



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 5

GOODS AND SERVICES TAX

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The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 ([LPUL Schedule 4 clause 18](#)).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 ([LPULAR clause 59](#)).

5.1 INTRODUCTION

Costs and disbursements are generally liable to GST from and after 1 July 2000.

Practitioners must satisfy themselves as to the correct legal position on GST and are advised to obtain further information, including rulings and practice statements by the Australian Taxation Office (ATO).

For ease of reference, this chapter includes a summary (5.2) and additional information as follows.

5.2 SUMMARY

Damages: Party/party costs are part of the damages claim.

Supply: Damages do not constitute a supply.

Consideration: Payment of damages (including party/party costs) does not constitute consideration for a supply.

Tax invoice: As party/party costs are not a taxable supply, it is incorrect for the successful party or the law practice instructed by the successful party to issue a tax invoice to the unsuccessful party or the unsuccessful party's law practice.

Input tax credit: As there is no taxable supply, payment of party/party costs does not give rise to an entitlement to an input credit for the benefit of the paying party.

Reimbursement: Party/party costs are merely a reimbursement. However, as part of this the successful party may seek reimbursement for any GST paid on the successful party's legal fees (if they are not entitled to an input tax credit).

A successful party registered for GST claims a GST exclusive amount for party/party costs: This is because they are entitled to an input tax credit and accordingly already have reimbursement for the GST they have paid to their instructed law practice.

A successful party unregistered for GST claims a GST inclusive amount for party/party costs: As they are not able to claim any input tax credit, they claim a GST inclusive cost (the actual expense borne by the party) from the unsuccessful party.

Workers compensation: This is subject to the general principles outlined above.

Apportionment: Where party/party costs and other damages are rolled up into a settlement/judgment with supplies, there must be apportionment between the same on a reasonable basis to determine the correct GST liability. This is because GST is payable on taxable supplies, provided certain conditions are met, whereas no GST is payable on damages, as there is no supply and no consideration.

5.3 LAW PRACTICE AND OWN CLIENT

5.3.1 DISCLOSURE AND COSTS AGREEMENTS

Rates, charges and other costs disclosed by a law practice:

- to a business may be stated on either a GST exclusive or GST inclusive basis, provided it is clear whether or not GST is to be added to the price; or
- to a consumer must be clearly stated on a GST inclusive basis.

It is recommended that:

- where individual rates, charges, expenses or disbursements are GST exclusive, it must be clearly stated that GST of currently 10 per cent will be added and any total should be a GST inclusive amount
- where a single price is quoted, it must be a GST inclusive amount
- where an estimate is based on GST exclusive rates, it must set out the GST exclusive component, and the GST component with the total GST inclusive costs (taking into account disbursements that are GST free, such as stamp duty).

5.3.2 TAX INVOICES

For tax invoices and bills/itemisation of costs, itemised charges and subtotals can all be GST exclusive; however, the GST component must be clearly shown and the final total must be a GST inclusive sum (that is, the GST exclusive subtotal plus 10 per cent GST on the costs that are subject to GST).

5.4 DISBURSEMENTS

Generally, disbursements that fall within the definition of “taxable supply” and are paid by the law practice on behalf of the client are subject to the same GST rules. However, some payments have been exempted from the application of GST; for example, court filing fees. A comprehensive list of these payments is found in [A New Tax System \(Goods and Services Tax\) \(Exempt Taxes, Fees and Charges\) Determination 2011 \(No. 1\)](#) issued by the Minister for Revenue and Assistant Treasurer.

5.5 APPLICATIONS FOR ASSESSMENT OF LAW PRACTICE/CLIENT COSTS

[Section 200\(3\)](#) of the LPUL provides that GST payable for legal services is to be taken into account in determining legal costs that are payable in relation to the provision of those services. Refer also to the decision in *Boyce v McIntyre* (2009) [NSWCA 185](#) (20 July 2009).

5.6 PARTY/PARTY COSTS

Goods and Services Tax Ruling (GSTR) [2001/4](#) (GST consequences of court orders and out-of-court settlements) addresses the issues that arise in relation to GST and party/party costs.

The primary rule on GST is that GST can be recovered by a successful party (that is, a party that has the benefit of a costs order) from an opposing party if the successful party is not registered for GST (and therefore could not recover GST from the ATO as an input tax credit).

[Section 70 of the LPULAA](#) states that on making a determination of costs, a costs assessor is to include any GST component (that the assessor determines is payable) in the certificate that sets out the determination.

For federal matters, a practice statement was issued in November 2008 by the ATO – [PS LA 2009/9](#) – dealing with the GST implications in the recovery of legal costs where those costs are calculated by reference to a scale of costs. This applies to costs in federal jurisdictions (where the scale of costs is GST inclusive). The practice statement states that the input tax credit (GST credit) entitlement of the party being reimbursed should not be taken into account when determining the costs payable.

The practice statement is not a public ruling, but a practice direction to ATO staff that must be applied whenever the ATO is required to pay legal costs (for example, where costs are awarded against the ATO in litigation). Nonetheless, the issues raised in the practice statement will also be relevant for parties recovering or paying legal costs.

5.7 PRO BONO WORK

Pro bono work may be done for no fee, for a small contribution, or at a reduced fee. There is no GST in the first case since there is no consideration. If the law practice includes a notional charge in the accounts or treats the work done as a donation by the law practice, the supply still does not attract GST. However, where the client pays a contribution towards the pro bono work, or pays at a substantially reduced rate of fees, then the GST will be payable on that amount. The practitioner’s cost agreement should clearly indicate whether the client is liable for the GST, and if so, the bill should indicate the amount of GST payable. As pro bono work is done in the course or furtherance of the enterprise, the law practice will still be able to claim input tax credits on acquisitions/importations used to provide the pro bono service.

5.8 GST AND LEASES

The law practice of the lessor issues the tax invoice to the lessor for payment of the legal services, including or excluding GST. The lessor will have to recoup the expenses from the lessee as part of the lessor’s expenses under the contract.

5.9 GST AND MORTGAGES

Similar principles regarding the GST treatment of leases apply to mortgages.

5.10 GST ON FIXED COSTS

[Clause 27](#) of the [LPULAR](#) provides that a cost fixed by this part may be increased (by up to 10 per cent) for the amount payable for GST.

These costs include costs of enforcement of a lump sum debt or liquidated damages, enforcement of a judgment, workers compensation matters, and obtaining a grant of probate or letters of administration (see [LPULAR](#), clauses [24](#), [25](#) and [26](#)).

5.11 RULINGS AND DETERMINATIONS

The following determinations, advice and practice statements may also be of assistance to practitioners:

- a. Goods and Services Tax Determination (GSTD) [2000/3](#) Goods and Services Tax: transitional arrangements: to what extent is the supply of services made on or after 1 July 2000, where the supply spans that date?
- b. GSTR [2000/37](#) regarding disbursements
- c. GSTD [2003/1](#) Goods and Services Tax: Is the payment of judgment interest consideration for a supply?
- d. Goods and Services Tax Advice (GSTA) [TPP 042](#): Goods and services tax: Is a payment to a lawyer by a client to reimburse the lawyer for a payment of a tax, fee, or charge (tax) that is excluded from the GST by a determination of the Treasurer consideration for a taxable supply by the lawyer if the lawyer paid the tax in their own right?
- e. GSTA [TPP 043](#): Goods and services tax: Is a client's reimbursement to a lawyer for a payment of a tax, fee, or charge (tax) that is not subject to GST consideration for a taxable supply by the lawyer if the lawyer paid the tax as an agent for the client?
- f. PS LA [2009/9](#): Goods and services tax, regarding the recovery of legal costs.

5.12 GENERAL ROLE OF LOCAL REGULATORY AUTHORITY IN COSTS DISPUTES

[Section 291](#) of the LPUL allows for the NSW Commissioner to deal with a costs dispute in the same manner as other consumer matters if:

- a. the total bill for legal costs is less than \$100,000 (indexed) payable in respect of any one matter; or
- b. the total bill for legal costs equals or is more than \$100,000 (indexed) payable in respect of any one matter, but the total amount in dispute is less than \$10,000 (indexed).

[Section 294](#) of the LPUL provides that the amounts payable by way of GST in respect of legal costs are to be disregarded when determining the total bill or amount as referred to in [LPUL](#), sections [291](#), [292](#) or [293](#).

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