

## **Legal Profession Act 2004**

### **Part 3.2 Costs disclosure and assessment**

#### **Division 1 Preliminary**

##### **301 Purposes**

The purposes of this Part are as follows:

- (a) to provide for law practices to make disclosures to clients and prospective clients regarding legal costs,
- (b) to regulate the making of costs agreements in respect of legal services, including conditional costs agreements,
- (c) to regulate the billing of costs for legal services,
- (d) to provide a mechanism for the review of legal costs and the setting aside of certain costs agreements.

##### **302 Definitions**

(1) In this Part:

*bill* means a bill of costs for providing legal services.

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*itemised bill* means a bill that specifies in detail how the legal costs are made up in a way that would allow them to be assessed under Division 11.

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*lump sum bill* means a bill that describes the legal services to which it relates and specifies the total amount of the legal costs.

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#### **Division 3 Costs disclosure**

##### **309 Disclosure of costs to clients**

- (1) A law practice must disclose to a client or prospective client in accordance with this Division:
- (a) the basis on which legal costs will be calculated, including whether a fixed costs provision applies to any of the legal costs, and
  - (b) the client's or prospective 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 within 30 days after receipt of a lump sum bill, and

- (iv) be notified under section 316 of any substantial change to the matters disclosed under this section, and
- (c) an estimate of the total legal costs if reasonably practicable or, if it is not reasonably practicable to estimate the total legal costs, 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
- (d) details of the intervals (if any) at which the client or prospective client will be billed, and
- (e) the rate of interest (if any) that the law practice charges on overdue legal costs, and
- (f) ..., and
- (g) the client's or prospective client's right to progress reports in accordance with section 318, and
- (h) details of the person whom the client or prospective client may contact to discuss the legal costs, and
- (i) the following avenues that are open to the client or prospective client in the event of a dispute in relation to legal costs:
  - (i) costs assessment under Division 11,
  - (ii) the setting aside of a costs agreement under section 328 (Setting aside costs agreements),
  - (iii) mediation under Division 8, and
- (j) any time limits that apply to the taking of any action referred to in paragraph (i), and
- (k) that the law of this jurisdiction applies to legal costs in relation to the matter, ...

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### **316 Ongoing obligation to disclose**

A law practice must notify the client in writing of any substantial change to anything included in a disclosure under this Division as soon as is reasonably practicable after the law practice becomes aware of that change.

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### **318 Progress reports**

- (1) A law practice must give a client, on reasonable request:
  - (a) a written report of the progress of the matter in which the law practice is retained, and
  - (b) a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter.

- (2) A law practice may charge a client a reasonable amount for a report under subsection (1) (a) but must not charge a client for a report under subsection (1) (b).

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## **Division 5 Costs agreements**

### **322 Making costs agreements**

- (1) A costs agreement may be made:
  - (a) between a client and a law practice retained by the client, or
  - (b) between a client and a law practice retained on behalf of the client by another law practice, or
  - (c) between a law practice and another law practice that retained that law practice on behalf of a client.
- (2) A costs agreement must be written or evidenced in writing.
- (3) A costs agreement may consist of a written offer in accordance with subsection (4) that is accepted in writing or by other conduct.
- (4) The offer must clearly state:
  - (a) that it is an offer to enter a costs agreement, and
  - (b) that the client may accept it in writing or by other conduct, and
  - (c) the type of conduct that will constitute acceptance.
- (5) A costs agreement cannot provide that the legal costs to which it relates are not subject to costs assessment under Division 11.

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### **326 Effect of costs agreement**

Subject to this Division and Division 11, a costs agreement may be enforced in the same way as any other contract.

### **327 Certain costs agreements are void**

- (1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.
- (2) Subject to this section and Division 11, legal costs under a void costs agreement are recoverable as set out in section 319 (1) (a) or (c) (On what basis are legal costs recoverable?).
- (3) However, a law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.

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- (5) If a law practice does not repay an amount required by subsection (3) or (4) to be repaid, the person entitled to be repaid may recover the amount from the law practice as a debt in a court of competent jurisdiction.

### **328 Setting aside costs agreements**

- (1) On application by a client, a costs assessor may order that a costs agreement be set aside if satisfied that the agreement is not fair or reasonable.
- (2) In determining whether or not a costs agreement is fair or reasonable, the costs assessor may have regard to any or all of the following matters:
  - (a) whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice or of any representative of the law practice,
  - (b) whether any Australian legal practitioner or Australian-registered foreign lawyer acting on behalf of the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in relation to the provision of legal services to which the agreement relates,
  - (c) whether the law practice failed to make any of the disclosures required under Division 3,
  - (d) the time at which the agreement was made.
- (3) ...
- (4) If the costs assessor determines that a costs agreement be set aside, the assessor may make an order in relation to the payment of legal costs the subject of the agreement.
- (5) In making an order under subsection (4), the costs assessor must determine the fair and reasonable legal costs in relation to the work to which the agreement related, taking into account:
  - (a) the seriousness of the conduct of the law practice or any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf, and
  - (b) whether or not it was reasonable to carry out the work, and
  - (c) whether or not the work was carried out in a reasonable manner.
- (6) In making an order under subsection (4), the costs assessor may not order the payment of an amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been set aside.
- (7) For the purposes of subsection (5), the costs assessor may have regard to any or all of the following matters:
  - (a) whether the law practice and any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf complied with any relevant legislation or legal profession rules,
  - (b) any disclosures made by the law practice under Division 3, or the failure to make any disclosures required under that Division,

- (c) any relevant advertisement as to:
    - (i) the law practice's costs, or
    - (ii) the skills of the law practice or of any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf,
  - (d) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
  - (e) the retainer and whether the work done was within the scope of the retainer,
  - (f) the complexity, novelty or difficulty of the matter,
  - (g) the quality of the work done,
  - (h) the place where, and circumstances in which, the work was done,
  - (i) the time within which the work was required to be done,
  - (j) any other relevant matter.
- (8) The costs assessor may determine whether or not a costs agreement exists.
- (9) The costs assessor may order the payment of the costs of and incidental to determining an application under this section.

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## **Division 7 Billing**

### **331 Legal costs cannot be recovered unless bill has been served**

- (1) A law practice must not commence legal proceedings to recover legal costs from a person until at least 30 days after the law practice has given a bill to the person in accordance with sections 332 (Bills) and 333 (Notification of client's rights).
- (2) The Supreme Court may make an order authorising a law practice to commence legal proceedings against a person sooner if satisfied that:
  - (a) the law practice has given a bill to the person in accordance with sections 332 and 333, and
  - (b) the person is about to leave this jurisdiction.
- (3) A court or tribunal before which any proceedings are brought in contravention of subsection (1) must stay those proceedings on the application of a party, or on its own initiative.
- (4) This section applies whether or not the legal costs are the subject of a costs agreement.

### **332 Bills**

- (1) A bill may be in the form of a lump sum bill or an itemised bill.

- (2) A bill must be signed on behalf of a law practice by an Australian legal practitioner or an employee of the law practice.
- (3) It is sufficient compliance with subsection (2) if a letter signed on behalf of a law practice by an Australian legal practitioner or an employee of the law practice is attached to, or enclosed with, the bill.
- (4) A bill or letter is taken to have been signed by a law practice that is an incorporated legal practice if it has the practice's seal affixed to it or is signed by a legal practitioner director of the practice or an officer or employee of the practice who is an Australian legal practitioner.
- (5) A bill is to be given to a person:
  - (a) by delivering it personally to the person or to an agent of the person, or
  - (b) by sending it by post to the person or agent at:
    - (i) the usual or last known business or residential address of the person or agent, or
    - (ii) an address nominated for the purpose by the person or agent, or
  - (c) by leaving it for the person or agent at:
    - (i) the usual or last known business or residential address of the person or agent, or
    - (ii) an address nominated for the purpose by the person or agent,  
with a person on the premises who is apparently at least 16 years old and apparently employed or residing there, or
  - (d) by sending it by facsimile transmission to a number specified by the person (by correspondence or otherwise) as a number to which facsimile transmissions to that person may be sent, or
  - (e) by delivering it to the appropriate place in a document exchange in which the person has receiving facilities, or
  - (f) in any other way authorised by the regulations.
- (6) A reference in subsection (5) to any method of giving a bill to a person includes a reference to arranging for the bill to be given to that person by that method (for example, by delivery by courier).
- (7) In this section:

*agent* of a person means an agent, law practice or Australian legal practitioner who has authority to accept service of legal process on behalf of the person.

### **333 Notification of client's rights**

A bill must include or be accompanied by a written statement setting out:

- (a) the following avenues that are open to the client in the event of a dispute in relation to legal costs:
  - (i) costs assessment under Division 11,
  - (ii) the setting aside of a costs agreement under section 328 (Setting aside costs agreements),
  - (iii) mediation under Division 8, and
- (b) any time limits that apply to the taking of any action referred to in paragraph (a).

**Note.** These matters will already have been disclosed under section 309 (1) (Disclosure of costs to clients).

### **334 Interim bills**

- (1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.
- (2) Legal costs that are the subject of an interim bill may be assessed under Division 11 (Costs assessment), either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid.

## **Division 8 Mediation of costs disputes**

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### **336 Referral for mediation**

- (1) A client who is given a bill may refer a costs dispute about the bill to the Commissioner or to a Council for mediation if the amount in dispute is less than \$10,000.
- (2) The Manager, Costs Assessment may refer a costs dispute about a bill to the Commissioner if the amount in dispute is less than \$10,000.
- (3) The Manager, Costs Assessment may, by notice in writing, require the client and the Australian legal practitioner concerned to enter into a process of mediation if the amount in dispute is less than \$5,000.
- (4) A costs dispute about a bill may be referred under this section at any time before an application for an assessment of the whole or part of a bill is accepted by the Manager, Costs Assessment.
- (5) Mediation is not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.
- (6) Failure on the part of an Australian legal practitioner to comply with the terms of a notice under subsection (3) is capable of being unsatisfactory professional conduct or professional misconduct.

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## **Division 11 Costs assessment**

### **Subdivision 1 Applications**

#### **350 Application by clients for costs assessment**

- (1) A client who is given a bill may apply to the Manager, Costs Assessment for an assessment of the whole or any part of legal costs.
- (2) An application for a costs assessment may be made even if the legal costs have been wholly or partly paid.
- (3) If any legal costs have been paid without a bill, the client may nevertheless apply for a costs assessment and, for that purpose, the request for payment is taken to be a bill.
- (4) An application under this section must be made within 60 days after the bill was given or the request was made or after the costs were paid in full (whichever is earlier or earliest).
- (5) However, a costs assessor must deal with an application made out of time, unless the costs assessor considers that the law practice has established that to do so would, in all the circumstances, cause unfair prejudice to the law practice.
- (6) In this section:  
*client* includes the following:
  - (a) a person who has been given a bill by a law practice (other than a person who is acting merely in the capacity of agent or a similar capacity, for example, a courier),
  - (b) a person who has paid legal costs,
  - (c) a person (other than a person who was given a bill) who is liable to pay legal costs,
  - (d) an executor, administrator or assignee of a person referred to in paragraph (a), (b) or (c),
  - (e) a trustee of the estate of a person referred to in paragraph (a), (b) or (c),
  - (f) a person interested in any property out of which a trustee, executor or administrator who is liable to pay legal costs has paid, or is entitled to pay, those costs.