

# NATIONAL COSTS LAWYERS CONFERENCE 2013

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## COUNTING THE COSTS

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**Queensland Legal Services Commissioner**

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## INTRODUCTION

I have been asked to speak to you today about lump sum costs agreements and related matters. I understand that the invitation was prompted by the Commission's (the Queensland Commission's) publication late last year of a consultation draft of a proposed regulatory guide on the subject.<sup>1</sup> I will get to that, but you will understand that document and what we are trying to achieve only if you understand what we are trying to achieve by developing and publishing regulatory guides more generally, and you will understand that only if you understand how we approach our regulatory role even more broadly again. So let's start there and work our way back.<sup>2</sup>

### 1: HOW WE APPROACH OUR REGULATORY ROLE

#### 1.1: Our fundamental purposes and values

We see ourselves to have two fundamental and overlapping purposes: to provide users of legal services a timely, effective, fair and reasonable means of redress for complaints; and to promote, monitor and enforce appropriate standards of conduct in the provision of legal services, including by initiating disciplinary action as appropriate. Those purposes serve an even more fundamental purpose: to help protect and promote public confidence in the legal system, the administration of justice and the rule of law.

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<sup>1</sup> The draft document is readily accessible on the *Consultations* page of the Commission's website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au). You are most welcome – in fact I encourage you – to make a submission. The closing date for submissions is now 28 February.

<sup>2</sup> The paper draws heavily on several previous papers which are published on the *Publications* page of the Commission's website, most notably the papers I gave at the 2011 Conference of Regulatory Officers under the title *Regulating for Risk* and at the 2011 Queensland Law Society Symposium under the title *At What Cost, Costs?* You should know by the way that I am not a lawyer and that I profess no expertise in what I am increasingly coming to understand to be the arcane world of the law in relation to legal costs. My background is in public interest advocacy of one kind or another and I come at these issues from a public policy and consumer protection perspective, tempered of course by the good legal advice that I get from both the Commission's lawyers and others, some of them costs lawyers who can claim significant expertise in these matters and who are sympathetic to what we are trying to achieve. Several of them are present today. I will leave it to them to out themselves if they wish.

There is nothing remarkable about this statement of our purposes - it could have been lifted straight out of our local *Legal Profession Act* (or LPA) - but we add flesh to the bones by committing to certain equally fundamental values.

We do our best never to impose any needless regulatory burden on lawyers and law firms but to direct our regulatory resource to where it is most needed and can have the most beneficial impact in the public interest. We do our best to give a voice to consumers, particularly those consumers who are least able to assert their legitimate interests themselves, and we aspire to be well-informed, fair, transparent and accountable.

Most importantly in this context, while we do not shy away from initiating disciplinary or other enforcement action, we believe we best achieve our purposes by taking a 'consciousness-raising' and preventative approach wherever possible and appropriate in preference to a policing and punitive or 'gotcha' approach. We undertake our regulatory responsibilities accordingly. That is not always recognised by lawyers but is readily apparent in the way we go about our work.

## **1.2: Why this approach?**

There is nothing given about this approach. It is entirely consistent with and we would argue suggested by the LPA but hardly prescribed. We've come to it for various reasons. One is that we've come to recognise the limitations of the regulatory tools the LPA gives us to achieve our purposes - essentially a system for dealing with complaints and a system for conducting compliance audits of incorporated legal practices. We've been influenced also by the changing regulatory environment, not least the trend both nationally and internationally towards principles-based (or outcomes-based) regulation.

### **a) the limitations of our current regulatory tools**

The system for dealing with complaints is a fundamentally important regulatory tool which gives aggrieved consumers a means of redress for complaints. Importantly - and these would be welcome consumer protection reforms - the recalibrated system under

the proposed *Legal Profession National Law* (the National Law) would, if enacted, have given consumers a significantly more effective and efficient means of redress.<sup>3</sup>

However the system for dealing with complaints, by itself, while still fundamentally important, is now and would remain under the National Law an ineffective and inefficient means of achieving the broader regulatory purposes of monitoring and enforcing let alone promoting appropriate standards of conduct in the provision of legal services and protecting consumers more generally.

That is because it is inherently reactive, firstly, and premised on the merest of minimum standards, the standards below which lawyers can be disciplined for unsatisfactory professional conduct or professional misconduct. Furthermore it directs our regulatory gaze disproportionately to solicitors, and to solicitors who work in sole practice and small law firms and in only certain 'retail' areas of law, so much so that the conduct of solicitors who work in medium-sized and larger law firms and other, more 'commercial' areas of law is only nominally subject to this kind of regulatory scrutiny. Yet there is no reason to believe that lawyers who work in medium-sized and larger law firms or 'commercial' areas of law are somehow more competent and ethical than their small firm, 'retail' counterparts. I may be wrong about that, of course, but it is an empirical question, ultimately, and, while very little has been done by way of research, the early evidence is hardly encouraging.<sup>4</sup>

Finally and crucially the system for dealing with complaints gives us little if any 'regulatory grip' on the underlying causes of complaints. The simple fact is that the majority of substantiated complaints are attributable not to any incompetence or

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<sup>3</sup> The Commission's annual report for 2011-12 describes in some detail both this and other reforms in the draft National Law that would, if enacted, enable us to achieve our purposes very much more effectively and efficiently. The report is readily accessible on the *Publications* page of the Commission's website.

<sup>4</sup> See, for example, Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture and the Effects of Billable Hours Requirements*, UMKC Law Review, Vol 68, 2000-2001; Lisa Lerman, *Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers*, (1999) 12 *Georgetown Journal of Legal Ethics* 205 and *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 *Hofstra Law Review*, 847, 2005-2006; and William G Ross, *Kicking the Unethical Billing Habit*, (1998), 50 *Rutgers Law Review*, 2199; and Patrick J Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52, *Vanderbilt Law Review* 871, 1999. See also the discussion under the heading *Ethics checks*, below.

dishonesty on the part of the individual lawyers subject to complaint but to deficient management systems and supervisory arrangements and the like of the law firms which employ them.<sup>5</sup>

We believe accordingly that the system for dealing with complaints should be supplemented with regulatory tools that are genuinely proactive and preventative in character; that are directed to ethical capacity-building more so than potential disciplinary consequences; that engage all lawyers and law firms and not merely a subset of lawyers and law firms; and that put the focus not only on lawyers but also on law firms and their management systems and supervisory arrangements - on their 'ethical infrastructure'.

The system for conducting compliance audits fits the bill almost perfectly, at least in relation to incorporated legal practices. It requires them to have '*appropriate management systems*' which enable them to provide legal services consistent with their professional obligations, and it complements that obligation by giving us the unfettered power to '*conduct an audit of an incorporated legal practice about the compliance of the practice, and of its officers and employees [with their professional obligations] and the management of the provision of legal services by the practice, including the supervision of officers and employees providing the services.*'

The power to conduct compliance audits is the power to conduct trust account investigations writ large. It is effectively the same power but directed to a law firm's compliance with all its professional obligations, not merely its obligations in relation to handling trust monies. It is a tool that can be used both reactively and proactively, and

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<sup>5</sup> I argue the case at length in *Regulating for Risk and At What Cost, Costs?* – see note 2, above. There is a significant organisational studies literature that examines how people's behaviour is influenced by their organisational environments including for example Christine Parker, Adrian Evans, Linda Haller, Suzanne le Mire and Reid Mortensen, *The Ethical Infrastructure of Legal Practice In Larger Law Firms: Values, Policy, and Behaviour*, University of New South Wales Law Journal, 31(1);158-188 especially at pp.161-166; Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*, Melbourne University Law School Legal Studies Research paper No 339, subsequently published under the title *An Opportunity for the Ethical Maturation of the Law Firm: The Ethical Implications of Incorporated Listed Law Firms* in K. Tranter, F. Bartlett, L Corbin, R Mortensen and M. Robertson (ed), *Reaffirming Legal Ethics: Taking Stock and New Ideas*, 2010 96-128; and Christine Parker and Adrian Evans, *Inside Lawyer's Ethics*, Cambridge University Press, Melbourne, 2007, at Chapter 8.

both to police minimum standards and to promote best practice. It is directed to all the law firms to which it applies, not just small firms or firms that practice in only certain areas of law, and it focuses squarely on their management systems and supervisory arrangements - on their 'ethical infrastructure'.

These are great virtues. Not surprisingly some of us have been arguing for some time now that the power to conduct compliance audits should be extended to apply not only to incorporated legal practices but to all law firms, incorporated or otherwise.

The draft National Law, if enacted, would have taken one step forward and one step back. It would have extended the compliance audit power to all law firms, incorporated or otherwise, but, regrettably, it would also have fettered the power by allowing us to conduct an audit only if *'there are reasonable grounds to do so based on the conduct of the law practice or one or more of its associates or a complaint against the law practice or one or more of its associates.'*

This a great pity, because fettering the power in this way would rob us of an historic opportunity to *'move away from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted.'*<sup>6</sup> It would ensure for all practical purposes that regulatory attention remains disproportionately directed to small law firms and lawyers who practice in only certain 'retail' areas of law. It would compromise our ability to extend to all law firms the same program of compliance audits that has proved so effective in helping incorporated legal practices to identify their risk of non-compliance with their professional obligations, to take remedial action and to improve standards of conduct in their provision of legal services – it would effectively make that program voluntary. It would deprive us in so doing of important regulatory tools which at the same time as helping law firms identify their risk of non-compliance help us as regulators to identify the law firms most at risk of non-compliance and thus to plan well targeted remedial interventions.<sup>7</sup>

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<sup>6</sup> These are Lord Hunt's words, taken from the report of his recent and comprehensive review of the regulation of the provision of legal services in England and Wales (the *Hunt Report*, October 2009) at pp 77-78. .

<sup>7</sup> I argue the case at length in *Regulating for Risk* – see note 2, above.

**b) the changing regulatory environment**

The regulation of the provision of legal services consistent with trends in regulation more generally is becoming increasingly 'firm about outcomes, flexible about means'. It is putting increasing emphasis on broadly stated, high level principles which spell out the policy outcomes legislators and regulators are seeking to achieve and less on detailed prescriptive rules which describe exactly how the regulated communities should conduct themselves. The draft National Law, if enacted, would have taken a significant step in this direction, and thus ran to only 200 pages whilst the LPA runs to 600.

This is a welcome development for various reasons. It achieves significant deregulation by gifting lawyers far more flexibility than they have had in the past to decide how best to achieve any given broadly stated outcome in the many and varied circumstances of their own particular law practices. Furthermore it requires lawyers to reflect on ethical issues rather than simply tick the boxes. And, as Sir Gerard Brennan observed some years ago now, '*if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion.*'<sup>8</sup> We see too much of both when the lesser of both the better.

The trend towards principles-based regulation may be gathering momentum but there is nothing entirely new about it. Many of a lawyer's most fundamental professional obligations have always been expressed as broadly stated principles, whether in legislation, the common law or the conduct rules devised by their professional bodies.<sup>9</sup>

So far so good, but principles-based regulation has a down-side. Many lawyers and law firms will be uncertain what many key principles require of them in practice - including for example the principle that requires lawyers to charge no more than fair and reasonable fees – and uncertain in particular whether we as regulators will interpret and apply them in the same way they do. The downside calls out for a response.

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<sup>8</sup> Sir Gerard is quoted in Parker and Sampford, *Legal Ethics and Legal Practice*, Oxford, 1995, at p.176.

<sup>9</sup> The High Court observed many years ago now, in *Clyne v NSW Bar Association (1960) CLR 186*, that many of the fundamental rules which govern the conduct of lawyers have never been committed to writing 'because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness.' The Queensland Court of Appeal commented to similar effect in *Council of Queensland Law Society v Roche [2003] QCA 469*.

The lesson in all this is that the regulatory tools we have available to us, even the recalibrated tools we would have available to us under the draft National Law, are less than what they might be to enable us to fully and effectively promote, monitor and enforce appropriate standards of conduct in the provision of legal services. That is regrettable, but we have to get on with it nonetheless. We have to squeeze every bit of potential we can out of the regulatory tools we have at our disposal to get on to the front foot, to identify potential problems in advance and to prevent them, and we have to invent new tools which help resolve the uncertainties inherent in principles-based regulation.

### 1.3: Demonstrating our approach

I would like to think that we demonstrate our pro-active and preventative approach in all that we do. It is evident in the materials we publish including fact-sheets, information for consumers and the like; in the papers we give at continuing legal education and like events; in the workshops we conduct or co-host with our law school partners; in the projects and research that we undertake, often but not always in collaboration with legal and other academics – in fact I hope it is obvious from even a cursory glance at our website.

It is evident for example in the way we go about our core business, and in particular the creative use of our ‘own motion’ investigation and compliance audit powers.<sup>10</sup> More importantly in this context, however, it is evident in our commitment to openness and transparency, and to alerting the public and the profession to the issues of concern to us and naming them in our annual reports, our e-newsletters and in particular in this context on the *Headline Issues* page of our website; in our commitment to engaging with law firms and their leaders to encourage and assist them to strengthen their ‘ethical infrastructure’, including by developing and offering them a range of innovative on-line tools to assist, not least (but not

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<sup>10</sup> I will give further examples later in the paper but note that it is evident also in our policy of not initiating disciplinary proceedings for any but serious disciplinary offences without first inviting the practitioners concerned to acknowledge their mistake and/or persuade us they’ve done all they reasonably can to put things right with the complainants, to fix any failures in their business processes and to prevent any similar mistakes in future - and hence satisfy us that no public interest would be served by holding them publicly to account. We consistently finalise about a quarter of all the complaints we assess to involve an issue of unsatisfactory professional conduct or professional misconduct on the basis that no public interest would be served by initiating disciplinary proceedings, four to five times more than we finalise by initiating disciplinary or other enforcement action. This data is readily accessible on the *About Us* page of the Commission’s website.

only) web-based surveys or ethics checks; and in our commitment to develop and publish regulatory guides.

**a) headline issues**

Some issues that arise in the course of our work demand we give them special attention if we are to achieve our purposes. One of them arises directly from our work in dealing with complaints – the issue of costs. The Commission has always received, and continues to receive many more enquiries and complaints about costs than any other single issue. Somewhere between one-third and one-half of all the enquiries and consumer matters we receive and about one-quarter of complaints that involve a potential disciplinary issue involve costs as the primary ‘bone of contention’. These figures do not include enquiries and complaints which involve costs as a secondary or tertiary issue.

The most common enquiries and complaints involve:

- a lawyer’s failure to give adequate costs disclosure, both up-front and on-going during the course of a matter;
- a client receiving a final bill in excess of the original estimate;
- a lawyer’s failure to provide an itemised bill on request;
- a lawyer’s improper exercise of a lien; and
- a lawyer engaging in unduly aggressive debt-recovery practices.

We have identified and given priority attention to several other costs issues in the past, two in particular. One was the (then) apparently quite widespread practice of lawyers billing clients undisclosed ‘mark ups’ (or ‘secret profits’) on disbursements. Another was the less common but still too frequent practice of lawyers charging clients more in personal injury matters than they are entitled to charge under Queensland’s so-called ‘50/50 Rule’ (which caps a lawyers fees in such matters at no more than half the settlement or judgement amount less refunds and disbursements).

We have recently identified several other billing practices which appear to be commonplace and that cause us concern - and we have told the profession exactly that,

to give lawyers the heads up, both on the *Headline Issues* page of our website and in our latest annual report. They include:

- the practice of substituting an itemised bill in a higher amount for an earlier lump sum bill after a client has exercised his or her entitlement to request that the lump sum bill be itemised;
- the practice of billing clients in six minute units of time 'or part thereof' and proceeding to bill for many such units of time over the life of a file for work that took much less than six minutes, and perhaps no more than 30 seconds, thereby significantly inflating the lawyer's stated hourly rate;
- the practice of lawyers charging a 'care and consideration' component on top of their standard hourly rate, often at the lawyer's 'absolute discretion';
- the practice of charging out 'paralegals' at rates which approximate the charge out rate for lawyers; and
- the practice of barristers arguably 'double-dipping' by charging clients 'cancellation fees' for time set aside in matters that settle early when they also charge other clients for work they have performed in the time that was set aside but subsequently freed up.

There are real questions to be asked in our view as to when and in what circumstances if at all these practices are fair and reasonable and consistent with a lawyer's professional obligations.

I note with interest that lawyers give very divergent answers to those questions when, as I have, you ask them at continuing legal education events and the like. Some solicitors say, for example, that it can never be right to charge 'care and con' on top of a stated hourly rate - one senior practitioner recently described the practice as 'all con and no care' - but others appear untroubled. Some see charging 'care and con' as a kind of success fee. Others, regrettably, appear to see it as payback for the client from hell.

It strikes me, whatever else might be said about it, that it can never be right to purport to be entitled under a costs agreement to charge care and consideration at a law firm's absolute discretion. I don't see how that can possibly satisfy the firm's statutory obligation to disclose 'the basis on which legal costs will be calculated.' That obligation

seems to me to require that the firm disclose the circumstances in which it proposes to charge these costs.

Similarly cancellation fees: some barristers tell me they never have and never will charge a cancellation fee, and don't think it's right; others include standard clauses in their costs agreements which purport to entitle them to charge, for example, the full four weeks of the time set aside for a trial in the event that it settles early or otherwise falls over.

It seems to me only fair and reasonable that barristers claim some at least of their losses when they have set aside time and foregone other paid work for matters which as it happens settle early. On the other hand it hardly seems fair and reasonable for barristers to charge for time set aside that is subsequently freed up if they then use it to perform other paid work which has queued up waiting for them to get to it, or for that matter to take a holiday.

Nor can it be right in my view to include a clause in a costs agreement which purports to entitle a barrister to charge the full time set aside in a matter which settles early when the real purpose of the clause is to serve as an ambit claim in a later negotiation to strike an agreed fee – that falls well short of disclosing the basis on which the costs will be calculated.

We are investigating complaints as we speak which involve all these issues and more. We have made creative use of our own motion and compliance audit powers to broaden out the investigations as appropriate – to identify whether the particular conduct of the particular lawyer subject to complaint illustrates a systemic practice within the law firm, for example, and in relation to the complaints about barristers inappropriately charging cancellation fees, to investigate the conduct of the solicitors in entering into the costs agreements with the barristers and passing on those fees to their clients.

We are dealing with the original complaints on a case by case basis and on their individual merits, obviously, and similarly the related own motion investigations and compliance audits, and taking advice both from a professional discipline and trades practices point of view. We'll see where they go.

**b) web-based surveys, or ethics checks**

We have developed a number of innovative, on-line tools which allow us to engage with and assist law firms and their leaders to strengthen their ethical infrastructure, not least but not only <sup>11</sup> a series of web-based surveys or ethics checks. The ethics checks are ethical capacity building tools which enable law firms to audit or review the strength of their ethical infrastructure - their formal policies, procedures and management systems and processes which enable the firm to provide legal services consistent with their professional obligations but also and in particular the unwritten rules and 'the ways we do things around here' that shape what actually happens in practice. We have designed them to enable not only a law firm's leaders but also its people to engage with and reflect on key ethical issues that arise in their everyday practice of law, to prompt both spontaneous and organised discussion within the workplace about those issues and to identify and remediate any weaknesses or gaps that require attention.

Individuals are most welcome to complete the surveys but they work best when everyone at a law firm takes part, or in larger firms at least a good sample of each of the different levels and classifications of their people and people from its different branch offices if it has them. That gives the firm a window on the ways its policies and systems are perceived and implemented 'down the line' by the different levels and locations of its people, whether they're followed through in practice and the values and attitudes its people bring to their work.

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<sup>11</sup> We have developed, for example, [www.lppportal.org.au](http://www.lppportal.org.au). The portal is an on-line point of entry to our data base which allows us both to 'pull in' and 'push out' regulatory data. It enables incorporated legal practices to complete and lodge their self-assessment audit on-line and to view and update that data from time to time as appropriate, just one of many potential applications. It gives all law firms access to comprehensive data and analysis describing their complaints-histories (if any). Law firms have never previously had access to such information. We hope in due course to capitalise on the unique capacity of our back office data warehouse to cross-reference the complaints data with trust account, compliance audit and other data to develop 'risk alerts' which identify the lawyers and law firms most at risk of falling short of their professional obligations. That will better enable us to direct our regulatory resources to where they are most needed and at the same time give those law firms an opportunity to review their systems and processes themselves and to make appropriate adjustments before the Commission comes knocking. We hope in due course also to be able to push out de-identified and aggregated complaints and other regulatory and professional analysis to legal academics and the public at large, supported by an ad hoc inquiry facility which will allow them to interrogate the data.

We have developed and run five ethic checks thus far:

- a workplace culture check
- a complaints management systems check
- a supervision practices check
- a billing practices check for medium-sized and larger law firms, and
- a billing practices check for small law firms.

Several hundred firms and several thousand of their people have participated in one or more survey. Notably more than one hundred incorporated legal practices have completed the complaints management systems check as a form of compliance audit. The firms that have participated in the other surveys have done so entirely of their own volition.

We publish and continually update both the aggregated and (de-identified) firm by firm results, including various 'cross-tabulations' which compare the aggregated results according to the individual respondents' gender, length of post-admission experience and employment status within their firms and which compare the results for participating firms according to their size and business structure. That is a rich source of information about lawyers' values, attitudes and behaviours and law firm culture. Publishing that information serves a broader public interest also, by exposing aspects of law firm culture to public scrutiny. Similarly we publish the feedback we have sought and received including from the principals of the participating law firms. Happily it has been profoundly encouraging.<sup>12</sup>

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<sup>12</sup> The surveys, the survey results and the feedback are all readily accessible on the *Ethics checks* page of the Commission's website. Notably the survey results lend themselves to disinterested scholarly analysis. Our academic partners have analysed the results of the workplace culture check, the complaints management systems check and the billing practices check and published their findings in various legal journals, and are analysing the results of the supervision practices check. See Christine Parker and Lyn Aitken, (2011) *The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms*, Georgetown Journal of Legal Ethics, volume 24, issue 2, pp.399-441; Christine Parker and Linda Haller, *Inside Running: Internal Complaints Management and Regulation in the Legal Profession*, Monash University Law Review, Vol. 36, No. 3, 2010, 217-249.Review; Christine Parker and David Ruschena, *The Pressures of Billable Hours: Lessons From A Survey of Billing Practices Inside Law Firms*, University of St Thomas Law journal, 2011, 9(2), 618-663.

Consider the billing practices check for medium-sized to larger law firms by way of example. It was prompted like all the ethics checks by the realisation that the conduct of individual lawyers like the conduct of everyone else who works within an organisational setting is in large measure a function of the workplace cultures of the law firms which employ them, for better or worse. This obvious fact of human behaviour has consequences, not least for lawyers' billing practices, for example. Law firms like other commercial enterprises exist to make a profit and their workplace cultures invariably reflect their commercial among other motivations. Think of what can go wrong – think of the potential impacts on individual lawyers of unreasonable pressure to meet unrealistic billing targets, for example, or other like risk factors including performance against billing targets being, or even just being perceived to be the 'all important' performance measure for promotion and remuneration purposes. We wanted to explore these possibilities.

The survey asks a series of straightforward factual questions relevant to a firm's billing practices including, for example, the following:

- do you have a billable hours target? What is it?
- does your firm have policies and procedures in relation to (for example) reviewing fee earner time sheets; reviewing accounts rendered; billing for travel, research, internal conferences, supervision and file reviews; and for dealing with employee and/or client complaints about its billing practices?
- does your firm measure the accuracy of its fee earner's costs estimates?
- does your firm have a system for ensuring its fee earners give timely ongoing costs disclosure?
- does your firm have a system for rewarding fee earners who exceed their billable hours targets?
- are the billing practices of fee earners in your firm audited for compliance with their professional obligations before the payment of any bonuses or promotions?
- have you ever had concerns about the billing practices of other fee earners in your firm?

Finally it asks a series of questions involving different billing scenarios and whether for example the survey respondents agree or disagree with various courses of action described in the scenario.

We invited all 172 Queensland law firms which employed 7 or more practising certificate holders to participate when we first conducted the survey in 2010, all of them entirely of their own volition and on the condition of strict anonymity. We were delighted that 40 firms accepted the invitation. You can view the raw results on the Commission's website and similarly the results of more detailed statistical analyses conducted by legal researchers at both Griffith and Melbourne University Law Schools. Their analyses make interesting reading indeed.<sup>13</sup> They include the following (confining their results after a 'data cleansing' exercise to 25 of the 40 participating law firms):

- *'employed lawyers are much more likely to believe that performance measurement and management is solely determined by the amount earned, while partners see performance assessment as based on a range of factors including the amount earned, competence, efficiency, and ethics';*
- *'the majority of partners agreed with the statement that 'it feels as if there is pressure to bill from the management of the practice', but partners expressed less agreement than other lawyers. The difference in variation between the two groups is statistically significant';*
- *'in 11 of the 25 firms, more than half of the lawyer respondents reported that they had had concerns about the billing practices of others within the firm'; and*
- *'in 11 of the 25 firms, more than 20% of the lawyers reported that they had actually observed instances of bill padding. This includes 5 firms where more than 40% of the lawyers said they had observed bill padding. However in no firm had more than half of the lawyers observed bill padding.'*

They conclude that the survey reveals *'a series of clear phenomena that influence lawyers' working environments in ways that push them towards unethical behaviour'*.

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<sup>13</sup> See Parker and Ruschena, footnote 11, above

One thing for sure: the survey results gave the participating law firms important and useful information about their employees' values, attitudes and perceptions about the firm's ethical climate, all of it 'risk data' that positioned the firms' leaders to decide whether they should take remedial action. That remedial action could include, for example, if money isn't the all-important performance measure, spelling out exactly what the firm's true performance measures are, having transparent processes for assessing its lawyers' performance against those measures, and devising strategies to communicate those arrangements to their lawyers and so to counter perceptions to the contrary.

The results gave us as the relevant regulatory authority that same information, some of it quite disturbing. It is disturbing for example to learn that more than half of the lawyer respondents in 11 of the 25 firms reported that they had had concerns about the billing practices of others within the firm, that more than 20% of the lawyers in 11 of the 25 firms and more than 40% of the lawyers in 5 of those firms reported that they had actually observed instances of bill padding.

I can not help but note in this context that these 25 firms are all medium-sized and larger law firms and as such rarely if ever subject to complaint. The survey was entirely voluntary in the absence of a compliance audit power in relation to law firms other than incorporated legal practices. We could do no more than invite unincorporated practices to participate entirely voluntarily and only on the condition of strict anonymity.

Thus we can't identify the 5 firms more than 40% of whose people reported not only having concerns about their firm's billing practices but having actually observed their colleagues padding bills. There is an important lesson in this about the limitations of the regulatory tools we currently have available to us.

## **2: REGULATORY GUIDES**

We have published various guidelines previously, including *Guidelines for Charging Outlays and Disbursements*, *Guidelines for Charging Fees in Speculative Personal Injury Matters* and

various *Guidelines to Advertising Personal Injury Services*,<sup>14</sup> but have since re-thought the project and re-committed to it.

I have spoken already of the changing regulatory environment and the welcome trend towards principles-based regulation. I noted however that it comes with a downside - that it is not always obvious how a broadly stated principle applies in any given factual circumstance and so comes at the price of greater uncertainty, not least from a lawyer's point of view uncertainty whether we as regulators understand and apply a broadly stated principle in the same way they do.

Thus it is important that we set out for the benefit of lawyers and users of legal services alike the factors we propose to take into account in exercising our responsibilities in such circumstances, most relevantly our responsibilities to mediate consumer disputes including costs disputes between lawyers and their clients and to decide having investigated a lawyer's conduct whether to take disciplinary or other enforcement action. This is no more than they are entitled to expect of a transparent and accountable regulator.<sup>15</sup>

Hence the regulatory guides. We have started, and deliberately so, with a series of guides about our headline issue – about billing practices we see at the Commission and that cause us concern. We hope to write them in plain English, with as little technicality as possible, so that they can be readily understood by lawyers and users of legal services alike. We will be careful not to reintroduce prescriptive detail by the back door.

We consult widely. We seek out expert advice including, obviously, from costs lawyers. We consult with lawyers' professional bodies and directly with lawyers themselves. We want to leverage the development of the guides to serve a consciousness-raising function – to alert lawyers to the issues, to engage with them in finding solutions, and to learn from what they tell us before we settle our position.

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<sup>14</sup> These are all accessible on the *Policies and Guidelines* page of the Commission's website.

<sup>15</sup> This is a relatively novel concept in the legal services sector but our counterpart regulators in other industry sectors have been doing it for years. The Australian Securities and Investment Commission, the Financial Ombudsman Service and the Telecommunications Industry Ombudsman, for example, all publish guidance in the form of Regulatory Guides (ASIC), Practice Notes or Guidelines (FOS) and Position Statements (TIO), all of which are all readily accessible on their websites: [www.asic.gov.au](http://www.asic.gov.au), [www.fos.org.au](http://www.fos.org.au) and [www.tio.com.au](http://www.tio.com.au) respectively.

Similarly resources permitting we want to consult with and give a voice to users of legal services, especially those of them who are least able to give voice to their legitimate interests themselves - the typically one-off users of legal services who seek assistance with residential conveyances and family law, estate and personal injury matters at often critical moments in their lives. We want to learn from what they tell us also, and to develop an informed capacity to analyse issues from their point of view.<sup>16</sup>

We hope and intend that the guides will promote adherence to high professional standards and help prevent non-compliance, especially inadvertent non-compliance by that vast majority of lawyers who want to do the right thing. We hope and intend them to be persuasive but we do not intend them to be, nor could they ever be binding.

We need to be absolutely clear about this. The Commission is responsible for promoting, monitoring and enforcing standards of conduct in the provision of legal services, not for setting them. The standards are set in laws enacted by parliaments, in the judgments of the disciplinary bodies and the courts and in the conduct rules promulgated by the professional bodies. The guides are neither 'rules' nor a misguided attempt to 'codify' the rules which establish a lawyer's professional obligations. They simply articulate the factors we take into account in exercising our responsibilities in circumstances where it is unclear how an obligation applies. They reflect our commitment to transparency and accountability, and no more.

Furthermore we recognise that we are dealing with uncertainties, and matters that haven't been judicially determined. That is the whole point of the exercise. We recognise that reasonable minds, including judicial minds will differ, but this does not imply as some suggest that we are overstepping the mark and that the exercise is misconceived. Of course it is true in so far as it goes and indeed obviously true that '*the courts are best placed to*

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<sup>16</sup> It will not be easy to consult with users of legal services given that there are no counterparts in the legal services sector of the consumer advocacy organisations such as Consumer Credit Legal Services or the Australian Communications Consumer Action Network which exist in other industry sectors. There are precedents, however. We note that the Legal Services Consumer Panel in the UK has commissioned research including facilitated focus groups of legal consumers. The groups comprised people who had personal experience of using legal services within the previous two years or who were likely to use them in the next twelve months. The groups were mixed gender and included participants from both urban and rural areas, from black and minority ethnic groups, and from a range of age and socio-economic groups. Go to the *Publications* page of the Panel's website at [www.legalservicesconsumerpanel.org.uk](http://www.legalservicesconsumerpanel.org.uk) for further information.

*make statements with respect to the law' and that 'matters with any uncertainty ought be the subject of judicial or legislative clarification.'*<sup>17</sup> That hardly relieves us in the interim however of our responsibility to decide what action, if any, to take on complaints which involve matters of these kinds. It hardly relieves us of our responsibility in particular to decide if there is a reasonable likelihood a disciplinary body will find the conduct subject to complaint to be unsatisfactory professional conduct or worse and whether it is in the public interest to initiate disciplinary proceedings.

So we have to form a view, and lawyers and users of legal services alike are entitled to know what it is. If we decide to make a discipline application relying upon the views we have set out in a guide then the disciplinary body or court that hears the application will get to decide the issue and thus to clarify the hitherto uncertainty. Hopefully we will have got it right but it is always possible that we will have got it wrong. So be it: we will revise and update the guide accordingly.

In any event, be all that as it may, we have finalised two regulatory guides to date - one dealing specifically with itemised bills and the second dealing very much more broadly with the application of the Australian Consumer Law (the ACL) to lawyers. We have also published consultation drafts of two further proposed guides – one dealing broadly with the key principles that apply to billing practices and the other quite specifically with lump sum costs agreements. All four documents are readily accessible on the Commission's website.<sup>18</sup>

I will talk briefly about the guide in relation to the ACL and in a little more detail about the guide dealing with itemised bills and the consultation draft dealing with lump sum costs agreements.

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<sup>17</sup> The Queensland Law Society commented to this effect in its submission in response to the consultation draft of our proposed regulatory guide to lump sum costs agreements submission. The submission is published on the *Consultations* page of the Commission's website.

<sup>18</sup> The completed guides are published on the *Regulatory guides* page and the consultation drafts on the *Consultations* page.

## **2.1: The application of the ACL to lawyers**

This guide is no more than an introduction to a subject I suspect we will hear a lot more of in years to come. It describes in general terms how the key provisions of the ACL in relation to misleading and deceptive conduct, unfair terms and consumer guarantees and the like are likely to impact a lawyer's provision of legal services. I think they will and significantly so, if not immediately then by a progressive drip feed.

There are two things to watch for. One is whether and to what extent the Australian Competition and Consumer Commission and the state-based Fair Trading authorities will take an interest in the provision of legal services by promoting, monitoring and enforcing the application of the ACL to lawyers, perhaps collaboratively with Legal Services Commissions and like bodies or perhaps not. There are interesting and complex issues here of will, resources and jurisdiction.

The second and clearly related question is whether and to what extent the well-developed trade practices jurisprudence will impact upon what is to us the more familiar jurisprudence in relation to lawyers' professional discipline – the extent to which for example the ways the unfair terms provisions are interpreted and applied in the trades practices jurisdiction will come to impact how we decide whether a lawyer's conduct falls short against the fair and reasonable test we are so often called upon to apply in our jurisdiction.

Personally I think it is inevitable that it will have an impact and possibly - hopefully - a significant impact. One of the regrettable historical legacies of the traditional self-regulation of the legal profession is that the professional obligations of lawyers are seen predominantly through a professional discipline lens. We should be looking at them through a consumer protection lens also.

## **2.2: Itemised bills**

I noted earlier that we not infrequently receive complaints about lawyers failing to provide an itemised bill on request and about lawyers substituting an itemised bill in a higher amount for an earlier lump sum bill after the complainant requested the lump sum bill be itemised.

Complaints of the first kind are relatively straightforward except for the occasional uncertainty about how much detail is required for a bill to qualify as properly itemised. There is a great deal more uncertainty about complaints of the second kind, however, and we have had to ask ourselves the question of whether and in what circumstances if at all such conduct is acceptable. We gave this matter very careful consideration before finalizing the regulatory guide which appears on our website. It includes the following excerpt:

- *'the LPA provides that lawyers are not entitled to charge users of legal services for the preparation of an itemised bill. Hence in our view:*
  - *lawyers must not 'adjust' the amount of the original lump sum bill to reflect the time taken to prepare the itemised bill;*
  - *while an itemised bill may 'work out' to a higher amount than the original lump sum bill, lawyers are not entitled to charge more in the itemised bill than they charged in the original lump sum bill;*
  - *lawyers may have a right to substitute a higher bill if the bill goes to costs assessment, but only if the original lump sum bill is delivered subject to an appropriately worded 'reservation of rights' condition in the lawyer's costs disclosure notice and costs agreement; but*
  - *any such reservation of rights condition must be fair and reasonable and must not discourage or deter users of legal services from exercising their entitlement under the LPA to request an itemised bill,'*

I note that none of the above precludes lawyers adopting the perfectly ordinary commercial practice of offering their clients a discount. Consistent with that ordinary commercial practice, lawyers who choose to offer a discount should clearly specify in their bills the full pre-discounted amount of the bill; the lesser, discounted amount they will accept in full satisfaction of the bill; and the circumstances in which their clients may claim the advantage of the discount, usually a 'pay by' date.'

I note also and incidentally that we hope shortly to publish a revised version of the guide.

**LUMP SUM COSTS AGREEMENTS – A CONSULTATION DRAFT**

This document is a consultation draft and by no means settled. We published it on our website last November and circularised all Queensland lawyers to invite them to comment by 4 February. We have pushed back the closure date to 28 February now that it has attracted a wider audience. You are most welcome to send us submissions. Please do.

It appears from the submissions we have received to date that some lawyers misunderstand our intentions. Let me be absolutely clear about what we are not trying to do.

First we are not entering into the debate about the comparative merits of time-costed vis-à-vis fixed fee or lump sum billing. We are not interested in promoting any particular method of calculating legal costs, just that legal costs are fairly and reasonably incurred and fair and reasonable in amount however they may be calculated. Thus I have mentioned some of the problems we see with time-costed bills – the charging of care and consideration component on top of a time-costed bill, for example, and the ‘rounding up’ of repeated six minute units of time ‘or part thereof’ in a way that artificially inflates a stated hourly rate. Similarly the consultation draft highlights some of the problems we see with lump sum costs agreements, all of them very real. None of this implies that one method of calculating legal costs is preferable to the other.

That said, however, and no doubt the finalised guide will emphasise the point, lawyers who enter into carefully designed lump sum costs agreements will for that reason give those clients an up-front certainty about their legal costs that is well nigh impossible for lawyers who time-cost their services. They are almost certain to avoid the most common of all complaints – complaints alleging failure to give adequate costs disclosure, whether up-front or ongoing during the course of a matter. This is a very good thing, on both counts.

Second, while we want to say very clearly that lawyers who issue lump sum bills pursuant to fixed-fee costs agreements are obliged to itemise their bills on request, just like lawyers who issued lump sum bills pursuant to time-costed agreements or according to scale, we are not saying that the itemised bill should itemise the lump sum bill by reference to the time it has taken to complete the various discrete tasks that have been undertaken or to a scale. Our point is just that the itemised bill should itemise the work that has been done in sufficient

detail to show how and to what extent the retainer has been carried out in exchange for the costs that have been charged, so as to allow the costs to be assessed if needs be.

So what then are the problems we see with lump sum costs agreements and are trying to counter? There are three of them (but please tell us if you see more).

I have just mentioned the first of them - the apparently quite common belief that a lump sum costs agreement relieves a lawyer of his or her obligation to provide an itemised bill on request. Notably however the LPA provides quite straightforwardly that *'any person who is entitled to apply for an assessment of the legal costs to which the [lump sum] bill relates may request the law practice to give the person an itemised bill.'* It makes no provision for any exceptions.<sup>19</sup>

The second problem we see is the misapprehension that a lawyer is under no obligation to treat money paid up-front pursuant to a lump sum costs agreement as trust money. The LPA is very clear however that *'trust money includes money received by [a] practice on account of legal costs in advance of providing the services.'*<sup>20</sup>

The third problem - and a problem that results from the same mind set that resists itemisation of lump sum bills issued pursuant to fixed fee costs agreements - is a failure to give clients a sufficiently detailed description in the costs agreement of the work that is to be performed in exchange for the agreed fee, and in particular an insufficient description of foreseeable contingencies that might effect the scope of work and thus a fair and reasonable calculation of the costs.

We believe, and the Queensland Law Society puts it neatly, that *'the key to fixed fee or lump sum billing is for practitioners to carefully design and describe the scope of work with regard to the special circumstances of each matter and to make provision for foreseeable events'*<sup>21</sup> (emphasis added). It all comes back in the end to lawyers making effective costs disclosure

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<sup>19</sup> Section 332

<sup>20</sup> Section 237

<sup>21</sup> The quotation is taken from the Queensland Law Society submission in response to the consultation draft. The submission is published on the *Consultations* page of the Commission's website.

and ensuring their clients are made fully aware of what they will be charged and in what circumstances. The basic rule as always is 'no surprises'.

The consultation document includes three scenarios that illustrate a failure to describe the scope of the work to be undertaken in exchange for the fee and hence to less than satisfactory costs disclosure. They are all self-explanatory. Let's consider another scenario.

Assume that a lawyer has a lump sum costs agreement with a client to conduct a District Court criminal trial through to completion for \$30,000. Plainly, it would be unfair and unreasonable for the lawyer to charge the whole \$30,000 if the matter 'falls over' well before trial because the prosecution decides not to proceed with the charges. That is because the work contemplated by the agreement in exchange for the \$30,000 fee (that is to say, conducting a trial) has not been done. A properly drawn costs agreement would make provision for that contingency.

The 'reverse' situation (where, for example, the fee under the costs agreement is worked out on the basis of, say, a 2 day trial but the trial 'blows out' to a 5 day trial) should also be addressed. The suggestion has been made that, in this situation, the lawyer 'bears all the risk' and the client none. That however is to ignore the fact that the lawyer will invariably be drafting the costs agreement. The situation is easily addressed by the lawyer making proper provision for that contingency in the agreement. Again, a fair and reasonable approach to a 'blow out' could hardly be considered objectionable.

Let's assume however that the trial goes ahead and there is an outcome after a 2-day hearing. Assume that the lawyer sends a bill; that the narration on the bill reads 'Fee as agreed - \$30,000' and that the client requests that the bill be itemised. There is no requirement in our view that the bill be itemised as if it were rendered pursuant to a time-costed costs agreement or according to scale. But the notion that because itemisation of a lump sum bill will be different means that it does not have to be done at all simply does not follow. The itemisation should give the client sufficient information to enable them to ascertain whether the work that has been agreed has in fact been done.

An adequate itemisation might, for example, outline the dates and nature of dealings with the other side, what briefs were produced, what statements were obtained and what

conferences and court time were involved. It need not necessarily list out every single item of work done, but it must allow the client (and ultimately, a costs assessor or the court) to ascertain whether the work agreed in exchange for the lump sum fee has in fact been done.

None of this is rocket science. It all comes back to adequate costs disclosure, the provision of adequate information and the well-established principles of fairness and reasonableness.

#### **IN CLOSING**

So that is all the draft guide to lump sum costs agreements says. It is a simple document that illustrates a simple and straightforward purpose – to let lawyers and users of legal services alike know what we think about issues that arise in grey areas of a lawyer’s professional responsibilities and that we are called upon to decide within the limits of our statutory powers. It is a simple matter of transparency and accountability in our view. It also reflects our broader approach to our regulatory responsibilities in which we try proactively to prevent misconduct before it occurs wherever possible and appropriate in preference to saying ‘gotcha’ after the event.