

NOTICE OF DETERMINATION

A notice made under section 318 of the *Legal Profession Uniform Law (Victoria)* ("Uniform Law").

Complainant: [REDACTED]
Respondent Lawyer / Law Practice: [REDACTED] / [REDACTED]
Case reference: [REDACTED]

Orders

1) Pursuant to section 290(2)(e) of the Uniform Law, I make the following orders –

Under section 308(3) of the Uniform Law, the Law Practice must **repay \$821.50 to the Complainant within 45 days.**

I have made this order in relation to legal costs charged by the Law Practice to the Complainant regarding the following bills –

- Bill dated 9 June 2015 for \$1,663.75;
- Bill dated 9 June 2015 for \$759.35;
- Bill dated 24 June 2015 for \$2,000.95;
- Bill dated 2 July 2015 for \$5,299.58;
- Bill dated 9 July 2015 for \$1,138.50;
- Bill dated 9 July 2015 for \$599.50.

I consider the amount of legal costs that are fair and reasonable in relation to these bills, pursuant to section 292 of the Uniform Law, to be **\$8,441.87** (GST inclusive). The Complainant has already paid the sum of **\$9,263.37** to the Law Practice, which was the discounted amount originally charged by the Law Practice for these bills.

2) Pursuant to section 290(2)(d)(i) of the Uniform Law, I make the following order –

The Respondent Lawyer undertakes a professional development course with focus on practice management; specifically, appropriate billing and compliance with costs disclosure obligations, to be approved by me **within 6 months** of this date.

Statement of Reasons

Background

Initial sale to [REDACTED]

1. On or around 14 February 2013, the Respondent Lawyer was retained by the Complainant's company, [REDACTED], in relation to the sale of commercial property at [REDACTED]

████████████████████ ("the Property") to A ██████████ (██████████) for \$5.25 million.

2. On 14 February 2013, the Respondent Lawyer sent the Complainant a letter which enclosed a draft Contract of Sale of Real Estate and a Section 32 Vendor's Statement in relation to the sale. The letter provided a costs estimate of \$1,000.00 (plus GST) plus disbursements of \$100.00 - \$250.00, if the matter proceeded as a normal sale. The letter also gave conditions where professional fees would be reviewed and a new estimate would be required. The sale of the property did not proceed at that time.

Sale to ██████████

3. In April 2014, the Complainant instructed the Respondent Lawyer to prepare an up-to-date Section 32 Vendor's Statement and Contract of Sale of Real Estate. The intention was to sell the Property to ██████████ (██████████).
4. On 15 April 2014, the Respondent Lawyer sent the Complainant a letter enclosing updated draft copies of the Contract of Sale of Real Estate and Section 32 Vendor's Statement. The letter confirmed the fixed quotation of "\$1,100.00 inclusive of GST for the normal conveyancing work associated with your purchase" [sic].
5. Between mid-July and October 2014, the Respondent Lawyer acted for the Complainant in this proposed sale. This included preparation of special conditions for the Contract of Sale, preparation of a lease, preparation of a guarantee, preparation of a Section 27 Statement and various attendances on the real estate agent and the purchaser's representatives. It appears that the sale did not proceed at that time.
6. The Respondent Lawyer rendered a Bill dated 28 August 2014, to the Complainant, in the total sum of \$6,153.22, which was paid in full using the Complainant's credit card.

Each bill rendered to the Complainant noted that *"all credit card payments shall incur a surcharge of 3%"*.

Sale to ██████████

7. In April 2015, the Complainant again consulted the Respondent Lawyer in relation to the sale to ██████████, specifically seeking advice in relation to Terms of Settlement for the sale of the property.
8. From May to July 2015, the Complainant sought advice in relation to various matters pertaining to the sale, such as Capital Gains Tax, preparation of an updated Contract of Sale, and preparation of a Section 32 Vendor's Statement.
9. On 9 June 2015, the Respondent Lawyer wrote to the Complainant in relation to the proposed sale of the Property ("the first Disclosure"). The letter quoted a fixed quotation of \$1100.00 (inclusive of GST) to undertake *"normal conveyancing work"* associated with the matter, plus other fees and out of pocket expenses of around \$150.00 - \$250.00 (plus GST). The letter stated that professional fees would be reviewed if, *inter alia*, the *"transaction becomes unusually difficult or protracted"*. The letter noted that fees were payable on completion and that *"all our outstanding accounts attract interest at the rate prescribed by the Penalty Interest Rates Act"*.

10. The Respondent Lawyer rendered the following bills, dated 9 June 2015, to the Complainant, which were paid in full using the Complainant's credit card:

'Bill 2'

Total Amount	Professional Costs	Disbursements and GST	Total Amount + 3%	Discounted amount if paid within 7 days	Discounted amount + 3%	Actually paid by Complainant
\$1,663.75	\$1,512.50	\$151.25	\$1,713.66	\$1,497.37	\$1,542.29	\$1,713.66

'Bill 3'

Total Amount	Professional Costs	Disbursements and GST	Total Amount + 3%	Discounted amount if paid within 7 days	Discounted amount + 3%	Actually paid by Complainant
\$759.35	\$500.00	\$259.35	\$782.13	N/A	N/A	\$782.13

11. On 19 June 2015, in a letter, more detailed Costs Disclosure was provided by the Respondent Lawyer to the Complainant, under the *Legal Profession Act 2004 (Vic)* ("LPA") ("the second Disclosure"). The letter noted that:

- The fees would be charged in accordance with the enclosed Scale of Costs;
- Alternatively, a cost agreement could be negotiated;
- The terms were outlined in the enclosed document headed "Legal Practice Information" ("LPI").

The second Disclosure provided no estimate of legal costs, neither in the covering letter, nor the LPI document, nor the Scale of Costs.

12. The Respondent Lawyer rendered the following bill, dated 24 June 2015, to the Complainant, which was paid in full using the Complainant's credit card:

'Bill 4'

Total Amount	Professional Costs	Disbursements and GST	Total Amount + 3%	Discounted amount if paid within 7 days	Discounted amount + 3%	Actually paid by Complainant
\$2,000.95	\$1,792.50	\$208.45	\$2,060.98	\$1,800.85	\$1,854.88	\$1,854.88

13. On or about 26 June 2015, the Complainant completed and signed a document which provided the Complainant's credit card details and authorization for the Respondent Lawyer to deduct all future legal fees in relation to the property matter, from the Complainant's credit card.

14. On 2 July 2015, in an attachment to a letter, the Respondent Lawyer provided another copy of the second Disclosure to the Complainant ("the third Disclosure"). The letter noted that

the Disclosure had been previously provided and that a “*further copy*” was enclosed. No estimate of legal costs was provided in the letter or attachment.

15. The Respondent Lawyer rendered the following bill, dated 2 July 2015, to the Complainant, which was paid in full using the Complainant’s credit card:

‘Bill 5’

Total Amount	Professional Costs	Disbursements and GST	Total Amount + 3%	Discounted amount if paid within 7 days	Discounted amount + 3%	Actually paid by Complainant
\$5,299.58	\$4,801.25	\$498.33	\$5,458.57	\$4,769.62	\$4,912.71	\$4,912.70

16. The Respondent Lawyer rendered the following bills, dated 9 July 2015, to the Complainant, which remain unpaid:

‘Bill 6’

Total Amount	Professional Costs	Disbursements and GST	Total Amount + 3%	Discounted amount if paid within 7 days	Discounted amount + 3%	Actually paid by Complainant
\$1,138.50	\$1,035.00	\$103.50	\$1,172.66	\$1,024.65	\$1,055.39	\$0.00

Bill 6 was the only bill rendered by the Law Practice which did not relate to the sale of the Property; it was headed “*Various Matters*”.

‘Bill 7’

Total Amount	Professional Costs	Disbursements and GST	Total Amount + 3%	Discounted amount if paid within 7 days	Discounted amount + 3%	Actually paid by Complainant
\$599.50	\$545.00	\$54.50	\$617.49	\$539.55	\$555.74	\$0.00

17. The Respondent Lawyer also acted for the Complainant in relation to other, personal matters (refer Bill 6, above); however, it does not appear that the Complainant provided a credit card authority in relation to matters other than the sale of the Property.
18. On 14 August 2015, my office received the Complainant’s complaint about the Respondent Lawyer.
19. The Complainant and Respondent Lawyer attempted to resolve the dispute informally. Both made offers to one another. However, these offers did not result in a satisfactory resolution of the matter for each other.

ISSUES IN DISPUTE

The issues that remain in dispute are whether –

- a. The Respondent Lawyer’s bills 2 to 7 are fair and reasonable;

- b. The Respondent Lawyer acted with proper authority to charge monies (for repayment of accounts) to the Complainant's credit card; and
- c. The Respondent Lawyer provided poor service to the Complainant.

Complainant's Case

The Complainant said the following in his complaint –

a. Legal costs

The Law Practice's fees were excessive, given it had already prepared the Section 27 Statement, Section 32 Statement, lease and letter of confidentiality contract and other associated documentation in relation to a previous prospective buyer. He paid Bill 1 in relation to that service. He only instructed the Law Practice to revise this material and make some minor changes.

The Respondent Lawyer had estimated legal costs at \$2,500.00.

b. Authorisation of payment from credit card

The Respondent Lawyer used his personal credit card to pay the outstanding bills without his authority.

As a result, when he went to purchase groceries and medicines on one occasion, he was unable to do so as his credit card limit had been exceeded.

c. Service issues

He alleged the Law Practice:

- entered the wrong date on the contract of sale;
- forgot to send out the purchaser's copy of the Section 27, which again delayed the signing of the contract; and
- failed to return telephone calls.

Respondent Lawyer's case

The Respondent Lawyer said the following in response to the complaint –

a. Legal costs

- The costs charged were fair and reasonable.
- In respect of the sale of the Property, the Complainant was quoted \$1,100.00 (including GST) for "attending to normal conveyancing work". He advised the

Complainant in writing, once it became clear that the matter was not straightforward, that costs would be higher.

- The sale was not straightforward and required many attendances upon the Complainant, his real estate agents, accountants and the purchaser's representative.
- On numerous occasions, the Complainant was advised of the costs of acting on his behalf in relation to the various matters. The Complainant was aware of the Law Practice's legal fees.

b. Authorisation of payment from credit card

All account payments were made at the Complainant's request and with his authority.

c. Service issues

He denied the Complainant's allegations relating to poor service.

Findings on Issues in Dispute

a. Fair and reasonable legal costs

A costs review of the Law Practice's file was undertaken and finalised by my office, which concluded that \$8,441.87 (including GST and disbursements) represents fair and reasonable legal costs for the Law Practice's bills as follows –

Date ("Bill number")	Total Bill Amount	Actually paid by Complainant	F&R ¹ costs assessed	F&R costs less 10% discount ²	F&R costs less disc. + 3% ³
9 June 2015 ("2")	\$1,663.75	\$1,713.66	\$1,267.75	\$1,267.75	\$1,305.78
9 June 2015 ("3")	\$759.35	\$782.13	\$660.35	\$660.35	\$680.16
24 June 2015 ("4")	\$2,000.95	\$1,854.88	\$1,863.45	\$1,677.11	\$1,727.42
2 July 2015 ("5")	\$5,299.58	\$4,912.70	\$3,727.95	\$3,355.15	\$3,455.81
9 July 2015 ("6")	\$1,138.50	\$0.00	\$753.50	\$753.50	\$753.50
9 July 2015 ("7")	\$599.50	\$0.00	\$519.20	\$519.20	\$519.20
Total	\$11,461.63	\$9,263.37	\$8,792.20	\$8,233.06	\$8,441.87

This amounts to a reduction of \$3,019.76 from the Law Practice's bills. I accept the findings of the costs review.

Costs Disclosure

¹ F&R = Fair and reasonable

² The Complainant took advantage of the 10% early payment discount in relation to Bills 4 and 5 and the assumption is made that this would also have occurred in relation to the total amounts assessed as being fair and reasonable by the Costs Reviewer, in relation to those Bills.

³ Bills 2 to 5 were paid by credit card, meaning a 3% credit card surcharge is to be added to the fair and reasonable (and, where appropriate, discounted) costs assessed for those Bills.

In relation to the first Disclosure, none of the required disclosure information was provided to the Complainant apart from the costs estimate and conditions under which the estimate could change. As a result, a number of breaches of the LPA disclosure provisions occurred including sections 3.4.9(1)(a), (b), (e), (h), (i), and (j). It is not clear from the material whether the potential disclosure failures would be excused under section 3.4.12(b) or (c).

The reference in the first Disclosure to interest being charged under the *Penalty Interest Rate Act* was unlawful and has been prohibited in relation to lawyers billing since 6 December 2007.

In relation to the second and third Disclosures and the attached "*Legal Practice Information*" (LPI):

- Neither an estimate of the costs, nor an explanation of the major variables that would affect the calculation of those costs, was provided in breach of section 3.4.9(1)(c) of the LPA;
- It does not appear that disclosure additional to that already provided to the Complainant in the first Disclosure was provided in either the second or third Disclosures. At the time of the third disclosure, the Complainant had already been billed a total of \$8,827.19 (discounted) in relation to the sale of the Property. It is not clear whether the Respondent Lawyer ever updated the original estimate of \$1,100.00 provided in the first Disclosure.

The Respondent Lawyer failed to comply with the requirement under section 3.4.16 of the LPA in relation to the ongoing obligation to disclose changes to costs estimates in writing. Whilst I note the Respondent Lawyer asserts that the Complainant was provided with written disclosure, the material before me does not support this claim. Ongoing disclosure would be crucial in a matter such as this, given the duration of the matter, the original estimate of \$1,100.00 including GST provided, and the ultimate charges (in Bills 2 to 5 and 7 inclusive) of approximately \$10,300.00 (undiscounted) / \$9,400.00 (discounted) in relation to this transaction.

In my view, the costs agreement was voided and the Law Practice's file was therefore assessed in accordance with the Professional Remuneration Order relevant at the time the bills were issued.

Scale of Costs

The Scale of Costs attached to the LPI document lacked clarity in terms of the difference between "correspondence" and "documents". The Respondent Lawyer appears to have charged the much more costly "drawing and engrossing documents" scale item (\$49.50 per folio) for every letter written. In my opinion, the Respondent Lawyer ought to have charged according to the items listed under the heading "correspondence" i.e. formal letters \$33.00 per letter, circular \$16.50 per letter, "other" \$49.50 per letter. The first two types of letters are defined at the bottom of the scale. Further, the Scale of Costs stated that an attendance other than by a legal practitioner would be chargeable at \$27.50 per attendance (presumably including GST, although the Scale does not specify this) and did not state that this was chargeable on a per 15 minute unit basis.

I have reduced the amount the Law Practice is able to charge for the following attendances:

Bill number	Attendance Date	Description of Attendance	Amount charged (incl GST)	Amount allowed (incl GST)
2	2 March 2015	Drawing and engrossing correspondence to you	\$49.50	\$33.00
	13 March 2015	Drawing and engrossing correspondence to you	\$49.50	\$33.00
	5 June 2015	Drawing and engrossing email to you	\$49.50	\$33.00
5	25 June 2015	Drawing and engrossing correspondence to you	\$198.00	\$49.50
	25 June 2015	Drawing and engrossing correspondence to Hall & Wilcox	\$49.50	\$33.00
	25 June 2015	Drawing and engrossing correspondence to Tolhurst Property	\$49.50	\$33.00
	26 June 2015	Drawing and engrossing email to Tolhurst Property	\$49.50	\$33.00
	26 June 2015	Personal attendance upon NAB by a secretary	\$55.00	\$27.50
	1 July 2015	Drawing and engrossing correspondence to Hall & Wilcox	\$49.50	\$33.00
	2 July 2015	Drawing and engrossing correspondence to you	\$792.00	\$49.50
Total			\$1,391.50	\$357.50

Charging more than fair and reasonable costs

The Respondent Lawyer charged every left message to return call (“LMTRC”) as an attendance, legal or otherwise. I have *disallowed* the amount that the Respondent Lawyer is able to charge in relation to these attendances, on the basis that the attendances were either minimal or related to LMTRCs.

Bill number	Attendance Date	Description of Attendance	Amount charged (incl GST)	Amount allowed (incl GST)
2	29 May 2015	Receipt and perusal of email from you	\$16.50	\$0.00
4	10 June 2015	Telephone attendance upon you by a secretary	\$27.50	\$0.00
	17 June 2015	Further telephone attendance upon you by a secretary	\$27.50	\$0.00
	19 June 2015	Receipt and perusal of email from Hall and Wilcox	\$16.50	\$0.00
5	24 June 2015	Telephone attendance upon Hall & Wilcox by a legal practitioner	\$96.25	\$0.00
	24 June 2015	Telephone attendance upon	\$27.50	\$0.00

Bill number	Attendance Date	Description of Attendance	Amount charged (incl GST)	Amount allowed (incl GST)
		you by a secretary		
	25 June 2015	Telephone attendance upon Hall & Wilcox by a legal practitioner	\$96.25	\$0.00
	25 June 2015	Telephone attendance upon Hall & Wilcox by a secretary	\$27.50	\$0.00
	25 June 2015	Telephone attendance upon you by a secretary	\$27.50	\$0.00
	25 June 2015	Telephone attendance upon Tolhurst Property by a secretary	\$27.50	\$0.00
	26 June 2015	Telephone attendance upon you by a legal practitioner	\$96.25	\$0.00
	26 June 2015	Telephone attendance upon you by a secretary	\$27.50	\$0.00
	30 June 2015	Telephone attendance upon you by a secretary	\$27.50	\$0.00
	30 June 2015	Telephone attendance upon you by a legal practitioner	\$105.88	\$0.00
	1 July 2015	Telephone attendance upon you by a secretary	\$27.50	\$0.00
7	9 July 2015	Drawing and engrossing correspondence to you	\$49.50	\$0.00
		Total	\$724.63	

Absence of file notes etc

I have *reduced* the amount that the Respondent Lawyer is able to charge in relation to the following attendances, on the basis that the file did not provide sufficient evidence supporting the amount that had been charged:

Bill number	Attendance Date	Description of Attendance	Amount charged (incl GST)	Amount allowed (incl GST)
2	1 June 2015	Personal attendance upon you by a legal practitioner	\$440.00	\$110.00
3	9 June 2015	OUR PROFESSIONAL COSTS in relation to preparation of draft Section 32 Vendor's Statement for the above property	\$550.00	\$451.00
4	17 June 2015	Receipt and perusal of email from you enclosing s27 mortgage details <i>[allowed 1 folio only]</i>	\$33.00	\$16.50
	22 June 2015	Receipt and perusal of email from Hall and Wilcox <i>[allowed 1 folio only]</i>	\$33.00	\$16.50
	22 June 2015	Drawing and engrossing email to Hall and Wilcox <i>[provided trust account details only]</i>	\$49.50	\$16.50
6	30 April 2015 to	10 attendances listed but amounts of each	\$1,138.50	\$753.50

Bill number	Attendance Date	Description of Attendance	Amount charged (incl GST)	Amount allowed (incl GST)
	9 July 2015	<i>attendance not individually itemised. The Respondent Lawyer's File did not support the total amount charged.</i>		
7	9 July 2015	Drawing and engrossing confidentiality agreement	\$550.00	\$519.20
Total			\$2,794.00	\$1,883.20

b. Authorisation of payment from credit card

The Complainant's claim that the Respondent Lawyer withdrew legal fees from the Complainant's credit card without proper authorisation is not substantiated. The Respondent Lawyer has provided my office with –

- (a) The above Credit Card authorisation form (signed by the Complainant);
- (b) A letter dated 2 July 2015, sent from the Respondent Lawyer to the Complainant (the third Disclosure). At page 4, it confirmed that the Complainant had "authorised our office to deduct our legal fees from your Credit Card (██████), upon the issuing of a tax invoice", and enclosed Bill 5 to the Complainant.

From the material before me, it appears that the Complainant authorised the Respondent Law Practice to withdraw its legal fees from the Complainant's credit card, but only in relation to the sale of the Property. It therefore does not appear that the Respondent Lawyer has acted inappropriately in relation to that aspect of the retainer. In relation to Bill 6, which pertains to "various matters" not related to the sale, the Respondent Lawyer has not charged the Complainant's credit card with the outstanding sum and therefore on the available evidence I find that this ground of complaint is not made out.

c. Service issues

Our costs review did not make any adverse findings about the service provided to the Complainant. I have no material before me to suggest that the Respondent Lawyer caused any substantial delay. As such, it does not appear that the Respondent Lawyer acted inappropriately in his delivery of services.

Determinations & Reasons

Having considered all of the evidence and relevant law, and having made the above findings on the issues in dispute, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

Further, in making a determination as to costs, I have determined that the amount is fair and reasonable in all the circumstances having regard to section 200 of the Uniform Law, and the following matters. I have also considered the principles in section 172.

Further, I am satisfied that the prerequisites for making a compensation order (pursuant to section 309 of the Uniform Law) have been met.

Non-compliance

Please be aware that a failure to comply with a determination in a consumer matter may amount to conduct capable of constituting unsatisfactory professional conduct or professional misconduct.



Michael McGarvie
Victorian Legal Services Commissioner
27 May 2017