

DIRECTIONS IN LEGAL FEES AND COSTS

THE HON BOB DEBUS MP*

I LEGAL FEES REVIEW PANEL: INQUIRY INTO LEGAL FEES

In February this year, the NSW Government announced an inquiry into lawyers' fees and overcharging. The inquiry was initiated following concerns over the time-based system of billing raised by the Hon J J Spigelman, NSW Chief Justice of the Supreme Court of NSW, who called for an end to the 'tyranny of the billable hour' at the opening of the 2004 Law Term.¹

The Government established an expert panel to conduct the inquiry. The panel comprises Mr Laurie Glanfield, Director-General, Attorney-General's Department, Mr Steve Mark, Legal Services Commissioner, Mr Ian Harrison SC, President, NSW Bar Association and Mr Gordon Salier, President, Law Society of NSW.

The Legal Fees Review Panel is currently examining the nature of complaints about legal costs. It will investigate the costing systems presently employed by law firms in relation to legal fees. The Panel will specifically identify the current methods of how fees are calculated, how they are presented to clients and what mechanisms are in place for clients to object to fees they consider unfair. The Legal Fees Review Panel will also explore options for alternative approaches to billing with a view to bringing greater transparency to the calculation of legal costs.

II REFORM OF LEGAL COSTS

Prior to 1994, lawyers typically charged for work performed in accordance with statutory scales of costs that specified the amount that they could charge their clients for certain types of work. Lawyers could only avoid scale-based

* Bob Debus is the NSW Attorney-General. The Attorney-General acknowledges the assistance provided by Aideen McGarrigle and Ben Atkinson, officers of the Attorney-General's Department, in the preparation of this paper.

1 The Hon J J Spigelman, Chief Justice of the Supreme Court of NSW, 'Opening of the Law Term 2004' (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2004) <http://www.lawlink.nsw.gov.au/sc/%5Csc.nsf/pages/Spigelman_040202> at 6 July 2004.

charging by entering into written agreements with clients that expressly allowed for higher fees to be charged.

The recommended scales of fees were complex and included separate charges for various activities such as taking instructions, preparing documentation, corresponding with clients and attendances. Where there were no statutory fees, lawyers and clients set fees by reference to other factors, including the result obtained, value of the services to the client, experience of the lawyer, and the length and difficulty of the matter. The final fee was often not determined until the conclusion of the matter after a level of trust had been established between the lawyer and client.

In 1994 the NSW Government, responding to the widespread belief that the scale-based system was anti-competitive and detrimental to the welfare of legal consumers, legislated to abolish many of the scales of costs.² Scaled fees were replaced by a costs disclosure system that required lawyers to provide written disclosure about how they would charge at the outset of a retainer.³

The reforms also established a costs assessment scheme administered by the Supreme Court, which was designed to promote 'an informal process intended to effect expedient and less costly resolution of disputes by experienced practitioners'.⁴ Under the scheme, costs assessors determine whether a bill of costs is 'fair and reasonable', whether the work to which the costs relate was carried out in a reasonable manner, and whether it was reasonable to carry out that work.⁵

III PROBLEMS WITH TIME-BASED BILLING

Today, most legal firms charge for work performed at an hourly rate. Some firms use alternative fee structures in conjunction with the hourly fee. For example, many firms use a fixed or flat fee for certain activities or events such as a conveyance or in preparation of a standard contract, with many law firms embodying this into conditional fee agreements. Some commentators have suggested, however, that firms who employ alternate fee structures in conjunction with the hourly rate often do so in an ad hoc manner employed at the behest of the client rather than through a properly thought out fee structure.⁶

While hourly billing has the appearance of objectivity and may be beneficial in that it allows a practitioner to provide a client with an itemised statement as tangible evidence of work done, it fails to provide the client with information about the value of the service provided and obtained. Consumers of legal services are not just concerned about what they are charged, but about the value and quality of the service they receive. From a client's point of view, the hourly fee structure may not necessarily reflect the true value of the service provided.

2 See Trade Practices Commission, *Study of the Professions – Legal Profession* (1994) [9.157].

3 *Legal Profession Act 1987* (NSW) s 175.

4 *Turner v Pride* [1999] NSWSC 859 (Unreported, Master Malpass, 26 August 1999) [24].

5 *Legal Profession Act 1987* (NSW) s 208A(1).

6 Colin Jasper, 'Pricing to Create Value', *Australian Law Management Journal*, Summer Issue 2003, 15.

In his speech at the opening of the Law Term, the Chief Justice of NSW stated that the inherent weakness in hourly billing is that it reduces the incentive to work productively and efficiently. While in his view most members of the profession act ethically, there are those who exploit their position by providing services that are either not required at all, or providing them in a manner that results in unnecessarily high fees. Such conduct, even by a minority, his Honour suggested, affects the reputation of the profession as a whole and may determine the nature of external regulation.

His Honour Justice Davies, in a speech given in 1995 at the 29th Australian Legal Convention, commented that a costs system should not only be predictable, but the fairness of the costs should be verifiable by reference to some objective benchmark.⁷ His Honour said that the inherent problem with legal fees charged at an hourly rate was the lack of an objective benchmark. The present system of hourly billing, his Honour suggested, is open to abuse and is often difficult for a client to identify whether particular work carried out is both necessary and reasonably costed.

In other jurisdictions, for example in the United States, commentators have likewise taken the view that time-based billing is liable to lead to unethical billing practices such as double billing.⁸ The time-based system, involving hourly rates, has been blamed for rewarding incompetence and it has been said that the lack of any proper mechanisms for verifying time records has resulted in creative time-keeping.⁹ With firms pushing to maximise profits, employed lawyers often feel under pressure to enter as many hours as possible in order to meet billing targets. Inevitably, some have engaged in unethical practices, and some junior lawyers have admitted to double billing, padding and over billing. As one commentator has argued, the use of time-based billing targets raises serious ethical questions about the hourly fee structure.¹⁰

IV COMPLAINTS

Complaints relating to lawyers' fees and, in particular, overcharging are not a new phenomenon. Each year the Office of the Legal Services Commissioner ('OLSC') receives approximately 3000 complaints relating to the conduct of barristers and solicitors in NSW. Approximately a third of these complaints relate specifically to costs.

The Legal Services Commissioner has said that about 80 per cent of the

7 Justice Geoffrey Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale' (1996) 5 *Journal of Judicial Administration* 201 (Justice Davies' speech delivered at the 29th Australian Legal Convention, Brisbane, 27 September 1995).

8 William G Ross, 'The Ethics of Hourly Billing By Attorneys' (1991) 44 *Rutgers Law Review* 1, 16. See also Sonia Chan 'ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Overbilling' (1996) 9 *Georgetown Journal of Legal Ethics* 611, 616.

9 Chan, above n 8, 616.

10 Ibid 617.

complaints include some grievance about costs.¹¹ Lawyers often argue that costs only become an issue when the client has been unsuccessful in their matter or when the client receives the bill. The Commissioner is of the view that while there may be some truth in this proposition, the evidence presented in costs complaints suggests that lawyers are not disclosing costs properly, are failing to keep the client informed about what is happening in the client's matter, and do not try to ensure that clients have realistic expectations of the legal system in general. He believes that these last issues are far more relevant in deciding whether a complaint is lodged about costs than the ultimate outcome of the matter.

At the first meeting of the Legal Fees Review Panel on 15 March 2004, the Panel members agreed that before they commenced addressing the problems in the present system they ought to have the benefit of empirical evidence about costs-related complaints. The Panel agreed that an analysis should be undertaken of the statistics held at the OLSC.

A statistical analysis of complaints relating to costs has been undertaken by the OLSC. A report has been compiled drawing on the OLSC statistics and case studies from over the past 10 years. The Commissioner and the Executive Officer of the Legal Profession Advisory Council have prepared a paper in relation to alternate billing methods. The report and paper were discussed at the last meeting of the Legal Fees Review Panel held on 10 June 2004. The Panel will draw on the information within these papers with a view to preparing a discussion paper to be distributed to relevant stakeholders and the public for comment and submissions in due course.

V COSTS ASSESSMENT

The Government is also commencing a review of the scheme for costs assessment in NSW. The current costs assessment scheme, which commenced operation in 1994, aims to provide a fair and flexible way of resolving costs disputes. However, clients disputing a bill of legal costs do not constitute the majority of applicants for costs assessment.

Between 1997 and 2003, an average of 2155 applications for costs assessment have been filed each year in the Supreme Court. Of these applications, on average, 85 per cent concerned party/party matters (cases in which a court or tribunal has made an award for costs without specifying the quantum of costs). On average, clients disputing the bill of costs provided by a legal practitioner made up approximately 12 per cent of all applications.¹²

The costs assessment scheme was, nonetheless, introduced with the clear intent that it should benefit clients disputing bills of legal costs. The scheme grew out of policies that made securing consumer welfare the primary objective of

11 Steve Mark, 'Alternative Forms of Billing and Possible Changes to the Current System of Billable Hours' (Speech delivered during Law Week 2004, Sydney, 17 May 2004).

12 Statistics are provided by the Supreme Court's Manager, Costs Assessment, from Court records.

regulatory reform.¹³ Introducing the scheme in 1993, the then Attorney-General stated that ‘the structure of the [legal] profession must facilitate its regulation in the public interest, having regard to consumer choice and protection’.¹⁴

Whether the scheme works effectively to benefit legal consumers remains a continuing concern. Unquestionably, in the eyes of practitioners and consumers alike, it works far better than the scheme it replaced, which involved officers of the Supreme Court determining the appropriateness of bills by reference to scales of costs.

The new scheme is characterised by far greater flexibility. To make a determination, costs assessors will look at any costs agreements, the bill of costs and related information, and the written submissions of the parties to the assessment. They may require the parties to supply further particulars but will not hear oral evidence.¹⁵ Assessors are not bound by the rules of evidence.¹⁶ Assessors determine applications by confirming a bill of costs or substituting costs that they consider fair and reasonable,¹⁷ and must give reasons for their determinations.¹⁸ Once a certificate of determination is filed in court, it is taken to be a judgment of the court and can be enforced as such.¹⁹

In addition, a party to the assessment can apply for review by a panel of any determination issued. An adverse review can then, with leave, be appealed to the Supreme Court. It can be argued, therefore, that the current costs assessment scheme not only works far better than the system it replaced, but is currently working to promote effective resolution of costs disputes. It is accessible and flexible.

The Government is aware that there is disquiet among consumers concerning the costs assessment scheme, largely on the basis that costs assessment is carried out exclusively by experienced legal practitioners. Some legal consumers argue that, because of their professional experience, lawyers assessing legal costs will regard as fair and reasonable costs that – judged by ordinary standards – are excessive. Such criticism points to the need to consider the extent to which the process of costs assessment appropriately reflects community standards.

It may well be that expert legal knowledge, based on long experience, is necessary to determine whether a bill of costs is fair and reasonable. Nor should it be assumed that costs assessors are anything other than conscientious, diligent and fair in determining bills of costs.

13 The Special Premiers’ Conference of July 1991 agreed that the aim of a national approach to competition policy was to ensure that consumers benefit fully from structural adjustment initiatives and other reform programs then under way. These included proposals for legal profession reform that resulted in the *Legal Profession Reform Act 1993* (NSW), which introduced the costs assessment scheme. This legislation implemented the recommendations of the Council of Australian Governments Working Group and the 1988 report of the Trade Practices Commission on regulation of the professions. See Trade Practices Commission, *Self-Regulation in Australian Industry and the Professions* (1988).

14 Second Reading Speech, Legal Profession Reform Bill 1993 (NSW), Legislative Council, 16 September 1993 (John P Hannaford, Attorney-General of NSW).

15 *Legal Profession Act 1987* (NSW) s 207.

16 *Legal Profession Act 1987* (NSW) s 208(2).

17 *Legal Profession Act 1987* (NSW) s 208A(2).

18 *Legal Profession Act 1987* (NSW) s 208JAA.

19 *Legal Profession Act 1987* (NSW) s 208JA(4).

The Government is committed to protecting the interests of consumers through the ethical, efficient and cost effective provision of legal services. If changes can be made which will improve transparency and effectiveness in costs assessment, then those changes will be made. Doubtless, such improvements would be welcomed by legal practitioners and consumers alike.