COSTS
HOW TO GET PAID

The Impact of the Uniform Law on your Rights

For some years the various Attorney-General's Department of a number of states in conjunction with "stakeholders", discussed the implementation of the Uniform Legal Profession legislation.
This was conceived as a way of unifying the legal profession throughout Australia and producing a set of uniform rules and legislation that applies to all legal practitioners in whatever State or Territory.

Unfortunately the result that was that only Victoria and New South Wales have each passed legislation in each case cited as Legal Profession Uniform Law (NSW) and the Legal Profession Uniform Law (VIC).

By a further Act of the Victorian and New South Wales Parliaments namely, the Legal Profession Uniform Law Application Act 2014, the Uniform Law applies in all matters where instructions were received after 1 July 2015. The repealed legislation continues to apply to matters commenced before this date.

The relevant part which deals with costs is contained within Part 4.3 of the Act.
It contains a number of important provisions which effect significant changes to the existing law.
In this Paper I will deal with some of the more important features of the "new" and the "old" law, the latter being the Legal Profession Act 2004 which has its equivalent in Queensland

OBJECTIVES

These are set out in Section 169 which is in the following terms:

The objectives of this Part are-

(a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and

(b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and

(c) to provide a framework for assessment of legal costs.

COMMERCIAL AND GOVERNMENT CLIENTS

The Uniform Law does not apply in all respects to work carried out on behalf of commercial or government clients.

These are defined under Section 170(2):

(2) For the purposes of this Law, a **"commercial or government client"** is a client of a law practice where the client is-

(a) a law practice; or

(b) one of the following entities defined or referred to in the Corporations Act-

(i) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body;

(ii) a liquidator, administrator or receiver;

(iii) a financial services licensee;

(iv) a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required;

(v) a subsidiary of a large proprietary company, but only if the composition of the subsidiary's board is taken to be controlled by the large proprietary company as provided by subsection (3); or

(c) an unincorporated group of participants in a joint venture, if one or more members of the group are persons to whom disclosure of costs is not required and one or more members of the group are not any such persons and if all of the members of the group who are not such persons have indicated that they waive their right to disclosure; or

(d) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company (within the meaning of the Corporations Act) if it were a company; or

(e) a body or person incorporated in a place outside Australia; or

(f) a person who has agreed to the payment of costs on a basis that is the result of a tender process; or

(g) a government authority in Australia or in a foreign country; or

(h) a person specified in, or of a class specified in, the Uniform Rules.

(3) For the purposes of subsection (2)(b)(v), the composition of the subsidiary's board is taken to be controlled by the large proprietary company if the large proprietary company, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, can appoint or remove all, or the majority, of the directors of the subsidiary.

(4) For the purposes of subsection (3), the large proprietary company is taken to have power to make an appointment referred to in that subsection if-

(a) a person cannot be appointed as a director of the subsidiary without the exercise by the large proprietary company of such a power in the person's favour; or

(b) a person's appointment as a director of the subsidiary follows necessarily from the person being a director or other officer of the large proprietary company.

Some parts of the law do apply to government or commercial clients, notably the provisions as to conditional costs agreements (Sections 181 and 182) and prohibiting contingency

fees (Section 183). A contravention of those provisions results in the costs agreement being void and the amounts in question not able to be recovered (Section 185).

EFFECT OF NON-COMPLIANCE WITH THE LEGISLATION

One of many new and important provisions which impact upon day to day practice is to be found at Section 178, which deals with the consequence of non-compliance with disclosure obligations.

> "**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 178**
>
> **Non-compliance with disclosure obligations**
>
> **178 Non-compliance with disclosure obligations**
>
> (1) If a law practice contravenes the disclosure obligations of this Part-
>
> (a) the costs agreement concerned (if any) is void; and
>
> (b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; and
>
> (c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation; and
>
> (d) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.
>
> (2) In a matter involving both a client and an associated third party payer where disclosure has been made to one of them but not the other, this section-
>
> (a) does not affect the liability of the one to whom disclosure was made to pay the legal costs; and
>
> (b) does not prevent proceedings being maintained against the one to whom the disclosure was made for the recovery of those legal costs.
>
> (3) The Uniform Rules may provide that subsections (1) and (2)-
>
> (a) do not apply; or
>
> (b) apply with specified modifications-
>
> in specified circumstances or kinds of circumstances."

Probably the most important aspect of this Section is that where a law practice contravenes the disclosure obligations of the law, any costs agreement entered into between the law practice and the client is void.

It follows that the client is not required to pay the costs until they have been assessed or the dispute has been determined by the designated local regulatory authority, which in New South Wales is the Legal Services Commissioner.

Further, the law practice may not commence or maintain proceedings for the recovery of any part of the costs until they have been assessed or the dispute has been determined.

Importantly a contravention of this provision relating to disclosure is "*capable of constituting unsatisfactory professional conduct or professional misconduct*". I will refer to this later.

DISCLOSURE OBLIGATIONS

What then are the disclosure obligations?

Whilst there are special laws relating to the disclosure obligations with related law practices, such as counsel briefed in a matter, the main disclosure requirement is set out in Section 174 and it requires:

- As soon as practicable the client must be provided with information disclosing the basis on which the costs will be calculated;
- And also with an estimate of the total costs;
- After there is any significant change to anything previously disclosed i.e. about the way the matter is to proceed the client must be informed;
- The information required in disclosing the change must include information about any significant change to the costs that will be payable as a consequence of the change.

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 174**

Disclosure obligations of law practice regarding clients

174 Disclosure obligations of law practice regarding clients

(1) Main disclosure requirement A law practice-

(a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and

(b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client-

together with the information referred to in subsection (2).

(2) Additional information to be provided Information provided under-

(a) subsection (1)(a) must include information about the client's rights-

(i) to negotiate a costs agreement with the law practice; and

(ii) to negotiate the billing method (for example, by reference to timing or task); and

(iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; and

(iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or

(b) subsection (1)(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be

payable to allow the client to make informed decisions about the future conduct of the matter.

It will be observed that sub-section 2 provides a number of matters which must be provided to a client. This is information about client's rights which is similar to, but not entirely identical with, the present requirement.

I have seen cases where in costs assessment matters the parties have entered into a retainer agreement which is in appropriate form, containing the appropriate disclosures, but there has been no evidence of the provision of information about client's rights, importantly one about the right to negotiate a costs agreement.

The new provision, or additional provision, here is where the client should be told that the client has the right to negotiate the billing method, that is by reference to the timing at which bills will be forwarded and/or the work which may form the part of each bill.

(3) **Client's consent and understanding**

If a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs."

Another additional obligation on the profession is contained in sub-section 3. A law practice has to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

This seems to me to introduce a new concept of disclosure, namely what is to happen in the matter.

This is of particular concern in matters which have the potential to become litigious, or which already are litigious, where one is instructed by a Respondent to proceedings which have already been commenced. It is clearly now necessary to confirm in writing to the client just what it is proposed to do in the matter.

It seems to me that this will be a very difficult provision to comply with because on one reading of it could require a law practice to spell out the proposed conduct of the matter, whatever that means. The conduct of a matter, particularly a litigious one, cannot be anticipated in advance usually and will be, to a great extent, dependent upon the attitude and conduct of the other side and the other side's legal advisors.

It seems to me that it will be a requirement in each particular type of matter one receives instructions in to determine what could be the possible ways in which the matter will proceed, settlement negotiations, disclosure, mediation and litigation.

PROPORTIONALITY

A lawyers activity in any matter must always bear proportionality to what is in issue. This concept is going to come more and more to the fore as the Courts commence to deal with the way in which to better utilise their scarce resources.

It will also have serious implications for the amount of costs that one can expect to legitimately claim from a client.

And of course it will be recalled that Section 172 of the legislation is in these terms:

> "**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 172**
>
> **172 Legal costs must be fair and reasonable**
>
> (1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are-
>
> (a) proportionately and reasonably incurred; and
>
> (b) proportionate and reasonable in amount."

For some years the Courts took the view that they had to have regard to what is termed the proportionality principle.

The proportionality principle was the subject of consideration by the New South Wales Court of Appeal in Skalkos and T & S Recoveries (2004) NSW CA 281. In his Judgment His Honour Justice Ipp said this:

> "*The ground on which the claimant seeks to challenge the decision … is firstly that the costs assessor failed to take into account the proportionality between the amount of the verdict and the amount assessed for costs, and secondly that the master* [on appeal] *failed to have regard to this principle of proportionality in determining whether or not the costs assessor had erred.*
>
> *In my opinion in determining whether costs have been reasonably and properly incurred, it is relevant to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue.*"

I believe we will hear more about this approach in the future. In an excellent Paper given for the New South Wales Bar Association Judge Peter Johnstone of the New South Wales District Court said in relation to the procedures of a modern court that one must have regard to the overriding

purpose which is facilitating the *just, quick and cheap* resolution of the real issues in the proceedings, in accordance with the dictates of justice and the objectives of eliminating delay and ensuring proportionality of costs.

In an extra judicial paper delivered in 2007 by Justice Brereton of the New South Wales Supreme Court His Honour noted that the practice and procedure of the Courts is to implement practice and procedure with the object of resolving issues in such a way that the costs of the parties is proportionate to the importance and complexity (not necessarily the quantum in monetary terms) of the subject matter in dispute. The reference to cost to the parties is, I think, a reference to solicitor/client costs.

His Honour's remarks which were recently repeated at a regular meeting of Costs Assessors have application not just to civil proceedings in the Supreme Court but also to proceedings under the Family Law Act. The remarks are apposite not just to the procedures of the Court, but also to the way in which costs will be calculated and possibly capped.

We should always bear this in mind not just in how we act in a matter, but in how we charge.

FAIR AND REASONABLE

A new and immensely important provision is to be found in Section 172.

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 172**

Legal costs must be fair and reasonable

172 Legal costs must be fair and reasonable

(1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are-

(a) proportionately and reasonably incurred; and

(b) proportionate and reasonable in amount.

(2) In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect-

(a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and

(b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and

(c) the labour and responsibility involved; and

(d) the circumstances in acting on the matter, including (for example) any or all of the following-

(i) the urgency of the matter;

(ii) the time spent on the matter;

(iii) the time when business was transacted in the matter;

(iv) the place where business was transacted in the matter;

(v) the number and importance of any documents involved; and

(e) the quality of the work done; and

(f) the retainer and the instructions (express or implied) given in the matter.

(3) In considering whether legal costs are fair and reasonable, regard must also be had to whether the legal costs conform to any applicable requirements of this Part, the Uniform Rules and any fixed costs legislative provisions.

(4) A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if-

(a) the provisions of Division 3 relating to costs disclosure have been complied with; and

(b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4."

It will be noted that the concept of proportionality has now been introduced into the equation. It has always been the case that proportionality is a test of whether or not costs were reasonably and properly incurred, but this makes it abundantly clear.

The new Section appears to me to introduce a whole new series of considerations additional to the current considerations.

What is the effect of the provision in sub-section 4 which suggests that where the disclosure obligations have been complied with (and remember these are continuing obligations) and there is no contravention of any provision of Division 4 the costs agreement is prima facie evidence that the legal costs disclosed in the agreement are fair and reasonable.

Does that mean that there is nothing more to do?

AVOIDANCE OF INCREASED COSTS

The legal consumer gained another advantage from the new legislation in provisions of Section 173 which is in these terms:

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 173**

Avoidance of increased legal costs

173 Avoidance of increased legal costs

A law practice must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs."

This is a provision which I suspect clients will endeavour to use where a dispute arises.

There are two elements to this provision – the law practice must not cause costs to "unnecessarily" increase by a particular course of action, and then there is the obligation to "act reasonably" and to avoid "unnecessary delay" which results in an increase in costs.

There is scope here for a client to complain that using the discovery process or Subpoenae which does not provide material of comfort or of use to the client or which can be used in a litigious matter, was unnecessary.

This points to the need for very specific instructions in litigation.

And what is an "unnecessary" delay, and who is responsible for it?

PRELIMINARY AGREEMENT

Sections 174(4) and (5) provides for a reduced disclosure obligation where the anticipated costs are $3,000 or less, and a lower threshold is, where the amount of anticipated costs below which one does not need to enter into a retainer agreement or make a disclosure, is $750.00.

However, this threshold relates to the total legal costs in the matter as opposed to the total legal costs in respect of the initial stages of a matter.

The disclosure documents for the "higher threshold" are set out below at the end of this paper, separately for Barristers or Solicitors.

SETTLEMENT OF LITIGATION

Another obligation which will arise in day to day conduct of a matter is work provided in more or less the same terms as the previous existing Section 313 as to the disclosure obligations regarding the settlement of litigious matters.

Before a settlement is put into effect ("executed") the law practice must disclose a reasonable estimate of the amount of legal costs payable by the client at that point, including the costs of what may be payable to the other party, and a reasonable estimate of any contribution to the costs likely to be received from another party.

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 177**

Disclosure obligations regarding settlement of litigious matters

177 Disclosure obligations regarding settlement of litigious matters

(1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed-

(a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay); and

(b) a reasonable estimate of any contributions towards those costs likely to be received from another party.

(2) A law practice retained on behalf of a client by another law practice is not required to make a disclosure to the client under subsection (1), if the other law practice makes the disclosure to the client before the settlement is executed."

CONSEQUENCES OF NON-COMPLIANCE

The consequences of non-compliance with disclosure obligations I have touched upon above will include the result that the costs agreement is void and therefore the rate at which costs may be charged is at large.

This is in contrast to the previously existing position where under Section 361 the costs assessment must be on the basis provided for in the retainer agreement.

It is in further contrast to the possibility under the previous legislation Section 317(4) that a proportion of the costs found to be fair and reasonable by a costs assessor can be, reduced by some proportion as the consequence of non disclosure. There is no equivalent provision in this legislation.

That is in addition to the mandatory provision in the previous legislation which requires the costs of a costs assessment to be met by the law practice where there has been a failure to disclose or where the costs have been reduced by more than 15%.

INTERIM BILLS

One of the more contentious aspects of the current legislation has been the right under the previous Section 334 (NSW) of a client to require a law practice to submit to an assessment of all interim bills no matter how long ago and no matter whether paid or not. There were a series of cases in Victoria and Queensland dealing with identical provisions in which the majority of the decisions were in favour of the legal consumer.

This has effectively been reproduced in the new legislation but with a twist – even though the interim bill may have already been assessed, it can be reassessed under Section 193(2) and, of course, as in the present legislation whether the bill has been paid or not.

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 193**

Interim bills

193 Interim bills

(1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.

(2) Legal costs that are the subject of an interim bill may be assessed under Division 7, either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has previously been assessed or paid."

APPLICATIONS FOR COSTS ASSESSMENTS

Applications for Costs Assessment can be made by a client who as payer is liable to pay costs of a third party payer or the law practice, including a retained law practice.

An Application must be made within 12 months after the bill was given or request for payment was made or the costs were paid if neither a bill nor a request was made.

The present legislation is more or less to that effect, however it contained a provision that had no impact upon the position of a law practice which could under the present legislation ask for the assessment of a bill more than 12 months old.

That will now cease.

The change is, apart from the fact that it is both the law practice and the client who are affected by the Section, that the Application for a costs assessment to be made out of time is to be dealt with by "*the designated Tribunal*".

Predictably the criteria for the determination includes the delay itself and the reasons for the delay and, having regard to those matters, whether it is just and fair for the Application to be dealt with after the 12 months period, or whether any prejudice exists.

This raises the spectre, as in the present legislation, of the tension between Section 198, with its 12 months requirement, and Section 193, the interim bills provision.

Section 198(3) is in these terms:

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 198**

Applications for costs assessment

198 Applications for costs assessment

(3) An application under this section must be made within 12 months after-

(a) the bill was given to, or the request for payment was made to, the client, third party payer or other law practice; or

(b) the legal costs were paid if neither a bill nor a request was made."

INTEREST

Another change in the uniform law is directed at whether or not interest may be charged. Section 195 contains this provision with the important new provision that a law practice must not charge interest either under the Section which allows for it or a costs agreement if a bill has been given more than 6 months after completion of the matter.

Sub-section 6 provides a let-out where the bill has been issued simply because a lump sum bill was initially given and the client has requested an itemised bill outside of the 6 month period or a bill has either not been issued or withdrawn at the request of the client.

There seems little that can be done here but otherwise the current provisions still apply with the requirement for either the costs agreement and, importantly, if the applicable terms of the costs agreement do not deal with interest, interest may still be charged if the costs were unpaid after the law practice has given a bill.

There are provisions which mirror the current ones as to the prescribing of a rate to be determined in the uniform rules and a statement in the bill itself to the effect that interest will be charged.

MANDATORY REPORTING

The provisions of Section 202 of the Uniform Law are important as they reproduce and perhaps strengthen the mandatory reporting requirements imposed on a Costs Assessor who in the course of an assessment finds that there has been unsatisfactory professional conduct (let alone professional misconduct). There is a mandatory reporting requirement in that regard.

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 202**

Referral for disciplinary action

202 Referral for disciplinary action

On a costs assessment, a costs assessor-

(a) may refer a matter to the designated local regulatory authority if the costs assessor considers that the legal costs charged are not fair and reasonable; and

(b) must refer a matter to the designated local regulatory authority if the costs assessor considers that the legal costs charged, or any other issue raised in the assessment, may amount to unsatisfactory professional conduct or professional misconduct."

COSTS OF THE COSTS ASSESSMENT

Section 204 makes provisions for this and here is one instance under which there has been a plus for the profession. In contrast to the mandatory provisions of Section 317 of the existing legislation referred to above now it is possible under Section 204(1) for a Costs Assessor to determine that costs are payable by a client.

This is brand new and will no doubt be controversial, but at least it may serve as a disincentive to the class of client that one frequently observes in the seeking of an Assessment of costs from a lawyer.

However Section 204(2) effectively reproduces the existing legislation, which prescribes the circumstances in which the law practice **must** pay the costs.

It is in these terms:

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 204**

Costs of costs assessment

204 Costs of costs assessment

(1) Without affecting the powers of a court or tribunal to award costs in relation to a costs assessment, a costs assessor is, subject to this section, to determine the costs of a costs assessment and by whom they are payable.

(2) Unless the costs assessor believes that in all the circumstances it is not fair and reasonable for the costs to be paid otherwise, the costs of a costs assessment are payable by a law practice if-

(a) the law practice has failed to disclose a matter required to be disclosed by Division 3; or

(b) the law practice has failed to disclose a matter required to be disclosed in the manner required by Division 3; or

(c) the law practice's costs have been reduced by 15% or more on assessment."

UNREASONABLE LEGAL COSTS – DISCIPLINARY ACTION AGAINST RESPONSIBLE PRINCIPAL

Section 207 is in the following terms:

"**LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 207**

Unreasonable legal costs-disciplinary action

207 Unreasonable legal costs-disciplinary action

(1) A contravention of a requirement of this Part that a law practice must not charge more than fair and reasonable legal costs is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of-

(a) the responsible principal or principals for a bill given by the law practice (see section 188); and

(b) each legal practitioner associate or foreign lawyer associate who was involved in giving the bill or authorising it to be given.

(2) Subsection (1) applies to a responsible principal-

(a) whether or not he or she had actual knowledge of the bill or its contents; and

(b) whether or not he or she had actual knowledge that the legal costs were unfair or unreasonable.

(3) However, subsection (1) does not apply to a responsible principal if he or she establishes that it was not reasonable for him or her to suspect or believe that the legal costs in the bill were unfair or unreasonable in the circumstances (otherwise than by the mere assertion of someone else involved in the law practice).“

This new provision is to the effect that where a law practice charges more than fair and reasonable costs (which presumably will be determined on an Assessment or by the new process with the Legal Services Commissioner) this can constitute unsatisfactory professional conduct or even professional misconduct on the part of the responsible principal “*for a bill given by the law practice as well as each legal practitioner who was involved in giving the bill or authorising it to be given*”.
The responsible principal is liable “***whether or not** he or she had **actual knowledge** of the bill or its contents and whether or not he or she had **actual knowledge** that the costs were unfair and unreasonable*”.

The only way out is for the principal to establish that it was not reasonable for him or her to suspect or believe that the costs were unfair or unreasonable in the circumstances.
However, this defence does not apply where reliance is placed upon the assertion of someone else involved in the law practice, presumably the solicitor responsible for the preparation of the bill in the first place.

Up until now it was not necessary for a principal, that is a partner of a firm, to sign a bill. Section 188 now makes **it mandatory that the bill be signed by a principal of the law practice and indeed unless there is a principal nominated as the responsible principal for a bill each principal of the law practice is taken to be a responsible principal.**

HOW TO LIVE WITH THESE PROVISIONS

It seems that one way of getting around this is to specify in a potentially litigious matter the scope of the legal works required that one will not be instructed do more than negotiate a settlement and/or to advise generally, or to act only until a future specified date requiring a new retainer agreement with a new scope of work to be undertaken to be entered into at a later stage.

The uniform standard disclosure form which, if provided to clients, will be taken to have satisfied the law practice's disclosure obligations. But as we have seen the threshold is a mere $3,000 and can be very quickly exceeded.

However, sub-section 6 is cautionary in that it notes that the requirement for writing does not affect the practice's obligations under sub-section 3 so that the law practice must take all reasonable steps to satisfy itself as to the client's understanding and consent to whatever is the proposed course of action for the conduct of the matter and the proposed costs.

There is a further provision which is in line with the existing requirements that where a change has occurred to the likelihood of the costs exceeding the higher threshold a law practice must inform the client of what is expected.

This obligation to make the disclosure arises not just when the law practice becomes aware of the likelihood of a higher amount of costs being incurred **but where they ought reasonably to have become aware of that fact**. There will be some interesting issues here, including crystal ball gazing as to what another party to the matter might do.

SUMMARY AND CONCLUSION

It is clear that the penalties under the new legislation for a failure to disclose are draconian and greatly enhanced from the penalties which applied under the existing legislation.

Accordingly all practitioners will need to go to great pains and troubles to keep clients informed about the likely costs they will incur including, in particular, changes to any previous estimates.

It will be better if you follow a few simple rules:

1. Frequent diary notes including a note as to the actual time;
2. Always send detailed bills each month;
3. When sending last months bill you forward a revised estimate covering at least the next stage of the matter; and
4. Whatever your WIP says, make sure the Bill you send is proportion to what is involved.

It is my view that it will be necessary each month when forwarding an account (and for reasons I will outline that is a very good idea) one should make a further estimate of the future costs to be incurred and any amendments to the disclosure previously made.

Whilst this is a difficult task, and one that I myself have not been able to embark upon, it nevertheless seems to me to be necessary and desirable.

29 March 2017

Michael Antony Paul
Mills Oakley | Sydney
Special Counsel

Schedule 1 Forms

Date provided to client:

Law practice details					
Name:				Contact:	
Address:				(i) hone:	
				(ii) obile (Optional):	
(iii) tate/Territory:		(iv) ostcode:		(v) mail (Optional):	
Client details					
(vi) ame:				(vii) hone:	
(viii) ddress:				(ix) obile (Optional):	
(x) tate/Territory:		(xi) ostcode:		(xii) mail (Optional):	
(xiii) **What we will do for you**					
(xiv) **How much we estimate you will need to pay**					
(xv) Estimated total cost of our legal services (excl. GST):			(xvi)	(xvii) The basis for calculating costs	
(xviii) Estimated amount for disbursements (excl. GST):			(xix)	(xx) Furth er Details:	
(xxi) Estimated total cost of barrister or other law practice (excl. GST):			(xxii)		

(xxiii) *[Attach information from the second law practice]*		
(xxiv) GST:	(xxv)	
(xxvi) **Estimated full amount you will need to pay (incl. GST):**	(xxvii)	

This is an estimate only. We will inform you if anything happens that significantly changes this estimate. If our professional fee is likely to be more than $3000 (before GST and disbursements are added) we will provide you with a full disclosure of costs in writing.

Your rights include to:

‣ Ask for an explanation of this form ‣ Negotiate a costs agreement ‣ Negotiate the billing method (eg timing or task) ‣ Request a written progress report of costs incurred ‣ Receive a written bill for work done ‣ Request an itemised bill ‣ Contact your local regulatory authority.

Form 2 Standard costs disclosure form for clients—barristers being briefed directly by a client

The standard costs disclosure Form 2 can be used when your professional fee is not likely to be more than $3000 (before adding GST and disbursements).

Date provided to client:

Barrister details					
Name:				Phone:	
Address:				(xxviii) obile (Optional):	
(xxix) tate/Territory:		(xxx) ostcode:		(xxxi) mail (Optional):	
Client details					
(xxxii) ame:				(xxxiii) hone:	
(xxxiv) ddress:				(xxxv) obile (Optional):	
(xxxvi)		(xxxvii)		(xxxviii)	

tate/Territory:		ostcode:		mail (Optional):	
(xxxix) **What I will do for you**					
(xl) **How much I estimate you will need to pay**					
(xli) Estimated total cost of my legal services (excl. GST):			(xlii)	(xliii) The basis for calculating costs	
(xliv) Estimated amount for disbursements (excl. GST):			(xlv)	(xlvi) Furth er Details:	
(xlvii) GST:			(xlviii)		
(xlix) **Estimated full amount you will need to pay (incl. GST):**			(l)		
(li) You may also need to pay other costs such as court fees.					

This is an estimate only. I will inform you if anything happens that significantly changes this estimate. If my professional fee is likely to be more than $3000 (before GST and disbursements are added) I will provide you with a full disclosure of costs in writing.

Your rights include to:

▸ Ask for an explanation of this form ▸ Negotiate a costs agreement ▸ Negotiate the billing method (eg timing or task) ▸ Request a written progress report of costs incurred ▸ Receive a written bill for work done ▸ Request an itemised bill ▸ Contact your local regulatory authority.