



# Supreme and County Court Costs Review of Litigious Costs

## Discussion Paper

### Introduction

- 1 A comprehensive review of litigious costs is overdue. The last review of the Supreme Court Scale of Costs (the Scale) was conducted in 2005. The report was received by the Supreme Court in 2009, and adopted in 2013. By the time the revised Scale came into effect in 2013, it was out of date and did not reflect current market practices.
- 2 The need for such a review has been the subject of continuing discussions at the Legal Costs Committee of the Supreme Court since 2018.
- 3 The Council of Judges of the Supreme Court Victoria approved a proposal from the Legal Costs Committee for a review of the use and utility of the Scale.
- 4 The Supreme and County Courts have commissioned Jack Forrest J and Judge Kathryn Kings to conduct a prompt and limited review of the method by which litigious costs in this state are regulated and fixed.
- 5 This review of both party/party and lawyer/client costs will consider –
  - (a) whether it is appropriate for the Courts to continue to use the Scale based approach currently enshrined in the Supreme Court Rules (SCR) in fixing litigious costs;<sup>1</sup>

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<sup>1</sup> See Appendices A and B to the Supreme Court Rules: <https://www.legislation.vic.gov.au/asmade/statutory-rules/supreme-court-chapter-i-appendices-and-b-amendment-rules-2021>

- (b) or, whether another, and if so what, model or practice should be adopted in its place?

### **Relevant Legislation and Rules of the Courts**

- 6 Several discrete pieces of legislation deal with costs in litigious matters.

#### ***Legal Profession Uniform Law Application Act 2014 (Vic)***

- 7 Part 4.3 of the Legal Profession Uniform Law (Uniform Law) is concerned with legal costs. The objectives of that part, at s 169, are to ensure that clients of law practices can make informed choices about their legal options and the costs associated with pursuing those options; legal practices must not charge more than fair and reasonable amounts for legal costs, and to provide a framework for assessment of legal costs.
- 8 Section 172(1) of the Uniform Law provides:
- Legal costs must be fair and reasonable**
- (1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are –
- (a) proportionately and reasonably incurred; and
  - (b) proportionate and reasonable in amount.
- 9 In considering whether costs satisfy the statutory criteria in ss 171(1), ss 172(2) of the Uniform Law requires that regard must be had to whether the legal costs reasonably reflect:
- (a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and
  - (b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
  - (c) the labour and responsibility involved; and
  - (d) the circumstances in acting on the matter, including (for example) any or all of the following –

- (i) the urgency of the matter;
  - (ii) the time spent on the matter;
  - (iii) the time when business was transacted in the matter;
  - (iv) the place where business was transacted in the matter;
  - (v) the number and importance of any documents involved; and
- (e) the quality of the work done; and
- (f) the retainer and the instructions (express or implied) given in the matter.

10 Subsection 172(3) provides that in considering whether legal costs are fair and reasonable, regard must also be had to whether the legal costs conform to any application requirements of Part 4.3 of the Uniform Law, and any fixed costs legislative provisions.

***Civil Procedure Act 2010 (Vic) ('CPA')***

11 The CPA provides: -

**24 Overarching obligation to ensure costs are reasonable and proportionate**

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

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

12 The requirement of the Uniform Law that a law practice must charge no more in legal costs than what is fair and reasonable in all the circumstances, is consistent with the overarching obligation set in s 24 of the CPA. By reason of s 10(1) of the CPA, that obligation binds litigants, their legal advisers and the Supreme and County Courts to which the Act, together with the Magistrates Court, has application.

***Assessment of costs under the Supreme Court Act 1986 (Vic) (SCA)***

13 Section 25(1) provides:

- (1) The Judges of the Court (not including any reserve Judge) may make Rules of Court for or with respect to the following:

...

- (da) the practice and procedure of the Costs Court, including, but not limited to generally providing for matters in respect of the assessment, settling, taxation and review of costs by the Costs Court;
- (db) without limiting paragraph (da), the performance of assessing, settling, taxing and reviewing of costs by costs registrars or judicial registrars, including, but not limited to, the exercise by costs registrars or judicial registrars of the jurisdiction of the Costs Court;
- (dc) the transfer or referral of matters between the Costs Court constituted by a Costs Judge and the Costs Court constituted by a costs registrar or a judicial registrar;
- (dd) reviews by and appeals from the Costs Court.

**SCR**

14 Rule 63.34 provides that –

**Charges of legal practitioner**

- (1) Subject to paragraph (3), a legal practitioner for a party to whom costs are payable (whether the basis of taxation is the standard basis or the indemnity basis) shall be entitled to charge and be allowed costs in accordance with the scale in Appendix A unless the Court or the Costs Court otherwise orders.
- (2) Witnesses' expenses and interpreters' allowances shall be fixed in accordance with the scale in Appendix B.
- ...
- (3) The Court may, on special grounds arising out of the nature and importance or the difficulty or urgency of the case, allow an increase not exceeding 30 per cent of the legal practitioner's charges allowed on the taxation of costs with respect to –
  - (a) the proceeding generally; or
  - (b) to any application, step or other matter in the proceeding.
- (4) Where the Court so directs, the Costs Court shall have the same authority as the Court under paragraph (3) to allow an increase in the fees set forth in Appendix A.

15 Rule 63.48 provides that –

**Discretionary costs**

- (1) Except where these Rules or any order of the Court otherwise provides, the fees and allowances which are discretionary that are referred to in Appendix A shall be allowed at the discretion of the Costs Court.
- (2) In exercising the discretion under paragraph (1), the Costs Court shall have regard to –
  - (a) the complexity of the matter;
  - (b) the difficulty or novelty of the questions involved in the matter;

- (c) the skill, specialised knowledge and responsibility involved and the time and labour expended by the legal practitioner;
- (d) the number and importance of the documents prepared and perused, regardless of length;
- (e) the amount or value of money or property involved;
- (f) research and consideration of questions of law and fact;
- (g) the general care and conduct of the legal practitioner, having regard to the instructions and all relevant circumstances;
- (h) the time within which the work was required to be done;
- (i) allowances otherwise made in accordance with the scale in Appendix A;
- (j) any other relevant matter.

16 Part 6 of Order 63 deals with 'Costs of a solicitor'. Rule 63.58 provides:

This Part applies –

- (a) where costs are payable to a solicitor by the solicitor's client, whether or not in respect of a proceeding in the Court, and by or under any Act or these Rules or any order of the Court or any agreement between the solicitor and the client the costs are required or permitted to be taxed in the Court;
- (b) where any person not the client of a solicitor is liable to pay or, having been so liable, has paid costs which are or were chargeable by the solicitor to the client, whether or not in respect of a proceeding in the Court, and by or under any Act or these Rules or any order of the Court or any agreement between that person and the client the costs are required or permitted to be taxed in the Court.

17 Rule 63.62 - 'Contentious business' - expressly deals with the use of the Scale for solicitor/client costs:

- (1) This Rule applies to the taxation of the costs payable to a solicitor by the solicitor's client for work done in a contentious matter where at the time the work was completed no proceeding had been commenced by or against the client in respect of the matter in any court or before any tribunal.
- (2) Costs for work in the matter shall be allowed –
  - (a) in accordance with the scale of costs of the court or tribunal in or before which, in the opinion of the Costs Court, it would be appropriate to commence a proceeding in respect of the matter; or
  - (b) if that court or tribunal has no scale of costs, in accordance with Appendix A.

18 However, r 63.63 states that:

- (1) Subject to the following Rules and to any Act or order of the Court –

- (a) costs under this Part (i.e. Part 6) shall be taxed as provided by Part 5; and
  - (b) Part 5 shall, with any necessary modification, apply to the taxation accordingly.
- (2) References in paragraph (1) to the application of Part 5 of this Order to the taxation of costs under this Part include references to a review of an order of the Taxing Master on the taxation under Rule 63.57.

This means that the same procedure applies to solicitor client costs as it does to party/party costs.

19 Also, r 63.37 (2) provides that, subject to Part 6, this Part (Part 5) applies to the taxation of costs payable to a solicitor by the solicitor's client.

20 Rule 63.59 provides that costs payable to a solicitor by the solicitor's client, subject to any Act or any order of the Court, or any agreement between the solicitor and the client, be taxed on the standard basis. Rule 63.60 provides that –

**Taxation between solicitor and client**

- (1) Costs not reasonably incurred or not of reasonable amount may nevertheless be allowed to a solicitor against a client if –
- (a) the costs were incurred with the authority of or the amount was authorised by the client;
  - (b) before the costs were incurred the solicitor expressly warned the client that the costs might not be allowed on a taxation of costs as between party and party.
- (2) An authority for the purpose of this Rule may be express or implied.
- (3) Where the client is a person under disability, references to the client in paragraph (1) include references to the litigation guardian of the client.

***Assessment of Costs under the County Court Civil Procedure Rules 2018 (Vic) ('CCR')***

21 The CCR requires that the SCR Scale be used as the basis for calculation of reasonable costs.

22 Order 63A deals with costs. Rules 63A.30 and 63A.30.1 deal with standard and indemnity costs respectively, and are in the same terms as r 63.30 (standard basis) and r 63.30.1 (indemnity basis) of the SCR.

23 The Costs Scale, as set out in s 1.13 of the CCR, is defined as:

- (a) a fee, charge or amount that is 80 per cent of the applicable rate set out in Appendix A to Chapter 1 of the Rules of the Supreme Court; or
- (b) in the case of a circuit fee, the amount set out in schedule 1.

### *Assessment of Costs under the Uniform Law*

24 Section 198 of the Uniform Law provides:

#### **Applications for costs assessment**

- (1) Applications for an assessment of the whole or any part of legal costs payable to a law practice may be made by any of the following –
  - (a) a client who has paid or is liable to pay them to the law practice;
  - (b) a third party payer who has paid or is liable to pay them to the law practice or the client;
  - (c) the law practice;
  - (d) another law practice, where the other law practice retained the law practice to act on behalf of a client and the law practice has given the other law practice a bill for doing so.

25 Section 199 then provides that the assessment is to be conducted by ‘costs assessor’. A costs assessor may be appointed by a court or judicial officer. Alternatively, it may be a body designated by legislation to have that responsibility. So, in Victoria, the Costs Court undertakes the assessment (consistent with s 97 of the *Legal Profession Uniform Law Application Act 2014* which provides for an appeal from a decision of the Costs Court). The assessor determines whether the costs are fair and reasonable with the relevant factors set out under s 200 of the Uniform Law.

### **The current Victorian approach**

#### *Lawyer and client bills*

26 All lawyers practicing in this state are required to enter into a costs agreement with their client in relation to a litigious matter. Absent the agreement, a lawyer is entitled to charge a proportionate and reasonable amount as prescribed by s 172(1) of the Uniform Law, but cannot sue for costs unless a valid costs agreement exists.

- 27 It is understood that very few legal firms use the Scale to monitor its real time cost of work on a file. Most firms, using sophisticated software packages, time cost in six-minute blocks with fees referable to the skill or expertise of the practitioner performing the task.
- 28 There is an exception to this practice: it appears that a number of plaintiff firms carrying out personal injury and TFM work do not time cost and in some cases simply make entries on the file as to the time taken on certain tasks. After resolution of the case the firm engages a costs consultant (who may be in house) to provide an estimate of costs for the file - both on a lawyer/client basis and, if applicable, a party/party basis. This estimate is based on the Scale and usually costs up to 4% of the estimated amount.
- 29 The Costs Court deals with a dispute between a client and a lawyer as to the amount charged by the lawyer. These are often mediated to resolution.

### *Party and party bills*

- 30 The obligation by one party to pay the costs of another party can arise, generally speaking, from (i) an agreement between the parties (e.g. a deed of release or terms of settlement); (ii) an order of the Court; or (iii) the operation of Court rules (for example, r 63.15 of the SCR).
- 31 Typically, an order for costs made by a Court will provide that:

*'The defendant pay the plaintiff's costs of the proceeding, to be taxed by the Costs Court on a standard basis (or in some case on an indemnity basis) in default of agreement.'*

*Standard basis:* all costs reasonably incurred and of reasonable amount shall be allowed (r 63.30).

*Indemnity basis:* all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred (r 63.30.1)

As just mentioned, the bill must be drawn up in a specified form - usually by a costs consultant - using the Scale. The average charge for drawing up a bill is up to 15% of the amount of the bill.

### *The role of the Costs Court*

- 32 There are different approaches in different jurisdictions in relation to Court oversight of



the fixing of litigious costs.

33 In Victoria, the Costs Court exercises this function under s 17C and s 17D of the SCA and s 199 of the Legal Profession Uniform Law.

34 The Costs Court deals with disputes between parties concerning either an agreement by the paying (unsuccessful) party to pay costs to successful party to a litigation, or a court order to pay costs. It also handles lawyer/client disputes.

35 A process is set out in Order 63 of the SCR, supplemented by a Costs Court Practice Note.<sup>2</sup>

36 It is helpful here to contrast the NSW approach to fixing litigious costs. There is no equivalent to the Costs Courts in NSW.

37 Costs disputes in NSW are determined by costs assessors (there is a List of Current Assessors appointed by the Court) who, after analysing the file, produce a certificate of costs. A party dissatisfied with a determination of a costs assessor may apply for a review of the determination by a review panel.<sup>3</sup> A party dissatisfied with a review panel's decision may then appeal to the District Court and Supreme Court against the decision.<sup>4</sup>

### *Party/Party Taxation in the Costs Court*

38 The majority of cases before the Costs Court are party/party disputes in common law (in particular in personal injuries claims), VCAT and commercial matters. A small proportion, approximately 5%-10% of these disputes proceed to taxation hearings.

39 To commence a proceeding in the Costs Court, a party must file a Summons for Taxation, the bill of costs (using the Scale), the Party/ Party Taxation Information Form, a copy of the costs order, judgment or deed of release, and pay the requisite filing fee.

40 Costs disputes where the claim exceeds \$100,000 are mediated at first instance. Matters under \$100,000 may be dealt with pursuant to r 63.88 - assessment of legal costs on the

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<sup>2</sup> [https://www.supremecourt.vic.gov.au/sites/default/files/2019-06/gen11costscourt\\_secondivision01102018.pdf](https://www.supremecourt.vic.gov.au/sites/default/files/2019-06/gen11costscourt_secondivision01102018.pdf)

<sup>3</sup> Part 7, Division 5 of the *Legal Profession Uniform Law Application Act 2014* No 16 (NSW).

<sup>4</sup> Section 89 of the Act; see also ss 82-91.

papers. If these fail, a formal taxation is arranged. Settlement rates at mediation are high and objections to assessments are relatively rare.

### *Lawyer/client Taxation in the Costs Court*

- 41 The Costs Court has a reasonable number of lawyer/client costs disputes (79 out of 291 in 2021).
- 42 The process is commenced by summons as in a party/party dispute. Usually, the solicitors' invoices are filed with the summons instead of a formal bill of costs. This occurs whether the applicant is the client or a lawyer. The invoices may be assessed on the Scale or on hourly rates, depending on the terms of the costs agreement.
- 43 A bill of costs will only be necessary if the invoices lack detail or where the Costs Court orders that the costs be taxed on the Scale rather than hourly rates set out in the invoices.
- 44 Costs disputes between a lawyer and client are listed for directions hearings in the first instance for case management purposes. They are usually listed for mediation or may be dealt with pursuant to r 63.88 - assessment of legal cost on the papers. If these fail a formal taxation is arranged.

### *How the Scale is used in the Costs Court?*

- 45 As just mentioned, the Scale must be used in drawing a party/party bill for taxation. It may also be necessary for a lawyer/client bill.

### *Solicitors fees*

- 46 Solicitors' Scale amounts are fixed charges, largely in terms of time spent or the length of documents/correspondence prepared, received, or reviewed. Additionally, a 'loading' for skill, care and responsibility will often be allowed having regard to the circumstances of the case as set out in item 17 of the Scale.
- 47 The Costs Court has an overall discretion to increase or decrease any Scale item.

## *Counsels fees*

48 Counsel's fees specified in the Scale set the maximum fees that may be allowed by the Costs Court. If a party seeks a greater fee for counsel then a Judge may certify his or her fees, including for preparation, the time involved, and for daily and hourly rates. Where a Judge certifies counsels' fees, he or she has a discretion to allow more or less than the Scale fee.

### **Criticisms of the Victorian approach**

- The current Scale attached is anachronistic in substance, terminology and in day-to-day practice, is not used by the profession.
- There is a complete disconnect between the Scale and how costs are calculated in the market. The overwhelming majority of lawyers, in real life, use (and bill clients) at hourly rates, and do not maintain their files in a manner that is referable to the Scale.
- The use of technology in legal practice has increased and there are difficulties in adapting the Scale to this evolving landscape in a way which provides a fair and reasonable costs recovery.
- The bill of costs for a party/party and lawyer/client bill (where the basis for the charges under the fees agreement is the Scale) is both highly artificial and opaque. It is not the method by which the practitioner manages the file. A client who wished to discover the amount owing on a file at a particular point of time would never be referred to the Scale.
- As the Scale is generally not used in practice as between lawyer and client, the preparation of bills of costs in taxable form involves retrofitting the Scale to the work that has been done to prepare a bill that reflects the content and structure of the Scale. That is, for work generally performed, recorded, and charged by solicitors to the client and often also by counsel on a time basis.
- The preparation of a Scale based bill of costs - usually by a costs consultant - is expensive amounting to as much as 15% of the bill for a taxation.
- A Scale based bill of costs is inappropriate as a significant amount of money is incurred on work which is of no relevance to the client. It is simply a recovery exercise which may impede payment to a client of his or her settlement or judgment.
- Indemnity costs orders are prima facie quantified by reference to the Scale which may bear little resemblance to the successful party's actual costs resulting in a recovery that is substantially less than the indemnity intended by the court.

- The Scale is used in limited circumstances as described previously: first, perhaps as the basis of solicitor/client, or counsel/client fee agreements, usually confined to personal injury claims. Second, the Scale is used as the basis for Supreme Court and County Court party/party costs orders.
- On the other side of the coin, the Scale rates may provide, at least for the legal profession, an objective rate of charge. For instance, the amount allowed on an hourly basis when considering questions of the reasonableness of the hourly rates specified in a Costs Agreement or when a Costs Agreement is found to be void under the Uniform Law.

### **Summary of approaches in other jurisdictions**

- **The UK Court** evaluates party/party costs similar to the approach in the Federal Court and NSW Court. The approach requires consideration of whether rates are reasonable and whether resources devoted to tasks are appropriate for the amount of money at stake. There are the Guideline Hourly Rates. Once the rates have been determined as reasonable, a determination whether the costs are proportionate follows.
- **Federal Court** is only involved in assessing costs as between party and party. It does not have jurisdiction over solicitor and own-client costs retainers. The method involves time-based costing on a 'fair and reasonable' basis. The system of time-based assessment of costs (some of the costs are calculated on reasonable hourly rates), subject to certain caps, appears to operate well as more solicitors assess their own costs, and as a result there may be less involvement of costs consultants in the process. There is a default position of lump sum costs orders which is often used in class actions.
- **The NSW** approach requires costs to be calculated on the basis of what is reasonable and the time spent. Party/party costs are assessed by using the 2016 Guidelines which provide reasonable hourly rates. The process of assessment is paper-driven - the file is assessed by the costs assessor. Any offers are provided in a sealed envelope for consideration by the costs assessor at the conclusion of the assessment for the purposes of considering who pays the costs of assessment: including costs of drawing bill, filing fee, costs assessor's fee. The market rates and criteria for fair and reasonable costs are set out in the guidelines, which makes the system transparent.
- **The New Zealand** approach involves three categories of proceeding based upon complexity. The daily recovery rates for each category of proceeding are set out in the Rules. The court will determine the reasonable time, for example, particular days, or a portion of a day, to certain tasks in a proceeding, across three categories - a comparatively small time, a normal amount of time, and a large amount of time.

### **Issues**

49 The primary issues to be considered in the review are:

- Whether the continued use of the Scale is justified?
- If it is abolished, what (if anything) should replace it?
- Should the Court (or Costs Court) set Guidelines (reflecting modern practice) updated regularly for the fixing of litigious costs?
- Should the Court consider the introduction of a litigious costs model similar to that in NSW and/or the Federal Court?
- What role will the Costs Court play if an alternative practice or model is adopted?
- What are the cost impacts to litigants of an alternative model or practice?

### **Consultation**

50 For the consultation process to be efficient it is important to gather broad input from a variety of stakeholders into their respective approaches to litigious costs. This paper is being circulated to many stakeholders in the operation of the two Courts.

51 Any interested party is invited to make a written submission (of no longer than 10 A4 pages) in response to the issues raised in this paper by 10 December 2021. In particular the reviewers seek input as to whether the Scale should be retained; if not which if any alternative model should be adopted.

52 Submissions will be treated as non-confidential, unless otherwise indicated. Consolidated responses might be used in a Costs Review Report.

10 November 2021