

Context

The purpose of the information provided below is for those seeking to commence urgent Supreme Court proceedings to remove a wrongful caveat lodged on their title. The reason that such applications are made is to avoid the penalties associated with a delay in settlement or the opportunities lost due to an inability to obtain urgent finance.

Dealing with uncertainty: managing the litigation process

Litigation is often an expensive, complex and time-consuming exercise. It is important that lawyers and their clients concentrate the evidence and arguments on the issues which are before the court and nothing else. If the evidence or arguments go outside the scope of relevance to those issues, it leads to a waste of money, in form of substantial legal costs, a waste of time, in the form of judicial sitting time, and an increased risk of oversight and error (*Motto & Ors v Trafigura Ltd & Anor (Rev 3)* [2011] EWCA Civ 1150).

Like all adversarial processes, litigation is attended by uncertainty, inconvenience, conflict, cost and stress. Notwithstanding that the litigation process takes place in an environment of uncertainty and dynamism, there are consistent actions that, if executed properly, significantly improve the chances of a favourable and cost effective outcome.

For the client, those actions are to provide:

1. money for legal costs and disbursements when asked;
2. all relevant documents and information and, in particular, be forthcoming with relevant information that might be detrimental to the case or embarrassing so that those issues can be addressed early; and
3. prompt instructions in response to the advice provided throughout the matter.

For the lawyer, those actions include:

1. ensuring, as far as is practicable, outcomes correspond with the advice given;
2. providing updates as to the direction of the matter and costs associated with any change of direction that may be required; and
3. accurately identifying the possible risks and possible rewards associated with the litigation.

Risks and rewards: litigation must be commercially focused

Any litigation should seek to achieve, first and foremost, a commercial result. We always advise against a course of action where legal costs will exceed the amount or value of the issues in dispute. Although you are entitled to pursue a 'matter of principle' in the courts and tribunals of Victoria, you do so understanding that it is not a course we recommend.

Moreover, one must understand that obtaining a successful judgment is not the end of the litigation process. Of course, many litigants accept the verdict and will abide by it, however, some people and companies do not behave in that way. When litigants do not accept the judgment, they may try and avoid its consequences, which will require the courts' various enforcement processes such as warrants for possession, examinations, search and seizure – among others.

There is also the risk that the other party is bankrupted or rendered insolvent either because of events outside the litigation or because of it. In this instance, despite a favourable judgment, some or all of what that party is ordered to pay to you might not ultimately be paid.

Client legal privilege

It is important that during and after our engagement in this matter you do not disclose our legal advice to others. The deliberate or inadvertent disclosure of legal advice to any other person may serve to waive client legal privilege and, in that event, may place the other party to this matter, in a position of inappropriate (but considerable) advantage.

The basis on which our charges will be calculated – section 174(1)(a) Uniform Law

Our charges are determined by hourly rates charged in 6-minute units. For example, the time charged for an attendance of up to 6 minutes will be rounded up to 6 minutes and the time charged for an attendance between 6 and 12 minutes will be rounded up to 12 minutes.

Our lawyers record the time they spend when they work on your matter, and each lawyer has an hourly charge rate which reflects that lawyer's skill and experience.

The lawyer primarily responsible for your matter is director Alexander Sheed-Finck. He will be assisted by lawyer, William Tennant. At times, it may be appropriate to delegate some tasks to other legal, paralegal or clerical staff. We encourage you to contact our Mollie Michel for all routine non-legal matters.

The current hourly rates of the other staff likely to be involved in working on this matter are (inclusive of GST):

| | |
|------------------------|-------|
| Accredited Specialist | \$517 |
| Senior Lawyer | \$495 |
| Lawyer | \$396 |
| Legal Executive | \$363 |
| Clerk | \$330 |
| Administrative Support | \$297 |

Please note that you will be charged according to the hourly rate plus GST. Our rates are reviewed from time-to-time and may change. We will notify you of any changes as soon as practicable after a change occurs.

Disbursements

In providing legal services to you it may also be necessary to incur other fees, expenses and charges, referred to as disbursements. You must pay reasonable disbursements we incur on your behalf either on demand or at the conclusion of the matter.

We absorb many of the day-to-day costs in dealing with your matter such as legal document exchange, stationery, the use of our electronic precedents and forms.

Disbursement costs also cover file opening, court filing and issue fees, barristers' fees, experts' fees, bank charges, travel expenses, stamp duty, courier fees, company and other search fees.

Goods and Services Tax

Unless our rates and costs estimate are stated to include goods and services tax (GST), we reserve the right to charge and recover from you an additional amount equal to any GST imposed on supplies we make. Where GST is payable, we will issue a tax invoice to you.

Estimate of costs

| No. | Step | Legal fees | Total |
|------------|--|-------------------|-----------------------------|
| 1 | Prepare and file court documents | | |
| 2. | Appear at Court to present your case (1 hearing) | | |
| | | | \$13,200 (fixed Fee) |

Adjournment appeals and additional litigation

If the matter is adjourned, for whatever reason, requiring more than one court appearance, you will be charged an additional \$2,000 for each additional court appearance required.

If further litigation is required to determinate issues underlying the registration of the caveat or additional disputes, we will provide an estimate of costs prior to being engaged in that work (if necessary).

If work is required to appeal or enforce judgment, we will provide an estimate of costs prior to being engaged in that work (if necessary).

What we do not do

We will not advise in relation to taxation matters or provide financial advice. We will, of course, work closely with any accountants you direct us to work with should the consideration of

financial of taxation matters become necessary. At this time, we do not anticipate that will be necessary.

Variables

The major variables that commonly affect an estimate of legal costs and disbursements in litigious matters include:

1. the extent of documentation we are required to review and consider;
2. the number of parties involved in the matter;
3. the complexity of the law involved in a matter;
4. the extent to which we are required to communicate with you, the other party's solicitor, the court, witnesses and others in relation to the matter;
5. the number of pre-trial steps required to prepare a matter for trial such as amending pleadings, requesting or providing particulars of pleadings, discovery, interrogation, mediation, preparation of court books, affidavits and written submissions;
6. any interlocutory applications (making or opposing them) and the court number of appearances those applications require;
7. any dispute between the parties by way of contribution proceedings or otherwise;
8. whether and, if so, at what stage settlement can be negotiated either on an informal basis or at court-ordered mediation;
9. if for some other reason (for example, if one party capitulates or becomes insolvent) the matter concludes prior to a final hearing;
10. the attitude or tactics adopted by the parties to the litigation;
11. the need to obtain evidence or reports from an expert witness or other witness;
12. the seniority of counsel you instruct us to brief and his or her fees (for example a junior barrister at the Victorian Bar commonly charges \$220 per hour or a daily rate of \$2,200, an experienced barrister commonly charges \$440 per hour or a daily rate of \$4,400 whereas a Queen's Counsel or Senior Counsel will commonly charge \$770 per hour or \$7,700 per day);
13. the number of days the final hearing of the matter ultimately takes;
14. any adjournments of the hearing by the court of one or more of the parties; and
15. any other matters which you may instruct us to assist you with which are unforeseeable at this time.

If the scope of this matter or your instructions to us change in a way that results in a significant change to anything we have previously disclosed, including this estimate, we will revise the estimate as soon as practicable. If you would like to clarify or are concerned about any aspect of this estimate, please tell us so that we may discuss it with you further.

Recovery of costs in litigious matters

If you are successful in this litigation we estimate that you will receive a costs order that will have you recover approximately 80% of your total legal costs.

Costs are at the discretion of the presiding Judge but will be exercised, in the usual case, in accordance with the rule that 'costs follow the event'. This means that if a party succeeds in their claim or their defence, an order for costs will follow in their favour. However, the area of costs

has developed over many years in an unnecessarily complicated way such that no lawyer is able to properly tell their client at the start of any litigation what costs might be recovered or even a formula for calculating any such amount. A favourable costs order does not mean, 'Here are the bills my lawyers have sent me — now, pay it'.

What a favourable costs order does in fact mean is (if the parties cannot agree to costs following litigation) a 'taxation' or assessment according to 'Appendix A of the Supreme Court Scale of Costs' - <https://www.liv.asn.au/Professional-Practice/LIV-Cost-Lawyers/Scales-of-Costs> .

The Courts have three bases upon which costs are awarded (or 'taxed' as the language of the relevant statutes provide), which are:

- (a) the standard basis;
- (b) the indemnity basis; or
- (c) such other basis as the court may direct.

The standard basis means 'all costs reasonably incurred and of reasonable amount must be allowed'. The indemnity basis means all costs must be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred. Such other basis is rarely ordered but may include a situation where the parties to a dispute have set how legal costs will be paid in the event of a dispute.

Your rights – section 174(2) Uniform Law

Under the Uniform Law you have a right to:

1. negotiate a Costs Agreement with us (you may want to seek independent legal advice before agreeing to the legal costs we propose to charge in this matter);
2. negotiate the billing method with us;
3. receive a Bill of Costs from us;
4. request an itemised Bill of Costs within 30 days after receiving a bill that is not itemised, or is only partially itemised, from us;
5. be notified of any significant change to the basis on which legal costs will be calculated or any significant change to the estimate of total legal costs; and
6. seek the assistance of the designated local regulatory authority (Victorian Legal Services Commissioner) in the event of a dispute about legal costs.

Our communications with you

We will continue to contact you by email and telephone. As you have authorised us to correspond with you by email, we confirm your acknowledgement that there are some delivery risks in using electronic mail and your acceptance of the risk of interception and/or associated viruses or file corruption. You accept that the completeness and integrity of an email may not be preserved during its transmission and agree to immediately notify us if you doubt the authenticity of an email received from us. If we communicate electronically with you or on your behalf, you release us from all claims, losses, expenses and liabilities howsoever incurred and arising directly or indirectly from that communication.

Our accounts

We will require fees be paid in advance of legal work and the incurring of disbursements.

If you do not pay our bill, we may be entitled to exercise a common law right known as a 'solicitor's lien'. The lien allows us to retain your documents until our bill is paid. We may also require you to execute an equitable charge if your costs are or may become substantial.

Interest on unpaid accounts – section 195(1) Uniform Law

If a bill remains unpaid 30 days after we gave it to you, we may charge you interest at a rate not exceeding the Cash Rate Target, as fixed by the Reserve Bank of Australia, plus 2 per cent, at the date the bill is issued.

Your right to request a written report on legal costs – section 190(1) Uniform Law

You have a right to request a written report of the legal costs incurred to date or since our last bill (if any), and we must provide such a report within a reasonable period and without charge.

If you have a concern about our legal costs – section 174(3) Uniform Law

If you have any concerns about our legal costs, please do not hesitate to contact Alexander Sheed-Finck. It is important to us that, in consenting to the proposed course of action for the conduct of your matter (in particular the proposed costs), you are informed and understand the issues involved.

Your documents

Your documents may be destroyed after seven years from the date of our final bill unless you write to us requesting retention for a longer period. At the end of the matter, and provided our invoices are paid in full, we will release your file.

Jurisdiction

The Uniform Law as applied in Victoria is applicable to legal costs in this matter.

Engagement of another lawyer or law practice – section 175 Uniform Law

In providing legal services for you, it may be necessary to engage another law practice (including Barristers) to provide specialist advice or services. We will consult you about the terms of these engagements before incurring the expense. We will provide you with a statement setting out the rates and estimated costs of any other law practice we propose to engage as soon as the retained law practice provides this information to us.

Privacy

We may collect personal information about your representatives, your clients and others when we provide services to you. If we do, you agree to work with us to ensure that we both meet the obligations that we each may have under the *Privacy Act 1988* (Cth) as amended (“**Privacy Act**”). Where you have collected personal information, you confirm that you have collected the personal information in accordance with the Privacy Act, that you are entitled to provide this personal information to us and that we may use and disclose the personal information for the purpose/s we provide our services to you. We will handle personal information in accordance with the Privacy Act.

Costs Agreement

Division 4 of Part 4.3 of the Uniform Law allows a law practice and you (the client) to agree on how the law practice's charges are to be calculated and paid. It is called a “Costs Agreement”

and it may be enforced in the same way as any other contract. This document is an offer to enter into a Costs Agreement in accordance with the information contained in the Disclosure Statement (Part A) given to you in compliance with Division 3 of Part 4.3 of the Uniform Law.

If you accept these terms, the Disclosure Statement, this document and our Standard Terms will make up the complete Agreement between us for this matter. You may accept the Agreement by returning a signed copy of this document as provided in the Acknowledgement at the end of this document. We are unable to begin work on your matter until you return the signed letter to us.

The basis on which our charges will be calculated

Our charges will be calculated in accordance with the method of hourly rates detailed on the first page of this costs disclosure and costs agreement.

Payment of our charges

Interim Bills of Costs will be given to you at the end of each month or at suitable breaks in the matter and a final Bill of Costs will be given to you at the conclusion of the matter. Our accounts are immediately due and payable.

If a bill remains unpaid 30 days after you receive it, we may charge you interest at a rate not exceeding the Cash Rate Target, as fixed by the Reserve Bank of Australia, plus 2 per cent, at the date the bill is issued. If you do not pay our bill, we may be entitled to exercise a common law right known as a 'solicitor's lien'. The lien allows us to retain your documents until our bill is paid.

Payment of disbursements

We will charge you at cost for any disbursements we incur on your behalf. You must pay disbursements, including GST (Goods and Services Tax), incurred by us on your behalf either on demand or at the conclusion of this matter.

We may also request that you provide us with payment in advance of us incurring a disbursement on your behalf. These funds will be held in our trust account until payment of the disbursement is required.

Trust money

If we receive money into our trust account on your behalf, you authorise us to draw on that money to pay any amount due from you to us in accordance with the provisions of the Uniform Law and the *Legal Profession Uniform General Rules 2015* relating to the withdrawal of trust money for legal costs. A trust statement will be forwarded to you upon completion of the matter.

Bills

We may give bills to you in any way specified in Rule 73 of the Legal Profession Uniform General Rules 2015. For the purposes of Rule 73, you consent to receiving bills:

1. by fax to the number specified by you;
2. by email address or mobile phone number to the address or number specified by you; or
3. by any other means of electronic transmission agreed to by you and us.

Your obligations

We require you to, and you agree to:

1. provide full and honest instructions relevant to your matter and any material change in your circumstances that might impact on your matter while we continue to act for you;
2. co-operate in the matter and do all that we reasonably request of you in a timely manner;
3. accept and follow our reasonable legal advice; and
4. provide funds in advance in accordance with this Agreement or some later arrangement.

If you fail to comply with any of these conditions, we have the option to terminate this Agreement by advising you of termination in writing.

If we cease to act for you or you stop using this law practice

Circumstances may arise (such as a conflict of interest) that make it impossible for us to continue to act for you.

We will notify you immediately if any of the above matters arise. If we cease to act for you: we will take steps to remove our name from the Court record; you will receive a final account which will include all outstanding legal costs; you must pay our legal costs up until the date we cease to act; and we may retain your file and keep your documents until we are paid, subject to any other statutory requirements. If we cease to act for you during the course of this matter and before there is an outcome, then all legal costs incurred up to the date of the termination will be charged. You may end our engagement by written notice at any time. If this occurs, then all legal costs incurred up to the date of the termination will be charged. Depending on circumstances, we may be entitled to exercise our right to a solicitor's lien by retaining documents relating to any matters we are conducting on your behalf.

Seeking independent legal advice

You may seek independent legal advice prior to engaging our services.

Civil Procedure Act 2010

PART 2.3—THE OVERARCHING OBLIGATIONS

In the State of Victoria, parties to litigation (including their lawyers) are subject to obligations set out at sections 16 to 26 of the *Civil Procedure Act 2010* (Vic). The purpose of those obligations is to reduce delays and costs both as between the litigants and on the Court system. You will be asked to certify in writing the fact that you have read and understood the obligation before commencing court proceedings.

16 Paramount duty

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

- (a) any interlocutory application or interlocutory proceeding;
- (b) any appeal from an order or a judgment in a civil proceeding;
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

17 Overarching obligation to act honestly

A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding.

18 Overarching obligation—requirement of proper basis

A person to whom the overarching obligations apply must not make any claim or make a response to any claim in a civil proceeding that—

- (a) is frivolous; or
- (b) is vexatious; or
- (c) is an abuse of process; or
- (d) does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis.

19 Overarching obligation to only take steps to resolve or determine dispute

For the purpose of avoiding undue delay and expense, a person to whom the overarching obligations apply must not take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.

20 Overarching obligation to cooperate in the conduct of civil proceeding

A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.

21 Overarching obligation not to mislead or deceive

A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—

- (a) misleading or deceptive; or
- (b) likely to mislead or deceive.

22 Overarching obligation to use reasonable endeavours to resolve dispute

A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only judicial determination is appropriate.

23 Overarching obligation to narrow the issues in dispute

If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—

- (a) resolve by agreement any issues in dispute which can be resolved in that way; and
- (b) narrow the scope of the remaining issues in dispute—

unless—

- (c) it is not in the interests of justice to do so; or
- (d) the dispute is of such a nature that only judicial determination is appropriate.

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.

25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—

- (a) act promptly; and

- (b) minimise delay.

26 Overarching obligation to disclose existence of documents

- (1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
 - (a) of which the person is aware; and
 - (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
- (2) Disclosure under subsection (1) must occur at—
 - (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
 - (b) such other time as a court may direct.
- (3) Subsection (1) does not apply to any document which is protected from disclosure—
 - (a) on the grounds of privilege which has not been expressly or impliedly waived; or
 - (b) under any Act (including any Commonwealth Act) or other law.
- (4) The overarching obligation imposed by this section—
 - (a) is an ongoing obligation for the duration of the civil proceeding; and
 - (b) does not limit or affect a party's obligations in relation to discovery.

