

ITEMISED BILLS

Regulatory Guide 1-2011 Consultation Draft

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The Legal Services Commission has recently dealt with a number of complaints about the conduct of lawyers after their clients requested an itemised bill. The Commissioner has decided to issue this regulatory guide¹ to help lawyers and users of legal services better understand a lawyer's professional obligations in these circumstances and the factors the Commission takes into account in dealing with related complaints.²

The relevant principles

We will set out the key statutory, common law and ethical principles that govern how lawyers can properly charge for their services in a separate Regulatory Guide headed *Billing Practices - the Key Principles* (forthcoming). They include most relevantly in this context the principles that **a lawyer's costs must be fair and reasonable** and that **a lawyer must, on request, give a client sufficient information about the costs the lawyer has charged the client to enable the client to make an informed decision whether the costs are reasonable, and whether to exercise his or her entitlement to have the costs independently assessed.**³

The *Legal Profession Act 2007* (the Act) sets out the specific requirements that apply to the provision of such information. It defines the term 'lump sum bill' to mean 'a bill that describes the legal services to which it relates and specifies the total amount of the legal costs'⁴ and 'any other bill that is not an itemised bill.'⁵ It defines the term 'itemised bill' to mean 'a bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed.'⁶ Importantly, the Act entitles clients (and 'third party payers') who have been given a lump sum bill to request an itemised bill. It provides that:

- 1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.
- 2) The law practice must comply with the request within 28 days after the date on which the request is made... [and]
- 3) A law practice is not entitled to charge a person for the preparation of an itemised bill requested under this section.⁷

The Act does not set a time frame for a person to request an itemised bill. It does however in the ordinary course of events require a person who applies to have their costs assessed to make the application within 12 months after the bill was given.⁸ This suggests that a person who requests an itemised bill should make the request well within that 12 month period, allowing the law practice time to comply with the request.

The commission's approach

The Commissioner believes, having regard to these principles and statutory requirements, that:

- 1) a lawyer must itemise the costs rendered in a lump sum bill within 28 days of being requested to do so by a client who has been given the lump sum bill;
- 2) an itemised bill must provide the client who requested the itemisation with sufficient information to decide whether to exercise his or her entitlement to apply to have the costs independently assessed, and must provide sufficient information to enable the costs to be assessed⁹ (but, subject

to those overriding principles, the level of detail required may vary depending on factors such as the nature of the matter, the way in which the costs are to be calculated and the client's 'sophistication' in legal matters);

- 3) a lawyer must not charge or attempt to charge a client who requests an itemised bill for preparing the itemised bill, and must not 'adjust' the amount of a lump sum bill to reflect the time taken to prepare the itemised bill;
- 4) an itemised bill may 'work out' to a higher amount than the lump sum bill but a lawyer is not entitled to charge a client more in the itemised bill than he or she charged the client in the lump sum bill that the client requested be itemised;
- 5) a lawyer may have a right to substitute a higher bill than an earlier lump sum bill if the bill goes to costs assessment, but only if the lump sum bill is delivered subject to an appropriately worded 'reservation of rights' condition in the lawyer's disclosure notice and costs agreement;¹⁰
- 6) any such 'reservation of rights' condition must be fair and reasonable, and in particular must not be intended to, or reasonably be thought to be intended to discourage or deter a client from exercising his or her entitlements under the Act;¹¹ and
- 7) if however a client exercises his or her entitlement to apply to have the costs assessed, the client must pay the lawyer the amount determined by the costs assessor regardless of whether that amount is greater or less than the amount the lawyer charged in the original bill.¹²

The Commission will deal with complaints in relation to these matters accordingly, both in settling costs disputes¹³ and deciding whether the charging of a fee for the preparation of an itemised bill or the substitution of a higher bill in a costs assessment following a request for an itemised bill amounts to charging excessive legal costs. Charging excessive legal costs is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.¹⁴

Notes:

¹ See *Regulatory Guides: An Overview* for further information about guides and what we are hoping to achieve, how we will go about developing them and, importantly, their status. The document is readily accessible on the Commission's website at www.lsc.qld.gov.au

² We are indebted to Roger Quick, author of the text *Quick on Costs* and currently a Special Costs Consultant with QICS Legal Costs Consultants, for his helpful comments on earlier drafts of this guide. It is a better paper for his input. The Commission accepts sole responsibility however for the final version.

³ The law underpinning this principle is usefully summarised by Reid DCJ in *Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2010] QDC 508. Note that while we use the 'client' throughout this document, because requests for itemised bills are most often made by clients, the *Legal Profession Act 2007* (the Act) provides at section 332 that 'any person who is entitled to apply for assessment of the legal costs' is entitled to request an itemised bill. Sections 335 -337 define who those persons are.

⁴ Section 300

⁵ See the note to section 332 (1)

⁶ Section 300

⁷ Section 332 sub-sections (1), (2) and (6). Sub-sections (3)-(5) read as follows:

- 3) If the person making the request is liable to pay only a part of the legal costs to which the bill relates, the request for an itemised bill may only be made in relation to those costs that the person is liable to pay.
- 4) Subject to sub-section (5), a law practice must not commence legal proceedings to recover legal costs from a person who has been given a lump sum bill until at least 30 days after the date on which the person is given the bill.

- 5) If the person makes a request for an itemised bill within 30 days after receiving the lump sum bill, the law practice must not commence proceedings to recover the legal costs from the person until 30 days after complying with the request.

⁸ Section 335(5)

⁹ Sections 334-344 set out the schema that applies to costs assessment.

¹⁰ Some commentators argue that lawyers may substitute, or ‘reserve the right’ to substitute a higher itemised bill for an earlier lump sum bill provided that the lump sum bill included an appropriately worded ‘reservation of rights’ clause. Thus the authors of the chapter 5 of Dr John de Groot’s text *Wills, Probate and Administration (Queensland)* argue (at paragraph 504.2) by reference to a body of case law concerning ‘reservation of rights’ clauses that ‘a solicitor may render a bill subject to a condition or reservation provided it is fair and clearly stated to the client. One reservation which is not infrequently encountered in practice is the reservation of the right to render an itemised bill in lieu of a lump sum bill and thereafter be entitled to such amount as may be shown on the itemised bill... In the writer’s view this form of reservation should be considered fair and clearly stated to the client. It discloses to the client his or her right to receive an itemised bill and also indicates that the lump sum bill is an estimate only of the costs due.’

The Commissioner disagrees. We note firstly that the case law which underpins that argument pre-dates the commencement of the Act, and that the Act obliges a lawyer at section 308 to disclose (among other things) ‘the basis on which legal costs will be calculated’. Clearly, if a lawyer proposes that the costs in a lump sum bill might be different to the costs the lawyer seeks on a subsequent costs assessment, the lawyer must disclose the ‘basis’ on which those costs will be calculated – hence any ‘reservation of rights’ condition must be included in the disclosure notice. Further, since any ‘right’ asserted by the lawyer must, of necessity, arise out of his or her retainer with a client, any ‘reservation of rights’ condition must also be set out in the costs agreement and have the client’s informed consent.

Secondly, the Act provides at section 330 that ‘a bill may be in the form of a lump sum bill or an itemised bill.’ It does not contemplate a ‘bill’ that is something else entirely, viz., ‘an estimate only’. The Act provides for estimates but only in the context of costs disclosure (e.g. at section 308).

Thirdly, consistent with the rationale underpinning a client’s right to be given sufficient information about a lawyer’s costs to enable the client to make an informed decision whether the costs are reasonable and whether to have them independently assessed (*Clayton Utz Lawyers v P & W Enterprises Pty Ltd*, above), section 332 is clearly intended to give clients a right to information about the lump sum bill that has actually been delivered. The Commissioner believes accordingly that it is that bill which must be itemised, not some new and different bill, and that while an itemised bill may ‘work out’ to a higher amount, the client should not be charged more than the amount of the lump sum bill except on assessment.

The Commissioner believes reservation of rights clauses that purport to entitle lawyers to substitute a higher itemised bill for a previous lump sum bill merely because a client exercises his or her entitlement to request an itemised bill could in some circumstances be regarded as an improper attempt to ‘contract out’ of the client’s statutory rights. See also note 11, below.

¹¹ ‘Reservation of rights’ clauses might also contravene the Australian Consumer Law (the ACL), most notably (if the legal services the subject of the bill were provided ‘wholly or predominantly for personal, domestic or household use or consumption’) the ‘unfair terms’ provisions. A lawyer who seeks to rely on a reservation of rights clause in those circumstances will need to demonstrate that the clause is reasonably necessary to protect his or her legitimate interests, that it does not cause a significant imbalance on the parties’ rights and obligations under the terms of their retainer and that it does not cause detriment to the client. The conduct of a lawyer issuing a lump sum bill and then replacing it with a higher itemised bill could also be ‘misleading or deceptive’ and contravene the ACL in that regard also, particularly if a client was led to believe that the amount of the lump sum bill was the amount payable. The Commission has published a detailed analysis of how the ACL applies to the provision of legal services on its website – see *The Application of the Australian Consumer Law to the Provision of Legal Services: A Regulatory Guide*, in preparation.

¹² Sections 334-344

¹³ This will become even more important if the proposed national legal profession reforms proceed as currently envisaged. The Commission will be obliged in those circumstances to attempt to resolve costs disputes by informal means as soon as practicable and, should those attempts fail, will be authorised to resolve the dispute by making a binding determination that the Commissioner believes to be fair and reasonable in all the circumstances

of the dispute. The Commissioner will be authorised among other things to make an order that prevents a practitioner subject to complaint from recovering an amount in dispute or, if it has already been paid, requiring the practitioner to repay the amount in dispute. See Chapter 5 (and especially part 5.3) of the COAG draft of the proposed *National Legal Profession Law*. The Law is published on the website of the Commonwealth Attorney-General's department at www.ag.gov.au/legalprofession.

¹⁴ Section 420