New cost provisions after the end of the Grandfather Clause

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The following article is a condensed version of a paper previously presented at a Law Society Continuing Professional Development session.

All practitioners should be aware that on 1 July 2015, an exemption which applied to certain client retainers entered prior to 1 July 2014 came to an end.

Major amendments to the *Legal Practitioners Act 1981 (SA)* (the Act) came into effect on 1 July 2014.

There is a "grandfather clause" in clause 9 of Schedule 2 to the Act, which exempted retainers entered into prior to 1 July 2014 from the requirements of the new cost provisions (including in relation to cost disclosure) in the Act which came into effect on that date.

Accordingly, until now, practitioners have only needed to concern themselves with updating retainer agreements and terms for use in those matters started on or after 1 July 2014.

The grandfather clause for retainers before 1 July 2014 was not, however, open-ended. The legislation included, in effect, an "expiry date" for that "grandfather clause", of 1 July 2015 (see schedule 2, clause 9(3) of the Act).

This article outlines the effect of this expiry of the grandfather clause from 1 July 2015, and the issues that practitioners need to address in the conduct of their practices to reflect this.

LEGAL ISSUES

Clause 9(1) in Schedule 2 to the Act provides that "… *schedule 3 of the Principal Act (as inserted by this Act) applies to a matter if a client first instructs the law practice in a matter on or after commencement of…*" 1 July 2014; and that any matter "…*immediately before the relevant day continues…*" to have the "old" law apply.

Clause 9(3) in Schedule 2 to the Act provides that the old law "*will cease to apply to the matter on the first anniversary of the commencement*"; as the commencement date was 1 July 2014, the "new" provisions apply to all matters from 1 July 2015.

The first issue is what is meant by "matter" in the Act – does this mean the entire engagement with a client, or, say, some part or task within it? While "matter" is not defined by the Act, clause 1 of Schedule 3 to the Act does define "litigious matter" as "*a matter that involves or is likely to involve, the issue or defence of proceedings in a Court or Tribunal*", suggesting that "matter" means the whole of the activity in which the solicitor is briefed, from beginning to end.

This is, however, subject to the general transitional provisions of the *Act Interpretation Act 1915* (SA) (Interpretation Act).

The law on its face appears to be capable of retrospective application to matters commenced before 1 July 2014 on 1 July 2015, unless the transitional provisions in the Interpretation Act save the efficacy of actions taken under the old law.

A literal interpretation of the transitional provisions in the Act would have bizarre results. For example, a solicitor who acted in accordance with the old laws then might become retrospectively in breach of the new obligations and provisions on 1 July 2015, if the "new" law was taken to date back, retrospectively, to 1 July 2014, and potentially be subject to disciplinary proceedings for steps or actions which were entirely legal when he or she performed them in that period from 1 July 2014 to 1 July 2015.

Section 16(1)(c) of the Interpretation Act contains the solution to this issue - this provides that when an Act is repealed, amended or has expired, the alterations to the Act do not "*affect any right interest title, power or privilege, created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal amendment or expiry*". This is supplemented by section 16(3) of the Interpretation Act, which provides that any Act or enactment stands to continue for the purpose of completing matters in progress "*if there is no substituted Act or enactment adapted to its continuance and completion.*"

Whether section 16 of the Interpretation Act saves the rights or duties imposed under the Act from the retrospective application of clause 9(3) in Schedule 2 to the Act, requires an examination of two different categories of actions.

ACTIONS OR LIABILITIES ARISING AFTER 1 JULY 2015

Actions performed or liabilities accruing after the operation of the "old" legislation are not saved by operation of section 16 of the Interpretation Act. Examples of such matters include:

(a) Bills sent to clients after 1 July 2015

Clause 33 in Schedule 3 to the Act requires a bill to contain a notification of rights, with clause 23(3) in Schedule 3 to the Act requiring that, if interest is to be validly charged, the interest rate charge will be noted separately each time a bill (whether interim or final) is issued. Thus, in a retainer that was commenced prior to 1 July 2014 for a matter that then continues after 1 July 2015, any interim or final bills issued after 1 July 2015 will need to contain the requisite notices in accordance with the "new" law under the Act.

Despite the potential retrospective application of clause 9(3) in Schedule 2 to the Act, bills delivered to clients between 1 July 2014 and 1 July 2015 are unlikely to be invalidated. They will be "saved" by sections 16(1)(b) and 16(1)(c) of the Interpretation Act, as the operation of the "new" law with effect from 1 July 2015 will not "alter the effect" of anything done prior to the repeal, nor will it "*affect any*

right" (the right to payment under the bill) "*accrued prior to the repeal*".

(b) Disclosure obligations arising after 1 July 2015

Clause 14 in Schedule 3 to the Act requires additional disclosure (as compared to the law prior to 1 July 2014) in relation to the settlement of any litigious matters. This creates a difficulty from 1 July 2015. Regardless of when the retainer for a particular matter was entered, on and from 1 July 2015 a solicitor will need to comply with the disclosure requirements under clause 14 in Schedule 3 to the Act.

This includes, for example, the obligation on the solicitor under clause 19 to Schedule 3 of the Act to give a progress report, which falls due on a reasonable request by a client, whether or not the retainer was entered before 1 July 2014.

However, what is not clear is the extent to which pre-1 July 2014 retainers are obliged to comply with the ongoing obligation to disclose "*substantial change*" which is imposed by clause 17 in Schedule 3 to the Act.

The reference to *"disclosure already made under this Part"* in clause 17 of Schedule 3 to the Act allows the interpretation that pre-1 July 2014 retainers do not have to include that particular disclosure, as "*this Part*" concerns only post-1 July 2015 retainers.

While this is probably correct, as a practical approach the writer recommends that practitioners disclose any "substantial change" to the client, regardless of whether the retainer is pre or post 1 July 2014.

In this regard, it is also worth noting that the Act is not considered as a code for the conduct of solicitors (see *Branson v Tucker* (2012) NSWCSA 310), and there is room for the survival of common law rights which are not inconsistent with its provisions - a future failure to disclose may be a breach of a solicitor's general fiduciary duty to his or her client.

ACTIONS OCCURRING BEFORE 1 JULY 2015

As set out above, the validity of a "pre 1 July 2014" retainer is likely to be preserved by the operation of section 16 of the Interpretation Act for the period to 1 July 2015, and accordingly no disciplinary complaint could be raised for noncompliance with the "new" law in respect of pre 1 July 2014 retainers, in relation to the period up to 1 July 2015.

However, it is clear that for any matter which is continuing after 1 July 2015 and for which the retainer was entered before 1 July 2014, the solicitor will need to enter a new written retainer with the client.

PRACTICAL CONSEQUENCES

Practitioners should immediately review and, if at all possible, finalise and close any files commenced prior to 1 July 2014.

For matters with retainer agreements entered into prior to 1 July 2014 and which are continuing beyond 1 July 2015, the solicitor must write to the client to explain the legislative changes, and to note that the client will need to enter into a new retainer agreement. The retainer agreement should be provided to the client, either in the "sophisticated" or "unsophisticated" client forms as appropriate and as required under the Act.

While the client is entitled to refuse the new retainer, this is probably not likely to be a frequent event, given that the variances between the form of the retainer under the "old" and "new" versions of the Act will be in the client's favour under the "new" version (for example, reducing interest rates, and imposing greater disclosure rights on solicitors in the clients' favour).

If a client does refuse the new retainer agreement, this may be a basis for declining to act for the client, but one might need to seek advice from the Law Society's Ethics division before doing so. **B**