BAQ CPD 15 OF 2007 (Ethics or Practice Management Strand)

COSTS DISCLOSURE OBLIGATIONS AND COST AGREEMENTS OF BARRISTERS RETAINED BY SOLICITORS UNDER THE LEGAL PROFESSION ACT 2007 (QLD)

by Hugh Fraser QC

1. This paper discusses two related subjects of regulation by part 3.4 of the *Legal Profession Act 2007* (Qld) ("LPA"), namely:

   (a) Barristers' cost disclosure obligations.

   (b) Barristers' cost agreements.

2. Part 3.4 applies to a matter if the client first instructs the law practice (the solicitor or barrister) in relation to the matter in Queensland: s 302.

3. Part 3.4 also applies in other cases involving extraterritorial elements, as specified in the subsequent provisions of division 2 (ss 303 – 307) of LPA and in s 79 of the *Legal Profession Regulation 2007* ("LPR").

Barristers' Cost Disclosure Obligations

4. Extensive obligations to make disclosures are imposed in division 3 of part 3.4 of LPA, by sections 308, 312, 313, 315, 317 and 318.

5. The terms of those provisions suggest that they apply to all matters in which the barrister is briefed after commencement of the LPA.

6. There is no moratorium relating to these provisions. They are now in force and have been since LPA commenced on 1 July 2007.

7. Any non-compliance by a barrister carries the potential for significant adverse consequences, notably including the following:

   (a) Non-compliance is capable of constituting unsatisfactory professional conduct or professional misconduct: s 316(7).

   (b) For a barrister briefed directly by a client:

      (i) The client or "associated third party payer" need not pay the costs payable to the barrister before they have been assessed under division 7: ss 316(1) and (2).

      (ii) Any costs agreement between the barrister and client or associated third party payer may be set aside: ss 316(3).

(iii) The amount of the barrister's costs might be reduced on assessment by an amount proportionate to the seriousness of the non-disclosure: ss 316(4).

(c) For a barrister briefed by a "law practice", those same consequences in (b)(i) – (iii) apply in relation to the barrister's fees where the barrister's non-compliance with s 309(2) is the sole cause of the solicitor's non-disclosure to the client: s 316(5)

Who Must Make Disclosure?

8. Division 3 imposes its extensive disclosure obligations upon a "law practice".

9. That term comprehends a barrister holding a current practising certificate, because such a barrister is "an Australian legal practitioner who is a sole practitioner": see the first limb of paragraph (b) of the definition of "law practice" in the schedule 2 dictionary.

10. For the same reason, "law practice" comprehends "a solicitor holding a current practising certificate who is a "sole practitioner". That latter term is defined to mean an Australian lawyer who engages in legal practice "on his or her own account".

11. "Law practice" also includes a "law firm". That term comprehends a partnership consisting only of Australian legal practitioners or of Australian legal practitioners and Australian-registered foreign lawyers. "Law practice" also includes an "incorporated legal practice" and a "multi-disciplinary partnership".

12. It follows that, subject to the exceptions discussed below, both barristers and solicitors must make the prescribed costs disclosures.

13. In considering the significant exception that applies where a barrister is retained by a solicitor who is a "law practice", it is important to note that:

    (a) The term "law practice" comprehends the traditional law firms, i.e., sole practitioners and partnerships of solicitors who in each case hold a current practising certificate and practise on their own account; and

    (b) Conversely, "law practice" does not comprehend a solicitor who is not carrying on practice on the solicitor's own account (such as many "in-house" solicitors), whether or not the solicitor holds an unrestricted practising certificate.

14. This paper uses the term "law practice" as bearing that defined meaning; it must be borne in mind that the exception from disclosure for barristers retained in the traditional way applies only where the barrister is retained by a "law practice" as defined in LPA.

To Whom Must Disclosure be Made?

15. The primary obligation is to make the necessary disclosures specified in division 3, other than in s 318, to "a client".

16. The word "client" is defined in the dictionary (for this division) as including a person to whom or for whom legal services are provided. For division 7, which concerns costs assessment, "client" means a person to whom or for whom legal services are or have been provided.

17. Those definitions are consistent with the ordinary meaning of "client" in a case in which a barrister is briefed by an instructing solicitor, namely the person who has retained the solicitor; [1] the ordinary meaning of "client" does not comprehend the barrister's instructing solicitor.

18. This meaning of "client" is suggested also by the scheme of division 3 (ss 309(1)-(3), 317(3)), division 5 (322(1), 322(1)(b)), and division 7 (compare s 335 with s 336), all of which draw clear distinctions between each of a "law practice" (relevantly including a barrister), who is retained by "another law practice" (relevantly including the barrister's instructing solicitor) on behalf of "the client".

19. It must be acknowledged that LPA is not unambiguous in this respect. For example, there is the curiosity that s 331 (in division 6) requires all bills to include a notice identifying the "client's" rights to assessment and to apply to set aside a costs agreement. But drafting quirks of that kind appear to fall well short of supporting the non-natural meaning of "client" as including a barrister's instructing solicitor.

20. It follows that the primary obligation of barristers, subject to the important exceptions discussed below, is to make the necessary disclosures to the client, regardless whether or not the barrister is retained on behalf of the client by a solicitor.

21. Under s 318, where disclosures must be made (by a barrister or solicitor) to a client, similar disclosures must also be made to any "associated third party payer" (i.e., a person other than the client who is obliged to pay the fees to the law practice: s 301).

Exception for a Barrister Retained by an Instructing Solicitor who is a "Law Practice"

22. However, the position is very different when the barrister is retained on behalf of the client by a law practice. (As already mentioned, this paper uses "law practice" in the way defined in LPA.)

23. In this conventional situation, the barrister generally need not make any disclosure to the client, but instead must instead give some quite limited information to the law practice: s 309(2) and s 317(3).

24. That is clear in relation to the primary disclosure obligations in ss 308 and 317(1). There are though some ambiguities in this respect in relation to the subsidiary disclosure obligations expressed in ss 313 and 315, discussed below.

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[1] *Apple v Wily* [2002] NSWSC 855 at [11] (Barrett J), *Maxwell v Chittick* (unreported, NSWCA, 23/8/1994, *Pegrum v Fartharly* (1996) 14 WAR 92, *Simmons v Story* [2001] VSCA 187.

25. Similarly, in this conventional case, the barrister need not make any disclosure directly to "associated third party payers". Subsections 318(1) and (4), which impose such obligations, apply only where the barrister is otherwise required under division 3 to make disclosure "to a client".

What Must be Disclosed by a Barrister Retained on Behalf of a Client by an Instructing Solicitor which is a "Law Practice"?

26. Barristers accepting direct briefs from clients or briefs from intermediaries who do not qualify as a law practice (including "in-house" solicitors not in practice on the solicitor's own account) are bound by the very extensive disclosure obligations set out in division 3 of LPA, subject only to particular exceptions, such as for "sophisticated clients".

27. This paper does not discuss those extensive obligations in any detail, but discusses the position in the conventional case of a barrister retained on behalf of a client by an instructing solicitor which is a "law practice".

28. The disclosure obligations of a barrister briefed by such an instructing solicitor may be identified under five headings.

(1) Initial Costs Disclosure, Including Uplift Fees, for Unsophisticated Clients: s 309(2) and s 313(1) of LPA

Exceptions

29. A significant exception to disclosure - where the client is a "sophisticated client" - is discussed under a later heading. Further, relatively minor exceptions to the disclosure obligation are set out in s 311(1)(a) (costs less than $750), (b) (waiver of disclosure by certain regular clients), (d) (costs agreed by tender) and (e) (where no costs are payable).

30. Apart from in those exceptional cases, it will be necessary for barristers to comply with the disclosure obligations expressed in this division of LPA.

The General Rule for a Barrister Retained by an Instructing Solicitor which is a "Law Practice"

31. However, when the barrister is retained on behalf of a client by an instructing solicitor who is a "law practice", s 309(2) relieves the barrister of the initial costs disclosure obligation under s 308.

32. Subsection 309(2) requires only that the barrister disclose to the instructing solicitor the information necessary for the instructing solicitor to comply with his or her obligations to the client described in s 309(1).

33. This limitation seemingly applies in all cases in which the barrister is retained by a law practice, including even a case in which the barrister makes a costs agreement directly with the instructing solicitor's client - as is permitted by s 322(1)(b).

34. Such an agreement directly with the client, however, should be rare, for reasons discussed later in this paper.

Content of Law Practice's Initial Costs Disclosure to the Client under s 309(1)

35. Subsection 309(1) refers particularly to some only of the disclosure obligations set out in s 308, namely those specified in s 308(1)(a), (c) and (d).

36. The information described in paragraphs (a), (c), and (d) of s 308(1) is:

    (a) **s 308 (1)(a)**: Whether any scale of costs applies to any of the costs.

    (b) **s 308(1)(a)**: The basis on which legal costs will be calculated.

    (c) **s 308(1) (c)**: An estimate of the total legal costs if reasonably practicable.

    (d) **s 308(1)(c)**: If an estimate of the total legal costs is not reasonably practicable:

        (i) a range of estimates of the total legal costs, and

        (ii) an explanation of the major variables that will affect the calculation of those costs.

    (e) **s 308(1)(d)**: Details of the intervals, if any, at which the client will be billed.

37. In addition, s 309(1), with reference to 308(1)(a) and (c), requires the instructing solicitor to inform the client also about any uplift fee. (An "uplift fee" is a success fee: s 300. It may not exceed 25% of the legal costs excluding disbursements: s 324(4)). This obligation is specified in more detail in s 313(1): disclosure is required of:

    (a) The legal costs;

    (b) The amount of the uplift fee or the basis of its calculation; and

    (c) The reasons why the uplift fee is warranted.

Barrister's Initial Disclosure to the Law Practice under s 309(2)

38. The barrister is not necessarily obliged to make that same extent of disclosure to the instructing law practice in all cases: ss 309(2) does not in terms oblige the barrister retained by an instructing solicitor to disclose all of that information specified in s 308(1)(a), (c) and (d) and s 313 about the barrister's costs.

39. Rather, it obliges the barrister to disclose only the information "necessary" to enable the instructing solicitor to disclose to the client those details in relation to the barrister's costs.

40. It follows that the required content of the barrister's disclosure to the instructing solicitor may vary from case to case.

41. Ordinarily, it is to be expected that the instructing solicitor will know whether or not there is any applicable scale of costs. In many cases, the instructing solicitor will also have a better idea than the barrister of the extent to which the barrister's services may be required in the matter.

42. In such a case, it might be argued that the only details required of the barrister by s 309(2) to enable the instructing solicitor to comply with his or her disclosure obligations to the client under s 309(1) are the barrister's rates or standard fees (including any uplift fee), terms relevant to costs (e.g., any cancellation fee or disbursements), and billing intervals.

43. Nevertheless, it would appear to be imprudent to rely upon such an argument in most cases. There are many reasons for favouring a cautious approach - the ambiguities inherent in these provisions, the need for a barrister to have a record establishing compliance, and the desirability of avoiding misunderstandings by the solicitor or the client. Disputes may more likely be avoided if the barrister provides more rather than less detail about the barrister's anticipated costs.

44. Some examples of disclosures intended to comply with these provisions are given in the attached draft precedent costs agreement. It must be emphasised, however, that it is a matter for each barrister to ensure compliance with these provisions in the great variety of circumstances in which the obligation arises.

Time for Initial Disclosure

45. LPA does not state when the barrister must make this initial disclosure to the instructing solicitor, but it is implicit in ss 309(2) and 310(2) that the barrister must do so before or as soon as practicable after the barrister is retained.

46. In any case, absent some such implication, s 18 of LPA would require the barrister to make the disclosure as soon as practicable.

Form of Initial Disclosure

47. The formal requirements for "writing" in s 310 apply to disclosures by law practices to clients under s 308 and s 309(1). Unless some contrary implication can be divined in LPA, that requirement for "writing" might be satisfied by electronic communication such as email: see the definition of "writing" in s 36 of the *Acts Interpretation Act 1954* ("any mode of representing or reproducing words in a visible form"); and see also sections 9 and 10 – 13 of the *Electronic Transactions Act (Queensland) 2001*.

48. But no requirement of writing is expressed to apply in relation to disclosures by a barrister to an instructing solicitor under s 309(2). On the face of it, oral disclosure is sufficient.

49. Similarly, the formal requirements for "clear plain language" and the use of a language familiar to the client in s 314 apply in terms only to disclosures "to a

client", but not to the disclosure by a barrister to instructing solicitor required by s 309(2).

50. Nevertheless, it is obviously prudent for barristers to make their disclosures to law practices in unambiguously simple language and to retain a record of such disclosures.

51. For that reason, and because it will usually be very desirable for the barrister to make a costs agreement with the instructing solicitor, it is likely that barristers will prefer to make full disclosure in the form of a written costs agreement.

(2) Progress Reports: s 317

52. Progress reports are not required for a "sophisticated client": s 317(5).

53. Otherwise, under s 317(3), the obligation of a barrister briefed by an instructing solicitor who is a "law practice" is to disclose to the solicitor any information necessary to enable the solicitor to comply with the client's request for:

(a) **s 317(1)(a):** A written report of the progress of the matter; and

(b) **s 317(1)(b):** A written report of the legal costs incurred by the client since the last bill.

54. What is necessary will be a matter of judgment. Presumably, instructing solicitors ordinarily will only ask the barrister to report the barrister's unbilled fees and when the barrister's work is expected to be finished.

(3) Disclosure on Settlement of Litigious Matters: s 312 (1) of LPA and s 81 of LPR

55. There is no exception for "sophisticated clients" under this heading.

56. Section 312 of LPA obliges a law practice (barrister or solicitor) who negotiates settlement of a litigious matter on behalf of the client to make certain costs disclosures to the client before the settlement is executed.

57. The content of the necessary disclosure is:

(a) **s 312(1)(a):** A reasonable estimate of the legal costs payable by the client, including those of another party payable by the client.

(b) **s 312(1)(b):** A reasonable estimate of any contributions towards those costs likely to be received from another party. =

<u>Settlement Negotiated by the Barrister Retained by Instructing Solicitor who is a "Law Practice"</u>

58. Of that information, most barristers are likely to be able to provide only the barrister's component of any costs to be borne by the client.

59. In this situation, the instructing solicitor is obliged to respond to the barrister's request for the balance of the information which it is within the solicitor's competence to give: LPR, s 81(2) –(3).

60. It must be borne in mind, however, that if the barrister does negotiate the settlement of a litigious matter, s 312, albeit incongruously, obliges the barrister to disclose "to the client" all of the information specified in s 312 (1) (a) and (b).

61. Unlike s 309(2), s 81 of LPR does not provide that the barrister is entitled to make the s 312 (1) disclosure to the instructing solicitor rather than to the client.

62. It therefore seems that a barrister negotiating a settlement is obliged to ask for and obtain from the instructing solicitor any information necessary to enable the barrister to make the prescribed disclosures, and then to make those disclosures "to the client".

63. LPA does not contain anything that expressly excludes the application of ordinary agency principles. Therefore, disclosure by the barrister to a instructing law practice acting as agent for the client might satisfy this obligation.

64. This view may be open to doubt: possibly, any such agency is excluded by an implication arising from the absence of any analogue of s 309(2) in s 312 or s 81 of LPR.

65. Perhaps the prudent course for a barrister who negotiates a settlement is to ensure that, before the settlement is executed, the barrister's instructing solicitor has in fact made full disclosure to the client on the barrister's behalf in terms of s 312, particularly including of the barrister's fees.

Settlement Negotiated by the Barrister's Instructing Solicitor

66. Where a settlement is negotiated by the barrister's instructing solicitor, it will be the solicitor who is obliged to make the disclosure required by s 312(1).

67. The effect of s 81(4) of LPR in such a case is that the barrister's obligation to provide information in response to a request by the instructing solicitor under s 81(3) is limited to a reasonable estimate of the legal costs payable to the barrister if the matter is settled.

(4) Ongoing Obligation to Disclose: s 315

68. There is no express exception for "sophisticated clients" under this heading, but it will have no application where there was no initial disclosure to such clients.

69. Section 315 obliges a "law practice" to disclose in writing "to the client" any substantial change to anything included in a disclosure already made under division 3

70. On its proper construction, this requirement, though literally applicable, may not apply to a barrister briefed by an instructing solicitor who is a "law practice". It would be odd if it did, because it would oblige barristers to bypass their instructing solicitors by writing directly to the client in relation to changes to the

initial disclosure of the barrister's costs – in which the client has no direct interest.

71. That literal requirement of s 315 is also incongruent with s 309(2), under which such a barrister is not obliged to make any initial costs disclosure to the client, or any disclosure in writing to anyone. A further indication that is has no such application appears in s 316(5), which imposes sanctions for non-compliances with s 309(2) by persons, such as barristers, retained on behalf of the client by an instructing solicitor; but which does not impose any sanction for non-compliance by such persons with s 315.

72. Nevertheless, it plainly would be sensible for a barrister to disclose in writing to the instructing solicitor any change from the barrister's initial or other costs disclosure to the solicitor, whether or not that is strictly required by s 315.

(5) "Sophisticated Clients": Initial Costs Disclosure, including Uplift Fee, Progress Reports and Ongoing Disclosure: s 311, s 313(2), 315 and s 317(5) of LPA

73. The effect of ss 311, 313(2) and 317(5) is that an instructing solicitor retained by a "sophisticated client" is not required to make any initial disclosure, including of uplift fees, or progress reports. And if no such disclosures have been made, there will be no occasion for ongoing disclosure under s 315.

74. It follows that a barrister retained on behalf of a client by an instructing solicitor of the kind under discussion (a "law practice") is not required to provide any such information to the instructing solicitor or to the sophisticated client.

75. That is not to deny the prudence of providing such information in the form of a costs agreement, by ongoing disclosures where earlier disclosures have been falsified, and by progress reports where requested or where otherwise appropriate.

76. And as mentioned earlier, where the barrister negotiates a settlement of a litigious matter for any client, including a "sophisticated client", the barrister is obliged to provide the costs disclosure described in s 312.

Who are "sophisticated clients"?

77. Section 300 defines "sophisticated client" by reference to a "client" who is described in 311(1) (c) and (d).

78. The first "sophisticated client" mentioned in those provisions (s 311(1)(c)(i)) is a "law practice" or an "Australian legal practitioner". The latter term includes persons who do not qualify as a "law practice" (or an "instructing solicitor" in the terminology of this paper) – e.g., a solicitor holding a current practising certificate but who does not practise on his or her own account.

79. A view has been advanced that a barrister's instructing solicitor might be regarded as the barrister's "client", and therefore a "sophisticated client". If that

were so, it would follow that, in the conventional case under discussion in this paper, a barrister never would never be required to give the prescribed initial disclosure, disclosure of uplift fees, or progress reports. Such a view would also have consequences for other parts of LPA – notably s 344.

80. For the reasons given in paragraphs 15-19 above, it is suggested that such a view should not be adopted, and that barristers should act on the basis that the word "client" in the term "sophisticated client" refers to the person who has retained the barrister's instructing solicitor.

81. That is to say, the better view seems to be that it is only when the instructing solicitor's client is a law practice or an Australian legal practitioner that the necessity for the usual disclosure is excluded by s 311(1)(c)(i).

82. A large range of other "sophisticated clients", for whom the usual disclosures are also not required, are identified in ss 311(1)(c)(ii) – (viii), including, e.g., public companies and their subsidiaries, liquidators, and particular large partnerships and unincorporated joint ventures.

83. Notably, the last of those paragraphs, (viii), includes any "public authority" of a "jurisdiction" (a State or Territory: see the dictionary) or of the Commonwealth. The term "public authority" is very broadly defined in s 300. It includes any authority or body established for a public purpose by a law of a State, Territory or the Commonwealth.

Summary

84. In all of those cases of "sophisticated clients", the barrister has no obligation to give any of the initial disclosure (s 308(1), 309 (2)) (including disclosure of uplift fees (s 313)), progress reports (s 317), or (where there has been no prior disclosure), ongoing disclosure (s 315).

85. However, the barrister will remain obliged to make the disclosure required by s 312 when the barrister negotiates a settlement of a litigious matter even for a "sophisticated client".

Barristers' Cost Agreements

86. Costs agreements are dealt with in division 5 of part 3.4 of LPA (ss 322 – 328).

Parties

87. Section 322 prescribes the persons between whom costs agreements may be made:

(a) **s 322(1)(a)**: " a client and a law practice retained by the client; or".

(b) **s 322(1)(b)**: "a client and a law practice retained on behalf of the client by another law practice; or".

(c) **s 322(1)(c)**: "a law practice and another law practice that retained that law practice on behalf of a client; or".

(d) **s 322(1)(d)**: " a law practice and an associated third party payer".

88. At least once the 6 month moratorium period in s 319(2) has expired on 1 January 2008 (and, in my view, before then), barristers retained by a law practice ordinarily should enter into a costs agreement with the instructing solicitor under s 322(1)(c) (rather than with the client or associated third party payer).

89. There are two main reasons in favour of that practice.

90. First, barristers will need to enter into a costs agreement to become entitled to recover the barrister's agreed costs, instead of being relegated to an assessor's decision as to what costs the barrister may recover: s 319(1)(b) and (c).

91. Section 336 empowers the instructing solicitor to apply for an assessment of the barrister's costs even where the barrister has made the necessary costs disclosures and there is an applicable and compliant costs agreement.

92. But the effect of s 340 is that (unless the barrister and instructing solicitor agree otherwise) the costs assessor will be bound to assess the disputed costs by reference to the costs agreement.

93. That should render academic any assessment of barrister's costs calculated in accordance with applicable provisions of a compliant costs agreement where the barrister has made the necessary disclosures.

94. Secondly, barristers need to ensure that the instructing solicitor, rather than the client or associated third party payer, is personally liable to pay the barrister's costs. Barristers, unlike their instructing solicitors, are in no position to assess the creditworthiness of the client. There are also prohibitions upon barristers receiving fees in advance in LPA ss 246(1) and 237 (1)("trust money"), and rule 84(d) of the *Barristers Rule 2007.*

95. Accordingly, the balance of this paper discusses only those costs agreements made pursuant to s 322(1) (c) between a barrister and instructing solicitor (who is a "law practice") which render the instructing solicitor personally liable for the barrister's costs.

Subject Matter of a Costs Agreement

96. The term, "legal costs" is defined in s 346, but only for division 8 (concerning speculative personal injury claims).

97. Section 300 defines a "costs agreement" as meaning an agreement "about the payment of legal costs".

98. Matters of the kind required to be disclosed by s 308(1)(a), (c) and (d) plainly are permitted, as no doubt are provisions rendering the instructing solicitor personally liable regardless of whether the client has put the instructing solicitor in funds.

99. Other sections indicate other kinds of matter that can be the subject of a costs agreement:

    (a) **s 321(1)**: Provision for interest on unpaid costs, which otherwise will be chargeable only if the costs are unpaid for 30 or more days after invoice. Interest is payable only if it is also claimed and the rate specified in the invoice: s 321(2). The rate is capped by regulation 82 at the Cash Target Rate plus 2%.

    (b) **s 303(1)(c)(i) and (2)(a), (3)**: A choice of law clause, making it clear that (where the services are to be provided wholly or primarily in Queensland or the matter otherwise has a substantial connection with Queensland: see s 79 of LPR), LPA applies rather than the corresponding law of a different State or Territory: s 303. There is, however, the difficulty that these provisions contemplate such clauses in agreements with "the client": it is not easy to see how they could be included in the barrister's cost agreement with an instructing solicitor.

    (c) **s 344**: A "sophisticated client" may contract out of division 7 (concerning costs assessment, including possible referral for disciplinary action for excessive costs under s 343). On the view of LPA indicated in this paper, any such clause should be in the costs agreement between the instructing solicitor and the client. (A similar clause might be included in the barrister's costs agreement in case a different construction of LPA is adopted.)

100. Some subject matter is excluded by general prohibition:

    (a) **s 322(5)**: Contracting out of costs assessment under division 7, otherwise than by sophisticated clients.

    (b) **s 323(2)**: Conditional costs agreements about criminal law or family law matters.

    (c) **s 324(4)**:Uplift fees exceeding 25% of the legal costs excluding disbursements. It has been held that a practitioner who agrees to a fraction of the practitioner's normal rate regardless of outcome and requires payment of the full rate infringes a similar statutory prohibition,[2] although those decisions may be open to review.[3]

    (d) **s 325**:Contingency fees and the like.

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2 *Equuscorp v Wilmoth Field Warne* [2006] VSC 28; *Coadys v Getzler* [2006] VCC 243.

3 *Wentworth v Rogers; Wentworth & Russo v Rogers* [2006] NSWCA 145; (2006) 66 NSWLR 474; at [120], [121], [128].

(e) **s 347**: (Ordinarily) provisions exceeding the prescribed maximum payment for speculative personal injury claims.

101. The effect of other provisions that are not "about the payment of legal costs" (in terms of the definition of "costs agreement" in s 300) is unclear.

Form

102. A costs agreement must be either written or evidenced in writing: s 322 (2). (The meaning of "writing" is discussed at paragraph 47 above.)

103. However, under s 322(3) that requirement is fulfilled by a costs agreement (other than a "conditional costs agreement") that consists of a written offer that is accepted either in writing or by other conduct, so long as the offer complies with the simple requirements of s 322(4).

104. A "conditional costs agreement" is one that provides for payment conditionally upon success: s 323(1). Such a costs agreement must be "in writing": s 323(3)(c)(i). That expression might be thought not to include a written offer accepted orally or by conduct,[4] although there is authority suggesting that it does.[5]

105. A conditional costs agreement ordinarily must comply with the more detailed requirements of s 323, but some of those detailed requirements do not apply to conditional costs agreements made between a barrister and the barrister's instructing law practice or to agreements made with a "sophisticated client": s 323(4).

Void Costs Agreements

106. A costs agreement made in contravention of division 5 is void, with the result that costs cannot be recovered under it but must be recovered either under any applicable scale of costs or upon assessment: s 327.

107. There is an exception for costs agreements which are or which include a prohibited contingency fee, in which case no costs at all are recoverable: s 327(5).

Setting Aside Costs Agreements

108. No doubt costs agreements might be set aside in any case in which any other contract might be set aside, but a further, very broad power to set aside costs agreements is conferred on the Supreme Court.

109. Section 328(1) provides that, on application by a client, the Supreme Court may order that a costs agreement be set aside if satisfied the agreement is not fair or

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4 *Re Walsh Halligan Douglas' Bill of Costs* [1990] 1 Qd Re 288 (Dowsett J); *Jovetic v Stoddart & Co* (1992) 7 WAR 208, 218 (Seaman J).

5 *McNamara Business & Property Law v Kasmeridis* [2005] SASC 269; special leave refused [2006] HCA Trans 52.

reasonable. The same application may also be made by an associated third party payer: s 322(6).

110. The client and any third party payer are not, however, parties to the costs agreement of the kind discussed in this paper, i.e., costs agreements made between a barrister and an instructing solicitor (a "law practice") in which the solicitor assumes personal responsibility to pay the barrister's costs, regardless of whether or not the client has put the solicitor in funds.

111. It seems to follow, on a literal construction of s 328, that it does not confer power upon the Supreme Court to set aside such a costs agreement.

112. Nor does there appear to be any reason to give the section a non-literal meaning:

    (a) Instructing solicitors are well placed to look after their own interests in making costs agreements with barristers, as is reflected in a solicitor's statutory description, when a client, as a "sophisticated client".

    (b) To the extent that an instructing solicitor depends upon the barrister to make proper disclosure of the barrister's costs to enable the instructing solicitor to obtain indemnity from the client, s 316(5) would permit the solicitor to apply for the barrister's costs agreement to be set aside and for the barrister's costs to be reduced accordingly by assessment.

113. Accordingly, it seems that no court has power to set aside a costs agreement made between a barrister and a law practice in conformity with division 5 after proper disclosure by the barrister under division 3, merely on the basis of the court's opinion that the agreement is not fair or reasonable.

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2 August 2007