# *PS LA 2008/16 (Withdrawn) - The GST implications in the recovery of legal costs (professional fees and disbursements) awarded by courts or settled by agreement between the parties*

This cover sheet is provided for information only. It does not form part of *PS LA 2008/16 (Withdrawn) - The GST implications in the recovery of legal costs (professional fees and disbursements) awarded by courts or settled by agreement between the parties*

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9

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Australian Government
Australian Taxation Office

# Practice Statement Law Administration

**PS LA 2008/16**

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.

**FOI status: may be released**

*This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax Office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax Office staff must follow their business line's escalation process.*

**SUBJECT:** **The GST implications in the recovery of legal costs (professional fees and disbursements) awarded by courts or settled by agreement between the parties.**

**PURPOSE:** **To ensure Tax Office staff:**

**(1)** **are aware of the GST implications in the recovery of legal costs, and**

**(2)** **correctly determine if GST is to be included when making a payment of legal costs or formulating a schedule of legal costs to receive payment under a court order or out-of-court settlement by agreement between the parties.**

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## SCOPE

1. This practice statement is concerned with the GST implications in the recovery of legal costs in civil matters.
2. This practice statement should be read in conjunction with PS LA 2007/1 on costs awarded by the courts.

## BACKGROUND

3. This practice statement replaces Law Administration Practice Statement PS LA 2005/11.

## STATEMENT

4. When making a payment of legal costs, or formulating a schedule of legal costs to receive payment, either as a result of a court order or an out-of-court settlement by agreement that includes a provision for the payment of legal costs, Tax Office staff must:
   - consider any entitlement to an input tax credit of the parties to the original supply of legal services
   - apply the legislation, court rules and case law in each jurisdiction to determine the amounts to be paid, and

- consider any jurisdictional differences in court rules regarding the assessment and determination of legal costs and whether or not an entitlement to an input tax credit is to be taken into account when making payment of legal costs.

**Standard or party/party basis in respect of professional fees**

5. Most court rules for standard or party/party costs will provide a fixed scale of costs to determine the amounts to be paid for professional fees.

6. The amounts to be paid in legal costs on a standard or party/party basis in respect of professional fees should be determined as follows:

   (a) In jurisdictions other than in the Supreme and District Court of South Australia and in the State Courts of New South Wales[1] the amounts for professional fees are determined by application of a fixed scale of costs in the court rules and these amounts cannot be reduced to take into account a party's entitlement to an input tax credit for the GST component of the expense.[2] Accordingly, the amounts to be paid are GST-inclusive.

   (b) In the Supreme and District Court of South Australia the amounts for professional fees in the fixed scale of costs in the court rules provide that a party's entitlement to an input tax credit is to be taken into account to determine the amounts to be claimed in a schedule of costs. Accordingly, the amounts to be paid are:

      - GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
      - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
      - GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

   (c) In the State Courts of New South Wales the court rules do not prescribe a fixed scale of costs except in limited circumstances. The amounts to be paid in respect of professional fees are determined on a 'fair and reasonable' basis by applying the *Legal Professions Act 2004*.

**Solicitor and client basis or indemnity basis in respect of professional fees**

7. Most court rules for solicitor and client basis or indemnity costs provide a taxing officer (of the court) with a wide discretion to allow costs that are reasonable. If no amounts for professional fees are prescribed by a fixed scale of costs in the court rules for solicitor and client or indemnity costs, the receiving party's entitlement to an input tax credit should be taken into account in ascertaining what is reasonable to determine the amount of professional fees to be paid.

[1] In limited cases a fixed scale of costs will apply.

[2] *Merringtons Pty Ltd v. Luxottica Retail Australia Pty Ltd* [2006] VSC unreported (per Wood M) (*Merringtons*); *Hennessey Glass and Aluminium Pty Ltd v. Watpac Australia Pty Ltd* [2007] QDC 057 per McGill DCJ (*Hennessey Glass*) have held that the amounts for professional fees on a fixed scale of costs in the court rules cannot be reduced to take account of a party's entitlement to an input tax credit.

8. The amounts to be paid in legal costs on a solicitor and client basis or indemnity basis in respect of professional fees should be determined as follows in all jurisdictions:

- GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
- GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
- GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

### *Disbursements*

9. Disbursements are discrete items of expenditure that can be fully recovered from the other party. If no amounts for disbursements are prescribed by a fixed scale of costs in the court rules, the receiving party's entitlement to an input tax credit should be taken into account to determine the amount of disbursements to be paid.

10. The amounts to be paid in legal costs for disbursements that are not fixed by a scale of costs should be determined as follows in all jurisdictions:

- GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
- GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
- GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

### *Out of court settlement of legal costs by agreement*

11. Legal costs negotiated by agreement between the parties should be the amount that the receiving party would be entitled to by reference to the court rules, legislation, any court orders and case law. The GST treatments for professional fees and disbursements provided above should apply.

### *Who does this practice statement apply to in the Tax Office?*

12. There are various areas in the Tax Office that may have direct involvement in dealing with legal costs, including:

- Legal Services Branch
- business line litigation liaison officers
- business line officers involved in negotiating settlement of disputes
- debt, and
- in-house prosecutions.

13. There are also areas of the Tax Office that provide advice in litigation and settlement matters, such as:

- Tax Counsel Network
- business line technical advisors; and
- Centres of Expertise.

14. All staff in the above areas should be aware of and understand this policy and these procedures. Where other Tax Office employees encounter legal costs payment issues, they must contact the Legal Services Branch in their respective region for advice on the application of the Tax Office policy.

**Where the Australian Government Solicitor or some other external legal service provider is engaged**

15. Where the Australian Government Solicitor (AGS) or some other external legal service provider has acted on the Tax Office's behalf in a matter, the AGS or other external legal service provider will deal with the legal costs and discuss any issues that may arise with the Legal Services Branch case officer. It is important in this arrangement that instructions to the AGS or other external legal service provider clearly specify the correct position of the GST law with respect to legal costs and the policy of the Tax Office in respect of the GST implications on the recovery of legal costs.

**The Tax Office must be the 'model taxpayer' and 'model litigant'**

16. The Tax Office, as the administrator of the Commonwealth taxation laws, must act in accordance with the Taxpayers' Charter and the model litigant obligation and must be seen to be fully compliant with all aspects of taxation law.

17. Section 47 of the *Financial Management and Accountability Act 1997* (FMA Act) creates an obligation on chief executives to actively pursue debts. The Tax Office must also act as a 'model litigant' in accordance with the Legal Services Directions 2005 of the Attorney-General, Department of the Commonwealth. Appendix B Note 5 of the Directions explains that the Commonwealth's obligation to act as a model litigant 'does not prevent it from enforcing costs orders or seeking to recover its costs'.

18. To overclaim or overpay legal costs through the misapplication of the GST law or any other processes would adversely affect the integrity and public confidence of the Tax Office's administration of taxation laws. It would also be contrary to the FMA Act. It is therefore imperative that the Tax Office correctly applies the law, court rules and GST laws to legal costs that consist of proper calculations for payment and recovery, either by court order or settled by agreement between the parties.

19. The Tax Office as either a receiving or reimbursing party of legal costs will apply the same practice as described in this statement. This is in circumstances that the Tax Office is entitled to an input tax credit for the GST amounts that are creditable acquisitions.

## EXPLANATION

20. This practice statement deals with the GST implications on the recovery of legal costs awarded by the court or settled by agreement between the parties and how to properly account for the GST amounts to be paid.

### Legal costs and the GST consequences

21. Legal costs are the costs for professional work and disbursements in relation to legal work or litigation.[3] These include fees, charges, expenses, disbursements and remuneration for work done by a person in the capacity of a barrister or solicitor. Disbursements are those payments that have been made in pursuance of the professional duty undertaken by the solicitor, which he or she is bound to perform, or which has been sanctioned as professional payments by the general practice and custom of the profession.[4]

22. A legal practitioner of a party in a legal dispute will incur legal fees and disbursements in the conduct of legal work or litigation for his or her client. The client will pay such expenses based on a costs agreement (or the equivalent) between the client and his or her legal practitioner. This is called solicitor and own client costs (and not to be confused with a costs assessment on a solicitor and client basis). Most legal services are 'taxable supplies'[5] for which the legal practitioner as the supplier is liable to remit GST.[6] Whether a legal service is a taxable, input taxed or GST-free supply will vary according to the application of the GST law. Further, the application of the GST will vary on the capacity in which the legal practitioner incurred the expenses on behalf of the client as agent for the client or as principal in providing a legal service to the client.[7]

23. If a client is registered for GST, to the extent that legal services are acquired for a creditable purpose the client will be entitled to an input tax credit.[8] The client will be entitled to an input tax credit equal to the GST payable to the legal practitioner as the supplier of the taxable supply.[9] This would not be the case for a client who is not registered for GST or does not acquire the legal services for a creditable purpose.

24. If the Tax Office is party to a legal dispute and is supplied with a legal service, such as the service of a barrister performing the counsel function, the barrister is required to provide the Tax Office with a tax invoice and include GST in the fee to be paid. The Tax Office is entitled to claim an input tax credit for the GST component charged by the barrister.

25. The following are legal fees and disbursements recovered as legal costs from the other side and the GST consequences on the original supply to the client:

[3] *Burford v. Allan*, Unreported, Full Court, 26 May 1998, Judgment no S 6693; *Cachia v. Hanes* [1994] 179 CLR 403.
[4] *Re Remnant* (1849) 11 Beav 603; 50 ER 949.
[5] Section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
[6] Sections 7-1 and 9-40 of the GST Act.
[7] GSTR 2000/37
[8] Section 11-15 of the GST Act.
[9] Section 11-20 and 11-25 of the GST Act.

| Legal Fees | Disbursement | Application of GST |
|---|---|---|
| Professional fees (or solicitor fees) | | GST applies |
| Barristers fees (or counsel fees) (if engaged by client) | Barrister fees (or counsel fees) (if engaged by solicitor) | GST applies |
| | Expert witness fees | GST applies if the supplier of the expert witness service is registered or is required to be registered for GST |
| | Fees for expert reports or attendance in court | GST applies[10] |
| | Legal administration fees (copying, courier, postage, etc) | GST applies |
| | Court-filing fees | No GST applies[11] |
| | Fees for recording of court proceedings and fees to obtain court transcript | GST applies |
| | Search fees (that is, Land Titles Office, Australian Securities and Investment Commission (ASIC) and Insolvency and Trustee Services of Australia (ITSA) searches) | GST applies[12] |
| | Advertising fees | GST applies |
| | Service of document fees | GST applies |
| | Travel and Accommodation | GST applies |

### *The recovery of legal costs*

26. The reimbursement of legal costs by one party to another party under a court order for legal costs or an out-of-court settlement by agreement that includes a provision for the payment of legal costs is not consideration for a separate supply.[13] While no GST applies to the payment of legal costs from one party to another party, there will be amounts of GST to be recovered by one party from the other party for the legal fees and disbursements with respect to original taxable supplies.

[10] If an overseas expert is solely engaged to prepare a report in his or her home jurisdiction and is not required to attend court, GST may not apply as to be a taxable supply the supply must be connected with Australia and otherwise meet section 9-5 of the GST Act. However, should the reverse charge provisions in Division 84 of the GST Act apply, GST will apply.

[11] In some instances, GST may apply to the reimbursement by the client of this expense. If the expense is incurred by the solicitor as principal for the client and as part of providing a legal service to the client, GST is payable. If the expense is incurred by the solicitor as agent for the client, no GST is payable.

[12] GST applies only if the searches are outsourced (that is conducted by a solicitor as principal and not agent) or conducted through an intermediary entity such as Australian Business Research Pty Ltd (ABR) or CITEC. If searches are performed directly with ASIC, ITSA or Land Titles Office, there will generally be no GST payable.

[13] See paragraph 148 of GSTR 2001/4.

27. Courts have statutory power to make an award of legal costs of one party to be paid by the other party. This usually follows the finalisation of a legal dispute and the unsuccessful party is ordered to pay the successful party's costs. Costs orders may be made during legal proceedings. On the application of a party, the court will make orders for one party to pay the other party's costs on what is usually a standard or party/party basis. Parties may apply to the courts for costs on a more generous basis, that is, on a solicitor and client basis or indemnity basis. If parties are unable to reach agreement on the quantum of legal costs to be paid pursuant to a court order, the court rules provide for a process to assess costs and adjudication on cost by way of taxation by the court. The party with a costs order against them will be liable to pay the legal costs of the other party and the party entitled to costs may take action pursuant to the order to recover legal costs through the process of taxation by the court. In some cases, during the proceedings or at the finalisation of a proceeding the court may fix an amount to be paid for legal costs by one party to the other party. This will depend on the court rules and nature of the matter.

28. In addition, parties may between themselves agree to make out-of-court settlements that include a provision for the payment of legal costs by one party to another and the amount to be paid. Based on this agreement, one party is liable to pay the costs of the other party. In such circumstances, parties will usually assess costs on a party/party basis and determine the amounts to be reimbursed for legal costs by applying the relevant court rules and legislation. If parties are unable to reach agreement on legal costs to be paid, then they may pursue recovery in the courts for these amounts based on the agreement to pay the legal costs.

29. The court rules and legislation in each jurisdiction provide for how legal costs are to be assessed and the items and amounts allowed to be recovered. The court rules will provide the basis for the assessment of costs.[14] In most cases an assessment of a party's costs will be on a party/party basis. These are costs necessary for the attainment of justice or for enforcing or defending the rights of the party. The court rules generally also provide for legal costs on a more generous basis and these are known as solicitor and client basis or indemnity basis.

30. Solicitor and client costs are the costs payable by the client to the solicitor on an assessment between them. This is not the same as solicitor and (own client) costs[15] as mentioned above and pursuant to a costs agreement (or equivalent) between a solicitor and his or her client. Indemnity costs are all costs incurred by a party to litigation in undertaking proceedings, provided they have not been unreasonably incurred and not of an unreasonable amount.

31. The items and amounts allowed for costs to be recovered are determined by application of a fixed scale of costs in the court rules.[16] The scale of costs in the court rules will prescribe the items and amounts that are to be reimbursed for legal fees and disbursements incurred by a party in legal work or the conduct of litigation. The table in the Attachment shows the relevant legislation and court rules in each jurisdiction to assess costs and reference to a scale of costs to determine items and amounts to be paid.

[14] Refer to PS LA 2007/1 for a definition of the assessment of costs on a standard or party/party basis, solicitor and client basis or indemnity basis.

[15] The terms 'solicitor and own client costs' and 'indemnity costs' are sometimes used interchangeably, however, care needs to be exercised as some court rules contemplate that these terms have different meanings. See PS LA 2007/1 for further details.

[16] A fixed scale of costs will apply in limited cases in the State Court of New South Wales.

### *Indemnity principle and recovery of the GST amount as an expense*

32. At common law, the primary purpose of an order for legal costs is to provide an indemnity to the successful party for their costs incurred in the conduct of litigation. This is known as the indemnity principle. The indemnity is for the out-of-pocket expenses incurred by a party and that they are required to pay at law. It is only intended to be a partial indemnity for the loss suffered by a party in the conduct of litigation and to compensate a party to the extent provided in the court rules, which limits the items and amount to be recovered.[17]

33. There are connected GST implications on the amounts for legal fees and disbursements as they relate to the original supply between a client and his or her legal practitioner (solicitor and (own client) costs) and the later recovery of those amounts by the client as a party from the other party as legal costs.

34. A party entitled to recover costs under a court order or settled by agreement between the parties is generally entitled to recover the amount referable to the GST paid on the legal fees and disbursements.[18] The GST component is an out-of-pocket expense incurred in legal work and the conduct of litigation by a party and recoverable from the other party. However, a party registered for GST and entitled to an input tax credit for the GST component on the original supply of the legal fees and disbursements would not be out-of-pocket for the GST component of the expense.[19]

35. Recent cases on the recovery of legal costs and the GST component have held that the amounts for professional fees as fixed by a scale of costs cannot be reduced to take into account a party's registration for GST and entitlement to an input tax credit for the GST component of the expense.[20] This is because there is no general discretion in the court rules for taxing officers (of the court) to allow less than the scale amounts except in instances that there is a power to do so.

### Taking into account the GST implications on the recovery of legal costs

36. Given the above, Tax Office staff in making a payment for legal costs, or formulating a schedule for legal costs to receive payment for legal costs, either as a result of a court order for legal costs or an out-of-court settlement by agreement that includes a provision for the payment of legal costs, must:

- consider any entitlement to an input tax credit of the parties to the original supply of the legal service
- apply the legislation, court rules and prevailing authority in each jurisdiction to determine the correct amounts to be paid, and
- consider any jurisdictional differences in court rules regarding the assessment and determination of legal costs and whether or not an input tax credit is to be taken into account.

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[17] *Oshlack v. Richmond River Council* (1998) 193 CLR 72 at 97; *Cachia v. Hanes* [1994] 179 CLR 403 at 410-411.

[18] *Re Treneski* (2004) 80 ALD 760; *Re Keen* (2005) 89 ALD 595; *Keen v. Telstra Corporation Ltd* [2006] FCA 834; *Thornton v. Apollo Nominees Pty Ltd* 2005 ATC 4480; 59 ATR 244.

[19] This is provided that the goods or services for which GST is payable is a creditable acquisition for a creditable purpose: see sections 7-1, 11-20 and 11-25 of the GST Act.

[20] *Merringtons* and *Hennessy Glass*.

***Assessment of costs on a standard or party/party basis and GST amounts to be paid for professional fees***

37. Recent cases in Victoria and Queensland dealt with costs assessments on a party/party basis, and in these cases, the amounts allowed for fees are fixed by a scale of costs in the court rules.[21] The position is similar in the Federal Court and Federal Magistrates Court of Australia and it has been held that a taxing officer (of the court) cannot reduce the amounts for fees as fixed by the scale of costs in the court rules.[22] These authorities would equally apply to the jurisdictions of Tasmania, Western Australia, Northern Territory and Australian Capital Territory that provide for an assessment of costs on a standard or party/party basis by reference to a fixed scale of costs in the relevant court rules for the amounts for fees allowed.

38. In South Australia, the scale of costs for the Supreme and District Court provide that a party's entitlement to an input tax credit is to be taken into account to determine the fee to be paid. In the State Court of New South Wales, the court rules do not prescribe a fixed scale of costs, except in limited cases as detailed in the court rules.

39. The table in the Attachment on the relevant legislation and court rules in each jurisdiction provide the section and rules to assess costs and determine items and amounts to be paid.

40. In jurisdictions that assess costs on a standard or party/party basis by using a scale of costs, a party's entitlement to claim an input tax credit for the GST amount of the professional fees ought not to be taken into account in the amounts to be paid. The amount for professional fees is the amount as prescribed by the scale of costs in the court rules (or referred to there in) and no reduction can be made to the amount for the GST component of the fee that a receiving party is entitled to an input tax credit. Most scale of costs in the court rules were adjusted to include an amount for GST and increased by 9.5% in 2000.[23] Accordingly, the amounts paid for professional fees in most jurisdictions on a standard or party/party basis should be the GST-inclusive amounts.

41. In the Supreme and District Court of South Australia, the scale of costs in the court rules for professional fees provide that the GST amount is to be added to the scale amounts except if the receiving party is able to recover the GST amount as an input tax credit. A receiving party's registration for GST and entitlement to an input tax credit is taken into account and the amounts paid for professional fees on a standard or party/party basis should be:

    - GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
    - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
    - GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

[21] *Merringtons* and *Hennessy Glass*.
[22] In *Re: Fat Sel Pty Limited and Brambles Holdings Limited* (1958) 2 FCR 440; 61 ALR 536.
[23] This is the case for State Supreme and Federal court scales and refer to: Quick on Costs at [4.11]; *Re Tresneski* (2004) 80 ALD 760 and *Re Keen* (2005) 89 ALD 595).

42. In the State Courts of New South Wales, the amount for professional fees is determined by applying the *Legal Professions Act 2004* (NSW) as the rules of court do not prescribe a fixed scale of costs. Costs are to be assessed on a party/party basis and amounts will be appropriate when they are fair and reasonable costs as assessed in accordance with the *Legal Professions Act 2004* (NSW). In determining what is 'fair and reasonable' in the amounts allowed and applying the indemnity principle, the receiving party's entitlement to an input tax credit ought to be taken into account to reduce the amount as they would not be out-of-pocket for the GST amount in the fee. The amounts to be paid for professional fees on a standard or party/party basis should be:

- GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
- GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
- GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

43. However, in limited cases in the State Courts of New South Wales a scale of costs is prescribed in the court rules for professional fees and the practice as described above should apply. That is, the amounts as prescribed by the fixed scale of costs and a party's entitlement to an input tax credit ought not to be taken into account. In these limited cases, as detailed in the court rules, the amounts to be paid for professional fees in the State Court of New South Wales on the standard or party/party basis should be the GST-inclusive amounts.

***Assessment of costs on a solicitor and client basis or indemnity basis and GST amounts to be paid for professional fees***

44. Recent cases provide that an assessment of costs on a solicitor and client basis or indemnity basis is different.[24] Most court rules provide a taxing officer (of the court) with a wide discretion to allow costs that are reasonable. In such cases, in determining what is 'reasonable' in the amount allowed and applying the indemnity principle, the receiving party's entitlement to an input tax credit ought to be taken into account to reduce the amount as they would not be out-of-pocket for the GST amount. Further, if no amounts for professional fees are prescribed by a fixed scale of costs in the court rules for costs on a solicitor and client basis or indemnity basis, the receiving party's entitlement to an input tax credit ought to be taken into account, and the amounts to be paid for professional fees on a solicitor and client or indemnity basis should be:

- GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
- GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
- GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

[24] *Merringtons* and *Hennessy Glass*.

### *GST amounts to be paid for disbursements*

45. Recent cases treat the GST amount for disbursements differently and apply the indemnity principle to take into account a receiving party registration for GST and entitlement to an input tax credit for the GST amount of the expense.[25] This is because each disbursement is a discrete item of expenditure which is fully recovered from the other party.

46. In circumstances where there are no fixed amounts provided for disbursements in the court rules and disbursements are allowable to the extent that they are properly and reasonably incurred in legal work or litigation and paid, in all jurisdictions the amounts for disbursements should be:

- GST-exclusive, in all circumstances that the receiving party is entitled to an input tax credit
- GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
- GST-inclusive, in all circumstances that the receiving party is not entitled to an input tax credit.

47. In circumstances where there is a fixed amount for disbursements in the scale of costs in the court rules, then the amount as fixed by the scale must be paid as there is unlikely to be any discretion by a taxing officer (of the court) to reduce the amount to take account of an entitlement to an input tax credit. This is similar to the fixed amounts in a scale of costs for professional fees in the court rules.

## EXAMPLES

48. The following examples are provided to assist Tax Office staff to correctly apply this practice to factual situations.

### Example 1

49. A party (receiving party) is registered for GST and entitled to claim legal costs from the other party (reimbursing party) either by costs awarded by the courts or settled by agreement between the parties.

50. The matter may be in any of the following jurisdictions: Victoria, Queensland, Federal Court and Federal Magistrates Court of Australia, Tasmania, Western Australia, Northern Territory, Australian Capital Territory and in limited circumstances in State Courts in New South Wales.

51. The assessment of costs is on the party/party basis and by application of a fixed scale of costs under the relevant court rules.

52. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

(i) court fees $100 (no GST payable)[26]

(ii) search fees $220 (includes $20 GST payable),[27] and

[25] *Merringtons* and *Hennessy Glass*.
[26] Please note by reference to the original supply, GST may be payable if this expense was incurred by the solicitor for the client as a principal and in providing a legal service.

(iii) professional fees for solicitor of $660 (this is the fees as fixed by the scale of costs in the court rules and includes GST).

53. The receiving party is entitled to an input tax credit of $80.

54. The correct amount of legal costs to be paid by the reimbursing party is $960 (being $100 plus $200 plus $660). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $660 (including the GST component) for professional fees as fixed by the scale of costs in the court rules as they will not take into account a receiving party's entitlement to an input tax credit of $60.

**Example 2**

55. A party (receiving party) is registered for GST and entitled to claim legal costs from the other party (reimbursing party) either by costs awarded by the courts or settled by agreement between the parties (receiving party) from the other party.

56. The matter may be in any of the following jurisdictions of the State Courts of New South Wales and in the Supreme and District Court of South Australia.

57. The assessment of costs is on the party/party basis.

58. In South Australia the amount to be paid is by reference to a fixed scale of costs that provides that an input tax credit is to be taken into account in a schedule of costs.

59. In the State Court of New South Wales the amounts are to be paid by application of the *Legal Professions Act 2004*.

60. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

(i) court fees $100 (no GST payable);

(ii) search fees $220 (includes $20 GST payable); and

(iii) professional fees for solicitor of $660 (this includes GST).

61. The receiving party is entitled to an input tax credit of $80.

62. The correct amount of legal costs to be paid by the reimbursing party is $900 (being $100 plus $200 plus $600). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $600 for professional fees and not the $60 for the GST component as they will take into account the receiving party's entitlement to an input tax credit of $60.

[27] As searches are outsourced (by the solicitor as principal not agent) or conducted through an intermediary entity such as ABR or CITEC.

**Example 3**

63. The circumstances are the same as in Example 2 except the costs assessment is on a solicitor and client basis or indemnity basis and in all jurisdictions.

64. The correct amount of legal costs to be paid by the reimbursing party is $900 (being $100 plus $200 plus $600). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $600 for professional fees and not the $60 for the GST component as they will take into account the receiving party's entitlement to an input tax credit of $60.

**Example 4**

65. A party is not registered for GST and is entitled to claim legal costs either by costs awarded by the courts or settled by agreement between the parties (receiving party) from the other party (reimbursing party).

66. The assessment of costs is either on the standard or party/party basis, solicitor and client basis or indemnity basis.

67. The matter may be in any jurisdiction (Victoria, Queensland, Federal Court and Federal Magistrates Court of Australia, Tasmania, Western Australia, Northern Territory, Australian Capital Territory, South Australia and New South Wales).

68. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

    (i) court fees $100 (no GST payable)

    (ii) search fees $220 (includes $20 GST payable), and

    (iii) professional fees for solicitor of $660 (this includes GST payable).

69. The correct amount of legal costs to be paid by the reimbursing party is $980 (being $100 plus $220 plus $660). The reimbursing party will pay the GST of $20 for search fees and $60 for professional fees as they are proper expenses incurred in the conduct of legal work or litigation.

**Details of legal costs required**

70. Before Tax Office staff make a payment for legal costs or formulate a schedule for legal costs to receive payment, they must ascertain a schedule of costs:

- detailing the legal fees and disbursements that the receiving party's solicitor has incurred on behalf of his or her client and is claiming as costs against the other party according to the applicable court rules and any court order(s) made with respect to costs, and
- with sufficient detail to identify:
    - how the amounts were determined and whether the legal costs are legal fees or disbursements
    - whether GST applied, and
    - if GST applied, whether the other party was entitled to claim an input tax credit and if so, to what extent.

71. If the schedule of costs does not give sufficient detail, the receiving party's solicitor should be queried and further details requested in respect of the GST application and payment. In some cases, it may be appropriate, to request the invoices with respect to the legal fees and disbursements to verify the payments.

72. The payment of legal costs should then be made when the:

- legal costs claimed are reasonable given the nature and complexity of the matter; and
- GST amount is properly accounted for as provided in this practice statement for reimbursing the GST component in circumstances that the receiving party is entitled to an input tax credit.

73. The Tax Office, whether a receiving or a reimbursing party, will pay or receive GST amounts as detailed in this practice statement.

### *Less complex proceedings*

74. There are less complex legal proceedings where there may be no need for Tax Office staff to prepare a schedule of costs, but the same policy applies. Where, for example, a Debt Officer obtains a default judgment on a summons issued for a tax liability, the only legal fees likely to be incurred by the Tax Office would be filing fees (no GST applied) and service fees (GST applied). In this situation, the Debt Officer should seek from the court the costs for the filing fee and the service fee exclusive of the GST amount (the costs of the service fee is a disbursement and the Tax Office is registered for GST and it is entitled to claim an input tax credit for the GST amount on the service fee).

## When the Tax Office makes a settlement of legal costs by agreement

75. A settlement of legal costs by agreement may occur on finalisation of a dispute or as part of finalising a dispute and may occur prior to or after litigation. Regardless of what point in time the settlement of the legal costs by agreement issue occurs, Tax Office staff involved must ensure that a schedule of costs incurred to that point in time is prepared and provided by the receiving party. The schedule of costs must include the same details as described above. If costs are to be settled by agreement the starting point for negotiation should be the amount the receiving party would be entitled by reference to the court rules, legislation, any court orders, and case law. Some lower amount may be agreed to between the parties.

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|---|---|
| Subject references | Courts<br>Goods and Services Tax<br>GST supply<br>Legal expenses<br>Legal orders<br>Legal remedies<br>Negotiated settlements<br>Taxable supply |
| Legislative references | ANTS (GST) Act 1999 7-1<br>ANTS (GST) Act 1999 9-5<br>ANTS (GST) Act 1999 9-40<br>ANTS (GST) Act 1999 11-15<br>ANTS (GST) Act 1999 11-20<br>ANTS (GST) Act 1999 11-25<br>ANTS (GST) Act 1999 Division 84<br>Federal Court of Australia Act 1976<br>Federal Court Rules 1979<br>Federal Magistrates Court (Bankruptcy) Rules 2006<br>Federal Magistrates Court Rules 2001<br>Financial Management and Accountability Act 1997 47<br>County Court Rules of Procedure in Civil Proceedings 1999 (VIC)<br>Court Procedure Rules 2006 (ACT)<br>District Court of Western Australia Act 1969 (WA)<br>Legal Practice Act 2003 (WA)<br>Legal Profession Act 2004 (NSW)<br>Legal Profession Regulations 2005 (NSW)<br>Legal Services Directions 2005 of the Attorney-General, Department of the Commonwealth<br>Local Court Rules (NT)<br>Magistrates Court (Civil Division) Rules 1998 (TAS)<br>Magistrates Court (Civil Proceedings) Rules 2005 (WA)<br>Magistrates Court Civil Rules 1992 (SA)<br>Magistrates' Court Civil Procedure Rules 1999 (VIC)<br>Rules of the Supreme Court 1971 (WA)<br>Rules of the Supreme Court (NT)<br>Supreme and District Court Civil Rules 2006 (SA)<br>Supreme and District Court Rules 1987 (SA)<br>Supreme Court (General Civil Procedure) Rules 2005 (VIC)<br>Supreme Court Rules 2000 (TAS)<br>Uniform Civil Procedure Rules 1999 (QLD)<br>Uniform Civil Procedure Rules 2005 (NSW) |
| Related public rulings | GSTR 2001/4 GSTR 2000/37 |
| Related practice statements | PS LA 1998/1 PS LA 2007/1 |
| Previous practice statement | PS LA 2005/11 |
| Case references | Burford v. Allan, unreported, Full Court, 26 May 1998, Judgment no S 6693<br>Cachia v. Hanes [1994] 179 CLR 403; 120 ALR 385<br>Hennessey Glass and Aluminium Pty Ltd v. Watpac Australia Pty Ltd [2007] QDC 057<br>Keen v. Telstra Corporation Ltd [2006] FCA 834 |

| | |
|---|---|
| | Merringtons Pty Ltd v. Luxottica Retail Australia Pty Ltd [2006] VSC unreported<br>Oshlack v. Richmond River Council (1998) 193 CLR 72; 152 ALR 83<br>Re Fat Sel Pty Limited and Brambles Holdings Limited (1958) 2 FCR 440; 61 ALR 536<br>Re: Keen (2005) 89 ALD 595<br>Re: Remnant (1849) 11 Beav 603; 50 ER 949<br>Re: Tresneski (2004) 80 ALD 760<br>Thornton v. Apollo Nominees Pty Ltd 2005 ATC 4480, 59 ATR 255 |
| Other references | Quick, R & Garnsworthy, D 1996, *Quick on Costs,* vol 4.11, LBC Information Services, Sydney NSW |
| File references | 07/17596 |
| Date issued: | 12 November 2008 |
| Date of effect: | 12 November 2008 |
| Other Business Lines consulted | **GST and Law & Practice** |

**ATTACHMENT**

***Table of legislation and court rules in each jurisdiction***

| Jurisdiction | Legislation and Court Rules | Standard or party/party basis | Solicitor & Client basis | Indemnity basis |
|---|---|---|---|---|
| South Australia | Supreme and District Court Civil Rules 2006 | Rules 263, 264, Schedule 1 – scale of costs; see Schedule 1 Note M | R264(5)(a) | R264(5)(b) |
| | Supreme and District Court Rules 1987 | R101.07(6)(b), Schedule 2 – scale of costs | R107(6)(c) | R107(6)(d) |
| | Magistrates Court Civil Rules 1992 | Rules 106(1),106(2), Schedule 3 – scale of costs | | R106 |
| Australian Capital Territory | Court Procedure Rules 2006 – apply Supreme & Magistrates Court | R 1722(1) – Part 4.2 – scale of costs – items, Rules 1751(2), 1722(2) | Rules 1752(1)(a), 1752(3) | Rules 1752(1)(b), 1752(4) |
| New South Wales | Uniform Civil Procedure Rules 2005 - apply Supreme, District & Magistrates Court | R42.2 | | R42.5 |
| | *Legal Profession Act 2004 (*NSW) | Section 319, 364, 365 and 367A | | Section 364(4) |
| | Legal Profession Regulations 2005 | Section 115 – GST may be added to costs; Division 2 (costs fixed) | | |
| Northern Territory | Rules of the Supreme Court (NT) | Rules 63.25, 63.26, 63.28, 63.32, Appendix – scale of costs | | Rules 63.25, 63.27, 63.29, |
| | Local Court Rules (1997) (NT) | Apply Supreme Court Rules, Order 63 (above) | | |
| Queensland | Uniform Civil Procedure Rules 1999 - apply Supreme, District & Magistrates Court | Rules 689, 690, 703, Schedule 1, 2, 3 – scale of costs | | R704 |
| Tasmania | Supreme Court Rules 2000 | R837, Schedule 1 – scale of fees and costs; R837A – GST on disbursements; R859 | | R837(2) |
| | Magistrates Court (Civil Division) Rules 1998 | R138, Schedule 1– scale of costs | R138(8) | |
| Victoria | Supreme Court (General Civil Procedure) Rules 2005 | Rules 63.28, 63.29, 63.31, 63.34(1), 63.69, Appendix A – scale of costs | Rules 63.28, 63.30, 63.32 | Rules 63.28, 63.30, 63.30.1 |
| | County Court Rules of Procedure in Civil Proceedings 1999 | Rules 63A.28, 63A.29, 63A.29, 63A.31, 63A.34(1), Appendix A – scale of costs | Rules 63A.28; 63A.30; 63A.32 | Rules 63A.28, 63A.30.1 |
| | Magistrates' Court Civil Procedure Rules 1999 | Rules 26.02, 26.03, Appendix A – scale of costs | | |
| Western Australia | Rules of the Supreme Court 1971 | Order 66 R11, refer to legal costs determination – scale of costs | | |
| | *District Court of Western Australia Act 1969* (WA) | Section 64(1) and 66, refer to legal costs determination – scale of costs | | |
| | *Legal Practice Act 2003* (WA), Legal costs determination (2006) | Section 9 – scale of costs and inclusive of GST | | Section 9 (2) |

| Jurisdiction | Legislation and Court Rules | Standard or party/party basis | Solicitor & Client basis | Indemnity basis |
|---|---|---|---|---|
| | Magistrates Court (Civil Proceedings) Rules 2005 | R81, refer to legal costs determination, clause 9; scale of costs and inclusive GST | | |
| Federal Magistrates Court of Australia | Federal Magistrates Court Rules 2001 | Rules 44.15, 21.10, Schedule 1 – costs | | |
| | Federal Magistrates Court (Bankruptcy) Rules 2006 | R13.01(1), Order 62 of the Federal Court Rules 1979 | | |
| Federal Court of Australia | Federal Court Rules 1979 | Order 62 R12, Schedule 2 – scale of costs | | |
| | *Federal Court of Australia Act 1976* | Section 43 | Section 43 | Section 43 |