

# COST DISCLOSURE CHECKLISTS

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## Client Checklist

Below is a checklist of provisions to consider when reviewing or developing your legal practice's Cost Disclosure Notice for clients.

### Part 1 – When to disclose

Are the total legal fees likely to exceed the regulated amount (currently \$1,500 excluding disbursements and GST for abbreviated disclosure and \$3,000 excluding disbursements and GST for detailed disclosure)?

NB Best practice suggests a cost agreement should also be entered into with a client. This can be as simple as a letter setting out the scope of the retainer and specific conduct of same.

#### Does the client fall within an exemption? – s 311 *Legal Profession Act 2007* (LPA)

- ☐ Has the client:
  - ☐ received one or more disclosures under s 307B (abbreviated disclosure of costs to clients), s 308 (detailed disclosure of costs to clients) or s 309 (disclosure if another law firm is to be retained) from the law practice within the previous 12 months? and
  - ☐ waived the right for disclosure? and
  - ☐ has the principal of the legal practice decided on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, further disclosure is not warranted?

NB A written record of the principal's decision is made and kept with the file – s 311(3). Also note s 311(4).

- ☐ Is the client a client described in s 311(1)(c)?
- ☐ Have the legal costs, or the basis on which they will be calculated, been agreed as a result of a tender process? s 311(1)(d)
- ☐ Will the client not be required to pay the legal costs, or will the legal costs not otherwise be recovered by the law practice (i.e. pro bono)? NB Consider the issue of cost recovery. s 311(1)(e)

Disclosure of costs to clients or another law firm being retained must be in writing before, or as soon as practicable after, the law practice is retained in the matter s 310(1) or other law practice is retained in s 310(3).

### Part 2 – How to disclose

#### Do you have client consent to communicate electronically?

You may provide the disclosure notice by electronic communications provided the client consents to provision of information by electronic communication. See s 11 *Electronic Transactions Act 1999* (Cth).

You may obtain the client's consent by express written consent, implied consent, or implied by conduct (i.e. mutual participation in electronic communications).

NB Best practice suggests obtaining the client's express written consent.

Abbreviated disclosure s307B:

☐ may be made orally or in writing s309(1)(a);

☐ if made orally, it must be confirmed in writing as soon as practicable s 310A(1).

Detailed disclosure s308:

☐ must be in writing s 310A(3).

Disclosure if another law practice is retained s 309(1):

☐ may be made orally or in writing if abbreviated disclosure applies - s 307B;

☐ otherwise it must be in writing s 310A(4).

Cost disclosure may be made in a costs agreement or an offer to enter into a costs agreement, but the disclosure must be in a prominent position at the beginning of the agreement or offer – s310A(5).

## Part 3 – What to disclose

### (a) Are you operating an incorporated legal practice? – ss 123 & 124 LPA

Ensure your disclosure notice includes:

- ☐ The services to be provided.
- ☐ Whether all of the legal services will be provided by an Australian legal practitioner; AND
- ☐ If some or all of the legal services will not be provided by an Australian legal practitioner – identifying those services and indicating the status or qualifications of the person(s) who will provide the legal services.
- ☐ A statement that the LPA applies to the provision of legal services but not to the provision of non-legal services.

A failure to make disclosure under s 123 will result in the standard of care owed by the practice to the client to be the same standard that would be applicable if the service had been provided by an Australian legal practitioner.

### (b) Are you operating a multi-disciplinary practice? – ss 152 & 153 LPA

Same as above in (a).

A failure to make disclosure under s 152 will result in the standard of care owed by the practice to the client to be the same standard that would be applicable if the service had been provided by an Australian legal practitioner.

### (c) Abbreviated disclosure of costs to client – s 307B LPA

The disclosure must clearly note:

- ☐ The legal services that will be provided in general terms.
- ☐ The basis on which the legal costs will be calculated including whether a scale of costs applies.
- ☐ An estimate of the total amount of the legal costs.
- ☐ An estimate of the total amount of disbursements
- ☐ The client's right to:
  - ☐ Negotiate a costs agreement with the law practice;
  - ☐ Receive a bill from the law practice;
  - ☐ Request an itemised bill after a receipt of a lump sum bill; and
  - ☐ Be notified under s 315 of any substantial change to matters disclosed.

Additionally, the abbreviated disclosure notice should include the total price the client will pay for legal costs (i.e. legal fees, disbursements and GST) – s 48 *Competition and Consumer Act 2010* (Cth) ('ACL').

### (d) Detailed disclosure of costs to clients – s 308 LPA

The disclosure must clearly note:

- ☐ The total price the client is to pay for legal costs, outlays and GST – s 48 ACL.

- ☐ When, and/or how frequently, the client will be billed.
- ☐ The rate of interest that the law practice charges on overdue legal costs. This may be a stated rate or a benchmark rate. NB See s 308(4)(e), (5) and (6) in relation to benchmarks.
- ☐ The client has a right to progress reports – s 317.
- ☐ The name of the person within the practice that the client may contact to discuss legal costs.
- ☐ If there is a dispute in relation to legal costs, the client may apply:
  - ☐ for a costs assessment under division 7;
  - ☐ the setting aside of a costs agreement under s 328; and
  - ☐ the time limits that apply to either of the above two actions.
- ☐ That the law of Queensland applies to the legal costs.
- ☐ That the client has the right to:
  - ☐ Accept under a corresponding law a written offer to enter into an agreement with the law practice that the corresponding provisions of the corresponding law apply to the matter.
  - ☐ Notify under a corresponding law, and within the time allowed by the corresponding law, the law practice in writing that the client requires the corresponding provisions of the corresponding law to apply to the matter.

NB Misrepresentations about fees payable and a client's rights in a costs dispute, including the complaint processes may be misleading or deceptive conduct s 18 ACL.

**(e) Disclosure if another law practice to be retained (including barrister) – s 309 LPA**

- ☐ If you intend to retain another law practice (which includes a barrister) for a matter that is between \$1500 and \$3000 exclusive of disbursements and GST then you must disclose to the client.
  - ☐ The basis on which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs.
  - ☐ An estimate of the total amount of the legal costs.
  - ☐ An estimate of the total amount of disbursements
- ☐ If you intend to retain another law practice (which includes a barrister) for a matter that is greater than \$3000 exclusive of disbursements and GST then you must disclose to the client:
  - ☐ The basis on which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs.
  - ☐ An estimate of the total legal costs if reasonable practicable, or a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs.
  - ☐ When, and/or how frequently, the client will be billed.
- ☐ The second law practice is not required to disclose to the client, the responsibility lies with the first law practice.

NB You may wish to provide to your client a summary of the second law practices costs together with the second practices disclosure notice and cost agreement. You might wish to draw to your client's attention

particular charges such as cancellation fees. Also note the limitation as to, or recovery of, costs by assessment.

**(f) Are you offering a Conditional Costs agreement?**

- ☐ Disclose that the client has the right to seek independent legal advice before entering into the cost agreement. See s 323(3)(d) LPA.

NB We recommend this disclosure be made for all cost agreements, not just conditional cost agreements.

**(g) Will your cost agreement include an uplift fee?**

- ☐ You must disclose to the client your:
- ☐ Law practice's legal costs;
  - ☐ The uplift fee, or the basis of the calculation of the uplift fee; AND
  - ☐ The reasons why the uplift fee is warranted.

**(h) Will you be acting in a litigious matter?**

- ☐ Before any settlement is executed, you must disclose to the client:
- ☐ Any reasonable estimate of the amount of costs payable by the client including any legal costs of another party the client is to pay; AND
  - ☐ A reasonable estimate of any contributions towards costs likely to be received from another party.

Note also:

- ☐ s 290A(3) *Workers Compensation and Rehabilitation Act 2003*
- ☐ s 51B(7) *Motor Accident Insurance Act 1994*
- ☐ s 37(4) *PIPA*
- ☐ Any other relevant legislation.

**Part 4 – Effect of non-disclosure – s 316 LPA**

- ☐ Client or associated third party payer not required to pay legal costs until they are assessed.
- ☐ Law practice cannot maintain debt recovery proceedings unless the costs have been assessed.
- ☐ The client may apply to have the costs agreement set aside.
- ☐ The costs assessor can reduce the legal costs by an amount the assessor considers to be proportionate to the seriousness of the failure to disclose.
- ☐ The Law practice must pay the costs of the costs assessment, unless cost assessor orders otherwise – s 342(2)(b) LPA.
- ☐ Failure to comply with disclosure may be capable of constituting unsatisfactory professional conduct or professional misconduct.

## Third Party Payer, Associated and Non-Associated Third Party Payers Checklist

Below is a checklist of provisions to consider when reviewing or developing your legal practice's Cost Disclosure Notice for **third party payers, associated and non-associated third party payers**. This should be read in conjunction with Chapter 3.1 of the [QLS Costs Guide](#).

### Is the person a third party payer?

- ☐ The person is not the client and:
  - ☐ The person is under a legal obligation to pay all or part of your client's legal costs; or
  - ☐ The person is under a legal obligation to pay all or part of your client's legal cost and has already paid all or part of those legal costs – s 301(1).

#### Examples:

The parent of a child who agrees to pay the legal costs.

A borrower who is required to pay the legal costs of the lender in preparation of mortgage documents.

### Is the person an associated third party payer?

- ☐ Is the person under a legal obligation to the law practice to pay all or part of your client's legal costs, whether or not the legal obligation is also owed to the client or another person? – s 301(2).

#### Examples:

A company director who has signed a personal guarantee on behalf of the company to pay the law practice's legal fees.

A beneficiary of a trust or will IS NOT an associated third party payer. (*Amos v Fry and Company* unreported decision A Lyons J 11 December 2009).

### Is the person a non-associated third party payer?

- ☐ Is the person under a legal obligation to the client or another person to pay all or part of the legal costs, but who does not owe that legal obligation to the law practice?

#### Examples:

A tenant who is required under the terms of the lease to pay to the landlord the landlord's legal costs in preparation of the lease.

### When to disclose – Refer to Parts 1, 2 & 3 of the [Client Cost Disclosure Checklist](#)

### What to disclose to a third party payer or associated third party payer?

- ☐ Disclosure of costs to the associated third party payer must be in writing and given at the same time of disclosure to the client or, as soon as practicable after the law practice becomes aware of the obligation of the associated third party payer – s 318(1).
- ☐ The same level of disclosure that is to be made to a client is to be made to an associated third party payer but only to the extent that the details disclosed are relevant to the associated third party payer, and relate to costs that are payable by the associated third party payer in relation to the legal services provided to the client.

- ☐ Disclosure if another law firm is to be retained must be made in writing **before, or as soon as practicable after**, the other law practice is retained in the matter – s 310(2).
- ☐ Progress reports, limited disclosure is required.

### **What to disclose to a non-associated third party payer?**

- ☐ Provide sufficient information to enable the non-associated third party payer to allow them to consider making / make, a costs application. NB Issues of privilege when providing a solicitor's bill (see paragraph 9.2.2.3 of the ASCR Commentary).

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- ☐ The costs assessor can reduce the legal costs by an amount the assessor considers to be proportionate to the seriousness of the failure to disclose.
- ☐ The law practice must pay the costs of the costs assessment, unless cost assessor orders otherwise – s 342(2)(b) LPA.
- ☐ Failure to comply with disclosure may be capable of constituting unsatisfactory professional conduct or professional misconduct.