



RECENT AMENDMENTS TO THE LEGAL PROFESSION ACT 2004 (NSW)

By Peta Solomon

A number of amendments to the *Legal Profession Act 2004* came into force last year,¹ and there will be more changes when further amendments are proclaimed.² Practitioners should take these changes into account when preparing their costs agreements, billing protocols and amending their procedures so as to ensure their ongoing compliance.

LEGAL PROFESSION AMENDMENT ACT 2006

The main amendments that apply from 2 June 2006 are as follows:

1. The maximum uplift fee of 25% now applies only to litigious matters (s324). Note, however, that conditional agreement with an uplift fee may still not be entered into in a claim for damages.
2. Interest charges: a maximum rate of 9% applies until 1 July 2006 and, thereafter, an amount equal to the cash rate target specified by the Reserve Bank of Australia plus 2% (s321(4)).³ This rate can be accessed at the Reserve Bank's website: www.rba.gov.au. Costs agreements/disclosure documents and billing protocols must be reviewed to ensure that the notice with respect to interest is correct (after 1 July 2006).
3. Interest can be charged 30 days after giving a lump-sum bill, even if the client is subsequently given, on request, an itemised bill (s321(5)).
4. If a conditional costs agreement with an uplift fee is held to be void, the uplift fee, or any part of it, cannot be recovered, or if already recovered, must be paid back.
5. Where a lump-sum bill is given to the client and an itemised bill is requested, proceedings for recovering costs cannot be instituted until 30 days after complying with the request (s332A).
6. A provision in a costs agreement can now be set aside if it is not considered fair and reasonable (s328). (Notices of rights in disclosure documents/costs agreements and/or bills of costs must be reviewed.)
7. The categories of exemptions under s312 have been increased.

LEGAL PROFESSION FURTHER AMENDMENT ACT 2006

The *Legal Profession Act 2004* will be further amended by

the *Legal Profession Further Amendment Act 2006*. Extensive amendments in Schedule 2 of the amending Act cover disclosure, costs and costs recovery, the client's right to itemised bills of costs, time limitations for applications for assessment costs, penalties for excessive claims and the categories of persons/entities exempt from disclosure. This Schedule is yet to be proclaimed.

The obligation to provide an itemised bill

The amendments will no longer require the client to request the itemised bill 'within 30 days'. Therefore, bill precedents and costs agreements/disclosure documents and notices will need to be amended to exclude the limitation. Practitioners may not charge for preparing itemised bills when requested.

Additions will be made to s332, so that any person who is entitled to apply for assessment (including certain third-party payers), may request an itemised bill (s332A(1)). The law practice will be required to:

- comply with the request within 21 days of the request (s332A(2)); and
- not commence legal proceedings to recover its costs until at least 30 days after complying with the request (s332A(5)).

Time limits on applications by clients for costs assessment

The time limit will be extended from 60 days to 12 months. Applications for extensions of time must be made to the Supreme Court, and the onus of demonstrating that, considering the delay and the reasons for it, it is just and fair for the application to be heard after the limitation period has ended rests with the client (s350(5)). 'Sophisticated clients' (as defined in the new provisions) will not be able to apply for an extension of time.

Expansion of categories of persons who may apply for costs assessment

The categories of persons who may apply for assessment will be expanded to include 'third-party payers' (TPPs) in certain circumstances (s350(1)-(4)). This will include a person/entity who:

- is not the client; and
- is under a legal obligation to pay all or any part of the legal services provided to the client (s302A).

The definition of 'client' and TPP in this section currently includes:

- an executor or administrator of a client or TPP; and
- a trustee of an estate of a client or TPP.

However, the new definition will omit s350(6)(f), which currently allows beneficiaries of trusts and estates to apply for assessment.

Expanded obligations on the law practice in applications for assessment: TPPs

The new provisions impose obligations upon the law practice to assist and co-operate with applications by TPPs. The practice will be obliged to provide certain TPPs with sufficient information to allow them to consider making an application for assessment (s350(6)). In substance, this would appear to impose an obligation to provide a TPP with a sufficiently itemised bill of costs, but could potentially extend to other material. Where an application is made by a TPP to participate in the assessment process, the TPP is taken to be a party to the assessment (s350(7)(c) and (8)).

Applications by a law practice for costs assessment of the fees of another law practice

Time limits for practitioners to apply for assessment of agents' and barristers' fees will remain at 60 days. Furthermore, the discretion previously available to allow further time has been removed. Practitioners whose costs (including counsels' fees) are challenged by their clients after 60 days may lose their rights to assess the fees billed to them and may be liable for them in full.

Costs of assessment: orders against the law practice

A particularly worrying new provision permits costs assessors to determine by who and to what extent costs are payable 'where the costs on the assessment are reduced by 15% or more' (s369(1)(c)). In such circumstances, costs assessors have discretion to order that costs be paid by the law practice or such other person as they determine. This provision could potentially apply to the costs of party:party assessments.

Further categories of amendment

These include:

- A new definition of public authority (s302) and its entitlement to request information about matters specified in s309 (disclosure).
- A global reference to the 'sophisticated client' (see s312(c)), to which special provisions relating to disclosure, conditional costs agreements, notifications of rights, time limits, assessment and contracting out will apply).
- New categories and sub-categories of TPP and new rules that apply to them; for example, when entering into costs agreements with TPPs (s322(1)(d)); disclosure (s318) rights to an itemised bill; rights to apply to set aside a costs agreement (s328 and s322(6)); to progress reports relating to costs (s318A); and to apply for assessment (s302A).
- A substantial broadening of the scope of matters to which a costs assessor can have regard when considering whether

to set aside a costs agreement (see s328(2)(d) to (g)), including events occurring before and after the agreement was made, and a range of other matters that will require practitioners to consider a broader range of contingencies and to monitor their costs agreement as the matter progresses to protect the practice's contractual entitlements.

- Broader recovery for tasks undertaken under a conditional costs agreement where, for example, due to urgency the practitioner is required to do work within the five-day cooling-off period (s323(5)).
- Further provisions relating to conditional costs agreements, which include uplift fees (s324(3) and (4)). Note that uplift fees in claims for damages are still prohibited by s324(1).
- Further provisions relating to the assessment of complying costs agreements (see re-formulated s361). ■

Notes: 1 *Legal Profession Amendment Act 2006*. 2 *Legal Profession Further Amendment Act 2006*. 3 See also r110A *Legal Profession Regulation 2005*.

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