

Regulatory Guide 6

Itemised Bills – Explanatory Notes

Version 1, 30 March 2012

These Explanatory Notes set out the analysis of the statutory and common law principles that underpin the Commission's [Regulatory Guide 6 - Itemised Bills](#). The notes are arranged under the same headings and numbering as the guide.

THE ENTITLEMENT TO AN ITEMISED BILL

1a) -1c) See the *Legal Profession Act 2007* (the LPA), section 332, sub-sections (1), (2) and (6) respectively. We note for completeness that section 332, 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.

We note also that section 332(1) entitles 'any person who is entitled to apply for assessment of the legal costs' to request an itemised bill but that we use the term 'users of legal services' throughout the guide for reasons of brevity.

The *Australian Consumer Law* (the ACL) also deals with itemised bills and, like the LPA, requires a law practice to give users of legal services an itemised bill on request. The LPA at section 332 gives lawyers 28 days to comply with the request. The ACL at section 101 gives lawyers only 7 days to comply with the request but, importantly, the ACL at section 101 applies not to all law practices but only to incorporated legal practices. See [Regulatory Guide 7 - The Application of the Australian Consumer Law to the Provision of Legal Services](#) for further discussion of this legislative anomaly. Regulatory Guide 7 is published on the [Regulatory Guides](#) page on the Commission's website at www.lsc.qld.gov.au.

2 a) Some lawyers appear to believe that users of legal services who have been given a lump sum bill pursuant to a fixed-fee costs agreement have no entitlement to request an itemised bill. That is not correct, in our view. Section 332 makes no exception for bills issued pursuant to fixed-fee costs agreements.

Furthermore users of legal services who have been given a bill pursuant to a fixed-fee costs agreement are entitled to know whether or not the work promised in return for the fixed fee has actually been provided. Accordingly, where a lump sum bill is rendered on this basis, the itemised bill should include full details of the work done to show how and to what extent the agreement has been carried out in exchange for the claimed fee.

- 2 b)** The term 'law practice' is defined in the Dictionary at Schedule 2 of the LPA. See also *Ipex ITG Pty Ltd (in liq) v McGarvie* [2011] VSC 675 (9 November 2011).
- 3** The LPA does not set a time frame for users of legal services to request an itemised bill. It does however require at section 335(5) that users of legal services who apply to have their costs assessed must make the application in the ordinary course of events within 12 months after the bill was given or the request for payment was made or, if neither a bill was given or a request for payment made, within 12 months after the costs were paid. This suggests that users of legal services who request an itemised bill should make the request well within that 12 month period, allowing the law practice time to comply with the request.

THE CONTENT OF AN ITEMISED BILL

- 4 - 6** The LPA defines the terms 'lump sum bill' and 'itemised bill' at section 300. 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' and 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.' It adds in a note to section 332(1) that 'a bill in the form of a lump sum bill includes a bill other than an itemised bill.'

There is no prescribed or 'set' form of itemised bill in Queensland (unlike for example in New South Wales, where section 111B of the *Legal Profession Regulation 2005 (NSW)* spells out what must be included in itemised bills in that jurisdiction).

Reid DCJ summarized the relevant law Queensland in *Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2011] QDC 5. He concluded that the level of detail required may vary from case to case, 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, but 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.

Samios DCJ determined in *Golder Associates v Challen* [2012] QDC 11 that an itemised bill should include full details of each item of work done, the date each item of work was done, the basis of the charge for each item of work, the amount charged for each item of work and details of the person who carried out each item of work. While the decision in that case turned plainly on the particular circumstances of the matter at

hand, the Commission believes it provides useful guidance as to what is required of itemised bills more generally.

We believe accordingly that:

- itemised bills in time-costed matters should include details of the time spent on each item of work and the charge-out rate of the person(s) who have done the work
- itemised bills in matters where the costs are calculated according to a scale should include sufficient detail to identify which item(s) of the scale are being applied to each item of work', and
- itemised bills in fixed fee should include sufficient detail to show what work was done in exchange for the fee.

THE AMOUNT OF AN ITEMISED BILL

7a) - 7b) These two propositions seem to us to be self-evident. Users of legal services are entitled to ask their lawyers to itemise a lump sum bill (section 332), and entitled in the itemised bill to be given sufficient information about the lawyer's costs to enable them 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). The entitlement is to further and better particulars about the lump sum bill they were actually given. We believe 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, users of legal services should not be charged more than the amount of the lump sum bill except on assessment.

Further, lawyers who charge more in an itemised bill than in the lump sum bill a user of legal service requested be itemised might well in our view have contravened the prohibition of 'misleading or deceptive' conduct under the Australian Consumer Law (the ACL). We have published a detailed analysis of the requirements of the ACL in our [Regulatory Guide 7 - The Application of the Australian Consumer Law to the Provision of Legal Services](#). The guide is published on our [Regulatory Guides](#) page.

7c) - 7d) 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 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.

We disagree. In our view, the inclusion of a 'reservation of rights' clause in lump sum bills that purports to entitle lawyers to substitute a higher itemised bill if users of legal services exercise their entitlement to request the bill be itemised might well be regarded as an improper attempt to 'contract out' of the users' statutory rights.

We note firstly that the case law which underpins the view that it is acceptable to include a 'reservation of rights clause in a lump sum bill pre-dates the commencement of the LPA. Notably the LPA obliges lawyers at section 308 to disclose (among other things) 'the basis on which legal costs will be calculated', and at section 310 to make that disclosure 'in writing [and] before, or as soon as practicable after, the law practice is retained in the matter.' 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 'up front', 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, as noted above, the entitlement to be given an itemised bill under section 332 of the LPA is intended to give users of legal services a right to information about the lump sum bill that has actually been delivered to them, not some new and different bill, and sufficient information to enable them to make an informed decision whether the costs are reasonable and whether to have them independently assessed. It follows in our view that users of legal services should not be charged more in an itemised bill than the lump sum bill except on assessment.

Fourthly and finally, 'reservation of rights' clauses might also contravene the ACL, and in particular (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. Lawyers who seek to rely on a reservation of rights clause in these circumstances will need to demonstrate that the clause is reasonably necessary to protect their legitimate interests, that it does not cause a significant imbalance in the parties' rights and obligations under the terms of their retainer and that it does not cause detriment to the client.

- 8** The LPA sets out at Part 3.4, Division 7, sections 334-344 who may apply for a costs assessment, how the costs assessment process takes place, the criteria that costs assessors must take into account in making their assessment and the costs and consequences of an assessment. The parties to a costs assessment are bound by the assessment.

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1		30 March 2012