# *A solicitor's guide* to the retainer and billing

*This is a heavily abridged version of a talk given by* ***Bill Ericson*** *at the Law Society Costs Symposium on 4 April. This article has been limited to retainers and billing. Solicitors wishing to be informed of changes relating to third party payers, disclosures by barristers, contingency fees, setting aside costs agreements and costs adjudications are referred to the unabridged paper which is available from the Law Society.*

## Application of the New Costs Rules

**Temporal Application**

From 1 July, costs law will be found in Schedule 3 to the *Legal Practitioners Act*.

The new rules apply if a client first instructs a law practice on or after 1 July. Section 9 of Part 4 specifically provides that if the client first instructed the law practice before 1 July, the old law continues to apply.

Section 9 (2) of Part 4 provides that the new provisions do not apply *"in respect of a law practice retained by a law practice on behalf of a client on or after the relevant date in relation to a matter in which the other law practice was retained by the client before the relevant date"*. This means that if the basic relationship between the client and the primary solicitor was entered into before the relevant date, should that solicitor then engage a barrister, or any other law practice to act on the client's behalf, then that relationship remains governed by the old law.

Even if the old law continues to operate initially, it will cease to have effect as of the first anniversary of the commencement of Schedule 3.

**Geographical Application**

The basic rule as to the geographical application of the provisions is set out in clause 3 of Schedule 3 to the proposed Act: *"This Schedule applies to a matter if the client first instructs the law practice in relation to the matter in this State"*.

**Client Application**

Whilst some of the provisions of the legislation apply to all clients, the core disclosure applications in clauses 10 and 11(1) are not required to be made in a number of circumstances, listed in clause 13.

The first exception under clause 13(1)(a) is if the total legal costs in the matter, excluding disbursements, are not likely to exceed $1500 (exclusive of GST) or the prescribed amount, whichever is higher.

Clause 13(1)(b) provides an exception if:

*(i) the client has received one or more disclosures under clause 9 or 10(1) from the law practice in the previous 12 months; and*

*(ii) the client has agreed in writing to waive the right to disclosure; and*

*(iii) a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, the further disclosure is not warranted.*

It should be noted that the decision of the principal referred to in clause 13(3) is required to be made in writing and kept with the files. A decision not made on reasonable grounds is capable of being unprofessional conduct (see clause 13(4)).

The most important exception is clause 13(1)(c), generally referred to as the sophisticated client exception, that disclosure requirements do not apply to a "law practice or a legal practitioner".

Whilst interstate legal practitioners are covered by this exception, lawyers outside Australia are not.

Also exempt from disclosure requirements are "a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body (each within the meaning of the Corporations Act 2001)"

Solicitors who have clients that are proprietary companies which may qualify in this regard will have to make enquiries as to whether they qualify. Some companies may fluctuate in and out of being large proprietary companies as their annual income assets or employees change. If you are in doubt it is safer to make the disclosure.

Other exemptions include a financial services licensee, a liquidator, administrator or receiver, a partnership that carries on the business of providing professional services in the partnership consists of more than 20 members or if the partnership and various others (see (iii) to (viii)).

In practical terms, it is suggested that the distinction between those clients to whom disclosure must be made and those to whom it need not be made (the latter usually being referred to as sophisticated clients) should be noted in a firm's internal records. This will require a categorisation of existing clients, and a requirement for categorisation of new clients when instructions are first taken.

## The Basic Disclosure Requirements

Clause 10(1) provides:

*"A law practice must disclose to a client in accordance with this subdivision -*

*(a) the basis on which legal costs are to be calculated, including whether a scale of costs applies to any of the legal costs*

This obligation is not new. It always has been the case that there has been an ethical duty to advise of the basis on which costs are to be calculated (see Rule 16B.2.1 of the Australian Solicitors Conduct Rules).

A law practice must also disclose to a client if:

*(b) the law practice will not be calculating legal costs in accordance with an applicable scale of costs – that another law practice may calculate legal costs in accordance with the scale; and*

# provisions of the Legal Practitioners Act

*(c) the client's right to -*

*(i) negotiate a costs agreement with the law practice; and*

*(ii) receive a bill from the law practice; and*

*(iii) request an itemised bill after receipt of a lump sum bill; and*

*(iv) be notified under clause 17 of any substantial change to the matters disclosed within this section; and*

This requirement is new. Clause 10(5) states: "A law practice is taken to have complied with the requirement to disclose the details referred to in subclause (1)(c)(i) to (iii), (h), (j), (k) and (m) if it provides a written statement in or to the effect of a form prescribed by the regulations for the purposes of this subsection at the same time as the other details are disclosed by this section."

The form may refer to a publicly accessible source of information from which the necessary details can be obtained and the statement of relevant details can be developed by the Law Society. The regulations have not yet been gazetted but it appears they will require a brief disclosure in a specified form which will refer the client to a Law Society-prepared fact sheet for further information. The Law Society has drafted such fact sheets but they cannot be finalised until the regulations are finalised.

*(d) an estimate of the total legal costs if reasonably practical or, if that is not reasonably practical, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; and*

This follows the longstanding ethical requirement to provide such an estimate (see Australian Solicitors Conduct Rule 16B.2.1). What is new is the requirement that if a range is given for the estimates there must be *"an explanation of the major variables that will affect the calculation of those costs"*. If a range is given but variables are not stated, the consequences of non-disclosure will flow. Any precedent retainer agreement should have a place for insertion of major variables.

*(e) details of the intervals (if any) in which the client will be billed*

This requirement should be dealt with in existing retainers, since at common law there are very limited rights to interim bill a client if this is not specified.

*(f) the rate of interest (if any) the law practice charges on overdue legal costs, whether that rate is a specific rate of interest or is a benchmark rate of interest (as referred to in subclause (2))*

Clause 10(1)(f), should also already be dealt with in retainer agreements. It is probably the case that there is no inherent right of a solicitor to charge interest if this is not stipulated in the fee agreement (see *Lyddon v Moss* (1859) 45 ER 41).

Clause 10(3) provides for regulations to be made to govern interest but these have not yet been finalised.

*(g) if the matter is a litigious matter, an estimate of -*

*(i) the range of costs that may be recovered if the client is successful in litigation; and*

*(i) the range of costs that the client may be ordered to pay if the client is unsuccessful; and*

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Clause 10(1)(g) changes the existing position in which such advices were only mandated on the settlement of a matter and not on its commencement (see Australian Solicitors Conduct Rule 16B.2.4). Unlike clause 10(1)(d) there is no obligation to state the major variables influencing the range of the other side's costs.

*(h) the client's right to progress reports in accordance with clause 19*

This is one of the sections which can be met under clause 10(5) by providing a written statement in the form of the regulations.

*(i) details of the person whom the client may contact to discuss the legal costs*

This is a new requirement but is an easy one to meet. Presumably the solicitor having the conduct of the file or the partner having the supervision of the file will be detailed.

*(j) the following avenues are open to the client in the event of a dispute in relation to legal costs:*

*(1) raising the matter with the practice;*

*(2) adjudication of costs under Part 7;*

*(3) the setting aside of a costs agreement under clause 29;*

*(4) if the client believes there has been overcharging - making a complaint to the Commissioner; and*

*(k) any time limits that apply to the taking of any action referred to in paragraph (j); and*

*(l) that the law of this State applies to legal costs in relation to the matter; and*

*(m) information about the client's rights:*

*(i) to accept under a corresponding law a written offer to enter into an agreement with a law practice that the corresponding provisions of the correspondence law apply to the matter; or*

*(ii) to notify under a corresponding law (and within the time allowed by the corresponding law) the law practice in writing that the client requires the corresponding provisions of the corresponding law to apply to the matter."*

Clauses 10(1)(j), (k) and (m) can be met by the form prescribed by the regulations.

Clause 10(4) provides that a disclosure under (1)(g) must include "(a) a statement that an order by the Court for the payment of costs in favour of the client will not necessarily cover the whole of the client's legal costs and (b) if applicable a statement those disbursements may be payable by the client even if the client enters into a conditional costs agreement".

**Form of Disclosure**

Disclosures must be in writing and per clause 16(1)(a) "must be expressed in clear plain language and (b) may be in a language other than English if the client is more familiar with that language". If a law practice is aware a client is unable to read they must arrange for the information to be conveyed orally in addition to the written disclosure.

**Continuing Disclosure**

Clause 17 provides "A law practice must, in writing, disclose to a client any substantial change of anything included in disclosure already made under this subdivision as soon as reasonable practical after the law practice becomes aware of that change". The main impact of this will be when changing circumstances require an updating of fee estimates.

Clause 19 requires the client to be given on reasonable request, a written report on the progress of the matter and a written report of the legal costs incurred by the client to date or since the last bill. The practice may charge under clause 19(2) a reasonable amount for a report on the progress of the matter but may not charge for the report on the amount of legal costs.

## Consequences of Non-Disclosure

The consequences of non-disclosure of relevant material will be much more severe than they used to be. Clause 18 now provides by subclause 18(1) that "If a law practice does not disclose to a client or an associated third party payer anything required by this subdivision to be disclosed, the client or associated third party payer need not pay the legal costs unless they have been adjudicated under Part 7". This is reinforced by clause 18(2) that provides "A law practice that does not disclose to a client or an associated third party payer anything required by this subdivision to be disclosed may not maintain proceedings against a client or associated third party payer (as the case may be) for the recovery of legal costs unless the costs have been adjudicated under Part 7". Accordingly, a solicitor whose bill has not been paid does not have the option of suing in the Magistrates Court or District Court for its payment if he or she has not made the requisite disclosure.

Solicitors should be extremely wary of suing for their fees when they may have made a non-disclosure, as clause 18(7) states "Failure by a law practice to comply with this subdivision is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any legal practitioner involved in the failure". Further, if there is an adjudication of costs by the Supreme Court and the retainer agreement is set aside for non-disclosure it is quite possible if the non-disclosure is regarded as being serious the practitioner will not only be reduced to scale fees, but to scale fees less a percentage to reflect the seriousness of the failure to disclose under clause 18(4).

## General Provisions as to Legal Costs

**The Basic Rule**

Clause 21 provides that legal costs can be recovered under a costs agreement made in accordance with the Act and in default of such a costs agreement, in accordance with an applicable scale. In default of both of these, according to the fair and reasonable value of the legal services provided (21(c)). In South Australia is that the Supreme Court scale operates as a default scale covering all matters which do not have unique scales of their own, so that clause 21(c) would seem to have little potential application to solicitors' costs. It is however applicable to disbursements, including

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counsel fees, as the Supreme Court Indicator as to Counsel Fees makes it clear it is not a scale but a non-binding guideline.

**Costs Agreement Formalities**

Pursuant to clause 24(2) cost agreements must be written or evidenced in writing and clause 24(3) provides that they may consist of a written offer in accordance with subclause (4), which may be accepted in writing or by other conduct. However, under clause 24(4) such an offer must clearly state "*(a) that it is an offer to enter into a costs agreement; and (b) that the offer can be accepted in writing or by other conduct; and (c) the type of conduct that will constitute acceptance*". Thus if you wish to argue that the client may accept, for example, paying bills calculated under the costs agreement, it will be necessary to expressly provide for this in the agreement itself.

**Billing**

Clause 31(1) provides that a legal practice cannot commence legal proceedings to recover legal costs from a person until at least 30 days after the law practice has given a bill in accordance with clause 32 and 33. Previously unless a costs agreement gave time to pay proceedings could issue immediately.

Clause 32 provides that a bill or the covering letter to the bill must be signed on behalf of a law practice by a legal practitioner or by an employee of the law practice authorised by a principal of the law practice to sign bills (although it is sufficient if the covering letter is signed by the legal practitioner). If an unsigned bill is sent out with an unsigned cover letter, the bill is ineffective and any proceedings based on it will be stayed.

Clause 33 provides that a bill must be accompanied by a written statement of the rights of the client to dispute it, unless per clause 32(2) the client is a sophisticated client (as to which see discussion above. A law practice is regarded as having complied with this provision if they provide a statement in the form prescribed by regulations.

Any person entitled to an adjudication of legal costs to which a bill relates may, as previously, request the law practice to give an itemised bill and the law practice must comply with the request within 21 days. If such a request is made then under clause 34(5) the law practice cannot commence proceedings to recover the legal costs until 30 days after compliance with the request for the itemised bill.

**Conclusion**

Practically, solicitors must:

- apportion existing clients between sophisticated and unsophisticated;
- adopt a new retainer provision for unsophisticated clients which meets all disclosure requirements of the Act;
- print bills for unsophisticated clients with advice of their right to challenge them;
- institute a system for reviewing and updating estimate of costs; and
- when fee recovery from a client is being considered, have a process for checking whether disclosure requirements are met thereby determining if court action can issue in the normal course or if adjudication is necessary. **B**