

## Introduction

Australia's legal market primarily services two broad categories of client: retail consumers, who tend to be infrequent purchasers of legal services; and sophisticated or institutional clients who generally are repeat purchasers and experienced commercial operators.<sup>1</sup> Each group has different levels of familiarity with legal processes and different levels of bargaining power in relation to legal costs. The Standing Committee of Attorneys-General recognised this in approving separate costs disclosure and assessment regimes for sophisticated and retail clients under the national legal profession model legislation ('Model Bill').

While sophisticated clients usually are able to negotiate their legal costs based on previous experience in similar matters and commercial decisions about the value of the work to their business, retail consumers generally have less experience or information when engaging a legal practitioner or law practice. The complex and specialised nature of legal work also means that retail consumers can have limited capacity to determine whether work is necessary or valuable.

This 'information asymmetry' can disadvantage retail consumers in their relationship with their lawyer—often at times when clients are in a state of heightened sensitivity and pressed to make urgent and significant life decisions. The lack of market-based or scientific methods for valuing legal costs, and the costs of changing representation, can result in retail clients being charged more than reasonable costs for legal services, or create a perception of overcharging.

### 1 LLFG comments:

1.1 *LLFG supports the view that retail clients require a level of consumer protection.*

1.2 *LLFG is in favour of a simpler regime for the benefit of consumers only. Drawing on the existing concept of a sophisticated client, "Consumer" could be defined as "any client which is not a Sophisticated Client."*

*Sophisticated Client is defined in the Model Bill and LLFG supports this definition with the addition of the following:*

- *foreign governments;*
- *foreign corporations not registered in Australia or required to be registered in Australia;*
- *all legal practitioners and law practices regardless of size, including all foreign legal practitioners and foreign law practices;*
- *individuals who confirm to the legal practitioner at the commencement of the matter that the client has net assets of no less than \$2.5M, or gross income for each of the previous 2 financial years exceeding \$250,000; and*

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<sup>1</sup> There are also a small group of high-net worth individuals who do not fall within the statutory definition of 'sophisticated client', but who are experienced commercial operators; and clients who primarily access the justice system through legal aid and community legal centres.

- *any other entity or class of client prescribed by the regulations.*

1.3 *However, should the Taskforce consider that an inclusive definition of “consumer” is more appropriate, LLFG has given some thought to who a consumer may be.*

*LLFG considers that it would need to include individuals (but not where they could be expected to be sophisticated users of legal services). This could be because of their income or assets; the value of the matter; the type of matter; or that they were experienced users of legal services. There would be some matters where individuals should no doubt be taken to be consumers, eg, family law matters; where they are bringing proceedings for personal injury or have been charged with an offence.*

*Some individuals may elect to use a business structure such as a proprietary company and there may be a case that small proprietary companies (not part of a broader corporate group) should in some cases also be treated as consumers, subject to similar qualifications such as income; assets; the numbers of people they employ (eg, 20 or less); the value of the matter and type of the matter.*

*In each case there will be compliance issues for law firms. These issues will need to be addressed in an efficient and practical manner by the legislation or regulations.*

Clear, concise and timely costs disclosure is a good business practice: it minimises the potential for misunderstandings at a later stage, and the possibility of complaints against lawyers where a client feels he or she has been charged more than is fair and reasonable. Early discussions about costs help to educate clients about how the legal process works, and can assist in focusing them on the desired outcome and the way the matter should be progressed to achieve it. This facilitates greater control by clients over their own legal matters and can result in greater clarity about the shared goals of the client and lawyer.

Costs disclosure also benefits the legal profession as a whole. Although complaints about costs disclosure and overcharging are made against a small proportion of the profession, costs complaints continue to be a primary ground of complaint in all States and Territories. Costs complaints can have a disproportionately negative impact on the profession’s reputation, obscuring its positive contribution to the community. Therefore, by reducing the potential for disagreements about legal costs, mandatory disclosure serves the interests of the broader profession by helping to maintain public confidence in it.

Regulatory oversight of legal costs can also be justified because lawyers enjoy a monopoly on the provision of most legal services. Independent review of legal costs therefore is a reasonable counter-measure to the maintenance of restrictions in market competition within this sector. Mandatory costs disclosure was introduced in the 1990s to off-set the deregulation of legal fees, which provided more freedom, flexibility and competition in fee charging for legal practitioners than the previous system of scales of costs.<sup>2</sup>

## **2 LLFG comments:**

2.1 *LLFG notes that while lawyers enjoy a monopoly on the provision of most legal services,*

<sup>2</sup> A Lamb and J Littrich, *Lawyers in Australia* (2007), 215.

*consumers of these services enjoy the benefits of a high degree of competition within the Australian legal market.*

However, while broad public interests require that all legal practitioners should be subject to a general obligation to charge only fair and reasonable legal costs, not all clients require the same level of consumer protection. The Taskforce proposes to maintain the existing approach that allows sophisticated clients to contract out of the mandatory costs disclosure and assessment regimes.

### **3 LLFG comments:**

*3.1 See comments in 5 below.*

### **SCAG proposals**

In April 2009, the Standing Committee of Attorneys-General noted a number of NSW proposals to constrain overcharging and exploitation of vulnerable legal services consumers, and asked a joint working party to make recommendations as to their adoption in the national model law. The proposals were as follows.

- Strengthening the existing provision that a written disclosure to a client may be in a language other than English if the client is more familiar with that language;
- Requiring law practices to provide periodic, itemised bills to clients in personal injury matters;
- Prohibiting law practices from seeking clients' authorities to deduct legal costs from a settlement amount without having first informed the client of the settlement amount and issued the client with a bill (which must be itemised in personal injury matters);
- Providing that a bill or covering letter must be signed by a principal of a law practice (rather than a legal practitioner or other person); and
- Prohibiting law practices from charging excessive costs in a legal matter, and providing a financial penalty for breach of this provision without a reasonable excuse.

SCAG subsequently referred these matters to the Taskforce for consideration as part of this reform process.

### **The proposed legislative principles**

The following legislative principles are proposed for the costs regime. These would be included in the National Law, and would be complemented by National Rules.

Objectives of the scheme

The purposes of this scheme are as follows:

- to provide for law practices to make disclosures to clients regarding legal costs;
- to regulate the making of costs agreements in respect of legal services, including conditional costs agreements;
- to regulate the billing of costs for legal services;

- to provide a mechanism for the assessment of legal costs and the setting aside of certain costs agreements.

### **Costs disclosure**

- Before, or as soon as practicable after, giving instructions to act clients shall receive sufficient written information about the estimated costs of their matter, and the method for calculating that estimate, to reasonably allow them to make informed decisions about the conduct of the matter. This shall also include disclosure in relation to costs where a law practice intends to retain another law practice or expert on behalf of the client.
- Any significant change to a matter previously disclosed must be notified to the client as soon as reasonably possible after the law practice becomes aware of the change.
- Costs disclosure should be presented in a concise, clear and accessible format.
- Legal practitioners should take reasonable steps to ensure that clients understand the information disclosed. In addition, consumers from culturally and linguistically diverse backgrounds should not be disadvantaged as compared to people for whom English is their first language.

#### **4 LLFG comments:**

- 4.1 *LLFG agrees that in some circumstances it may be appropriate for a translator to explain cost disclosure to the client. In those circumstances, it would be reasonable for the legal practitioner to charge the client for the costs of the translation service.*
- 4.2 *However, we disagree that a positive obligation should be imposed on the legal practitioner to ensure that clients understand the information being disclosed. In practice, this would be a very difficult obligation to discharge. How would the legal practitioner be “reasonably satisfied” that the client understands the costs disclosure given? Would the legal practitioner need to question or test the client in relation to these matters? If the legal practitioner complies with the costs disclosure provisions in the legislation, the legal practitioner should have discharged his or her obligations to provide the requisite and appropriate level of costs disclosure.*

- Clients must be informed about their right to negotiate a costs agreement and to challenge legal costs.
- Costs agreements are enforceable as a contract between the parties (and any assessment will by reference to the costs agreement if it is a valid agreement complying with the legislation).
- If a law practice fails to disclose anything required by the legislation, the client will not be required to pay legal costs until they have been assessed. The law practice must not commence or maintain proceedings to recover fees until after the assessment.
- Sophisticated clients may contract out of the mandatory costs disclosure and assessment regimes.

#### **5 LLFG comments:**

- 5.1 *Under the Model Bill sophisticated clients are not subject to the costs disclosure requirements and are not required to positively contract out. This should remain and sophisticated clients should not be required to agree in writing to waive cost disclosures designed to protect retail clients. It would be a significant, costly and unnecessary change from the current regime. It would also be impracticable as obtaining consent to non-disclosure would presumably itself require some form of disclosure.*
- 5.2 *Consistent with the approach taken in 4.1 above, costs assessment regimes should not apply to sophisticated clients.*
- 5.3 *The consequence of a failure to disclose in clause 3.4.18 of the Model Bill is that the client is not required to pay legal costs until they have been assessed. This outcome appears to be overly harsh and should only apply to material non-disclosure. For example, failure to provide a costs estimate or a range of estimates to a consumer client.*

#### **Reasonableness**

- Legal practitioners and law practices may only charge fair and reasonable costs.

#### **6 LLFG comments:**

- 6.1 *LLFG considers that this positive obligation should not be placed on legal practitioners. Retail clients are protected adequately by existing provisions. The existing Model Bill does not include a positive duty to charge only fair and reasonable costs, but does contain adequate protection for clients in the disclosure, reporting, billing, costs assessment and complaints provisions and the right to negotiate a costs agreement. There is also the requirement that where there is no valid costs agreement or applicable costs determination or scale of costs, a costs assessor must consider fairness and reasonableness.*
- 6.2 *LLFG notes that there is already a heavy legal and professional disincentive on each individual legal practitioner to charge excessive costs. Under the Model Bill (section 4.2.3), the charging of excessive costs is an example of conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct, together with all of the disciplinary implications that flow from this.*
- 6.3 *The difficulty in defining what is fair and reasonable has been noted by the Taskforce and other stakeholders.*
- 6.4 *Imposing this positive duty and placing the onus on legal practitioners is inconsistent with the regulation of other professionals and service providers, including those who may also be said to enjoy a monopoly on the provision of their services.*
- 6.5 *If it is concluded that a positive duty should be imposed, it is agreed that, as acknowledged by the Taskforce, any duty to charge only fair and reasonable costs should not apply to sophisticated clients.*
- 6.6 *This obligation should also not apply where there is a valid costs agreement in place – see 7 below.*
- 6.7 *A practical restraint already exists in relation to excessive costs. Following a costs assessment, the relevant costs assessor must refer the matter to the relevant regulator to*

*consider whether disciplinary action should be taken against the legal practitioner.*

- A costs agreement is prima facie evidence of what are fair and reasonable costs.

## **7 LLFG comments:**

- 7.1 *If a valid costs agreement is in place, it is still subject to the over-riding capacity of the court to scrutinise ‘gross overcharging’ or ‘excessive costs’. This is an appropriate test that should be maintained.*
- 7.2 *In cases where there is no valid costs agreement the requisite standard is ‘fair and reasonable’ costs.*

- Legal costs should be proportionate to the complexity or importance of the issues and amount in dispute.

## **8 LLFG comments:**

- 8.1 *We have addressed this point in the context of litigation as it refers to a dispute. In simple civil matters which are of low value or “importance” or personal injury matters the public and private resources expended should be proportional and it is understood that this is generally accepted.*
- 8.2 *However, LLFG does not agree that an unqualified requirement should be imposed in all cases. This is because of the very practical difficulties in imposing this obligation upon legal practitioners. “Complexity or importance of the issues” is highly subjective and may well be different for the client, the other party and the public. For example, some matters involving a small amount in dispute could be of strategic importance or important as a precedent. This subjectivity means that further explanation is unlikely to be able to solve the problem. The disciplinary consequences mean that certainty would be critical.*
- 8.3 *Moreover, proportionality is very difficult to measure. A number of factors must be taken into account in addition to those mentioned above, including the retainer and whether the work done was within the scope of the retainer, the complexity, novelty or difficulty of the legal issues involved in a matter, the circumstances in which the legal services were provided, as well as the time within which the work was required to be undertaken. All of these are matters which must be taken into account by a costs assessor under the current regime.*
- 8.4 *As the Victorian Law Reform Commission (see footnote 5 below) notes, the concept of proportionality is not readily applicable where the outcome cannot be quantified in economic terms including important public interest cases.*
- 8.5 *Examples given of other difficulties include an insurer running a test case and seeking to deter future unmeritorious claims, and the professional issues associated with not following a client’s instructions should the client seek to pursue a particular path which*

*is subjectively and legally legitimate.*

8.6 *If it is determined that a positive duty should be imposed, this obligation should not apply to sophisticated clients.*

- Law practices and their clients may agree to a variety of methods for calculating legal costs.
- The courts and tribunals may set aside costs agreements, in whole or in part, which are not fair or reasonable.

## **9 LLFG comments:**

9.1 *See comments in comments 7 and 8 above.*

- Legal practitioners and law practices must make reasonable endeavours to act promptly and to minimise delay in the legal process and must not otherwise work in a way that unnecessarily increase costs in a matter.

### **Billing**

- A law practice may not seek to recover its fees unless it has provided a properly prepared bill to the client.
- A law practice may not charge for the preparation of bills and clients may request an itemised bill (at no additional cost).
- Bills must include a notice about a client's right to challenge legal costs or to have a costs agreement set aside.

## **10 LLFG comments:**

10.1 *The existing exemption in the Model Bill from this notification for sophisticated clients should remain.*

### **Liability of principals for overcharging**

- Principals of law practices are responsible for the reasonableness of bills rendered to clients, and will be personally liable in the event of the charging of excessive legal costs in matters in which they have acted or which they have supervised.
- A law practice may be liable for the charging of excessive legal costs by one of its principals or one of its employees.

## **11 LLFG comments:**

*LLFG objects to the liability of law practices for charging excessive legal costs. Any liability should be borne by the specific legal practitioner/s actually responsible for the costs.*

*Also see 35 below.*

### **Cost assessment**

- Costs assessments must be conducted in accordance with National Rules.
- Determinations of costs assessors are admissible in disciplinary proceedings as evidence as to the reasonableness of legal costs.

### **Regulatory Guidelines**

- The Board shall issue National Rules detailing actions that practitioners are required to take to comply with these legislative principles, and to give effect to these legislative principles.
- A breach of the National Rules will be conduct capable of constituting unsatisfactory professional conduct or professional misconduct. In the case of law practices, a breach without reasonable excuse may constitute an offence.

### **Discussion**

Several of these proposed legislative principles are not currently included in the Model Bill. The following provides a brief discussion of the policy arguments for their inclusion in a new costs regime.

#### Level of detail in disclosure

A criticism of the mandatory disclosure regime is the lack of guidance about the level of detail required in disclosure documents. It is argued that practitioners are either legally required to, or regularly err on the side of, caution and provide voluminous detail in costs disclosure documents for fear of failing to meet their professional obligations. Overwhelmingly detailed disclosure does not serve the interests of either practitioner or client and was not intended when the regime was introduced.

The aim of costs disclosure is to provide the parties with a starting point from which to begin a dialogue about costs. Written disclosure should be a high-level summary to which the client can refer when making decisions during the course of a legal matter—it is not expected to be a detailed document providing substantive legal advice on legal rights and options (although it should complement that advice when later provided). It should be made clear that practitioners are only required to take reasonable steps in providing mandatory disclosure.

#### Disclosure in languages other than English

The Model Bill currently provides that written disclosures to a client *may* be in languages other than English if a client is more familiar with that language. A more positive obligation could be imposed to ensure that clients from culturally and linguistically diverse backgrounds understand the information being disclosed. Accordingly, in addition to this provision about written disclosures, there could be an additional requirement that a legal practitioner be reasonably satisfied that the client understands the costs disclosure given. In practice, this would mean that where necessary a legal practitioner (or, where this is not practicable, the client) would need to obtain a translator to explain the costs disclosure to the client.

### **12 LLFG comments:**

*12.1 See our comment in comment 4 above.*

The Taskforce does not consider this proposal to be unduly onerous given that the legal practitioner would in any case be required to ensure that he or she is able to communicate effectively with a client in order to obtain ongoing instructions in a matter.

#### Proportionality in assessing reasonableness of costs

Proportionality of legal costs is already enshrined in certain areas. For example, section 60 of the *Civil Procedure Act 2005* (NSW) provides that: ‘in any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute’.

In *Seven Network Ltd v News Ltd* [2007] FCA 1062, Justice Sackville commented adversely on the disproportionate amount of the legal fees relative to the amount ultimately in dispute.<sup>3</sup> His Honour has subsequently commented that ‘... there is an undeniable public interest in the courts actively applying the principle of proportionality to all forms of litigation, whether the stakes are very high or comparatively low. If this is not done, judges can hardly be surprised if the civil courts are largely seen as the exclusive domain of the wealthy and powerful’.<sup>4</sup>

The Victorian Law Reform Commission discussed the issue of proportionality in its report, *Civil Justice Review* (2008). The Commission noted certain difficulties in applying the principle of proportionality to legal costs. However, it recommended that new provisions should be enacted in respect of certain matters, including a paramount duty on parties, legal practitioners and law practices involved in civil proceedings to the court to further the administration of justice; and this would include a duty to ‘use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute’.<sup>5</sup>

#### **13 LLFG comments:**

*13.1 See our comment in comment 8 above.*

#### Liability of principals for overcharging

Under the Model Bill, bills must be signed on behalf of the law practice by a legal practitioner or other employee, and anything done by a legal practitioner on behalf of the law practice is deemed to have been done by the law practice.

#### **14 LLFG comments:**

*14.1 The requirement to have bills signed or to be accompanied by a signed letter, whether by a legal practitioner, other employee or principal is out of step with modern commerce, including in the consumer context, and should not be included in the National Law. We question whether there are any other instances where a business is required to provide customers or clients with signed bills. It also interferes with the electronic billing processes of practitioners and their clients and modern modes of delivery adding to costs and reducing efficiency for both parties.*

<sup>3</sup> *Seven Network Ltd v News Ltd* [2007] FCA 1062, [8]-[10].

<sup>4</sup> R Sackville, ‘The C7 Case: A Chronicle of a Death Foretold’, Paper presented to New Zealand Bar Association International Conference, 15 & 16 August 2008.

<sup>5</sup> Victorian Law Reform Commission, *Civil Justice Review Report* (2008), Rec 16.3.

14.2 *See comments in comment 11 above in relation to the liability of a practice.*

14.3 *See comments in comment 35 below in relation to a principal's liability.*

The Model Bill also deems any breach of the Act by a law practice to have also been committed by a principal unless he or she establishes that:

- the practice contravened the provision without the actual, imputed or constructive knowledge of the principal; or
- the principal was not in a position to influence the conduct of the law practice in relation to its breach of the provision; or
- the principal, if in that position, used all due diligence to prevent the breach by the practice.

The Model Bill also provides that the charging of excessive legal costs in connection with the practice of law is capable of being unsatisfactory professional conduct or professional misconduct. However, the common law standard culpability for a finding of professional misconduct appears to require that the legal practitioner be personally implicated in the conduct that is the subject of the complaint.<sup>6</sup>

**15 LLFG comments:**

15.1 *The common law standard of culpability is appropriate and should continue to be applied.*

In practice, difficulties could arise in identifying a particular legal practitioner against whom to bring any disciplinary proceedings where a law practice has engaged in excessive overcharging. For example, in many legal practices the preparation and provision of bills may be broken into multiple sub-tasks undertaken by different people, of whom some may be legal practitioners and some may not. It is possible that no one legal practitioner could be identified who has the necessary level of personal culpability for a finding of professional misconduct for charging excessive legal costs in connection with the practice of law.

Depending on the circumstances, it might be possible to bring disciplinary proceedings for professional misconduct on other grounds, such as where a legal practitioner fails to supervise his or her staff in preparing or signing a bill. However, another approach would be to require principals of law practices to take responsibility for the content of bills sent to clients, including the reasonableness of the costs in them. The Taskforce considers this an appropriate option, and proposes that the National Law include principles to this effect (as outlined above), which could be complemented by National Rules as discussed below.

**16 LLFG comments:**

16.1 *See our comments in comment 35 below.*

Requirement to avoid delay

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<sup>6</sup> See the discussion in *Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130.

A number of reports on civil law reforms have raised concerns about over-servicing and its impact on the overall cost of litigation. One proposal is the increased use of capped or fixed costs orders<sup>7</sup> by courts, but over-servicing is also potentially a disciplinary matter. An obligation on practitioners to expedite the legal process would be consistent with practitioners' broader duties to the courts to ensure that the administration of justice is timely and efficient and that costs are reasonable. It would also assist practitioners to resist requests from clients for unnecessary or surplus services. This kind of obligation was recently recommended by the Victorian Law Reform Commission, which recommended a duty on parties to civil proceedings, their legal practitioners and law practices to use reasonable endeavours to act promptly and to minimise delay.<sup>8</sup>

### **National Rules for legal costs**

Under the new regulatory framework, the National Legal Services Board will be responsible for developing uniform National Rules (ie, national binding rules) in relation to various areas of legal profession regulation.

The Taskforce proposes that the National Rules deal with the following matters, and would be interested in the views of the Consultative Group and other stakeholders in relation to the proposals. Generally, the proposals are based on the relevant provisions of the Model Bill, and other measures that have been identified to address concerns with existing regulation.

Under the Model Bill, disclosure largely only applies to retail clients (eg, individuals, families and small businesses) as 'sophisticated clients' are excluded from the costs disclosure regime. Therefore, the following suggestions are based primarily on addressing the needs of retail clients.

### **Costs disclosure**

The National Rules should include the following matters, which are largely based on the existing Model Bill provisions.

#### Mandatory disclosure

- Written disclosure must be made in writing before, or as soon as practicable after, the law practice is retained in the matter.
- Disclosure must be made to the client and any associated third party payer for the client (to the extent relevant).
- There should be exemptions from the mandatory disclosure requirements where the total legal costs in the matter are not likely to exceed a certain amount;<sup>9</sup> the client is a sophisticated client and has agreed in writing to waive the right to disclosure; or the client is one of a certain class of client for whom the Board considers on reasonable grounds to be a sophisticated client or for whom mandatory disclosure is otherwise unnecessary.
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### **17 LLFG comments:**

*17.1 See our comments in comment 5 above. The Model Bill does not require a sophisticated client to 'agree in writing to waive the right to disclosure' but simply provides that the disclosure regime does not apply. No amendment to the position adopted in the Model*

<sup>7</sup> Orders which limit the total amount of costs recoverable in the matter by one party against another to a specified capped amount. Alternatively, courts might be given the power to fix costs at a particular rate for specified pieces of work undertaken in the proceedings (eg filing further and better particulars).

<sup>8</sup> Victorian Law Reform Commission, *Civil Justice Review Report* (2008), Rec 16.3.

<sup>9</sup> Currently, NSW and Victoria require costs disclosure in matters where legal costs are likely to exceed \$750, while other jurisdictions have adopted a \$1,500 threshold. The Board should specify the appropriate monetary threshold in a National Rule.

*Bill should be made.*

### Form of disclosure

Written disclosures to a client must be expressed in clear plain language; may be in a language other than English if the client is more familiar with that language;; and if the law practice is aware that the client is unable to read, the law practice must arrange for the required information to be conveyed orally to the client in addition to providing the written disclosure.

### Nature of disclosure

The mandatory disclosure should include:

- The basis on which legal costs will be calculated, including the things to be billed for (eg photocopying etc);
- The client's rights in relation to costs, including the right to negotiate the basis of costs; receive periodic bills from the law practice; request an itemised bill; and be notified of any substantial change to the matters previously disclosed;
- An estimate of the total legal costs if reasonably practicable, or else a range of estimates of the total legal costs and an explanation of the major variables in them;
- The rate of interest (if any) that the law practice charges on overdue legal costs;
- The client's right to make reasonable requests for progress reports (which may include a written report of the legal costs incurred to date or since the last bill, at no cost to the client);
- The avenues for disputing legal costs, the process for following them, and any time limits that apply to any such action;
- If a law practice intends to retain another law practice, a barrister or an expert on behalf of a client, it must disclose that practice or person's costs and billing arrangements;<sup>10</sup>
- If there will be an uplift fee, there should be disclosure of the law practice's legal costs; the uplift fee (or the basis of calculation of the uplift fee); and the reasons why the uplift fee is warranted.

In relation to litigious matters, mandatory disclosure should also include:

- An estimate of the range of costs that may be recovered if the client is successful in the litigation;
- The range of costs the client may be ordered to pay if unsuccessful (and that a court order for costs in favour of the client will not necessarily cover all of the client's legal costs);
- Where the client enters into a conditional costs agreement, that the client may be required to pay the law practice's disbursements even if not required to pay legal costs.

## **18 LLFG comments:**

*18.1 Note that disclosure of the range of costs the client may be ordered to pay if unsuccessful in a litigious matter can only be an estimate.*

<sup>10</sup> This proposal extends the current disclosure from law practices, to include an expert retained on behalf of the client. The NSW Legal Fees Review Panel recommended that: where a practitioner proposes to retain a third party expert, other than another legal practitioner; and the practitioner expects that that expert's fees will exceed \$1,000, the practitioner should be required to: obtain an estimate of the expert's fees; provide that estimate to the client; and obtain the client's consent prior to retaining the expert. However, an exception should be provided for urgent situations: NSW Legal Fees Review Panel, *Report: Legal Costs in NSW* (2005).

### Impact of non-compliance

Where a law practice does not comply with the disclosure requirements:

- The client need not pay the legal costs unless they have been assessed under the costs assessment provisions, and a law practice may not bring proceedings for the recovery of legal costs unless the costs have been assessed;
- The client may apply to have the costs agreement set aside and/or may make a complaint to the National Legal Services Ombudsman;
- The amount of the costs may be reduced by an amount considered proportionate to the seriousness of the failure to disclose; and
- Failure to comply with these provisions may be subject to appropriate penalties, and is capable of constituting unsatisfactory professional conduct or professional misconduct.

#### **19 LLFG comments:**

*19.1 It should be noted that non-compliance with mandatory disclosure should only apply to material non-disclosure. See comments in comment 5.3 above.*

*19.2 It should also be noted that a legal practitioner will only be required to take reasonable steps to provide mandatory disclosure (see page 9 under “Level of detail in disclosure”).*

### Additional proposals

The National Rules could also include provisions to deal with the following matters.

#### A standard national costs agreement

The NSW Legal Fees Review Panel proposed a standard form of costs disclosure as a way of making information about costs more accessible and transparent.<sup>11</sup> A similar ‘standard form’ approach was adopted in the Model Bill in relation to standard disclosure requirements (eg, a summary of the right to challenge legal costs). Under the Model Bill, law practices may opt to meet their disclosure obligations by attaching the plain language fact sheets to their costs agreements.

Accordingly, the Board should have the power to approve a single national costs agreement precedent, to be used as the basis for costs disclosure by law practices and legal practitioners (see example at Attachment A). Additional disclosure information could be included where necessary in the circumstances of the case. If a standard document were developed, translated versions could also be prepared. This would reduce the costs associated with proposals to strengthen the disclosure regime for people from culturally and linguistically diverse backgrounds.

#### **20 LLFG comments:**

*20.1 It is agreed that a single national costs agreement precedent would assist some law practices where mandatory disclosure is required. The use of the national precedent should be optional.*

<sup>11</sup> NSW Legal Fees Review Panel, *Report: Legal Costs in NSW* (2005).

### Nature of disclosure

In addition to the existing requirement to inform a client about the potential risk of being ordered to pay the costs of the other side in a litigious matter, there should be a duty to disclose that the client's own costs must be paid from the total amount of any settlement or damages award and may not be fully recovered from any party/party costs received.

#### **21 LLFG comments:**

*21.1 Note for clarification that costs may come out of the settlement but have to be paid regardless of the settlement amount.*

This would build upon existing disclosure obligations. Clients would be in a better position to make informed choices about their legal matter if they understood the costs implications of the various options presented to them. Estimates should be reasonable at the time at which they are given, but should be based on the practitioner's professional judgement and experience. Requiring this disclosure up-front also protects the practitioner who can use the initial disclosure to reinforce to the client that certain strategies may have high cost implications.

### **Disclosure of costs increases**

The National Rules should prohibit material changes to the method of charging legal costs in a legal matter (eg, by increasing hourly rates) unless written notice of, say, three months has been given prior to the increase and the client has given informed consent. If no disclosure is made, the law practice should be allowed to recover only at the rate in the original costs agreement or the last complying notice. The Taskforce would be interested in the views of the Consultative Group and stakeholders as to whether three months is a reasonable amount of time.

#### **22 LLFG comments:**

*22.1 It is agreed that written notice should be provided to a client of an increase to legal costs. However, it is considered that 3 months is excessive and 1 month would be reasonable, unless the client agrees otherwise. In any event, this provision should not apply to sophisticated clients. It should be remembered that a client can always terminate the retainer with the legal practitioner at any time and without cause. Therefore, if the client does not agree with the fee increase it is always within the power of the client to terminate the engagement.*

*22.2 In practice, the method for increasing legal costs is usually communicated to the client at the beginning of a retainer.*

### Disclosure in litigious matters

Generally, the Taskforce considers that the National Rules should require disclosure in litigious matters to be divided into estimates of a range of costs for: initial advice about rights and options; a pre-hearing settlement or equivalent; a standard contested hearing; and a complex/delayed hearing.

#### **23 LLFG Comments:**

- 23.1 *LLFG notes that in the vast majority of litigious matters, overcharging of legal costs does not arise. The allegations in the discussion paper below relate to a small percentage of matters where overcharging of legal costs has occurred in litigious matters. The introduction of an onerous and burdensome regulatory regime would be disproportionate to the perceived problem and should not be imposed in these circumstances.*
- 23.2 *To the extent that it is suggested that those estimates be provided in an initial engagement letter, in our view that is impractical, at least for the nature of litigation in which LLFG firms regularly practise.*
- 23.3 *The difficulties in estimating costs in a litigation environment must be emphasised. There are many unknowns, including (i) the approach of the opposing side; (ii) the approach of the Court; (iii) where the evidentiary trail will lead. It is not unusual for the substance of claims to be amended as the litigation proceeds.*
- 23.4 *It would be helpful if clarification was provided as to what constitutes a 'litigious matter'. Should it be defined where proceedings have been commenced, are likely to be commenced, or may be commenced?*
- 23.5 *There are already detailed rules around the disclosures which legal practitioners are required to make to clients. While no doubt a 'break up' of a global estimate is good practice, it is not clear that further prescription in this area is desirable for anyone (clients or legal practitioners).*
- 23.6 *The Taskforce has suggested that costs be divided into 4 categories. It is not clear where work in relation to discovery and the preparation of evidence (which probably represent the bulk of the costs, at least in major commercial litigation) would go. More generally, costs estimates can be broken up in numerous ways. Importantly, they are usually broken up in the course of the matter as it becomes clear what is and is not in issue and how the case is being conducted.*
- 23.7 *LLFG is not sure how a legal practitioner would be expected to deal with the difference between a 'standard' and a 'complex/delayed' hearing. Clarification of what is 'standard' would be of assistance.*
- 23.8 *If it is concluded that these disclosure obligations should be imposed, they should only apply to consumer clients.*

As discussed above, SCAG has referred certain proposals in relation to legal costs to the Taskforce for its consideration. These proposals were developed in response to recent allegations of overcharging by legal practitioners that included failure to inform the client of the amount of damages paid in settlement of a claim; failure to deliver any bill in relation to costs deducted from settlement amounts; and settling claims without authority.

The Taskforce notes that the Model Bill already provides that, if a law practice negotiates the settlement of a litigious matter, it must disclose to the client before the settlement is executed: a reasonable estimate of the amount of legal costs payable by the client (including any legal costs of another party); and a reasonable estimate of any contributions towards those costs likely to be received from another party.

However, to ensure greater clarity for consumers of legal services in litigious matters, the Taskforce proposes that law practices also should be required to disclose an estimate of the costs to complete the matter if it settles, and should be prohibited from seeking clients' authorities to deduct legal costs from a settlement amount without providing the minimum required information.

**24 LLFG comments:**

24.1 *Again, this level of prescription is not desirable.*

24.2 *LLFG understands that in some matters involving consumers (eg personal injury matters the subject of newspaper reports) this can become an issue for certain clients. If it is concluded that these disclosure obligations should be imposed, they should only apply to consumer clients or certain types of matters.*

24.3 *Especially in more complex matters, the ability to accurately estimate the costs to complete the matter if it settles is not straightforward. Much will depend, for example, on the length of the mediation, and the complexity of the settlement documentation. Also, in some instances the court will need to be involved in 'approving' the settlement (eg, in class actions).*

24.4 *Most clients of large law firms would, where relevant to them, seek and be provided with, costs estimates of various types, including in making a settlement decision, say at a mediation. It would be unfortunate if legal practitioners were required to provide clients with irrelevant, unwanted and unnecessary estimates.*

**Nature of determining costs**

The Taskforce notes that there is a range of ways in which legal costs could be determined in any legal matter. While 'time billing' has been adopted by a substantial part of the legal services market, other options include fixed or flat fee billing,<sup>12</sup> capped fees,<sup>13</sup> contingency fees and percentages,<sup>14</sup> blended hourly rates,<sup>15</sup> retrospective fees based on value,<sup>16</sup> relative value,<sup>17</sup> task based billing<sup>18</sup> and discounted billing.<sup>19</sup> However, some of these proposals have also been the subject of certain criticism.

<sup>12</sup> This involves the legal practitioner and client agreeing on a set fee for specified purposes.

<sup>13</sup> This involves setting a ceiling for all fees for a particular matter. For example, a law practice may charge an hourly rate for a particular matter, but may not exceed the agreed ceiling.

<sup>14</sup> This involves an agreement under which the legal practitioner will be paid in the event of a particular outcome, and an agreement to pay the legal practitioner a certain percentage of the final settlement.

<sup>15</sup> Under this arrangement, rather than each legal practitioner charging at his or her usual hourly rate, the law practice calculates a rate that is averaged across all of the employees who would work on the matter (including, in some cases, paralegal and secretarial staff), which is then charged for each of those employees.

<sup>16</sup> This involves determining the value of the work at the conclusion of the matter.

<sup>17</sup> This involves the legal practitioner and client preparing a schedule of services that a broken down by subject matter and task, and attaching to each task an agreed relative value or multiplier.

<sup>18</sup> This involves billing according to particular tasks. The legal practitioner is asked to provide a budget before performing a particular task and may not (without prior agreement) exceed the budget.

<sup>19</sup> This involves providing a discount on a bill or a billing method (such as a discounted hourly rate) in consideration for, for example, a certain volume of business. In relation to these forms of billing, see

### Alternatives to time billing

There has been significant debate in recent years about the dominant role of the billable hour in calculating legal costs. The NSW Legal Fees Review Panel listed the most common criticisms of time based pricing, being:<sup>20</sup>

- Time based charging privileges quantity over quality. It rewards best those who take longest, regardless of what they produce.
- It allocates all major risk to the client.
- It discourages, by not rewarding, non-chargeable uses of time- such as education, community contributions, professional activities and perhaps most importantly of all, the active and detailed supervision of junior staff.
- It encourages increasing billable hours targets, since this is the easiest way to boost profits without encountering client resistance.
- It provides no incentive for speed or efficiency and arguably actively discourages both.
- It puts the client's interest in a swift and efficient resolution directly in opposition to the lawyer's interest in maximising hours and therefore income.
- It is unaffected by success, and therefore not conducive to improvement and excellence.

The Panel also noted that time billing distances lawyers from any understanding of the real market value of their services.<sup>21</sup>

The Commonwealth Attorney-General's Department's Access to Justice Taskforce raised the issue of legal costs in its recent report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009). The Taskforce noted the benefits of increasing transparency in legal fees, suggesting that this would 'allow people to make informed decisions about legal issues, taking into account whether a proposed course of action is proportionate in the circumstances',<sup>22</sup>

The Access to Justice Taskforce also discussed the use of event billing for Commonwealth legal services. The Taskforce noted that some large corporations are using their market power to demand different fee structures, and more transparent and fair fees. Given that the Commonwealth is a large consumer of legal services, it suggested that it could be in a position to influence the culture of the legal profession in terms of billing. For example, it suggested that requiring firms to bill on an event basis would provide more certainty in Government legal purchasing and may encourage event billing in the wider community. The Access to Justice Taskforce recommended that:<sup>23</sup>

Commonwealth agencies should negotiate with legal service providers for the provision of legal services associated with litigation on an event basis—not time billing. For example, the Commonwealth could negotiate payment stages such as initial advice, pre-filing, filing, discovery, interlocutory, ADR, and final hearing stages. Agencies should provide a report to the Office of Legal Services Coordination on the outcome of such negotiations. This Recommendation could be implemented initially as a pilot. Where the Commonwealth is already engaged in cost saving billing practices such as a fixed fee arrangement, this should continue.

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generally, S Mark, 'Analysing Alternatives to Time-Based Billing and the Australian Legal Market' (2007), Paper presented at the Finance Essentials for Practice Management Conference, Sydney, 18 July 2007.

<sup>20</sup> NSW Legal Fees Review Panel, *Report: Legal Costs in NSW* (2005), 14.

<sup>21</sup> *Ibid*, 15.

<sup>22</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

<sup>23</sup> *Ibid*, Rec 9.4.

The Taskforce recognises that the traditional costs disclosure regime may not adequately address the range of ways in which legal costs could be determined. In order to provide sufficient incentives to legal practitioners and clients to discuss and negotiate the most appropriate way to determine legal costs in a particular matter, the Taskforce proposes that the Board should have the capacity to develop National Rules where it considers it appropriate to do so which address matters such as mandatory costs disclosure, billing and costs assessments for these alternative forms of billing for legal services.

**25 LLFG comments:**

*25.1 LLFG fully supports flexible billing practices. The rules and/or legislation should support flexible billing practices by being facilitative, rather than prescriptive.*

Contingency fees

The Model Bill currently prohibits contingency fee agreements, but permits conditional costs agreements providing for uplift fees of up to 25% of fees for litigious matters. The Taskforce would be interested in the views of the Consultative Group and stakeholders as to whether these provisions should remain under the National Law.

**26 LLFG comments:**

*26.1 Broadly speaking, the legislation is intended to avoid legal practitioners having an excessive financial interest in a case which may bring their personal interests into conflict with those of their client. Given the importance of that goal, good reasons would need to be advanced in support of a removal of the restriction against contingency fees.*

*26.2 One such reason, which has emerged in the context of class actions, is that more generous contingency fees will increase lawyer's appetite for bringing proceedings that are otherwise uneconomical (presumably because of the risk of failure in comparison to the costs of prosecution), with associated access to justice benefits. That raises the question of whether the emergence of the third party litigation funding market in Australia has already bridged any access to justice "gap" caused by the restriction on contingency fees. Litigation funders who are not bound by the professional obligations applicable to lawyers, charge contingency fees of between 25-40%, and are commonly attributed with pushing Australia closer to the position in the United States (where lawyers' contingency fees are permitted).*

*26.3 A possible consequence of removing the restriction for corporates who are usually the subject of such claims is greater litigation costs burdens, given the loser pays rule in Australian jurisdictions. Another possible implication is greater levels of small to middle scale litigation (not usually the target of litigation funders) which raises anecdotal concerns about increases in unmeritorious litigation and the conflict of interests issues raised above.*

*26.4 More generally, the issue of contingency fees has been extensively trawled over by law reform, and other, bodies over the years. It gives rise to difficult (and important) ethical and professional questions. It is also closely related to the current policy consideration being given to litigation funding arrangements generally. It travels well beyond just a*

*consideration of legal costs (which appears to be focus of the current Project).*

26.5 *LLFG would resist the introduction of contingency fees more generally. Doing so may encourage the proliferation of litigation along the US model.*

### Costs agreements

Generally, the Taskforce proposes that the National Rules should include a simplified form of the Model Bill's existing provisions regarding costs agreements. As with the Model Bill, the National Rules should provide that a costs agreement that breaches the statutory requirements is void, but that a practitioner can recover costs either under an applicable scale or according to the fair and reasonable value of the legal services provided. However, a law practice cannot recover any amount exceeding the amount it would have been entitled to recover under the costs agreement.

### Litigation funding

Litigation-funders often provide funding on the basis that the costs recoverable from the litigant will be determined as a proportion of any award of damages. In several jurisdictions practitioners are prohibited from entering into contingency agreements in claims for damages. Generally, practitioners should not be able to avoid these prohibitions by taking a financial interest in a litigation-funder or by their associate or relative taking an interest. Accordingly, the Taskforce notes that legal practitioners could be prohibited from establishing corporate vehicles to provide litigation funding or entering into agreements with litigation funding vehicles owned by an associate of their law practice or a relative. The Taskforce would be interested in the views of the Consultative Group and stakeholders on this matter.

### **27 LLFG comments:**

27.1 *It is agreed that there should be a prohibition on lawyers taking a financial interest in a litigation-funder as well as their associate or relative taking an interest.*

27.2 *However, there should be an exclusion for an interest in publicly listed companies.*

27.3 *LLFG agrees with prohibiting legal practitioners from establishing (related) corporate vehicles to provide litigation funding. In the view of LLFG such a prohibition necessarily follows from the matters discussed in comment 26 above .*

27.4 *In any event, lawyers have traditionally been seen by the courts as a "safeguard" of clients' interests, operating as a check on the purely commercial incentives of the litigation funder, which currently at least are subject to minimal supervision or regulation. Allowing lawyers to establish funding vehicles or provide associated funding would in a practical sense remove this safeguard.*

### **Reasonableness of costs**

The overriding principle in relation to legal costs is that the costs charged for legal services should be fair and reasonable—regardless of the means by which the costs are charged. In addition, it would appear appropriate to include a requirement that costs should be proportionate to the complexity or importance of the issues and amount in dispute.

The National Rules should include the following matters.

Obligation to charge fair and reasonable costs

Subject to exceptions in relation to sophisticated clients, law practices should have a duty to charge only fair and reasonable costs.

The Model Bill currently does not include such a duty, but provides that legal costs are recoverable only under a complying costs agreement; in accordance with an applicable costs determination or scale of costs; or according to the fair and reasonable value of the legal services provided. In conducting a costs assessment, a costs assessor must consider: whether or not it was reasonable to carry out the work to which the legal costs relate; whether or not the work was carried out in a reasonable manner; and the fairness and reasonableness of the amount of legal costs in relation to the work (except in certain circumstances).

In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to any or all of the following matters:

- whether the law practice and legal practitioner complied with relevant legislation;
- any disclosures made;
- any relevant advertisement as to: the law practice's costs; or the skills of the law practice or any legal practitioner acting on its behalf;
- the skill, labour and responsibility displayed on the part of the legal practitioner responsible for the matter;
- the retainer and whether the work done was within the scope of the retainer;
- the complexity, novelty or difficulty of the matter;
- the quality of the work done;
- the place where, and circumstances in which, the legal services were provided;
- the time within which the work was required to be done; and
- any other relevant matter.

The Taskforce considers that placing a positive obligation on law practices to charge fair and reasonable costs would be a more effective consumer protection mechanism than the current provisions which place the onus on the client to seek costs assessment, or to have a costs agreement set aside, where they believe they have been overcharged.

**28 LLFG comments:**

28.1 *See our comments in comments 6 and 7 above.*

The National Rules should provide guidance on the meaning of fair and reasonable costs by specifying the factors relevant to determining fairness and reasonableness in the circumstances, and, where appropriate, outlining practices that clearly would breach this obligation.

Fairness and reasonableness

The courts have recognised the inherent difficulty in determining what is fair and reasonable in relation to legal costs. For example in *Veghelyi v Law Society of NSW* (unreported, Supreme Court of NSW Court of Appeal, 6 October 1995), Mahoney JA commented that:

A solicitor's entitlement to remuneration is conventionally stated in terms of what is fair and reasonable in the circumstances ...

It is, in my opinion, to be recognised that whether costs are fair and reasonable will depend upon—or at least be affected by—facts such as the size of the solicitor’s firm, the resources employed or available to be employed by it, the value which the lawyers place upon their skill and expertise, and the urgency of the clients requirements. What is fair and reasonable for a large firm may be, in the ordinary case, grossly excessive for a sole practitioner.

The Taskforce proposes that the National Rules include the same, or similar, criteria for determining fair and reasonable costs as are currently applied by costs assessors. In addition, there are certain practices that generally would indicate that costs are not fair and reasonable for a legal matter, including the following. However, the Taskforce notes that a costs agreement should be considered prima facie evidence that the costs provided in it are fair and reasonable.

**29 LLFG comments**

29.1 *See above in relation to reasonableness comment 6 & 7 and proportionality comment 8.*

Multiple charging for the same work

The National Rules should prohibit law practices from charging multiple clients for the same work; or, alternatively, provide that the costs for legal services and disbursements undertaken on behalf of multiple clients should be apportioned proportionately between each client (rather than each client bearing the full cost of the work). In *Legal Services Commissioner v Bechara* [2009] NSWADT 145, the NSW Administrative Decisions Tribunal found a practitioner guilty of professional misconduct for deliberately charging grossly excessive costs under the *Legal Profession Act 1987* (NSW). In that case, the practitioner had failed to apportion the costs of a joint hearing involving three clients.

**30 LLFG comments:**

30.1 *It is agreed that law practices should not charge multiple clients for the same work where the work is done for them jointly and that costs undertaken on behalf of multiple clients together should be apportioned proportionately between each client. However, legal practitioners should not be restricted from charging multiple clients for a work product sold to their clients, eg a publication or suite of documents concerning a particular specialist topic.*

Prohibit charging for non legal work

The National Rules should prohibit practitioners from charging for communications or administrative activities which are not directly related to the provision of legal advice, including opening files, sending ‘welcome letters’, sending or reading ‘thank you’ and Christmas cards, closing files, reordering an untidy file, the use of a legal practitioner’s trust account, the use of a telephone directory, or charging for contributions to professional indemnity insurance.

Administrative costs like file-opening fees are often ‘hidden costs’ which make it harder to compare the value of services offered by competing law practices. They can also increase the costs of accessing the justice system and do not aid the profession’s reputation as they involve significant charges for activities that do not involve the application of professional knowledge, skill or judgement. These costs should be absorbed as overheads by law practices—for example, doctors and dentists do not charge ‘file-opening fees’, they charge for professional services. Taking a call from a client thanking the practitioner for his or her previous service is not a call in which the practitioner is providing a professional service and the client should not be charged for it.

**31 LLFG comments:**

*31.1 LLFG agrees that legal practitioners should not be charging clients for sending or reading “thank you” and Christmas cards. However, we question the practicalities in drawing a clear distinction between those administrative activities that should not be charged for and those administrative activities that are a legitimate part of the client service. For example, acting as a registered office, arranging an ASIC or title search and providing related strategic/business advice could be seen as an “administrative” or ‘non legal’ activity but they are likely to form a legitimate part of servicing the client’s matter. Similarly, the closing of a file may involve steps that can legitimately be charged to the client. For example, preparing documents “bibles”, checking and returning original documents to the client or other parties, or advising the client on key future dates. We would suggest that aberrant behaviours such as charging for the reading of Christmas cards can better be addressed by individual clients taking up the issue with their lawyers, rather than attempting to impose a regime which may create uncertainty and deleteriously impact upon the legitimate charging for “administrative” or “non legal” matters.*

*Disbursements*

The Victorian Law Reform Commission has recommended various methods for reducing and rationalising the costs of litigation, including a prohibition on law firms profiting from disbursements (including photocopying), except in the case of clients of reasonably substantial means who agree to pay them. It also recommended that, when a client recovers costs, only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party.<sup>24</sup>

The NSW Legal Fees Review Panel has noted that costs assessors regularly reduce disbursements claimed by practitioners, and that the Costs Assessors’ Rules Committee supported reforms to stop practitioners profiting from in-house disbursements. It recommended that:

- a practitioner should be required to disclose to a client the existence and nature of any relationship between the practitioner, the practitioner’s firm or any member of the practitioner’s firm and any service provider proposed to be retained to provide services for which the client will be charged;
- no practitioner, or practitioner’s firm, should be permitted directly or indirectly to make a profit on disbursements; and

<sup>24</sup> Victorian Law Reform Commission, *Civil Justice Review Report* (2008).

- practitioners should not be permitted to charge separately for disbursements in the nature of overheads (ie, other than payments to independent third parties unrelated to the practitioner or any member of his or her firm).<sup>25</sup>

The Taskforce proposes that the National Rules include a prohibition on making a profit on disbursements; a prohibition on charging for disbursements that are in the nature of overheads; and a provision that, when a client recovers costs in a matter, only the reasonable actual costs of disbursements should be recoverable.

**32 LLFG comments:**

- 32.1 *There should be no objection to including any profit element so long as the law practice does not mislead a client that it is only intending to recover actual costs. For example, there should be no objection to charging a 'fee'.*
- 32.2 *In any event, in the view of LLFG, the charging of disbursements should be an issue of transparency rather than terminology or prohibition.*
- 32.3 *The discussion paper suggests that a practitioner should be required to disclose to a client the existence and nature of any relationship between the practitioner, the practitioner's firm and any service provider proposed to be retained to provide services to the client, for which the client would be charged. It should be a private matter for the law practice how it arranges for provision of the service and there should be no requirement to disclose these matters. Further, given that many legal practitioners provide services to clients through their service companies, we question whether this disclosure will be of any use or benefit to the client. The provision of services via a service company/trust is both well established and well accepted.*
- 32.4 *We question the practicality of this prohibition. For example, in relation to photocopying, will the legal practitioner need to calculate the cost of paper, ink, electricity, leasing costs, rental space and labour costs associated with the reproduction of each photocopied piece of paper? Similar questions could be asked in relation to the provision of a facsimile service and for interstate and overseas telecommunications. This seems like an extraordinarily difficult and onerous obligation to impose upon legal practitioners.*
- 32.5 *In the view of LLFG the appropriate response to the charging of disbursements is to ensure that there is clear disclosure as to the nature of the disbursement that will be charged and the cost of that disbursement. If the client is fully informed as to the nature and costs of all disbursements, the client can take that matter into consideration when choosing whether to acquire legal services from the particular practitioner or law firm. The market for legal services is both competitive and dynamic. The client can negotiate with the legal practitioner or law firm as to both the type of disbursements they will pay for and the amount that they are prepared to pay.*
- 32.6 *In any event, LLFG notes that clients are driving what can be charged as a disbursement. For example, many firms have ceased charging their clients for the costs of photocopying, except in relation to large bulk photocopying material provided to a client.*

<sup>25</sup>

NSW Legal Fees Review Panel, Report: Legal Costs in NSW (2005).

## **Billing**

The National Rules should include the following matters, which are largely based on the existing Model Bill provisions.

- A bill may be in the form of a lump sum bill or an itemised bill (however, if a client requests an itemised bill it must be provided at no cost to the client).
- A law practice must not commence legal proceedings to recover legal costs from a person until a specified period after the law practice has provided a bill that complies with the National Law and National Rules (subject to reasonable exceptions).

### **33 LLFG comments:**

*33.1 This requirement should only apply to consumer clients and the Model Bill should be amended to include this exception. It is out of step with notions of freedom of contract and would put firms at a disadvantage to such clients.*

*33.2 The “reasonable exceptions” should include the exception currently in the Model Bill relating to a person about to leave the jurisdiction but could also be amended to include, for example, reasonable concerns with the client’s solvency.*

- A bill must include a written statement setting out the avenues for a client to dispute the legal costs, and any time limits that apply.

### **34 LLFG comments:**

*34.1 As is recognised in the Model Bill, this requirement should not apply to sophisticated clients who are equipped to determine the recourse available.*

*34.2 As noted by LLFG previously, the complaint avenues are different in each State making it difficult for firms to adopt common cost disclosures throughout Australia. A single method for dealing with complaints is required.*

## **Additional proposals**

The National Rules could also include provisions to deal with the following matters.

### **Bills to be signed by principals**

The Taskforce has recommended new legislative principle that principals of law practices are responsible for the reasonableness of bills rendered to clients, and will be personally liable in the event of the charging of excessive legal costs in matters in which they have acted or which they have supervised. In addition, a law practice may be liable for the charging of excessive legal costs by one of its principals or one of its employees.

To make it clear to principals how they may manage this responsibility, the Taskforce proposes that the National Rules should provide that: (a) a bill must be signed on behalf of a law practice by a principal of the law practice (rather than a legal practitioner or other employee); and (b) once signed, the principal is deemed responsible for the reasonableness of the bill unless the

principal establishes that it was not reasonable for him or her to suspect or believe that the bill was excessive in the circumstances. The objective of this proposal is to ensure that principals who sign bills to clients of the law practice make reasonable enquiries as to the content of the bill and its appropriateness in the circumstances.

**35 LLFG comments:**

- 35.1 *As noted in 14 above, the practice of having signed bills is commercially obsolete for many clients. It should not require the signing of a bill to make it clear to principals how they may manage their responsibilities on costs.*
- 35.2 *The deeming of responsibility is an artificial device requiring burdensome enquiries by the principal. Responsibility should only lie with the individuals who are actually doing the work and charging the time.*
- 35.3 *As noted by the Taskforce, the apparent difficulties in identifying a particular legal practitioner against whom to bring any disciplinary proceedings where the matter involves numerous practitioners and tasks could be addressed by bringing disciplinary proceedings for professional misconduct on other grounds, such as where a legal practitioner fails to supervise his or her staff in preparing or signing a bill.*

In addition, the Taskforce proposes the creation of an offence for a law practice that charges excessive costs in a legal matter without reasonable excuse (eg, where the client is a sophisticated client who has agreed to pay higher legal costs). As a result, a law practice could be fined for charging excessive legal costs, and its principals could be subject to disciplinary proceedings or other penalties imposed under the regime.

**36 LLFG comments:**

- 36.1 *To create a criminal offence for charging excessive costs is an extreme and unjustified sanction in light of the existing disciplinary penalties. The subjective nature of what is reasonable or excessive, which is highlighted by the Taskforce, compounds this concern.*
- 36.2 *To require a practice to defend charges and establish a reasonable excuse such as that the client is a sophisticated client agreeing to pay higher costs is harsh and unjust. In the example given, the costs may not actually be “excessive” in the first place given the nature of the client and the arrangements with the client.*

Under the Model Bill, a law practice generally may charge interest on unpaid legal costs if the costs are unpaid 30 days or more after the practice has given a complying bill. A law practice may also charge interest on unpaid legal costs in accordance with a costs agreement.

The Taskforce is aware that some law practices have rendered bills for work as long as five years after the work has been done. These bills may be issued for various reasons, including where an outside party such as an accountant has been engaged to call in the debts owed to a practice. It has been suggested that ‘this can cause enormous distress and disruption for people who have

organised their lives and their finances on the basis that outstanding liabilities had been dealt with'.<sup>26</sup>

The NSW Legal Fees Review Panel commented that 'there is no justification in permitting such distress, or benefit in encouraging the continuation of poor administrative and management practices in law firms'. It recommended a prohibition on interest being charged on accounts rendered more than six months after completion of a matter.<sup>27</sup> The Taskforce considers that this would be a useful mechanism for ensuring that bills are given to clients within a reasonable period of a matter being finalised, and proposes that this be included in the National Rules.

**37 LLFG comments:**

*37.1 LLFG has no broad objection to the recommendation of the NSW Legal Fees Review Panel that interest being charged on accounts rendered more than 6 months after completion of the matter should be prohibited.*

*37.2 However, our support is subject to 2 provisos. First, this prohibition should only relate to matters being undertaken for consumer clients (sophisticated clients are in a position to negotiate their own arrangements concerning billing practices and the payment of accounts). Also, the prohibition should be subject to client instruction and consent. For example, it is possible that a client will request that the law firm not render a bill for a certain period of time or after a specific date for example, 30 June. If the legal practitioner agrees with the client's request, and the client subsequently fails to pay the account within the agreed time period, the legal practice should not be put at a disadvantage in these circumstances.*

Periodic billing

In personal injuries cases (particularly 'no win no fee' matters), the absence of bills or regular costs updates can lead to unrealistic client expectations about the amount of the final award or settlement that will be theirs to keep. Irregular bills also contribute to clients losing sight of their expenditure and to them being subsequently surprised by the amount of their accumulated debts. The Model Bill already provides that clients should be provided with updated estimates of costs when there is a significant change to the disclosures previously made. However, it not entirely clear how this requirement operates where no costs are immediately payable (and may not be payable) because the matter is a 'no win no fee' agreement. For the sake of clarity and transparency, several members of the NSW Legal Fees Review Panel felt that clients should be apprised of their potential liability at least quarterly.

The Taskforce proposes that the National Rules should include an overriding requirement that bills must be sent no less than quarterly. In matters where it has been agreed that a bill will not be issued until completion, the law practice should be required to issue a statement of accrued costs and disbursements at least quarterly. The Taskforce notes the SCAG proposal that all bills rendered in personal injury matters must be itemised, and seeks the views of the Consultative Group and stakeholders on this matter.

**38 LLFG comments:**

*38.1 It is not entirely clear whether this is intended to apply only to personal injury matters. If*

<sup>26</sup> NSW Legal Fees Review Panel, *Report: Legal Costs in NSW* (2005).

<sup>27</sup> NSW Legal Fees Review Panel, *Report: Legal Costs in NSW* (2005).

*it is decided to proceed with this rule it should be limited to plaintiffs in such matters.*

- 38.2 *The proposal for quarterly bills or statements of accrued costs is too prescriptive and does not work in all instances, for example matters which have not progressed over 3 months. Whether this is practical will also depend on the fee arrangements for the matter, eg it may be possible to provide accrued costs where fees are charged on a time basis, but may not be with other fee models.*
- 38.3 *We doubt whether retail clients would want in all cases to be billed quarterly if the law practice chooses not to do so. It will also lead to additional collection and other costs if the bill remains unpaid.*
- 38.4 *For sophisticated clients the regularity of billing is a matter for the client and the requirement should not apply.*
- 38.5 *The Model Bill requirement for updated estimates when there is a significant change to the disclosures previously made is sufficient.*

### **Recovery of costs**

The National Rules should include the following matters, which are based on the existing Model Bill provisions.

- *A law practice may take reasonable security from a client for legal costs (including security for the payment of interest on unpaid legal costs); and*
- *Legal costs are recoverable: under a valid costs agreement; if this does not apply, in accordance with any applicable costs determination or scale of costs; or if neither of these apply, according to the fair and reasonable value of the legal services provided.*

### **39 LLFG comments:**

- 39.1 *LLFG agrees with this approach. What is fair and reasonable should depend on the circumstances of the particular case and should take into account a number of matters such as:*
- *the approval (express or implied) of the client to:*
    - *the lawyer undertaking all or any part of the work giving rise to the costs; or*
    - *the amount of the costs.*
  - *the complexity of the matter and the difficulty or novelty of the questions raised;*
  - *the skill, labour, specialised knowledge and responsibility involved;*
  - *the timeframe in which the matter is to be completed and the time spent on the matter;*

- *the quality of the work done;*
- *the number, importance and length of the documents prepared or perused;*
- *the place where and the circumstances in which the matter is transacted;*
- *the amount or value of any money or property involved or any matter in contention;*
- *the importance of the matter to the client.*

### **Costs assessment**

There are significant variations across jurisdictions in how costs assessments are undertaken. This can lead to different approaches in allowing costs on assessment and different interpretations about whether costs agreements are reasonable.

The Taskforce considers that there is merit in providing a uniform national framework for dealing with disputes over costs quickly and efficiently. As discussed in the paper on the National Legal Services Ombudsman, the Taskforce is proposing that the Ombudsman be able to deal with complaints about legal costs up to \$100,000; and, as is currently the case, the charging of excessive costs in a legal matter could result in disciplinary proceedings.

#### **40 LLFG comments:**

*40.1 It is agreed that a uniform method for dealing with cost disputes with consumers is required. See our comments in paragraph 1 in relation to who should qualify as a “consumer”.*

*40.2 The proposal that the National Legal Services Ombudsman deal with complaints about legal costs up to \$100,000 is different from the current position in eg NSW and Vic in terms of the maximum amount where costs disputes over \$25,000 and \$10,000 respectively are referable to the relevant Legal Services Commissioner. \$40,000 would be a more appropriate figure than \$100,000.*

In addition, the National Rules would provide for costs assessment by making uniform provision for the following:

- The timing of applications;
- Jurisdiction to hear these matters (ie, courts, tribunals, costs assessors etc);
- The skills and qualifications of costs assessors;
- The criteria for determining the reasonableness of legal costs;
- The criteria for setting aside costs agreements;
- The avenues of appeal;

- The obligations on the assessor to refer excessive overcharging, and failure to comply with mandatory costs disclosure requirements, to the National Legal Services Ombudsman.

The National Rules should provide that, in conducting an assessment of legal costs, the costs assessor must consider:

- Whether or not it was reasonable to carry out the work to which the legal costs relate;
- Whether or not the work was carried out in a reasonable manner; and
- The fairness and reasonableness of the amount of legal costs in relation to the work.

In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to any or all of the matters already outlined in the Model Bill (and discussed above). If the costs assessor considers that the legal costs charged by a law practice are grossly excessive, the costs assessor must refer the matter to the National Legal Services Ombudsman to consider whether disciplinary action should be taken against a legal practitioner. The costs assessor also may refer any other matter that he or she considers may amount to unsatisfactory professional conduct or professional misconduct. There should be a review mechanism from decisions of cost assessors.

Consistent with the legislative principles for costs, a costs assessor should also consider proportionality when considering what is a fair and reasonable amount of legal costs.

**41 LLFG comments:**

*41.1 See our comments in comment 8 above in relation to proportionality.*

*41.2 See our comments in comment 5.2 above.*

**Court management of costs**

The Taskforce is also considering the issue of court management of costs more generally. This may be the subject of future consultation.

## ATTACHMENT A

Sample costs disclosure in table format.

<p>41.3 Basis upon which we will charge our costs</p>	<p><i>Practitioner to circle applicable method of calculating costs:</i></p> <ol style="list-style-type: none"> <li>1. We will charge our costs according to the time spent working on your matter, as set out in our covering letter.</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>2. We will charge our costs according to an agreed value for each piece of work as set out in our covering letter.</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>3. We will charge our costs according to the legal budget set out in our covering letter, which provides for payment upon us achieving agreed milestones in your matter.</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>3. We will charge our costs partly based on the time spent working on your matter and partly according to an agreed value for particular pieces of work specified in our covering letter.</li> </ol>
<p>41.4 Estimate of our costs in your matter</p>	<p>We advise that the total costs in your matter will be \$_____.</p> <p>OR</p> <p>Our costs in this matter are likely to range from \$_____ to \$_____, depending on a number of considerations impacting on your matter. The variables that are likely to impact on the costs in your matter are discussed in more detail in our covering letter.</p>
<p>41.5 Disbursements payable in addition to our legal fees</p>	<p><i>Practitioner to strike out disbursements that will not be charged.</i></p> <p>You will be required to pay for the costs of the following costs in addition to our legal fees:</p> <ul style="list-style-type: none"> <li>• Photocopying</li> <li>• Expert reports</li> <li>• Transcription services</li> <li>• Courier and other postage costs</li> <li>• Faxes</li> <li>• Other disbursements as specified in our covering letter.</li> </ul> <p>The rate at which each of these disbursements will be charged is set out in our covering letter. The legislation prevents us from profiting from the charges from these disbursements, although we are permitted to charge you a reasonable fee for the labour component associated with obtaining or providing these services.</p>
<p><b>Important note about costs in litigation.</b></p>	<p>If your case is successful, you may be able to recover costs from the other party/parties. However, you should be aware that it is unlikely that you will be able to recover the full amount of your legal costs and you may have to pay some costs to us out of your own pocket. This means that if you are successful, some of the damages you receive will need to be used to pay our costs. If your case is unsuccessful you may have to pay your own legal costs owed to us as well as costs incurred by the other party.</p>

