

NATIONAL LEGAL PROFESSION REFORM

RESPONSE TO TASKFORCE DISCUSSION PAPER ON LEGAL COSTS

1. This response to the Taskforce's 4 November 2009 Discussion Paper on Legal Costs ("**Paper**") has been approved by the following members of the Consultative Group:-

Tony Abbott – Member, Law Society of South Australia

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Context of the Paper

2. It needs to be reinforced that, in relation to the fees it charges to its clients/customers, the legal profession is already the most heavily regulated profession, if not industry, in Australia. Further, the level of regulation goes considerably beyond the level of regulation anywhere else in the world. (The complexity and depth of the regulation also directly impacts on the cost of regulation and on lawyers' costs of compliance.)
3. Therefore, while general statements in the introduction section of the Paper can be accepted, and while we accept that practically and politically the level of regulation cannot be substantially reduced (although it should be simplified and reduced in length), it is strongly suggested that there is no obvious necessity for substantial further regulation.
4. Further, it is noted that this Paper, like other Taskforce discussion papers, does not attempt to set out any evidence of alleged mischief or bad practice which might be said to justify the new regulation proposed. It is desirable for such evidence, and the value of the benefit sought to

be gained by the new regulation, to be set out, for consideration of the cost benefit equation, before any wide ranging proposals are further developed or implemented. Generally, most Taskforce proposals for new regulation in this area will add to the regulators' costs of supervision and to the lawyers' costs of compliance, which will be passed on to clients generally.

5. The Paper seems to be written largely from the perspective of the NSW Legal Profession Act. Care must be taken in translating legislation from the most populous state to all states and territories. Sometimes NSW-type legislation will not be suitable given the particular characteristics of a particular jurisdiction. For example:
 - 5.1 Most states other than NSW do not have a body of people with the skills and experience of the NSW costs assessors. In smaller jurisdictions it is extremely doubtful whether a sufficient number of costs assessors of the requisite skills and experience could be located.
 - 5.2 In many jurisdictions, assessment of costs is mainly carried out by officials of the Court like taxing advisors and Registrars, and with different procedures. In some jurisdictions this is the preferred system. Such systems have the advantages of transparency, a right of audience for all parties and an ability to provide some sanction for unmerited challenges to costs.
 - 5.3 In some jurisdictions, for example Victoria and WA, a scale laid down by courts still has a role to play in solicitor/client costs assessment.

Context – historical bases of costs law

6. The law and practice of taxation/assessment of costs is complex and sophisticated. However:-
 - 6.1 most of this law was built up at a time when time-billing was unknown;
 - 6.2 also, most of it was developed when the most common method of solicitor-client charging was party/party, which is the basis on which the costs of the "winner" of a Court case are assessed for purposes of payment by the "loser", which is the general principle for the Court's order of costs at the end of a Court case.
7. Time billing was really only introduced in Australia in the 1960's.
8. However, time billing has since become the almost invariable, and a well understood, default method of solicitor-client billing, applied in the great majority of cases, except for areas where standard fixed charges are sometimes agreed, such as simple wills, simple conveyancing, standard personal injury claims, simple (undefended) debt collection and simple Family Court

procedures, ie. all comparatively routine areas where it is possible to predict reasonably accurately the amount of time required to perform a given service.

9. The result is that in almost all non-routine cases Australian lawyers charge by reference to the time that a particular task is expected to take or in fact does take – they do not charge on the basis on which, according to the law of costs, party/party costs are assessed on taxation, ie according to folios of documents produced and read.
10. Further, it is also a fact that party/party assessment of costs invariably produces much less than a time costing assessment of the same work, and is sometimes no more than 50% of the time cost charge. This is due both to the party/party scales not now accurately reflecting modern ways of practice nor the very different types of matters the scales are required to cover, and to the inability of the scales to keep up with inflation in the costs of practice.
11. The tension between these realities and the historical basis of the law and practice of costs sometimes produces unsatisfactory results for lawyers (rarely clients). This is another factor which indicates that it would be unwise and unfair to impose significant extra levels of regulation on lawyers as to costs.
12. It should also be borne in mind that the procedure under a taxation of costs, by Court officers, applying Court procedures, is different from the procedure of costs assessments, by non-judicial private persons of limited requisite qualifications applying informal procedures in private.
13. The ability of current costs assessment/taxation personnel to administer the new regulations proposed by the Taskforce is questionable. On this topic, and generally, if the Taskforce wishes to pursue all its costs proposals, we suggest that it would be helpful for some of our group to meet with Taskforce officers to explain what happens in practice on taxation and assessment of costs, so that the Taskforce can gain some appreciation of the practical difficulties and costs in implementing them.

Context - inherent variability of costs

14. Some of the proposals of the Paper (obligations as to proportionality, delay, reasonable costs, reasonable estimates) assume that it is always possible for an experienced person (or costs assessor) to come up with, in hindsight, a single figure for what ought to have been the reasonable price, or was the reasonable value, of costs for work actually carried out. We suggest that this assumption is fallacious.
15. Costs for the same piece of work will vary according to the particular solicitor, barrister, or firm doing the work. Equally conscientious and equally qualified lawyers will differ significantly in the costs they actually charge for the same work, or as to the costs which should have been

charged, or estimated, by others. Costs actually charged for a particular piece of work can vary for a number of reasons, including:-

- 15.1 the expertise and experience of the lawyer: this is not always reflected in the hourly rate;
 - 15.2 some people, including lawyers, can read a document quicker than others;
 - 15.3 some lawyers, like other people, work quicker than others, which usually leads to lower time-cost;
 - 15.4 some lawyers have a higher overhead structure than others which is reflected in the hourly rate;
 - 15.5 some lawyers have a different view on the profit margin they ought to make on costs, which is reflected in the hourly rate;
 - 15.6 one lawyer may respond more intuitively to and therefore spend more time on the client's desire for an urgent result, leading to increased work and charges;
 - 15.7 one lawyer may desire to impress, leading to increased work and charges, and another may not;
 - 15.8 during all non-routine matters there will be forensic judgments which a lawyer must make at each stage of the matter or proceedings which can significantly affect the amount of costs incurred.
16. All these factors can affect the amount of a bill without in any way reflecting on the conduct of the lawyer in a way which justifies any alteration in the cost charged by the lawyer.

Preliminary – role of Board

17. We note that this Paper, as with the recent papers on professional indemnity insurance and trust accounts, contemplates that the proposed National Legal Services Board will have a very prominent role in issuing binding regulations (National Rules) in a number of important areas, probably much more than people envisaged at the start of this process.
18. We are opposed to this. We think that it should be the draft legislation and draft regulations which are produced at the end of this COAG process which should contain much of the detail which the Task Force's papers seem to contemplate will be provided by the Board.
19. Our opposition is for two reasons. First, constitutionally and politically, it is more appropriate that regulation which affects the contractual rights of citizens instructing lawyers and has serious implications for the livelihood of lawyers should be produced by the current political

and consultative process, i.e. by a process which involves politicians responsible to the electorate, and by legal politicians responsible to their professional body, rather than by a non-elected Board.

20. Secondly, the significance, breadth and complexity of the issues which seem to be contemplated as being the subject of Board directives or instruments confirms that the Board will be very busy, to the point that it is unlikely that it can be composed of full-time professionals volunteering their time - certainly a current serving Judge would not have the time to chair it – and therefore the proposed Board is likely to involve significant expense, in that:

- 20.1 Board members will, justifiably, require to be paid reasonably substantial amounts;
- 20.2 the Board will, justifiably, require a sizeable and skilled secretariat to service it, which will also be expensive; and
- 20.3 these factors will apply even if the Board is successful in enlisting the unpaid help of volunteers on committees: as the ultimate instrument-making responsibility falls on the Board it is unlikely that the Board would feel able to discharge its responsibilities merely by accepting the recommendations of the voluntary committee.

SCAG proposals supported

21. Subject to the caveats that the legislative expression should be simple and principles-based, and to some details expressed later, we support in principle the SCAG proposals (Paper p2) for:-
- 21.1 strengthening the existing provision that a written disclosure to the client may be in a language other than English if the client is more familiar with that language;
- 21.2 prohibiting law practices from seeking clients' authorities to deduct legal costs from the settlement amount without having first informed the client of the settlement amount and issued the client with a bill, which must be itemised in personal injury matters;
- 21.3 providing that a bill or covering letter with a bill must generally be signed by a principal of a law practice, unless (we suggest) a client agrees or requests a bill to be sent electronically or by other than a principal, or in circumstances where a principal is unable to sign.

Proposed legislative principles

22. By way of general comment on this section (Paper pp 2 – 4) we point out that care needs to be taken in the terms used in the expression of these principles. For example, on page 3, the

terms "a properly prepared bill" and "itemised bill" are used, possibly to mean different things. It will be important to define what is meant by these terms.

23. This response in subsequent specific sections provides comments on most principles in relation to their discussion in specific parts of the Paper subsequent to this general section (Paper pp2-4).
24. However, the principle (Paper p3) that "clients must be informed about their right to negotiate a costs agreement" does not appear to be subsequently discussed in detail in the Paper. It is difficult to understand what this principle means. All but the most vulnerable and ignorant of clients will understand that they have a choice of lawyers, except with some matters in rural and remote areas, and will understand that terms are negotiable. Professional conduct rules, and the Court's ability to set aside unfair costs agreements, deal adequately with the case of a lawyer who might take advantage of a client's ignorance or lack of sophistication. It is suggested that this level of regulation is sufficient.

Sophisticated clients

25. We note and support the principle that "sophisticated clients may contract out of the mandatory costs disclosure and assessment regimes" (Paper p3). We assume therefore, that the Taskforce suggestions contained in the Paper under the headings of "Reasonableness", "Billing", "Liability of principals for overcharging", "Cost assessment", "Level of detail in disclosure", "Disclosure in languages other than English", "Requirement to avoid delay", "Costs disclosure", "Nature of determining costs" and "Reasonableness of costs" do not apply to such sophisticated clients, which we suggest is appropriate.
26. The definition of "sophisticated client" should be at least as wide as to include the clients set out in Section 3.4.12(c) and (d) of the Victorian Act. New national regulation would be an occasion to review that definition to see whether additional categories of client ought to be included as sophisticated clients.
27. On this topic, we also support the principle that "exemptions from the mandatory disclosure requirements where the total legal costs in the matter are not likely to exceed a certain amount" (Paper p7) should be included in regulation. We suggest that the threshold should be part of the legislation or regulations, and that it should be at least \$2,000 exclusive of GST, indexed.
28. Our following comments are therefore applicable to costs issues with clients who are not "sophisticated clients", and are not intended to apply to costs as between a lawyer and a sophisticated client who has contracted out of the mandatory regime.

Level of detail in disclosure

29. We disagree with the Paper's proposition (page 4) that "the aim of cost disclosure is to provide the parties with a starting point from which to begin a dialogue about costs. disclosure should be a high-level summary to which the client can refer..."
30. Because of the number of topics on which disclosure is currently required (reinforced by pages 7-8 of the Paper), and the potential complexity of these matters, the prudent lawyer will in fact, in all but standard routine matters, generally feel obliged to make very detailed disclosure to a non-sophisticated client. This is done not only because the regulation appears to require it, but also because of the potentially very significant sanction of not being able to recover costs if there is a non-compliance with the regulation, even a minor non-disclosure.
31. Assuming that it is not possible to wind back the degree of regulation of disclosure, one means of dealing with this situation would be for the national regulations (or Rules) to provide for an optional standard form and detailed Costs Agreement which would include formulae for disclosure of all the matters required to be disclosed, with a legislative provision that if the standard form Costs Agreement was used disclosure would be conclusively presumed to have been complied with.
32. The principle (Paper, p4), that it should be made clear in the legislation "that practitioners are only required to take reasonable steps in providing mandatory disclosure", is supported. A consequence of this principle is that if practitioners are shown to have taken those reasonable steps, they should not be prohibited from recovering their legal costs, and this should be spelled out in the legislation.
33. Given the importance of these disclosures, and of the need to ensure that the client understands the costs agreement and what has been disclosed, it is further suggested that the legislation contain a provision, to avoid any doubt about the matter, that unless agreed to the contrary (for example, in routine cases such as simple wills and conveyancing an all-inclusive fixed fee will be agreed) the lawyer is entitled to charge the client for the time costs of the disclosure and the costs agreement, ie, this should not be seen as a mere administrative matter and part of the accounting and office procedures of opening a file.

Disclosure in languages other than English

34. We generally support the proposals under this heading, subject to the qualification that, for the reasons expressed in the previous paragraph, it should be clarified that the lawyer is entitled to charge the client for the costs of the translator if this is necessary in the circumstances.

Proportionality in assessing reasonableness of costs

35. Although the current "proportionality" provisions appear so far to work satisfactorily in the personal injury cases to which they apply, we have reservations about and oppose the application of this principle in areas other than personal injury, if there are disciplinary, financial penalty or criminal offence type consequences, and/or consequences which include the reduction of costs to which a practitioner would otherwise be entitled as a matter of contract.
36. First, the bases for regulatory intervention in this area are, presumably, a combination of a reaction to plainly excessive charging, and the consideration that a client who had been properly informed about the (assumed disproportionate) amount of costs which would be charged in the event of success in the personal injury claim would have either not given instructions to proceed or would have sought alternative lawyers or remedies. But these considerations are already adequately dealt with by existing specific law – there is a disciplinary sanction for gross overcharging, and the lawyer already has an existing statutory and fiduciary obligation to provide proper estimates. As a matter of general principle, if a client has been properly advised of the range of likely costs and the range of likely awards or settlements, as currently required by law and conduct rules, there is no reason why the lawyer should not be entitled to charge for costs within that range, even if some other person later forms the view that the costs as charged were disproportionate.
37. Secondly, the personal injury area is a volume area where practices, procedures and outcomes are reasonably settled and predictable. Thus, the range of reasonable costs and settlements can be more readily estimated at the commencement of a matter, and it can be more easily demonstrated that, in some types of cases, actual costs charged have been excessive. Thus, regulatory intervention will be less controversial in application, because the case for intervention will be obvious. But this consideration does not apply in other areas of practice which are not so settled or predictable.
38. Thirdly, if a "disproportionate" amount of costs has been reasonably and properly estimated, and the client wished to proceed, why should not the client be held to its bargain? As many have commented, sometimes clients want to pursue matters which, to the reasonable observer, might seem disproportionate, but the client has their own reasons. Sometimes those reasons can be strategic and commercial, other times they can be public spirited or political, and perhaps other times they can be frivolous or vindictive. But why should access to justice for people depend on their motives? Who can judge or prescribe what are deemed to be acceptable motives? If there is a requirement for proportionality, practitioners will refuse to take on cases of principle, and access to justice for such people will be denied.
39. Fourthly, sometimes costs are increased, sometimes even to a disproportionate level, by factors beyond the control of the lawyer, including the way in which the client cooperates or

does not cooperate with a lawyer, the approach and competence of the other side, and the degree and quality of intervention by a court exercising case management techniques.

40. Fifthly, insofar as contravention of the principle can depend upon factors such as "complexity" and "importance", these factors are inherently subjective, and people can differ on them reasonably. It is undesirable for serious professional consequences to flow from a contravention which depends on decisions on such factors.
41. The remedy for the expensive C7 commercial litigation example lies in active and clever case management, more use of the summary judgment procedure, and measures like increased Court fees if a Judge reasonably takes the view that litigation has been conducted in a disproportionate manner. Certainly the remedy should not lie in penalising practitioners for carrying out a client's instructions in a matter of principle.
42. While the aspirational provision recommended by the Victorian Law Reform Commission (Paper, p5) can be supported as a general principle, it is strongly opposed if consequence of a breach of the principle can lead to the financial and professional disciplinary consequences referred to at the commencement of this section of our response. Taxing masters, costs assessors and clients can differ in their opinion as to what are "reasonable endeavours". Financial and disciplinary consequences should only follow in the case of gross or egregious departures from the standard of reasonableness.
43. There is no need for further regulation of this area. Already "gross overcharging" has a reasonably well understood meaning and practice in relation to disciplinary consequences. However, if disciplinary or other financial consequences are to follow from merely charging excessive costs, meaning costs in excess of what an assessor or other person might think is a reasonable range of costs, then this is opposed – reasonableness is a subjective matter, and the law and practice of costs is complex, and the steps involved in handling a matter are not necessarily predictable or uniform (refer previous comments).
44. This is another area where universal application of a deceptively simple high-level principle, one which may work reasonably well in a narrow and well understood area of law, could well have unforeseen and serious consequences for practitioners.

Liability of principals for overcharging (and National Rules for bills to be signed by principals)

45. We are opposed to the suggestion (page 6 of the Paper) "to require principals of law practices to take responsibility for the content of bills sent to clients, including the reasonableness of the costs of them", if, as we understand the Paper to assert, contravention would or could lead to disciplinary proceedings for professional misconduct against all the principals.
46. The proposal would require much additional unnecessary and costly administration for the many firms with more than a small number of principals, or with more than one office. We are

strongly of the view that the principles of the Model Bill set out at page 5 of the Paper constitute a workable, balanced and sophisticated approach to the issue of professional sanctions for lawyers other than those directly implicated in a breach.

47. The Paper (p6) seems to justify this suggested new regulation because of the hypothetical case where it may be "possible that no one legal practitioner could be identified, who has the necessary level of personal culpability for a finding of professional misconduct for charging excessive legal costs". First, we very much doubt that, in cases of gross overcharging, there would not be a lawyer or lawyers who could not be identified as being personally involved in the overcharge. Secondly, it would be unjust to impose professional responsibility and consequences on a principal who did not, as required by the Model Bill provisions, have actual imputed or constructive knowledge of the overcharging contravention, or was not in a position to influence the conduct of the practice in relation to the contravention, or (if the principal was in that position), the principal used all due diligence to prevent the contravention.
48. We therefore oppose any introduction of an unfair and potentially wide-ranging principle to catch a type of situation which has not been shown to have occurred and in our view would not occur.

Requirement to avoid delay

49. For reasons very similar to those expressed in the "proportionality" section, we are opposed to any additional regulation imposing an automatic financial or disciplinary consequence on practitioners for breach of any suggested duty "to use reasonable endeavours to act promptly and to minimise delay".
50. Of course the general principle is accepted as an aspirational principle, and one for which it is appropriate professional consequences would follow for gross breaches.
51. However, the subjective opinion of a costs assessor (if it is suggested that they have the power to make this judgment – which in our view would be inappropriate, as they and costs assessment procedures are not suited for making such judgments fairly) or other person as to whether there has been delay, even minor, should not operate to reduce costs to which a practitioner is otherwise entitled.
52. Thus, to that extent, we oppose any provision (compare Paper p12) that "in considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to...whether the law practice and the legal practitioner complied with relevant legislation", if that legislation included generally expressed aspirational obligations in relation to matters such as proportionality and timeliness.

53. Delay is already the subject of a professional conduct obligation, per the LCA's Australian Solicitors Conduct Rule 4.1.3. Further regulation is duplicatory and unnecessary.

Impact on non-compliance (with disclosure requirements)

54. We suggest that the time has come for amelioration of the severe financial consequence that "where a law practice does not comply with the disclosure requirements the client need not pay the legal costs unless they have been assessed under the costs assessment provisions, and the law practice may not bring proceedings for the recovery of legal costs unless the costs have been assessed".
55. These provisions of the Model Bill already weight the scales too much in favour of the client. Sometimes a non-disclosure breach is minor or inadvertent.
56. Other provisions, such as the obligation to provide information about avenues to challenge a bill, also contribute to the balance in favour of the client. The result at the moment is that sometimes solicitors will readily, perhaps too readily, compromise a client's dispute to a bill, even if the solicitor thinks the client is unfounded, because they wish to avoid the further disruption to cashflows (GST will likely already have had to be paid) by reason of the non-payment of the bill during the costs assessment process, and because they know that the costs assessment process will be time consuming for the solicitor (in explaining their reasons for a particular course of action) and that time will not be reimbursed. This is unfair.
57. Accordingly, it is proposed that consideration be given to a fairer regime which would involve :
- 57.1 the right to challenge legal costs by way of requests for taxation or costs assessment should strictly only be able to be exercised within a specified time period, say 30 days, from actual receipt of the bill, and this should be rigidly enforced, except in narrow defined cases such as demonstrated misrepresentation;
- 57.2 unless the client obtains a contrary order from the costs complaint authority, a client disputing a bill must:
- (a) nevertheless pay, say, 75% of the outstanding bill (and the solicitor is able to continue or commence proceedings for recovery of same), and
- (b) as a condition of the costs assessment procedure continuing, pay into court or lodge with the costs assessor 20% of the outstanding costs, or 10% of the costs which are being disputed, whichever is the greater, as security for the costs of the assessment and for the outstanding costs; and
- 57.3 the costs assessor should have power to make an order for the client to pay the time-costs of the lawyer involved in the costs assessment, in addition to the costs of the

costs assessor, if it is found that the client's challenge to and non-payment of the bill was substantially unfounded.

58. Obviously these broad suggestions will need to be the subject of further consultation, and it would be important in working out the detail of the suggested changes to ensure that clients are not unfairly disadvantaged.

Standard national costs agreement

59. We support a "single national costs agreement precedent", with the further provision that use of the precedent would be deemed compliance with all disclosure requirements, but not affecting the right of the firm to impose and the client agree additional costs-related terms.
60. Further, it would be appropriate for there to be two basic precedents, one for litigious matters and one for non-litigious matters.
61. However, and referring again to our disagreement with the proposition that costs disclosure should be a "starting point" for dialogue, and "high level", we strongly suggest that the precedent should be comprehensive and should refer, in necessary detail, to all topics on which disclosure is required, and also to the matters which a prudent solicitor would consider desirable to be disclosed given the topic.
62. Further, all of the disclosure requirements should be addressed in the one document, the costs agreement, rather than be contained in a costs agreement with additional information in a covering letter as contemplated by the Paper, and attachment A to the Paper. Disclosure in several documents causes confusion to the client and is cost intensive to the lawyer.

Nature of disclosure (estimates to be reasonable estimates)

63. Again, because of the inherent variability of costs, and also because costs actually incurred can be affected significantly by matters beyond the reasonable contemplation of the lawyer at the time of the estimate, and can be affected in ways the costs consequences of which are impossible also to predict with any reasonable accuracy, we oppose the imposition of any obligation (Paper p8) for estimates to be "reasonable" if it is intended that professional sanctions or financial penalties are to be imposed merely because actual costs are more than the estimate, plus a reasonable tolerance.
64. Also, estimates are by their nature imprecise and implicitly or expressly are heavily qualified. This means this area is difficult to regulate satisfactorily.
65. There is no problem with an obligation for practitioners to take care in their estimates, but we suggest that this should be the limit of the obligation if it is to have any professional or financial sanction.

66. However, the estimating process is important to get as right as possible, and therefore we suggest that it would be a better use of resources for PLT courses and CPD programs to include segments on how to estimate, and for Law Societies and Bar Associations to be assisted to publish ranges of typical third party expenses and lawyer time involved with typical steps in matters, such as interlocutory injunctions, Anton Piller orders, mediations, directions hearings, subpoenae, non party discovery, trials etc.

Disclosure of costs increases

67. We oppose the suggestion (Paper p9) that the National Rules (or, as we would prefer, Regulations) "should prohibit material changes to the method of charging any more costs in a legal matter (eg by increasing hourly rates) unless written notice of, say, three months has been given prior to the increase and the client has given informed consent".
68. Provided the possibility that rates will change has been clearly flagged in the costs agreement (and this should be a matter a subject of the standard national costs agreement) and the increase is within the range reasonably foreshadowed or implied by the costs agreement, then the lawyer ought to be able to charge the increased rate in a long-running matter. It is a reasonable expectation for both client and lawyer that this will occur, for reasons such as increases in practice costs and promotion of staff occurring during a matter.
69. There is no objection to notice of the increase being required to be given (and this is another matter which should be provided in the costs agreement), but it is suggested that it is reasonable for the notice to be of one month. Three months is far too long.
70. It is accepted that if there has been no advance disclosure of the possibility of increase of rates, the solicitor is bound by the disclosure documents and costs agreement, and cannot increase the charge out rates, in the absence of a further agreement with the client (ie, the "informed consent" referred to in the Taskforce's proposals). This is the law of contract.
71. The Taskforce's proposals in this area are too harsh and go unreasonably far beyond the current satisfactory contractual protections provided to clients.

Disclosure in litigious matters

72. There is a number of difficulties with the proposal (Paper p9) that "the national rules should require disclosure in litigious matters to be divided into estimates with a range of costs for (various stages in the matter are set out)".
73. First, the common broad stages of a matter will depend upon the court or tribunal, and the jurisdiction, and the type of matter. It is dangerous to be too prescriptive.

74. Secondly, further, sometimes matters can depart from usual stages, and it may not be known at the time of giving the estimate whether there will be that departure. For example, a particularly activist Judge might make unforeseen case management orders involving experts, conferences and exchange of issues in relation to experts which in effect add a new stage to the litigation.
75. Thirdly, if this requirement of disclosure is to be complied with at the commencement of the matter, or soon thereafter, often in practice it is difficult to provide a useful range of estimates for stages in proceedings, other than the early stages until some way into the matter, as costs can be affected by an understanding of the complexity of the matter which often cannot be appreciated at its commencement, and by the approach to be taken by the other parties and the Court, which may not be revealed until later.
76. We also refer to our comments about the general difficulty of assessing costs and providing reasonable estimates.
77. We therefore suggest that great care would be needed in framing any such rules, which would be different in each State or Territory, and would be different for different tribunals and courts in a State or Territory, particularly rules prescribing stages of the matter at which the estimates are to be given. In fact, the difficulties are so great that we suggest that the task of framing rules along these lines should not in the short term be given to the Board, nor contained in the new National legislation.
78. We support the proposals in the final paragraph of this section of the Paper (p9) that "law practices also should be required to disclose an estimate of the cost to complete the matter if it settles and should be prohibited from seeking client's authorities to deduct legal costs from a settlement amount without providing the minimum required information." However, we do assume disclosure is only required at the time that a settlement offer is received or recommended.

Contingency fees

79. There is some but not universal support, (eg QLS opposes any form of contingency fees), for lifting the prohibition against contingency fee agreements, at least in some circumstances, and subject to the principle that there should be no deviation from the "loser pays" principle of costs orders. We do not wish there to be any US style contingency fee system in Australia.
80. Contingency fees are well understood by clients, and are sometimes perceived as usefully providing a greater degree of certainty as to the fees to be charged.
81. Another reason for the support is that the prevalence of litigation funders, now apparently recognised by the High Court, in fact now make a contingency fee option available to clients.

82. There is also some, but not universal, support for conditional costs agreement with a limited 15% fee uplift applying to personal injury and workers compensation matters, as well as to non-personal injury/litigious matters. An upper limit of 25% could apply for other litigious matters.
83. If implemented, this would involve the amendment or repeal of legislation other than the legal profession legislation, for example, section 27A of the *Motor Vehicle Accidents Act (WA)* and section 87 of the *Workers Compensation Act (WA)*.
84. This is a complicated and difficult policy area. The safe course in the short term, and in the absence of evidence and full consultation, might be to adopt a lowest or medium rank common denominator status quo position, preserving existing legalities of existing fee agreements.

Litigation funding

85. Although the existing law and conduct rules currently provide that a lawyer who wishes to use a litigation funder in which he or she might have an interest must disclose that fact to the client, at this early stage in the experience of litigation funding there is some but not universal support for a prohibition on lawyers "establishing corporate vehicles to provide litigation funding or entering into agreements with the litigation funding vehicles owned by an associate" (Paper p11).
86. The prohibition could have a sunset provision which would require it to be reviewed after, say, three years.

Obligation to charge fair and reasonable costs

87. While this is obviously a reasonable aspiration for lawyers, as well as for doctors, accountants and all other professional people as well as other reputable commercial firms supplying services (none of whom are regulated in this way), we again argue against introduction of an express regulation to this effect this if and to the extent that there are sanctions such as potential disciplinary proceedings, or inability to recover costs, for failing to charge what someone thinks are "reasonable" costs. Such proposed new regulation would be unprecedented.
88. Rather, we strongly support the principle, in the current Model Bill, that:-
- 88.1 a "reasonable" amount is only required to be assessed when there has been significant non-disclosure or absence of a costs agreement where one was required;
- 88.2 if there is a costs agreement, then the costs should be assessed according to the standards the client accepted contractually in the costs agreement;

- 88.3 those standards should apply unless the client demonstrates that there has been unreasonable over-servicing or a departure from the charging of costs according to the standards agreed in the costs agreement.
89. We oppose the suggested obligation because of the inherent unfairness, given the inherent variability of costs, in penalising a practitioner because a costs assessor (if it is proposed that the jurisdiction to decide what is reasonable and what is not is given to a costs assessor - which we have argued would be inappropriate) or any other person may differ from the practitioner as to what is a reasonable price for the services. The assessor may think the hourly rate quoted is too high, or that the barrister's daily fee is too high, but if the client has agreed to it after a disclosure mandated by legislation why should that agreement be interfered with?
90. Many losing clients, at the time of the final bill, and irrespective of what they have agreed during the course of a matter, will readily form the view that the costs charged have not been "reasonable", and some of them will seek to avail themselves of what appears to be an easy way to reduce costs or at least to delay payment of them.
91. Generally, given that there is no one "reasonable" approach to costs for a particular service, as we have argued above, allowing a small group of people like taxing masters, or costs assessors of sometimes doubtful qualifications and experience, to affect the consequences of bargains and reduce (they will never increase) the charges for services rendered by lawyers gives too great a power to a small group of people.
92. At the moment, disciplinary consequences for overcharging only follow if there is a gross overcharge, which has a reasonably well understood jurisprudence. It would be wrong if disciplinary consequences could also follow merely if there was, in the opinion of the costs assessor (on an inherently variable matter), a minor over charging which did not amount to gross over charging.
93. In relation to the setting out of the detail of the factors which a costs assessor it is suggested should have regard to in considering what is a fair and reasonable amount of legal costs, we note again that these comments in the Paper (p12) are made from the perspective of the NSW costs assessment system and may not translate to other jurisdictions.

Multiple charging for the same work

94. The current law and practice of costs probably prevents most instances of law practices charging each of multiple clients the same amount for the same work where the amount charged is the amount that this work would have cost under the costs agreement for a single client.

95. However, we have no objection to National Rules or Regulations providing that, in the absence of express agreement, costs of multiple clients should be apportioned proportionately between each client, rather than each client bearing the full cost of the work (Paper p13).

Prohibit charging for non-legal work

96. We oppose the introduction of a new regulation expressed in such general terms.
97. It should clearly be understood that, contrary to the implication which may be contained from the first sentence on page 13 of this section, some communications or activities, which may not be "directly related to professional legal advice" (at least in the opinion of some taxing officer or costs assessor), are in fact properly matters for which charge, we suggest, is entitled to be made, and fairly entitled to be made. For example:
- 97.1 although there should be no administrative fixed charge for "opening files", the processes of taking instructions from a client and preparation of the costs agreement and initial estimates are matters which may be charged for on the agreed basis;
- 97.2 it can also be argued that a lawyer should be entitled to charge for making conflict searches – although if a conflict is revealed it would not be proper, in the absence of express agreement, to charge either the former client or the current proposed client for any time involved in attempting to establish whether the conflict can be managed;
- 97.3 ordering a Lands Titles Search does not require the skill of a legal professional, but should be able to be charged for;
- 97.4 if the client provides a file or papers that until put in order cannot be read, or can only be read inefficiently and at greater expense to the client, a reasonable fee should be able to be charged for this administrative work.
98. Thus, although we agree that charges should not be made for obvious examples like welcome letters or Christmas cards, it is dangerous to make a blanket provision preventing charging for all communications or administrative activities not directly related to professional legal advice.
99. We also question whether the practices sought to be prevented are sufficiently wide spread as to justify National Regulation. No evidence of the practice is given, nor of the degree of harm allegedly suffered by the public.
100. On the other hand, a National Rule expressed in such general terms would add to the costs of compliance with regulation – it would be another topic which would have to be considered for disclosure or for an express provision in the costs agreement. It also has the potential to be unfair as has been argued.

Disbursements

101. The proposals in relation to disbursements (Page p13) are generally supported, provided that it is accepted that the "actual costs" of disbursements should, as well as materials and facilities costs, include an allowance for the true costs of the time involved in photocopying, sending facsimiles and scanning, and other office processes where this time is not charged for otherwise.
102. Also, again we mention the danger of blanket provisions such as a prohibition on charging for disbursements "that are in the nature of overheads" - reasonable minds may differ on what is an overhead and what is not.
103. In these and other matters it is preferable for a Board, as Courts and/or law societies currently sometimes do now, first to consult on and to issue guidelines as to what is and what is likely not to be acceptable, and what rates are likely to be acceptable, or the ranges thereof, before imposing binding rules, if the need for rules is shown nevertheless to arise.

Interest on late bills

104. We do not support the Paper (p15) that "there be a prohibition on interest being charged on accounts rendered more than 6 months after the completion of a matter."
105. Interest does not run from the completion of the matter, but from the time when payment of the bill when rendered becomes due, or an earlier or later date if otherwise agreed, including agreed for reasons related to considerations of the client.
106. In such circumstances, prohibiting the right to charge interest would be an unfair penalty.

Periodic billing

107. We do not support a compulsory inflexible requirement for the quarterly provision of bills or information about charges accrued in personal injury matters.
108. This is a potentially onerous and expensive requirement which should not be imposed unless the client requests it, or agrees to it, as part of the costs agreement.
109. There is no reason to impose this law only on personal injury practitioners.
110. Further, in order to comply with the obligation with any degree of economy, computerised accounting systems and time billing methods are virtually mandated, and this is undesirable for the small but substantial minority of practitioners who currently do not operate both.
111. We also oppose the suggestion that all bills rendered in personal injury matters should be "itemised". The current entitlement of a client to request an itemised bill, (within a specified

time limit for such request, which should be absolute if compliance with the request is to be without cost) is sufficient.

Costs assessment

112. While we agree with the Taskforce that "there is merit in providing a uniform national framework for dealing with disputes over costs quickly and efficiently" (Paper p16), we again point out that the infrastructure and procedures for dealing with costs disputes in each state differ significantly from those in New South Wales. Care will have to be taken to ensure that any uniform national framework does not require individual jurisdictions other than NSW to create new and expensive bodies and procedures or assume a body of expertise and personnel, such as costs assessors, which in fact do not exist and could not be quickly created or transplanted. This is especially the case in jurisdictions such as Victoria , where taxation of costs by Courts is considered to be a fair, efficient and transparent mechanism for resolving costs issues.
113. Any cost assessment procedure must provide both parties the right to be heard.
114. As to the desirability of resolving cost disputes "quickly and efficiently" this is of course supported.
115. A provision that the ombudsman (or rather as is understood, the local embodiment of the ombudsman) has authority to deal with complaints about legal costs up to \$100,000.00 has merit. But it must also be recognised that in the smaller jurisdictions the local complaints-handling authority would not have the expertise in-house to determine costs complaints.
116. Subject to these comments, we support the discussion under this heading.

Court management of costs

117. We suggest it is not wise for the Taskforce to embark on "considering the issue of court management of costs more generally" (Paper p17).
118. This is a large topic. Much has been written on the topic. It goes well beyond the issue of legal profession reform.
119. It is also a topic which is not susceptible of a national approach while there are different state courts with different procedures, a position which is likely to obtain for the foreseeable future.
120. Given the already unrealistic timelines and the lack of sufficient resources and experience in the Taskforce and the working party supporting the Taskforce, we suggest that the Taskforce should not embark upon the topic.