COSTS DISCLOSURE AND REVIEW: A NATIONAL PERSPECTIVE

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I INTRODUCTION

A significant milestone was reached on 4 May 2004 when the Standing Committee of Attorneys-General ('SCAG') released the National Profession Model Bill. This Model Bill, the product of intensive work undertaken over the last two years by the Law Council of Australia, its constituent bodies and SCAG, paves the way for many reforms to be made to the laws, regulations and practices necessary to implement a truly national legal services market.

The Law Council of Australia, with its constituent bodies, has invested an enormous amount of energy and work in championing these reforms over the past decade. As part of national practice, the Law Council recognised that the legal profession needed an Australian standard for costs disclosure and regulation in order to enhance consumer protection, foster more efficient practice and reduce compliance costs. This standard is now provided in the Model Bill.

In this paper, I wish first to outline the historical process leading to the drafting of Part 10 of the Model Bill, which sets out the provisions for costs disclosure and review. After noting some key features of Part 10, I wish to consider two subjects which have played a key role in the development of costs disclosure – the position of the consumer, and national competition policy guidelines. Finally, I wish to note a new initiative being undertaken by the Law Council to establish a federal costs assessment scheme for determining the quantum of costs on a party/party basis.

II THE DEVELOPMENT OF A NATIONAL APPROACH TO COSTS DISCLOSURE

In outlining the history of this development, I have drawn on a useful paper

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the Law Council, I believe it is important to understand some of the history leading to the current position.

Historically, costs disclosure requirements and costs review mechanisms have not been uniform in the various States and Territories of Australia. Prior to the Model Bill, costs disclosure requirements could only be found in legislation or, in some cases, in the practice rules of the relevant professional associations. Costs review mechanisms varied in their approach and scope.[2]

In July 2000, the Law Society of NSW resolved a set of minimum cost disclosure requirements. The Law Society proposed that these requirements be supported by the Law Council and be forwarded to the Federal Attorney-General for discussion at SCAG. In preparing the proposal, the Law Society of NSW sought to achieve some uniformity in costs disclosure throughout Australia in recognition of the move towards a nationally integrated legal profession and the great benefits such uniformity would bring to both clients and legal practitioners.

In August 2001, the Secretary to SCAG requested that the Law Council consult with its members in all states and territories with a view to submitting a national costs disclosure model for consideration by the Attorneys-General. Shortly after, the Law Council formed a Working Group to develop a proposal for national uniform costs disclosure. This work was subsequently incorporated into the Law Council's work with SCAG Officers in the development of Part 10 of the Model Bill.

It was well recognised that inconsistencies in the costs disclosure requirements caused practical difficulties for lawyers practising in more than one jurisdiction.[3] In such cases, two or more separate costs disclosures might be required. More disturbingly, disclosure in accordance with the requirements of one jurisdiction might not meet the requirements of other relevant jurisdictions. The Law Council saw that difficulties often arose, for example, when legal work was undertaken by a practitioner in a jurisdiction in which they did not have an office. Making multiple disclosures often led to confusion for clients and an increase in costs – and became a significant risk management consideration.

The Law Council felt that the need for reform in the area of costs disclosure was vital. The growth in multi-state practices or 'national' firms, as well as the need for Australian legal providers to be more competitive in the global legal services market, meant this need could not be ignored.

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1 Standing Committee of Attorneys-General, 'Costs and Costs Disclosures', *Officers' Report Concerning Model National Laws Governing Australia's Legal Profession* (2002) ch 11. The Law Council commented on this paper, as well as an earlier Draft Options Paper, which contained proposals that might form the basis of national model laws for the legal profession.

2 Ibid 2.

3 Ibid.

REVIEW

In helping to shape the provisions in relation to costs disclosure and review, the Law Council reviewed the various costs disclosure regimes in jurisdictions throughout Australia. The Law Council concluded that costs disclosure obligations should be as simple as possible, and that there should not be separate requirements at separate stages of the matter.

Section 1009 of the Model Bill sets out the elements that a law practice must disclose to a client. These elements include:

- the basis upon which legal costs will be calculated, including whether a costs determination or scale of costs applies to any of the legal costs;
- the client's right to negotiate a costs agreement with the law practice; receive a bill from the law practice; request an itemised bill within 30 days after receipt of a lump sum bill; be notified of any substantial change to the matters disclosed;
- an estimate of the total legal costs, if reasonably practicable;
- if not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs;
- details of the intervals (if any) at which the client will be billed;
- the rate of interest (if any) that the law practice charges on overdue legal costs;
- the client's right to progress reports;
- details of the person whom the client may contact to discuss the legal costs; and
- the avenues open to the client in the event of a dispute in relation to legal costs.

Disclosure must be made in writing before, or as soon as practicable after, the law practice is retained in the matter.[4] There are exemptions to requirements for disclosure in such circumstances as: the total costs, excluding disbursements, not being likely to exceed $750 of the prescribed amount;[5] the client receiving one or more disclosures from the law practice in the previous 12 months;[6] or the client agreeing in writing to waive their rights to disclosure.[7]

Part 10 also provides that an additional disclosure must be made in the settlement of litigious matters[8] and where an uplift fee is involved,[9] Division 7 of Part 10 sets out the principles and procedure for costs review.

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4 National Profession Model Bill 2004 s 1011(1). An exception is made for oral disclosure in urgent circumstances: s 1011(2).

5 National Profession Model Bill 2004 s 1012(1)(a).

6 National Profession Model Bill 2004 s 1012(1)(b)(i).

7 National Profession Model Bill 2004 s 1012(1)(b)(ii).

8 National Profession Model Bill 2004 s 1013.

9 National Profession Model Bill 2004 s 1014.

The key objective of costs disclosure is to ensure adequate consumer protection. Costs disclosure may assist consumers in 'shopping around' for legal services which, in turn, should enhance competition and reduce the cost of legal services.[10] But for a costs disclosure regime to do this, compliance with costs disclosure obligations must be relatively high and consumers need to be made aware of their power to 'shop around'.[11]

Evidence does suggest that imposing an obligation to disclose costs encourages competition and improves consumer protection. The benefits for the client include improved access to information and better opportunity to compare costs for legal services. In addition, early costs disclosure benefits both client and practitioner by enabling informed decisions about whether to pursue litigation and by reducing the number of disputes about costs.

Since the passing of the *Legal Profession Reform Act 1993* in NSW,[12] a market has evolved with an absence of regulation, great opportunity for negotiation and a clear exercise of market power by some consumers.

The Law Council believes that economic efficiency, through the facilitation of national practice, is possible without compromising consumer protection.

V COMPETITION POLICY, DEREGULATION AND THE LEGAL PROFESSION

In 1992, the Council of Australian Governments ('COAG') commissioned Professor Hilmer to chair the Independent Committee of Inquiry into National Competition Policy.[13] In 1995, COAG agreed to the National Competition Package of measures to implement Professor Hilmer's proposals.[14] This Agreement contained a number of reforms to enable and encourage competition.[15]

COAG also requested that the Working Group on Microeconomic Reform report with detailed proposals for reform of the legal profession, with the objective of removing constraints on the development of a national market in legal services. The Working Group proposed a set of nine principles and related

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10 See Law Society of New South Wales, *National Competition Policy Discussion Paper* (2002), commissioned to analyse the outcomes of competition principles for the consumer.

11 SCAG, above n 1, 6.

12 The objective of the 1993 reforms was to create a more competitive market for legal services. The scheme for the disclosure of costs by solicitors and barristers was implemented in 1994.

13 This outline on competition policy is based on SCAG, above n 1, 3, 4.

14 This package is underpinned by three intergovernmental agreements. The Competition Principles Agreement sets out, amongst other things, the principles agreed by governments in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulation.

15 COAG reaffirmed its commitment to the National Competition Package ('NCP') on 3 November 2000. A further review of the terms and conditions of the NCP Agreements and the National Competition Council's assessment role is due to take place before September 2005.

of the legal services market.[16]

Principle 5 of the COAG Working Party Report stated that the Working Party supported moves to market-based measures for establishing the price of legal services. Full disclosure and voluntary fee arrangements were important elements of reform.[17]

In 1994, the Access to Justice 'Action Plan' recommended a number of reforms regarding the regulation of lawyer-client costs.[18] These included the abolition of fee scales, the introduction of mandatory written costs agreements between lawyers and clients at the commencement of the matter, the introduction of penalties against lawyers who failed to comply with disclosure requirements, enabling the courts to set aside unfair costs agreements and allowing mediation of costs disputes for bills up to a specified amount.[19]

A number of jurisdictions have already moved to deregulate legal costs, away from the traditional fee scales model. Where rates have been deregulated, disclosure regimes have been introduced to rectify the information imbalance that would otherwise exist in favour of legal services providers, so that consumer protection is improved. Now, under the Model Bill, uniform cost disclosure will ensure that consumers receive a single, consistent set of costs information.

VI THE FEDERAL COSTS ASSESSMENT SCHEME

In December 2003, the Law Council approved a proposal prepared by one of its Working Groups to establish a uniform scheme to apply in each of the four federal courts for the determination of party/party costs by specialist assessors in place of a process of taxation.

This proposal is designed to deal with party/party costs[20] as distinct from the practitioner/client costs dealt with under the National Profession Model Bill.[21] The proposal to develop a federal costs assessment scheme is a natural evolution of the issues raised in relation to the regulation of costs over the past 15 years. A goal of the National Profession Model Bill is a simple, nationally based

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16 The Working Group recommended that regulation of the legal profession should be kept to the minimum necessary to protect the public interest in the administration of justice and consumer protection.

17 NSW Attorney-General's Department, *National Competition Policy Review of the Legal Profession Act 1987*, Issues Paper (1998) 64. The Working Party recommended further that fee scales should not be used to set prices in the market and supported contingency fee arrangements, including conditional uplift fees, on the basis that these would increase access to the justice system. The COAG Working Party also supported independent review of fee agreements and outcomes.

18 Access to Justice Advisory Committee, Parliament of the Commonwealth of Australia, *Access to Justice: An Action Plan* (1994).

19 Summary taken from SCAG, above n 1, 3. Regarding party/party costs, the Action Plan recommended that if the costs indemnity rule were maintained, costs should be assessed by reference to reasonable market rates for the legal services properly performed on behalf of that party for the purposes of the litigation, above n 18, 75.

20 The quantification of costs pursuant to an order made by a court or tribunal as between the parties to a contested dispute.

21 The regulation of costs between the client and the legal service provider.

Assessment Scheme is a parallel development of a simple, straightforward mechanism for all federal courts to determine the quantum of party/party costs where there is no specified amount of costs in the order.

For years the federal and state courts have struggled to deal with both the determination of the costs recoverable by one party to proceedings from the other (party/party costs) and the amount of costs payable by a client to his/her lawyer (practitioner/client costs).

The proposed Scheme recognises that each State and Territory has its own sophisticated mechanism for determining costs between a lawyer and client. In some jurisdictions this is by way of taxation; in others it is by way of assessment; and in some, it is a combination of both.[22]

The Law Council has proposed that an assessment system, similar to that operating in NSW, be introduced across the federal courts. It is hoped that the Scheme will apply to the High Court, Federal Court, Family Court and Federal Magistrates' Court, together with any other federal tribunals empowered to make costs orders.[23] These Courts are currently considering the Law Council's proposal.

The Scheme makes proposals for structural and mechanical change and is specifically designed not to interfere with the power of judicial officers to make costs orders and to use their discretion to determine the amount payable pursuant to those orders. The Scheme will only apply where the particular order is for an *unspecified* amount of costs.[24]

The Scheme does not attempt to limit the rule and/or regulatory power of a court to regulate costs in whichever way it chooses. The Federal Magistrates' Court, for example, will still have the lump sum/event based scale as the primary plank upon which to base its party/party cost orders.[25]

Under this proposal, the first step in assessing party/party costs will be the determination of whether the work claimed is reasonable having regard to the costs order pursuant to which the assessment is being made (and taking into consideration a number of other criteria).[26] The second step will involve determining whether the amount claimed is fair and reasonable for such work. The assessment process is preferred to a taxation process as it is expected to be quicker and more cost efficient than the tedious and costly item-by-item approach adopted in the existing taxation schemes. The Scheme should also

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22 Costs determination is tied in with the regulatory functions of law societies, bar associations or legal services commissions.

23 It will also include costs pursuant to arbitration under *International Arbitration Act 1974* (Cth). The Scheme has adopted some of the time and cost saving mechanisms used in taxation of costs in the Federal Court.

24 In following the NSW model, individual judges retain their power to make orders which limit or expand the costs, such as an order that a party recover only a percentage of costs, certain costs for particular legal work or that particular events be excluded or limited.

25 If a court has particular concerns, it is able to create rules setting up scales to bind assessors in party/party assessments.

26 *Legal Profession Act 1987* (NSW) s 208G.

reflect the true costs of the litigation.

VII THE FUTURE

Smoothing the way forward for the implementation of the Model Bill by Stat and Territory governments throughout Australia is now essential if the benefits c the reforms for consumers and lawyers are to be realised. This work contemplate the continuing refinement of the Model Bill as operational experience mature and the development of supporting model regulations as a matter of priority ove coming months.[27]

This work will continue to be an important agenda item for the Law Counc over the coming year. The end result will be a legal profession that will serve th Australian community well into the future. It will ensure that lawyers ma practise law across Australia without impediments. It will ensure that they will d so in vigorous competition with each other, while still maintaining the principl of the rule of law and preserving the overriding objectives of service to th Australian community and quality of service to clients.

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27 SCAG has established the Law Council/SCAG Officers' Joint Working Group to monitor th implementation of the Model Bill to ensure that inter-jurisdictional consistency is maintained.