

Regulatory Guide 9

Fixed Fee Costs Agreements

The Legal Services Commission (the LSC) receives more complaints about lawyers' billing practices and costs than any other single issue. Some of these complaints concern fixed fee costs agreements and bills issued pursuant to such agreements.

We have published this guide to help lawyers and users of legal services alike better understand a lawyer's professional obligations in relation to fixed fee costs agreements, to help lawyers avoid complaints stemming from fixed fee costs agreements and to set out the factors we take into account in dealing with such complaints.¹

We have prepared the guide having regard to the feedback we received in response to the consultation draft that we published and circulated widely to the profession and others on 19 November 2012.² The guide is directed primarily to the conduct of lawyers in their dealings with 'consumers' or 'retail' clients rather than commercial clients.³

¹ We refer readers who are interested to learn more about what we are hoping to achieve by publishing regulatory guides to our publication headed [Regulatory Guides - An Overview](#). The Overview is published on the Regulatory Guides page of the Commission's website at www.lsc.qld.gov.au.

² The draft guide (headed *Lump Sum Costs Agreements*) is published on the Consultations page of the Commission's website together with the submissions we received in response. We are indebted to the people and organisations who took the time to give us their feedback. We are especially indebted to John Chisholm, Managing Director, John Chisholm Consulting and Roger Quick, one of the authors of *Quick On Costs* and a Special Costs Consultant with QICS Law. This is a much improved document for their input. The Commission is entirely responsible however for any remaining errors or omissions.

³ This is because 'retail' clients or 'consumers' – ordinary people who purchase legal services only infrequently and mostly in relation to personal injury, criminal, family law and deceased estate matters or buying or selling a house and the like – make the vast majority of complaints we see at the Commission including costs complaints. Secondly and more importantly, it is because of the 'information asymmetry' and comparative lack of bargaining power that characterises their dealings with their lawyers – their reliance upon and the trust they place in their lawyers to fully and frankly explain their options and likely costs, to explain technical terms and unusual terminology in proposed costs agreements and to bill them fairly and reasonably. See *Council of the Queensland Law Society v Roche* [2003] QCA 469; *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; and *Veghelyi v The Law Society of New South Wales* (unreported, 4057 of 1991, 6 October 1995).

The Chief Justice in *QLS v Roche* quoted Kirby P in *Foreman* to the effect that 'no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety' (page 422). He then quoted Mahoney JA in *Foreman* who said that 'if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she is conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgement in entering into them' (page 437). Mahoney JA commented to similar effect in *Veghelyi*. He noted that 'clients are, or may frequently be, in a vulnerable position vis-a-vis their solicitors. The presumption of undue influence is, I think, based in part at least upon the fact that when making decisions clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable. They ordinarily assume that the solicitor will only make such charges. Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage.'

Introduction

The *Legal Profession Act 2007* (the LPA) requires lawyers to disclose to their clients the basis on which they propose to calculate their legal costs⁴ and requires them to make that disclosure in writing either before or as soon as reasonably practicable after they accept the client's instructions.⁵ It allows lawyers to enter into costs agreements with their clients for that purpose among others.⁶ It requires some specific kinds of costs agreement to meet certain specific requirements⁷ and prohibits one kind of costs agreement altogether⁸ but otherwise allows lawyers considerable flexibility, subject of course to their over-arching ethical obligation to ensure that the agreements they enter into with their clients are fair and reasonable.⁹

Fixed-fee costs agreements allow lawyers and their clients to agree a price for the lawyer's services up front, in advance of the lawyer providing the service – and so to 'fix' the lawyer's fee to conduct a conveyance or criminal trial, for example, or to prepare a will and enduring power of attorney or to provide some other agreed service.

Fixed fee agreements stand in stark contrast to the more familiar time-costed form of costs agreement. Time-costed costs agreements provide for lawyers to calculate their costs by reference to the time it takes them to provide the service they agreed to provide in return for the agreed fee, most commonly by reference to an hourly rate, calculated more often than not in 6 or 10 minute units of time - and hence only after the service has been provided. The best they can do in advance is to estimate their costs within the required framework of disclosure.

Time-costing has been much criticized on the basis among other things that it rewards inefficiency and over-servicing (the more time it takes a lawyer to do the work, the more the lawyer gets paid) and we know that it is open to abuse in both this and other ways.¹⁰ Thus there has been lively debate in legal circles urging the advantages of alternative fee arrangements including fixed fee arrangements.

⁴ Section 308

⁵ Section 310

⁶ See section 322. As to the consequences of not having a costs agreement, see section 319.

⁷ Thus for example section 323 sets out some specific requirements of costs agreements which provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter (conditional costs agreements); and section 324 some further specific requirements of conditional costs agreements with conditional costs agreements which provide for the payment of an uplift fee.

⁸ Section 325 prohibits costs agreements which provide for the payment of contingency fees, i.e. fees which are calculated in whole or in part by reference to the amount of any award or settlement or the value of any property that may be recovered in the proceedings to which the agreement relates.

⁹ See section 328 and the discussion in *Lawyers' Professional Responsibility*, Dal Pont, 3rd ed. at [14.165]

¹⁰ We describe some of abuses in the course of discussing the key principles that apply to time-costing in *Regulatory Guide 8: Billing Practices - Key Principles*.

We do not propose to enter that debate. We have no role to promote any one method of calculating legal costs over any other, save that legal costs however they may be calculated are fairly and reasonably incurred and fair and reasonable in amount.

That said, fixed-fee agreements have some marked advantages over time-costed agreements, for both lawyers and their clients alike.¹¹ Lawyers who enter into carefully designed fixed-fee agreements give their clients a welcome up-front certainty about their legal costs that is well-nigh impossible for lawyers who time-cost their services. Furthermore lawyers who enter into fixed fee agreements are almost certain to avoid the most commonplace of all consumer complaints about lawyers - complaints that a lawyer failed to give adequate costs-disclosure and that the bill when it finally arrived came as a nasty surprise.

Thus while this guide addresses deficiencies we see from time to time with fixed-fee costs agreements and bills issued pursuant to those agreements nothing in the guide should be construed to suggest that this kind of costs agreement is inherently problematic or should be discouraged: quite the contrary.

Variants of fixed fee costs agreements

There appear to be three sub-types of fixed-fee costs agreement which we will characterise as follows:

- 'lump sum' agreements according to which lawyers and their clients agree on a single set fee for the entire legal services to be provided. The agreement purports to set that fee 'in stone' as the amount the clients must pay, come what may and regardless of the outcome;
- 'staged' arrangements which break down the legal services which will be (or may be) provided under the agreement into various defined stages and agree the fee to be paid for each stage; and
- 'capped' agreements according to which lawyers and their clients agree on the basis on which legal costs are to be calculated (say, time-costing) but then agree on an fixed upper limit to those costs.

Scoping the work to be performed

The bulk of the complaints we receive which involve fixed fee costs agreements stem from the lawyers' failure to give their clients a sufficiently detailed description of the work they agreed to perform in exchange for the agreed fee, or an insufficient description of the foreseeable contingencies that might affect the scope of the work required to be done and thus the amount of a fair and reasonable fee.

¹¹ It should be said in fairness that while time-costed agreements are vulnerable to the criticism that they reward inefficiency and over-servicing, fixed fee agreements are vulnerable to the criticism that they reward cutting corners and under-servicing (the lawyer gets paid the same fixed fee irrespective of how much time they put in). That said, British research shows that consumers who enter into fixed-fee agreements with their lawyers report higher levels of satisfaction than consumers who enter into time-costed agreements - see the *Legal Services Consumer Panel for England and Wales Tracker Survey 2013*. It shows also that consumers who are offered legal services for a fixed fee are more likely to 'shop around' than consumers who are offered time-costed services and better able to compare like with like.

Consider the conduct of the lawyer in each of the following scenarios, all of whom not unsurprisingly find themselves subject to complaint and potentially to disciplinary action for charging costs to which they are not entitled and /or for charging excessive legal costs:

1. A young man has been arrested on criminal charges and engages a solicitor to defend those charges. The solicitor assures him that he will 'see the matter through to the end of a jury trial' and they enter into a costs agreement which provides for an all up, up front fixed fee of \$100,000 including preparation, barrister's fees and outlays. The solicitor reviews the material and the police brief and engages a barrister. The matter proceeds to a committal hearing, a part of the process which he had not fully explained to his client. The young man is represented by the barrister instructed by the solicitor; the magistrate refuses to commit him for trial; and he is released. The solicitor sends his client a lump sum bill for the full fixed fee of \$100,000 who complains he has been over-charged.

The complainant in this scenario has a compelling argument in our view to seek to have the costs agreement set aside. It is clearly arguable that the lawyers' conduct before, when and after the agreement was made misled him as to the basis on which the fee was fixed and/or that the agreement failed to adequately address changed circumstances affecting the nature and extent of the legal services that were to be provided in exchange for the agreed fee.

The fee was 'fixed' on the basis of the matter proceeding to a jury trial when in fact it did not. The bill can hardly be said to represent the fair and reasonable value of the services the lawyer actually provided. The bill should be itemised in our view and assessed accordingly, and the lawyer should charge only the fee as assessed.

2. A lawyer is retained in a personal injury matter and enters into a 'staged' costs agreement with his client which provides for an all up fixed fee of \$18,500 made up as follows:
 - stage 1: pre-proceedings steps - \$2,500
 - stage 2: compulsory conference - \$3,000
 - stage 3: issue proceedings - \$4,000
 - stage 4: disclosure of documents - \$1,000
 - stage 5: mediation - \$2,000
 - stage 6: trial - \$6,000.

The matter proceeds through stages 1 and 2. No agreement has been reached but the insurer's lawyer suggests at the conclusion of the compulsory conference that the matter might be able to be resolved by mediation. The matter proceeds to mediation and settles. The lawyer sends his client a bill for \$12,500 on the basis that he has taken the matter to the end of Stage 5. The client complains she has been overcharged.

The costs agreement in this scenario scopes the work appropriately and sets what appear to be appropriate fixed fees for each of six defined stages. However the lawyer calculated the bill by adding the agreed fees for stages 1 through 5 as if the work envisaged in stages 3 and 4 had been performed when in fact it had not (and rightly so) - thus the bill should

have been calculated by adding the agreed fees for only the work that was actually performed (i.e. stages 1, 2 and 5). It should be reduced accordingly, from \$12,500 to \$7,500.

3. A lawyer is engaged by the seller of a residential property. They enter into a costs agreement which provides for a capped fee of \$1,000 with time costing to apply below that amount. The building and pest inspection is satisfactory and the transfer documents are prepared. As it happens however finance isn't approved and the contract 'falls over'. The lawyer sends his client a bill for \$1,000 arguing that 'all the real work was done'. The client complains he has been overcharged.

We would suggest to the complainant in this scenario that she request an itemised bill. If it turns out that the lawyer's costs calculated at the agreed hourly rate exceed \$1,000 for the work the lawyer performed before the contract fell over then the cap applies and the bill is justified. If on the other hand the fee thus calculated comes to some lesser amount, then the lawyer is not entitled to the 'cap' and should reduce the bill to the lesser amount.

Sometimes and in addition to complaints arising from a lawyer's failure to adequately scope the work they agree to perform in exchange for the agreed fixed fee we receive complaints about the conduct of lawyers in:

4. paying themselves (or paying their practices) money they receive 'up front' under fixed fee costs agreements rather than paying it into their trust accounts and dealing with it accordingly, as trust money; and/or
5. giving their clients lump sum bills pursuant to fixed fee costs agreements but later failing to meet a client's request to be given an itemized bill, as if entering into fixed fee costs agreements relieves them of their obligations in this regard.

We deal with these issues under separate sub-headings below.

The key principles

We will decide what action if any to take on a complaint about a lawyer's conduct stemming from a fixed fee costs agreement having regard to the following key principles in particular:¹²

1. to be valid, fixed fee costs agreements like any other costs agreements must be both fair (i.e. entered into in circumstances which are fair) and reasonable (i.e. reasonable in their terms, including the amount of any fee).

Notably the LPA gives the both the Supreme Court and the Queensland Civil and Administrative Tribunal wide discretion to set aside a costs agreement having regard among things to:

- whether the lawyer made valid costs disclosure;

¹² For further discussion about these and other key principles that govern a lawyer's professional obligations in relation to their billing practices, see *Regulatory Guide 8: Billing Practices – Key Principles*.

- the circumstances and conduct of the parties before, when and after the agreement was made; and
 - whether and how billing under the agreement addresses changed circumstances affecting the nature and extent of the legal services required to be provided under the agreement.¹³
2. costs billed pursuant to fixed fee costs agreements (like costs billed pursuant to any other kind of costs agreement) should be fair and reasonable, and if their costs are challenged, lawyers will not be allowed more than their fair and reasonable costs.
 3. lawyers are not protected from disciplinary action for charging excessive legal costs on the basis simply they calculated their costs consistent with their costs agreement with the client.¹⁴
 4. lawyers are typically in a position of distinct advantage over their clients in negotiating costs agreements, fixed fee or otherwise, especially vulnerable clients and clients who are unfamiliar with the legal system and processes. Lawyers in these circumstances are far better placed than their clients to scope the legal services that may be required and to come to decide whether the proposed fee is fair and reasonable. A lawyer's fiduciary duty to a client implies that the lawyer must not take unfair advantage of the client in these circumstances and must not prefer their own interests over their client's interests.¹⁵
 5. the Australian Consumer Law (the ACL) applies to the conduct of lawyers who enter into standard form fixed fee (or other) costs agreements with clients to provide legal services of a 'personal, domestic or household' nature, and requires that such costs agreements are fair and do not cause any significant imbalance in the rights and obligations of the parties.¹⁶
 6. money that a client pays up front under a fixed fee costs agreement on account of the legal costs that will become due to the lawyer under the agreement is trust money and must be paid into the lawyer's trust account (see below).
 7. lawyers must on request give a client sufficient information about the costs they have charged under a fixed fee costs agreement (or any other kind of costs agreement) to enable the client to make an informed decision whether to exercise their entitlement to have the costs independently assessed and, if the client applies to have the costs assessed, to enable the costs assessor to decide whether the costs are fair and reasonable (see below).

¹³ See section 328

¹⁴ See *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198; *Re Law Society of the Australian Capital Territory v Roche* (2002) 171 FLR 138; and *Council of the Queensland Law Society v Roche* [2003] QCA 469 in which the Chief Justice observed that 'the circumstance that a solicitor's right to exact certain charges is enshrined in an executed costs agreement will not necessarily protect the solicitor from a finding of gross overcharging.'

¹⁵ See footnote 3, above. The LPA imposes stringent costs disclosure obligations upon lawyers (notably at sections 308 and 315) to help remedy their clients' disadvantage.

¹⁶ For further information, see *Regulatory Guide 7: The Application of the Australian Consumer Law to Lawyers*.

Money paid up front

The LPA says at section 237 that *'trust money means money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice, and includes money received by the practice on account of legal costs in advance of providing the services'* [emphasis added].

There might be some nice questions as to whether money a client pays up front to a lawyer by way of a retainer arrangement to secure a lawyer's services or priority attention in the event the client requires some as yet unspecified legal assistance down the track is money 'entrusted' to the lawyer or money received by the lawyer 'on account of legal costs' - hence whether the money is trust money or can be paid into the lawyer's working account.¹⁷

That said, money that clients pay up front to lawyers under a fixed fee costs agreement in connection with a conveyance or a criminal trial, for example, or the preparation of a will and enduring power or some other such specified legal service is a different kettle of fish. It is money the clients pay to their lawyers on account of legal costs in advance of the services the lawyer has agreed to provide in exchange for that money.

Thus it is trust money, and it must be paid into the lawyer's trust account.¹⁸ Similarly money clients pay to their lawyers up front for outlays (e.g. barrister's fees or stamp duty) is trust money and must be treated as such.

Itemised bills

The LPA says at section 332 that *'any person who is entitled to apply for an assessment of the legal costs to which a bill relates may request the law practice to give the person an itemised bill'* and *'the law practice must comply with the request within 28 days'* [emphasis added].

The section makes no provision for any exceptions – thus a lawyer who has given a client a lump sum must give the client an itemised bill on request, and must do so whether the lump bill was issued pursuant to a fixed fee agreement or otherwise.

An itemized bill is *'a bill stating in detail how the legal costs are made up in a way that would allow the legal costs to be assessed.'*¹⁹ It is a bill which includes sufficient information about the work the lawyer has done in exchange for their costs to enable the client to make an informed decision whether to exercise their entitlement to have the costs independently assessed and, if they apply to have the costs assessed, to enable the costs assessor to decide whether the costs are fair and reasonable.²⁰

¹⁷ *State of Queensland v Masman* [2009] QSC 430 (23 December 2009) evidences that sophisticated drafting is required to avoid the conclusion that an up front payment is both a deposit 'on account of legal costs in advance of providing thee services' and hence trust money pursuant to section 237.

¹⁸ The *Legal Profession Regulation 2007* at section 58 governs how money may be withdrawn from lawyers' trust accounts.

¹⁹ See section 300

²⁰ For further information about itemised bills, see *Regulatory Guide 6: Itemised Bills*.

None of this implies that lawyers who have issued bills under fixed fee costs agreements and have been requested to provide an itemized bill must itemise the bill by reference to the time it took them to complete the various ‘items’ of work they did in exchange for the agreed fee.

It means no more than that they have to itemize (i.e. unpack, particularise or task analyse) the work they performed in sufficient granular detail to enable the client to decide how and to what extent the agreement was carried out and to make an informed decision whether to have the costs assessed and, in that eventuality, to allow an assessor to assess the costs.

It is perfectly adequate in our view to describe what searches were done, for example, what statements were obtained and from whom and when, what conferences were held and with whom and when and for what purpose, what briefs or documents were perused or prepared and when, the dates of any attendances at mediations or compulsory conferences or appearances in court and so on. None of it need reference how long those various tasks took.

Conclusion

Nobody imagines for a moment that the amount of the fixed fee under a properly considered fixed fee costs agreement can somehow be ‘plucked out of the air’. It should always be predicated on well-defined assumptions about the quantum of work that will likely be required in exchange for the agreed fee.

The costs agreement should spell out those assumptions. Skilled lawyers will mostly get them right but inevitably reality sometimes takes another course. The costs agreement should contemplate the foreseeable contingencies and describe how the fee that has otherwise been agreed will be adjusted (whether up or down) to accommodate those eventualities: *‘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.’*²¹

That’s it in a nutshell. It all boils down in the end to making effective costs disclosure and ensuring that clients are made fully aware of not only how much they will be charged but for what and the variables that might need to be factored in. The basic rule as always is to ensure that there are no surprises.

²¹ See the Queensland Law Society’s submission in response to the consultation draft of this guide. The Society’s *Costs Guide* (v1.0, 2014) includes a useful discussion of the issues involved in designing fixed fee costs agreements in a criminal law context at [2.4.1], pages 24-25.