponding law applies. In litigious matters, disclosure of a range of costs that may be recovered or paid and a statement that a costs order will not necessarily cover the whole of the client's costs is also required. In matters where a conditional costs agreement exists, which is increasingly rare under the 2004 Act, a statement about the payment of disbursements is also mandatory where disbursements are payable in any event.

Disclosure must be made in writing before the law practice is retained in the matter, or as soon as practicable afterwards,[1] and must be updated as necessary.[2] If a practitioner fails to disclose, the client need not pay the costs unless they have been assessed.[3]

Estimates

One of the most important changes to disclosure is to the consequences of failing to make an estimate of the client's costs and the adverse party's costs in litigious matters. While an estimate of the client's costs was required by the 1987 Act, many practitioners in litigious matters did not provide an estimate of the total costs because they considered that this could not be known at the outset. Failure to provide an estimate under the 1987 Act did not oblige the practitioner to assess his or her costs in the same way as failure to make the primary disclosures referred to above.

However, under the 2004 Act, the provision of an estimate or a range of estimates and an explanation of the variables that will affect the fees have become primary disclosure obligations. Failure to disclose an estimate will require the costs to be assessed before they can be recovered.

Additional disclosure

Additional disclosure is required where a practitioner retains counsel or an agent;[4] before execution of the terms of settlement in a litigious matter;[5] an uplift fee or success premium is being charged;[6] the matter involves a claim for personal injury damages;[7] and where an offer of compromise is received on a claim for personal injury damages.[8] Additional disclosure is also required where a practitioner intends to contract out of regulated costs in motor accident[9] and workplace injury claims.[10]

Exceptions to disclosure

The Act allows exceptions to disclosure in circumstances including:[11] where the legal costs (excluding disbursements) are not likely to exceed $750; where the legal costs have been agreed as a result of a tender process; where the client will not be required to pay the legal costs; or where the client has received disclosure in the last 12 months and has agreed in writing to waive the right to disclosure. To rely on the last exception, the law practice must also retain a written record of a decision made by one of its principals on reasonable grounds that, because of the nature of previous disclosures and the relevant circumstances, further disclosure is unnecessary.[12]

Disclosure is also exempted for certain categories of clients including legal practitioners or law practices, public companies, large proprietary companies and foreign companies or their subsidiaries; financial services licensees; liquidators, administrators or receivers; a partnership of 20 or more members which carries on professional services; certain joint venturer clients; and Ministers of the Crown (acting in that capacity).

COSTS AGREEMENTS

Under the 1987 Act, disclosure could constitute an offer to enter a costs agreement. The offer could be accepted by conduct, such as continuing to instruct the law practice. However, many clients >>

were unaware that their receipt of mandatory disclosure information was, in fact, an offer to enter a costs agreement. This should no longer be the case, because the 2004 Act requires that an offer to enter a costs agreement must clearly state that it is an offer which can be accepted in writing or by other conduct. The type of conduct that will constitute acceptance must also be specified.[13]

A costs agreement must be in writing or evidenced in writing.[14] It may be set aside if an assessor is satisfied that the agreement is not fair or reasonable or if the practitioner has failed to make disclosure in accordance with division 3 of part 3.2.[15]

Conditional costs agreements

Under the 1987 Act, provisions relating to conditional costs agreements applied only to agreements in which *all* of the costs were contingent on a successful outcome. Under the 2004 Act, a conditional costs agreement may provide that payment of some or all of the legal costs is conditional on a successful outcome. This means that some costs could be payable irrespective of the outcome, with the remainder being payable only in the event of a successful outcome.

The circumstances that constitute a 'successful outcome' must be defined in the agreement. The definition should be carefully worded to cover not only the recovery of money but also the obtaining of any order, including an order for costs, to ensure that the practitioner can still recover costs in cases that are successful, but where the client fails to recover because the other party is impecunious. Circumstances in which clients provide false instructions or terminate their instructions – depriving the law practice of its opportunity to succeed – also need to be considered in the context of this definition. New requirements for conditional costs agreements provide that: the agreement must be signed by the client; a statement must be provided that the client has been informed of the right to seek independent legal advice prior to entering into the agreement, and the agreement must contain a cooling-off period of at least five clear business days during which the client can terminate the agreement by written notice.[16]

Uplift fees

A conditional costs agreement can be entered into for all matters other than criminal or *Family Law Act* 1975 proceedings. However, a conditional costs agreement for a 'claim for damages' must not include a premium or uplift fee payable on a successful outcome.[17] In other words, practitioners remain entitled to enter into an 'all-or-nothing' conditional agreement for a claim for damages, but are not entitled to an additional uplift fee in the event of success. If a conditional agreement in a matter involving a claim for damages made between 1 October 2005 and 1 June 2006 provides for an uplift fee, no costs are recoverable at all.[18] If such an agreement was made from 2 June 2006, costs are recoverable, other than for the uplift fee which must be repaid if already received.[19]

In contrast, for non-litigious matters, the success premium is no longer limited to 25% but must simply be 'reasonable'.[20] This may lead to some interesting decisions on what constitutes a 'reasonable' premium. For litigious matters, other than matters involving 'claims for damages', the premium is limited to 25% of the legal costs.[21]

SOLICITOR:CLIENT COSTS

A bill must notify the client of their rights in a costs dispute and the time limits, as set out in s333. A client also has the right to request an itemised bill within 30 days of receiving a lump-sum bill. The itemised bill must be prepared at the solicitor's own expense.[22] As under the 1987 Act, a solicitor cannot begin proceedings to recover costs until 30 days after serving the bill and notifying the client of their rights.[23]

One of the major changes to solicitor:client assessment is to time limits. The 1987 Act provided that where costs were paid or partly paid, a client had 12 months from the date of the bill or request for payment to assess the costs. Under the 2004 Act, a client has 60 days to apply for assessment from the earliest of either the date the bill is given; the date the request for payment is made; or the date the costs are paid in full.[24] However, a costs assessor is required to deal with the application out of time unless the law practice establishes unfair prejudice. To date, there have been no reported decisions on what constitutes unfair prejudice. However, substantial delay beyond the 60-day period may be viewed as prejudicial. In addition, because a solicitor has only 60 days to assess counsel's fees (which cannot be extended), it would no doubt be prejudicial if the solicitor loses the right to challenge counsel's fees and the client subsequently challenges them as part of the solicitor's bill.

One of the most difficult provisions in the 2004 Act is s334, which provides that legal costs that are the subject of an interim bill may be assessed at the time of the interim bill or at the time of the final bill – whether or not the interim bill has been paid. This provision appears to be inconsistent with the 60-day time limit in s350. As it is not subject to s350, it apparently reinstates the 60-day period for assessment for the entirety of the costs at the time that the final bill is given. This removes the certainty practitioners previously had regarding costs that had been paid and not challenged by the client within 12 months. Potentially, a matter could run for many years with the client able to assess the entirety of the practitioner's costs, despite having paid interim bills without question.

The criteria for assessment of practitioner:client costs is substantially unchanged. However, s393 lowers the bar for the referral of matters to the Legal Services Commissioner. An assessor must refer a matter where s/he considers that the legal costs charged by a law practice are grossly excessive. Under s208Q of the 1987 Act, an assessor was required to refer matters where s/he considered that any conduct of a practitioner involved deliberately charging grossly excessive amounts.

PARTY:PARTY COSTS

Assessment of party:party costs is largely unaltered, with the exception that they are now also assessed with reference to 'whether or not the work was carried out in a reasonable manner'.[25] This change brings the tests used to assess party:party costs into line with practitioner: client costs.

Another change is to the procedure for obtaining certificates of determination, which are no longer forwarded directly to parties. Instead, the Supreme Court makes them available only once the costs assessor's fees are paid.[26] In practical terms, this means that the party who wishes to enforce the costs order must pay the assessor's fees to access the certificate, even though the other party to the assessment may have been ordered to do so. However, these fees can be recovered from the party who is liable in the same way as the assessed costs.

SUMMARY

Because the 2004 Act has commenced only relatively recently, its full effects are yet to be seen. Disclosure obligations are being taken seriously, and solicitors are endeavouring to comply.

Over the last few years, there has been an increase in the number of clients seeking assessment of their solicitors' costs. This is likely to lead to an increasing number of clients with 2004 Act retainers who rely on their entitlement to an itemised bill of costs and thereafter assess the entirety of the costs even where the costs may have been paid. For this reason, practitioners should be vigilant to ensure that their disclosure and costs agreements are in order and that proper records are maintained for work done so that their costs are fully recoverable. Where a problem arises in relation to costs, early dispute resolution is likely to prove the most beneficial and least expensive solution.

Notes: **1** Section 311 *Legal Profession Act* 2004. **2** Section 316 *Legal Profession Act* 2004. **3** Section 317 *Legal Profession Act* 2004. **4** Section 310 *Legal Profession Act* 2004. **5** Section 313 *Legal Profession Act* 2004. **6** Section 314 *Legal Profession Act* 2004. **7** Regulation 116 *Legal Profession Regulation* 2005.

8 Clause 117 *Legal Profession Regulation* 2005. **9** Clause 11 *Motor Accidents Compensation Regulation* 2005. **10** Clause 88 *Workers Compensation Regulation* 2003. **11** Section 312 *Legal Profession Act* 2004. **12** Sections 312(1)(b)(iii) and 312(3) *Legal Profession Act* 2004. **13** Section 322(4) *Legal Profession Act* 2004. **14** Section 322(2) *Legal Profession Act* 2004. **15** Section 317(2) *Legal Profession Act* 2004. **16** Section 323 *Legal Profession Act* 2004. **17** Section 324(1) *Legal Profession Act* 2004. **18** Section 327(4) *Legal Profession Act* 2004 prior to the insertion of s327(3A) and the amendment of s327(4) by the *Legal Profession Amendment Act* 2006. **19** Section 327(3A) *Legal Profession Act* 2004. **20** Section 324(2) *Legal Profession Act* 2004. **21** Section 324(4) *Legal Profession Act* 2004. **22** Section 332A *Legal Profession Act* 2004. **23** Section 331 *Legal Profession Act* 2004. **24** Section 350 *Legal Profession Act* 2004. **25** Section 364(1)(b) *Legal Profession Act* 2004. **26** Section 368(6) *Legal Profession Act* 2004.

AUSTRALIAN CAPITAL TERRITORY

By Nicole Armitage

The *Legal Profession Act* 2006 (ACT) (the 2006 Act) was passed on 6 June 2006. While the Act commenced on 1 July 2006, the costs provisions are not expected to commence until 1 January 2007.[1] The Act ushers in an entirely new regime regarding the way ACT practitioners contract with clients for legal costs.

Prior to the introduction of the 2006 Act, solicitor:client relationships were governed by the *Legal Practitioners Act* 1970 (the 1970 Act) which simply provided that a costs agreement could be made if it was signed by the client and if the amount of costs was ascertainable from that agreement or memorandum.

The 2006 Act introduces a regime that regulates four aspects of legal costs which are almost entirely new to the profession in the ACT:

1. disclosure of specific costs information to clients (not previously provided for in the 1970 Act);
2. the regulation of two types of costs agreements: standard and conditional (not previously provided for in the 1970 Act);
3. new obligations in relation to billing, such as the information that must be included in bills; and
4. a new procedure known as 'review', under which solicitor:client costs disputes will be adjudicated by the Supreme Court. This will replace taxation (the old procedure for assessing reasonable costs in solicitor:client disputes).

Party:party costs are not regulated by the 2006 Act and, as of 1 July 2006, are governed by the *Civil Procedures Rules* 2006, which have introduced significant changes to the way party:party costs are viewed and assessed.

PART 3.2: COSTS DISCLOSURE AND REVIEW

Disclosure

The 2006 Act has introduced the concept of disclosure of costs to the ACT, which was not a requirement under the 1970 Act. This means that the new Act substantially changes the way solicitors in this territory manage their practice and significantly increases their obligations at law.

The definition of 'client' has been considerably expanded to include a prospective client.[2] A law practice must now disclose to a 'client' extensive matters, including their rights to negotiate a costs agreement;[3] receive an itemised bill; receive estimates; to know the basis upon which costs will be calculated; any major variables in calculating costs;[4] the rate of interest that the law practice charges on overdue legal costs;[5] and other more extensive costs ranges in litigious matters.[6] On settlement of costs,[7] the practice must disclose the avenues open to a client in the event of a dispute over costs;[8] any time limits that apply; and jurisdictional matters relating to costs.[9]

There are significant exceptions from the requirement of disclosure,[10] such as to another law practice and where legal costs are not likely to exceed $1,500.

The 1970 Act stipulates that an agreement is not enforceable unless a note containing the terms of an agreement is signed by the person liable to pay the costs.[11] The 2006 Act, however, states that a costs agreement can be accepted by conduct where that conduct is described in the agreement.[12]

Recovery of legal costs

Legal costs are recoverable as follows:[13]

- under a valid costs agreement;
- if that is not applicable, in accordance with an applicable scale of costs; or
- if neither of the above are applicable, according to the fair and reasonable value of the legal services provided.

Costs review

'Costs review'[14] is the new phrase for what was formerly known as solicitor:client taxation. Interestingly, party:party taxation remain untouched by the *Legal Profession Act*.

The test for allowable solicitor and own client costs is a 'reasonableness' test, that is, the court must consider:

1. whether or not it was reasonable to carry out the work;
2. whether or not the work was carried out in a reasonable way; and
3. the fairness and reasonableness of the amount of costs in relation to the work.

CONCLUSION

The new *Legal Profession Act* 2006 (ACT) has brought about historic and important changes to the way that legal practices are regulated in terms of costs in the ACT. Compliance with the new law is challenging, and the consequences of non-compliance are serious.

Notes: **1** The Law Society of ACT, after consultation with local law firms, has approached government to request further delaying commencement of the costs and disclosure provisions, with a preferred start date of 1 July 2007, to tie in with the start of the financial year. The request has not yet been granted. **2** 'Client' is defined in the *Legal Profession Act* 2006 (ACT), s261 as 'a person to or for whom legal services are provided, and includes a prospective client'. The 1970 Act defined 'client' to mean, in relation to costs or disbursements payable to a solicitor, only the person from whom the solicitor is entitled to claim the costs and disbursements. **3** *Legal Profession Act* 2006 (ACT), s269(1)(b). **4** *Legal Profession Act* 2006 (ACT), s269(1)(c). **5** *Legal Profession Act* 2006 (ACT), s269(1)(e). **6** *Legal Profession Act* 2006 (ACT), ss269(1)(f) and (2). **7** *Legal Profession Act* 2006 (ACT), s273. **8** *Legal Profession Act* 2006 (ACT), s269(1)(i) **9** *Legal Profession Act* 2006 (ACT), s269(1)(l). **10** *Legal Profession Act* 2006 (ACT), s272. **11** See *Legal Practitioners Act* 1970, s190(3). **12** See *Legal Profession Act* 2006 (ACT), s282(4). **13** *Legal Profession Act* 2006 (ACT), s279. **14** *Legal Profession Act* 2006 (ACT), division 3.2.7.

NORTHERN TERRITORY

By Robert Perry

The Northern Territory legislation based on the national code has not yet reached Bill form. For that reason, no substantive comment on the regime in the Northern Territory is possible at this stage, but the issue should be revisited once the content of the Bill is finalised.

Robert Perry is a solicitor at Ward Keller Lawyers. He has generously offered to comment on the implications of the new code in NT in due course, and we look forward to revisiting the issue with him in a later edition.

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QUEENSLAND

By Roger Quick

The *Legal Profession Act* 2003 (Qld) (now repealed) was the first stage of the Queensland Government's legal profession reforms. It reformed the areas of admission, national practice, conduct rules, complaints and discipline, financial arrangements and incorporated legal practices.[1]

The *Legal Profession Act* 2004 incorporates and replaces the *Legal Profession Act* 2003. The remaining parts of the national model laws in relation to trust accounts, client agreements and cost review will be covered in a further Bill later in 2006.

The changes made to the *Queensland Law Society Act* 1952 (Qld) by the *Civil Justice Reform Act* 1998, which replaced the system of taxation of solicitor and clients costs in Queensland with a system of assessment of costs under the control of the Solicitors' Complaints Tribunal, have been significantly changed by the *Legal Profession Act* 2004 (Qld).

This overview of the further amended *Queensland Law Society Act* 1952 (Qld) (the Act) is therefore tentative and temporary.

CLIENT AGREEMENTS

Part 4A[2] covers client agreements. Solicitors are under a statutory duty to enter into a written agreement with the client within a reasonable time after starting work for a client.[3] This excludes urgent work or work for which the charge is $750 or less.[4]

Under s48(4), a notice to client must be completed by the practitioner and given to the client together with a copy of any statutory scale for the work before the client signs the agreement. Under s48(5), the client agreement must not be inconsistent with the notice to client as prescribed by the schedule to the Act. The notice to client is not required where the client is one of the types of client specified in s48(6).

REQUIREMENTS OF A VALID CLIENT AGREEMENT

A client agreement must:

1. be expressed in clear, plain language;[5]
2. specify the work that the solicitor is to perform;[6]
3. specify the fees and costs payable by the client for the work by specifying either a lump sum or the basis upon which the fees and costs will be calculated;[7]
4. be consistent with a notice, which is contemplated as a schedule to the client agreement and described in a footnote to s48(4) and in the Act as 'Schedule – Important Notice to Client';[8] and
5. be made within a reasonable time after 'starting work for the client'.[9]

To be consistent with the prescribed notice to client, a client agreement must:

1. state the manner and status of the persons who will undertake the legal work for the client;[10]
2. give an estimate of the total amount of fees and costs likely to be payable for the work or, if this is not reasonably practicable, give a range of estimates of the total amount likely to be payable and an explanation of the significant variables that will affect it. In particular:[11]
   - the practitioner must provide an accurate and realistic initial estimate;
   - if the costs are going to exceed the initial estimate, the practitioner must clearly communicate that to the client so they can make an informed decision about the further conduct of their work;
   - failure to do one or both of these things may mean that the practitioner is guilty of unsatisfactory professional conduct[12] or of misleading or deceptive conduct under trade practices or fair trading legislation.
3. state the intervals when client accounts will be delivered;[13]
4. if the work involves or is likely to involve litigation, include an estimate and explanation of the range of costs that the client may recover from another party if s/he is successful and state that the client may be required to pay the other party if the client is unsuccessful.[14] If the solicitor agrees to do work on a speculative basis, the agreement must state the terms and conditions on which the solicitor's fees become payable;[15]
5. not contain provisions that are contrary to other clauses of the prescribed notice to client which, for example, stipulate that the client can change solicitors; and
6. not contain prohibited provisions.[16] Prohibited provisions will be void, and a solicitor who has received money or property because of a void provision must return it to the client.[17]

Additionally, solicitors have a statutory duty to provide their clients with a notice to client before the client signs the client agreement.[18]

APPLICATIONS FOR ASSESSMENT

The Act provides that a client (including a person liable to pay the legal fees of another) who is dissatisfied with the amount of fees and costs charged by his or her solicitor may apply to the Solicitors' Complaints Tribunal to have the account assessed.

A client who takes this step is thereafter barred from challenging the validity or enforceability of the client agreement.[20] Once an application has been made, the clerk of the Tribunal will appoint a costs assessor to assess the solicitor's account.

MAXIMUM FEES RECOVERABLE

Solicitors can recover costs for work undertaken pursuant to a client agreement in accordance with the terms of the agreement.[21] Where no client agreement exists, the solicitor can recover a maximum amount calculated in accordance with the relevant scale for the work concerned.[22] Division 2A[23] provides for a maximum amount for speculative personal injury claims.

If there is no scale prescribed for the work concerned, a solicitor can recover a maximum amount assessed by a Tribunal costs assessor as reasonable for the work undertaken.

Notes: **1** Sections 231 to 234 of the 2003 Act commenced on 7 May 2004. The remaining provisions were never proclaimed and were repealed by the *Legal Profession Act* 2004 (Qld) which received royal assent on 31 May 2004. Sections 1 and 2, ch 1, ss83, 213, ch 2 pt 9 div 3, ch 6 pt 1, pt 2 divs 1 to 3, pt 3 divs 1 to 3, pt 5 divs 1 to 4, ss586 and 587, ch 8 pt 3, pt 5 div 1, ss602, 605, 610(3), 610(6), 613, 617, 638, ch 8 pt 5 divs 13 and 14, and sch 5 commenced on date of assent. The remaining provisions have not yet come into force. **2** Sections 47A - 48G of the Act. **3** Section 48(2) of the Act. **4** Section 48(1) of the Act. **5** Section 48(2) of the Act. **6** Section 48(2)(a) of the Act. **7** Sections 48(2) and 48(3) of the Act. **8** The client agreement must be consistent with the notice in the schedule but does not incorporate it. There is therefore a degree of latitude in the content of the client agreement: *Herald v Worker Bee (Brisbane) Pty Ltd* [2004] 2 Qd R 263; [2003] QSC 223, per Fryberg J. **9** What amount of time is reasonable will depend on the circumstances of the case: see *Gemstar Corporation Pty Ltd v Barwicks Wisebould*s [2000] QSC 143. **10** Prescribed notice to client, clause 8. **11** Prescribed notice to client, clause 11. **12** Defined by s244 *Legal Profession Act* 2004 (Qld) to mean conduct in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner. **13** Prescribed notice to client, clause 17. **14** Prescribed notice to client, clause 18. **15** Prescribed notice to client, clause 19. **16** See ss48(4), 48C and 48D of the Act. **17** Section 48F of the Act. **18** Section 48(4) of the Act. **19** Section 6ZA(1)(b) of the Act. **20** Section 6ZB(2) of the Act. **21** Section 481(1)(a) of the Act. **22** Section 481(1)(b) of the Act. **23** Sections 481A - 481C of the Act.

SOUTH AUSTRALIA

By Tim Cogan

The National Legal Profession Model Bill (the Model Bill) will make significant changes to the way that law practices contract with their clients for legal costs, how they bill their clients and how their costs are reviewed.

It will be imperative to make costs agreements in all matters as soon as possible after full disclosure of costs issues has been made to the client.

COSTS AGREEMENTS

In the absence of a written agreement or legislation to the contrary, until 4 September 2006 the fees chargeable by law practices are limited by the scales contained in the Supreme Court Rules.

The new Supreme Court Civil Rules, operative from 4 September 2006, do not regulate costs paid by a client to a law practice. The costs scale in the Rules applies only to party:party costs. However, a law practice may enter into a written agreement with a client to pay costs in accordance with a specified scale or to pay a specified amount for legal costs. This amount may be calculated with reference to a time-related rate.[1] From 4 September 2006, it will be necessary to make a fee agreement – otherwise the client has only an implied obligation to pay a reasonable fee for the services rendered by the practitioner.

Under s1022 of the Model Bill, a costs agreement may be made between a law practice and a client. In addition to a written agreement, an agreement evidenced in writing will be sufficient. An agreement may also consist of a written offer, accepted in writing or by other conduct.[2]

The only restriction on when an agreement may be made is the provision, in s1028(2)(d) of the Model Bill, that regard may be had to the time at which the agreement was made when determining whether a costs agreement is fair, just or reasonable. That suggests that the agreement should be made at the earliest possible time after the law practice's disclosure obligations have been met.

Under s1019 of the Model Bill, if there is no binding costs agreement, costs will be recoverable only according to the applicable scale or, if there is no scale, according to the fair and reasonable value of the services provided. The fair and reasonable value will be determined having regard to the matters set out in s1041(2).

DISCLOSURE

For an agreement to be fair, there must be proper disclosure before the agreement is made. For example, where a scale would apply in the absence of a costs agreement, the fact that the charges under the costs agreement are higher than the scale must be disclosed.

The Model Bill regulates the disclosure obligations of a law practice. Disclosure must be made in writing before, or as soon as practicable after, the law practice is retained. Disclosure must be made in clear, plain language.

Failure to disclose will not automatically vitiate the costs agreement, but the client will not have to pay the costs until they have been reviewed (usually at the law practice's expense). Such a failure will be of great significance to whether the agreement is fair, just and reasonable.

Failure to disclose may also be regarded as unsatisfactory professional conduct or professional misconduct.[3]

The various disclosure requirements are set out below.

The basis of calculation of legal costs

Under s1009(1)(a), the law practice must disclose the basis upon which legal costs will be calculated, including whether a costs determination or scale of costs applies to any legal costs.

Full disclosure of the basis for calculating legal costs requires an explanation of all its implications. For example, if costs are calculated by minimum time units of six minutes for each task, the law practice must explain that the client will be paying for six minutes of time even if a task takes one minute.

Estimate of total legal costs

Under ss1009(1)(c) and (d), the law practice must give an estimate of the total legal costs if reasonably practical or, if not, a range of estimates of the total legal costs and an explanation of the major variables that will affect the quantum of costs.

Party:party costs

In the case of litigious matters, an estimate must be given of the range of costs that a client may recover if successful and the range of costs that a client may have to pay if unsuccessful. In particular, the client must be informed that, if successful, they will not necessarily recover all the costs that they have paid.

Right to seek review of costs

The law practice must disclose the avenues open to a client if there is a dispute about legal costs.

Right to seek independent advice

Interestingly, there is no express requirement to inform the client of their right to obtain independent legal advice, except in the case of conditional costs agreements.[4] However, it is likely that the failure to give such advice would be considered relevant in a costs review.

ONGOING DISCLOSURE

Section 1013(1) requires that, before settlement is finalised, a law practice must disclose a reasonable estimate of legal costs payable by the client if the matter is settled (including any other party's costs), and a reasonable estimate of any contributions to those costs likely to be received from another party.

The law practice must disclose any changes to the matters required to be disclosed as soon as practicable after it becomes aware of the changes.

CONDITIONAL COSTS AGREEMENTS

A costs agreement which provides that payment of some or all of the legal costs is conditional on a successful outcome is a 'conditional costs agreement' under the Model Bill. Such an agreement may, in specified circumstances, provide for the payment of a reasonable premium on legal fees (but not disbursements) upon a successful outcome. In the case of litigious matters, the premium must not exceed 25% of the legal fees (but not disbursements) otherwise payable.[5]

Currently, in South Australia, an uplift of 100% is permitted.

Additional disclosure to the client is required in the case of conditional costs agreements. Under s1014, the law practice must disclose the risk of an unsuccessful outcome, the practice's usual fees, the uplift fee (expressed as a percentage) and the reasons why the uplift fee is warranted. Under s1009(2)(b), the client must be informed that disbursements may still be payable by the client.

Fees calculated by reference to the quantum in dispute or the amount of any award (called contingency fees in the Model Bill) are not permitted, which is the same as the current position.

SETTING ASIDE COSTS AGREEMENTS

Section 1028 gives the power to set aside a costs agreement on the application of a client if it is found not to be fair, just or reasonable.

Presently, s42(7) of the *Legal Practitioners Act* 1981 provides that the Supreme Court may set aside a costs agreement if it considers any term to be unfair and unreasonable. The Model Bill introduces an additional requirement, that the costs agreement be 'just'. What impact this will have remains to be seen. >>

BILLING

Under s1029, a law practice may not commence recovery proceedings for legal costs until at least 30 days after a bill (which may be in the form of a lump-sum bill or an itemised bill) has been given to the client in a manner prescribed by s1030.

The bill must be accompanied by a written statement of the avenues through which the client can dispute the bill. Within 30 days of receiving a lump-sum bill, a client may request an itemised bill. The law practice must then prepare an itemised bill (at no cost) and serve it on the client. It may not commence recovery proceedings for a further 30 days.

Currently, recovery action may be taken once the bill has been given, and an itemised bill may be requested within six months of the issue of a lump-sum bill.[6]

COSTS REVIEW

Under s1034, a client may seek a review by the relevant authority of its liability for legal costs, whether or not the client has already paid those costs in part or in full and whether or not they are the subject of a costs agreement.[7] The application must be made within 60 days after the bill was given to the client or the costs were paid by the client; however, extensions of time must be given, except where there is prejudice to the law practice.

A law practice may also apply for a review of its costs. It may need to do this where, for example, no costs agreement has been made.

An application for review is a bar to recovery action until the costs review has been completed.

Pursuant to s1041, the reviewer of a costs agreement 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; and
- the fairness and reasonableness of the amount of legal costs in relation to the work.

The costs agreement is one of the matters taken into account when a reviewer determines what is a fair and reasonable amount for legal costs. This suggests that, in addition to unreasonableness being a ground for setting aside a costs agreement, a costs reviewer may always allow a lesser amount than that specified by the agreement.

Notes: **1** *Legal Practitioners Act* 1981, s42(6). **2** Such as continuing to provide instructions: s1022(4) of the Bill. **3** See s1017(4) of the Bill. **4** See s1023(3)(d) of the Bill. **5** Section 1024 of the Bill. **6** *Legal Practitioners Act* 1981, s41. **7** See s1034 of the Bill.

TASMANIA

By Robert Walker

In Tasmania, implementation of the legal profession model laws project has not progressed beyond the draft Bill form; it is expected that the legislation will not be proclaimed before January 2007. For that reason, comment on how the proposed legislation will apply is not possible at this stage. The issue should be revisited once the Act is proclaimed and, preferably, after it has been in operation for a short time.

Robert Walker is the Deputy Registrar and chief taxing officer of the Supreme Court of Tasmania. Mr Walker has generously offered to comment on the implications of the new code in Tasmania in due course, and we look forward to revisiting the issue with him next year.

VICTORIA

By John D White

The costs disclosure and review provisions of the Legal Profession Act 2004 (Vic) (the 2004 Act) came into effect on 12 December 2005 and apply to matters where first instructions were taken on or after that date.

DISCLOSURE

Since the introduction of the *Legal Practice Act* 1996 (Vic) (the 1996 Act) on 1 January 1997, Victorian practitioners have been required to provide to a prospective client a statement setting out:

1. details of the method of costing the legal services, billing intervals and arrangements;
2. the client's right to negotiate a costs agreement, to receive a bill of costs and to request an itemised bill within 30 days of receipt of a lump-sum bill;
3. the name of the legal practitioner who will primarily perform the work;
4. an estimate of the total legal costs or a range of estimates with an explanation of the major variables affecting the calculation of costs;
5. in litigious matters, the range of costs likely to be recovered in the event of success and the range of costs that a court may order the client to pay if unsuccessful;
6. the right to progress reports; and
7. the name of the body responsible for regulating the practitioner.

The provisions of division 3 of part 3.4 of the 2004 Act increase the disclosure obligations. In addition to the disclosures previously required under the 1996 Act, a Victorian practitioner is now required to disclose the following in writing before, or as soon as practicable after, the law practice is retained in the matter:

1. whether a practitioner remuneration order or scale of costs applies to any of the legal costs;
2. the client's right to be notified of any substantial change to anything included in the disclosure statement;
3. the rate of interest charged on overdue legal costs;
4. details of the person whom the client may contact to discuss the costs;
5. the avenues open to the client in the event of a dispute;
6. any time limits that apply to commencing action in respect of a costs dispute;
7. that Victorian law applies to legal costs;
8. that the client has the right to sign an agreement under corresponding laws in another jurisdiction or to give notification that the client requires corresponding laws to apply to the matter; and
9. that, in a litigious matter, an order made by the court that the other party pay the client's costs will not necessarily cover the whole of their costs.

The additional disclosure obligations under the 2004 Act have effectively subsumed the requirement under the 1996 Act to disclose to the client the name of the body responsible for regulating the practitioner.

EXCEPTIONS TO DISCLOSURE

Section 3.4.12 of the 2004 Act provides that disclosure is not required in the following circumstances:

- where the total legal costs in the matter (excluding disbursements) are not likely to exceed $750 or the amount prescribed by the regulations (whichever is higher);
- where the client has received one or more disclosures in the previous 12 months, has agreed in writing to waive the right to disclosure and the principal of the law practice decides on reasonable grounds

that, having regard to the nature of the previous disclosures and the relevant circumstances, further disclosure is not warranted; or
- where the client is a law practice, an Australian legal practitioner, a public or foreign company or its subsidiary, a registered Australian body, a financial services licensee or a Minister of the Crown acting in that capacity.

ADDITIONAL DISCLOSURE

Under the 2004 Act additional disclosure is required:
1. where another law practice will be retained (this would usually be counsel or an agent);
2. before execution of the terms of settlement in a litigious matter; and
3. before making a costs agreement that involves an uplift fee.

FAILURE TO DISCLOSE

The consequences of failing to make the required disclosure under the 2004 Act are severe. If full disclosure is not made to the client:
1. the client need not pay the legal costs unless they have been reviewed by the taxing master of the Supreme Court pursuant to division 7 of part 3.4;
2. the client may apply under s3.4.32 to have any costs agreement set aside;
3. the law practice may not begin recovery proceedings for the legal costs unless they have been assessed under division 7; and
4. the practitioner may be guilty of unsatisfactory professional conduct or professional misconduct.

COSTS AGREEMENTS

Under the 1996 Act, provision of the disclosure statement arguably also constituted an offer to enter a costs agreement which could be accepted by the client's subsequent conduct. However, over recent years, there have been conflicting decisions on this issue. Further, under the 1996 Act, the taxing master had no power to assess costs claimed under a costs agreement where they were calculated other than with reference to a scale of costs.

The 2004 Act clarifies the requirements of entering a costs agreement. The agreement must be in writing or evidenced in writing. In particular, it is mandatory that the offer to enter a costs agreement clearly state that it is an offer to enter a costs agreement; that the client may accept it in writing or by other conduct; and must detail the type of conduct that will constitute acceptance.

Further, a conditional costs agreement: must be in clear, plain language; must be signed by the client; must contain a statement that the client has been advised of the right to seek independent legal advice; and must contain a cooling-off period of not less than five clear business days.

A costs agreement cannot exclude the client's right to review under division 7 of the 2004 Act and costs under a costs agreement, however calculated, can now be assessed by the taxing master.

UPLIFT FEES

A conditional costs agreement may provide for the payment of a reasonable premium on the legal costs (excluding unpaid disbursements) on the successful outcome of the matter. The premium must be a specified percentage of the legal costs (excluding unpaid disbursements) and, in litigious matters, it must not exceed 25%.

Interestingly, under the 2004 Act, there appears to be no ceiling on the percentage uplift in a conditional costs agreement in a non-litigious matter.

BILLING AND REVIEW BY THE TAXING MASTER

Under s3.4.35, a bill of costs must now be accompanied by a written statement setting out the avenues open to the client in the event of a costs dispute:
1. to review the costs pursuant to division 7;
2. to set aside a costs agreement under s3.4.32; and
3. to make a complaint under chapter 4.

The statement must also detail any time limits that apply to taking any of these steps.

The client's right to request an itemised bill within 30 days after receiving a lump-sum bill still exists, as does the prohibition on a legal practitioner charging for preparing an itemised bill. Under the 2004 Act, once a request for an itemised bill is made, the legal practitioner cannot begin proceedings to recover outstanding costs until at least 35 days after complying with the request.

Section 3.4.40 of the 2004 Act allows a law practice that has given a bill in accordance with division 6 to apply to the taxing master for a review of it. Such an application cannot be made until 65 days have passed since the bill was given. Because an order of the taxing master has the force of a judgment of the Supreme Court, s3.4.40 may come to provide an alternative to the usually expensive and time-consuming process of recovering unpaid legal costs through litigation.

The taxing master is now obliged to refer matters to the Legal Services Commissioner where the master considers that the legal costs are grossly excessive or where the costs review raises other matters that may amount to unsatisfactory professional conduct or professional misconduct.

CIVIL COSTS DISPUTES

Under the 2004 Act, cost issues are described as civil complaints and civil disputes and other than the fact the jurisdiction is increased from $15,000.00 to $25,000.00, the effect is generally the same as under the 1996 Act.

Civil complaints and costs disputes are solely under the jurisdiction of the Legal Services Commissioner and, unlike the 1996 Act, they cannot be delegated or referred to another body. A complaint must be made within 60 days after the legal costs are payable, although the Commissioner may extend that period to six months if there is a reasonable cause for the delay and recovery proceedings have not been issued.

The 2004 Act allows the complainant 21 days within which to lodge the disputed amount or to obtain a dispensation. If this is not done, the Commissioner must dismiss the complaint and, once the complaint is dismissed, the law practice may commence recovery proceedings.

The Commissioner has the power to attempt to resolve a matter by referring it to mediation. If no agreement is reached at mediation, the Commissioner will advise the parties of their rights to refer the matter to the Victorian Civil and Administrative Tribunal (VCAT). VCAT has quite wide powers to make orders in respect of the costs dispute, including payment orders, compensation orders against the law practice or legal practitioner, waiver of the whole or part of the legal costs, waiver of any lien, or an order that specified legal services are either free of charge or should be charged at a specified cost.

WESTERN AUSTRALIA

By David Garnsworthy

BACKGROUND

Costs disclosure in Western Australia is dealt with by r18 of the Professional Conduct Rules, r46 of the District Court Rules 2005 and generally by the Family Law Rules 2006. Case law such as *Brown v Talbot & Olivier*[1] sets out requirements for disclosure relating to cost agreements.

The Law Society Rules are regarded as setting the professional standard, even for lawyers who are not its members. These rules apply even where disclosure is required by other statutes or rules. >>

The model law will make cost disclosure a statutory requirement and introduce cost consequences not currently in place. For example, if costs disclosure does not occur, the client will not be required to pay the fees in the absence of assessment. To date, there are no cases that impact on recovery in this state, although the issue has been raised in South Australia.

Other changes in the model laws impact on disclosure and the assessment process.

This state, putting federal jurisdiction to one side, taxes its costs at all levels: although the process in the Magistrates Court is described as assessment, in practical terms a taxation is still taking place. At the Supreme Court level, the process has been changed by provisional assessment (as it has in the Federal Court) and mediation. There are no cost assessors in this state, and only a small group of practitioners experienced in costs. The District Court has not followed the innovative developments in the Supreme Court. The requirements for disclosure in the model laws go further than the present rules.

The model laws are based on an assessment system like that in force in NSW. Indeed, the conclusion can be drawn that legislation in NSW is seen as the basis for the model laws. The assessment process differs from taxation in that:

- an assessment does not involve appearances;
- contact with the assessor is only by writing;
- a formal 'bill' is not filed;
- the practitioner's file is used by the assessor;
- rights of appeal are very limited – on points of law only; and
- only basic reasons are given.

It is unlikely that the scales and taxation process will be abolished in this state. At least one of the institutional stakeholders is opposed to any move away from scales and taxation.

Unlike NSW, the 'pool' of available assessors in this state is small. The five practitioners focusing on costs may prefer to remain outside the system. Also, one of the greatest difficulties with the NSW assessment process is a lack of uniformity and therefore predicability. Advising a client of their liability for, or prospects of recovering, costs appears to be difficult under an assessment system.

The impact on practice is not limited to these issues. Obligations on practitioners will increase. For example, progress reports will become a matter of entitlement, in addition to progressive costs estimates.

ADDITIONAL DISCLOSURE

Under the model laws, disclosure is required to a 'third party payer'. The *Legal Practice Act* 2003 (WA) recognises the right of third parties to tax – for example, by contract. Mortgagors and lessees are obvious examples. The Professional Conduct Rules do not provide for third-party disclosure. Some difficult situations could arise here – for example, disclosing to a party engaged in hostile litigation, which in turn raises privilege issues.

EXCEPTION TO DISCLOSURE

An interesting exception is created for a 'sophisticated client'; for example, a Minister of the Crown (in that capacity) or a liquidator. Though this is a useful phrase for picking up categories, it does not create a new
class of client.

COST AGREEMENTS

The test for the validity of a cost agreement is apparently simple – whether the agreement is unreasonable.[2] The Full Court of WA in *Stobbart & Co v Jovetic*[3] noted that the 'test' involves several levels – for example, an examination of the circumstances in which the agreement came into being. As yet, there are no known examples of challenges based on equitable or other statutory grounds – for example, s51AAC of the *Trade Practices Act*.

The test in clause 1028(1) of the Model Bill is whether the agreement is 'fair or reasonable'. Cases in the Family Court suggest that 'fair' relates to the circumstances in which the agreement came into being. Decisions in WA such as *Stobbart & Co v Jovetic* clearly indicate that an agreement may be unreasonable by reference to the circumstances in which the agreement was made – for example, *Mossensons v Dissidomino*.[4]

While at first sight it might have seemed that the difference between the present and proposed tests are not great, the range of factors to be taken into account is much wider than the present case law suggests. Clause 1028(7) lists 10 factors. Failure to make disclosure as required by the model law is a 'new' requirement, not seen in WA case law to date. Also, a relevant advertisement of the skills of the practice may be taken into account. This requirement is not seen in the wider case law relating to cost agreements – for example, in family law cases. The nature of the work done, including complexity, quality and timeframes are to be considered, as are the place and circumstances where the work was done. These requirements add new elements to consideration of cost agreements not seen in the wider case context. An example of that consideration may be the difference in terms of expenses of running a city practice compared to a suburban one.

COSTS REVIEW

The model law puts beyond doubt the right of a client to tax even though the bill has been paid: clause 1034(1A). The practice in the Supreme Court of WA has been not to regard payment as a barrier to taxation, although the point has not been tested. The time limit for requesting review is 12 months: clause 1034(4), although the limit is currently 30 days from rendering an itemised account. The extended time limit may affect case law on extending the limit. Clause 1034 does not refer to extending the proposed limit.

Notes: **1** (1993) 9 WAR 70. **2** Section 232 *Legal Practice Act* 2003 (WA). **3** (1993) 8 WAR 420. **4** (unreported, Full Court of WA, lib no 970661).

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