Queensland Law Society

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Office of the President

Your ref:

Our ref: Litigation Rules Committee 2100342/11 4 February 2013

Mr J Briton
Legal Services Commissioner
Legal Services Commission
PO Box 10310
ADELAIDE STREET QLD 4000

Dear Mr Briton,

DRAFT REGULATORY GUIDE 4 – LUMP SUM COST AGREEMENTS

Thank you for the opportunity to make comments on the draft regulatory guide 4: Lump Sum Cost Agreements.

The attached submission has been prepared with the assistance of the Litigation Rules, Ethics, Criminal Law and Accident Compensation/Torts Law Committees.

Yours faithfully

Annette Bradfield
President

Queensland Law Society

Submission

Draft Regulatory Guide 4: Lump Sum Cost Agreements

Legal Services Commission

A Submission of the
Queensland Law Society

4 February 2013

Queensland Law Society

Table of Contents

Introduction

We refer to our earlier letters with respect to the draft regulatory guides and repeat our concerns stated within.

We also note the recent High Court judgment of *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross & Thelander* [2012] HCA 56 - 12 December 2012. This judgment demonstrates that judicial interpretation may be divided on certain issues therefore the Courts are best placed to make statements with respect to the law.

The issues this submission will consider are:

- Key principles
- Itemisation of bills; and
- Trusts.

Key principles

We refer to key principle 5 which states:

> *the lawyer is in a position of distinct advantage over the client, as the lawyer is likely to be in a position to assess at the outset whether the proposed fixed fee is reasonable; whereas the client will most likely not be;*

The Society considers that this statement is inaccurate when one considers s308(1)(a), *Legal Profession Act 2007*("the Act") which requires a law practice to disclose:

> *the basis on which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs…*

Therefore a client is in a position to consider whether the costs are reasonable, and if so, to then instruct the law firm to act on its behalf. In addition, by their nature, fixed fee quotes are more amenable to comparison shopping by the client, and can be used by a client to seek to attain the 'best deal'. The advantage, in such circumstances, is with the client.

Furthermore it is simplistic to suggest a client is inexperienced and is not in a position to assess whether a fee is reasonable. There are many experienced clients who are very familiar with various billing practices. It is our view that they should not be discouraged from contracting on the basis that the practitioner/firm provided all the client's legal services during a certain period for a fixed fee. In those circumstances we consider that the practitioner/firm bore the risk and ought not be penalised.

Moreover, as point 4 notes, the lawyer's fiduciary duty to the client and point 6 details the cost disclosure required, we consider that point 5 is also superfluous as the issue of fiduciary duty (and the obligations that stem from that) has been addressed. We therefore recommend that point 5 be excluded from the guide.

Itemisation of bills

The Society notes that no form of itemisation is prescribed by the Act. What is required is dependent upon the nature of the agreement made between the client and law firm.

Section 300 of the Act provides:

> *itemised bill means a bill stating, in detail, how the legal costs are made up **in a way that would allow the legal costs to be assessed under division 7**.* (emphasis added).

This requirement is more easily satisfied in the event of a fixed fee agreement. We do not agree with your suggestion that the itemisation requirements in the case of a fixed fee agreement are identical with those attaching to an agreement charging on a time basis.

Note that, s 340(1)(a) of Division 7 of the Act sanctions assessment on the basis of a fixed amount for the service:

> *340 Assessment of complying costs agreements*
>
> *(1) A costs assessor for a costs application must assess any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if—*
>
> *(a) a relevant provision of the costs agreement **specifies the amount,** or a rate or other means for calculating the amount, **of the costs**; and*
>
> *(b) the agreement has not been set aside under section 328;*

Accordingly, a global description of the work completed, and the fixed fee agreed, is sufficient to allow the legal costs to be assessed under division 7 (as required by s300 of the Act.)

We also refer to our letter to you on 4 May 2012, **attached** where we refer to the recent Supreme Court judgment of *Tabtill No 2 Pty Ltd & Ors v DLA Phillips Fox (a firm) & Anor* [2012] QSC 115. His Honour Justice Applegarth's judgment in this matter is particularly pertinent to the discussion of itemisation of bills.

We also note that on 9 November 2012, Garde J considered an application for review of costs in *Collection Point Pty Ltd v Cornwalls Lawyers Pty Ltd* [2012] VSC 492. In his judgment Garde

J decided not to follow an earlier Victorian authority but to bring Victoria into line with New South Wales and Queensland authorities on this issue.

Trusts

We note your guide states:

> *Accordingly, money paid 'up front' under a fixed fee agreement must be treated as trust money (indeed, this appears to have been the view adopted by the Supreme Court of Queensland in the decision of State of Queensland v Masman[10]).*

The *Masman* case did not decide this question. The agreement in that case claimed to be a fixed fee agreement, but in reality it was not. Accordingly the money had to be held in trust. Chesterman JA said that the application turned upon this very question. At [21]-[22] his Honour observed:

> *The application thus turns upon the character of the moneys paid on 3 November, whether they were in fact subject to a trust for the benefit of the first and/or second respondent or whether they were paid to the third respondent in its own right as consideration for its contractual promises.*
>
> *The question is answered by a consideration of the terms of the contract.*

In the case of a straightforward fixed fee agreement the issue is whether the money is "entrusted" to the firm for the purposes of s237 of the Act. A fee paid for an agreed service is not, in any ordinary form of trade or commerce, regarded as received subject to a trust. Consider the purchase of airline tickets. One may pay in advance but such payment is not "entrusted" to the airline and no one considers that such money is paid on trust. Nor is such money paid "on account of" the provision of the service, as that phrase is used in s.237 of the Act. The money is paid pursuant to a contract whereby the law practitioner will provide a stipulated service. There is no entrustment of the money unless the intentions of the client and law practice create an entrustment or suggest an entrustment.

On this point, in *Twinsectra Limited v Yardley and Ors* [2002] UKHL 12 Lord Milllett said at [73] "payments in advance for goods and services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cash-flow. Commercial life would be impossible if this were not the case." The same approach has been followed by Australian courts in holding that the existence of a trust must be determined by the intention of the parties.[1]

[1] *Marriner and Ors v Australian Super Developments Pty Ltd & Ors* [2012] VSCA 171 at [65] to [67], *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [56], *Raulfs v Fishy-Bite Pty Ltd* [2012] NSWCA 135 at [47] to [51] per Campbell JA.

We note that the New South Wales Law Society provided the following advice to its members about the corresponding provision in the *Legal Profession Act* 2004 (NSW):

> "However, the use of the word "entrusted" in the definition reinforces the general belief that trust money is not merely given or delivered to a law practice; it is placed in its "care and protection" to be held for or on behalf of another person."

We therefore recommend that this section be revised.

We also note that the last sentence on page 4 refers to money received for future outlays as "transit money." We recommend that that sentence instead read:

> "Money received for future outlays (eg counsel's fees or stamp duty) is 'trust money.'"

Conclusion

From a proactive perspective, it is our view that the key to fixed fee or lump sum billing is for practitioners to:

- carefully design and describe the scope of work with regard to the special circumstances of each matter; and

- make provision for foreseeable events;

rather than over-rely on generic templates or a simplistic and potentially uncertain scope of work.

There is particular benefit for lawyers and clients in the certainty offered by properly drawn fixed fee agreements. It would be regrettable if the benefits of such agreements were lost through the default imposition of time costing or scale standards, in the absence of evidence of overcharging.

In summary it is the view of the Society that the practice of law involves a gentle balance and compromise of various positions: the freedom to contract overlaid by a solicitor's fiduciary duties of loyalty and not to prefer the solicitor's own interest to that of their client. These positions are at the forefront of a solicitors' practice and ultimately are critical for any objective investigation of practices. We also refer to the High Court's judgment in *Cross & Thelander* above and reiterate that matters with any uncertainty ought be the subject of judicial or legislative clarification.

Thank you for providing us the opportunity to contribute our comments to the publication.