How the changing role of the Legal Services Commissioner will impact on regulation issues within the Costs Consulting Community

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INTRODUCTION

Success through change at the office of the Legal Services Commissioner involves following the principle that good regulation is about good relationships. This very week some of you will have seen news about successes we have had in prosecuting a solicitor for misconduct. Big cases always have impact. The bigger impact from our changes though have come from dialogue, education and persuasion. Our big gains seem to have emerged, not from heavy-handed policing but by a considered use of our powers of forgiveness. The *Mietto v. G4S Custodial Services Pty Ltd* case raises significant professional standards issues for the regulator, the courts, the Law Institute of Victoria and the costs community. I believe better outcomes will emerge from education and communication, extracting cooperation and compliance compared with widespread policing where powers and controls for the regulator are sometimes mixed, as they seem to be in this area.

As Legal Services Commissioner I handle complaints against lawyers. I am also CEO of the Legal Services Board which deals with all other aspects of regulatory activity like licensing, funds management, trust account supervision, auditing, compliance, and practice supervision. When the *Mietto* judgement came to my attention last year I worked with the Chairperson of the Legal Services Board, Colin Neave, to determine the right response. I also consulted the Law Institute of Victoria to address the issues the case raised. Each of us determined that our responsibility was initially to raise awareness about the issues identified, and work with the legal community and the costs consulting community to address weaknesses and improve standards.

I invited about 25 costs lawyers and costs consultants last November to join me in discussions about the implications of the *Mietto* judgement. I emailed the invitation to the group I had selected to initially discuss this with and somehow the invitation went "viral". It meant that dozens of others in the costs consulting and legal community were apparently invited by some of my invitees, perhaps thinking that I was holding a Town Hall meeting. I may have felt comfortable convening a Town Hall meeting, but what I was not aware of was the degree of internal hostility that exists between some members of the costs lawyers and costs consulting communities. I received many comments, proposals and suggestions, some of whom expressed frustration and antipathy and anxiety about each others' credentials, motivations, capacity, conduct, ethics, and judgement. I therefore postponed the meeting to take a raincheck and try and better understand your community before attempting to continue the dialogue. Today happens to be the first opportunity since then where I can express my views and comments about the issues raised by His Honour, Associate Justice Wood in *Mietto v. G4S Custodial Services.*

I see this case to be about management of protocols, self-regulation, and organised communications. I don't see it as justifying industry-wide criticisms of costs consultants just because they don't carry practising certificates. As Commissioner I don't directly regulate anyone but lawyers. Some regulatory activity however, can assist here, but probably only at the margins in the absence of legislative change that might establish a new regulatory regime for costs consultants.

Commissioner complaints

As a complaints handling body we receive complaints connected with legal services on the subject of legal costs and on the subject of lawyers' conduct. We can deal with costs disputes up to $25,000. Costs disputes relating to legal fees and billing practices form a very large proportion of the complaints my office handles.

We receive approximately eight complaints per day. That sounds like a depressingly high figure but the reality is that seven of those eight complaints are not about dishonesty, theft, fraud or conduct that would ordinarily attract a prosecution. Those seven complaints are largely about the breakdown of the lawyer-client relationship. They usually relate to failure to communicate, uncertainty or inadequacy relating to costs disclosure, issues of timeliness, clear advice and attentiveness. With the assistance of the regulator these can often be resolved to the satisfaction of the complaining consumer. My office has therefore adopted traditional alternative dispute resolution techniques to attempt to resolve these sorts of complaints early. Our methods involve talking, meeting, mediating, and conciliating. It's in our power of forgiveness and education that we've had most impact. Our clearance rate has gone up dramatically. For calendar year 2009, we were generally finalising about 200 complaints per quarter. In 2010 however, we were able to complete over 600 matters in some quarters. This means we are closing cases much faster than we are opening them. We have been able to dramatically reduce the case load per investigations staff member by about half. This allows us to direct more of our resources and time to major misconduct investigations and prosecutions. It also allows more time and space for education and communication.

Steve Mark, the Legal Services Commissioner of New South Wales, was quoted in the Financial Review on 11 February 2011, to have said that complaints will drop if regulators work closely with lawyers via education and practice guidelines. I agree with him. In Victoria the speedy resolution of complaints and investigations helps everyone. It is my belief that a relationships approach to dealing with issues involving the costs consulting community is the starting point, especially if education and guidelines help to minimise complaints as well.

Complaints against costs consultants are extremely rare. In fact, my staff tell me they are only aware of one complaint since 2005. It involved a question about the standard of work, overcharging, and issues about whether the client of the costs lawyer was the legal practitioner or the original consumer of legal services. The matter settled and was withdrawn without any finding being made by us or a court.

Language – Lawyers v. Consultants

In judgements of courts and in other communications there is a very liberal use of the phrase "unqualified" costs consultants. I would prefer not to use that term. It sounds pejorative. We should however, talk about disqualified lawyers, unqualified practise, costs lawyers and costs consultants. There is a distinct difference between these particular phrases which I also intend to discuss in this paper.

I referred before to some obvious hostility between some costs lawyers and some costs consultants. In my role as Commissioner I would prefer to ease any tension felt between those two groups and, along with the Law Institute, encourage transparency and proper management of a very valuable and important service.

I was a personal injuries practitioner for 23 years at Holding Redlich. I always relied heavily on employed costs clerks and contracted costs consultants to assist me. I saw costing as a burdensome task that inevitably arose in busy litigation practices like mine. I must also admit that I was not in the habit of checking the CVs of my contracted costs consultants to determine whether or not they carried a practising certificate. In fact, I almost always assumed they did not. I was aware that some costs consultants I retained had previously been solicitors and preferred the world of costs consulting. The *Mietto* judgement does raise many new issues for consideration. They should be discussed.

Mietto v. G4S Custodial Services

This case was effectively a dispute over $376 and whether that sum should be allowed for an appearance by a costs consultant who did not carry a practising certificate but who was retained to appear before a Taxing Registrar in the County Court. Leave to appear was sought and granted. The question for the Costs Court was whether allowing a fee in this situation encouraged the activity of unqualified practice. Unqualified practice refers to persons engaging in legal practice who are not qualified to do so in this jurisdiction.

Associate Justice Wood concluded that the granting of leave to appear does not automatically entitle the costs consultant, nor the solicitor retaining them, to scale costs for that appearance. The judge analysed the County Court scale and noted that it is preserved for fees for counsel and practitioners, that is: barristers and solicitors. His Honour also referred to allowances for solicitors or the supervised clerk of a solicitor. He discussed the process of seeking leave and discussed the role of the lawyers' clerk in comparison to the contracted costs consultant. The conclusion of the judge was that a mini-industry has developed in Victoria around costs consulting which he described as unregulated and confusing. The essence of the discussion for us should focus on the concept of unqualified practice.

Victorian Law on unqualified practice

The law defines legal services as ordinary work done in a legal practice. His Honour, Associate Justice Wood in *Mietto,* suggested that a number of the activities of a costs consultant fall under the definition of legal services in legal practice, namely: negotiating, advising, interpreting orders, drafting objections, scrutinising legislation, preparing and making arguments. I am not so sure that the function performed by costs consultants neatly fits into the definition of ordinary work done in a legal practice. Part of the work of a costs consultant involves perusing the work done as recorded by the solicitor and applying it to the scale or other applicable fees arrangement. This is probably why accountants and bookkeepers are so good in the costs consulting field because much of their work involves accounting, listing, ordering, compiling, and calculating.

On unqualified practice, the Victorian law says you must not engage in legal practice unless you are an Australian legal practitioner – meaning a person who holds a current practising certificate. The penalty for doing so is two years gaol. The law specifically excludes lay persons who are authorised by law or who get leave from a court. There is a ban on any lawyer assisting a person to practise unqualified. There is also a ban on falsely holding out or advertising another's entitlement to practise while unqualified. A person who is paid fees for unqualified practice can be sued for a debt.

The *Mietto* judgement is not authority for suggesting that a costs consultant without a practising certificate is carrying on the activity of unqualified practice. The Court did point out however, that the language of advertising, branding, communication, and service proposals must meticulously eliminate any potential for confusion about what services are being offered. If a person does not have a practising certificate they cannot offer legal services. Nor can they imply that they offer legal services.

Common Law on Solicitors' clerks

A large part of the *Mietto* judgement analyses the concepts and rules around the role of a solicitor's clerk. A costs lawyer is not a law clerk. A clerk is an employed person under supervision but is also not an independent contractor. The Court's scale recognises clerks' roles in courts because it preserves a fee for clerks at callovers. The scale doesn't recognise appearances in trials or final hearings by clerks and it has been the practice of the Supreme Court of Victoria to disallow clerks' fees at final hearings in costs taxations.

Legal Services Board's compliance policy

The Legal Services Board maintains a compliance and enforcement policy that adopts a low-level enforcement approach to issues affecting the legal community if no prior warning has been provided to a legal practitioner. Low-level enforcement involves education, information, and warnings. It is this policy that is influencing me to approach the issues raised by *Mietto* in a similar light: not by raising alarm, but by alerting members of the costs consulting community and consumers of legal and costing services to the relevant issues. This includes warning people who are on the edge of attracting unqualified practice action.

Other jurisdictions

I understand that some of the issues raised by *Mietto* may not replicate themselves in other jurisdictions. His Honour Associate Justice Wood commented that all costing consultants in South Australia, Western Australia, Queensland and Tasmania are lawyers with practising certificates. The judge did note that the Queensland law bans lay persons charging for appearances. He also noted that the United Kingdom separately regulates costs consultants and positively recognised that Victoria now has recently embarked on an accreditation system for costs lawyers.

***Mietto* issues for consultants**

Costs consultants without practising certificates are now at risk of being unfairly accused of unqualified practice. It is up to this community of costs consultants, those with and without legal practising certificates, to take a measured view about resorting to such accusations. On the other hand costs consultants must manage their branding, communications, and service offerings. Solicitors retaining costs consultants can't always charge for some of the work done by costs consultants. For example, the other party doesn't pay some of these contracted services if they are not listed under the Court's scale. The *Mietto* judgement also speculated that there may be a waiver of privilege by a consumer of legal services if confidential legal material is provided to a person who does not have a practising certificate. I am genuinely unsure about whether that waiver occurs. It will require further research and analysis.

Another concern expressed by Associate Justice Wood in *Mietto* is the importance of the costs consultant carrying professional indemnity insurance. Such insurance is compulsory for a costs lawyer. Indemnity insurance is certainly good business practice for a costs consultant but I'm not aware that it is compulsory. It may be compulsory for those who are members of other professional organisations like the Institute of Legal Executives (Victoria). It should be noted that this and similar associations also impose ethical obligations on their members that are not unlike lawyers' ethical constraints. If a costs consultant is disqualified from being a lawyer then this fact must be disclosed to the person retaining their services.

Disqualified lawyers as cost consultants

To be disqualified you have either been removed from the roll of practitioners, your license has been suspended or your application for renewal has been refused. In Victoria, it is a crime to associate in business with lawyers without disclosing your disqualification. In this sense, associate means exchange of fees in business. It is also a disciplinary offence for a lawyer to associate with any disqualified lawyer. It is this area that lends itself to stern warnings from the courts and the regulator about the dangers of working alongside disqualified lawyers. I reiterate however, an unqualified person without a practising certificate is not a disqualified lawyer.

Mietto issues for lawyers

I would like to suggest that it is sensible in all of your communications as a lawyer that you alert your clients to the fact that some persons in your employ and under your supervision, like clerks, are not lawyers and therefore cannot provide legal advice and services. As Commissioner I often deal with complaints about lawyers failing to clearly explain the role played by support staff who are not lawyers. It is incumbent upon legal practitioners not to allow the public or their clients to believe that legal services come from employed clerks. Solicitors should check if their consultant is a disqualified lawyer. That applies to consultants in a costing field or any other field. It is expected that lawyers will supervise their employed costing clerks. In the absence of supervision or adequate supervision the employed costing clerk becomes an unregulated risk that could attract allegations of an unqualified practice or disciplinary proceedings against their employer. It is also clear from the comments of Associate Justice Wood that a supervised employed costing clerk would not be the suitable choice for a final hearing on taxation. Solicitors should be aware of this.

Mietto issues for consumers

Consumers would need to be aware whether they are paying for legal services or costing services. It is important that they ask about insurance cover. They can always assume that a licensed practitioner has insurance and that a contracted consultant may not. Although privilege would not be well understood within the general community the findings in *Mietto* suggest that a consumer may risk losing legal professional privilege where their confidential legal material is released to a person who does not carry a practising certificate. Another salient point raised by *Mietto* is that a consultant appearing in court is not bound by undertakings, time wasting rules, and bans on untenable arguments, as legal practitioners are. This is an actual risk, but I would see it as a manageable risk that starts with the need for a number of protocols and understandings being developed by the costs consulting community as a whole. The consumer would also need to be made aware of the possibility that a costs consultant may be unable to appear at a final hearing. Further, some of the unrecoverable costs of the contracted consultant will either have to be absorbed by the law firm or paid as a solicitor and client cost by the consumer of the legal services. The consumer would also need to be aware that the Commissioner does not regulate the ordinary conduct of costs consultants and therefore cannot investigate misconduct allegations against them.

Mietto – Future Actions

Through *Mietto* the Supreme Court of Victoria has called for action being taken by the Commissioner or the Law Institute of Victoria. The Court has also called for the regulation of costs consultants through legislation. I don't know whether we are at the stage of separately regulating costs consultants as was done for the conveyancing community some years ago. That is a matter for parliament. I also do not know what the new Victorian Government thinks about regulating costs consultants. Even if regulation is seen as a last resort for another time then the issues raised by this judgement convince me that self-regulation, collaboration over the establishment of agreed protocols together with wide discussion and communication about this subject are absolutely necessary.