

## Regulatory Guide 1

# Charging Outlays and Disbursements

The Legal Services Commission has had concerns in the past and continues to have concerns about some law firms' billing practices in relation to charging outlays and disbursements.<sup>1</sup> We have issued this guide to set out the factors we take into account in dealing with related complaints.<sup>2</sup>

The billing practices which cause us concern include:

- law firms charging clients more for outlays or disbursements than the amounts they have actually expended on behalf of their clients, including by charging surcharges or undisclosed mark ups (or 'secret profits') on the actual amounts they have paid out.

Undisclosed mark ups and surcharges are not outlays or disbursements and it is misleading and deceptive in our view and arguably dishonest to describe them as such.

- law firms charging clients for and describing as outlays or disbursements a range of practice overheads including, for example, items described as client registration fees, file opening fees, archive fees, file retrieval fees, file closing fees, in-house stamping administration fees, Citec administration fees, contributions to professional indemnity insurance, bank charges (as distinct from bank cheque fees) and settlement fees (when there is no agent).

The words 'outlay' and 'disbursement' refer in ordinary speech to amounts that have actually been paid out on a client's behalf to some other person or entity and in our view the same applies here.

- law firms charging clients for and describing as outlays or disbursements a range of items including, for example, postage, stationery, photocopying, printing, facsimile and email charges when the actual cost of those items hasn't been or can't be accurately identified.

We recognise that items including 'postage and petties', 'sundries', photocopies and facsimiles have traditionally been billed to clients as outlays or disbursements when the actual cost to the clients either hasn't been or can't be accurately identified. In our view,

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<sup>1</sup> This regulatory guide updates and replaces an earlier document headed *Guidelines for Charging Outlays and Disbursements* that the Commission and the Queensland Law Society published under our joint names and in June 2006. The Guidelines were widely publicised at the time including in the QLS Update of 6 June 2006 and the subsequent edition of Proctor.

<sup>2</sup> Please refer to [Regulatory Guides: An Overview \(the Overview\)](#) for further information about the regulatory guides and what we hope to achieve by publishing them. The Overview is published on the [Regulatory Guides](#) page of the Commission's website. We note there that 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' but that the guides 'are not, nor can they ever be binding.' We explain that 'the Commission is responsible for promoting, monitoring and enforcing appropriate 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 developed by the professional bodies.' We are very clear that the guides simply 'set out the factors we take into account in exercising our regulatory responsibilities in grey areas where it is uncertain how a lawyer's professional obligations apply.' This is no more than lawyers and users of legal services are entitled to expect of a transparent and accountable regulator.

however, such items should only be billed to clients as outlays or disbursements if they are capable of and have been accurately costed. If not, they may be billed to clients under the heading 'professional fees' provided the amounts are agreed with or adequately disclosed to clients prior to or at the time the clients retain the law practice to act on their behalf.

## Principles involved in charging outlays and disbursements

In our view:

- a law firm is not entitled to charge clients for practice overheads as if they were outlays or disbursements.<sup>3</sup> We repeat: the words 'outlay' and 'disbursement' refer in ordinary speech to amounts that have actually been paid out on a client's behalf to some other person or entity and in our view the same applies here.
- without the client's informed consent<sup>4</sup>, a law firm is only entitled to charge and recover as an outlay, or disbursement, the actual amount paid out on the client's behalf.
- to obtain a client's informed consent to charge more than the amount actually paid out on the client's behalf, a law practice:
  - must disclose to the client the amount of the proposed mark up or surcharge in either dollar terms or as a percentage of the actual amount; and
  - make that disclosure to the client in plain English and in writing prior to or at the time the client retains the practitioner; and
  - ensure the disclosure isn't 'buried in the fine print'. It may take the form, where there is no client agreement, of a notice designed specifically for the purpose or, where there is a client agreement or contract relating to the provision of the legal services in question, of a discrete schedule or annexure to the agreement or contract.

## Principles involved when services are provided by an associated or related entity

Similarly, we believe that:

- a law practice is not entitled to charge or recover as an outlay or disbursement amounts paid to the practice's service company, or an entity in which one or more of the partners of the law practice has an interest, whether direct or indirect, unless the law practice:
  - discloses to the client its interest in the service company or entity; and

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<sup>3</sup> see *Equuscorp Pty Ltd v Wilmoth Field Warne* (No 4) [2006] VSC 28 per Byrne J, with particular reference to disbursements at paragraphs 53-58.

<sup>4</sup> see GE Dal Pont, *Lawyers Professional Responsibility*, 3<sup>rd</sup> edition, at pp.142-144.

- discloses the actual amount paid out on the client's behalf to a third party and the amount of the fees, mark up, or surcharge proposed to be paid to the service company or entity in excess of that actual amount, either in dollar terms or as a percentage of the actual amount paid out on behalf of the client; and
- makes those disclosures to the client in plain English in writing prior to or at the time the client retains the practitioner; and
- ensures the disclosures aren't 'buried in the fine print'. They may take the form, where there is no client agreement, of a notice designed specifically for the purpose or, where there is a client agreement or contract relating to the provision of the legal services in question, of a discrete schedule or annexure to the agreement or contract.

## The Commissioner's approach to initiating disciplinary action

The Commissioner will decide any complaint or investigation matter involving an alleged or suspected breach of these principles on its individual merits in accordance with the Commission's [Discipline Application Guidelines](#).<sup>5</sup>

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<sup>5</sup> the *Discipline Application Guidelines* are published on the [Policies](#) page of the Commission's website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)

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