

## **FAILURE TO PROVIDE PROPER ESTIMATES CAN RESULT IN SERIOUS COSTS CONSEQUENCES**

Lawyers are required to disclose to (prospective) clients, in writing in a way that they can understand, the way in which the lawyer will charge and an indication of their likely costs exposure.

Section 308(1) of the *Legal Profession Act 2007* (Qld) (“LPA”) sets out 17 cumulative disclosure requirements. Two sub-sections that often cause issues for law practices are:

- Failing to disclose, in a litigious matter, an estimate of recoverable and payable legal costs (s.308(1)(f)); and
- Failing to give an estimate of total legal costs (s.308(1)(c)).

### Section 308(1)(f) LPA

Basically, considered and accurate estimates are the goal. These are achieved by giving consideration to the various factors in the case and tailoring the estimate on a matter by matter basis. We recommend providing the estimate as a figure, as opposed to a percentage to be consistent with the decision of *Paroz v Clifford Gouldson Lawyers*.<sup>1</sup>

In *Paroz* McGill DCJ examined provisions of the LPA dealing with costs disclosure. His Honour’s comments regarding s.308(1)(f) LPA are as follows:

*What is said about costs recovery was that, if successful in litigation, he may recover some of the fees, estimated at one-third to one-half of the total costs. This, however, did not provide a range of estimated amounts. The same applied to the estimate of costs payable if unsuccessful... Partly satisfied*<sup>2</sup>(emphasis added).

Utilising a figure amount requires you to consider the matter at the time of initial instructions and forecast not only your costs but also the recovery as well. This is not a simple task however, if you are providing an estimate of your fees and are specifically tailoring each cost agreement to the particular matter, then it should little problem to provide a figure for the amount recoverable.

### Sections 308(1)(c) LPA

It has been judicially observed that “the discipline of producing estimates is one of the strategies which has been adopted to contain legal costs”<sup>3</sup>.

Whilst the “accuracy of estimates shall not be judged too finely”<sup>4</sup> there must be a genuine attempt by the law practice to provide meaningful information to the client.

It is important to remember that a Disclosure Notice is a form of consumer protection. You must provide an estimate that is meaningful to the client so they can make an informed decision whether or not to continue with the matter.

### Consequences of Failing to Provide Proper Disclosure

Section 316 LPA deals with failures to disclose anything required to be disclosed. The failure to disclose means that:

- the client need not pay without assessment (s.316(1));
- the law practice cannot sue the client without assessment (s.316(2));
- a costs assessor is permitted to reduce the costs by an amount the assessor considers to be proportionate to the seriousness of the failure to disclose (s.316(4)).

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<sup>1</sup> [2012] QDC 151.

<sup>2</sup> *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 at para [26] per McGill DCJ.

<sup>3</sup> *Garbutt v Edwards* [2006] 1 WLR 2907 at [33] (CA).

<sup>4</sup> *Casey v Quabba* [2005] QSC 356 per Jones J at [41].

In *Paroz* costs were assessed on the Supreme Court scale. The Respondent submitted that there had been a double penalty imposed in requiring assessment on the Supreme Court scale, and in exercising the discretion under s.316.<sup>5</sup>

In response to the 'double penalty' submission McGill DCJ stated:

*"There is nothing in s 316 to indicate that the provisions in the different subsections are to be applied in the alternative, that is to say, that so long as a "penalty" is imposed under one of the subsections, no penalty can be imposed under another.... It seems to me clear, therefore, that the Act contemplates that there may be multiple penalties imposed for failing to make proper disclosure."*<sup>6</sup>

It is clear that the consequences for failing to comply with the disclosure requirements of the LPA are severe. Not only may costs be assessed according to scale but the costs assessor also has discretion to reduce the costs by an amount the assessor considers to be proportionate to the seriousness of the failure to disclose.

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<sup>5</sup> *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 at para [20] per McGill DCJ.

<sup>6</sup> *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 at para [51] per McGill DCJ.