

## **Billing checklist for barristers**

This checklist sets out some commonly encountered requirements relating to barristers' billing practices under Part 3.2 of the *Legal Profession Act 2004* (LPA) and the *Legal Profession Regulation 2005* (LPR).

**Currency: Last revised October 2007.**

### **Preliminary matters: time recording**

#### **1. Time recording**

Most barristers bill on a time costing basis. Anyone who bills on this basis should keep accurate daily records of time spent, the nature of the work done, and the brief to which the work relates. There is no set form. The barrister may, for example, keep a day book or an excel spreadsheet, or may use proprietary accounting software with time recording features. The important thing, both in fairness to the client and solicitor and for the protection of the barrister, is to keep a reliable record sufficient to support the creation of an itemised bill.

### **Form, content and service of the bill**

#### **2. Requirement for bill**

There is no positive requirement to give a bill, or to give it in a particular form, but a barrister cannot sue for fees unless he or she first gives a bill in compliance with LPA s331 and then waits 30 days (or as abridged by order). If the recipient of a lump sum bill requests an itemised bill before the barrister commences proceedings, however, the barrister must wait 30 days after giving an itemised bill before suing for the fees (s332A). By contrast, s352 imposes no explicit condition on a barrister's application for assessment of billed costs, other than waiting 30 days.

#### **3. Signature of bill**

The bill (or an attached or enclosed letter) must be signed by the barrister (s332).

#### **4. Content and detail of bill**

The bill must be either an itemised bill or a lump sum bill (s332).

- a) **Itemised bill:** If the bill 'specifies in detail how the legal costs are made up in a way that would allow them to be assessed under [LPA Part 3.2,] Division 11', it is an itemised bill (s302). A barrister's itemised bill must include the following particulars, set out in generally chronological order (LPR, clause 111B(2)):

(a) short details of each item of work carried out on behalf of the client, including the method by which it was carried out (whether by letter, telephone, perusal, drafting, conference, teleconference or otherwise) if not otherwise apparent,

(b) the date on which each item of work was carried out,

(c) the amount charged for each item of work or for items of work carried out on a particular day, and particulars of the basis for calculating the amount charged.'

Many barristers issue itemised bills as of course.

- b) **Lump sum bill:** If the bill 'describes the legal services to which it relates and specifies the total amount of the legal costs' but is not an itemised bill, it is a lump sum bill (s302).

## 5. Interest

If interest is to be claimed, include a statement that interest is payable and a statement of the rate. Interest cannot be charged above the rate prescribed under s321(4), presently the RBA target cash rate plus 2 percentage points (LPR, clause 110A). A barrister can only charge interest if he or she has given a bill which contains 'a statement that interest is payable and of the rate of interest' (s321(3)). The Act is not explicit whether the current percentage rate must be stated, or whether it is necessary or sufficient to describe how the rate is derived, e.g. by reference to s321(4) and/or the RBA cash rate. Consider the following example:

Interest is payable on unpaid legal costs. The rate is as prescribed under the *Legal Profession Act 2004*, section 321(4), being the Reserve Bank of Australia target cash rate plus 2 percentage points, currently [     ]%.

## 6. Statement of clients' rights

The bill must contain or be accompanied by a written statement of clients' rights complying with s333(1). A 'safe harbour' form of notice is prescribed under section 333(4). There is also an exception in relation to a 'sophisticated client' as defined in section 302A

Unfortunately, both section 333(1) and the prescribed form overlook the legal and practical differences between a barrister's bill and a solicitor's bill. A notice that simply follows the prescribed form will be positively misleading if it is included in a typical barrister's bill to an instructing solicitor. In the ordinary case of a barrister retained by a solicitor for a client, the client's rights lie against the solicitor, and the solicitor's rights against the barrister differ materially from the client's rights against the solicitor.

Barristers should make their own decisions about section 333, but may consider the following form of notice:

The following notification applies to a client in relation to a bill issued by a law practice retained or contracted by the client or third party payer. It does not apply between a client and a barrister who is retained in the usual way by the client's solicitor law practice such that the barrister bills the solicitor, but it can apply between client and solicitor when the solicitor bills or asks the client for payment of the barrister's fees. (Some client's rights may also apply to a third party payer, depending on the circumstances.)

*Legal Profession Regulation 2005*, Schedule 5, Form 3: Form of notification of client's rights: Your rights in relation to legal costs

The following avenues are available to you if you are not happy with this bill:

- requesting an itemised bill
- discussing your concerns with us
- having our costs assessed
- applying to set aside our costs agreement

There may be other avenues available in your State or Territory (such as mediation).

For more information about your rights, please read the fact sheet titled *Your right to challenge legal costs*. You can ask us for a copy, or obtain it from your local law society or law institute (or download it from their website).

## **7. Method of service**

The bill must be given by a method of service recognized under s322 or LPR clause 111 (including service by post, fax, DX or email – see those provisions for detail.)

## **GST tax invoices and adjustment notes**

### **8. Requirement for tax invoice**

GST legislation imposes form and content requirements to qualify a document as a tax invoice. A barrister's bill does not have to be a tax invoice, but a tax invoice must be given for a taxable supply within 28 days of request. Most barristers' supplies are taxable, and many give all bills in tax invoice form without request. The following items are based on the usual requirements for a supplier-created tax invoice for barrister's services over \$1,000 under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), s29-70 and the *A New Tax System (Goods and Services Tax) Regulation 1999*, reg. 29-70.01.

## 9. Tax invoice

The invoice must set out the following:

- a) the barrister's ABN
- b) the (total) price
- c) the words 'tax invoice', stated prominently
- d) its date of issue
- e) the barrister's name
- f) the name of the recipient
- g) the address or ABN of the recipient
- h) a brief description of each thing supplied
- i) for each such description, the extent of the services
- j) the amount payable, net of GST (alternatively, if GST is exactly 1/11 of the total price, a statement is permitted that the total includes GST)
- k) the total amount of GST.

## 10. Mixed supplies in tax invoice

If the tax invoice includes a pre-GST or GST free supply as well as a taxable supply, it must also clearly identify each taxable supply, state the total amount of GST payable, and state the total amount payable for the taxable supplies. (A simpler course is to invoice taxable and GST-free supplies separately.)

## 11. Adjustment note

If a barrister has to issue an adjustment note, it must comply with s29-75 of the GST Act and the A New Tax System (Goods and Services Tax) Act 1999 Adjustment Note Information Requirements Determination (No. 1) 2000 in Schedule 1 to GSTR 2000/1 (as amended).

## Payment in advance

### 12. Payment in advance

Payments in advance are deemed to be trust money under LPA s243. Section 252 prohibits a barrister from receiving trust money, but an exception is provided by clause 106A of LPR 2005. To engage the exception, it is necessary to follow the procedures prescribed in clause 106A. Non-compliance subjects the barrister to disciplinary action for breach of section 252. It may also attract obligations under the trust account provisions in LPA Part 3.1.

Clause 106A provides:

106A Receipt of trust money by barrister (section 252 of the Act)—exclusion under section 246 (3) of the Act

Part 3.1 of the Act does not apply to trust money received and held by a barrister if the money is received by the barrister on account of legal costs for legal services in advance of the provision by the barrister of the legal services, in the following circumstances:

- (a) the barrister is practising as a sole practitioner and the money is received in connection with instructions accepted by the barrister directly from a person who is not a solicitor,
- (b) the money is deposited, within a reasonable time, after the barrister receives the money, in an account maintained with an ADI in connection with the barrister's law practice,
- (c) the money remains deposited in that or another account maintained with an ADI in connection with the barrister's law practice until:
  - (i) a bill is given to the client, or
  - (ii) the money is refunded to the client, or
  - (iii) the money is paid to a solicitor who is later engaged by the client in the matter.