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Your Ref:

Our Ref: Litigation Rules Committee: 21000342/93

27 April 2012

Mr John Briton
Legal Services Commissioner
PO Box 10310 Adelaide St
BRISBANE QLD 4000

By email: lsc@lsc.qld.gov.au

Dear Commissioner

BILLING PRACTICES - A REGULATORY GUIDE 3-2012

Thank you for the opportunity to provide comments on Regulatory Guide 3 – "Billing Practices."

This letter is written with the assistance of the Litigation Rules Committee and the Succession Law Committee.

Overview

While the Society applauds the objective of the Guide, namely to clarify the operation of the multiple legislative provisions having application to the billing practices of law practices, we have concern about specific sections of the guide, particularly those portions which relate to the application of the Australian Consumer Law ("ACL").

Currently the legal profession is directly regulated by (inter alia):

- *Legal Profession Act 2007 (Qld)*
- *Legal Profession Regulation 2007 (Qld)*
- *Legal Profession Solicitors Rules 2007 (Qld)*
- *Competition and Consumer Act 2010 (Cth)* ("CCA")
- *The Australian Consumer Law (Cth)* (incorporated by the CCA)

The Solicitors Rules are to be replaced by the "*Australian Solicitors Conduct Rules*" on 1 June 2012. The Society recommends that the Guide be consistent with these upcoming provisions.

Specific Issues with the Guide

Lawyers must give valid costs disclosure (p2)

This heading is silent on the requirements set out in sections 308(1)(c) and 308(1)(f) to provide costs estimates. The Society recommends its inclusion in the Guide.

Duty to ensure the standard form contract is not unfair (pp 5 & 6)

The examples given of a potentially unfair contract term include: "to suspend work pending payment or to claim assets or property as security". The Society is concerned that these statements are included in the guide as indicating the view of the Legal Services Commission (the LSC) that such provisions are, or are likely to be, unreasonable.

In circumstances where there is a Client Retainer, reference must be had to Rule 13 of the *Australian Solicitors Conduct Rules* which provides that, except as permitted by the rule, a solicitor must "*ensure completion of the legal services for that matter".*

Without a contractual provision entitling the firm to cease work unless fees are paid, the Conduct Rules require that the solicitor 'ensure completion of the legal services'.

The Society considers that it is entirely reasonable that a law firm should be entitled to suspend the provision of legal services if fees are unpaid, and to require adequate security for the provision of services on credit.

Note that this view is specifically set out in s320 of the *Legal Profession Act 2007* (QLD), which provides:

> *320 Security for legal costs*
> *A law practice may—*
>
> *(a) take reasonable security from a client for legal costs, including security for the payment of interest on unpaid legal costs; and*
> *(b) refuse to act, or stop acting, for a client who does not provide reasonable security.*

This provision is also mirrored in the proposed Legal Profession National Law.[1]

We consider that the Guide should indicate that a clause "to suspend work pending payment or to claim assets or property as security" is acceptable and consistent with s320 of the *Legal Profession Act 2007.*

Lawyers must not use undue harassment or coercion in connection with the payment of their costs (p6)

This is a re-statement of section 50 of the ACL.

The Society considers that the example in the guide suggests that strong demand for payment (anything beyond a request for payment) is equivalent to harassment.

Section 50 prohibits "physical force, or undue harassment or coercion". We recommend that the Guide use the same terms. The Guide's example of writing 'in a way calculated to intimidate, demoralise, tire

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[1] *"4.3.36 Security for legal costs*
A law practice may take reasonable security from a client for legal cost
(including security for the payment of interest on unpaid legal costs) and refuse or cease to act for a client who does not provide reasonable security."

out or exhaust" is not equivalent, and incorrectly introduces the concept of intent "calculated to" which is not an element of s 50.

Guarantee as to skill and effect of services (p6)

The Guide's discussion under this relates to section 61 of the ACL. Section 61 has exceptions which are not acknowledged in the discussion, with the effect that the Guide is misleading.

Specifically, the Guide does not acknowledge the issue of the reasonableness of the expectations of the client given:

- the wording of section 61(2): *"the services will be of such a nature, and quality, state or condition, that they might* ***reasonably be expected to*** *achieve that result."*

- the exception in section 61(3): "This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier."

The Guide's encapsulation of section 61 states that the services must be reasonably fit for the purpose and ***'of a quality that they may be expected to achieve the result the client wishes the service to achieve'***. This is not an equivalent to the meaning of section 61.

For example, take any litigation matter. There will be an unsuccessful litigant. That litigant is likely to take the view that they did not achieve the result they wished from the legal service supplied. This does not mean that the service has not been delivered with the skill guaranteed by section 61, nor the flow-on, that the law firm is not, therefore, entitled to payment for the service.

The Society considers that the Guide should acknowledge the legislative limitation imposed by the requirement of reasonableness of the expectation.

Lawyers must not charge legal costs for work other than professional work (p8)

The Society considers this heading to be misleading and incorrect, especially as there does not appear to be any authority cited to support the proposition. In stark contrast, the Society notes the unreported Queensland Supreme Court decision of Derrington J in *Murjen Pty v M.V Parmelia* on 15 October 1993. His Honour, in interpreting the Scale for an attendance by a solicitor involving skill or legal knowledge, found that if the attendance required any of the talents or knowledge of an experienced clerk and was undertaken by a solicitor, it attracted the solicitor's rate.

The notion that work incidental to legal work is somehow not able to be charged for as professional costs is a difficult concept and one that members of our specialist committees have not come across. Work incidental to legal work must be, by definition, within the scope of legal work. The Society therefore strongly cautions against setting a prescriptive set of guidelines.

For example, consider the Court Scale of Costs which exist in the various Courts. Court Scales have always and still do allow for attendance rates for attendances that do not involve the exercise of skill or legal knowledge. Whilst the scales typically allow a reduced rate for such attendances, there can be no

doubt that they are in fact professional legal costs. These matters must necessarily be the subject of Client Retainers.

We are unable to conceive how your proposition could be accurate, particularly as there are no laws that regulate what non-qualified persons are able to charge for non-legal work. Your proposition seems to suffer from some inherent logical difficulties. If your proposition is correct then it must also necessarily follow that charges for non-legal work are not subject to the provisions of the *Legal Profession Act*. For instance, a client would then have no ability to challenge such charges as, according to the LSC, they are not legal costs. Rights to review are quite clearly limited to legal costs. The attempt to clarify the comments in the second paragraph on page 8 is insufficient and the real problem is that the first paragraph significantly misrepresents the position.

Non-Legal work in relation to Estate Administration

The Society has received input from its Succession Law Committee with respect to the Guide's reference to what is, and is not, legal work with respect to Estate Administration.

Care needs to be taken before work is categorised as 'Non-Legal," especially in circumstances where a practitioner is instructed by a Personal Representative to administer the estate.

Your comment relies on, among other things, passages from the President's publication as footnoted at 17. That publication in turn refers to *In the estate of Purton (1935)* 53 WN (NSW) 148. There, items in estate accounts by way of legal charges were queried by the NSW Registrar because they were in respect of receipt and distribution of moneys, and writing of letters. These were said not to be matters which the executor could delegate to a solicitor, to be done at the expense of the estate. The passage in Purton (at l49) states:-

> *"If the trustee employs a solicitor he may have to pay him his proper charges, but he is not entitled to do so at the expense of the estate in so far as those charges are in excess of the amounts proper for the work done."*

In other words, it goes not to the question of the solicitor being paid, but of the executor being entitled to an indemnity from the estate for amounts paid to the solicitor. In Vance "Executors Commission", Purton is described as the NSW practice, and is contrasted with the Victorian practice in these words (at page 143):-

> *"In Victoria, no objection is taken to the delegation by the executor of this work to the estate solicitor, but in that case the fact that he has so delegated it and the estate has paid for it will be taken into account in the estimate of the executor's pains and trouble. The estate will not pay twice in respect of this work."*

Our online inquiries with Casebase indicate that Purton has never been cited in any Australian court since it was decided. Therefore, there is no compelling reason for regarding it as applicable, indeed Purton may very well depend upon sub-section *5 of section 53 of the Trustee Act 1925 (NSW)* which at the time read:-

> *"Nothing in this section shall authorise a trustee to employ an agent in any case where a person acting with prudence would not employ the agent to transact the business or do the act, if the business or act was required to be transacted or done in such person's own affairs."*

There is no such provision in Queensland. Whilst the Queensland Parliament has embraced the concept of a prudent person standard by s22 of the *Trusts Act* in relation to the trustee's power of investment, it did not introduce the same test in relation to the statutory authority to appoint an agent. In fact the terms of section 54 of the *Trusts Act 1973* give positive encouragement to a trustee employing an agent to handle the receipt and payment of money (to take just two issues which were exemplified in Purton).

In the current consumer driven environment, Personal Representatives undertake estate administrations under the constant threat of liability to the beneficiaries and third parties for any action or inaction which, in hindsight, is challenged. The most mundane of transactions have legal consequences. Using one of the examples in the Guide, collecting and distributing rent requires a clear understanding of the legal rules applying to the entitlements to the rent and the obligations of the Personal Representative to pay tax on it, and to distribute rent. So, while the physical process of receiving payment is an administrative task, there is legal work associated with the receipt of rent.

It is 'legal work' for the Personal Representative to obtain legal advice and assistance with carrying out the entirety of the administration of the estate. It is an unfair and dangerous limitation on the rights of the Personal Representative to attempt to unduly restrict the advice and assistance the Personal Representative is entitled to obtain. The court retains jurisdiction for the benefit of any person aggrieved by the Personal Representative's decisions to address questions of entitlement to reimbursement.

The reference to commission confuses the work of the law firm with the right of the Personal Representative to claim commission. The court determines the reasonable commission having regard to the extent of third party assistance (including engaging solicitors) the Personal Representative obtained during the administration process. It is wrong to say that this means that commission is the means by which this expenditure should be recovered. In fact the delegation of both professional and non-professional work by the Personal Representative to a solicitor is not an issue for either fees payable to the solicitor or the extent to which the Personal Representative has an indemnity against estate assets for the payment of those fees. The delegation is only considered (to the detriment of the Personal Representative) if that Personal Representative seeks commission. On any application for commission, the Personal Representative will either receive no commission or a reduced commission for any non-professional work which he or she did not attend to personally, but which was delegated to the solicitor. Further, it is important to note that, in the experience of our members, only a small number of Personal Representatives seek commission.

An executor and trustee of a deceased estate is entitled to be reimbursed from the estate for the expenses they reasonably incur in the administration of the estate. This right is enshrined in legislation through the combination of s49 (1) of the *Succession Act 1981* and Part 6, of the *Trusts Act 1973* - in particular s72.

In *Public Trustee of Queensland v MacPherson* [2011] QSC 169 McMeekin J stated at [25] *"a trustee or executor is entitled* ***as of right to be indemnified for expenses incurred*** *before paying out the trust funds to anyone else".* [emphasis added]

Lawyers who agree with the client to charge for their services on a time-costed basis (p10)

While the Society agrees with the view expressed in the Guide about misusing the fixed units for obvious price gouging, the thrust of this section of the Guide is to generally challenge the validity of a 6 minute unit charge.

The Society considers that a 6 minute unit is both a well-established and accepted approach to time recording in the legal profession, and a reasonable reflection of the level of precision appropriate to the task, taking into account the realities of practice.

The Society also notes that the 6 minute unit has been legislated by the Federal Government with the Federal Court Scale, which commenced on 1 August 2011. See items 1.1, 1.2 and 1.3 of that Scale. Not only does the 6 minute unit have the support of the Australian Federal Parliament, it also has the support of the Judges of the Federal Court who developed the Scale. Further the Society considers that in the absence of a cost agreement, the Federal Court Scale may be recognised as being an appropriate method to determine the basis upon which legal costs are recoverable, in accordance with s319(1)(b) of the LPA. It would be a difficult argument to suggest that a party can recover costs on one basis against another party but his or her solicitor is prevented from charging the client on the same basis.

Therefore to suggest that lawyers cannot charge 6 minute units is at odds with the Federal Court Scale and fetters the right of indemnity envisaged by the Federal Court as the client's liability to the solicitor. Preventing a practitioner from charging 6 minute units also creates uncertainty for our members who practice in both State and Federal areas of law.

The Society therefore considers adverse commentary in relation to the 6 minute unit is inappropriate.

Lawyers must not charge one unit of time more than once (p11)

The Society considers the first and third dot points to be very useful examples of the principles of not charging one unit of time more than once. However, the second dot point regarding units of time is more problematic. Invariably there will always be a minimum unit of time. Six minute units are very common but not unique. Some firms charge five minute units. Some Court Scale of Costs still allow a minimum of fifteen minutes for any attendance involving legal skill.

The Society considers that the point would be clearly expressed by illustrating it with reference to a minimum unit of one hour as it is likely that an agreement which provided for minimum charges of one hour or part thereof would not be regarded as reasonable. The same cannot be said to apply to the six minute unit of time.

Thank-you again for the opportunity of commenting on your proposed Guide.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Ms Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au

Yours faithfully

Dr John de Groot
President