

REPORT ON LITIGIOUS COSTS

EXECUTIVE SUMMARY

In October 2021, after the Council of Judges approved the recommendation by the Legal Costs Committee, the Supreme and County Courts appointed the Hon. Justice Jack Forrest and Her Honour Kathryn Kings to conduct an expeditious review of litigious costs. In particular: (a) whether it is appropriate for the Courts to continue to use the Scale based approach currently enshrined in the Supreme Court Rules in fixing litigious costs; (b) or, whether another, and if so what, model or practice should be adopted in its place?

The review was recommended to be limited in scope, with the aim of identifying the most appropriate model for litigious costs, and the critical elements of that model.

During the review process their Honours received written submissions, conducted interviews and consultations, met individually with a number of practitioners in different jurisdictions, costs experts and judicial officers in this county and overseas. Consultations were also conducted by Judges of both Courts.

Legal Framework

Party/party costs

The *Civil Procedure Act 2010 (CPA 2010)* provides that a person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs are reasonable and proportionate to the complexity or importance of the issues in dispute, and the amount in dispute. Section 24 of the *Supreme Court Act 1986* provides that costs are at the discretion of the court, unless otherwise provided by an Act or the Rules. Order 63 of the *Supreme Court (General Civil Procedure) Rules 2015* applies to costs.

Lawyer/client costs

Both general law and the Legal Profession Uniform Law (Victoria) (**Uniform Law**) regulate aspects of charging lawyer/client costs. Legal practitioners may charge no more than what is 'fair and reasonable.'

Costs Objectives

Any costs assessment model should be guided by the following objectives: (a) facilitate access to justice; (b) be transparent to both lawyers and clients; (c) encourage certainty and predictability; (d) be cost-effective and efficient to apply in practice; (e) provide flexibility; (f) be informed by empirical evidence; and, (g) compensate the successful party.

The Scale

The Report identifies two significant aspects of the Supreme Court Scale of Costs (Appendix A of the *Supreme Court (General Civil Procedure) Rules 2015*): first, it is the mandatory form of assessment if a party wishes to enforce a costs order or agreement

made against another party (i.e. the assessment of party/party costs); second, and probably as a by-product of the first aspect, it is also used in two significant areas of practice in both Courts in fixing lawyer/client costs, namely personal injuries/death claims, and estate/testators family maintenance (TFM) claims.

The Report rejects the concept of retaining the Scale, or engaging in any revision of it, for the following reasons:

- The language and structure of the Scale is difficult to understand and apply, for example, the difference between ‘perusing’ and ‘examining’, or ‘drafting’ and ‘engrossing,’ and how this operates in practice.
- The Scale sets out fixed fees for discrete items, which gives the cloak of objectivity, but the assessment process and adjustments involved are complicated in practice, require specialised skills, and involve elements of subjectivity.
- The Scale is opaque and inhibits transparency in relation to the charging and assessment of legal costs. It lacks both differentiation and flexibility. It does provide some limited flexibility as it allows for a mixture of charging by item, and by time, while also recognising that there is a discretion to increase the overall costs reflecting skill, care, and responsibility. However, it does not contemplate or allow for alternative charging practices or the application of technology.
- The Scale does not reflect the charging practices of many firms, and it does not have a resemblance with reality. It only comes into play at the end of the case, whether on a party/party or lawyer/client basis – with the retrofitting exercise managed by costs consultants. There is a disconnect between costs incurred in practice and assessed costs, creating uncertainty.
- Although the Scale is used as a tool of measurement by prescribing fee rates for particular services, it is open-ended and retrospective.

Short term: Recommendation 1: That the Scale be discarded.

The Report adopts a staged approach to mechanisms of costs assessment replacing the Scale. It is recommended that in the short term, guidelines setting out hourly and daily rates (that is, time costing) be implemented, aiming to simplify the measure of costs assessment and enhance transparency of reasonable charging rates. In the medium term, it is recommended that mechanisms be adopted to prospectively set limits on litigious costs, similar to those currently used in England and Wales.

Guidelines – time costing

The Report recommends the adoption of time costing guidelines, based upon the NSW Guidelines 2016, with necessary modification to reflect Victorian practices. This will simplify the measure of costs assessment and enhance transparency of reasonable charging. The Guidelines should, as a minimum, set out reasonable hourly and daily rates in accordance with the experience of the practitioner or counsel. Also, greater specificity and clarity reflecting modern costing practices should be incorporated

within the guidelines, so that litigants can satisfactorily understand the basis upon which the bill is rendered.

Time costing is already overwhelmingly used by legal firms in Victoria. It is an integral part of the billing practices. Even in practices using the Scale for billing a client, many firms, notwithstanding the costs agreement, will have time costed the file.

Identified benefits of a time costing model are:

- It is easier for clients to understand hourly and daily rates than an item-based scale.
- Guideline rates will be in the public domain.
- Hourly rates reflect charging practice of the majority of firms, so that issues surrounding any disconnect between practice and assessment are less.
- There is an easy-to-understand reference point for those tasked with assessing 'fair and reasonable' and 'reasonable and proportionate' costs in the particular circumstances of a case or complaints before VCAT, the Legal Services Commissioner, and the Costs Court.
- Processes of assessment can accommodate alternative charging practices, unlike fixed activity rates as in Scale.

Short term:

Recommendation 2: That guidelines primarily based on time costing be developed and promulgated by the Legal Costs Committee in a similar form to those currently utilised in NSW.

Recommendation 3: That the guidelines be revised by the Legal Costs Committee, at its discretion, preferably on a yearly basis.

Recommendation 4: That there is no reason to introduce a Costs Assessor Regime in Victoria (as exists in NSW).

Fixed recoverable costs

In general terms, the adoption of the costs model currently used in litigation in England and Wales is recommended; namely, a combination of fixed recoverable costs (FRC) and costs budgeting. The benefits of these approaches include improved transparency, consistency and comprehension. They can:

- Give greater certainty and predictability for potential litigants who may currently be deterred from pursuing valid claims due to the risk involved in open-ended costs.
- Enhance access to justice.
- Promote early resolution of litigation.
- Reduce costs disputes and the associated costs and delay.
- Reduce the overall costs of litigation.

While ss 65A, 65B and 65C of the CPA 2010 give the Supreme and County Courts significant powers concerning costs, including fixing or capping recoverable costs in advance, there is no consistency of approach and their application appears to be the exception rather than the rule.

It is recommended that FRC be piloted for certain types of litigation – specifically, in: (a) personal injuries proceedings involving transport accident and WorkCover claims; and (b) TFM proceedings. In such cases clients are more likely to be ‘unsophisticated’ and would benefit from the prospective certainty provided by the regime. However, on application to the Court, a complex case might be excluded from the FRC model.

A concern raised in the Report is that with the introduction of FRC, there may be an increase in the amount of lawyer/client costs, resulting in the client receiving a lesser sum than they would now. For that reason, it is suggested that a similar approach to that currently taken in WorkCover (common law) proceedings should apply to all cases within the proposed FRC regime. The *Workplace Injury Rehabilitation and Compensation Act 2013* mandates that lawyer/client costs in such cases can only be recovered pursuant to an order of the Court. This process is currently administered by the Supreme and County Courts, on occasions with assistance from the Costs Court. It could be extended to transport accident cases in the proposed model.

Costs budgeting

Costs budgeting involves court approval of ‘costs budgets’ submitted by parties shortly after the commencement of a proceeding. The model has been working well for years in England and Wales. Benefits identified by Lord Jackson (the driving force behind the reforms) and adopted in the Report include:

- Both sides know what they will recover if they win or what they will be liable for if they lose.
- Early settlement is encouraged.
- Costs are controlled from an early stage. The very act of preparing a budget, which is subject to critical scrutiny, tempers behaviour, and effective costs management generally reduces the costs payable by the losing party.
- It focuses attention on costs at the outset of litigation.
- Case management conferences are more effective when costs estimates are provided initially.
- It is elementary fairness to give the opposition notice of what you are claiming.
- It protects losing parties from being destroyed by costs.

It is suggested that consideration would have to be given in Victoria as to whether the costs budget function was carried out as part of the case management process or separately managed by the Costs Court, or both, depending on the circumstances of the case.

Medium term:

Recommendation 5: A prospective cost scheme based on the England and Wales model be introduced in the Victorian Supreme and County Courts.

Recommendation 6: Such a scheme would involve:

- (a) Fixed costs for particular types of litigation – certain personal injuries and testators family maintenance proceedings;
- (b) In all other cases, costs budgets approved by the Court shortly after the commencement of a proceeding.

Recommendation 7: In the event that the Scale is replaced by the scheme described in Recommendation 5, that the courts engage in a process of judicial education similar to that undertaken in England and Wales.

The Report acknowledges that education of consumers of legal services is vital, particularly those in the personal injuries and estates jurisdictions. Consumers should be able to understand how the costs are calculated and why, and to what extent, there is a difference between recoverable party/party costs and lawyer/client costs.

Recommendation 8: Although outside the ambit of this enquiry, it is recommended that the appropriate statutory bodies engage in an education campaign for consumers of legal services and practitioners.

Role of Costs Court

Under the Uniform Law, the Costs Court provides the appropriate level of supervision of lawyer/client litigious costs. Its role as the final arbiter of both party/party costs and lawyer/client costs would continue under the proposed changes.

It is recommended that the operation of any new scheme would be overseen by the Costs Court. During the consultations process, its work received unanimous praise, and it provides expertise and uniformity. If an alternative model or models are adopted, the powers and functions of the Costs Court should remain as they are or, if necessary, be expanded.

Recommendation 9: Under the Uniform Law, the Costs Court – as the costs assessor – provides the appropriate level of supervision of lawyer/client litigious costs. Its role as the final arbiter of both party/party costs and lawyer/client costs would continue under the proposed changes.

Recommendation 10: The operation of any new scheme would be overseen by the Costs Court.