Barristers’ Fees: Law and Practice

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Liability limited by a scheme approved under Professional Standards Legislation.
1. INTRODUCTION AND OVERVIEW

The first purpose of this paper is to provide an introduction for barristers to the general provisions of the Legal Profession Act 2004 (NSW) (LPA 2004) relating to legal costs, costs disclosure and costs agreements. It focuses primarily on the typical case where counsel is retained by a solicitor. An earlier paper published in the Law Society Journal focuses on the obligations of solicitors by reference to the Act as originally passed. The second purpose of the present paper is to provide practical resources in the form of precedents for disclosure and agreements documents, a billing guide, and some observations on the law and practice relating to fee recovery.

Part 1 introduces some basic concepts and distinctions and gives an overview of the topic. Part 2 addresses disclosure under Part 3.2, Division 3, of the Act. Part 3 deals with costs agreements under Division 5. Part 4 considers billing, recovery and other issues.

Appendix 1 reproduces precedent costs disclosure and agreement precedents with annotations as published on the NSW Bar Association website. Appendix 2 reproduces the barristers’ billing checklist from the same source. Appendix 3 is a summary of particular problems concerning costs provisions of the present legislation with proposals for legislative reform.

LPA 2004 replaced the Legal Profession Act 1987 with effect from 1 October 2005. Part 3.2 of the 2004 Act deals with legal costs. It has been substantively amended three times, most recently by the Legal Profession Further Amendment Act 2006 (‘LPFAA’). The majority of the amendments in LPFAA (those in Schedule 2) did not commence until 1 July 2007.

1.1. Retainer, Disclosure, Agreement, Billing, Assessment, Recovery

The subjects of costs disclosure and the regulation of charging and recovery of legal fees are regulated by LPA Part 3.2. In order to achieve legal and ethical compliance as well as sound professional practice, it is necessary to maintain a clear distinction between several different but related concepts:

- the retainer of a law practice by a client or by another law practice on behalf of a client
- the various disclosures that a law practice is obliged to make to a client, a retaining law practice, and/or a third party payer
- a costs agreement between a law practice and a client, a retaining law practice, or a third party payer
- the rights and obligations of a law practice relating to billing, assessment and recovery of professional fees and other legal costs as against a client, a retaining law practice and/or a third party payer

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1 Brabazon, ‘Costs Disclosure’ (2005) 43 LSJ (No. 5) 59.
Part 3.2 recognises a fundamental distinction between a retainer by a ‘client’ of a ‘law practice’ (which is in effect the default setting for all the obligations of disclosure and the cost agreement provisions in the Act), and the case where a ‘law practice’ retains ‘another law practice on behalf of the client’. It is convenient to refer to these cases respectively as direct and indirect retainer.

Generally speaking, a directly retained law practice has more onerous disclosure obligations than an indirectly retained law practice. The indirectly retained law practice does not have to make initial disclosure to the client, but must give the retaining law practice the ‘information necessary’ to enable it to fulfil a fraction of its disclosure obligations referable to the costs of the indirectly retained law practice. The policy reason for this is obvious. The primary consumer protection provisions of the Act look to the relationship between the client and the directly retained law practice – typically, the solicitors’ firm with principal conduct of litigious or non litigious business on the client’s behalf. Both formally and in substance, the typical barrister stands at second remove from the client, being briefed and retained by the solicitor. The same is true of a solicitor acting as agent for another solicitor who has principal conduct of particular legal business for a client.

A retainer is not a costs agreement. As originally enacted, LPA 2004 recognized three possible combinations of retainer and costs agreement: direct retainer and costs agreement between barrister and client; indirect retainer by another law practice, but a costs agreement between the barrister and the client; and the traditional arrangement of an indirect retainer with a costs agreement between the barrister and solicitor. The Act now recognises a further category of costs agreement between a law practice and a third party payer, and gives that entity some of the rights of a client in relation to disclosure and in relation to the quantification and recovery of costs.

The distinction between direct and indirect retainer is primarily relevant to disclosure obligations, though it can also affect billing, assessment and recovery. The distinction between a lawyer/client costs agreement and a barrister/instructing solicitor costs agreement relate primarily to billing, assessment and recovery. Apart from the obvious consideration of the identity of the debtor, the Act treats cost agreements with a client more paternalistically than agreements between law practices.

1.2. **Key concepts: ‘law practice’, ‘client’ and ‘third party payer’**

1.2.1. **Meaning of ‘law practice’: ss4(1), 302(2)**

The Act uses the concept of a law practice as a generic term for an entity that carries on domestic legal practice on its own account. ‘Law practice’ is defined in section 4(1) as an Australian legal practitioner (i.e. an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate – see section 6(a)) who is a sole practitioner (i.e. one who ‘engages in legal practice on his or her own account’), a law firm (i.e. a partnership of Australian legal practitioners, possibly with one or more Australian-registered foreign lawyers), a multidisciplinary partnership, an incorporated legal practice, or a complying community legal centre. The definition is further extended for the purposes of Part 3.2 by section 302(2), which broadly speaking picks up former practitioners, former

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2 See section 310.

3 This paper uses the concepts of initial disclosure, additional disclosure and continuing disclosure in the same sense as the LSJ paper.

4 See section 310(2). There are other differences, but this is the greatest.
partners, executors, assignees and receivers, and permits the definition to be further extended by regulation. The *Legal Profession Regulation 2005* has not yet taken up that particular invitation.

It is clear enough that a barrister in private practice is a ‘law practice’, as is also a solicitor in private practice as a sole practitioner, or a firm of solicitors in private practice. It is doubtful that the same can reliably be said of a solicitor or group of legal practitioners employed as such by a large corporation or by a government department or public authority; the question in any particular case would have to be answered by applying the statutory criteria to the facts and circumstances of the particular case. The mere possession of an unrestricted practising certificate does not make a person a law practice.

1.2.2. **Meaning of ‘client’: s 4(1)**

The definition of ‘client’ in LPA 2004 is significantly changed by LPFAA. The new definition in section 4(1) is attractively parsimonious: ‘client includes a person to whom or for whom legal services are provided’. This takes the ordinary meaning as its starting point, but seeks to remove some perceived uncertainty adding an inclusive definition which, while close to the ordinary meaning, is simpler and more succinct.\(^5\)

Before the amendment took effect on 1 July 2007, the meaning of ‘client’ was a mess. Under the former definition in section 4(1), a client included ‘a person who is legally liable to pay for the services even if the services are not provided to or for that person’.\(^6\) The extension of the former definition to persons liable for costs reflects the judgment that such persons should not be without rights in relation to the assessment of costs. The extended definition was ill-considered in both its terms and its scope of operation. One problem with it may be illustrated by a commonplace scenario. Under a typical retainer between solicitor and barrister, the solicitor undertakes personal liability for the barrister’s costs. This satisfies the literal requirements of the former definition. So did this mean that the solicitor was the barrister’s client? Read literally, the answer would be ‘yes’, but that was at odds with the structure and apparent intent of Part 3.2. It is difficult to imagine that such a counter-intuitive and irrational meaning was intended by Parliament or those responsible for drafting the Act.

1.2.3. **Meaning of ‘third party payer’: s 302A**

It was perceived that a non-client (in the ordinary sense) who incurs an obligation to pay a client’s legal costs should have some protection, other than whatever general equitable or contractual obligations the client might have to protect the non-client’s position. LPFAA addressed this by introducing the concept of a ‘third party payer’,\(^7\) on whom is conferred a defined subset of the rights accorded to a client. Broadly, a third party payer is a non-client who is obliged to pay legal costs or who, being obliged, has paid such costs. The obligation may be owed to the law practice or to someone else – often but not necessarily the client. If the third party payer’s obligation is owed to the law practice (with or without some other

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\(^6\) Cf former section 350(6), repealed by LPFAA, which contained a special but seemingly redundant definitional provision for the purposes of that section (relating to client applications for costs assessment).

\(^7\) Defined in new section 302A.
obligee) it is an associated third party payer and has, as one might expect, stronger rights than a non-associated third party payer.

A law practice that retains another law practice on behalf of a client is explicitly excluded from the definition of a third party payer. This avoids a solicitor being classified as a third party payer in relation to a conventionally retained barrister.

A liability insurer will typically be a third party payer in relation to solicitors retained for the insured client’s defence. If, as is usual, the insurer promises to pay the solicitors’ fees, it will be an associated third party payer in relation to the solicitor. It will also become an associated third party payer in relation to a barrister retained by the solicitors if it incurs an obligation to the barrister for the barrister’s fees. If, without incurring an obligation to the barrister, the insurer incurs an obligation to the solicitors to pay the barrister’s fees, the insurer will be a non-associated third party payer in relation to the barrister and an associated third party payer in relation to the solicitors in respect of the barrister’s fees.

1.3. Overview

There are several possible permutations of the elements affecting a barrister’s disclosure obligations and rights regarding fee recovery. Anticipating what will follow and leaving aside the rights of third party payers, the consequences can be tabulated in shorthand form:

<table>
<thead>
<tr>
<th>Initial disclosure obligations</th>
<th>Additional disclosure obligations</th>
<th>Recovery rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indirect retainer, costs agreement with solicitor, no s312 exemption</td>
<td>Limited</td>
<td>Modified</td>
</tr>
<tr>
<td>Indirect retainer, costs agreement with solicitor, with s312 exemption</td>
<td>None</td>
<td>Modified</td>
</tr>
<tr>
<td>Indirect retainer, costs agreement with client, no s312 exemption</td>
<td>Limited</td>
<td>Modified</td>
</tr>
<tr>
<td>Indirect retainer, costs agreement with client, with s312 exemption</td>
<td>None</td>
<td>Modified</td>
</tr>
<tr>
<td>Indirect retainer, no costs agreement, no s312 exemption</td>
<td>Limited</td>
<td>Modified</td>
</tr>
<tr>
<td>Indirect retainer, no costs agreement, with s312 exemption</td>
<td>None</td>
<td>Modified</td>
</tr>
<tr>
<td>Direct retainer, costs agreement with client, no s312 exemption</td>
<td>Full</td>
<td>Full</td>
</tr>
<tr>
<td>Direct retainer, costs agreement with client, with s312 exemption</td>
<td>None</td>
<td>Full</td>
</tr>
<tr>
<td>Direct retainer, no costs agreement, no s312 exemption</td>
<td>Full</td>
<td>Full</td>
</tr>
<tr>
<td>Direct retainer, no costs agreement, with s312 exemption</td>
<td>None</td>
<td>Full</td>
</tr>
</tbody>
</table>

The most important differences are those relating to initial disclosure and recovery rights.

A barrister who is retained by a solicitor in private practice will typically be ‘a law practice retained … on behalf of a client by another law practice’, and as such subject to the more

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8 Section 310.
limited disclosure regime that applies to an indirectly retained law practice. Costs agreements between an instructing law practice and an indirectly retained law practice are explicitly recognized by section 322(1)(c). This continues to be the typical scenario for barristers, but only where the retainer comes from a ‘law practice on behalf of a client.

The alternative of accepting a retainer directly from a client *prima facie* exposes the barrister to the full range of disclosure and regulatory obligations that apply between solicitor and client, described in the LSJ paper. Few barristers are likely to be comfortable with such an outcome as a general setting for the conduct of professional practice, since barristers’ practices are typically organized on the basis of dealing financially and contractually with other professionals, which permits counsel to maintain a relatively lean operation in chambers. This is one of the structural advantages of the divided profession. If barristers’ overheads relate almost exclusively to the provision of their professional services rather than client-related credit management and consumer relations, their services can be offered efficiently and at prices which are highly competitive relative to the level of their professional expertise because they do not duplicate the cost inputs of a solicitors’ practice.

Section 312 offers a substantial measure of relief from disclosure obligations, particularly where the barrister is directly retained by a sophisticated client. It may usefully apply where an employed instructing solicitor does not qualify as a law practice, thereby precluding an indirect retainer (as that term is used in this paper).

If the barrister is indirectly retained, an initial disclosure exemption of the solicitor under section 312 flows through to the barrister because the barrister’s initial disclosure obligation is defined by reference to the solicitor’s obligation.

### 2. Disclosure

This section focuses on the disclosure obligations under LPA 2004 of a barrister who is indirectly retained by a solicitor on behalf of a client. I do not propose to deal with any additional disclosure that may be required by other statutes.

#### 2.1. Initial disclosure: Section 310(2)

Initial disclosure requirements are prescribed by section 310 for an indirectly retained law practice or section 309 if the retainer is direct. The obligations of a directly retained barrister can be ascertained, if need be, from the literature relating to solicitors’ obligations.

Section 310 applies to ‘a law practice retained … on behalf of a client by another law practice’, regardless whether any costs agreement is with the client or the instructing solicitor. The initial disclosure obligation is set out in subsection (2):

> (2) A law practice retained or to be retained on behalf of a client by another law practice is not required to make disclosure to the client under section 309, but must disclose to the other law practice the information necessary for the other law practice to comply with subsection (1).

The solicitor’s obligation under subsection (1) is to disclose to the client the details specified in section 309 (1) (a), (c) and (d) in relation to the barrister. Those details are:

- the basis on which the barrister’s costs will be calculated,
• whether any fixed costs provision applies to those costs,

• an estimate of the barrister’s total legal costs if reasonably practicable (it will seldom be practicable except in very small or straightforward cases) or, if not, ‘a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs’, and

• ‘details of the intervals (if any) at which the client or prospective client will be billed’.

The solicitor needs to rely on the barrister directly for the first and last of these pieces of information. That is not necessarily true of the other items. A competent solicitor should be able to work out what fixed costs provisions may apply. *À priori* estimation of legal costs in litigious business is notoriously difficult at the best of times. The amount of a barrister’s costs depends to a large degree on how the work of the case is distributed between counsel and solicitor and the degree to which the solicitor chooses to rely on counsel – a matter that varies widely from solicitor to solicitor and even from case to case. When the barrister is retained, the solicitor will usually know more about the case than the barrister, and it is not unreasonable to think that a competent solicitor can provide a range of estimates to a client inclusive of counsel’s fees. Such an estimate must always be subject to heavy qualifications, no matter who gives it. My own view is that ‘necessary’ in section 310(2) refers to whatever extra the solicitor needs to be able to perform his obligation. In other words, the barrister’s job is to top up the solicitor’s knowledge to the extent that it appears deficient. On this view, the barrister should usually be justified in assuming that the solicitor, knowing counsel’s rates, has enough information to give the client a range of estimates and major variables unless the solicitor asks for help.

Counsel should consciously consider what is ‘necessary’ for each new brief. Of course, the statutory test is a minimum. It does not prevent counsel from discussing likely costs beyond what is ‘necessary’.

The time requirement for initial disclosure by an indirectly retained law practice is implicit. Section 311(2) requires a retaining law practice’s disclosure to the client under section 310(1) to be made before, or as soon as practicable after, the other law practice is retained. It follows that the indirectly retained barrister must make disclosure under section 310(2) before or very shortly after the retainer.\(^9\)

The test of necessity in section 310(2) must presumably be judged by reference to the content of the brief (if it has been delivered) and other relevant communications with the solicitor at or before the time for disclosure. At the least, the barrister should ensure that the solicitor is aware of the barrister’s proposed terms and charges, or of the barrister’s standards terms and charges for the relevant class of work, including billing. More may be required if the solicitor has explicitly requested assistance with respect to an estimate of counsel’s fees.

The Act requires disclosure under section 310(1) to be made in writing, but is silent about the form of disclosure under section 310(2). Although written disclosure is not positively required, it is obviously preferable to document compliance.

Although the obligation under section 310(2) arises separately and afresh for each new matter, it does not necessarily require any fresh action. If the solicitor already knows the barrister’s basis of charging and billing and requires no additional information in order to make the

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\(^9\) Section 311(2) formerly required the retaining law practice (the solicitor) to make disclosure under section 310(1) before the other law practice (the barrister) was retained. The impracticality of this rule has been ameliorated by LPFAA.
required estimate of counsel’s fees and to work out whether any fixed costs provisions apply, no further conduct is required of the barrister to achieve compliance with section 310(2). Some barristers may thus find it convenient to rely on a standing arrangement with solicitors who regularly send them work. If so, however, it is important to include an explicit term in the arrangement requiring the solicitor to tell the barrister at or before the time of briefing if any further information is required to enable the solicitor to comply with section 310(1) for a particular matter. Prudence and good practice (though not positive law) also dictate that any such standing arrangement should be in writing, and any changes (such as rate increases and the like) should be properly documented as they occur.

2.2. Initial disclosure exemption: 312

Section 312 exempts a law practice from obligations of initial disclosure to a client under sections 309 and 310(1) in a range of circumstances. No reference to section 310(2) is necessary because it is secondary to the section 310(1) obligation; if the retaining solicitor is exempted from initial disclosure, so too is the indirectly retained barrister.

The exemptions are grouped under six paragraphs. Paragraph (a) applies to small matters, (b) relates to repeat business, (c) and (d) apply to sophisticated clients, (e) applies to cases where the client will not be required to pay the costs or they will not otherwise be recovered by the law practice, and (f) allows the regulations to prescribe further exemptions.

Section 312(1)(a) applies where the total legal costs in the matter excluding disbursements are not likely to exceed $750 (ex GST) or such higher amount as the regulations may prescribe.

A question may arise whether barrister’s fees charged to a solicitor are disbursements. Section 302 tells us that disbursements include outlays, which does not take the matter any further. As between solicitor and client, barrister’s fees have traditionally been regarded as disbursements. One may suspect that the legislature intended to draw a distinction between professional fees for legal services on the one hand and all other costs and expenses on the other, but that is not what the Act says. In any event, paragraph (a) is unlikely to be relevant to barristers except in the smallest of cases. An obligation to disclose ‘the matters in section 309 or 310’ arises under section 312(2) if and when the directly retained law practice becomes aware that the costs are likely to exceed the de minimis limit in section 312(1)(a). Because this obligation does not actually arise under section 310, it is questionable whether any obligation can arise for an indirectly retained law practice under section 310(2). As a matter of proper professional relations, however, a barrister should assist an instructing solicitor with any necessary information.

The repeat business exemption under paragraph (b) is so drafted as to be practically unworkable. As far as an indirectly retained barrister is concerned, it turns not on repeat business to the barrister but repeat business from the client to the instructing solicitor. If a solicitor were to provide an assurance to a barrister that a particular case was covered by the exemption, the barrister would presumably be entitled to rely on the assurance as good grounds for concluding that no action was required to comply with section 310(2).

The most important exemptions relate to sophisticated clients. That term is defined in section 302 as a client to whom disclosure under section 309 or 310(1) is not required because of section 312(1)(c) or (d), which apply

(c) if the client is:

(i) a law practice or an Australian legal practitioner, or

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(ii) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body (each within the meaning of the Corporations Act 2001 of the Commonwealth), or

(iii) a financial services licensee (within the meaning of that Act), or

(iv) a liquidator, administrator or receiver (as respectively referred to in that Act), or

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

(vi) a proprietary company (within the meaning of that Act) formed for the purpose of carrying out a joint venture, if any shareholder of the company is a person to whom disclosure of costs is not required, or

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

(viii) a Minister of the Crown in right of a jurisdiction or the Commonwealth acting in his or her capacity as such, or a government department or public authority of a jurisdiction or the Commonwealth,

(d) if the legal costs or the basis on which they will be calculated have or has been agreed as a result of a tender process …

Sometimes it will be obvious to a barrister that the client is or is not a sophisticated client, such as the Commissioner of Taxation, the Director of Public Prosecutions or BHP. Such clients frequently brief counsel without the intervention of a law practice, bearing in mind that in-house solicitors of large concerns are unlikely to constitute a law practice, even if they practice and go on the Court record in their own names. Despite the presence of a properly qualified instructing solicitor, this means that the barrister will incur full section 309 disclosure obligations unless section 312 is engaged. Sometimes it will be necessary to make inquiries and obtain the assurance of the client or instructing solicitor about the status of the particular client, if it is intended to rely on the exemption. For example, a firm of accountants may be factually sophisticated, but it is unlikely to attract the statutory exemption unless it is a financial services licensee. This cannot be assumed. Many accounting firms make a deliberate choice not to seek such a licence.

The exemption under paragraph (e) of cases where the client will not be required to pay the costs or they will not otherwise be recovered by the law practice applies most obviously to pro bono work (at least in the strict sense where the lawyer foregoes all prospect of payment by anyone). It also arguably applies where the client ‘will not be required to pay’ but someone else will – as in many insurance contexts, and for plaintiff’s worker’s compensation work in New South Wales. It would not be sufficient to attract the exemption that the law practice is only entitled as against the client to be paid out of the proceeds of an action. In such a case, the client is still ‘required to pay’, albeit out of the realisation of a chose in action that the client owns. There may be a closer argument, however, if the law practice is restricted to the proceeds of any party/party costs order recovered from the adverse litigant.

The exemption in paragraph (f) applies via reg 110 of the Legal Profession Regulation 2005 to qualifying foreign lawyers and corporations in majority government ownership. Despite their factual sophistication, these entities do not qualify as ‘sophisticated clients’ unless they also fall within paragraph (c) or (d).
Section 312 does not give exemption from additional disclosure requirements under sections 313, 314 and 318 or continuing disclosure requirements of section 316 so far as they may apply to such additional disclosure.

2.3. **Additional disclosure – before settlement: 313(2)**

Section 313 imposes additional requirements of disclosure before settlement ‘if a law practice negotiates the settlement of a litigious matter on behalf of a client’. There is no requirement of writing.

Section 313(2) exempts an indirectly retained law practice, but only if the retaining law practice actually makes the disclosure to the client before settlement is executed. This means that, if a barrister ‘negotiates the settlement’ of a case, the barrister must either make disclosure to the client or ensure that the solicitor does so.

2.4. **Additional disclosure – uplift fees: 314**

Section 314 imposes additional disclosure requirements ‘if a costs agreement involves an uplift fee’ with respect to the law practice’s usual fees, the uplift percentage, and the reasons why the uplift is warranted. The section does not advert to the distinction between direct and indirect retainer. It requires disclosure to be made ‘to the client in writing, before entering the agreement’. Would this requirement be satisfied by a barrister making written disclosure to an instructing solicitor with whom the barrister also contracts? The question can be avoided by requiring a signed receipt from the client. Section 314 does not apply to a sophisticated client, though this exemption oddly does not extend to a sophisticated associated third party payer.

Section 314 is unlikely to be important for barristers in practice because section 324(1) prohibits an uplift fee in any action where damages are claimed.

2.5. **Clarity of written disclosures: 315**

Section 315 sets out some anodyne requirements of clarity relating to written disclosures under Part 3.2, Division 3. It does not, however, specify when a disclosure has to be given in written form. That requirement is found case by case in the provisions requiring particular disclosures.

2.6. **Continuing disclosure: 316**

Section 316 has been rewritten by LPFAA, apparently to clarify perceived ambiguities in the previous text. The section now requires a law practice to ‘disclose [in writing] to a client any substantial change to anything included in a disclosure already made under this Division as soon as is reasonably practicable after the law practice becomes aware of that change.’

It may be questioned whether the section applies to the disclosure obligation of an indirectly retained law practice under section 310(2). Section 316 requires disclosure ‘to a client’, and it seems improbable that a barrister would be required to update disclosure to a solicitor with supplementary disclosure to a client. Further, section 316 requires disclosure to be in writing, even though section 310(2) does not. Perhaps the correct interpretation is that section 316 only addresses those disclosures which are to be made to a client. That would avoid the impracticalities implicit in the alternative but admittedly more literal reading. If not, a question arises whether the solicitor is the client’s agent for receiving continuing disclosure in respect of matters disclosed under section 310(2).
Be that as it may, as a matter of sound practice management as well as risk management, it makes sense for a barrister to bill regularly and to have an open and communicative relationship with an instructing solicitor in relation to likely future costs. Those barristers who commonly bill only at the end of a case, e.g. because they are acting explicitly or de facto on a conditional basis, may find it useful to send interim, conditional bills or statements of work in progress. Dedicated or generic billing software usually provides for bills to be made up as a case or project progresses, and there should be no difficulty in producing printouts in a suitable form.

Section 316 is parasitic on other disclosure obligations, whether initial or additional. If there is no original disclosure obligation, e.g. because of an exemption under section 312, no updating obligation arises.

2.7. **Failure to disclose: 317**

Section 317 prescribes consequences of failure to disclose. It is substantially rewritten and improved by LPF AA. In its new form, it precludes recovery against a client or associated third party payer if the law practice has failed to disclose ‘anything’ required by Division 3 to be disclosed to that person, gives that person the right to withhold payment, permits an application to set aside provisions of a costs agreement under section 328 (though this is arguably just a signpost because it expresses no additional criteria for setting aside) and permits a Costs Assessor to reduce the ‘relevant legal costs’ by an amount ‘proportionate to the seriousness of the failure to disclose’. These provisions are explicitly made applicable to an indirectly retained law practice where the operative failure is that of the retained law practice under section 310(2).

Given that the indirectly retained law practice may have a costs agreement with the retaining law practice or the client, it is not clear whether or how far the retaining law practice may take advantage of provisions affecting a ‘client’ in the applied provisions.

2.8. **Progress reports: 318(3)**

In contrast to sections 314 and 316, section 318 draws an explicit distinction between direct and indirect retainers. An indirectly retained law practice is not required to give a progress report to a client, but must ‘disclose’ to the retaining law practice ‘any information necessary for the other [retaining] law practice to comply with’ its obligation to the client. Associated third party payers have similar rights to clients, and presumably the obligation of the indirectly retained law practice to the retaining law practice should be read as extending to this situation also.

A section 318(1) ‘report’ is probably not ‘disclosure’ for the purposes of sections 316 and 317, notwithstanding that as between law practices section 318(3) uses the verb ‘disclose’.

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11 The former text was highly problematic. See Brabazon, ‘Costs Disclosure: New Regime’ (2005) 43 LSJ (No 5) 59.

12 Sections 317(1)-(4); cf. section 328.

13 Section 317(5).

14 Section 318A(4).

15 See Brabazon, ‘Costs Disclosure: New Regime’ (2005) 43 LSJ (No 5) 59. This view appears to be confirmed by section 318A in that, if the section 318 obligation were one of disclosure, section 318A(1) would make 318A(4) redundant.
2.9.  **Associated third party payers: 318A**

Section 318A, inserted by LPFAA, prescribes the manner and circumstances in which disclosure obligations owed to clients are also owed to associated third party payers. The test is one of ‘relevance’, and it is limited to costs for which the associated third party payer is liable. Cognate rights apply to progress reports.

The fact that a third party payer would or would not satisfy the criteria that characterise a sophisticated client is immaterial to the obligation of disclosure. If the obligation is owed to the client, it is owed to the associated third party payer. If it is not owed to the client, perhaps because the client ‘will not be required to pay the legal costs’ in terms of section 312(1)(e), it is not owed to the third party payer. (This contrasts with the approach to late assessment applications under section 350, where sophisticated third party payers are treated in the same way as sophisticated clients.)

2.10.  **Other disclosure requirements**

Other disclosure requirements may apply outside the general provisions of Division 3 discussed above. For example, regulations made under section 339 in Division 9 require further initial disclosure before a law practice enters into a costs agreement with a ‘client’ in connection with a claim for ‘personal injury damages’ within that Division,\(^{16}\) and regulations under section 340 require additional disclosure after receipt and before response to an offer of compromise on such a claim.\(^{17}\) These are particularly important for personal injury practitioners. Unfortunately, they are also drafting disaster areas. They are considered in more detail below.\(^{18}\)

3.  **Costs agreements**

There are three principal reasons for a barrister to have a costs agreement.

The first is to engage the protection of section 319(1)(b) of the 2004 Act. Section 319 is self-explanatory:

(1) Subject to the provisions of this Part, legal costs are recoverable:

(a) in accordance with an applicable fixed costs provision, or

(b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or

(c) if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.

(2) However, the following kinds of costs are not recoverable:

(a) the costs associated with the preparation of a bill for a client,

\(^{16}\) See Legal Profession Regulation 2005, cl 116. Broadly speaking, this requires timely, written disclosure of the limiting effect of Division 9 and the practical, financial consequences if section 339 applies.

\(^{17}\) See Legal Profession Regulation 2005, cl 117. Broadly speaking, this requires timely, written advice concerning the offer and its potential cost consequences, if declined.

\(^{18}\) See note 20 and corresponding text.
(b) the costs associated with the making of disclosures for the purposes of Division 3,
(c) the costs associated with the making of a costs agreement with a client.

The second reason for having a costs agreement is to make explicit the personal, contractual
liability of an instructing solicitor. Typically, barristers do not consider themselves to have
cost recovery rights against a client. They rely not on the credit of clients, but of their
instructing solicitors, whose job it is to satisfy themselves to the extent they feel necessary
concerning the client’s credit, and whose professional rules\(^{19}\) as well as the long history of
professional relations between solicitors and the bar provide a basis for a professional if not
also a legal obligation to pay a conventionally retained barrister.

The third reason is to take advantage of exemptions from limits that otherwise apply to costs
in various classes of personal injury cases. Section 339 is one such provision. It provides
relief from fixed costs provisions under Part 3.2, Division 9 as they apply to the remuneration
of a law practice. Others may be found elsewhere, such as in clause 11 of the Motor
Accidents Compensation Regulation 2005.

The application of the exemption in section 339 is problematic because it refers only to ‘costs
payable as between a law practice and the practice’s client provided for by a costs agreement
that complies with Division 5’. The section is badly drafted. Its author has forgotten that
New South Wales has a divided legal profession. To justify its literal application to
barrister’s fees under a conventional solicitor/barrister costs agreement, one may argue that a
solicitor/client costs agreement which provides for the client to pay the solicitor for barrister’s
fees incurred, preferably by reference to the actual barrister/solicitor costs agreement, is
sufficient to bring the barrister’s fees billed to the solicitor under the costs agreement with the
client.\(^{20}\)

3.1. Costs agreements generally: 322

3.1.1. Parties: 322(1)

Section 322(1) describes the permissible parties to a costs agreement:

(1) A costs agreement may be made:

(a) between a client and a law practice retained by the client, or

(b) between a client and a law practice retained on behalf of the client by another law
    practice, or

(c) between a law practice and another law practice that retained that law practice on
    behalf of a client, or

(d) between a law practice and an associated third party payer.

This is relatively straightforward, but observe that an agreement falls outside this description
if made between a barrister and someone who is neither a ‘client’ by or on whose behalf the
barrister is retained, nor a ‘law practice’ that retains the barrister on behalf of a ‘client’, nor a
third party payer.

\(^{19}\) NSW Solicitors Rules rr 26, 32, 33.

\(^{20}\) See further Appendix 1: Precedents for Barristers’ Costs Agreements and Disclosures under the
heading Division 9 (Personal Injury) cases, p 27, and Appendix 3: Legislative Issues and Reform, p 41
below.
Observe also the distinction between retainer and costs agreement. The retainer creates the barrister’s agency for the client and gives rise, in conjunction with ethical rules, to the barrister’s obligation to provide services. The costs agreement is separate, and governs the obligation to pay. This distinction incidentally illustrates why a barrister’s bill to a local solicitor acting for an overseas client may be GST free: the barrister provides services to the client under the retainer, but bills the solicitor under the costs agreement. It is possible, though unusual, to have an indirect retainer (barrister/solicitor) and a direct costs agreement (barrister/client).

3.1.2. Subject: 302(1) ‘costs agreement’, 4(1) ‘legal costs’

Section 302(1) defines a costs agreement as ‘an agreement about the payment of legal costs’. This identifies the permitted subject matter of the agreement. Section 4(1) defines legal costs as ‘amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services including disbursements but not including interest’, and legal services as ‘work done, or business transacted, in the ordinary course of legal practice’.

The Act does not explicitly say that a contract which is (or contains) a costs agreement cannot contain other contractual subject matter. There is no evident policy reason why a costs agreement should be confined in such a way. Indeed, section 321(2) explicitly provides for interest to be charged ‘in accordance with the costs agreement’, but the definition of ‘legal costs’ carries interest outside the prima facie subject matter of such an agreement. It is submitted that a costs agreement may be embedded in a contract that deals with other matters ancillary to the relationship between barrister and client or barrister and solicitor.

3.2. Conditional costs agreements: 323

Section 323 permits conditional costs agreements in certain circumstances. There are two obvious potential reasons why a barrister might consider entering into a conditional costs agreement. One is to facilitate an uplift fee, if still permitted under section 324. Secondly, a barrister may enter into a conditional costs agreement for the comfort of the client and/or the instructing law practice; this, in effect, formalises the practice that applied to speculative litigation before 1 July 1994.

As under the 1987 Act, a conditional costs agreement must set out the circumstances that constitute the ‘successful outcome’ which is the condition for payment of the costs of the law practice. It may provide for disbursements to be paid irrespective of outcome. So can other costs, such as a part or fraction of the fees of the law practice, be made non-contingent? The words ‘some or all’ in section 323(1) suggest that they can. Care must be taken, however, to avoid a prohibited uplift (section 324(1)) or contingency fee (section 325), discussed further below.

There are specific formal requirements peculiar to a conditional costs agreement (discussed further below) and, unless the agreement is between a retaining law practice and an indirectly retained law practice, the agreement must also provide for a cooling off period of at least five clear business days.

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21 See A New Tax System (Goods and Services Tax) Act 1999, section 38-190 as it applies to supplies of legal services to a non-resident who is not in Australia. This is illustrated by the judgment of Gzell J in Fiduciary Ltd v Morningstar Research Pty Ltd (2004) 60 NSWLR 425. The case only discusses solicitors’ work, presumably because the parties raised no separate issue concerning counsel.

22 See under ‘3.4 Form: 322(2),(3)&(4), 323(3)&(4)’ p 14.
3.3. **Conditional costs agreements with uplift fees: 324**

Section 324 continues the possibility, first created by the 1994 amendments to the 1987 Act, that a law practice may include in a conditional costs agreement a ‘reasonable premium on the legal costs (excluding unpaid disbursements) otherwise payable’. The uplift must be separately identified and cannot exceed 25% of ‘those costs’. Much of the practical effect of this is lost because the section also prohibits an uplift if the legal subject is a claim for damages – the only context where uplifts have been commonly used to date – but is understood that sophisticated commercial applications are now being developed in the field of mergers and acquisitions by which part of the pain and gain of those activities is sought to be shared between clients and their lawyers in a way that sidesteps the prohibition of contingency fees.

A cognate provision to section 324 has been interpreted in Victoria in a manner which, if followed in New South Wales, would effectively prohibit contingent fee discounting and would engage section 327 to oblige the law practice to disgorge even any discounted fees paid. This is discussed further below\(^{23}\) and in Appendix 3.\(^{24}\)

3.4. **Form: 322(2),(3)&(4), 323(3)&(4)**

Sections 322 and 323 contain formal requirements relating to writing.

The *Interpretation Act 1987* (NSW), section 21(1), defines ‘writing’ as including ‘printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form’.

Section 322(2)-(4) provides:

1. A costs agreement must be written or evidenced in writing.
2. A costs agreement may consist of a written offer in accordance with subsection (4) that is accepted in writing or by other conduct.

   **Note.** *Acceptance by other conduct is not permitted for conditional costs agreements—see section 323 (3) (c) (i).*

3. The offer must clearly state:
   1. that it is an offer to enter a costs agreement, and
   2. that the client may accept it in writing or by other conduct, and
   3. the type of conduct that will constitute acceptance.

Subsections (3) and (4) contemplate a written offer accepted otherwise than in writing. It is not clear whether these provisions are capable of applying to a costs agreement between a retaining law practice and an indirectly retained law practice, although that situation attracts less need for legislative protection than a contract between solicitor and client, because an agreement between law practices would not normally involve any acceptance by ‘the client’ as referred to in paragraph (4)(b). The safer course is therefore to ensure that any such costs agreement complies with subsection (2) without reliance on subsections (3) and (4).

The requirements of form for a conditional costs agreement are more restrictive. Section 323(3) and (4) provide:

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\(^{23}\) See ‘3.5.2 Prohibited terms: 322(5), 324(1), 325, 327’ p 16.

\(^{24}\) See *Uplift and contingency fee provisions*, p 46.
(3) A conditional costs agreement:

(a) must set out the circumstances that constitute the successful outcome of the matter to which it relates, and

(b) may provide for disbursements to be paid irrespective of the outcome of the matter, and

(c) must be:

(i) in writing, and

(ii) in clear plain language, and

(iii) signed by the client, and

(d) must contain a statement that the client has been informed of the client’s right to seek independent legal advice before entering into the agreement, and

(e) must contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement.

(4) Subsection (3) (c) (iii), (d) and (e) do not apply to a conditional costs agreement made under section 322 (1) (c) (Costs agreements between law practices).

LPFAA extends this exemption to agreements with sophisticated clients by a new paragraph (4A). A conditional costs agreement between a barrister and a retaining law practice or a sophisticated client must therefore be ‘in writing’, but need not be signed by the client. Compare this with the concept of an agreement ‘written or evidenced in writing’ in section 322(2).

A Full Court of the South Australian Supreme Court held in *McNamara Business & Property Law v Kasmeridis* [2005] SASC 269 that a provision of the *Legal Practitioners Act 1981* (SA) which allowed a legal practitioner to ‘make an agreement in writing with a client’ for payment of legal costs on a basis specified in the agreement is satisfied if a solicitor writes to a client with a proposed fees agreement, offering to act on that basis, and the client orally accepts the solicitor’s offer. The Court declined to follow *Jovetic v Stoddart & Co* (1992) 7 WAR 208, 218 (Seaman J), *Re Walsh Halligan Douglas’ Bill of Costs* [1990] 1 Qd R 288 (Dowsett J), and a number of English authorities which would have required relevant writing from the client, whether in the form of a signature to the agreement or some other writing that constitutes or evidences acceptance. An application by McNamaras for special leave to appeal to the High Court was dismissed for insufficient prospects of success.25

The safest course is obviously to have an agreement signed by the barrister and the solicitor. Assuming applicability of the reasoning in the South Australian decision, compliance with the requirements of writing in sections 322 and/or 323 is relatively straightforward, and acceptance of a written offer with clear, written terms may be proven by parol. If not, an agreement may still be ‘in writing’ where there is an exchange of writings which, properly construed, amount to a contract, or (in the case of section 322) evidence a contract..

Terms of costs agreements generally

Choice of law: 304

Section 304 of the Act permits a ‘client’ to enter a written agreement with a ‘law practice’ that Part 3.2 of the NSW Act is to apply to a ‘matter’, rather than the corresponding law of another State or territory that might have a collateral jurisdictional claim. The case of a retainer between law practices is not explicitly addressed, but it seems prudent to include a choice of law clause in a costs agreement, whether relating to a direct or an indirect retainer.

There is a question whether the undefined expression ‘matter’ as used in the choice of law provisions and elsewhere in the Act refers to the client’s business in question or to the particular retainer. If the former, choice of law rules in relation to the relationship between solicitor and client arguably override choice of law between barrister and solicitor in relation to the barrister’s retainer. If that is so, the result is unsatisfactory.

Choice of law issues are considered further in Appendix 3.

Prohibited terms: 322(5), 324(1), 325, 327

Section 322(5) prohibits contracting out of costs assessment under Division 11. Section 325 prohibits costs agreements under which any part of the amount payable to the law practice ‘is calculated by reference to’ the value of the subject matter of a relevant transaction or proceeding. Contravention of either of these provisions not only avoids the costs agreement, but also disentitles the law practice to enter any fees whatsoever and requires repayment of any fees received under section 327(4).

Recent Victorian decisions (Equuscorp v Wilmoth Field Warne [2006] VSC 28; Coadys v Getzler [2006] VCC 243) hold that a practitioner who agrees to take a fraction of his or her normal rate regardless of outcome and to require payment of the full normal rate only if the case succeeds infringes uplift prohibitions similar to section 324(1). Under the New South Wales Act, this would deprive the practitioner of all costs and require repayment of any costs received. A similar argument may arise under section 325, though not adopted in the Victorian cases. It should not be assumed that the Victorian cases would be followed in New South Wales (see Wentworth v Rogers; Wentworth & Russo v Rogers (2006) 66 NSWLR 474 at [120], [121], [128]). It is submitted that the Victorian decisions are unsound in relation to section 324(1). Their error lies in treating the amount ‘otherwise payable’ as the amount payable in the event of failure instead of the amount that would have been payable without the contingency agreement.

Overriding provisions

A costs agreement is overridden under section 319 to the extent that it applies to services which are covered by fixed costs provisions under Part 3.2, Division 6 or 9, or any other legislation. Clauses 112 to 115 and Schedules 2, 3 and 4 of the Legal Profession Regulation

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26 LPFAA Schedule 2 expands references to signing in section 304 to include other forms of acceptance of offers.

27 See Choice of law provisions, p 44.

28 See Appendix 3: Legislative Issues and Reform, Uplift and contingency fee provisions, p 46.

29 See the definition of ‘fixed costs provision’ in section 302.
2005 prescribe fixed costs under Division 6 in relation to the enforcement of certain judgments, workers compensation proceedings and some relatively simple probate and administration business. Costs payable to a law practice for legal services in certain classes of personal injury cases are limited under Division 9 by reference to the value of compensation recovered, unless the services are provided under a complying costs agreement within section 339 and the law practice makes additional disclosure in accordance with the regulations.\footnote{30} Other statutes may also limit or prescribe the costs payable for legal services within the scope of their particular operation, and may impose related disclosure obligations; see \textit{e.g.} the \textit{Motor Accidents Compensation Act 1999}, section 149, and the \textit{Motor Accidents Compensation Regulation 2005}, clause 11 of which may be compared with section 338 of the \textit{Legal Profession Act 2004}.\footnote{31} I do not propose to discuss those subjects further here.

3.5.4. \textit{‘Fair and reasonable’}: 328

Section 208D of the 1987 Act provided for a costs assessor to determine ‘whether a term of a particular costs agreement entered into by a barrister or solicitor and a client is unjust in the circumstances relating to it at the time it was made’. Its successor in the 2004 Act is section 328. Its core provision is subsection (1), which provides that ‘On application by a client, a costs assessor may order that a costs agreement or a provision of a costs agreement be set aside if satisfied that the agreement is not fair or reasonable.’ Section 328 as originally enacted was a drafting disaster, but its more egregious errors have been corrected by subsequent amendments. The resulting provision is serviceable, though far from elegant.

Section 328 only applies ‘on application by a client’. A client is not party to a costs agreement between barrister and instructing solicitor, and is not a proper party to an assessment between them. It follows that section 328 has no application to a conventional agreement between barrister and instructing solicitor.

There may be a question whether section 317(3) and (5) as substituted by LPFAA would, as a matter of construction, allow an application under section 328 by a retaining law practice against an indirectly retained law practice that has failed to make required disclosure under section 310(2). If so, it is difficult to imagine a set of factual circumstances in which an application could plausibly be made.

In cases where section 328 does apply, it remains to be seen how the substitution of ‘not fair or reasonable’ for ‘unjust’ plays out in practice.

4. OTHER MATTERS

4.1. \textit{Choice of law}

One of the chief objectives of the Model Bill project and LPA 2004 is to resolve interstate conflicts of law in a way that chooses a single proper law on which all participating

\footnote{30} \textit{See Legal Profession Regulation 2005}, Part 9, Division 3 and Appendix 3: Legislative Issues and Reform, \textit{Division 9 (personal injury) costs disclosure} p 41 and \textit{Division 9 (personal injury) offer of settlement disclosure} p 41 below.

\footnote{31} Cf Appendix 1: Precedents for Barristers’ Costs Agreements and Disclosures ‘Motor Accidents Compensation Act Cases’ p 35 below.
jurisdictions agree. This applies to legal costs as well as other matters of legal practice, such as the right to practice and professional discipline.

The choice of law rules in Part 3.2 and related issues are considered further in Appendix 3.  

4.2. Billing

There has never been a freestanding obligation on lawyers to deliver bills, or to bill in any particular form. Formal billing requirements are only imposed as a precondition to the lawyer’s right to sue for recovery of legal costs – which makes them important enough. The position was summarised by Young J in *Smits v Buckworth* (22/9/97; BC9704802) and not doubted on appeal (*A-G v Smits* (1998) 45 NSWLR 521):

[The only significance that a bill of costs has is that the solicitor may not sue under s192 [of the 1987 Act] until he has served a signed bill of costs. The process of assessment of costs is, however, one which may be carried out though there is not a bill of costs in the ordinary form at all.’

The rules relating to form and content of actionable bills have changed significantly under the 2004 Act. The new requirements are in sections 331 to 333 and section 321. Clause 45 of the 2002 Regulation, which prescribed content requirements for a bill of costs under the 1987 Act, has no direct equivalent under the 2004 Act. Instead, the present Act recognizes an itemised bill (one which ‘specifies in detail how the legal costs are made up in a way that would allow them to be assessed under Division 11’ – s 302) and a lump sum bill (one which ‘describes the legal services to which it relates and specifies the total amount of the legal costs’ – s 302). A debt for legal costs owed by a ‘person’ – i.e. a client or a retaining law practice – is actionable 30 days after the billing law practice gives the person a signed bill in either of those forms (ss 331, 332) that contains or is accompanied by a written statement under section 333 (a provision which is particularly misleading in relation to barristers).

Although a law practice can sue on a lump sum bill after 30 days, the client can request an itemised bill within that window of time, thereby delaying the right to sue until 30 days after service of the itemised bill.

The Act offers no guidance about the nature or degree of detail that ‘would allow’ the costs to be assessed and thereby satisfy the test of itemisation. It should not be assumed that a bill is insufficiently itemised just because further submissions might or would probably be made or details given if the bill were taken to assessment. Few if any assessments take place without such a process. One may hope that the 2004 Act will be interpreted as imposing no more onerous billing requirements on barristers than have for many years been regarded as normal and sufficient. Barristers’ bills to solicitors have generally been regarded as meaningful and sufficient (assuming a billing basis referable to hourly and daily rates) if there is a separate entry for each day (or for each task, if a particular large task runs over several days) that contains enough information for the solicitor to identify, in the case of hourly billing, the overall nature of the task or tasks done on the particular day and the time taken on that day (or the total time taken on the particular task and the days over which it was done) – for example: ‘1 April 2006, Preparation for hearing, 5h, $[5 x hourly rate]’. In the case of daily billing, the usual practice has been to identify the task(s) and the date in a way that relates to the daily

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32 See *Choice of law provisions* p 44 and *Barrister retained by foreign law practice* p 46 below.

33 See Appendix 2: Billing checklist for barristers, item 6, p 38; Appendix 3: Legislative Issues and Reform, *Section 333 notice*, p 42 below.

34 Section 332A.
billing basis – for example: ‘2 April 2006, Appearance on hearing, \$[daily rate]’. This reflects the exigencies of legal practice. The barrister does not retain the brief, but sends it back to the solicitor. If the instructing solicitor takes the barrister to assessment, the principal evidentiary documents are in the solicitor’s hand. The instructing solicitor knows the case, holds the principal file, and controls what interlocutory tasks are sent to the barrister. The solicitor is in a better position to understand a relatively terse barrister’s bill than a lay client would be if the solicitor rendered a similarly terse bill of the solicitor’s services to the client.

Regulation 111B(2) now sets out explicit requirements for an itemised barrister’s bill, which are required by sub-reg (3) to be set out in generally chronological order:

(2) The following particulars are to be included in an itemised bill given by a barrister:

(a) short details of each item of work carried out on behalf of the client, including the method by which it was carried out (whether by letter, telephone, perusal, drafting, conference, teleconference or otherwise) if not otherwise apparent,

(b) the date on which each item of work was carried out,

(c) the amount charged for each item of work or for items of work carried out on a particular day, and particulars of the basis for calculating the amount charged.

These requirements are, strictly speaking, additional to the assessability requirement under section 302, but it may be hoped that a bill which complies with the Regulation will generally be accepted as also complying with assessability requirement.

A solicitor who has received a barrister’s bill may take the view that it is insufficiently itemised and request an itemised bill to forestall civil recovery action. The barrister, faced with this, may (1) take the view that the bill is itemised and sue, (2) issue an itemised bill, wait 30 days, then sue, or (3) apply for assessment. (1) runs the risk of a successful s. 332A defence by reference to the original bill. (2) runs the risk that the barrister’s itemised bill may still fail the statutory test. (3) successfully avoids the issue because an itemised bill is not required to support an application for assessment.

Good practice can minimise a barrister’s risk. In keeping daily time and work records and in drawing a bill to an instructing solicitor, a barrister should consider the formal requirements of the Regulation and what information the solicitor would reasonably expect in order to make sense of the bill, to relate it to the basis of charging under the relevant costs agreement or disclosure, and to form an impression of its reasonableness, bearing in mind the solicitor’s own knowledge of the matter and relevant communications with counsel.

Most barristers bill on a time costing basis. Anyone who bills on this basis should keep accurate daily records of time spent, the nature of the work done, and the brief to which the work relates. There is no set form. The barrister may, for example, keep a day book or an excel spreadsheet, or may use proprietary accounting software with time recording features. The important thing, both in fairness to the client and solicitor and for the protection of the barrister, is to keep a reliable, contemporaneous record.

A billing checklist for barristers is offered in Appendix 2 of this paper.

4.3. Recovery

Apart from negotiation, mediation and the assistance of the Bar Association, barristers may consider three courses of action that may lead to fee recovery from a defaulting solicitor: conventional debt recovery litigation, assessment under LPA 2004, and professional complaint.
If litigation is pursued, the barrister must bear in mind that non-compliance with the form and content requirements relating to bills of costs, non-compliance with the time limit in section 331, and any non-disclosure within the parameters of section 317(5) will be a complete defence to the action.

If assessment is pursued, practitioners should be aware of the time limits under section 352 (see below). If the barrister retains costs consultants to assist with the assessment, their fees will not be recoverable.

Some practitioners report that they have obtained payment orders against defaulting solicitors in the context of professional complaint procedures. The terms of the NSW Solicitors Rules provide a substantial basis for the view that non-payment by a solicitor of a conventionally retained barrister will usually be a professional default. It is obvious that a barrister should not make a professional complaint against a solicitor lightly or without fair warning, and that such complaint should not be made if the solicitor has disputed the bill and the dispute is not obviously groundless.

4.4. **Time limit for assessment: 350, 351**

LPFAA substantially rewrites the provisions governing applications for assessment. Under the rewritten section 350, a client or third party payer may apply for assessment within 12 months from service of the bill, request for payment or unrequested payment, as the case may be. The time can be extended by the Supreme Court if it is ‘just and fair’, save in the case of a sophisticated client or a corresponding third party payer. Under the rewritten section 351, a

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35 Rules 26, 32 and 33 are relevant:

26. Undertakings

   A practitioner who, in the course of the practitioner’s practice, communicates with another practitioner orally, or in writing, in terms which expressly, or by necessary implication, constitute an undertaking on the part of the practitioner, to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time. 

32. Contracting for services

   A practitioner who deals with a third party on behalf of a client for the purpose of obtaining some service in respect of the client’s business, must inform the third party when the service is requested, that the practitioner will accept personal liability for payment of the fees to be charged for the service or, if the practitioner is not to accept personal liability, the practitioner must inform the third party of the arrangements intended to be made for payment of the fees.

33. Undertakings

   A practitioner who, in the course of providing legal services to a client, and for the purposes of the client’s business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.

The Solicitors Rules define ‘practitioner’ as ‘a legal practitioner who holds a current practising certificate as a barrister and solicitor, as a solicitor or as a barrister, and includes a practitioner corporation’.
A law practice may also apply for assessment of its own costs under section 352. It must wait at least 30 days after giving the bill or request for payment or after payment without request. For reasons which are not apparent, it must also wait at least 30 days after any application is made for assessment of the same costs by any other person.

The time limits governing applications for assessment are not entirely what they seem. Section 334 provides that a law practice may give ‘a person’ an interim bill ‘covering part only of the legal services the law practice was retained to provide’, in which case costs covered by the bill are assessable ‘either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid.’ This may come as a shock to barristers who are used to the non-extendible 30 day time limit under section 200 of the 1987 Act. Section 334 also has potential difficulties of interpretation as between barrister and solicitor. A solicitor may relevantly retain a barrister on successive occasions to provide discrete blocks of legal services in a case which, as between the solicitor and the client, represents a single retainer. A brief to advise is not a brief on hearing. It seems clear that the interim or final nature of a bill is to be judged by the extent of the relevant retainer as at the time of the bill – a matter to which practitioners pay little attention now, but which may give rise to disputes under the new Act.

The Act does not say what should happen where a law practice sues for fees in compliance with the 30 day time limit and the defendant client or law practice files timely application for assessment of the same fees, whether before or after commencement of court proceedings. Nor does it say directly what happens if the defendant in a recovery action then files late...
application for assessment, although no doubt the commencement of proceedings may be urged against extension under section 350.

4.5. **Transitional provisions: Schedule 9**

The general transitional rule in Schedule 9, clause 3, is that things done under the 1987 Act and still effective shall continue to have effect as if done under the new Act, subject to a *mutatis mutandis* rule. Clause 18 makes specific provision for the continued application of Part 11 of the 1987 Act in lieu of Part 3.2 of the 2004 Act:

1. Subject to subclauses (2) and (3), Part 3.2 of this Act applies to a matter if the client first instructs the law practice on or after the commencement day, and Part 11 of the old Act continues to apply to a matter if the client first instructed the law practice in the matter before that day.

2. Part 3.2 of this Act does not apply in respect of a law practice that is retained by another law practice on behalf of a client on or after the commencement day in relation to a matter in which the other law practice was retained by the client before that day, and in that case Part 11 of the old Act continues to apply.

3. If:
   (a) an application for assessment of costs was referred to a costs assessor for assessment under Part 11 of the old Act, and
   (b) the assessment was not commenced or completed before that day,
   the application may be dealt with under that Part as if that Part had not been repealed.

For barristers on indirect retainer, the governing law is determined by the date of the solicitor’s relevant retainer. Barristers will have to distinguish for some months and years to come between briefs that continue to be governed by the costs provisions of the 1987 Act and those which are governed by Part 3.2 of the 2004 Act. It is doubtful whether the ‘first instructed’ rule permits solicitors and clients to renew a retainer in an existing ‘matter’ (an expression which the Act uses frequently, but does not define) in a way that engages Part 3.2 of the new Act, even if they want to.

**IN CONCLUSION**

In conclusion, barristers should not find the new regime relating to costs disclosure and agreements significantly more onerous than that which applied under the 1987 Act unless they accept a retainer which is neither given by a ‘law practice’ on behalf of a ‘client’ nor exempt from initial disclosure under section 312. It is, nevertheless, necessary to understand the regulatory landscape of the new law and to adapt their standard documentation and practice management procedures to reflect the new concepts and obligations.
APPENDIX 1: PRECEDENTS FOR BARRISTERS’ COSTS AGREEMENTS AND DISCLOSURES

http://www.nswbar.asn.au/docs/professional/costs/precedents_all_final.doc

1 July, 2007

These precedents are offered in response to requests for precedent costs disclosure documents and costs agreements under Part 3.2 of Legal Profession Act 2004.

The precedents are intended to provide a resource to the profession. They are not meant to be prescriptive or comprehensive. Barristers must still take personal responsibility for determining whether their own disclosure and costs agreements comply with all applicable legislation and meet the needs of their professional practice.

The precedents include variations for conditional costs agreements (s. 323) and also for cases where a ‘sophisticated client’ exemption from disclosure applies (ss. 302, 312(1)(c) & (d) and related provisions).

It is assumed that a barrister using the precedents will be a member of the NSW Bar Association and obliged to publish the usual professional standards endorsement. It is also assumed that the jurisdictional requirements of Part 3.2 are satisfied.

No precedents are offered for disclosure without costs agreement, but the precedents may be adapted if a barrister wishes to follow that course. Costs agreements are not mandatory, but they provide greater certainty than mere compliance with statutory disclosure requirements (s. 319).

No precedents are offered for disclosure or agreement where an uplift fee is charged (s. 324).

Currency: The precedents were last updated on 1 July 2007.

The precedents and related notes are set out in four sections.

1. Barrister/solicitor precedents

The precedents in the first section are prepared on the assumption that the barrister is retained in the normal way by a law practice acting on behalf of a client and wishes to enter into a costs agreement with the instructing law practice under LPA s. 322(1)(c). This reflects the usual practice and usage of the legal profession. Barristers do not take funds in trust from their clients or investigate the clients’ creditworthiness. Instead, they rely on the credit and professionalism of instructing solicitors. This enables barristers to provide expert and specialised professional services to solicitors’ clients with relative economy because they do not have to duplicate the infrastructure of a solicitor’s office.

Links:

1.1 Disclosure letter from Barrister to Solicitors, s. 310(2)

1.2 Costs Agreement between Barrister and Solicitors, s. 322(1)(c)
1.3 Division 9 (Personal Injury) cases

2. Barrister/client precedents

The precedents in the second section are prepared on the assumption that the barrister is retained directly by a client and wishes to enter into a costs agreement with the client under LPA s. 322(1)(a). The Act also permits a costs agreement between barrister and client where the barrister is retained by an instructing solicitor (s. 322(1)(b)); no precedents are offered for that situation.

Barristers should also be aware of the separate disclosure requirement under s. 318A if there is an associated third party payer (relevantly, one who owes a payment obligation to the barrister within s. 302A). Cases may differ, and no separate precedent is offered.

No precedent is offered for direct access disclosure in personal injury cases under s. 339. For further notes about these provisions, see the introduction to precedent 1.3.

Links:
2.1 Disclosure Letter from Barrister to Client
2.2 Costs Disclosure Notice from Barrister to Client, s. 309

3. Basis of charging

The third section is a note about basis of charging. This is set out separately because it is likely to vary considerably across the profession. Examples of possible charging clauses are offered.

Link:
3 Basis of charging

4. Motor accidents cases

Finally, there is a note about special disclosure requirements for contracting out of fixed costs in cases under the Motor Accidents Compensation Act 1999.

Link:
4 Motor Accidents Compensation Act Cases
Barrister/solicitor precedents

The precedents in this section are prepared on the assumption that the barrister is retained in the normal way by a law practice acting on behalf of a client and wishes to enter into a costs agreement with the instructing law practice under LPA s. 322(1)(c). This reflects the usual practice and usage of the legal profession. Barristers do not take funds in trust from clients or investigate their clients’ creditworthiness, but rely on the credit and professionalism of instructing solicitors instead. This enables the barrister to provide appropriate professional services without duplicating the infrastructure of a solicitor’s office.

1. BARRISTER/SOLICITOR PRECEDENTS

1.1. Disclosure letter from Barrister to Solicitors, s. 310(2)

[date]

[Solicitors’ address &c]

Dear [salutation]

Re: [Matter]

(Ref. no: [Barrister’s reference no.])

I refer to [our recent discussions concerning the above matter and thank you for offering a brief in this matter.] Pursuant to the Legal Profession Act 2004 (NSW), I enclose my proposed Costs Agreement setting out inter alia the basis on which my fees will be calculated and billed.

I shall require a costs agreement between us under section 322(1)(c) of the Act as a condition of accepting the retainer. The enclosed will become such an agreement when you sign and return a copy or otherwise accept its terms by conduct. Please sign and return a copy at your early convenience.

[If considered appropriate or necessary, or if the solicitor has requested an estimate of fees, provide further information of that character.]

I expect that the information set out above and in the Costs Agreement will suffice to enable you to comply with section 310(1) of the Act, having regard to your knowledge of the matter and your own professional expertise and experience. Let me know if you require further information.

[If a sophisticated client exemption applies, the paragraph referring to section 310 may be deleted. The following may be used instead:
I note your advice that the client is within the disclosure exemption under section s. 312(1) of the Act{on the basis that – identify basis of exemption, if required}.]

Yours faithfully, [&c]

Liability limited by a scheme approved under Professional Standards Legislation.
1.2. *Costs Agreement between Barrister and Solicitors, s. 322(1)(c)*

**Costs Agreement between Barrister and Solicitors**

Between: [name of barrister] (‘the Barrister’)

And: [Solicitors], (‘the Solicitors’)

Re: [Matter].

Date:

The Solicitors propose to retain the Barrister on behalf of a client or clients of the Solicitors. This is a costs agreement between the Barrister and the Solicitors under the *Legal Profession Act* 2004 (NSW) (‘LPA’), section 322(1)(c).

1. This agreement applies to legal services provided by the Barrister under retainer from the Solicitors in connection with or arising out of the above-mentioned matter. Part 3.2 of the LPA applies correspondingly.

2. The Solicitors shall pay the Barrister:
   a) [set out basis of charging – see 3 Basis of charging]
   b) The cost of any [specify billable expenses – e.g. travel, accommodation and incidental expenses in connection with any attendance outside Sydney].
   c) The amount of any applicable goods and services tax, which shall be added to each of the above.

3. **[If the costs agreement is conditional]**: Payment of the Barrister’s costs [other than for disbursements] is conditional on the successful outcome of the matter. The circumstances constituting successful outcome are: [set out those circumstances – e.g. verdict, judgment, settlement or any other arrangement entitling the client to any relief, remedy or benefit relating to the subject matter of the proceedings (other than being relieved of an adverse party’s potential claim for costs).] If the Barrister on reasonable grounds considers that the client has unreasonably rejected a reasonable offer of compromise contrary to the Barrister’s advice, this clause does not apply to legal services provided after the Barrister gives notice to that effect to the Solicitor.

4. Interest is charged from date of invoice until payment at the rate referred to in LPA section 321(4), but interest is waived if fees are fully paid within 30 days of invoice.

5. The Barrister shall send invoices from time to time (a) at the Barrister’s discretion and (b) when requested by the Solicitors. Each invoice is payable within 30 days. **[If the costs agreement is conditional]**: An invoice may relate to costs that are still conditional, in which case those costs are not payable until the condition is satisfied but interest still runs from date of invoice.

6. The Solicitors’ obligations are personal and do not depend on their being put in funds by any person.

7. The Solicitors warrant that (a) they are a law practice under the LPA and (b) they are and shall remain authorised to receive on behalf of any client any disclosure that the barrister may be required to make to the client under the LPA and shall pass on any such disclosure to the client **[If the costs agreement is conditional]**: and (c) they have informed each client of the effect of Rule 100 of the Barristers’ Rules.

8. This costs agreement is not a retainer. It governs costs for legal services but not the provision or acquisition of legal services.

9. The Barrister may review rates of charge and other terms after six months from the date of this agreement. If the Barrister and Solicitors cannot then agree, the Barrister may return the brief.
10. The Solicitors’ agreement hereto is signified by signing below or by instructing or continuing to instruct the Barrister after receiving this document.

11. **If the case is within LPA Part 3.2, Division 9 relating to personal injury matters,** see additional notes under 1.3 Division 9 (Personal Injury) cases. Precedent 1.3.1 Personal injury: solicitor’s warranty may be inserted here and 1.3.2 Personal injury client’s certification and solicitor/client agreement about barrister’s fees at the end of the document.

12. **If a sophisticated client exemption applies, the following may be added:**
The Solicitor warrants that the Client is an entity of a kind referred to in LPA s. 312(1) to which disclosure is not required to be made under LPA s. 309 or 310(1){, namely – identify basis of exemption, if required}.]

…………………………..    ………………......................
[name of barrister]    [Solicitors]

Liability limited by a scheme approved under Professional Standards Legislation.

1.3. **Division 9 (Personal Injury) cases**

Part 3.2, Division 9, limits legal costs in ‘personal injury damages’ cases. Section 338 provides that ‘if the amount recovered on a claim for personal injury damages does not exceed $100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed’ by the imposition of statutory maximum amounts. It also says that ‘a law practice is not entitled to be paid or recover for those legal services an amount that exceeds those maximum costs’, subject to ss. 339 to 341. Section 339 provides that Division 9 ‘does not apply to the recovery of costs payable as between a law practice and the practice’s client to the extent that recovery of those costs is provided for by a costs agreement that complies with Division 5 (Costs agreements).’ Clause 116 of the Legal Profession Regulation 2005 imposes additional requirements for ‘the law practice’ to make disclosure to ‘the client’ as a condition for engaging the protection of s. 339. How this applies to the normal case where the client retains and enters into a costs agreement with solicitors and the solicitors retain and enter into a costs agreement with a barrister is unclear and has not been authoritatively determined.

The first question is whether s. 338 affects the barrister’s right to recover his or her fees from the solicitor (assuming in the case of a conditional costs agreement that any applicable condition has been satisfied). If so, there is a further question: are the barrister’s fees capable of attracting exemption under s. 339, and by what criteria? One possibility is that costs payable by a solicitor to a barrister under a costs agreement between them can attract s. 339 if they are also payable by the client to the solicitor under a complying costs agreement between the client and the solicitor in the character of disbursements, that being within the statutory definition of costs, and that the disclosure requirements of reg. 116 correspondingly address themselves to the relationship between solicitor and client. If this is so, the barrister needs to ensure that the client has received requisite disclosure from the solicitor.

Where the barrister enters into a costs agreement under LPA s. 322(1)(c) with instructing solicitors and wishes to take advantage of exemption under section 339 from the limits otherwise imposed under Part 3.2, Division 9, in a personal injury case, assuming that this is legally possible where the costs agreement is between barrister and solicitor (barristers should consider this question and the legal effect of the precedent for themselves), the costs agreement may include a warranty from the solicitors that they have entered into a complying costs agreement with the client and made the necessary disclosure. The solicitor’s warranty may be coupled with additional clauses added at the end of the barrister/solicitor costs
agreement providing certification by the client and a collateral costs agreement between client and solicitor covering the barrister’s fees.

1.3.1 Personal injury: solicitor’s warranty

[To be inserted in a barrister/solicitor costs agreement]

[clause no.] The Solicitors warrant that they have entered into a costs agreement with the client complying with LPA Part 3.2, Division 5, and that, before, or as soon as practicable after, they were retained in the matter, but before the costs agreement was entered into, they disclosed to the client all information in relation to the effect of that costs agreement (including the effect of this costs agreement) in connection with the operation of LPA Part 3.2, Division 9 required by clause 116 of the Legal Profession Regulation 2005 to engage the operation of LPA s. 339, including the following:

a) But for the costs agreement, Division 9 would limit the maximum costs for legal services provided to the client or prospective client in connection with any claim for personal injury damages, such that, if the amount recovered on such a claim does not exceed $100,000 (or such other amount as may be prescribed for the purposes of Division 9), the maximum aggregate costs of all law practices that have provided legal services to the client or prospective client are limited in the case of a plaintiff to the greater of 20% of the amount recovered or $10,000 or in the case of a defendant to the greater of 20% of the amount sought to be recovered by the plaintiff or $10,000.

b) For the purpose of calculating the limit, the ‘amount recovered’ includes any amount paid under a compromise or settlement (with or without legal proceedings), but no regard is paid to any part of the amount that is attributable to costs or interest. For the purpose of applying the limit, costs charged for disbursements (including disbursements for services provided by another person who is not a law practice) are not counted as part of the ‘costs for legal services’. The limit is increased (i) if the case goes to District Court arbitration and the other party obtains an order for a partial or full rehearing or (ii) if the case is decided by the District Court is appealed by the other party. If both these things happen, there are two increases. The increase is ¾ of the original limit (subject to Regulation). Where multiple law practices (e.g. the Barrister and the Solicitors) provide legal services to the same party, the Court may by order apportion the limit between them. The Court may also order particular legal services to be excluded from the limit in certain circumstances under LPA s. 341.

c) The costs agreement will have the effect of excluding the operation of Division 9.

d) The Barrister’s costs will be calculated in accordance with this costs agreement (and the Solicitors warrant that they have given each client or prospective client particulars as to how the Barrister’s costs will be calculated under the costs agreement).

e) This costs agreement relates only to costs payable as between the Solicitors and the Barrister and therefore ultimately payable by the client or prospective client to the Solicitors so that, if costs are recoverable against the other party, the maximum costs so recoverable will be as provided by Division 9.

f) If ordinary party/party costs are ordered to be paid by one party to the other (e.g. if the Court orders the unsuccessful party to pay the successful party’s costs), the maximum costs so payable as provided by Division 9 are subject to the limits mentioned above even if the receiving party has a complying costs agreement with the relevant law practice and has to pay a larger amount for his or her legal services. Despite those limits, however, Division 9 does not prevent a Court from ordering costs to be paid by one party to the other on an indemnity basis in respect of legal services provided to the receiving party under the costs order after that party has made an offer of compromise to the paying party under the costs order and it turns out that the Court determines or makes
an order or award on the claim in question in terms that are no less favourable to the paying party (whether plaintiff or defendant) than the terms of the offer. In those circumstances, costs payable by one party to another may exceed the limits referred to above.

1.3.2 Personal injury client’s certification and solicitor/client agreement about barrister’s fees

[To be added at the end of a barrister/solicitor costs agreement incorporating a personal injury solicitor’s warranty]

I certify that I have shown each client or prospective client a copy of this costs agreement, explained its terms and conditions, and explained the effect of LPA Part 3.2, Division 9.

………………………………..
(signed) Solicitors
Date: …………………

I certify that (a) my Solicitors have shown me a copy of this costs agreement between the Barrister and my Solicitors and explained to my satisfaction its terms and conditions and the effect of LPA Part 3.2, Division 9 and (b) I accept those terms and conditions. By way of further costs agreement with my Solicitors, I hereby agree with to pay them the proper amount of the Barrister’s costs in accordance with and subject to the conditions in the costs agreement between the Barrister and the Solicitors.

………………………………..
(signed) Client
Date: …………………
Barrister/client precedents

The precedents in this section are prepared on the assumption that the barrister is retained directly by a client and wishes to enter into a costs agreement with the client under LPA s. 322(1)(a). The Act also permits a costs agreement between barrister and client where the barrister is retained by an instructing solicitor (s. 322(1)(b)); no precedents are offered for that situation.

Barristers should also be aware of the separate disclosure requirement under s. 318A if there is an associated third party payer (relevantly, one who owes a payment obligation to the barrister within s. 302A). Cases may differ, and no separate precedent is offered.

No precedent is offered for direct access disclosure in personal injury cases under s. 339 and reg. 116. For further notes about these provisions, see 1.3 Division 9 (Personal Injury) cases above.

2. BARRISTER/CLIENT PRECEDENTS

2.1. Disclosure Letter from Barrister to Client

[date]

[Client’s address &c]

Dear [salutation]

Re: [Matter]

(Ref. no: [Barrister’s reference no.])

I refer to [our recent discussions concerning the above matter and thank you for offering a brief in this matter.] Pursuant to the Legal Profession Act 2004 (NSW), I enclose my proposed Costs Agreement setting out inter alia the basis on which my fees will be calculated and billed.

I shall require a costs agreement under the Act as a condition of accepting the brief. The enclosed document will become such an agreement when you sign and return a copy. If it is acceptable to you, please do so [at your early convenience / within n days].

I am required by the Act to disclose certain information to you about legal costs. That disclosure is made by giving you the enclosed Costs Disclosure Notice and proposed Costs Agreement.

[If a sophisticated client exemption applies, the paragraph referring to disclosure and the Costs Disclosure Notice may be omitted. If explicit reference to the exemption is desired, the following may be inserted:
I note your advice that you are within the disclosure exemption under section s. 312(1) of the Act (on the basis that – identify basis of exemption, if required).]

Yours faithfully,

Liability limited by a scheme approved under Professional Standards Legislation.
2.2. **Costs Disclosure Notice from Barrister to Client, s. 309**

Costs Disclosure Notice

Given under the *Legal Profession Act* 2004 (LPA)

From: [name of barrister]

To: [Client]

Date:

1. The legal services to which this Costs Disclosure Notice relates are the following:
   a) [Describe the proposed legal services. Remember that fresh disclosure will be required if legal services are to be provided outside the scope of what is described.]

2. I propose that my legal costs will be calculated in accordance with the accompanying proposed Costs Agreement, subject to any fixed costs provision that applies and cannot be excluded.

3. [Use whichever alternative applies:]
   - No fixed costs provision applies to any of those legal costs.
   - OR
     The following fixed costs provisions apply or may potentially apply: [Identify fixed costs provisions and what costs they apply to. ‘Fixed costs provision’ is defined in LPA s. 4. It includes maximum costs as well as fixed scale costs. Special considerations apply to some types of fixed costs provisions. *E.g.*, limitations in Part 3.2 Division 9 can be excluded by agreement and disclosure complying with s. 339 and LPR 2005 cl. 116, and limitations under the *Motor Accidents Compensation Regulation* 2005 can be excluded by agreement and disclosure complying with cl. 11 – but these are not situations that readily lend themselves to direct access work by barristers, and no form or precedent is offered here.]

4. The LPA gives you the right to be notified in writing of any substantial change to anything included in a disclosure by me under LPA Part 3.2, Division 3, as soon as is reasonably practicable after I become aware of the change.

5. Estimate of legal costs:
   a) The following is an estimate only. Actual costs may differ considerably from the estimate.
   b) [EITHER:]
      - My estimate of the total legal costs for my legal services referred to in 1 above is $ .
      - OR:
      - It is not reasonably practicable to give a single estimate of costs. A range of estimates of the total legal costs for my legal services referred to in 1 above is $ to $ .
      - On present indications, the major variables that will affect the calculation of those costs are:
        i) 
        ii) 
        iii) 
  ]
6. Details of the intervals at which I propose to bill you are set out in the accompanying proposed Costs Agreement.

7. I charge interest on overdue legal costs at the rate specified in the accompanying proposed Costs Agreement. The rate prescribed is currently the Reserve Bank of Australia target cash rate plus 2 percentage points.

8. [Only use this clause for litigious matters.]
   In many classes of litigation, the Court or Tribunal may order that one party pay an amount towards the costs of the other party.
   
a) My estimate of the range of costs that may be recovered from another party if you are successful in the relevant litigation is $      to $      [Consider whether the case is one in which costs can be awarded at all; if not, the figure is nil]

b) My estimate of the range of costs that you may be ordered to pay if you are unsuccessful in the relevant litigation is $      to $      [Consider whether the case is one in which costs can be awarded at all; if not, the figure is nil]

c) Bear in mind that these are only estimates. The actual result may be substantially different.

d) An order by a court or tribunal for the payment of costs in your favour will not necessarily cover the whole of your legal costs.

9. [Use this clause if a conditional costs agreement is proposed.]
   Disbursements may be payable by the client even if the law practice enters into a conditional costs agreement with the client. This depends on the terms of the agreement.

10. You may contact me to discuss the legal costs. My contact details are on my accompanying letter.

11. The law of New South Wales applies to legal costs in relation to the matter.

12. [If a conditional costs agreement is proposed, include the following:]
   Under Rule 100 of the Barristers’ Rules, a barrister may return a brief accepted under a conditional costs agreement if: (a) the barrister, and the instructing solicitor if any, consider on reasonable grounds that the client has unreasonably rejected a reasonable offer of compromise contrary to the barrister's advice; (b) the client has refused to pay the barrister a reasonable fee for all work done or to be done after the client's rejection of the offer; (c) the client was informed before the barrister accepted the brief of the effect of this Rule; and (d) the barrister has the firm view that the client has no reasonable prospects of success or of achieving a result better than the offer.

13. You have the right to seek independent legal advice before entering into the proposed Costs Agreement or any costs agreement.

14. You also have the rights described as follows in the Legal Profession Regulation, Sch. 5, Form 2: Form of disclosure of costs to clients:

   **Legal costs—your right to know**

   You have the right to:

   - negotiate a costs agreement with us

   - receive a bill of costs from us
• request an itemised bill of costs after you receive a lump sum bill from us

• request written reports about the progress of your matter and the costs incurred in your matter

• apply for costs to be assessed within 12 months if you are unhappy with our costs

• apply for the costs agreement to be set aside

• accept or reject any offer we make for an interstate costs law to apply to your matter

• notify us that you require an interstate costs law to apply to your matter

For more information about your rights, please read the fact sheet titled Legal Costs—your right to know. You can ask us for a copy, or obtain it from your local law society or law institute (or download it from their website).

2.3. Costs Agreement between Barrister and Client, s. 322(1)(a)

Costs Agreement between Barrister and Client
Between: [name of barrister] (‘the Barrister’)
And: [Client], (‘the Client’)
Ref. No. [Barrister’s ref. no.]
Re: [Matter].
Date:

The Client proposes to retain the Barrister directly in the above matter. This is a costs agreement between the Barrister and the Client under the Legal Profession Act 2004 (NSW) (‘LPA’), section 322(1)(a).

1. This agreement applies to legal services provided by the Barrister in connection with or arising out of the above-mentioned matter. Part 3.2 of the LPA applies correspondingly.

2. The Client acknowledges receipt from the Barrister of the Barrister’s letter and Costs Disclosure Notice dated [                ].

3. The Client shall pay the Barrister:
   a) [set out basis of charging – see 3 Basis of charging]
   b) The cost of any [specify billable disbursements for expenses – e.g. travel, accommodation and incidental expenses in connection with any attendance outside Sydney].
   c) The amount of any applicable goods and services tax, which shall be added to each of the above.

4. [If the costs agreement is conditional:
Payment of the Barrister’s costs [other than disbursements] is conditional on the successful outcome of the matter. The circumstances constituting successful outcome are: [set out those circumstances – e.g. verdict, judgment, settlement or any other arrangement entitling the client to any relief, remedy or benefit relating to the subject matter of the proceedings (other than being relieved of an adverse party’s potential claim for costs).] If the Barrister on reasonable grounds considers that the Client has unreasonably rejected a reasonable offer of compromise contrary to the Barrister’s]
advice, the last preceding clause does not apply to costs for any legal services provided after the Barrister gives notice to that effect to the Client.]

5. **[If the costs agreement is conditional, unless a sophisticated client exemption applies:]**
The Client confirms that [he/she] has been informed that [he/she] has the right to seek independent legal advice before entering into this agreement.

6. **[If the costs agreement is conditional, unless a sophisticated client exemption applies:]**
The Client has a cooling-off period of five clear business days during which the Client may terminate this agreement by written notice. If that happens, the Client must pay the Barrister’s costs in accordance with this Agreement for legal services (if any) performed before that termination and reasonably necessary to preserve the Client’s rights. Such costs are payable regardless of the outcome of the matter.

7. Interest is charged from date of invoice until payment at the rate referred to in LPA section 321(4), but interest is waived if fees are fully paid within 30 days of invoice.

8. The Barrister shall send invoices from time to time (a) at the Barrister’s discretion and (b) when requested by the Client. **[If the costs agreement is conditional: An invoice may relate to costs that are still conditional, in which case those costs are not payable until the condition is satisfied but interest still runs from date of invoice.]**

9. This costs agreement is not a retainer. It governs costs for legal services but not the provision or acquisition of legal services.

10. The Barrister may review rates of charge after six months from the date of this agreement, but only to give effect to changes in the Barrister’s normal rate the relevant type of work. If the Barrister and Client cannot then agree, the Barrister may return the brief.

11. **[If a sophisticated client exemption applies, the following may be added:]**
The Client warrants that the Client is an entity of a kind referred to in LPA s. 312(1) to which disclosure is not required to be made under LPA s. 309 or 310(1){, namely – identify basis of exemption, if required}.]

12. **[If the costs agreement is made with an entity such as an accounting firm that may be acting for its own client, the following may be added:]**
The Client’s obligations under this agreement are personal to the Client, regardless of any relationship that may exist between itself and any client of the Client. Any retainer shall only be between the Client and the Barrister unless otherwise expressly agreed in writing.]

.................................................. ..................................................
[name of barrister] ............................................ Client

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3. **Basis of Charging**

All costs agreements and disclosure obligations must specify the barrister’s basis of charging. This varies from barrister to barrister. It may also vary according to the nature of the work.

Most barristers use a daily rate and an hourly rate. The relationship between these rates and the circumstances in which each applies should be made clear.
Cancellation fees can be particularly contentious. Without offering a view whether or on what basis it is proper to charge a fee where a hearing day is cancelled, barristers who wish to do so should make explicit provision to that effect. Consideration should be given to what is fair and reasonable in the circumstances (cf. Wilkie v Gordian Runoff Ltd [2005] NSWCA 873).

The following are examples of a basis of charging that might be used in a Costs Agreement, if appropriate to the barrister’s practice and fair in the circumstances:

Example A.

$xxx per hour for all time properly spent (including waiting and travelling time, if any), with items or daily totals rounded up or down to the nearest [quarter hour / tenth of an hour], but subject to the following minimum charges:
$xxx for a short appearance in a Court or Tribunal; $yyy for an interlocutory hearing before a duty judicial officer not exceeding ½ day; otherwise $zzz for every day or part thereof occupied by, listed or set aside for any hearing, mediation or arbitration; but if a matter is settled or de-listed more than seven and not more than 14 days before such a day, the daily fee is reduced by 50%; or if more than 14 days before, or if the Barrister is subsequently briefed to appear in another case and entitled to charge a daily fee for that day, the fee is waived.

Example B.

$xxx per hour for all time properly spent (including waiting and travelling time, if any), with items or daily totals rounded up or down to the nearest [quarter hour / tenth of an hour], but subject to the following minimum charges:
$xxx for a short appearance in a Court or Tribunal; $yyy for an interlocutory hearing before a duty judicial officer not exceeding ½ day; otherwise $zzz for every day or part thereof occupied by any hearing, mediation or arbitration.

4. MOTOR ACCIDENTS COMPENSATION ACT CASES

Various provisions of the Motor Accidents Compensation Act 1999 regulate legal costs. One such provision is s. 149, which permits regulations to fix maximum costs for certain legal services and related matters. Division 2 of the Motor Accidents Compensation Regulation 2005 is made under s. 149 and sets certain maxima, but clause 11 permits contracting out. Both s. 149 and cl. 11 still refer to provisions of the LPA 1987 rather than LPA 2004.

It is not clear how the contracting-out provisions map across to the 2004 Act, given that the new Act does not require disclosure under s. 309 or 310 by a barrister to a client where the barrister is retained by solicitors acting on behalf of the client. It is not clear whether it is (a) necessary or (b) sufficient that the solicitors have made the requisite disclosure to the client, nor whether a separate act of disclosure is required by a barrister to a client. The safest course is to ensure that both solicitors and barrister make the prescribed disclosure to the client by a separate document of the kind contemplated by the Regulation, with receipt acknowledged by the client in writing to facilitate proof. The requirement does not distinguish between plaintiffs and defendants; prima facie, it applies to defendants’ work as well as plaintiffs’ work.

The content of the required disclosure is straightforward, but it must be provided ‘before entering into the costs agreement and ‘in a separate written document’. After prefatory
matters and reference to the relevant claim under the Act and the proposed Costs Agreement, the separate, written document addressed to the client may say something like the following:

Even if costs are awarded in your favour, you will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the *Motor Accidents Compensation Act 1999* in the absence of a costs agreement.
APPENDIX 2: BILLING CHECKLIST FOR BARRISTERS

This checklist sets out some commonly encountered requirements relating to barristers’ billing practices under Part 3.2 of the Legal Profession Act 2004 (LPA) and the Legal Profession Regulation 2005 (LPR).

Currency: Last revised October 2007.

Preliminary matters: time recording

1. **Time recording** Most barristers bill on a time costing basis. Anyone who bills on this basis should keep accurate daily records of time spent, the nature of the work done, and the brief to which the work relates. There is no set form. The barrister may, for example, keep a day book or an excel spreadsheet, or may use proprietary accounting software with time recording features. The important thing, both in fairness to the client and solicitor and for the protection of the barrister, is to keep a reliable record sufficient to support the creation of an itemised bill.

Form, content and service of the bill

2. **Requirement for bill** There is no positive requirement to give a bill, or to give it in a particular form, but a barrister cannot sue for fees unless he or she first gives a bill in compliance with LPA s. 331 and then waits 30 days (or as abridged by order). If the recipient of a lump sum bill requests an itemised bill before the barrister commences proceedings, however, the barrister must wait 30 days after giving an itemised bill before suing for the fees (s. 332A). By contrast, s. 352 imposes no explicit condition on a barrister’s application for assessment of billed costs, other than waiting 30 days.

3. **Signature of bill** The bill (or an attached or enclosed letter) must be signed by the barrister (s. 332).

4. **Content and detail of bill** The bill must be either an itemised bill or a lump sum bill (s. 332).

   a) **Itemised bill** If the bill ‘specifies in detail how the legal costs are made up in a way that would allow them to be assessed under [LPA Part 3.2] Division 11’, it is an itemised bill (s. 302). A barrister’s itemised bill must include the following particulars, set out in generally chronological order (LPR, cl. 111B(2)):

   ‘(a) short details of each item of work carried out on behalf of the client, including the method by which it was carried out (whether by letter, telephone, perusal, drafting, conference, teleconference or otherwise) if not otherwise apparent,

   (b) the date on which each item of work was carried out,

   (c) the amount charged for each item of work or for items of work carried out on a particular day, and particulars of the basis for calculating the amount charged.’

Many barristers issue itemised bills as of course.
b) **Lump sum bill** If the bill ‘describes the legal services to which it relates and specifies the total amount of the legal costs’ but is not an itemised bill, it is a lump sum bill (s. 302).

5. **Interest** If interest is to be claimed, include a statement that interest is payable and a statement of the rate. Interest cannot be charged above the rate prescribed under s. 321(4), presently the RBA target cash rate plus 2 percentage points (LPR, cl. 110A). A barrister can only charge interest if he or she has given a bill which contains ‘a statement that interest is payable and of the rate of interest’ (s. 321(3)). The Act is not explicit whether the current percentage rate must be stated, or whether it is necessary or sufficient to describe how the rate is derived, e.g. by reference to s. 321(4) and/or the RBA cash rate. Consider the following example:

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Interest is payable on unpaid legal costs. The rate is as prescribed under the Legal Profession Act 2004, section 321(4), being the Reserve Bank of Australia target cash rate plus 2 percentage points, currently [        ]%.
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6. **Statement of clients’ rights** The bill must contain or be accompanied by a written statement of clients’ rights complying with s. 333(1). A ‘safe harbour’ form of notice is prescribed under section 333(4). There is also an exception in relation to a ‘sophisticated client’ as defined in section 302A.

Unfortunately, both section 333(1) and the prescribed form overlook the legal and practical differences between a barrister’s bill and a solicitor’s bill. A notice that simply follows the prescribed form will be positively misleading if it is included in a typical barrister’s bill to an instructing solicitor. In the ordinary case of a barrister retained by a solicitor for a client, the client’s rights lie against the solicitor, and the solicitor’s rights against the barrister differ materially from the client’s rights against the solicitor.

Barristers should make their own decisions about section 333, but may consider the following form of notice:

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The following notification applies to a client in relation to a bill issued by a law practice retained or contracted by the client or third party payer. It does not apply between a client and a barrister who is retained in the usual way by the client’s solicitor law practice such that the barrister bills the solicitor, but it can apply between client and solicitor when the solicitor bills or asks the client for payment of the barrister’s fees. (Some client’s rights may also apply to a third party payer, depending on the circumstances.)

Legal Profession Regulation 2005, Schedule 5, Form 3: Form of notification of client’s rights: Your rights in relation to legal costs

The following avenues are available to you if you are not happy with this bill:

- requesting an itemised bill
- discussing your concerns with us
- having our costs assessed
- applying to set aside our costs agreement

There may be other avenues available in your State or Territory (such as mediation).

For more information about your rights, please read the fact sheet titled Your right to challenge legal costs. You can ask us for a copy, or obtain it from your local law society or law institute (or download it from their website).
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7. **Method of service** The bill must be given by a method of service recognized under s. 322 or LPR cl. 111 (including service by post, fax, DX or email – see those provisions for detail.)
**GST tax invoices and adjustment notes**

8. **Requirement for tax invoice**  
   GST legislation imposes form and content requirements to qualify a document as a tax invoice. A barrister’s bill does not have to be a tax invoice, but a tax invoice must be given for a taxable supply within 28 days of request. Most barristers’ supplies are taxable, and many give all bills in tax invoice form without request. The following items are based on the usual requirements for a supplier-created tax invoice for barrister’s services over $1,000 under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), s. 29-70 and the *A New Tax System (Goods and Services Tax) Regulation 1999*, reg. 29-70.01.

9. **Tax invoice**  
   The invoice must set out the following:
   
   a) the barrister’s ABN
   b) the (total) price
   c) the words ‘tax invoice’, stated prominently
   d) its date of issue
   e) the barrister’s name
   f) the name of the recipient
   g) the address or ABN of the recipient
   h) a brief description of each thing supplied
   i) for each such description, the extent of the services
   j) the amount payable, net of GST (alternatively, if GST is exactly 1/11 of the total price, a statement is permitted that the total includes GST)
   k) the total amount of GST.

10. **Mixed supplies in tax invoice**  
    If the tax invoice includes a pre-GST or GST free supply as well as a taxable supply, it must also clearly identify each taxable supply, state the total amount of GST payable, and state the total amount payable for the taxable supplies. (A simpler course is to invoice taxable and GST-free supplies separately.)

11. **Adjustment note**  
    If a barrister has to issue an adjustment note, it must comply with s. 29-75 of the GST Act and the *A New Tax System (Goods and Services Tax) Act 1999 Adjustment Note Information Requirements Determination (No. 1) 2000* in Schedule 1 to GSTR 2000/1 (as amended).

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**Payment in advance**

12. **Payment in advance**  
    Payments in advance are deemed to be trust money under LPA s. 243. Section 252 prohibits a barrister from receiving trust money, but an exception is provided by clause 106A of LPR 2005. To engage the exception, it is necessary to follow the procedures prescribed in clause 106A. Non-compliance subjects the barrister to disciplinary action for breach of section 252. It may also attract obligations under the trust account provisions in LPA Part 3.1.

   Clause 106A provides:
106A  Receipt of trust money by barrister (section 252 of the Act)—exclusion under section 246 (3) of the Act

Part 3.1 of the Act does not apply to trust money received and held by a barrister if the money is received by the barrister on account of legal costs for legal services in advance of the provision by the barrister of the legal services, in the following circumstances:

(a) the barrister is practising as a sole practitioner and the money is received in connection with instructions accepted by the barrister directly from a person who is not a solicitor,

(b) the money is deposited, within a reasonable time, after the barrister receives the money, in an account maintained with an ADI in connection with the barrister’s law practice,

(c) the money remains deposited in that or another account maintained with an ADI in connection with the barrister’s law practice until:
   (i) a bill is given to the client, or
   (ii) the money is refunded to the client, or
   (iii) the money is paid to a solicitor who is later engaged by the client in the matter.
APPENDIX 3: LEGISLATIVE ISSUES AND REFORM

The following is a summary of particular problems concerning costs provisions of the Legal Profession Act 2004 (NSW) with proposals for legislative reform.

The first six issues bear more particularly on the bar than on the solicitors’ branch of the profession. The order of issues is not intended to suggest order of importance.

1. **Division 9 (personal injury) costs disclosure**

1.1. It is unclear how ss. 338 and 339 of the Act and clause 116 of the Legal Profession Regulation 2005 apply to barrister’s costs in the normal case where a client retains and enters into a costs agreement with solicitors and the solicitors retain and enter into a costs agreement with a barrister.

1.2. Division 9 limits costs in personal injury cases. In so far as the limit applies to non-party/party costs, it is a consumer protection provision for the protection of clients. The Act allows contracting out, subject to disclosure. The disclosure requirement should apply at the level of the law practice that deals directly with the client. Normally, this is the solicitor with principal conduct of the client’s case, who enters into a costs agreement with the client under which the client is obliged i.e. to pay for disbursements which the solicitor pays or becomes liable to pay, such as barristers’ and solicitor agents’ fees. There is no need for another layer of disclosure and red tape between the barrister or solicitor agent and the client. A barrister or solicitor agent who is retained by and enters into a costs agreement with the principal solicitor in the usual way under s. 322(1)(c) should not have to duplicate the solicitor’s disclosure to the client. Disclosure to the solicitor concerning the effect of Division 9 is obviously unnecessary.

1.3. **Recommendation:**

1.3.1. It is submitted that s 339 should be amended by deleting in sub-section (1) ‘as between a law practice and the practice’s client’ and inserting ‘for the provision of legal services’ and by adding in sub-section (2) after ‘to the practice’s client’ the further words ‘with whom it enters into a costs agreement’.

1.3.2. An obvious grammatical error in cl. 116 of the Regulation should be corrected by adding after ‘of a law practice’ the further words ‘and that law practice’.

2. **Division 9 (personal injury) offer of settlement disclosure**

2.1. Clause 117 of the Regulation requires disclosure by a law practice to a client in respect of settlement offers received by the client regardless of the role of the law practice (if any) in relation to the settlement negotiation. The Regulation overlooks the fact that multiple law practices are usually involved in a case with different roles and responsibilities in relation to settlement offers.

2.2. First, settlement negotiations can take place between solicitors without involving the barristers. Secondly, if a barrister receives an offer of compromise from opposing counsel, he or she usually passes it on to the instructing solicitor, and there is normally no need for counsel to become involved in subsequent communications between solicitor and client. Either of these situations engages clause 117. Although the financial consequence of not making disclosure is discretionary (s. 340(4)) and the discretion
ought not be exercised against a barrister who is unaware of an offer, the obligation under the Regulation is unqualified. The practical effect of the Regulation is that (a) a barrister can be in breach of the rule without being aware of an offer and (b), upon becoming aware that a current client has received an offer, a barrister must also make his or her own personal ‘disclosure’ to the client, duplicating the solicitor’s disclosure and incurring extra costs for the client.

2.3. **Recommendation:** It is submitted that the Regulation should be amended to take account of these problems.

3. **Section 333 notice**

3.1. The notice required by s. 333 is misleading and unnecessary in the case of a bill rendered by one law practice to another.

3.2. The notice describes the rights of a client as against a directly retained or contracted law practice. This is true both of a notice drafted to comply with section 333(1) and the safe harbour form of notice now prescribed under section 333(4) (LPR 2005 clause 111A and Schedule 5, Form 3). It is also true of the Attorney-General’s consumer fact sheet *Your right to challenge legal costs*.

3.3. In the normal case of a barrister retained by an instructing solicitor, the barrister does not look to the client for payment, but to the solicitor. The solicitor has no need of consumer-protection disclosure because of his or her own professional knowledge and expertise. If the notice is construed as a notice by the barrister to the solicitor about the solicitor’s rights, it is misleading. If the solicitor passes the bill on to the client and the client reads the section 333 notice as being addressed to him or her by the barrister, it is misleading.

3.4. In the usual case, a barrister is retained by a solicitor on behalf of a client. Any costs agreement is usually made with the instructing solicitor under s. 322(1)(c). The barrister bills the solicitor, not the client.

3.5. A section 333 notice is misleading if it is construed as a notice by the barrister to the solicitor about the solicitor’s rights because the solicitor’s rights against the barrister are materially different from a client’s rights against a directly retained or contracted law practice as described in section 333(1) or in the present section 333(4) notice. For example, the solicitor has a shorter time limit to apply for assessment of the barrister’s costs, does not have the right to apply to set aside a costs agreement between barrister and solicitor under s. 328, and does not have access to the mediation process under Division 8.

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37 The form is as follows:

`Your rights in relation to legal costs`
The following avenues are available to you if you are not happy with this bill:

- requesting an itemised bill
- discussing your concerns with us
- having our costs assessed
- applying to set aside our costs agreement

There may be other avenues available in your State or Territory (such as mediation).

For more information about your rights, please read the fact sheet titled *Your right to challenge legal costs*. You can ask us for a copy, or obtain it from your local law society or law institute (or download it from their website).`
3.6. Notice of rights to a solicitor is also unnecessary. The solicitor has no need of consumer-protection disclosure because of his or her own professional knowledge and expertise. A law practice that is given a bill by another law practice should know its rights without special notice. Notice of rights between law practices should not be required at all.

3.7. An unqualified section 333 notice is misleading if the solicitor passes the barrister’s bill on to the client and the client interprets the notice as a statement of his or her rights against the barrister. This would not be an unreasonable mistake for an unsophisticated client to make, particularly if the notice simply reproduces the prescribed form under section 333(4). When a solicitor gives a client a copy of a conventional barrister’s bill for payment, it is the solicitor who is making the relevant request for payment. As between solicitor and client, the barrister’s fees are a disbursement item. The client’s relevant rights lie against the solicitor, not against the barrister.

3.8. Similar observations apply to a solicitor agent’s bill to a principal solicitor.

3.9. The inclusion of a s. 333 notice is presently required for any bill to be actionable (s. 331). To comply with this requirement and prevent the s. 333 notice from being misleading, a convoluted form of words is needed to avoid the notice being misleading.38

3.10. In failing to distinguish between directly and indirectly retained law practices, s. 333 repeats a mistake that was previously made in cl. 45(1)(d) of the Legal Profession Regulation 2002. As originally enacted, that clause required notice of client’s rights in any bill, forgetting that separate provisions applied to bills between legal practitioners. The provision had to be amended to distinguish between a bill to a solicitor and a bill to a client.39

3.11. **Recommendation**: It is submitted that a section 333 notice should not be required where a bill is given by one law practice to another, e.g. by re-numbering the existing section 333 as sub-section (1) and adding a new sub-section (2) to the effect: ‘Sub-section (1) does not apply to a bill given by one law practice to another’.

4. **Fees in advance: LPR cl. 106A**

4.1. Fees in advance are deemed to be trust money under section 243. The exemption in LPR clause 106A from trust accounting requirements where a barrister receives fees in

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38 Such as the wording suggested in the Billing Checklist on the Bar Association website: ‘The following notification applies to a client in relation to a bill issued by a law practice retained or contracted by the client or third party payer. It does not apply between a client and a barrister who is retained in the usual way by the client’s solicitor law practice such that the barrister bills the solicitor, but it can apply between client and solicitor when the solicitor bills or asks the client for payment of the barrister’s fees. (Some client’s rights may also apply to a third party payer, depending on the circumstances.)’

39 From 22 November 2002, cl. 45(1)(d) required a bill to include ‘a statement: (i) in a case where the bill of costs is given to a client—that the client may apply to have the costs assessed under Part 11 of the Act, but that if the costs have been wholly or partly paid, the application must be made within 12 months after the client is given the bill of costs, or (ii) in a case where the bill of costs is given by a barrister or solicitor who was retained by another barrister or solicitor to act on behalf of a client and the bill of costs is given to that other barrister or solicitor—that the barrister or solicitor who is given the bill of costs may apply to have the costs assessed under Part 11 of the Act within 30 days after the bill of costs is given’. Before that date it required a statement of the kind in sub-paragraph (i) in all cases without differentiation, as section 333(1) does now.
advance only applies if the barrister is directly retained by the client. Some solicitors do not maintain a trust account. A barrister who acts on instructions from such a solicitor has neither the security of funds in trust nor access the protection of the exemption.

4.2. **Recommendation:** It is submitted that clause 106A should be extended to a case where the instructing solicitor does not maintain a trust account when the payment is made.

5. **Choice of law provisions**

5.1. Division 2 of Part 3.2 enacts choice of law provisions reflecting Division 2 of Part 3.4 of the *National Legal Profession Model Bill* 2nd ed (accessible at [http://www.lawcouncil.asn.au/natpractice/currentstatus.html](http://www.lawcouncil.asn.au/natpractice/currentstatus.html)). The relevant choice lies between Part 3.2 of the NSW Act and corresponding provisions in the laws of other jurisdictions. Division 2 fails adequately to reflect the legal and practical differences between a directly retained law practice and a law practice retained by another law practice on behalf of a client.

5.2. Part 3.2 of the NSW Act can commence to apply to a matter in any of three ways: first, by first instruction of the relevant law practice in New South Wales under section 303; secondly, by agreement between client and law practice under section 304(1)(c)(i); and thirdly, by notification from the client to the law practice under section 304(1)(c)(ii). NSW Part 3.2 can cease to apply in favour of the law of another jurisdiction in either of two ways: first, by agreement between the client and the law practice under section 305(2)(b)(i); secondly, by notification from the client to the law practice under section 305(2)(b)(ii). The interstate agreement and notification provisions are complementary: the criteria for validity of an agreement or notification to commence the application of one system of law correspond to the criteria for validity of an agreement or notification to discontinue the application of another system of law.

**First instructions**

5.3. Under section 303, NSW Part 3.2 ‘applies to a matter if the client first instructs the law practice’ in New South Wales. First instruction is defined by section 306. Reading the two provisions together, NSW Part 3.2 applies ‘if the law practice first receives instructions from or on behalf of the client in relation to the matter’ in New South Wales, by whatever means of communication. This implies that the application of Part 3.2 must be determined separately in relation to each law practice concerned. First, section 303 uses the definite article to qualify ‘law practice’. Secondly, the concept of instructions ‘on behalf of the client’ in section 306 is comparable with retainer by one law practice of another ‘on behalf of a client’ in section 310 and elsewhere, and suggests that section 306 is intended to cover such a situation. If so, the retainer of a New South Wales barrister or solicitor by an interstate law practice on behalf of a client will attract NSW Part 3.2 if the first instructions to the New South Wales practitioner are received in New South Wales. The application of Part 3.2 to a ‘matter’ thus appears specific to the particular law practice under consideration, whether barrister or solicitor.

**Agreement**

5.4. NSW Part 3.2 also commences to apply if the requirements of section 304(1)(a) and (b) are met and ‘the client’ accepts a written offer to enter into an agreement with ‘the law practice’ that it apply to ‘the matter’ and the offer meets the requirements of section 304(2A). The operative provisions are section 304(1)(c)(i) and (2)(a). An agreement
under corresponding interstate provisions discontinues the application of NSW Part 3.2 under section 305.

5.5. Unlike section 306, the agreement provisions do not refer to the case where the relevant law practice is indirectly retained. It is part of the normal function of the retaining law practice to manage the retainer of other professionals. Normally, the retainer of barristers by solicitors is conducted on a professional to professional basis. In that situation, it should be sufficient if the two law practices agree on choice of law without the need for personal involvement of the client or application of the consumer protection measures in section 304(2A).

Notification

5.6. NSW Part 3.2 thirdly commences to apply if the requirements of section 304(1)(a) and (b) are met and ‘the client’ gives written notification of choice of law to ‘the law practice’ under section 304(1)(c)(ii) and (2)(b) not later than 28 days after ‘the law practice’ makes disclosure of the right to give such notification under a corresponding law in terms of section 304(3). The interstate disclosure contemplated by section 304(3) corresponds to that required by section 309(1)(l)(ii) of the NSW Act and clause 3.4.10(1)(l)(ii) of the Model Bill. An indirectly retained law practice has no obligation to make disclosure of those matters to the client (see Model Bill clause 3.4.11(2), corresponding to NSW section 310(2)).

5.7. Interstate notification provisions correspond to those in section 304 in accordance with clause 3.4.5 of the Model Bill. Notification under corresponding interstate provisions discontinues the application of NSW Part 3.2 under section 305. Where NSW Part 3.2 presently applies to a matter and there is also a substantial interstate connection such as the residence or principal place of business of the client (cf. LPR cl. 109 and interstate equivalents), the time limit for notification applying interstate law and dis-applying NSW Part 3.2 only begins to run if and when ‘the law practice’ makes disclosure to ‘the client’ under section 309(1)(l)(ii) of the NSW Act.

5.8. These provisions do not take account of the case of an indirectly retained law practice, whether barrister or solicitor agent. First, there is no need nor any proper occasion for an indirectly retained law practice to make disclosure to a client concerning the client’s right to give a choice of law notification. To do so would add unnecessary regulation which is not required by Division 3. Secondly, choice of law is a proper matter for negotiation and agreement if necessary between the retaining law practice (typically, principal solicitor) and the retained law practice (barrister or solicitor agent). There is no need to reserve a right of unilateral choice of law by notification. The notification provisions should therefore not apply to a law practice that has been retained by another law practice on behalf of a client.

Model Bill

5.9. NSW sections 303 to 307 correspond to clauses 3.4.4 to 3.4.8 of the Model Bill, all of which are classified as ‘core uniform’ provisions. To maintain uniformity and to achieve necessary amendments in other jurisdictions, the proposed amendments should be made in the Model Bill first.

5.10. **Recommendation:** It is submitted that clause 3.4.5 of the Model Bill and section 304 of the NSW Act should be amended to the following effect:

5.10.1. Amend subsection/subclause (1)(c) by adding a third alternative to the effect that Part 3.2 also applies ‘(iii) where the law practice is or has been retained by
another law practice acting on behalf of the client, those law practices agree that this Part shall apply’.

5.10.2. Provide that paragraph (1)(c)(ii) does not apply in relation to a law practice retained by another law practice acting on behalf of the client.

6. **Barrister retained by foreign law practice**

6.1. The Act only permits a costs agreement between a law practice and a client or another law practice which retains the first on behalf of a client, but a ‘foreign law practice’ is unlikely to be a ‘law practice’.

6.2. **Recommendation:** The Act should be amended to treat (a) a retainer and (b) an agreement between a law practice and a foreign law practice acting on behalf of a client in a manner generally similar to a retainer from or agreement with (as the case may be) with a domestic law practice so acting.

7. **Uplift and contingency fee provisions**

7.1. There is a danger that that charging a fraction of one’s normal fee unconditionally and the balance conditionally, or of limiting one’s fees so as not to exceed the amount recovered or a proportion of the amount recovered, may be taken to infringe the ‘uplift’ and/or contingency fee prohibitions (ss. 324, 235).

7.2. Recent Victorian decisions (*Equuscorp v Wilmoth Field Warne* [2006] VSC 28; *Coadys v Getzler* [2006] VCC 243) hold that a practitioner who agrees to take a fraction of his or her normal rate regardless of outcome and to require payment of the full normal rate only if the case succeeds infringes uplift prohibitions similar to NSW s. 324. Under the NSW Act, this would have the further consequence of depriving the practitioner of all costs, not just the uplift, and require repayment of any costs received (s. 327). A similar argument may be made under s. 325 (prohibition of contingency fees), although not adopted in the Victorian cases.

7.3. Section 323 explicitly allows a law practice to make part only of its costs conditional, and there should be no ethical objection to allowing part of one’s normal fees to be conditional. For example, a case may have apparent merit, but the litigant may not have the means fully to fund the case, and the case may be too big for the practitioner (particularly a sole practitioner, such as a barrister) to risk remaining entirely unpaid until final judgment, or at all, for what might be months of work. To charge (say) a quarter or a half of one’s normal fees unconditionally and the balance conditionally in such circumstances is ethically unobjectionable and facilitates access to justice. Given s. 327 and the case law, however, no barrister could take the risk.

7.4. Likewise, a provision explicitly capping one’s fees so as not to exceed the proceeds of the action (however defined) or a proportion thereof offends the literal terms of s. 325, but is ethically unobjectionable if the fees before application of the cap are calculated on the normal professional basis. The cap in such a case only serves to protect the client from having a bill that eats up or exceeds all the proceeds of the action.

7.5. As to the ethical propriety of the practices just described, see *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203, *Schokker v FCT* (No. 2) (2000) 106 FCR 134 at 139-9; *Ladd v London Road Car Co* (1900) 110 LT Jo 80; *Sievwright v Ward* [1935]
NZLR 43 at 48 per Ostler J; Re Sheehan (1990) 13 Fam LR 736 at 749; and cf. Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145 at [120], [121], [128]. The Victorian decisions are wrong in law. The error lies in treating the amount ‘otherwise payable’ as the amount payable in the event of failure instead of the amount that would have been payable without the contingency agreement. If the Equuscorp decision is right, an agreement to work for nothing at all in the event of failure and any rate, however modest, in the event of success would entail a premium equal to an infinite percentage of the fee otherwise payable. Further, the decision fails to take account of the purpose and history of the legislation (at least viewed in terms of the history of the New South Wales legislation – the Committee has not attempted to track the history of the Victorian legislation). Nevertheless, while the decisions stand, they are an impediment to proper practice.

7.6. **Recommendation:** Unless the matter is sooner resolved by judicial decision, the Act should make it clear that a costs agreement by which a law practice charges legal costs on terms not exceeding its normal terms and rates on the basis all or part of its costs are conditional on a successful outcome or limited by reference to the amount of any award or settlement or the value of any property that may be recovered in proceedings to which the agreement relates shall not be taken to infringe s. 324(1) or s. 325(1). (A further requirement of reasonableness seems unnecessary, given ss. 328 and 364.)

8. **Costs assessment**

8.1. There is no provision for issues unsuitable for paper-based determination by costs assessors to be referred for determination by a judicial officer.

8.2. The costs assessment system is paper-driven. Costs assessors have some powers of information gathering (s. 358), but there is no provision to summon witnesses, to receive viva voce evidence, or to allow or require cross-examination. Costs assessors are not judicial officers, nor are they officers of any court. Sometimes questions of fact material to assessment cannot satisfactorily be determined without a conventional hearing. Sometimes the correct outcome of an assessment depends on a question of law, or a mixed question of fact and law, which the costs assessor is not properly empowered to determine. At present, the only avenue to have such questions determined is to seek leave to appeal from the costs assessor’s determination to the Supreme Court or another court or tribunal under s. 385 (see Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145, esp. [193], [202]).

8.3. Section 369(4) permits an assessor to ‘refer to the Supreme Court any special circumstances relating to a costs assessment’, but its scope appears limited by section 364(1) to the costs of the assessment itself. Further, costs of assessment are only in issue in cases where a person is or may be liable for those costs under section 317 or section 364. Section 369(4) therefore does not address the problem identified above.

8.4. It is difficult to prescribe precise, objective criteria for issues that are unsuitable for paper-based determination. There may be significant issues of credit, alleged unfairness in formation of costs agreements, allegations of serious misconduct, disputed payments, or other important facts that do not fully or fairly emerge from the documentary record or that require cross-examination for reliable determination, particularly (but not only) if there is a s. 328 application to set aside a costs agreements for unfairness, &c.

8.5. **Recommendation:** It is submitted that the Act should be amended to provide that (a) costs assessors may to refer issues for determination by an appropriate judicial officer and (b) parties may apply to a Court and/or to the costs assessor for such referral.
9. **Interest**

9.1. There is no provision for interest on unpaid legal costs to be included in a s. 368 / 378 certificate.

9.2. The Act allows interest to be charged (s. 321). It also provides for a costs assessor’s certificate to be registered as a deemed judgment in lieu of suing for costs, but it fails to provide a mechanism for recovery of interest without ordinary civil litigation. Section 363A does not overcome this.

9.3. **Recommendation:** It is submitted that the Act should be amended to provide for a costs assessor in an assessment under Sub-division 2 to include interest in a certificate under s. 368, either as a monetary sum calculated by the costs assessor or by reference to the amounts, dates and rates necessary to calculate the interest, with corresponding provision in the case of a review panel.

10. **Costs assessment certificates**

10.1. The issue of costs assessors’ and review panels’ certificates is delayed pending payment of their fees, even if the person entitled to payment under the certificate is not the person liable for those fees.

10.2. An innocent party can be precluded from enforcing a certificate by the other party’s non-payment of assessment costs (e.g. a client entitled to refund from a law practice, or the receiving party under a party/party costs order).

10.3. **Recommendation:** It is submitted that ss. 368 and 378 should be amended: first, to require the certificate to be forwarded to any party to the assessment who would be entitled to file it as a judgment and who is not liable to pay the costs of the costs assessor or review panel (as the case may be); and secondly, where a party is liable to pay any costs of the costs assessor or review panel (as the case may be), to provide for the issue of the certificate to that party upon payment of those costs to the extent that that party is liable to pay them.

11. **Costs of leave to appeal (Division 9 personal injury cases)**

11.1. The appeal allowance in the party/party costs limit under s. 338 does not cover an unsuccessful application for leave to appeal.

11.2. See *Port Stephens Council v Theodorakakis (No 2)* [2006] NSWCA 143. This is unfair to successful personal injury claimants and/or their lawyers, who effectively have to bear their own costs of the leave application if they succeed in resisting it.

11.3. **Recommendation:** It is submitted that s 338(3) should be amended by adding after ‘subject of an appeal’ the further words ‘or application for leave to appeal’.