

LEGAL COSTS, OUTLAYS AND DISBURSEMENTS AND BILLING

The Legal Services Commission (the Commission) receives more complaints about lawyers' billing practices and legal costs than any other single issue. The Legal Profession Act 2007 (LPA) regulates legal costs, how law practices are to bill for those legal costs and the process for having legal costs assessed.

Purposes of legal costs and billing

This regulatory guide provides an overview of the LPA on these issues and comments on the Commission's approach to complaints about legal costs and billing.

Part 3.4 of the LPA deals with legal costs, billing, and how and when costs may be assessed.

This includes in respect of speculative personal injury claims.

The purpose of these obligations and regulations, as they concern this regulatory guide, are to:

- regulate the billing of costs for legal services
- provide a mechanism to assess legal costs
- provide for a maximum payment for a law practice's conduct of a speculative personal injury claim.

These objectives sit within the broader purpose of the LPA, to protect the consumers of legal services and the public generally.

When assessing conduct issues arising from non-compliance with obligations around legal costs and billing, the Commission will have regard to these purposes.

This aligns with the approach taken by the courts, and the usual rules of statutory construction.

Fair and reasonable legal costs

Legal costs must be fair and reasonable; any costs agreement that is not fair and reasonable may be set aside by a court or the Queensland Civil and Administrative Tribunal (QCAT).

The court and QCAT have wide discretion when considering what is fair and reasonable.

Some matters they may consider include the conduct and circumstances of the parties after the agreement was made and whether adequate costs disclosure was made.

If a costs agreement is set aside, the court or QCAT may decide the fair and reasonable value of legal costs.

If legal costs are assessed, a costs assessor must have regard to the reasonableness of the work and the fairness and reasonableness of costs charged, if the costs are not calculated by reference to a compliant costs agreement.

Costs that are not fair and reasonable may ultimately result in the law practice being referred to the Commission by the court or a costs assessor.

Recovering legal costs and interest

The LPA specifies that legal costs are recoverable when they are:

- under a valid costs agreement
- if there is no costs agreement, under the applicable scale of costs
- if neither of the above apply, the fair and reasonable value of the legal services provided.

Without court ordered permission, a law practice cannot start proceedings to recover legal costs unless 30 days have passed since the law practice issued the client a bill.

The bill may be either a lump sum or itemised bill.

The LPA allows a law practice to charge interest on unpaid legal costs where:

- it's provided for in the costs agreement
- otherwise, 30 days after the law practice gives a bill for the legal costs.

When charging interest, a bill must state that interest is payable and the rate of interest.

The rate of interest must not be more than the rate prescribed under the Civil Proceedings Act 2011, section 59(3).

Lump sum bills vs itemised bill

An itemised bill is one that states, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed.

A lump sum bill is one that describes more generally the legal services it relates to and specifies the legal costs associated with those services.

Where a law practice gives a lump sum bill, a client (and anyone else entitled to apply for an assessment of the legal costs the bill relates to) may request an itemised bill.

The law practice must comply with this request within 28 days of the date it was made.

The law practice also must not charge for the preparation of an itemised bill.

A law practice must not commence proceedings to recover legal costs until:

- at least 30 days after delivering a lump sum bill, or
- if an itemised bill is requested within 30 days of being given a lump sum bill—until 30 days after the issue of the itemised bill.

Compliant and enforceable bills

Bills that comply with the requirements of the LPA may be either in the form of a lump sum bill or an itemised bill, but in either case must:

- if the law practice is an incorporated legal practice, have the law practice's seal affixed or be signed by a legal practitioner director of the law practice or an officer or legal practitioner employee of the law practice
- if the law practice is not an incorporated legal practice, be signed on behalf of the law practice by a legal practitioner or employee of the law practice, or attached to a letter signed by a legal practitioner or employee
- include, or be accompanied by, a written statement that informs the client of their rights to a costs assessment and the right to seek to set aside the costs agreement, including any time limits.

As bills may not be enforced (without leave of the court) until they have been served, the LPA requires that a bill be given to a person by:

- delivering it personally to the client or the client's agent
- posting it to the client or the client's agent at their usual or last known business, or residential address or an address nominated for that purpose
- leaving it for the client or the client's agent at their usual or last known business or residential address, or an address nominated for that purpose, with a person apparently at least 16 years old employed or residing there
- if the legal costs have been agreed as a result of a tender process, in a way provided as part of that tender process, or by later agreement
- giving it electronically if the client has provided their consent.

Charging for outlays and disbursements

Outlays and disbursement typically refers to amounts that have been paid out on a client's behalf to some other person or entity.

Law practices may charge disbursements to clients, including under conditional costs agreements (regardless of outcome), provided proper costs disclosure has been provided.

Outlays and disbursements can be distinguished from standard business overheads such as 'postage and petties' and 'sundries', which should only be billed to a client as a disbursement if they are attributable to a matter and are capable of being, and have been, accurately costed.

A law practice is only entitled to charge and recover as an outlay or disbursement, the actual amount incurred on a client's behalf, unless they obtain the clients informed consent.

When seeking to apply a mark-up or surcharge to the amount actually paid out on a client's behalf, a law practice should obtain the clients' informed consent by:

- disclosing to the client the amount of the mark-up or surcharge in dollars or as a percentage of the actual amount
- making the disclosure in writing, in plain English and before or at the time, the client retains the law practice
- ensuring the disclosure is not hidden, but clearly visible.

Outlays and disbursements in speculative personal injury matters

For speculative personal injuries claims, interest and other additional amounts (additional amounts) are effectively treated as legal costs, and not as disbursements, when calculating the maximum amount that may be charged and recovered from a client.

See Regulatory guide: Costs disclosure and costs agreement.

Who can request a costs assessment?

The LPA permits three broad groups to request an assessment of legal costs:

- clients and third-party payers
- a law practice that retains another law practice

- the law practice giving the bill.

In all three cases, the application may be brought where legal costs have been paid without a bill or where the legal costs have already been wholly or partly paid.

Subject to sections 335 to 337 of the LPA, an application for a costs assessment must be made in compliance with the Uniform Civil Procedure Rules 1999 (UCPR).

Client and third-party costs assessment

A client may apply for an assessment of all or part of any legal costs while a third party may apply for an assessment of those legal costs payable by that third party.

Applications must be made within 12 months after a bill or request for payment was given to the client or third party, or the legal costs were paid if no bill was given or request for payment was made.

After considering the reasons for the delay, a court or costs assessor may consider an out of time costs assessment application unless the applicant is a 'sophisticated client' or a third party that would be a 'sophisticated client' if they were the client.

Similarly, a 'sophisticated client' and an associated third party that would be a 'sophisticated client', if they were a client of the law practice, may contract out of the right for a costs assessment.

Practice that retains another practice costs assessment

Where a law practice retains a second law practice to act for a client, the first law practice may apply for an assessment of the second law practice's costs.

This will most commonly occur where a solicitor law practice (the first law practice) retains a barrister (the second law practice) to act for a client.

This application must be made within 60 days after the bill was given or a request for payment was made, or the costs were paid if there was no bill or request for payment.

The right for the first law practice to seek a costs assessment does not arise where the costs agreement is directly between the second law practice and the client.

Law practice giving the bill costs assessment

A law practice that has given a bill may apply for an assessment of the legal costs the bill relates to.

This application may not be made unless at least 30 days have passed since:

- the bill was given or a request for payment was

made

- the costs were paid, if no bill was given or no request for payment was made
- a costs application was made by another person relating to the legal costs.

Costs assessment procedure

The party applying for a costs assessment must give notice to anyone the party knows to be:

- a law practice the legal costs have been paid, or are payable, to
- a law practice that retained a law practice the legal costs have been paid, or are payable, to
- the client
- a third-party payer.

The UCPR require that the applicant serve a copy of the application on to those required within 7 days.

Provided the costs agreement has not been set aside, there has not been a failure to meet disclosure obligations and the LPA does not prevent the recovery of legal costs, the costs assessor will perform the assessment by reference to the provisions of the costs agreement.

The costs assessor must consider, when assessing legal costs:

- whether it was reasonable to carry out the work
- whether the work was carried out reasonably
- the fairness and reasonableness of the legal costs, unless a compliant costs agreement applies.

The costs assessor must decide the costs of the costs assessment.

Unless ordered otherwise by the costs assessor, if the legal costs are reduced by more than 15%, or the law practice failed to comply with its costs disclosure obligations, then the law practice must pay the costs of the assessment.

Effect of a costs assessment

Where a party has made an application for a costs assessment, the law practice must not start proceedings to recover the legal costs until the costs assessment has been completed.

A court reviewing a costs assessment, or a costs assessor deciding a costs assessment, may refer information to the Commission to consider whether disciplinary action should be taken against a legal practitioner where the costs

assessor or court reduces the legal costs by 15% or more.

If the costs assessor or court must refer information to the Commission if it considers legal costs charged to be grossly excessive or the assessment raises another matter that may amount to professional misconduct.

Further Information

This guide was published on 1 March 2024 and will be updated from time to time and should be regularly reviewed on the Commission's website (www.lsc.qld.gov.au).