SUPREME COURT OF VICTORIA

COUNTY COURT OF VICTORIA

REPORT

ON LITIGIOUS COSTS

AUTHORS

THE HON. JUSTICE JACK FORREST

HER HONOUR KATHRYN KINGS

3 MAY 2022

Supreme and County Court Review of Litigious Costs

Report

1. Introduction and summary

1. In October 2021, the Supreme and County Courts appointed the authors to conduct an expeditious review of the manner in which litigious costs are assessed in this State.

2. The referral by the Courts involves an assessment of the Supreme Court Scale of Costs (Appendix A of the *Supreme Court (General Civil Procedure) Rules 2015*) (**Scale**)[1] and whether it should be discarded and replaced by a contemporary method of fixing costs. More fundamentally, the exercise requires a determination of how use of the Scale measures up against the legislative objectives under both the *Civil Procedure Act 2010* (**CPA 2010**) and the Legal Profession Uniform Law (Victoria) (**Uniform Law**),[2] as well as broader policy aims in relation to the recovery of legal costs in litigation. And, if to be replaced, the model which best fulfils these objectives.

3. We believe that the Scale is well past its use-by date and is quite inadequate in today's legal landscape. It should be replaced by a contemporaneous and transparent method of assessing litigious costs. It does not meet policy or statutory objectives; it is not working effectively; it uses outdated language; it is opaque and difficult for clients and lawyers to understand; it does not reflect the charging practices of almost all legal practices in every area of practice; it is antithetical to innovative charging in both small and large-scale litigation; and it does not facilitate the specific and critical goal of 'proportionate' costs.

4. We consider that, in the short term, the method of litigious costs assessment should be simplified by the introduction of guideline time costing rates (such as hourly or daily fees) for solicitors and counsel, rather than the Scale. More importantly, in the medium term, we think that there should be fundamental change to the current method of assessment. Specific mechanisms that fix costs

---

1 See Appendix A; see Supreme Court (Chapter I Appendices A and B Amendment) Rules 2021 (legislation.vic.gov.au).

2 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1.

prospectively and transparently should be introduced. We recommend, in general terms, the adoption of the model currently used in litigation in England and Wales; namely, a combination of fixed recoverable costs and costs budgeting.

Summary of recommendations

Short term

1. That the Scale be discarded.
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.
3. That the guidelines be revised by the Legal Costs Committee, at its discretion, preferably on a yearly basis.
4. That there is no reason to introduce a Cost Assessor Regime in Victoria (as exists in NSW).

Medium term

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

Consumer and practitioner education

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 the Costs Court

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

2. Terms of reference and process

5. In August 2021, after reviewing cost regimes and practices in a number of jurisdictions, the Legal Costs Committee[3] approached the Supreme Court Council of Judges (**Council**) seeking guidance on whether a review of the appropriate basis for litigious costs should be undertaken. It was noted that such a review was long overdue, and concerns were raised that the Scale was used in only limited circumstances.

6. Two specific issues were identified by the Committee for consideration by the Council: first, whether the Council considered that there was a need for the Scale to be reviewed; and second, the scope and nature of any such review. The Committee proposed that any review be limited, in scope, to identification of the most appropriate model for litigious costs, and the critical elements of that model.

7. It was envisaged that, upon completion and adoption of the review recommendations, with or without qualification or amendment, detailed work could then be carried out as required.

8. After discussion, the Council approved the recommendation and the authors were subsequently commissioned by the Supreme and County Courts to conduct a 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?[4]

9. A discussion paper was published on the Supreme Court website on 10 November 2021 for the purposes of the review (**Discussion Paper**).[5] It invited written submissions, and judges of both Courts chaired consultations with the profession. Subsequent to the consultations and receipt of written submissions, the authors met individually with a number of practitioners in different jurisdictions, costs experts, and judicial officers in this country and overseas.

---

[3] The Legal Costs Committee was continued under the *Legal Profession Uniform Law Application Act 2014*, s 92, and has functions under s 93 of that Act, including inquiring into and reporting to the Judges of the Supreme Court on alternative structures to the existing scale of costs, and inconsistencies in scales of costs between jurisdictions.

[4] Supreme Court of Victoria and County Court of Victoria, *Supreme and County Court Costs Review of Litigious Costs* (Discussion Paper, 10 November 2021) [5] (**Discussion Paper**); see Appendix B.

[5] See Appendix B. The Discussion Paper was shared with the County Court.

3. The issues

10. In the Discussion Paper, we identified what were thought to be, at the time, the primary issues for determination in response to the two questions posed by the Courts. Following our consultations and research, we have refined these as follows:

    (a) At the present time, is it appropriate to recommend a major change to the way in which litigious costs are assessed?

    (b) Should the Scale or a revised version be retained?

    (c) If the Scale or a revised version is not appropriate, what model if any should replace it?

    (d) Whether there will be any adverse cost impacts to litigants as a result of adopting an alternative model?

    (e) What role will the Costs Court play if an alternative model is adopted?

4. Statutory and policy objectives underpinning an award of litigious costs

Methods of costs assessment should facilitate access to justice

11. Access to justice is a fundamental right. It has been described as 'the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state'.[6] Access depends on a range of factors, including the availability of dispute resolution mechanisms, 'geographic location, economic capacity, health, education, cultural and linguistic variations, formal and informal discrimination';[7] barriers are encountered mostly by disadvantaged members of the community.[8] After decades of inquiries and reforms, 'equal access to justice' in Australia has been referred to as being 'as elusive as ever'.[9]

12. Alongside complexity and delay, cost has been described as a 'critical element

---

6 Lola Akin Ojelabi, 'Adopting Culture-Specific Dispute Resolution Processes in Australia: Which Way Forward for Access to Justice?' (2015) 29(3) *Australian Journal of Family Law* 235, 238, quoting M Cappelletti and B Garth, 'Access to Justice: The World-Wide Movement to Make Rights Effective' in M Cappelletti and B Garth (eds), *Access to Justice: A World Survey* (Sitjhoff & Noordhoff, 1978) 6; see also Law Council of Australia, *The Justice Project* (Final Report, August 2018) 48–51.

7 Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, No 72, 5 September 2014) 6, quoting submission of Law Council of Australia.

8 Ojelabi (n 6) 239; Law Council of Australia, *The Justice Project: Overarching Themes (*Final Report, August 2018) 2.

9 Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41(1) *UNSW Law Journal* 80, 88.

in access to justice'.[10] Duffy et al recently summarised the situation in contemporary Australia as follows:

> The justice system is most open to the very rich who can afford representation, and the very poor who can access legal aid, leaving a large group of 'ordinary Australians' in the middle without good access.[11]

13. In 2014, the Australian Productivity Commission suggested that the 'missing middle' may be more widespread than middle income earners, estimating that 'only 8 per cent of households would likely meet income and asset tests for legal aid'.[12] Today, while some gains have been made,[13] it remains generally accepted that 'civil litigation, particularly in the higher courts, is prohibitively expensive'.[14]

14. In the last decade, Lord Jackson has led costs reforms in England and Wales, and has said that:

> Controlling litigation costs (while ensuring proper remuneration for lawyers) is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work.[15]

15. In a similar vein, after noting that Australia had the best justice system that 'money could buy – a lot of money', Chief Justice Wayne Martin, in 2014, observed that 'it was a bit like owning a Rolls Royce':

> You can be proud to own it; you can polish it; you can leave it in the garage and you can take people around to see it and you can sit in it, but unless you can afford to put fuel in it, it will not

---

10 Australian Law Reform Commission, *Cost Shifting: Who Pays for Litigation* (Report, No 75, October 1995) Overview (**ALRC**); Michael Duffy, Andrew Coleman and Matt Nichol, 'Mapping Changes in the Access to Civil Justice of Average Australians: An Analysis and Empirical Study (2021) 42(1) *Adelaide Law Review* 293, 303; see also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Cost of Justice. Foundations for Reform* (Report, February 1993) [43].

11 Duffy et al (n 10) 303; see also Centre for Innovative Justice, RMIT University, *Affordable Justice: A Pragmatic Path to Greater Flexibility and Access in the Private Legal Services Market* (Report, October 2013) 4, 7; Bernard Murphy, 'The Problem of Legal Costs: Lump Sum Costs Orders in the Federal Court (FCA)' [2017] *Federal Judicial Scholarship* 4.

12 Productivity Commission (n 7) 20.

13 See, eg, Duffy et al (n 10) 336. After surveying 575 individuals, it was concluded that the majority of Australians believed their access to justice had increased over the past 20 years, perhaps as a reflection of increased access to 'no-win no-fee agreements'.

14 Peter Cashman, 'Civil Procedure Act 2010 (Vic): Some Reflections on Civil Justice and the Need for Further Reform' (2021) 10 *Journal of Civil Litigation and Practice* 5, 10.

15 Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs* (Supplemental Report, 21 July 2017) 10 [12] (**Jackson Supplemental Report**).

> perform its basic function of taking you where you want to go.[16]

16. Models of litigious costs should seek to enhance access to justice by minimising disputes concerning costs, and helping to reduce financial barriers to civil litigation,[17] while also ensuring that the results remain just.[18] Parties 'should not be dissuaded from bringing meritorious claims for fear that they may be bankrupted by an adverse decision'.[19] In this regard, for example, measures that provide for fixed or capped costs can provide certainty and facilitate access to justice.[20]

Costs must be reasonable and proportionate to the claim

17. Civil proceedings in the Supreme Court, County Court, and Magistrates' Court are subject to the CPA 2010.[21] The overarching purpose of the CPA 2010 and court rules on civil proceedings is to facilitate the just, efficient, timely, and cost-effective resolution of the real issues in dispute;[22] courts must seek to give effect to this purpose in the exercise of their powers.[23] Relevantly, in 2012, significant amendments were made to the CPA 2010 which greatly expanded the powers of courts in relation to costs in civil proceedings.[24]

18. The overarching obligations established in the CPA 2010 apply to parties, as well as legal practitioners and law practices acting on behalf of parties.[25] Section 24 imposes an obligation on such persons to ensure that 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.

---

16 Wayne Martin, 'Access to Justice' (2014) 16 *University of Notre Dame Australia Law Review* 1, 3.

17 See, eg, ALRC (n 10) Overview, [2.2]–[2.7], [2.20].

18 Ojelabi (n 6) 239–240; James Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29(2) *Australian Bar Review* 136, 146.

19 Manitoba Law Reform Commission, *Costs Awards in Civil Litigation* (Report No 111, September 2005) 6.

20 See Adrian Zuckerman, 'Lord Justice Jackson's Review of Civil Litigation Costs: Preliminary Report (2009)' (2009) 28(4) *Civil Justice Quarterly* 440; Andrew Higgins and Adrian Zuckerman, 'Lord Justice Briggs' "SWOT" Analysis Underlies English Law's Troubled Relationship with Proportionate Costs' (2017) 36(1) *Civil Justice Quarterly* 1.

21 CPA 2010, ss 1(1)(a), 3.

22 Ibid s 7.

23 Ibid s 8.

24 *Civil Procedure Amendment Act 2012*, ss 4, 6; the latter inserted Part 4.5 into the CPA 2010.

25 CPA 2010, s 10(1).

Additionally, s 25 imposes an obligation to minimise delay.[26]

19. Section 24 of the CPA 2010 'imposes a positive obligation to take steps to ensure that costs are not excessive and empowers courts to sanction those who breach their obligations'.[27] As the Court of Appeal stated in *Yara Australia Pty Ltd v Oswal*, the provision

> adopts a flexible test. There is plainly no costs matrix or formula that can be applied in determining whether the parties have met their obligations. Rather, the court must weigh the legal costs expended against the complexity and importance of the issues and the amount in dispute, in order to determine whether the parties used reasonable endeavours to ensure those costs were proportionate.[28]

20. Part 4.5 of the CPA 2010, inserted in 2012, gives courts specific powers concerning costs. In particular, a court can order that a legal practitioner prepare a memorandum setting out the estimated costs and disbursements in relation to a trial or proceeding,[29] and make any order as to costs that it considers appropriate to further the overarching purpose, including making an order to fix or cap recoverable costs in advance.[30]

21. These provisions of the CPA 2010 are complemented by the regulation of litigious lawyer/client costs under the Uniform Law.[31] Part 4.3 of the Uniform Law aims:

> (a) to ensure that clients of law practices are able to make informed choices about their legal options and the cost associated with those options; and
>
> (b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and
>
> (c) to provide a framework for assessment of legal costs.[32]

22. Save for certain sections covering conditional cost agreements and contingency fees, Part 4.3 does not apply to commercial or government clients.[33]

23. In accordance with s 172(1), when charging legal costs, a law practice must

---

26 Ibid s 25.
27 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 307 [12].
28 Ibid 307 [13]; see also *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666, [1339].
29 CPA 2010, ss 65A, 65B; See also case management power: pt 4.2, s 48(2)(d).
30 Ibid s 65C(2)(d).
31 For the charging of certain non-contentious costs, see *Legal Profession Uniform Law Application Act 2014* (Vic) s 94.
32 Uniform Law, s 169.
33 Ibid s 170.

charge costs that are no more than fair and reasonable in all of the circumstances, and are:

(a) proportionately and reasonably incurred; and

(b) proportionate and reasonable in amount.

24. Subsection (2) then sets out factors to which regard must be had in considering whether legal costs satisfy subsection (1). These are 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.

25. The aim of the CPA 2010 and the Uniform Law to ensure 'reasonable and proportionate' and 'fair and reasonable' (including the issue of proportionality) costs, respectively, reflects concerns surrounding public confidence in the legal system, access to justice, and the protection of consumers.[34]

---

34 See Victoria, Parliamentary Debates, Legislative Assembly, 24 June 2010, 2606–7 (Attorney-General Rob Hulls); Victoria, Parliamentary Debates, Legislative Assembly, 12 December 2013, 4665 (Attorney-General Robert Clark).

The method of costs assessment should be transparent to both lawyers and clients

26. An objective of Part 4.3 of the Uniform Law is to ensure that clients are able to make informed choices about their legal options and the costs associated with pursuing those options.[35] Despite this, issues surrounding the transparency of legal costs are ongoing. Allegations about overcharging form the bulk of those made in complaints received by the Legal Services Commissioner.[36] Additionally, courts have long recognised the imbalance in bargaining power between lawyers and clients in relation to fees charged.[37] As Chief Justice Martin recognised:

> If you are going to buy a fridge, you can go to the various retailers and look at the fridge, compare the cost of that fridge in one store as compared to another store and compare the features of one model of fridge with those of another model or brand. It is very hard for consumers of legal services to undertake such a process of evaluation because they do not know what the legal services are like; they do not know the quality of the services; and they do not know the size of the job that they want done. That places them at a very significant negotiating disadvantage when trying to agree upon price.[38]

27. There can be a 'veil of mystery' in relation to the legal services provided and whether the clients are getting value for money,[39] although consumer innovations such as 'firmchecker.com.au' are starting to provide a degree of insight. A risk also arises that the lawyer-client relationship may become paternalistic, with unsophisticated clients in particular having little understanding of the progress of litigation and the ongoing accrual of costs.

28. In seeking to address these issues, any measure of litigious costs should aim to be transparent and easily understood. Further, clients would benefit from information concerning what is considered 'fair and reasonable' charging in practice.[40]

The method of costs assessment should encourage certainty and predictability

29. Litigation, and its attendant costs, is often associated with much uncertainty.[41]

---

35 Uniform Law, s 169(a).

36 Victorian Legal Services Board and Commissioner, *Delivering More Together: Annual Report 2021* (2021) 83 (each complaint received by the Legal Services Commissioner may contain a number of allegations).

37 GE Dal Pont, *Law of Costs* (LexisNexis, 4th ed, 2018) [2.20], [3.2].

38 Martin (n 16) 7; see also Centre for Innovative Justice (n 11) 14.

39 Steve Shaw, 'NSW Costs Assessment Review' (2015) 24(3) *Journal of Judicial Administration* 184, 184–5; Productivity Commission (n 7) 9.

40 See Centre for Innovative Justice (n 11) 15; Productivity Commission (n 7) 9.

41 Bret Walker, 'Proportionality and Cost-Shifting' (2004) 27(1) *University of New South Wales Law Journal* 214, 216; Paul Lynch and Roger Quick, 'The Williams Review: Federal Costs and Economic Rationalism' (1998) 73 *Reform* 47, 49; Martin (n 16) 6.

Cannon has noted that both 'time-costing and the court scale are unpredictable at the start of litigation'.[42] While it is acknowledged that, to a degree, some uncertainty is unavoidable (such as, for example, the opposing party's conduct during the matter), certainty and predictability in costs assessment should be facilitated as far as possible.

30. In the context of party/party costs, the ability of parties to weigh risk and identify settlement options early may be enhanced if the process of costs assessment is clear, simple to apply, and predictable.[43] This could be particularly beneficial for litigants with limited financial resources, as they face a greater threat from the unpredictability of litigation.[44] Enhanced certainty can facilitate a reduction in the number of costs disputes[45] and lead to more efficient resolution of proceedings. That is, long and expensive debates concerning costs could potentially be avoided.[46]

The method of costs assessment should be cost-effective and efficient to apply in practice

31. In order to achieve other policy objectives, it is necessary to ensure that costs assessment methods are accessible and cost-effective. If they are costly or otherwise inaccessible, parties or clients may be left to negotiate outcomes in circumstances where information asymmetries can exist.

The method of costs assessment should provide flexibility

32. Flexibility concerning litigious costs can assume relevance in relation to measures to assess costs, as well as the circumstances in which costs are being incurred.

33. Regarding the assessment of litigious costs, mechanisms of legal charging are continually expanding beyond hourly charges or fees according to the Scale. These include approaches such as fixed fees for certain legal products and

---

42 Andrew Cannon, 'Alternatives to Activity-Based Costing' (2008) 17 *Journal of Judicial Administration* 178, 178; see also Zuckerman (n 20) 435.

43 Manitoba Law Reform Commission (n 19) 6; see also, Phillip Williams et al, *Report of the Review of Scales of Legal Professional Fees in Federal Jurisdictions* (Report, Commonwealth of Australia, Attorney-General's Department, 31 March 1998) [3.0] (**Williams Review**); ALRC (n 10) Overview; Ministry of Justice (UK), *Extending Fixed Recoverable Costs in Civil Cases: The Government Response* (Report, September 2021) 10 [2.3] (**Ministry of Justice Response**).

44 Walker (n 41) 217; Productivity Commission (n 7) 464.

45 Productivity Commission (n 7) 467.

46 Manitoba Law Reform Commission (n 19) 6; Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (Final Report, December 2009) xviii [2.10] (**Jackson Final Report**); Walker (n 41) 217.

subscription pricing.[47] The use of technology over the past twenty years demonstrates the necessity of having a flexible and adaptable method of assessing costs. Cost assessment procedures should be flexible enough to capture various methods of charging, in order to 'future proof' the procedures against new and emerging approaches.

34. The Legal Services Commissioner supports the idea of innovative pricing models that move beyond time-billing, and thereby benefits both lawyers and clients. For example, fixed-price models provide greater certainty and satisfaction for a number of clients; while others, such as small businesses, may prefer the advantages of subscription-fee models that provide regular and quick advice. Benefits to the firm have been identified as including:

    (a) selling a scoped and defined service, which allows consideration of standardisation, efficiency, and ways to leverage the value of expertise;

    (b) defined services reaching new markets and improving access to justice; and

    (c) elimination of timesheets and anxiety around billable hours.[48]

35. Of note, in 2013, the Centre for Innovative Justice identified that innovation in service delivery tends to be sparked by market pressures in the corporate sector, therefore it is important to consider approaches that will benefit 'consumers caught in the middle'. That is, incentives need to be found for law practices to increase affordability for individual and small business clients who may walk away from the system altogether.[49]

36. At a broader level, the issue of estimating and assessing party/party costs can arise in proceedings with diverse profiles. Ideally, to promote efficiency and ease of use, approaches should be flexible enough to be adopted in different proceeding types. However, it is readily acknowledged that an approach to litigious costs assessment considered appropriate for a small claim with predictable steps may be inappropriate for a large commercial matter of significant complexity. Further, it may be necessary to incorporate areas of discretion into any assessment process to address exceptional circumstances.[50]

---

47 Subscription pricing involves a regular set payment for work within a defined scope. For example, a monthly fee may cover a specified number of advice consultations. See Legal Services Board and Commissioner, *Subscription Pricing* (Web Page) <https://lsbc.vic.gov.au/lawyers/legal-costs/innovation-pricing/subscription-pricing>.

48 Fiona McLeay, 'The Changing Face of Legal Costs and Pricing' (2021) 95(12) *Law Institute Journal* 62, 62.

49 Centre for Innovative Justice (n 11) 6, 13.

50 Manitoba Law Reform Commission (n 19) 7.

As Bret Walker SC has previously suggested:

> We should abandon any search for a panacea. The range of civil litigation measured by the value of the rights and obligations at stake, the importance of them to the parties, the parties' resources, and the social importance of effective legal representation is far too wide to render credible the notion that one solution (assuming any can be found at all) will indifferently improve the whole variety of civil cases.[51]

The method of costs assessment should be informed by empirical evidence

37. To ensure that litigious costs reform is properly targeted, it should be based upon empirical evidence;[52] that is, guided by experience or experiment. Data 'collection, analysis and sharing' may be used to help identify weaknesses in current systems, guide policy, and test, evaluate, and improve implemented reforms.[53] Further, data publication and collection has been described as 'critical to building trust in reformed processes'.[54]

38. However, while exceptions exist,[55] it has been recognised that, in Victoria and Australia more broadly, there is a general lack of empirical evidence concerning the civil justice system.[56] In 1993, Worthington and Baker

---

51 Walker (n 41) 216.

52 Productivity Commission (n 7) 33; Sackville (n 9) 99; Victorian Law Reform Commission, *Civil Justice Review* (Report, 2008) 10, 98–9; 691 [7.13] (**VLRC Civil Justice Review**); Peter Cashman and Amelia Simpson, 'Research Paper #5: Costs and Funding Commissions in Class Actions' (UNSW Law Research Paper No 87, rev 11 December 2020) 6–8, see especially 8, quoting Camille Cameron, 'Australia' in Christopher Hodges et al (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010) 195; See G Pesce, 'Analysing the Structure of Litigation Costs' (2002) 16(1) *Australian Journal of Family Law* 1, 1, 25; see also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Cost of Justice. Foundations for Reform* (Report, February 1993) [36].

53 Natalie Byrom, Legal Education Foundation, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice* (2019) 2; Productivity Commission (n 7) 33.

54 Byrom (n 53) 2.

55 See, eg, ALRC, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) [6.1], citing Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017); Cashman and Simpson (n 52) 6; Duffy (n 10) 303; Stephen Shaw, 'The Assessment of Disputes About Legal Costs: A Comparative Analysis of the Western Australian and New South Wales Regimes' (PhD Thesis, Murdoch University, 2013); see also, empirical research in relation to pre-action procedures: Tania Sourdin and Naomi Burstyner, 'Cost and Time Hurdles in Civil Litigation: Exploring the Impact of Pre-Action Requirements' (2013) 2(2) *Journal of Civil Litigation and Practice* 66; and empirical research regarding the civil litigation system in NSW: Annette Marfording and Ann Eyland, 'Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany' (UNSW Law Research Paper No 28, 15 July 2010).

56 Cashman (n 14) 27; Cashman and Simpson (n 52) 6; Sackville (n 9) 90; Productivity Commission (n 7) 33; VLRC Civil Justice Review (n 52) 648, 691, 694; Tom Bathurst and Sarah Schwartz, 'Costs in Representative Proceedings, Costs Budgeting and Fixed Costs Schemes' (2017) 13(2) *Judicial Review* 203, 215.

investigated the costs of litigation in the Supreme Court and County Court.[57] The date of this research, however, means that it is of limited assistance, particularly as it was conducted before enactment of the CPA 2010 and the Uniform Law. Although the Victorian Law Reform Commission (**VLRC**) surveyed legal firms and Supreme Court data as part of its Civil Justice Review in 2008, the conclusions were limited by low response rates[58] and data related to matters prior to establishment of the Costs Court.

39. The authors acknowledge that there is a lack of comprehensive and current data in relation to the cost of litigation in this state.[59] However, we consider that our consultations and consideration of the submissions, allied with the analysis of costs regimes in other jurisdictions, has provided us with sufficient empirical information to proceed with the task that the Courts have asked us to perform.

An award of party/party costs aims to compensate the successful party

40. Party/party orders aim to compensate the successful party, rather than punish the unsuccessful party.[60] This approach evolved in equity, aligning with concerns of fairness, and the notion that an individual should not suffer loss on account of asserting or defending their rights.[61] Under the *Supreme Court (General Civil Procedure) Rules 2015* (**Rules**), this compensatory aim remains, even in the context of an award for indemnity costs[62] and costs orders against practitioners;[63] albeit such orders may also reflect the Court's disapproval of certain conduct.[64]

41. Although this approach is referred to as the 'indemnity rule', it has long been recognised that, in practice, the successful party only receives a partial indemnity.[65] In 2008, the VLRC noted:

---

57 Deborah Worthington and Joanne Baker, Civil Justice Research Centre, *The Costs of Civil Litigation: Current Charging Practices* (Law Foundation of New South Wales, December 1993).

58 VLRC Civil Justice Review (n 52) 650 [3.3.1].

59 Part of the problem may be that, in this state, most costs disputes are resolved between practitioners before reaching the Costs Court, and without the drawing of a bill.

60 *Harold v Smith* (1860) 157 ER 1229, 1231; *Oshlack v Richmond River Council* (1998) 193 CLR 72, 75, 89, 97 (***Oshlack***); *Latoudis v Casey* (1990) 170 CLR 534, 543, 567.

61 ALRC (n 10) [4.4], citing Bernard Cairns, *Australian Civil Procedure* (The Law Book Company Ltd, 3rd ed, 1992) 487.

62 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills (No 2)* [2018] VSC 501, [13] (upheld on appeal); *Hamod v State of New South Wales* (2002) 188 ALR 659, 665 [20].

63 *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, 229; *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 309 [18] (***Yara Australia***).

64 See Dal Pont (n 37) [16.23], citing *Gallagher International Ltd v Tlais Enterprises Ltd* [2008] EWHC 2046 (Comm) [27].

65 *Swan v Bank of New Zealand* (1890) 24 SALR 20, 21; *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 233 (***Colgate***); ALRC (n 10) [4.7]–[4.8]; VLRC Civil Justice Review (n 52) 648 [3.2.1].

> Historically, the operation of the indemnity principle ceased to achieve its stated intention of indemnification because of the increasing disparity between costs actually incurred and those recovered by the successful litigant.[66]

42. In a number of cases from the late 1980s and 1990s, the gap between the costs recovered by the successful party and those payable to their lawyer was noted,[67] as was the potential injustice associated with such an outcome.[68] In *McIntyre v Perkes*, for example, Rogers A-JA commented:

> As a broad generalisation … For myself, I have never been able to understand why a litigant who is forced to come to court and successfully vindicates his rights, should be left substantially out of pocket. It is commonly accepted that the difference between the costs recovered on a party and party taxation and the costs payable by a person to his own solicitor, even if taxed on a solicitor and own client basis, will be approximately one-third of the total cost. In some cases, that can be a substantial amount indeed.[69]

43. However, an approach whereby 'partial indemnity' is afforded, rather than full indemnity, has also been referred to as striking a balance between the interests of successful and unsuccessful litigants.[70] While high levels of indemnification in a 'loser-pays' model may deter unmeritorious claims,[71] they may also make settlement more difficult by 'increasing the stakes' and leading to increased costs.[72] That is, once litigation has commenced, overspending may occur in the optimistic belief that the opposing party will ultimately have to pay.[73] In this regard, it has been noted in academic literature and research in England that uncapped cost shifting resulting from such a model drives up costs.[74]

44. As such, in the context of standard costs, a partial indemnity may discourage

---

66 VLRC Civil Justice Review (n 52) 658 [4.6.1].

67 *Hurstville Municipal Council v Connor* (1991) 24 NSWLR 724, 731 (***Hurstville***); *Colgate* (n 64) 318; *Spencer v Dowling* [1997] 2 VR 127, 147 (***Spencer v Dowling***); *Singleton v Macquarie Broadcasting* (1991) 24 NSWLR 103, 106 (***Singleton***).

68 *McIntyre v Perkes* (1988) 15 NSWLR 417, 434–5 (***McIntyre***); *Cachia v Hanes* (1991) 23 NSWLR 304, 318 (***Cachia***); *Spencer v Dowling* (n 65) 147.

69 *McIntyre* (n 68) 434–5.

70 *Spencer v Dowling* (n 67) 147; *Oshlack* (n 60) 97; *Shepherd v National Mutual Life Association of Australasia & Bob Bradley & Associates* [1994] VicSC 699 (Supreme Court of Victoria, Hedigan J, 15 November 1994) 5; *Singleton* (n 67) 106; *Cachia* (n 68) 318; ALRC (n 10) [4.7], [4.8]; Dal Pont (n 37) [15.5], quoting *Jakovljevic v Law Society of Upper Canada* (1996) 129 DLR (4th) 761, 767.

71 VLRC Civil Justice Review (n 52) 78 [3.5.2].

72 Manitoba Law Reform Commission (n 19) 4, quoting *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (1996) 6; Jackson Final Report (n 46) 47 [3.23].

73 See, eg, Williams Review (n 43) [2.4]; Jackson Final Report (n 46) 47 [3.23].

74 Lord Justice Jackson, 'Confronting Costs Management' (Harbour Lecture, 13 May 2015) [2.8] (**Jackson Harbour Lecture**); Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report – Volume 1* (May 2009) 93 [3.3] (**Jackson Preliminary Report**); see also, Williams Review (n 43) [2.4]; ALRC (n 10) [2.21].

spending on legal services and encourage settlement,[75] as well as lessen the risk that litigation is beyond the reach of an unsuccessful party. Regarding costs awarded on an indemnity basis, it is recognised that there is 'no reason why the loser should have to pay for the absurd extravagancies of the winner'.[76]

45. For the purposes of this review, it is assumed that the 'loser-pays' approach to cost-shifting is not open to question. That is, the analysis proceeds on the basis that the successful party should be compensated for a proportion of their litigious costs. Also relevant to our analysis is the cost burden of the unrecovered litigation costs – lawyer/client costs – visited upon the successful party. It became clear to us that the calculation of this amount often occurs without any or any proper scrutiny of the charges rendered by lawyers to their client. This appears to be particularly noteworthy where the Scale is used as the measure of those costs.

46. Reform to the party/party litigation costs would need to account for the consequential prospect of a greater cost burden being imposed by the lawyer upon the successful client, and the means by which this could be avoided.

5. The legal framework and use of the Scale in Victoria

47. To understand our recommendations, it is necessary to set out both the legal framework within which the Scale operates, as well as how it is used in practice.

Origins and content of the Scale

48. The origins of a scale or scales as a measure of remuneration can be traced to legislative reforms in the early seventeenth century.[77] Typically, a scale will identify the quantum of fees that can be paid to legal practitioners for particular items of work, such as reading documents, attendances, filing or photocopying. Judicial comments have previously suggested that the broad purpose is to 'keep costs within reasonable bounds',[78] with case law suggesting that charging scale costs '[has] hardly proven a badge of unfairness or unreasonableness'.[79]

---

75 ALRC (n 10) [2.21]; VLRC Civil Justice Review (n 52) 644 [3.1.6].

76 *Singleton* (n 67) 106, discussing *EMI Records Ltd v Ian Cameron Wallace Ltd* [1982] Ch 59, 71.

77 See Shaw (n 55) 11, citing *An Act to reform the multitude of misdemeanours and abuse of some attorneys and solicitors, who, by charging excessive fees for their services, and by making other unnecessary demands, caused clients to be financially overburdened, whereby legal services were being extraordinarily delayed 1605* (UK) (3 Jas 1 c 7); see also Westlaw AU, *Quick on Costs* (online at 30 March 2022) Assessment of Costs, 'Principles and development', Chronology on the English law of costs, [10.40]; 'A Historical Outline of the Assessment of Costs', Introduction, [300.30], The Right to Assessment, [300.40]; Spigelman (n 18) 144.

78 *Kirwin v Pilbara Infrastructure Pty Ltd* [2012] WASC 99(S), [20]; see Dal Pont (n 37) [15.58], quoting *Frank Jasper Pty Ltd v Glew (No 3)* [2012] WASC 24 (S), [33].

79 GE Dal Pont, 'Contextualising Lawyer Overcharging' (2016) 42(2) *Monash University Law Review* 283, 289; see also Williams Review (n 43) [1.0].

However, at least from the 1960s, concerns were raised that the use of a scale might be anti-competitive and capable of artificially sustaining the cost of legal services.[80]

49. In Victoria, items within the Scale can be traced to the *Supreme Court (Costs) Rules 1984*, which provided for 'Ordinary Scales of Costs' in Appendix N. In 1986, Order 63 was introduced to the *Statutory Rules 1986* in relation to costs, and the scales formed Appendix A. Shortly after this period, a costs coordination committee was established to advise the courts in relation to issues of costs, including the scale.[81]

50. The Scale is within Appendix A of the Rules.[82] In overview:

(a) Items 1 to 16 prescribe allowances for the work of legal practitioners, on the following bases:

- time basis (for attendances, travel, waiting, review and consideration, research, collation, redaction and electronic document management);
- time basis at the discretion of the Costs Court (delegation and supervision);
- per single action (filing, service);
- per folio or page (drawing, engrossing, correspondence, receiving and filing, perusals, scanning, examination);
- per 'message' of 20 words or less (correspondence); and
- discretion of the Costs Court (reproduction of documents and additional pages of circular letters).

(b) Item 17 provides that an additional amount may be allowed for legal practitioners, based upon factors such as the complexity of the matter and specialist knowledge and responsibility involved;

(c) Item 18 prescribes a fixed amount for the costs of obtaining a winding-up order under s 470 of the *Corporations Act 2001* (Cth), with additional costs in the way of reasonable disbursements being allowed; and

(d) Item 19 prescribes maximum fees for senior and junior counsel, on time bases, with circuit fees being additional, and the Supreme Court and Costs Court are both afforded discretion to allow fees in excess of the Scale (the latter only if it is taxing other than pursuant to an order of the

---

80 Dal Pont (n 37) 286. In NSW, scales were abolished in 1994, due to concerns that scale-based systems were anti-competitive and detrimental to the welfare of clients. See Bob Debus, 'Directions in Legal Fees and Costs' (2004) 27(1) *UNSW Law Journal* 200, 201.

81 VLRC Civil Justice Review (n 52) 636.

82 See Appendix A. There is also a Scale in Appendix B of the Rules for witnesses' expenses and interpreters' allowances (r 63.34(2)); however, Appendix B is not the focus of this Review.

Supreme Court).

51. As provided in r 1.13 of the *County Court Civil Procedure Rules 2018* (**County Court Rules**), the County Court costs scale is: a fee, charge or amount that is 80 per cent of the applicable rate set out in the Scale; or, in the case of a circuit fee, the amount set out in Schedule 1. Schedule 1 is referred to in Item 19 of the Scale and prescribes daily circuit fees for each circuit town. Order 63A of the County Court Rules deals with costs. For the purposes of that Order, a reference in the Scale to the Supreme Court is taken to be a reference to the County Court.[83]

52. The last review of the Scale was conducted in 2005. The report was received by the Supreme Court in 2009 and adopted in 2013.

How the Scale operates in practice

53. The Scale is relevant to two significant aspects of litigious costs assessment. First, it is the mandatory form of assessment if a party wishes to enforce a costs order or agreement made against another party (ie, 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 (**personal injury claims**), and estate/testators family maintenance claims[84] (**estate claims**). It is incorporated by specific reference within costs agreements or conditional costs agreements. It forms the basis for the billing of the client.

Party/party costs

54. As noted earlier, civil proceedings in the Supreme Court, County Court, and Magistrates' Court are subject to the CPA 2010, one of the objectives of which is to expand the powers of courts in relation to costs. Section 24 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.

55. Section 24 of the *Supreme Court Act 1986* stipulates that costs are at the discretion of the Court, unless otherwise provided by an Act or the Rules. While this discretion has been described as 'absolute', it must be exercised judicially.[85] It is to be exercised subject to and in accordance with Order 63 of the Rules. Part 3 of Order 63 applies to costs in a proceeding which, by or under any Act,

---

83 County Court Rules, r 63A.01(5).

84 Claims made under Part IV of the *Administration and Probate Act 1958* (**TFM claims**).

85 *Innes-Irons v Forrest (Costs)* [2017] VSC 10, [5]; see Dal Pont (n 37) [6.15].

Rules, or order of the Court, are to be paid to a party by another party or out of a fund.

56. Subject to the Rules, a party is not entitled to recover costs of a proceeding from another party except by order of the Court.[86] Save for certain exceptions,[87] where costs are to be paid to a party under any rule or order, the party is entitled to taxed costs.[88] Unless the Court orders otherwise, costs are to be taxed in the Costs Court by a Costs Judge, or if a Costs Judge so directs, by a judicial registrar, a Costs Registrar, a Deputy Costs Registrar, the Prothonotary, or a Deputy Prothonotary.[89]

57. In accordance with r 63.34, the legal practitioner for a party to whom costs are payable is entitled to charge and be allowed costs in accordance with the Scale, unless the Court or Costs Court otherwise orders. Commencing a proceeding in the Costs Court involves filing a summons for taxation and bill of costs;[90] the latter listing items of work and the cost claimed, as well as identifying the actual hourly rates charged.[91]

58. The usual basis for taxation is the standard basis.[92] That is, all costs reasonably incurred and of reasonable amount are allowed.[93] Alternatively, costs may be ordered on a basis that the court directs, or on an indemnity basis, which allows all costs, except those that are of an unreasonable amount or have been unreasonably incurred, with any doubt in this regard resolved in favour of the party to whom costs are payable.[94]

59. The discretionary fees and allowances in the Scale are at the discretion of the Costs Court and, in exercising this discretion, consideration must be given to the following factors:

    (a) the complexity of the matter;

    (b) the difficulty or novelty of the questions involved in the matter;

---

86 Rules, r 63.13. Note that r 63.10 sets out circumstances in which no order for taxation is required, such as where parties have agreed in writing that costs payable by one party to another may be taxed, and the agreement is filed (r 63.10(f)).

87 See, eg, where the court has otherwise ordered, rr 63.07(2), 63.09; or, where there has been default judgment, r 63.08.

88 Rules, r 63.07.

89 Ibid r 63.05.

90 Ibid rr 63.38, 63.39.

91 Ibid r 63.42. At the conclusion of the description of work done, the bill is also to contain a description – having regard to the matters referred to in r 63.48 (discretionary costs) – of work done that justifies an allowance under the Scale of the amount claimed beside that item.

92 Ibid r 63.31.

93 Ibid r 63.30.

94 Ibid r 63.30.1.

(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];

(j) any other relevant matter.[95]

60. Rule 63.72 gives the Costs Court the power to increase or decrease the amount, value, or expense in the Scale, as it thinks fit.[96] Additionally, as provided in rr 63.34(4) and (5), the Court (or Costs Court, if directed by the Court) may, on special grounds arising out of the nature and importance, difficulty, or urgency of the case, allow an increase of up to 30 per cent of the legal practitioner's charges allowed on taxation.[97] In a conditional costs agreement, a lawyer may charge clients an uplift fee of up to 25 per cent, as prescribed by the Uniform Law.[98]

61. The Costs Court must exercise its jurisdiction with as little formality and technicality as the requirements of the *Supreme Court Act 1986*, the Rules, and the proper consideration of the matters before the Court permit.[99] The Rules also give the Costs Court the power to make an estimate of costs in the absence of the parties.[100]

62. In the County Court, costs are at the discretion of the Court,[101] and the fees

---

95 Ibid r 63.48.

96 Ibid r 63.72.

97 Ibid rr 63.34(3), (4).

98 Uniform Law, s 181, allows for conditional cost agreements. That is, a costs agreement which provides that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate. A conditional costs agreement may provide for the payment of an 'uplift fee' (additional legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates), which must not exceed 25 per cent of the legal costs (excluding disbursements) otherwise payable. This is distinct from the power of the Court under Order 63. See *Williams v AusNet Electricity Services Pty Ltd (Ruling No 3)* [2017] VSC 528.

99 *Supreme Court Act 1986* (Vic) s 17D(3).

100 Rules, pt 8, r 63.88.

101 *County Court Act 1958* (Vic) s 78A.

allowed to legal practitioners practising in the Court are those fixed by the scale under the County Court Rules.[102] The Court's discretion is exercised subject to Order 63A of the County Court Rules, the relevant provisions of which generally reflect those in the Rules.[103] Where costs are taxed, they are taxed at 80 per cent of the applicable rate in the Scale.[104]

63. In practice, if a matter proceeds to party/party taxation in the Supreme or County Court, an itemised bill in taxable form must be prepared, to which allowances under the Scale are then applied. Invariably, this involves the engagement of costs lawyers or costs consultants, who charge a fee as a percentage of the total amount of the bill, reported as being between 10 to 15 per cent of the amount of the bill being taxed. During consultations, an irony was noted: costs consultants can charge a percentage fee on the basis of the quantum of the bill, while lawyers are unable to charge a percentage fee on the basis of the award or settlement sum.[105]

64. As discussed in more detail in the following part, apart from personal injury and estate claims, virtually all legal practices charge clients on the basis of an agreed hourly rate or, less often but increasingly so, a fixed fee for particular work or to a stage in the litigation process. Consequently, where a party wishes to enforce a costs order or agreement, the process of taxation of the costs of a proceeding has been accurately described as 'retro-fitting' the work done to the Scale. Indeed, a number of personal injury firms 'time cost' their files, and then retrofit the costs using the Scale.

65. Where the Scale is used in drawing up a lawyer/client bill, the costs consultant (either in-house, such as a costing department, or contracted) provides a costs estimate and, if necessary, a bill of costs in taxable form. We were told by numerous practitioners specialising in personal injury claims that they had 'little idea' of how the Scale worked and were guided in assessing the bill (on both a party/party and lawyer/client basis) by costs consultants and intuition. This produces an industry in itself (serviced by costs consultants), and involves uncertainty, artificiality, and complexity.

66. Several practitioners (not working in personal injury or estate litigation) advised that, in order to avoid the uncertainty, expense and delay of costs disputes in the taxation process, they prefer not to use a method (ie, the Scale)

---

102 Ibid s 33; County Court Rules, r 63A.34A.

103 See County Court Rules, rr 63A.07, 63A.34A, 63A.13, 63A.05, 63A.48, 63A.72, 63A.38. However, the County Court Rules do not have an equivalent of r 63.34 in the Rules (which allows the Supreme Court or Costs Court to allow an increase of up to 30 per cent on taxation).

104 County Court Rules, rr 1.13, 63A.34A.

105 Uniform Law, s 183.

that has no commercial reality, and which has not been used as the basis for charging a client. Rather, particularly for commercial and defendant firms, it is seen as preferable to identify costs estimates for each stage of litigation, and then use these to negotiate the assessment with opposing lawyers. During one consultation, the 'rule of thumb' noted was that clients would recover 40 to 50 per cent of their actual costs; an approach said to be based upon previous experience of recovering costs in accordance with the Scale.[106]

67. Further difficulties identified by these practitioners related to the preparation (and assessment) of a retrofitted bill using the Scale, where the underlying costs agreement is based on a fixed-fee agreement. This can include innovative pricing arrangements, such as where a firm charges a fixed fee for a litigious service, after considering factors such as value, risk, and the time involved. In performing the service, the time spent on discrete items is not necessarily recorded. This leads to real problems if a party/party taxation is undertaken and requires application of the Scale.

Lawyer/client costs

68. 'Lawyer/client' costs refer to the remuneration of a lawyer for professional services rendered to a client.[107] Under the Uniform Law, 'legal costs' means:

> (a) amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services; or
>
> (b) without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person,
>
> including disbursements but not including interest.[108]

69. A lawyer is entitled to charge costs on the basis of the retainer with a client. Primarily, this entitlement is governed by contractual principles.[109] The lawyer and client are free to enter into an agreement in relation to the costs payable and the method of charging, which may, for example, be in accordance with the Scale, hourly rates, or an alternative fee structure such as subscription pricing or fixed fees for certain services.

---

106 Other practitioners identified the proportion as, '50 to 70 percent', once the County Court Scale was applied; or 'half to two-thirds, if you're lucky'.

107 See Dal Pont (n 37) [1.5], quoting *Elders Trustee and Executor Company v Herbert* (1996) 132 FLR 24, 29.

108 Uniform Law, s 6.

109 Ibid s 184.

70. However, both the general law and the Uniform Law regulate aspects of the charging of lawyer/client costs. As already identified, a key limit is that legal practitioners may charge no more than what is 'fair and reasonable'. The Uniform Law also:

(a) imposes costs disclosure requirements on legal practitioners;[110]

(b) prevents uplift fees of greater than 25 per cent;[111] and

(c) prevents the charging of contingency fees,[112] although s 33ZDA of the *Supreme Court Act 1986* allows, in certain circumstances, for such fees in class actions subject to Court approval.[113]

71. There are disclosure obligations for clients who are not commercial or government clients, and where the costs are estimated to be over $750; namely, a law practice:

(a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and

(b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client.[114]

72. Additionally, the client must be provided with information setting out their rights to negotiate a costs agreement, be apprised of the billing method, request an itemised bill, and seek the assistance of the Legal Services Commissioner; and the law practice must take all reasonable steps to satisfy itself that the client has understood and consented to the proposed conduct of the matter and costs.[115]

73. Accordingly, under the costs disclosure requirements, if a law practice opts to

---

110 Ibid pt 4.3, div 3.

111 Ibid s 182. 'Uplift fee' means additional legal costs (excluding disbursements) payable under a costs agreement on the successful outcome of the matter to which the agreement relates.

112 Ibid s 183. That is, where amounts payable are calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in the proceedings. The prohibition is subject to the costs agreement adopting an applicable fixed costs legislative provision.

113 See *Bogan v Estate of Smedley (dec'd)* [2022] VSC 201.

114 Uniform Law, ss 170, 174, sch 4, s 18(3). Note that if the costs estimate is not likely to exceed the higher threshold ($3,000), the uniform standard disclosure form prescribed by the Uniform Rules may be used instead.

115 Ibid s 174(3).

charge in accordance with the Scale, it is obliged to explain to the client how the Scale will be used to calculate costs, provide an estimate of the total costs, and ensure that the client understands the proposed conduct of the matter, and the total estimate of costs based upon application of the Scale.

74. We have already touched on the use of the Scale for lawyer/client bills in certain practice areas. The submissions received, interviews and consultations conducted by us, and the consultations conducted with the help of judges of both Courts have confirmed that the Scale is used as the basis for charging in the following practice areas:

(a) personal injury claims;

(b) estate claims;

(c) some class actions; and

(d) by lawyers acting for the Commissioner of State Revenue.

75. Our consultations with practitioners, as well as the meetings with practitioners chaired by judges of the Courts, confirmed that time costing is predominately used as the basis for lawyer/client charges in respect of Commercial Court litigation in the Supreme Court: General Commercial List; Insurance List; Technology, Engineering and Construction (TEC) List; and Corporations List. The same applies to cases issued in the County Court Commercial List. Time costing commonly involves the use of software packages to monitor the real-time cost of work performed by the law firm. Usually, these are based on 6-minute blocks with fees referrable to the skill of the practitioners. Practitioners and staff make entries as the work is performed.

76. The alternative method of billing in these practice areas is to charge a client on the basis of an agreed fixed fee for specified work, or work performed to a particular stage in the proceeding.

77. The same approach applies to firms engaged in most other areas of practice. For instance, in general insurance practice, and common law cases other than personal injury and estate claims, the vast majority of bills are calculated on a time costing basis. As one of the practitioners stated, 'insurers are comfortable with hourly rates'. It was also said that 'clients can understand hourly rates whereas costs are a foreign concept to them'.

78. At the conclusion of our consultations, it was abundantly clear that the Scale is not used (either in real time or at the conclusion of a case) as a tool for billing clients in most litigation, in this state, other than in personal injury and estate claims.

79. Notwithstanding that lawyer/client litigious costs assessments using the Scale are confined to these limited areas, they form a significant part of the workload of both Courts. This is demonstrated by the table below:

Table 1: Approximate proportion of civil initiations that were personal injury or estate matters for the last four financial years[116]

	FY 2017/18	*FY 2018/19*	*FY 2019/20*	*FY 2020/21*	*TOTAL*
Supreme Court	1689/5876 (29%)	1845/6070 (30%)	1978/6006 (33%)	1925/4553 (42%)	33%
County Court	3,234/5276 (61%)	3,199/5,379 (59%)	3,530/5,512 (64%)	3,528/4,955 (71%)	64%

* For example, in the Supreme Court, for the 2017/18 financial year, 1,689 initiations were 'personal injury or estate' matters out of the 5,876 civil initiations.

80. We have perused (to use the language of the Scale) a number of conditional legal costs agreements – colloquially known as 'No Win–No Fee' agreements.[117] Each of the agreements is between a leading personal injuries firm and its client, and has been filed with the Supreme or County Court.

81. The following are features of the agreements:

- The legal firm's professional fees are calculated in accordance with the relevant court's scale. This includes the possibility (in truth, the likelihood) that an uplift of up to 30 per cent will be added, pursuant to rr 63.34(3) and (4), in calculating the Scale allowance.
- The professional fees are charged either on a standard or an indemnity basis.
- All agreements provide for a further uplift fee ranging from 10 to 25 per cent (separate to that available under the Rules) to be applied to the total professional fees (ie, professional costs and disbursements – which include counsel's fees).

---

116 Figures for the Supreme Court (Court of Appeal and Trial Division) are based upon the Personal Injuries List, Dust Diseases List, Civil Circuit List, Institutional Liability List, Trusts, Equity and Probate List, and Testators Family Maintenance List, as a proportion of all civil initiations. It is noted that the proportion in 2020/21 may be higher due to a reduction in mortgage recovery and winding up initiations associated with the COVID-19 pandemic; the figures for the County Court are based upon the Family Property List, General List, Medical List, Serious Injury List, and WorkCover List as a proportion of the total of those lists, plus the Defamations List and all initiations in the Commercial Division. **Note:** the figures are approximate and are intended to be used as a guide only.

117 See *Williams v Ausnet (Ruling No 3)* [2017] VSC 528, [4].

- Each agreement asserts that the uplift fee is justified by certain factors, such as the complexity, specialised knowledge, and skill of the lawyers; the nature and circumstances of the case; the risk involved in acting on a conditional basis; and the costs of carrying and maintaining the case without payment.
- The client is obliged to accept and follow all reasonable advice given by the lawyer.
- While the client is obliged to retain the lawyer until the matter is completed, the lawyer has a right to terminate the agreement.
- The client is liable to pay any disbursements incurred whether or not a successful outcome is achieved.

82. In relation to use of the Scale, the following text appears in one of the agreements:

> [The firm's professional fees] will be calculated according to the Victorian Supreme Court Scale of Costs plus an 'Uplift' success fee. A copy of the current version of the Victorian Supreme Court Scale of Costs is attached. The 'scale of costs' is published by the Supreme Court of Victoria and lists all of the different types of tasks a law firm could perform when pursuing a claim and applies an amount for each task. The Supreme Court updates this scale every 12 months and the current version at any given time can be found at [web address]. If you would like a copy of the current Supreme Court Scale at any time during the claim, please let us know and we will give you a copy. You will be charged in accordance with the scale of costs current at the time that the task is performed.
>
> Some tasks on this scale are very specific and easy to predict, such as Item 5(a) that allocates a charge of $40.20 to write a short letter. Other items though, are more discretionary such as Item 17 that allows a charge for 'skill, care and responsibility' when appropriate. When calculating our fees [the firm] include an amount for skill, care and responsibility on the basis of our specialist expertise and experience.

83. Several of the costs agreements contain detailed predictions of the potential costs, both party/party and lawyer/client, depending upon the particular stage of the case. Extracted below is an example of the form in which this was provided to the client within the conditional costs agreement:[118]

---

118 *Ellis Palmos v Pravlik* [2020] VSC 112, [35].

	Supreme Court Damages Claim **(resolution by agreement without fully contested damages trial)**	**Supreme Court Damages Claim** **(resolution after fully contested damages trial)**
Our charges	~~$80,000*~~ $120,000	~~$100,000~~ $150,000
Plus uplift fee (25%)	~~$20,000~~ $30,000	~~$25,000~~ $37,500
Sub-Total	~~$100,000~~ $150,000	~~$125,000~~ $187,500
Plus Disbursements	~~$30,000~~ $80,000	~~$175,000~~ $350,000
Total Legal Costs	~~$130,000~~ $230,000	~~$300,000~~ $537,500
Less estimated contribution by defendant/s on a party/party basis	~~$75,000~~ $130,000	~~$200,000~~ $350,000
Balance payable by you	~~$55,000~~ $100,000	~~$100,000~~ $187,500

*The struck-out figures represent the initial costs estimates, as distinct from the updated estimates provided in the table.

84. The Supreme Court has inherent and general jurisdiction to ensure that legal practitioners are remunerated properly, including that they 'are paid no more than what is fair and reasonable'.[119] Historically, courts have viewed 'agreements between individuals and their legal advisors as to the latter's remuneration with a "great jealousy" due to the risk of circumstances in which solicitors may improperly attempt to benefit themselves at the expense of their clients'.[120] Similar analysis has justified the role of processes of taxation. In *Redfern v Mineral Engineer Pty Ltd*, for example, Tadgell J explained:

> The courts' surveillance over costs as between solicitor and client is assumed with a view to preventing any unfair advantage by solicitors in their charges to their clients. It stems, it seems, from the notion that ordinarily a solicitor is presumed to be in a position of dominance in relation to his client as a result of his presumed knowledge of the law and of what may and may not be properly

119 *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106, [44] (McMillan J) (***Re Jabe***), citing *Pryles & Defteros (a firm) v Green* (1999) 20 WAR 541, [22]–[23], citing *Harrison v Tew* [1989] 1 QB 307, 320; *Electrical Trades Union v Tarlo* [1964] 1 Ch 720, 734; *Sutton v Sears* [1960] 2 QB 97, 102 (obiter). In overview, under the general law, consideration of 'fairness' involves inquiring into the circumstances in which the agreement was obtained, whereas 'reasonableness' concerns the agreement's substantive terms, see Dal Pont (n 37) [3.21]–[3.36].

120 *Re Jabe* (n 119) [45], citing *Clare v Joseph* [1907] 2 KB 369, 376.

> charged by way of fees. Were a strict view not taken it might be open to a solicitor to overreach his client or otherwise act oppressively towards him on the matter of costs. Considerations of public policy and undue influence combined to shape the attitude of the Courts of Equity, by which the general rules of taxation of costs were formulated.[121]

85. These general law principles are complemented by the Uniform Law.[122] As noted earlier, in accordance with s 172, when charging legal costs, a law practice must charge costs that are no more than fair and reasonable in all the circumstances. In particular, they must be proportionately and reasonably incurred, and proportionate and reasonable in amount.

86. In assessing whether legal costs are fair and reasonable, in addition to the factors set out in s 172(2), consideration must be given to whether the legal costs conform with any applicable requirements in Part 4.3, the Uniform Rules, and any fixed costs legislative provisions.[123] The latter is defined to mean 'a determination, scale, arrangement or other provision fixing the costs or maximum costs of any legal services that is made by or under the Uniform Rules or any other legislation'.[124]

87. If the provisions of Part 4.3 Division 3 have been complied with, and Division 4 has not been contravened, a costs agreement is prima facie evidence that the legal costs disclosed in the agreement are fair and reasonable.[125]

88. Together, the *Legal Profession Uniform Law Application Act 2014* and the Uniform Law enable three mechanisms to address disputes relating to lawyer/client costs.

89. First, a client or the law practice may apply for a costs assessment at the Costs

---

121 *Redfern v Mineral Engineer Pty Ltd* [1987] VR 518, 523.

122 Regarding the charging for legal services, other than in litigious matters, see *Legal Profession Uniform Law Application Act 2014* (Vic) s 94.

123 Uniform Law, s 172(3).

124 Ibid s 6(1). Wood AsJ has previously noted that the emphasis is on 'fixed', and a scale in this context must be one that fixes costs. In *Johnston v Dimos Lawyers*, (2019) 59 VR 16, when considering the relevance of the Family Law scale, his Honour discussed examples of 'fixed legislative provision' as follows (at 23):

> The Federal Court scale contains a fixed amount for the costs for an entire proceeding in *Corporations Act* and *Bankruptcy Act*. The Supreme Court scale contains a similar fixed amount under *Corporations Act*. The *Workcover (Litigated Claims) Legal Costs Order 2016* fixes amounts for legal costs in Serious Injury matters and the Transport Accident Commission fixes amounts for legal costs under Impairment, No Fault Disputes and Common Law Protocols. These all fall within the definition of 'fixed legislative provision.

125 Uniform Law, s 172(4).

Court.[126] The assessment is conducted in accordance with Part 4.3, the Uniform Rules, and any applicable jurisdictional legislation. The Costs Court must: determine whether or not a valid costs agreement exists; and, determine whether legal costs are fair and reasonable and, to the extent that they are not fair and reasonable, determine the amount of legal costs (if any) payable.[127] In accordance with s 200, when considering whether the costs are fair and reasonable, the Costs Court must apply the principles in section 172, so far as they are applicable. Additionally, under s 200(2), the Costs Court may have regard to the following:

(a) whether the law practice and any legal practitioner associate or foreign lawyer associate involved in the work complied with [the Uniform Law] and the Uniform Rules;

(b) any disclosures made, including whether it would have been reasonably practicable for the law practice to disclose the total costs of the work at the outset (rather than simply disclosing charging rates);

(c) any relevant advertisement as to the law practice's costs or the skills of the law practice or any legal practitioner associate or foreign lawyer associate involved in the work;

(d) any other relevant matter.[128]

90. The second is via the Legal Services Commissioner, which can receive complaints about costs,[129] and has powers that include:

(a) referring a matter for costs assessment;[130]

---

126 See ibid s 6: 'costs assessor' means 'a person appointed by a court, judicial officer or other official to have the responsibility of conducting costs assessments; or a person or body designated by jurisdictional legislation to have that responsibility'. *Supreme Court Act 1986* (Vic) s 17D(1)(ea): the Costs Court must conduct costs assessments under div 7 of pt 4.3 of the Uniform Law. *Legal Profession Uniform Law Application Act 2014* (Vic) s 97, a person may appeal from a decision made by the Costs Court as the costs assessor. See also Uniform Law, s 197: If the costs are or have been the subject of a complaint under ch 5 of the Uniform Law, they may not be the subject of a costs assessment unless the Commissioner has been unable to resolve the matter or has arranged.

127 Ibid s 199.

128 Ibid s 200.

129 Ibid s 269. A 'consumer matter' is 'so much of a complaint about a lawyer or a law practice as relates to the provision of legal services to the complainant', and as the Legal Services Commissioner 'determines should be resolved by the exercise of its functions'. A 'cost dispute' is 'a consumer matter involving a dispute about legal costs payable on a solicitor-client basis where the dispute is between a lawyer or law practice and a person who is charged with those legal costs or is liable to pay those legal costs'.

130 Ibid s 284.

(b) dealing with the costs dispute in the same manner as other consumer matters if the total bill for legal costs is less than $100,000, or if the costs are equal or more than that sum, but the amount in dispute is less than $10,000. Or otherwise informing the parties of their right to make an application for costs assessment;[131] and

(c) making binding determinations about the costs, where the amount in dispute is less than $10,000. Such a determination is based upon the Legal Services Commissioner's assessment of what is 'fair and reasonable' in all the circumstances, having regard to the factors set out in s 200.[132]

91. Third, as provided in s 99 of the *Legal Profession Uniform Law Application Act 2014*, the party to a complaint that involves a costs dispute may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for determination of a costs dispute, if the total amount of legal costs in dispute is not more than $25,000, and the parties have been informed by the Legal Services Commissioner of their right to apply to VCAT. VCAT is empowered to make various orders, based upon what is fair and reasonable in all the circumstances, having regard to s 200 of the Uniform Law.[133]

92. The Rules provide for the taxation of lawyer/client costs. In accordance with r 63.59, subject to r 63.60, costs payable to the lawyer by the client are taxed on a standard basis; that is, allowing for those that are reasonably incurred and of reasonable amount. However, this is subject to any act, order of the court, or agreement between the lawyer and client. Rule 63.60 also provides that costs not reasonably incurred or not of a reasonable amount may be allowed if: the costs were incurred with the authority of or the amount was authorised by the client; and before the costs were incurred, the lawyer expressly warned the client that the costs might not be allowed on a taxation of costs as between party and party.

93. The procedure for taxation of lawyer/client costs in the Costs Court is the same as that for taxation of party/party costs.[134]

94. As we have mentioned, most law firms use hourly rates as the basis for charges set out in costs agreements (with lawyers litigating personal injury and estate claims being the exception). If the relevant provisions of the Uniform Law are complied with and the costs agreement is valid, the use of hourly rates will not

---

131 Ibid s 291.
132 Ibid s 292.
133 *Legal Profession Uniform Law Application Act 2014* (Vic) s 99.
134 Rules, r 63.63 (subject to the Rules and any Act or order of the Court).

be in dispute, and the costs agreement is prima facie evidence that the legal costs disclosed in the agreement are fair and reasonable.[135] If the costs agreement is declared void, on assessment, hourly rates may still be an appropriate basis of charge if they meet the criteria set out in s 172.[136]

95. In some cases, the Scale might be considered by the Costs Court as an alternative measure to hourly rates, under the application of s 172.[137] However, it is no longer a 'default' means of determining the appropriate basis of charge, as it was under the *Legal Profession Act 2004*.[138]

6. Alternative approaches to litigious costs in Victoria and other jurisdictions

96. The following discussion identifies alternative models of costs assessment (other than the Scale) utilised in Victoria and other jurisdictions that have been considered in the review process. It is not intended to be an exhaustive description nor do we pretend that it necessarily reflects practices in all jurisdictions; rather, the significant aspects that have helped inform our analysis and recommendations are described.

Victoria

Personal injury claims

97. Minor personal injury claims are proscribed in this state.

98. In workplace injury claims,[139] two orders in council (which trump the Rules) apply: the WorkCover (pre-litigated claims) Legal Costs Order 2016;[140] and, the WorkCover (litigated claims) Legal Costs Order 2016 (**Legal Costs Orders**).[141] Each mandates fixed fees for legal costs, depending upon the stage of resolution of the claim, and whether it was for both pain and suffering and pecuniary loss, or pain and suffering only. The pre-litigated claims order covers the pre-issue settlement processes. The litigated claims order covers serious injury applications: fees are prescribed for statutory conferences, adjournments, re-

135 Uniform Law, s 172(4).

136 See, eg, *Johnston v Dimos* (2019) 59 VR 16, 25; *Bennett (a pseudonym) v Farrar Gesini Dunn Pty Ltd* [2019] VSC 744, [62], [63].

137 See also Uniform Law, s 200; see, eg, *Shi v Mills Oakley* [2020] VSC 498, [48].

138 *Legal Profession Act 2004* (Vic) s 3.4.19 (as repealed by *Legal Profession Uniform Law Application Act 2014* (Vic) s 157); *Frigger v Madgwicks* [2018] VSC 281, [11].

139 See *Accident Compensation Act 1985* (Vic) ss 134AG, 134AGA; *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 354, 355 (**WIRC Act**).

140 Victoria, *Victoria Government Gazette*, No G24, 16 June 2016, 1466 <https://content.api.worksafe.vic.gov.au/sites/default/files/2018-06/ISBN-Orders-in-council-workcover-pre-litigated-claims-legal-costs-order-2016-06.pdf>.

141 Ibid 1469.

hearings, and interlocutory proceedings.

99. Additionally, the *Workplace Injury Rehabilitation and Compensation Act 2013* (**WIRC Act**) establishes a scheme for costs recovery in common law proceedings for damages in respect of WorkCover injuries.[142] The scheme mandates that costs consequences flow from statutory offers and counter offers. For the purposes of taxing costs, any applicable scale has effect as if amounts were reduced by 20 per cent.[143] Significantly, as provided in s 344(6), a person representing or acting on behalf of a worker is not entitled to recover any costs from the worker or claim a lien in respect of those costs, or deduct costs from any sum of damages awarded, unless an award of costs has been made by the court.[144] The court determines the amount of costs on the application of the worker or their representative.

100. In transport accident claims, protocols have been developed and implemented by the Transport Accident Commission (**TAC**), Australian Lawyers Alliance, and Law Institute of Victoria. Specifically, four protocols were implemented in 2016 (the No Fault Dispute Resolution Protocols, Impairment Assessment Protocols, Common Law Protocols, and Joint Medical Examinations), which are to be read with the Supplementary Common Law Protocols (2020) (together, **Protocols**).[145]

101. For applications lodged under the Protocols, fixed legal costs are identified in relation to different types of applications, according to the circumstances of settlement.[146] In addition to identifying fixed fees, several 'uplifts' are set out, such as where a solicitor attends a 'common law conference' without counsel. Costs and disbursements not specifically regulated are to be determined in accordance with the appropriate court scale. The TAC reports that the Protocols have successfully reduced legal costs.[147]

---

142 WIRC Act, s 344.

143 Ibid s 344.

144 Ibid s 344(6), or in the rare case, where the costs are payable by the worker in accordance with div 2 of pt 7. This presumably refers to s 344(2)(c).

145 See 'TAC Protocols: Supplementary Common Law Protocols', *Transport Accident Commission (TAC)* <https://www.tac.vic.gov.au/providers/resources/tac-protocols>.

146 See 'TAC Protocols: Legal Costs effective from 1 July 2021', *Transport Accident Commission (TAC)* <https://www.tac.vic.gov.au/__data/assets/pdf_file/0010/547849/Legal-costs-1-July-2021.pdf>.

147 See TAC (n 145).

102. A Supreme Court Practice Note[148] addresses costs in testators family maintenance applications by requiring the plaintiff's solicitor, before the first return of the summons, to file an affidavit setting out an estimate of: the plaintiff's costs and disbursements to the end of mediation; and, whether or not a conditional costs (no win-no fee) agreement has been entered (including the amount of any uplift fee).[149] Parties applying later for orders finalising a proceeding must inform the Court of each party's costs.

103. If the costs vary by more than 20 per cent from the estimate initially provided to the Court, then the solicitor must file a further affidavit showing how the costs have been calculated.[150]

104. In 2013, the VLRC recommended that the family provision costs provisions in the *Administration and Probate Act 1958* should specify that the court has the power to cap costs.[151] This was on the basis that, although the power was available in the CPA 2010, a specific power would 'embolden judicial officers and serve as a reminder to practitioners in the jurisdiction that this was possible',[152] in a context where concerns had been raised that estates were being depleted by legal costs. However, the recommendation has not been implemented.[153]

105. In the County Court, a Practice Note provides guidance as to the monetary limit on the jurisdiction of the value of the estate or amount claimed, as well as the estimate of legal costs (including disbursements) to the conclusion of mediation.[154] The Practice Note also states that the Court will actively consider the reasonableness and proportionality of legal fees before making orders finalising the proceeding.

---

148 Supreme Court of Victoria, *Practice Note SC CL7: Testators Family Maintenance List (Second Revision)*, 25 March 2022, <https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/sc-cl-7-testators-family-maintenance-list-second-revision>.

149 Ibid [7.3].

150 Ibid [12.4].

151 VLRC, *Succession Laws* (Report, August 2015) Recommendation 42, [6.116].

152 Ibid [6.116].

153 Although other recommendations regarding executors fees and commissions, and the repeal of ss 96(6), (7) concerning applicants' costs in family provision matters were implemented. See *Administration and Probate and Other Acts Amendment (Succession and Related Matters) Act 2017* (Vic) s 14; *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) s 6(7).

154 County Court of Victoria, *Practice Note PNCLD 3-2021: Family Property List*, 30 November 2021, [1.3], [1.4] <https://www.countycourt.vic.gov.au/practice-notes?filter[keyword]=family%20property%20list>.

106. Item 18 of the Scale currently prescribes a lump sum for the costs of obtaining a winding-up order up to and including authentication, filing, and service of the order under s 470 of the *Corporations Act 2001*, as well as the obtaining of an order as to costs ($5,931) from the Costs Court.[155] In *Johnston v Dimos Lawyers*, Wood AsJ described this as an example of a 'fixed legislative provision'.[156]

New South Wales

107. In NSW, save for specific cost-capping mechanisms such as those involving personal injury claims, lawyer/client costs and party/party costs are regulated by provisions in the Legal Profession Uniform Law (NSW), and the *Legal Profession Uniform Law Application Act 2014* (NSW), which require that costs are 'fair and reasonable'.[157] As in Victoria, under the cognate provision, attention is focused on whether costs are proportionately and reasonably incurred, and proportionate and reasonable in amount.

108. Non-binding guidelines (**NSW Guidelines 2016**) promulgated by the Cost Assessment Rules Committee (**CARC**) apply to the assessment of party/party costs.[158] They are intended to provide guidance as to what will be appropriate in the ordinary case. The guidelines identify:

(a) a range of hourly rates for nine categories of legal service providers, including senior and junior counsel, senior partners, employed solicitors/junior associates, and clerks;

(b) costs for photocopying and document production; and

(c) the general approach to charging for other office overheads, travelling expenses, research, and in-house conferences.

The guidelines state that they are intended to be reviewed annually; the version currently in use is dated March 2016.

109. Cost assessors undertake the task of quantifying litigious costs – both party/party and lawyer/client costs. They must be legal practitioners of at least five years' experience and are appointed by the Chief Justice.[159] There are

---

155 If our recommendations are adopted, this fixed fee will need to be separately provided for – perhaps under the Rules.

156 *Johnston v Dimos Lawyers* (2019) 59 VR 16, 23 [18].

157 *Legal Profession Uniform Law (NSW)* ss 172, 199, 200; *Legal Profession Uniform Law Application Act 2014* (NSW) s 76.

158 See Appendix C.

159 *Legal Profession Uniform Law Application Act 2014* (NSW) s 93C, sch 6.

currently 61 cost assessors.[160]

110. Assessments are conducted on the papers. For lawyer/client assessments, applicants lodge the approved form annexing the bills to be assessed and any objections. In relation to party/party costs, information must be attached to the approved form, including the work done, who performed the work, when the work was performed, the amount claimed, and the basis of charging. Provision of this information is intended to be less formal than a bill of costs required for taxation.[161] Cost assessors issue certificates as to the determination of costs;[162] pre-completion certificates may be issued where costs are agreed. Enquiries made by the Legal Costs Committee also identified that offers can be made by way of sealed envelopes at the conclusion of the assessment, for the purposes of considering who pays the costs of the assessment.

111. CARC has issued guidelines for 'Time Standards in Costs Assessments and Reviews' which provide that costs assessors are to make a determination 'within 3 months from date of referral to an assessor where the costs claimed are less than $100,000.00, and within 6 months of the date of referral where the costs claimed are $100,000.00 or more'.[163]

Family Provision

112. In NSW family provision applications, s 99 of the *Succession Act 2006* (NSW) allows for regulations fixing a maximum fee for legal costs that may be paid out of an estate, and for court rules to be made concerning costs payable out of 'small estates' (defined as those of less than $750,000).[164] The section was introduced as part of reforms enacted in 2009 to control 'cost blow-outs' in family provision proceedings.[165] It appears that regulations have not been

---

160 For a list of the current costs assessors and the members of the Costs Assessor Rules Committee (CARC), see 'Costs assessment', *Supreme Court of New South Wales*, <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_costsassessment/sco2_costsassessment.aspx>.

161 *Legal Profession Uniform Law Application Regulation 2015* (NSW) rr 32, 58; see *Turner v Pride* [1999] NSWSC 850, [23]–[24]; Supreme Court of NSW, *Report of the Chief Justice's Review of the Cost Assessment Scheme* (12 March 2013) 9 [3.1.1].

162 See *Legal Profession Uniform Law Application Act 2014* (NSW) s 70; see also ss 63–80; *Legal Profession Uniform Law Application Regulation 2015* (NSW) rr 31–58.

163 See 'Costs Assessment Rules Committee: Time Standards in Costs Assessments and Reviews', available at 'Information about Costs Assessment', *Supreme Court of New South Wales*, <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_costsassessment/sco2_costsassessment_faqs/sco2_costsassessment_faqs.aspx> (link at bottom of page).

164 *Succession Act 2006* (NSW) ss 99(2), 142; see Christopher Crawford, 'Family Provision Applications in Small Estates: *Cope v The Public Trustee of Queensland*' (2013) 20(1) *James Cook University Law Review* 118, 120–1.

165 New South Wales, *Parliamentary Debates*, Legislative Council, 26 June 2008, 9423–4; New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2008, 10285.

made under this provision; however, NSW Supreme Court Practice Note No EQ 7 provides that 'orders may be made capping the costs that may be recovered by a party in circumstances including, but not limited to, cases in which the net distributable value of the estate (excluding costs of the proceedings) is less than $500,000'.[166] A comparable practice direction exists in Western Australia.[167]

113. Rule 42.4(1) of the *Uniform Civil Procedure Rules 2005* (NSW) empowers the court to fix the maximum party/party costs that may be recovered in advance; in family provision matters, this has been referred to as putting 'into the Court's hands a brake on intemperate and disproportionately expensive conduct of proceedings'.[168] Dal Pont notes that:

> Family provision cases are particularly amenable to a statutory cap, in part because the costs usually come out of a fund in which each litigant is interested, and in part because they are prone to generating litigation the costs of which are entirely disproportionate to the value of the fund.[169]

While courts have ordered 'cost capping' in the context of family provision proceedings, it appears that this usually occurs at the conclusion of the matter.[170]

Personal Injury

114. The Legal Profession Uniform Law (NSW) has the same uplift cap on conditional cost agreements as in Victoria – 25 per cent. There is also a legislative limit on costs for legal services in personal injury matters where the damages recovered does not exceed $100,000. In these cases, the charge for legal services provided to a party in connection with a claim (excluding

---

166 Supreme Court of New South Wales, *Practice Note No EQ 7: Supreme Court – Family Provision*, 12 February 2013, [24] <http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/7c3901744d55ce92ca257b1000819c25?OpenDocument>. Practice Note No EQ7 also requires the plaintiff to file and serve with the summons a copy of an affidavit setting out an estimate of the plaintiff's costs and disbursements up to mediation.

167 Supreme Court of Western Australia, *Consolidated Practice Direction*, 21 March 2022, 9.2.2 [46]. Note also, in South Australia, where the court may order that a trial proceed by summary determination, with the objective of minimising costs and achieving an expeditious but just determination of the action, in relation to estates of less than $750,000: *Uniform Civil Rules 2020* (SA) r 254.15.

168 See, eg, *Re Sherborne Est (No 2)* (2005) 65 NSWLR 268, 273 [29].

169 GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis, 2nd ed, 2017) [23.35].

170 See *Nudd v Mannix* [2009] NSWCA 327, [26], [27]; *Detheridge v Detheridge* [2019] NSWSC 183, [174]–[177]; *Baychek v Baychek* [2010] NSWSC 987; *Askew v Askew* [2015] NSWSC 192, [122]–[129]; see also *Sergi v Sergi* [2012] WASC 18, [51], [52].

disbursements) is:

(a) for legal services provided to the plaintiff – 20 per cent of the amount recovered or $10,000, whichever is greater; and

(b) for legal services provided to the defendant – 20 per cent of the amount sought to be recovered by the plaintiff or $10,000, whichever is greater.[171]

115. Where the limit applies, a law practice cannot be paid or is entitled to recover an amount that exceeds the limit for those legal services; and a court or tribunal cannot order another party to the claim to pay the costs of those legal services, in an amount that exceeds the limit. However, the legislative limit does not apply to the recovery of lawyer/client costs payable under a valid costs agreement. Nor does it apply to claims made under various statutes, including the *Motor Accidents Compensation Act 1999* (NSW). Additionally, courts can order that certain costs are excluded from the limit, if they were incurred because of unreasonable or unnecessary conduct by the other party.

116. It has been suggested (almost certainly, correctly) that these limits reflect issues of proportionality, and may have been prompted by many of the overcharging disciplinary cases involving personal injury matters.[172]

Queensland

117. In Queensland, the maximum amount of legal costs that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim[173] cannot be more than the amount calculated by the following formula:

[E – (R + D)] x 0.5

Where: 'E' means the amount to which the client is entitled under a judgment or settlement, including an amount that the client is entitled to receive for costs under the judgment or settlement; 'R' means the total amount that the client must, under an Act, a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under

171 *Legal Profession Uniform Law Application Act 2014* (NSW) s 61, sch 1.

172 Dal Pont (n 37) 303.

173 ***Speculative personal injury claim*** 'means a claim for, or substantially for, damages for personal injury if the right of a law practice to charge and recover legal costs from a client for work done is dependent on the client's success in pursuing the claim': see *Legal Profession Act 2007* (Qld) s 346.

the judgment or settlement; and 'D' means disbursements.[174]

118. The formula is described as the '50/50 rule', as a law practice is entitled to charge 'no more than half the amount to which the client is entitled under a [judgment] or settlement after deducting any refunds the client is required to pay and the total amount of disbursements for which the client is liable'.[175] Of note, if the amount that a law practice can recover from a client is greater than the legislative limit, a law practice (or barrister) may apply in writing to the law society (or bar association) for approval to charge and recover the greater amount.

Australian Capital Territory

119. A statutory limit for costs applies in the *Civil Law (Wrongs) Act 2002* (ACT), where the amount recovered on a claim for personal injury damages is $50,000 or less. A lawyer is not entitled to be paid, nor must a court decide that a lawyer is entitled to be paid, nor must a court order anyone to pay the lawyer an amount that is more than the 'maximum costs':

(a) The maximum costs allowable for legal services provided to the plaintiff is the greater of 20 per cent of the amount recovered and $10,000.

(b) The maximum costs allowable for legal services provided to the defendant is the greater of 20 per cent of the amount sought to be recovered by the plaintiff and $10,000.[176]

120. Like NSW, a court may order that certain costs are excluded from the limit if they were incurred in response to an action of the other party that was intended, or reasonably likely, to unnecessarily delay or complicate determination of the claim.[177] Additionally, the court or taxing officer may increase the maximum amount because of the complexity of the claim, or the behaviour of one or more of the parties.

South Australia

121. In South Australia, event-based and proportionate cost scales are used in the Magistrates' Court costs scale, the Minor Civil costs scale, and the Fast Track costs scale.[178] The Fast Track Lists encompass proceedings in the Supreme and

---

174 Ibid s 347.

175 Queensland Legal Service Commission, 'Charging Fees in Speculative Injury Matters' (Regulatory Guide 3, August 2020) 3.

176 *Civil Law (Wrongs) Act 2002* (ACT) s 181.

177 Ibid ss 183, 184.

178 See *Uniform Civil Rules 2020* (SA) ch 16, sch 6, pts 3, 4, 5.

District Courts which: involve a combined claim of not more than $350,000, and a trial of no more than 3 days; or are sufficiently straight forward to proceed in the Fast Track List.

122. When reviewing the 'Fast Tracks' in 2017, Tutton concluded that the scheme had a low rate of adoption, perhaps due to lack of awareness of its existence and how it operated. It may also not have been considered because it was not 'sufficiently entrenched in litigation discourse and practice'.[179]

Federal Court of Australia (FCA)

123. The Federal Court uses a scale that is relatively modern in both its language and structure.[180] For example, 'reading' is referred to rather than 'perusing', and reference is made to correspondence that is up to 50 words in length, such as 'text messages' and 'instant messaging'.[181] Like the Scale, it can be described as 'mixed', in the sense that it uses a number of different bases for charging:

(a) units of time:

i. attendances (a rate of up to $65 per six minutes for lawyers; and rates of $24 per six minutes for law graduates or articled clerks, and $11 per six minutes for clerks or paralegals);

ii. reading documents, other than correspondence of up to 100 words;

iii. delegation and supervision;

iv. research; and

v. electronic document management (at the rate of a law graduate or clerk, depending upon the task).

(b) at the discretion of the taxing officer (reading, if time units not applied and having regard to the number of pages read);

(c) number of words (preparation of documents, and reading correspondence of up to either 50 or 100 words);

(d) per item of work (personal service).

124. Of note, the rates for time-charging by a lawyer are provided as a maximum figure, to be considered in all the circumstances including the lawyer's skill and experience, and the complexity of the matter. As with the Scale, an additional amount may be allowed for 'skill, care and responsibility', having regard to

---

179 Jordan Tutton, 'Litigation in the South Australian Fast Track Streams' (2017) 6(3) *Journal of Civil Litigation and Practice* 108.

180 See *Federal Court Rules 2011* (Cth) sch 3 (**Federal Court Scale**).

181 Similarly, Item 5 of the Scale refers to electronic communications and 'messages' of 20 words or less.

matters such as the complexity of the matter, the novelty of questions and value involved, and the time within which the work was required to be done. Item 12 of the Federal Court Scale expressly contemplates charging on a basis other than time:

> 12.1 In matters where the lawyer has not charged the client on a time costing basis, items 1 to 11 above do not apply and a fair and reasonable amount will be allowed, having regard to:
>
> (a) the complexity of the matter;
>
> (b) the difficulty or novelty of the questions involved;
>
> (c) the skill, specialised knowledge and responsibility involved;
>
> (d) the work actually done by the lawyer;
>
> (e) the extent to which the work was reasonably necessary;
>
> (f) the period during which the work was done;
>
> (g) the time spent on performing the work;
>
> (h) the quality of the work;
>
> (i) the number and importance of the documents prepared and read, regardless of length;
>
> (j) the amount or value of money or property involved;
>
> (k) the terms of the costs agreement between the lawyer and client; and
>
> (l) any other relevant matter.

Additionally, fixed sums are provided for short form bills in relation to certain applications under the *Corporations Act 2001* (Cth), *Bankruptcy Act 1966* (Cth), and *Migration Act 1958* (Cth).

125. Party/party assessments are conducted by Registrars, and a number of mechanisms are used to encourage the inexpensive and efficient resolution of costs issues:

(a) a preference for lump sum costs orders within six weeks of the judgment, made on the basis of a 'costs summary' prepared by the costs applicant;

(b) as part of case management, the ability to cap the amount of recoverable costs;

(c) the use of 'short form' and 'long form' bills of cost. The former are available on applications for winding up, appeals from the Federal Circuit Court and Family Court, and creditor's petitions. They are intended to provide a 'speedier' process than detailed itemised bills and are used alongside the fixed sums identified in the scale;

(d) for 'long form' bills of costs, the use of an estimate (provided by a Registrar) of the total amount that the bill is likely to be if it were taxed; and

(e) certification by the legal practitioner that the amounts claimed do not exceed the applicant's liability and the calculations are correct; and that the amounts claimed are capable of further verification through source material, should such material be required by the court.[182]

126. The lump sum process has been described as primarily relying upon the maximum hourly rates provided in the scale and, in that way, is somewhat akin to the NSW system of costs assessment, but more 'broad-brush'. An issue identified in consultation was the wide variation in estimates on comparable files.

Federal Circuit Court and Family Court of Australia

127. For general federal law matters (other than bankruptcy), unless the Federal Circuit and Family Court otherwise orders, a party entitled to costs is allowed those prescribed in an event-based scale where fees are fixed for specified events, such as initiating or opposing an application up to the first court date, preparing for a hearing, and the daily hearing fee.[183]

---

182 See Federal Court of Australia, *General Practice Note GPN-COSTS: Costs Practice Note*, 25 October 2016, [3.1], [3.3], [3.5], [3.10], [3.11], [3.16], pts 4, 5, and Annexure B Part A; Federal Court of Australia, *Central Practice Note CPN-1: National Court Framework and Case Management*, 20 December 2019, [8.5(n)], pt 17; see also Deborah Vine-Hall and Liz Harris, 'Chapter 25: Costs in the Federal Court' (26 July 2021) in Law Council of Australia and Federal Court of Australia, *Case Management Handbook* (2014).

183 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) r 22.09 and sch 2.

New Zealand

128. In the High Court of New Zealand, subject to the discretion of the court, party/party costs are assessed by 'applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding'.[184] Proceedings are allocated to one of three categories according to complexity,[185] and an appropriate fixed 'daily recovery rate' is prescribed for each category.[186] The appropriate daily recovery rate is intended to be around two-thirds of the daily rate considered reasonable.[187] The reasonable time required for each step is determined according to a table that identifies the steps in the proceeding and three time bands.[188]

129. The aim of such an approach is for the determination of costs to be predictable and expeditious.[189] Anecdotally, the scheme has facilitated certainty concerning recoverable costs, which has assisted practitioners when advising clients and reduced the number of costs disputes.

130. Disadvantages raised during the review included uncertainty of the gap between recoverable and actual costs, and how this might be used strategically. For example, parties are aware of the complexity level and can predict recoverable costs, but an unscrupulous or inefficient litigant may expose the opposing party to a significant gap between actual and recoverable costs. That is, a party may take advantage of the inflexibility of the model, with an additional costs burden falling to the lawyer/client costs of the successful litigant.

England and Wales

131. Over recent decades, litigious costs in England and Wales have been the subject of a number of reforms. The Woolf Reforms[190] were implemented in 1999, with

---

184 *High Court Rules 2004* (NZ) rr 14.1–14.2.

185 Category 1: Proceedings straightforward in nature and able to be conducted by junior counsel in the High Court. Category 2: Proceedings of average complexity requiring counsel of average skill and experience in the High Court. Category 3: Complex or significant proceedings requiring counsel with special skill and experience in the High Court. See *High Court Rules 2004* (NZ) r 14.3.

186 *High Court Rules 2004* (NZ) r 14.4, sch 2.

187 Ibid r 14.2(1)(d).

188 Time band A: A comparatively small amount of time is considered reasonable. Time band B: If a normal amount of time is considered reasonable. Time band C: If a comparatively large amount of time for the particular step is considered reasonable. See ibid r 14.5, sch 3.

189 Ibid r 14.2(1)(g).

190 Reforms introduced after the publication of Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (**Woolf Final Report**). See also Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (June 1995).

the commencement of the *Civil Procedure Rules 1998* (UK) (**CPR 1998**). Among other things, the Woolf Reforms established three tracks of litigation: a 'small claims track' (cases with values below £5000); a 'fast track' (claims not appropriate for the small claims track and worth up to £15,000, where the trial was not expected to last longer than a day, and where limited expert evidence would be given); and 'multi-track' (all claims not appropriate for the small claims track or fast track).[191]

132. Lord Woolf's recommendations regarding costs included establishing a system of fixed costs in the small claims and fast tracks, and requiring costs estimates to be provided by parties at case management conferences for multi-track cases, which would be approved by the court.[192] However, the recommendation concerning fixed costs in the fast track met stiff opposition from the legal profession and was not undertaken.[193]

133. Concerns surrounding disproportionate and unpredictable costs remained and, in 2008, Lord Jackson was tasked with reviewing the rules and principles governing the costs of civil litigation. Key recommendations in Lord Jackson's 2009 Final Report (**Jackson Final Report**) included:

(a) fixing costs in fast track matters, which at that time covered cases from £10,000 up to £25,000 and the trial could be conducted in one day.[194] It was proposed that costs in fast track personal injury matters would be fixed according to a matrix adjusting for the stage of the proceeding, case type and quantum of damages claimed,[195] while all other fast track cases would be capped;

(b) costs management, including costs budgeting, in multi-track cases;[196] and,

---

191 See *Civil Procedure Rules 1998* (UK) r 26.6, as enacted 26 April 1999.

192 See Woolf Final Report (n 190) chs 4, 7.

193 See Jackson Preliminary Report (n 74) 203 [1.6].

194 The scope of each track is set out in *Civil Procedure Rules 1998* (UK), r 26.6 (**CPR 1998**). **'Small track'** currently includes: personal injury proceedings with a value of not more than £10,000, and the value of any claim for damages for personal injuries is not more than £5,000 in a claim for personal injuries arising from a road traffic accident; £1,000 in a claim for personal injuries arising from a road traffic accident in specified circumstances, or £1,000 in any other claim for personal injuries; certain small claims by tenants of residential premises against landlords; and is the normal track for any claim which has a value of not more than £10,000. **'Fast Track'** for claims with a value between £10,000 and £25,000, where the trial is not likely to last longer than one day, and oral expert evidence will be limited to: one expert per party in relation to any expert field; and expert evidence in two expert fields. **'Multi-track'** is the normal track for any claim for which the small claims track or the fast track is not the normal track. FRC for the main categories of personal injury Fast Track matters are prescribed in CPR 1998, pt 45 (road traffic accident, employers' liability accident, and public liability cases).

195 Jackson Final Report (n 46) app 5.

196 Ibid 173 [4.1], 400–19.

(c) once the reforms were 'bedded in', consideration being given to extending fixed recoverable costs beyond fast track.[197]

Underpinning these recommendations was the belief that the only effective way to control costs was to do so in advance.[198]

134. The following should be noted. First, the reforms do not deal with costs incurred pre-issue. In England and Wales, these can be significant, and are usually assessed on a time costing basis. Second, the reforms do not extend to the regulation of lawyer/client costs – they are directed to recoverable litigious costs from the losing party.

135. The important parts of Lord Jackson's recommendations, and the associated reforms, are set out in some detail below.

Fixed recoverable costs (FRC)

136. FRC refer to 'a regime of scale or fixed costs, under which the amount recoverable is prescribed by a set of rules or can be calculated arithmetically in accordance with those rules'.[199] In 2013, FRC were implemented in fast track personal injury matters on the basis of Lord Jackson's recommendations. His Lordship noted three particular advantages of such a model:

(a) giving all parties certainty as to the costs that they may recover if successful or their exposure if unsuccessful;

(b) avoiding the further process of costs assessment, or disputes over recoverable costs, which could themselves generate further expense; and

(c) ensuring that recoverable costs were proportionate. There was a public interest in making litigation costs in the fast track proportionate and certain.[200]

Costs for legal representatives and counsel were fixed according to the value of the claimed (or agreed or awarded) damages, the type of proceeding, and the stage of proceeding.[201]

137. In 2017, Lord Jackson finalised a supplemental report on FRC (**Jackson Supplemental Report**), which reflected the further work foreshadowed in the

197 Ibid 172 [2.10], 173 [4.1]; Jackson Supplemental Report (n 15) 9 [3]–[4].
198 Jackson Supplemental Report (n 15) 24.
199 Ibid 6.
200 Jackson Final Report (n 46) xviii [2.10], 158 [5.8].
201 CPR 1998, pt 45. Prior to 2013, a system of fixed fees existed for certain road traffic accident and employers liability matters.

Jackson Final Report. The Jackson Supplemental Report concluded that FRC were working satisfactorily, and Lord Jackson recommended their extension to all fast track proceedings, as well as to a new 'intermediate track'. His Lordship proposed that costs would be fixed according to a matrix addressing the quantum of the claim, four bands of complexity, and the chronological stage of the proceeding. The fees were set after statistical analysis of recovered costs in practice,[202] and an 'escape clause' to the FRC rules was to be maintained.[203]

138. After receiving the Jackson Supplemental Report, the UK Ministry of Justice engaged in consultations (at length and with no great haste, it would seem) regarding the supplemental recommendations.[204] In late 2021, it proposed:

(a) extending FRC to all fast track cases;[205] and,

(b) expanding fast track to include 'intermediate cases'; that is, 'straight-forward' cases valued between £25,000 and £100,000, where the trial is not anticipated to last longer than three days.

The Ministry of Justice identified that FRC were advantageous, as they reduced actual costs, ensured that costs were proportionate, and controlled costs in advance, which promoted certainty.[206] Ultimately, it was concluded that where appropriately balanced, FRC could enhance access to justice. Once the proposals are implemented, there will be FRC for all matters up to £100,000 that are straight-forward, and costs budgeting for multi-track matters above £100,000.

139. The authors discussed the reforms with the Senior Costs Judge for England and Wales, his Honour Judge Gordon-Saker. His Honour told us that he believed the FRC scheme was working well; and that while lawyer/client costs are not regulated, in practice, firms tend to keep their costs comparable to the FRC rate to maintain client satisfaction.

Costs budgeting

140. 'Costs management', a term advanced by Lord Jackson (and now enshrined in the CPR 1998, r 3.12), is concerned 'with ensuring that the incidence of costs is actively controlled by the court as the case moves from inception to

202 Jackson Preliminary Report (n 74) 206 [2.4].
203 Ibid 21 [2.19]. See CPR 1998 r 45.29J.
204 See United Kingdom, Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals* (Consultation Paper, 28 March 2019) (**Ministry of Justice Consultation**).
205 Ministry of Justice Response (n 43) 11–12 [3.1]–[3.6].
206 Ibid 13.

conclusion'.[207] A key element of costs management is 'costs budgeting', the essence of which is that 'the costs of litigation are planned in advance; the litigation is then managed and conducted in such a way as to keep the costs within the budget'.[208] It commenced in England and Wales in 2013.

141. As summarised in the White Book, a number of exceptions from the cost budgeting rules are set out in r 3.12, including where the amount of money claimed is £10 million or more:

> **3.12.3 Cases to which Pt 3 Section II applies**
>
> Legally represented parties are required to file and exchange costs budgets before the first [case management conference] in all Pt 7 multi-track cases except the following:
>
> (a) claims in which the amount of money claimed as stated on the claim form is £10 million or more;
>
> (b) claims containing a statement that the claim is valued at £10 million or more;
>
> (c) proceedings in which a claim is made by or on behalf of a person under the age of 18 (on that person reaching majority this exception will continue to apply unless the court otherwise orders);
>
> (d) proceedings which are the subject of fixed costs or scale costs;
>
> (e) litigants in person;
>
> (f) claims proceeding in the Shorter Trials Scheme; or
>
> (g) proceedings in which the court otherwise orders.[209]

However, even where there is no requirement for costs budgeting under the rules, the Court may make an order for costs budgeting on its own initiative or where the parties agree.[210]

142. Costs budgets are certified and, unless the court otherwise orders, must follow

---

207 Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report – Volume 2* (May 2009) 484 [1.6].

208 Ibid 491 [3.5].

209 Westlaw UK, White Book 2022, Volume 1, Section A, Part 3, The Court's Case and Costs Management Powers, II. Costs Management, 186 [3.12.3] (**White Book**). The White Book contains the sources of law relating to the practice and procedures of the High Court and County Court in England and Wales regarding civil litigation. It describes costs management and costs budgets.

210 CPR 1998, r 3.13(3).

'Precedent H'.[211] This requires budgets to be set for about eight separate phases of the proceeding. In a 'statement of truth', a legal practitioner must certify that the budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for the client to incur. Unless the court otherwise orders, a party who fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.[212]

143. Where costs budgets have been filed and exchanged, the court will make a costs management order unless it is satisfied that the litigation can be conducted justly, and at proportionate cost, in accordance with the overriding objective without such an order being made. By a costs management order, the court will —

(a) record the extent to which the budgeted costs are agreed between the parties;

(b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;

(c) record the extent (if any) to which incurred costs are agreed.

144. After a costs management order is made, the court will control the parties' budgets in respect of recoverable costs,[213] and will not make any case management decision without fully considering its costs implications.[214]

145. In proceedings where a cost management order has been made, in the assessment of costs on a standard basis the court will have regard to the last approved or agreed budget, and will not depart from it unless satisfied that there is 'good reason' to do so.[215]

146. Judge Gordon-Saker noted that most budgets are agreed between the parties. When approving a budget, the judge fixes a lump sum figure for each phase, which must be proportionate to the claim. The assessment is conducted in a broad fashion, so as to avoid a 'prospective detailed assessment'.

---

211 Lord Chief Justice of the High Court of England and Wales, *Practice Direction 3E: Costs Management*, 6 April 2021, [3(a)], [4(a)] <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management> (see Annex A for Precedent H).

212 CPR 1998, r 3.14.

213 Ibid r 3.15(3).

214 Ibid r 3.17(1); White Book (n 209) [3.12.2].

215 CPR 1998, r 3.18.

7. Submissions and Consultations

147. In response to the Discussion Paper, the authors received written submissions from 16 stakeholders.[216] As set out in Appendix D, the stakeholders included representative organisations, costs practitioners and experts, law firms, statutory bodies, and a civil justice research centre.

148. Multiple consultation sessions took place with professionals from the following practice areas: insurance; VCAT (practitioners and members); corporate counsel; costs consultants (including an economist); insolvency; common law; general commercial; and construction/building. A meeting also took place with a personal injury solicitor from NSW. These were chaired by judges of the Supreme and County Courts.

149. To assist with understanding specific issues, and after reviewing the written submissions and extensive minutes of the consultations, the authors held focused meetings with individual judicial officers (in Victoria and other jurisdictions) specialising in costing, costs experts, and legal practitioners (solicitors and barristers). A meeting was also held with representatives of the Legal Services Commissioner.

150. In overview, and not surprisingly, the written submissions, consultations, and meetings revealed mixed views regarding the ongoing role of the Scale and a divergence of opinions as to any alternative model.

Support for retaining the Scale

151. The Discussion Paper noted that:

> 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.

152. Most of the written submissions did not support abolition of the Scale. Stakeholders identified a number of reasons for retaining the Scale. We hope that we do no disservice to their authors by summarising, collectively, their views as follows:

(a) The Scale was reviewed in 2013. It simplified the previous Scale. It introduced a degree of 'time costing' but retained various provisions to provide objective measures of the value of work done.

(b) The Scale provides relative predictability and uniformity.

---

216 TAC and WorkSafe requested that their submissions remain confidential.

(c) The Scale provides reliable and consistent benchmarking for costs which is generally in line with market rates for the relevant jurisdictions.

(d) A court-mandated Scale provides an objective and fair rate of charge which recognises the quality and value of the work product and output. That the Scale is court-mandated, also provides reassurance to clients.

(e) A bill of costs prepared on Scale achieves greater transparency as to work undertaken, because the description of work undertaken is derived from the source documents on the lawyer's file.

(f) The Scale is consistent with the consumer protection purposes of the Uniform Law and the CPA 2010. The consumer protection legislation requires a client to be informed of the basis of charging, and if charges are to be calculated on Scale, then a copy of the Scale must be provided to the client. The lawyer must be satisfied that the client understands the basis of charging. The Scale is a helpful and transparent reference point in discussions with the client. Subject to updating terminology, the Scale sets out the elements of work for which the solicitor may charge and describes how fees for such work will be calculated. Cost estimate updates and assessments are undertaken by reference to the Scale, including the purpose of updated costs disclosure to comply with the Uniform Law relating to disclosure before a settlement event or at the request of the client.

(g) The Scale provides sufficient built-in flexibility to accommodate exceptional circumstances in individual matters.

(h) The Scale requires lawyers to record time for certain items, for example, conferences and attendances at Court. It is largely 'value based'. The Scale is mixed, but allowances for documents prepared, received, or reviewed are based on length. Unusual 'complexity or skill' required can be accommodated in a discretionary loading.

(i) The Scale provides a level playing field for the assessment of inter parties' costs and is of particular importance when the resources of the parties engaged in litigation are unequal.

(j) The Scale provides flexibility in the charge for drawing a bill on Scale, up to 15 per cent of the amount of the bill. Experience is that the preparation of the bill in taxable form is typically charged at between 8 per cent and 11 per cent of professional costs (not the bill in total) and, subject to r 63.85 of the Rules, a significant portion of that is recoverable in the Court's discretion. Some costs consultants charge on the Scale rates for drawing/engrossing, rather than on a percentage of professional costs. For those who charge based on a percentage of professional costs, similar percentages are charged for bills drawn on other bases, such as time costing. Where a bill is drawn on some higher basis (such as high hourly rates), and the drawing of the bill is claimed

as a percentage of professional costs, the costs of drawing the bill will necessarily be higher. The cost of drawing a bill may be justification to review the allowable costs for drawing a bill, or the quantum of an individual Scale item; it is not a basis to abolish the Scale.

(k) Where the Scale is the basis of charge for solicitor/client costs, from the outset, it improves certainty and allows transparency in solicitor/client disclosures consistent with the consumer protection provisions of both the Uniform Law and the CPA 2010.

(l) Subject to updating terminology, the Scale sets out the components of the work for which the solicitor may charge and describes how the fees for such work will be calculated.

(m) Reference to the Scale improves the accuracy of the mandatory estimate of total legal costs under section 174(1)(a) of the Uniform Law.

(n) The Scale provides a useful objective benchmark and a basis upon which fair and reasonable costs may be quantified in the absence of any valid costs agreement.

(o) Scale costs are increased annually, so they should remain relevant and reasonable.

(p) Some costs consultants disputed the statement in the Discussion Paper that the Scale does not reflect current market practice. They stated that most clients practicing in personal injuries litigation rely on the Scale for both party/party and lawyer/client costs. Further, that solicitors who practice in financial services and general insurance disputes quantify solicitor/lawyer client costs in accordance with the Scale.

153. Consultations revealed similar themes. That is, the Scale has a role in providing an 'objective' reference that can be useful for both costs estimates and assessment, and in this way it may 'level the playing field'. As will become apparent, we do not accept many of these 'justifications', which upon examination do not hold up to objective scrutiny.

Criticisms of the Scale

154. In the Discussion Paper, a number of criticisms of the Scale were identified. These were as follows:

(a) The Scale is anachronistic in substance, terminology, and in day-to-day practice is not used by the profession.

(b) 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.

(c) The use of technology in legal practice has increased, and there are difficulties in adapting the Scale to this evolving landscape in a way that provides a fair and reasonable costs recovery.

(d) 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 in time would never be referred to the Scale.

(e) 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 done, in order 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.

(f) The preparation of a Scale-based bill of costs – usually by a costs consultant – is expensive and can amount to as much as 15 per cent of the bill for a taxation.

(g) A Scale-based bill of costs is inappropriate, as a significant amount of money is incurred on work that is of no relevance to the client. It is simply a recovery exercise, which may impede payment to the client of their settlement or judgment.

(h) Indemnity costs orders are prima facie quantified by reference to the Scale, which may bear little resemblance to the successful party's actual costs, and result in a recovery that is substantially less than the indemnity intended by the court.

(i) The Scale is used in limited circumstances, as described previously. First, perhaps as the basis of solicitor/client, or counsel/client fee agreements, and usually confined to personal injury claims. Second, the Scale is used as the basis for Supreme Court and County Court party/party costs orders.

155. The written submissions, consultations, and meetings identified other issues:

(a) The terminology within the Scale should be updated to become more user friendly and more readily adaptable to modern legal practice.

(b) The Scale did not anticipate and cannot cope with the rapid changes in technology, despite consultation with Legal Technologists at the time of drafting. The use of Technology Assisted Review (TAR), in particular Predictive Coding, has transformed the approach to discovery review, with physical review by lawyers now confined to small subsets of

documents.

(c) The Scale does not reflect the different expectations of clients about how they will communicate (WhatsApp, text messaging, video calls), or the utilisation of software such as Microsoft Teams or Slack, to facilitate management and communication in a remote working environment.

(d) The Scale is antithetical to transparency and technological advances that facilitate understanding of a complex exercise. For instance, it does not accommodate utilising a digital whiteboard to brainstorm with a client, preparing a video recording for a client, or preparing an Infographic to explain a complex issue in simple terms for either the Court or a client.

(e) The courts and the community are increasingly expecting information to be provided to clients in a way that ensures all understand the information provided. The Scale is antithetical to this aim.

(f) Clients can, at least, understand how hourly rates work as opposed to the 'dark arts' of the Scale only understood by costs experts.

(g) The Scale does not reflect best practice in the time costing utilisation of 6 minutes as the basis of charge. In an era where time spent on a messaging task is less than a minute, the Scale needs to be adjusted.

(h) If the Scale adopts rates substantially lower than the market, this will result in an increased gap between actual and recovered costs, and further reduce access to justice.

(i) There is a disconnect between the charging of clients and the Scale. Taxation can be opaque, costly, and involve 'retro-fitting' or a 'manufactured outcome' if the firm does not charge according to the Scale.

(j) The Scale does not adequately value the substantive advice work of solicitors. Further, technology has changed approaches to tasks such as perusal, and it can be a matter of luck whether a bill of costs reflects the actual work done. For example, a complex letter may take a significant time to draft.

(k) The Scale gives the impression of precision and objectivity, but that is not realistic.

8. Analysis

(a) At the present time, is it appropriate to recommend a major change to the way in which litigious costs are assessed?

156. Any change to the way in which litigious costs are assessed will impact practice in both party/party and lawyer/client costs. This is particularly so for personal

injuries and estate matters in which many practitioners rely upon the Scale as the measure of lawyer/client costs. Perhaps reflecting this, several stakeholders cautioned the authors about recommending changes without undertaking further consultation.

157. Others suggested that it was necessary to have data – or empirical evidence – surrounding costs practice before changes are considered.

158. The limitations of this review need to be acknowledged. The review sought written submissions and conducted consultations over a short timeframe. The consultations were intended to capture perspectives from key practice areas and those with expertise in legal costs.

159. Notwithstanding these cautionary observations, we do not believe that it is in anyone's interests (particularly litigants) to delay reform. There is much to be learnt from interstate and overseas practice, without engaging in lengthy and costly research exercises which will inevitably frustrate timely and necessary access to justice. The experience of reform in England and Wales is a sanguine lesson. We are convinced that we have enough material to reach a firm conclusion about retention of the Scale and its potential replacements.

160. That said, we have, nonetheless, adopted a somewhat cautious approach in formulating our recommendations. In particular, a staged implementation of two different approaches is recommended, with some of the more far-reaching recommendations to be treated as a medium-term goal.

(b) Should the Scale or a revised version be retained?

161. This is the first question posed by the Courts in commissioning this report.[217]

162. We have carefully read and considered the submissions supporting retention of the Scale. For the following reasons, we reject the concept of retaining the Scale or engaging in any revision of it.

163. First, on account of both the language that it adopts and its structure, the Scale is difficult to understand and apply. For example, clients (and, indeed, most lawyers) cannot comprehend the difference between 'perusing' and 'examining', or 'drafting' and 'engrossing', and how this operates in practice. What is an attendance? Who is attended? What is a folio? Why does a lawyer get the same amount for identical letters copied to a raft of solicitors, clerks, and others?

---

217 See [8] above.

164. While the fact that the Scale is established under the Rules and identifies fixed fees for discrete items gives it the cloak of objectivity, the assessment process and adjustments involved are complicated in practice, require specialised skills, and involve elements of subjectivity. As such, despite its apparent objectivity, the Scale is opaque and inhibits transparency in relation to the charging and assessment of legal costs.

165. Second, the Scale lacks both differentiation and flexibility. Although in some aspects it differentiates between legal practitioners and employees of practices who are not legal practitioners (attendances, for example), and a distinction is drawn in relation to the experience of counsel, the skill of the individual performing the particular service is not otherwise recognised. For example, unless upon taxation the Costs Court exercises discretion under r 63.72,[218] the allowance to write a letter may not necessarily reflect the letter's value to the client nor the cost to the firm in producing it. While skill, care, and responsibility can be addressed in Item 17, this is a gross, holistic assessment, relative to the overall circumstances of the case. A client has no idea when and how this provision might be triggered and, if so, how it is to be measured. Again, this lack of differentiation contributes to an opaqueness or complexity in the Scale relative to the services that are provided in practice.

166. The Scale provides limited flexibility: 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. For example, during consultations, a difficulty was noted regarding TAR. A firm that uses TAR may conduct document review more efficiently than the 'perusing' of folios allowed under the Scale. As such, assessment on the basis of the Scale may not reflect the actual work done. Additionally, the Scale adopts six-minute intervals as a basis for attendances, when technology has now advanced such that some programs allow time-recording on the basis of one-minute units.

167. Unlike the Federal Court Scale, the Scale does not provide an alternative to allowances based upon the identified items, in circumstances where a law firm does not charge upon the basis of time.[219] This means that Victorian firms adopting innovative approaches to charging are left with much uncertainty surrounding taxation of their party/party costs. Necessarily, if they cannot settle the question of party/party costs, they must endeavour to fit the work done into a model that simply does not account for changing business practices

218 See [60] above.

219 See Federal Court Scale (n 180) Item 12.

as a result of technology and other developments. Given the importance of technology and innovative charging models for access to justice and client satisfaction, this is a significant shortcoming of the Scale, which may well deter innovation.

168. Third, to quote one interviewee, it 'does not have a resemblance with reality'. It does not reflect the charging practices of many firms, meaning that it has to be 'retrofitted' to files. Consultations and interviews revealed that this leads to multiple problems:

(a) the process of retrofitting involves the complexity, cost, and delay of specialised costs consultant services – a process that has been described as involving 'dark arts';

(b) the disconnect between assessing party/party costs according to the Scale, and charging on a time basis, means that there is uncertainty in relation to how much the assessed costs will reflect lawyer/client costs;

(c) these two problems mean that firms seek to avoid processes of assessment and prefer to settle matters without taxation. As one interviewee commented: '[T]axation takes enormous time, adds uncertainty and creates another layer of legal costs. Those factors can also create a point of leverage to use against one another'. While, on one view, the avoidance of taxation leads to early resolution of disputes, the result is that costs are negotiated between parties, with no independent oversight. 'Rules of thumb' are adopted, whereby clients may recover 40 to 70 per cent of their actual costs.

169. Fourth, although the Scale acts as a tool of measurement by prescribing fee rates for particular services, it is open-ended and retrospective. This means that there is no incentive for legal costs to be proportionate to the value of the claim; it may encourage over-servicing; and it contributes little to the certainty of costs estimates. That is, although a client may understand the fee for a letter, or photocopying, the potential liability that they face in pursuing litigation is uncertain.

170. As we see it, the only positive benefit of the Scale is that it provides a reference point for some practitioners and those tasked with assessing costs in relation to what may be considered reasonable costs for particular items of work. Those who support retention primarily rely upon the fact that it provides objectivity and certainty. But, we would rhetorically ask, to whom? Certainly not the litigants and, in the main, not the solicitors, who it is abundantly clear rely on cost experts – some might say 'masters of the dark arts'. Indeed, the costs assessors with whom we conferred clearly understood the anomalies and traps within the Scale. We have no doubt that they understand it, and find it

comforting in its ability to provide certainty, but that is only for the select few who can comprehend it. We doubt very much whether the public, properly informed in the manner in which the Scale is used, would stand for this form of costing – particularly when compared to the methods of costs assessment in other professions.

171. We are satisfied that the Scale is opaque, difficult to apply, and engenders a false sense of certainty and objectivity in the select few who understand its nuances and anachronisms.

172. Further, as far as we could tell from our research and discussions, it appears to contribute to litigants avoiding the process of independent assessment (and instead, negotiating costs based upon impressions of what would be recoverable under the Scale). It also stifles innovation and does little to encourage proportionate costs. Overall, it is both outdated and not fit for purpose.

173. The next question is whether it is possible to modernise the Scale or is it time to look for a model better suited to modern litigation?

174. On one view, it may be possible to update the language and general structure of the Scale, as well as enhance its ability to accommodate alternative charging practices. In this regard, the Federal Court Scale could provide a useful model. Benefits of that scale include: its modern language; maximum rates for attendances (affording differentiation based upon the actual experience and charging rates of the lawyers performing the work); time charging or the discretion of the taxing officer for reading documents other than correspondence; and contemplation of charging other than upon a time basis. However, the items concerning the preparation and reading of correspondence remain on a prescribed rate per number of words.

175. The Legal Costs Committee, which gathered information concerning how the Federal Court assesses litigious costs, observed that the time-based assessment of party/party costs 'that have been fairly and reasonably incurred by the party in the conduct of the litigation, subject to certain caps, operates well. More solicitors assess their own costs; as a result there may be less need for involvement of costs consultants in the process'. However, it was also acknowledged that the Federal Court Scale has some residual items that are not time-based, which can mean that amounts paid are not consistent with the time spent and costs incurred.

176. While there is a possibility of improvement with the adoption of a model similar to that of the Federal Court, in the authors' view, if the language and

structure of the Scale were so modernised (and without additional regulatory changes), there remains a real risk of an ongoing disconnect between the value and costs of providing services, and the process of assessment. There may be a continued need for costly and specialised processes for costs assessment, as well as uncertainty surrounding the outcome and avoidance of the system. The problem remains that litigants only become aware of the impost of costs on the claim at the end of the case – not at the commencement, when the cost mountain has yet to be climbed – or perhaps has only reached base camp.

177. The principles set out in [11] to [46] cannot be achieved by modernising the Scale – either by wholesale revision or by updating it. We have been persuaded that nothing less than a wholesale change of strategy is necessary. Transparency, comprehension, and predictability for consumers of legal services are the keys. The Scale (in whatever form) meets none of these aims.

178. Accordingly, the Scale should be discarded, and the role and process of assessment should be reconsidered afresh with emphasis on the following: transparency; certainty and predictability; access to justice; and encouraging litigious costs that are reasonable and proportionate.

Recommendation 1: That the Scale be discarded.

(c) If the Scale or a revised version is not appropriate, what model if any should replace it?

179. This is the second question posed by the Courts in commissioning this report.[220]

180. The legal framework regulating litigious lawyer/client and party/party costs in Victoria, absent the Scale, contains statutory mechanisms requiring costs to be 'fair and reasonable' and 'reasonable and proportionate'. The Uniform Law and CPA 2010 are both directed toward proportionate costs, and the latter provides courts with significant powers. It has been described as 'undoubtedly the most powerful case management legislation in Australia';[221] a view which was echoed during consultation. Additionally, the Costs Court has received wide stakeholder support, as a body with significant expertise which can be tasked with monitoring costs practices and producing rulings that give guidance to practitioners.

---

220 See [8] above.

221 Corey Byrne, 'Changing the Culture of Litigation in Victoria: Ten Years of the Civil Procedure Act 2010 (Vic)' (2021) 10(1) *Journal of Civil Litigation and Practice* 31, 38. This is despite the Victorian government failing to introduce all of the recommendations of the Victorian Law Reform Commission: see Cashman (n 14).

181. So, a threshold question arises as to whether anything further is needed if the Scale is abolished. Relying upon the legislative standards and enforcement via the Costs Court, the Legal Services Commissioner, and VCAT would afford maximum flexibility. Party/party costs and lawyer/client costs would essentially be at large, although constrained by the statutory principles we have identified.

182. With one exception, no submission or consultation recommended this approach. We agree with the majority.

183. In the authors' view, there is a real benefit in promoting access to justice by establishing a mechanism, or mechanisms, to provide guidance on the reasonable costs of litigious legal services in the party/party context and, given current practices, its likely application in the lawyer/client area; and to target important criteria such as predictability, comprehension, and proportionality. This approach:

(a) would help inform the consumer in relation to reasonable costs;

(b) would, to a degree, help inform the charging practices of lawyers;

(c) would provide a reference point for judicial officers in determining recoverable costs;

(d) may provide a reference point for the assessment of 'fair and reasonable' and 'reasonable and proportionate' costs, and promote consistency and predictability in outcomes.

184. Without such guidance or criteria, beyond the current legislative standards, clients and the profession would have to rely on the publication of reasons after costs assessment in the Costs Court (or perhaps on appeal) to gauge issues of reasonableness and proportionality. Such an approach would have a limited impact upon transparency and do little to address information asymmetries.

185. Therefore, assuming it is necessary to provide criteria for determining litigious costs, what model should be implemented? Having considered litigious costs models in other jurisdictions, we have identified mechanisms that we think will enhance the approach to litigious costs in this state, beyond any gains that may have been made through revision of the Scale.

186. Our recommendations seek to complement the strengths of the Uniform Law and CPA 2010, and further align the regulatory framework with the policy objectives identified earlier in this report. Our research, discussions, and review of the written submissions and material from consultations, has led us to conclude that the cost models in both NSW, and England and Wales, have

advantages that we should seek to draw upon in this State.

187. Broadly, these recommendations operate at two levels:

(a) first, in the short term, simplifying the measure of costs assessment and enhancing transparency of reasonable charging rates by implementing guidelines setting out hourly and daily rates (that is, time costing), similar to those currently used in NSW; and

(b) second, in the medium term, enhancing the certainty and predictability of party/party costs by adopting mechanisms which prospectively set limits on litigious costs, similar to those currently used in England and Wales.

188. We have opted for this two-stage approach for several reasons.

189. First, we think that immediate and significant reform of litigious cost assessment is long overdue. In the short-term, adopting in substance the NSW model of guidelines, with necessary modifications, is both practical and relatively simple. For the reasons explained in a moment, the model is easy to adapt and would only require a modest change to the Rules of Court.[222]

190. Second, time costing is already prevalent and an integral part of the billing practices of most legal firms. Practitioners presently use (or are capable of using) this method of charging their clients. As mentioned earlier, even in practices using the Scale for billing a client, many firms will have (notwithstanding the costs agreement) time costed the file. The Scale 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. Time costing fits comfortably with current business practices in legal firms in this State.

191. Third, there will need to be a 'shift in mindset' amongst lawyers and the judiciary, in relation to the introduction of FRC and costs budgeting. The introduction of FRC and cost budgeting regimes will require considerable investigation and education of practitioners and the judiciary. It cannot be introduced overnight, and the profession and consumers of legal services will need to be involved in the development of both modes of assessment. Based on the English and Wales experience, this will unfortunately need to be measured in years of work, rather than months.

192. Fourth, the likely introduction of these cost models may generate greater

---

222 In light of the proposed changes, it might be necessary for the Legal Costs Committee to determine a suitable procedure for the related issues: (i) Scale B charges; and (ii) Orders with respect to the costs under *Legal Profession Uniform Law Application Act 2014* (Vic) s 94.

consideration by lawyers in the short term of pricing models beyond time costing. For instance, the increasing use of technology in litigation should be supported. Fixed-price and subscription-pricing will, it can be assumed, achieve greater acceptance.

193. Fifth, guideline hourly or daily rates can subsequently be incorporated into the prospective model of FRC and costs budgeting.

Guidelines: time costing

194. The adoption of time costing guidelines, as a first step, meets the requirements we have set out. The benefits of this approach are:

(a) hourly and daily rates are easier for clients to understand than an item-based scale;

(b) there would be guideline rates in the public domain, providing an indication of what is generally a reasonable charging rate, and allowing comparison against the charging rates of individual firms;

(c) hourly rates reflect the charging practices of the majority of firms, meaning that issues surrounding any disconnect between practice and assessment are less. As a result, firms may be better able to consider and predict how their costs would be assessed; reliance upon specialised and expensive costing processes would potentially decrease; and, party/party costs may more accurately reflect the actual work done;

(d) it was reported to the Legal Costs Committee that, in NSW, where reasonable hourly rates are used for party/party costs assessment, 'recovery is usually good for litigants, around 70–80% of actual costs, with indemnity recovery around 90–95%; and, this can be an issue in Victoria where there is a high cost to litigation and recovery is low because it is tied to the Scale';

(e) 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 complaint; namely, VCAT, the Legal Services Commissioner, and the Costs Court;

(f) adopting 'guidelines' instead of fixed activity rates, as in the Scale, means that processes of assessment can accommodate alternative charging practices, rather than there being a disconnect between the two.

195. We have identified several risks in the adoption of a time costing model – each of which we think can be mitigated.

196. First, although upon their face, hourly rates afford transparency, there is still

subjectivity in their application. That is, the flexibility created in such a model means that inconsistencies may arise in application, as discretion is required when applying the hourly rates to the circumstances of the particular case. For example, while a solicitor who drafts a letter may charge according to the guideline hourly rate, an assessment needs to be made as to the reasonable time involved. Such issues perhaps underlie some of the inconsistencies reported in NSW. However, here, the Costs Court, Legal Services Commissioner, and VCAT are all experienced in assessing files, which may help guard against the problem of an assessment 'lottery'. Additionally, guideline hourly and daily rates do not remove the need for evidence supporting the costs claimed. That is, evidence of the work product.

197. Second, as with application of the Scale, if guideline rates are set too low, there may be a significant gap between costs that are recovered under a party/party assessment, and those that are actually charged. Issues of access to justice and public confidence in the system of civil litigation could potentially arise. As such, the guidelines would need to be reviewed and updated regularly (preferably annually) and set at appropriate market rates on a party/party basis.

198. Third, adopting guideline rates may signal to the profession and clients that time-based charging is preferable. Time-based charging has received some criticism over the years, in that it can 'reward inefficiencies', forms the basis of many client complaints, and potentially increases the focus on 'billable hours' within firms.[223] In this regard, several points may be made: once the conclusion is drawn that a flexible and widely applicable measure of reasonable costs is required to guide charging, assessment, and taxation, the choices appear limited to item-based scales, time-based guidelines, or a mixture of the two. The advantages of guideline rates, although not perfect, appear preferable. While time-based measures may be open to exploitation, it was recognised during consultations and interviews that the same can be said about the Scale, and that options to mitigate this include a certification process for assessment or taxation, and ensuring that source materials may be requested when files are assessed or taxed.

199. Finally, as a tool of measurement, guideline rates are relatively open-ended. That is, while there is enhanced transparency regarding reasonable rates of charging, there is limited certainty and predictability in relation to the overall

---

223 See Murphy (n 11); Murray Gleeson, 'Access to Justice: A New South Wales Perspective' (1999) 28(2) *University of Western Australia Law Review* 192, 197; Centre for Innovative Justice (n 11) 11, 14; Marfording and Eyland (n 55) 75; McLeay (n 48). See generally, Andrew J Cannon, 'Affordable Costs in Civil Litigation' (2014) 23(3) *Journal of Judicial Administration* 171; cf Cannon (n 42) 178.

costs of litigation. A risk arises that the amount of litigious costs associated with a particular proceeding will remain uncertain, and at times, disproportionate. While this is countered by the overall legislative requirements that costs are 'fair and reasonable' and 'reasonable and proportionate', given the importance of certainty and predictability to access to justice, the guideline rates should ultimately be complemented with other mechanisms, such as fixed costs in certain classes of proceedings and costs budgeting.

200. There was surprising opposition from many of the costs consultants we spoke to concerning the introduction of a model similar to that operating in NSW. Most of the criticisms, when analysed, were not directed towards the system itself but to its application by costs assessors. There was unanimity amongst the costs consultants that the unpredictability of results was a major pitfall in the application of the system. One might well respond by saying that the same predicament faces parties involved in a civil jury trial or perhaps in front of a judge alone. However, there is a more refined answer in that disputed assessments in this state would be determined by the Costs Court and subject to its processes. Its published rulings will provide a transparent and accessible indicator to the profession and litigants as to the application of the new model.

201. Notwithstanding these problems, we think that guidelines should be developed by the courts (or relevant bodies) as to costs payable between the parties. Whether this model is then adopted by the profession as the basis for lawyer/client costs is a matter for practitioners and their clients; although, as noted earlier, in most areas of practice (with two notable exceptions), this form of costs assessment is a common basis for a lawyer/client agreement.

202. The guidelines should be based upon the NSW Guidelines 2016, but will require modification to reflect Victorian practices. These, as a minimum, should set out reasonable hourly and daily rates in accordance with the experience of the practitioner or counsel. There will need to be greater specificity and clarity reflecting modern costing practices incorporated within such guidelines, in order that litigants can satisfactorily understand the basis upon which the bill is rendered. The guidelines should also provide guidance as to the charging of items of an administrative nature, such as electronic lodgement, scanning, etc.

203. Some fixed fees (such as item 18 of the Scale) will need to be separately provided for – perhaps under the Rules.

204. Critical to the implementation of guidelines are the following:

(a) That the guidelines be reviewed regularly by an appropriate expert body. Part of the criticism of the NSW model is the antiquity of the

recommendations. For there to be confidence in the system, we think that regular review (ideally yearly) by a body such as the Legal Costs Committee is necessary.

(b) Given the existence of the Costs Court (and its widespread support amongst Victorian practitioners), it is unnecessary and indeed would lead to duplication if a costs assessor regime was introduced. Under the Uniform Law, the Costs Court is regarded as the relevant costs assessor and that should remain.[224]

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 Cost Assessor Regime in Victoria (as exists in NSW).

Fixed Recoverable Costs and Costs Budgets

205. The reforms in England and Wales relevant to this exercise are set out at [131] to [146]. The extensive analysis of civil costs, which led to those reforms, and the practical experience of their implementation over the past ten years provides us with important and helpful guidance in relation to potential litigious costs models in Victoria. The significance of these reforms was also reflected in our consultations and meetings, and in several of the submissions.

206. The experience in England and Wales demonstrates that there are significant advantages in using models of cost recovery that are prospective, rather than retrospective.[225] These mechanisms have already been flagged as warranting further investigation and possible implementation in a number of Australian civil justice reviews. During interviews and consultations, these models received strong support from those with significant expertise in managing and

224 See Uniform Law, s 6 (definition of 'costs assessor'). 'Costs assessor' means a person appointed by a court, judicial officer or other official to have the responsibility of conducting costs assessments; or a person or body designated by jurisdictional legislation to have that responsibility. *Supreme Court Act 1986*, s 17D(1)(ea), the Costs Court must conduct costs assessments under Uniform Law, pt 4.3, div 7. *Legal Profession Uniform Law Application Act 2014* (Vic) s 97, a person may appeal from a decision made by the Costs Court as the costs assessor.

225 As noted in [128] to [130] above, the High Court of New Zealand also uses a prospective costs model which has facilitated certainty.

advising on litigious costs.

207. Several experienced costs experts and lawyers outlined the changing billing environment in Australia and the significance of new approaches to litigious costs overseas. In relation to the former, the following point was made:

> The Discussion Paper does not acknowledge that, as the Internet fulfils its promise to abolish geographical barriers to business, there are now different markets for different categories of legal services in which different vendors operate with different business models and offer different services.
>
> There is therefore no longer one alternative model offering one option to the continuing problems of Time Billing. Each option offered will have different cost implications for different clients.

208. A number of costs consultants identified specific parts of the reforms in England and Wales:

(a) Fixed costs for lower value cases, and costs management for larger cases through costs budgeting at the commencement of a proceeding, which the Court actively manages.

(b) These methods are said to provide increased access to justice by making recoverable costs both certain and proportionate. This is attained by enabling parties to plan their litigation more effectively and to consider in a more effective way: whether it is appropriate (and how) to litigate; what costs may be recovered (or paid to the winning party); and how work on a case can be more proportionate.

(c) The importance of providing adequate training to judicial officers in costs budgeting and costs management. The training must ensure judicial officers keep up to date with best practice in the conduct of litigation, including options available through new technology.

209. These reforms have now been in place for nearly ten years. They have been the subject of a number of judicial decisions. There has been a considered review of their operation and potential expansion. This means that we can examine and, if deemed applicable, adopt a model operating in a particularly similar jurisdiction which, essentially, has been through the experimental stages.

210. It was repeatedly said during the consultation process that sections 65A, 65B, and 65C of the CPA 2010 had given clients improved rights to information beyond those under the Uniform Law which may give greater transparency about legal costs. Those provisions afford the Supreme and County Courts significant powers concerning costs, including:

(a) ordering a legal practitioner acting for a party to prepare a

memorandum setting out the estimated length of the trial and related costs and disbursements;[226]

(b) ordering a legal practitioner acting for a party to prepare a memorandum setting out the actual and estimated costs and disbursements in relation to a proceeding;[227]

(c) making any other order as to costs that it considers appropriate to further the overarching purpose; that is, to facilitate the just, efficient, timely, and cost-effective resolution of the real issues in dispute, including fixing or capping recoverable costs in advance.[228]

211. These provisions are designed to promote transparency and comprehension for litigants. As mentioned earlier, they are currently utilised in some court lists in the Supreme and County Courts. Courts (either by direction or practice note) require parties to provide prospective estimates as to costs during the course of a proceeding. However, there is no consistency of approach, and these practices are the exception rather than the rule.

212. Often, where required, Court-directed cost estimates are provided at a fairly late point in time when a considerable amount of costs have already been incurred. Such measures do not go far enough in providing predictability and certainty for clients who may be contemplating commencing litigation; moreover, they rely upon the approach of the individual judge, and there is no expectation in the profession or their clients as to the utility of this approach.

213. The patent benefits of both FRC and costs budgeting are those of transparency, consistency, and comprehension. It is known from the 'off' how the costs have been calculated and what the end result (from a costs perspective) is likely to be. Recoverable costs are identified prospectively, rather than informing parties after the fact that they have incurred disproportionate costs, and that their recoverable costs are to be reduced accordingly. This accords with the primary objects of the CPA 2010 – namely, early resolution of proceedings, as well as the goals of cost reasonableness and proportionality.

214. It is acknowledged that there are some disadvantages in the English and Wales model. Costs budgeting requires greater judicial intervention and time spent by legal practitioners (and therefore expense) at the commencement of the claim; and the potential front-loading of costs in the 'pre-action phase' is not addressed.

---

226 CPA 2010, s 65A.
227 Ibid s 65B.
228 Ibid s 65C.

215. The authors are also mindful of differences between civil litigation here, as compared to England and Wales. For example, there is a greater volume and wider variety of cases in that jurisdiction: there are many huge claims which we rarely see in this state. And, in contradistinction, minor personal injury cases are still actionable.

216. Notwithstanding these concerns, we are convinced that the weight of material examined by us significantly favours a fundamental shift in the way litigious costs are approached in Victoria. Emphasis should be placed upon prospective models of cost assessment, rather than retrospective analysis with its attendant problems. This will 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; it will enhance access to justice; it will promote early resolution of litigation; reduce costs disputes and the associated costs and delay; and reduce the overall costs of litigation.

217. In particular, the authors recommend the implementation of:

(a) fixed costs for certain types of litigation – specifically, particular personal injuries claims, and most testators family maintenance (**TFM**) proceedings; and

(b) in all other cases (including class actions), costs budgets approved by the Court shortly after the commencement of a proceeding.

218. We now look in more detail at these two methods of costs assessment and how they can be adapted to the Victorian legal landscape.

219. We think that, as far as is practicable, all cases brought in the Supreme and County Court should be the subject of these proposed reforms. We accept, however, that it will be necessary to consider whether exceptions should be permitted. One that comes readily to mind is that of litigation brought by or against unrepresented litigants.

Fixed Recoverable Costs

220. The VLRC has previously explored the possibility of fixed-costs schemes and made the following recommendation:

> Although fixed or capped costs are a good idea in principle, there are practical problems in their implementation. These should be developed for particular areas of litigation after

consultation and with the agreement of stakeholders (under the auspices of the Costs Council/Civil Justice Council).[229]

221. The Productivity Commission has also previously recommended fixed fees in lower-tier courts.[230]

222. However, FRC models have not been widely used in Australian civil litigation. Concerns that tend to be raised regarding the approach include:

(a) it can be a blunt tool, with little capacity to adjust for the nuances or sensitivities of a case. For example, in some cases of complexity or importance, such as public interest cases, the amount of work involved may not reflect the financial value of the claim.[231] Similarly, it may not be appropriate where there is enormous variation between proceedings;[232]

(b) the fixed or capped costs may not reflect the actual costs incurred.[233] If recoverable costs do not sufficiently reflect the actual costs involved in a proceeding, clients may be dissuaded from pursuing litigation because there will be a large gap between the recoverable costs and those that they owe their lawyer, thus reducing access to justice.[234] Alternatively, the client will be required to bear the gap;[235]

(c) it may encourage inflated claims and parties may litigate beyond an appropriate stage to enter a higher band of fixed fee.[236] Unscrupulous litigants may take advantage of the fixed figure of recovery and any gradation relevant to the stage of the proceeding. Regarding the former, judges and perhaps court rules would need to be alive to the risk and draw upon case management powers within the CPA 2010 where necessary. In relation to the latter, any matrix would need to be carefully balanced, avoiding significant increases in cost recovery between stages;[237]

---

229 VLRC Civil Justice Review (n 52) 692, Recommendation 144.

230 Productivity Commission (n 7) 466–70, Recommendation 13.2.

231 See VLRC Civil Justice Review (n 52) 679; Bathurst and Schwartz (n 56) 214; Ministry of Justice Response (n 43) 27–8; Productivity Commission (n 7) 467; Marfording and Eyland (n 55) 89.

232 VLRC Civil Justice Review (n 52) 141 (Law Institute of Victoria submission in relation to a proposal to fix pre-action protocol costs); Productivity Commission (n 7) 467, 472; Jackson Preliminary Report (n 74) 106 (submission that not appropriate in high-value commercial cases where 'one case tends to be unlike another').

233 Productivity Commission (n 7) 467, 469–70; VLRC Civil Justice Review (n 52) 661, 679 (referring to the submission of the Law Institute of Victoria).

234 Cannon (n 42) 188. The Productivity Commission has described this as striking the appropriate balance between indemnifying the successful party and enhancing certainty: Productivity Commission (n 7) 462–7.

235 See VLRC Civil Justice Review (n 52) 141 (Law Institute of Victoria submission in relation to a proposal to fix pre-action protocol costs in the Supreme Court).

236 Marfording and Eyland (n 55) 88; Jackson Preliminary Report (n 74) 107, 204, 209.

237 See Jackson Preliminary Report (n 74) 204.

(d) there is a risk of satellite litigation surrounding the categorisation of complexity bands, if thresholds are not clear.[238]

223. On the other hand, FRC provides absolute certainty to both clients and lawyers, allowing parties to best weigh the financial risks involved in litigation. As Lord Jackson said:

> A fixed costs regime provides certainty and predictability. This is something which most litigants desire and some litigants desperately need. A fixed costs regime is easier for solicitors to explain to clients than the current costs rules. Also a fixed-costs regime dispenses with the need for costs budgeting and costs assessment. This will achieve (a) a substantial saving of costs for the parties and (b) a substantial reduction in the demands made upon the resources of the court.[239]

Advocates argue that they are the only way to truly provide certainty to parties and address issues of disproportionate costs.[240]

224. Countering the concerns that we have identified requires:

(a) so far as possible, ensuring that the fixed recoverable rate reflects the actual reasonable and proportionate costs of running the proceeding. This seeks to maintain compensation of the successful party (encouraging meritorious claims and discouraging unmeritorious claims), while also facilitating certainty;

(b) at least initially, targeting classes of proceeding where the steps and associated costs are relatively predictable, so that the appropriate fixed rate is more easily identified;

(c) if necessary, using additional mechanisms to prevent costs being disproportionately borne by the client as lawyer/client costs. For example, capping or fixing such costs;

(d) providing an 'escape clause', where applications may be made for the scheme not to apply.

225. On balance, we believe that the concerns identified can be managed and that there is real merit in limited types of cases being the subject of the FRC model on a trial basis. We have already noted that variants of this model exist in this jurisdiction in the personal injuries area, in the form of pre-litigation TAC claims and WorkCover 'serious injury' litigation. Several other states have introduced costs-capping regimes for personal injuries cases. TFM cases in the

---

238 Ministry of Justice Response (n 43) 25.

239 Lord Justice Jackson, 'Fixed Costs: The Time has Come' (Insolvency Practitioners Association Annual Lecture, 28 January 2016) [2.13].

240 See Zuckerman (n 20) 439; Higgins and Zuckerman (n 20) 5–6.

Supreme Court require costs estimates at the first directions hearings.

226. In the authors' view, it would be appropriate to develop and pilot the FRC model in:

(a) personal injuries proceedings involving transport accident and WorkCover claims; and

(b) TFM proceedings.

227. In these two classes of proceedings:

(a) clients are more likely to be 'unsophisticated' and benefit from the certainty provided by the regime;

(b) the progression of cases has a degree of consistency;

(c) claims are already subject to a level of costs management at one stage or another.

228. We would also allow for application to be made to the Court for a complex personal injuries or TFM case to be excluded from the FRC model.

229. It may well be (as in England and Wales) that, once the FRC model has operated for a period of time (say two to three years), consideration could be given to the application of FRC to other types of proceedings currently within the common law divisions of both courts.

230. Finally, we set out below (purely as an example), the grid proposed recently in England and Wales for FRC in claims between £25,000 and £100,000:[241]

Stage (S)	**Band 1**	**Band 2**	**Band 3**	**Band 4**
S1 Pre-issue or pre-defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed)	£1,750	£1,750	£2,000	£2,000
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages

241 Ministry of Justice Consultation (n 204) 33, table 3.

Stage (S)	**Band 1**	**Band 2**	**Band 3**	**Band 4**
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damages	£17,400 + 18% of damages
S6 Up to PTR, alternatively 14 days before trial	£5,100 + 15% of damages	£12,750 +16% of damages	£13,950+ 16% of damages	£21,050 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500
S8 Up to trial	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages
S9 Attendance of solicitor at trial per day	£500	£750	£1,000	£1,250
S10 Advocacy fee: day 1	£2,750	£3,000	£3,500	£5,000
S11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/ specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750
Total: (a) £30,000 (b) £50,000 (c)£100,000 damages	(a) £19,150 (b) £22,150 (c) £29,650	(a) £33,250 (b) £37,250 (c) £47,250	(a) £39,450 (b) £43,450 (c) £53,450	(a) £53,050 (b) £57,450 (c) £68,450

The shaded boxes are cumulative totals, and the unshaded boxes are separate sums for particular items if they are carried out.[242] As Lord Jackson proposed: 'if the claimant succeeds, the specified percentage applies to the sum recovered. If the defendant succeeds, the specified percentage applies to the claim defeated, as valued in the particulars of claim'.[243] The Ministry of Justice summarised the four bands of complexity as follows:

- Band 1: the simplest claims that are just over the current fast track limit, where there is only one issue and the trial will likely take a day or less, e.g. debt claims.
- Band 2: along with Band 3 will be the 'normal' band for intermediate cases, with the more complex claims going into Band 3.
- Band 3: along with Band 2 will be the 'normal' band for intermediate cases, with the less complex claims going into Band 2.
- Band 4: the most complex, with claims such as business disputes and [Employers' Liability Disease] claims where the trial is likely to last three days and there are serious issues of fact/law to be considered.[244]

It also noted that for personal injury cases, 'straightforward, quantum-only cases will generally go into Band 1. Where both liability and quantum are in dispute, either Band 2 or Band 3 will be used. Band 4 will be used for cases where there are serious issues on breach, causation, and quantum (but which are still intermediate cases)'.[245]

Costs budgeting

231. The primary aim of costs budgeting is the identification of recoverable costs prospectively, rather than informing parties after the fact that they had

---

242 The totals in the final row of the table — for claims of (a) £30,000 (b) £50,000 and (c) £100,000 — are the total of the cumulative sum at S8 and the additional items, assuming a one-day trial in Band 1, a two-day trial in Band 2, and a three-day trial in Bands 3 and 4. In calculating this, for all bands, it is assumed that there was no counterclaim, that the receiving party prepared the trial bundles, that there was unsuccessful ADR, and that there was no approval of settlement for a child or protected party. Additionally: in the grid, the word 'damages' is used as shorthand for damages, debt, liquidated sum, or other monetary relief; and for non-personal injury cases, which are settled before issue, the figures in stage S1 are capped costs, rather than FRC.

243 Jackson Supplemental Report (n 15) 106 [5.3].

244 Ministry of Justice Consultation (n 204) 32 [4.1]; For an explanation of 'fast track' for claims with a value between £10,000 and £25,000, see [133] n 193 above.

245 Ministry of Justice Consultation (n 204) 32 [4.1]. Note that certain types of proceeding are intended to be excluded from FRC, including mesothelioma and other asbestos-related claims; clinical negligence cases; actions against the police; child sexual abuse claims; and intellectual property cases.

incurred disproportionate costs.

232. Lord Jackson identified the following benefits of cost budgeting:

(a) both sides know what they will recover if they win or what they will be liable for if they lose;

(b) it encourages early settlement;

(c) it controls costs 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;

(d) it focuses attention on costs at the outset of litigation;

(e) case management conferences are more effective when costs estimates are provided initially;

(f) it is elementary fairness to give the opposition notice of what you are claiming; and

(g) it protects losing parties from being destroyed by costs.[246]

233. In the Australian context, the author of *Quick on Costs* (who has considerable knowledge of the costs reforms in England and Wales) notes:

> A client cannot wait until the matter is over to understand what it might cost, the risks involved, and the options. Without an evaluation of the risks of a matter, a plan for handling it, and a budget for its likely cost, the client cannot make rational judgments about whether to pursue the matter, whether to settle it, and what resources will be required to handle it.
>
> Plans need to be created for a matter, including not only the most likely strategy and tactics, but likely contingencies, pitfalls, detours and options as well.
>
> Hourly rates may let a matter meander toward completion. Plans establish paths to goals.[247]

234. In 2014, the Productivity Commission recommended that:

> Judicial officers in all superior courts in Australia should, at their discretion, have the power to require parties to submit costs budgets at the outset of litigation. Where parties do not agree upon a budget, the court may make an order to cap the amount of

246 Jackson Harbour Lecture (n 74) 3–6; see also Roger Quick, 'The Woolf and Jackson Reforms' (2018) 7(3) *Journal of Civil Litigation and Practice* 169, 178–9.

247 Westlaw AU, *Quick on Costs* (online at 26 April 2022), Judicial Costs Budgeting and Management, Introduction [120.920].

> awarded costs that can be recovered by the successful party. Courts should publish guidelines informing parties and the judiciary as to how costs budgeting processes should be carried out.
>
> By 30 June 2016, the Australian Law Reform Commission (in consultation with its State and Territory counterparts) should examine the performance of the costs budgeting regime of the English and Welsh courts and recommend in which Australian courts the application of such a regime would be appropriate.[248]

The Australian Government's response of April 2016 did not specifically address these recommendations[249] and, although eight years have passed, as far as we know, no such examination has been carried out in this country.

235. However, during that period, costs budgeting has been operating successfully in England and Wales. This was confirmed in the Jackson Supplemental Report (delivered four years after the introduction of the reforms) which, although noting an issue with incurred costs, concluded that:

> The costs management regime was, initially, greeted with horror in many quarters. However, opposition to this new discipline has slowly been diminishing. In the last eighteen months the process of accepting and embracing costs management has accelerated. This is for several reasons, including:
>
> (i) High quality judicial training delivered by the Judicial College, which has improved the level of consistency between different courts.
>
> (ii) Increasing familiarity with the process on the part of both practitioners and judges.
>
> (iii) Increased willingness by the profession to discuss and agree budgets or parts of budgets before the first [costs and case management conference].
>
> (iv) General acceptance that, one way or another, costs must be controlled in advance combined with a preference by the profession for costs management over FRC.

248 Productivity Commission (n 7) 66, Recommendation 13.3.

249 Government of Australia, Attorney-General's Department, 'Government Response to the Productivity Commission's Report into Access to Justice Arrangements' (29 April 2016) <https://www.ag.gov.au/legal-system/publications/government-response-productivity-commissions-report-access-justice-arrangements>.

(v) Refinement and improvement of the costs management rules by the Civil Procedure Rule Committee … as experience of costs management has accumulated.[250]

236. We respectfully agree with the observations of Lord Jackson set out at [232], which are entirely consistent with the objectives of the CPA 2010, referred to earlier at [17] to [20].

237. There is no reason, as far as we can tell, why costs budgeting could not be applied across the board in the Supreme and County Courts, with a discretion to exclude some cases from its purview. It provides the transparency and certainty that a modern costs regime should have – at a time in the proceeding, when resolution should be discussed – ie, before a mountain of costs have been incurred.

238. The costs budget is not fixed in stone. Applications can be made to vary the estimate during the course of the case. In the event of a justified change of circumstances, the court may allow a revision of the budget.

239. We think it particularly appropriate in commercial cases, where the preparation of a costs budget will, in all likelihood, reflect the billing practice of the legal firm in its arrangements with its client. In the real world, in many, if not all cases, the client will have been given projections of the costs associated with prosecuting or defending a claim.

240. We have set out the approach in England and Wales to costs budgeting in general terms at [140] to [146]. Below is an outline of how it works in practice, as described in the White Book:

3.12.2 Costs management in outline

Rule 3.12(2) states the purpose of costs management which is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective, namely to deal with cases justly and at proportionate cost (see further, r.1.1). Other rules in this section of Pt 3 set out the procedures by which this purpose may be achieved.

(i) In most Pt 7 multi-track claims, parties who are legally represented are required to file and exchange budgets prior to the first case management conference ('CMC'; for the exceptions, see r.3.12(1), and para.3.12.2).

(ii) The form of budget to be used is prescribed (PD 3E

250 Jackson Supplemental Report (n 15) 96 [4.1]; see also Ministry of Justice Response (n 43) 76 [8.1]; Simon Middleton and Jason Rowley, *Cook on Costs 2022* (LexisNexis Butterworths, 2021) 242 [15.3].

para.3(a), and see para.3.12.4). A deadline for filing budgets is set (r.13.3(1)).

(iii) Parties who fail to file a required budget in time will be heavily penalised in the costs they may later recover (r.3.14).

(iv) Prior to the first CMC the parties are required to file and exchange 'budget discussion reports' which indicate, in respect of each phase of each budget, whether the sum of costs claimed is agreed and, if not, a brief summary of why they are not agreed (r.3.13(2) and PD 3E para.11).

(v) At the first CMC the court will usually make a costs management order ('CMO'; r.3.15(2)). Such an order will record the extent (if any) to which the parties have agreed any of the costs and, in respect of costs to be incurred after the date of the first budget, will record the amounts of those costs which the court has approved, having considered and if necessary, revised the budgets in question (r.3.15(2)).

(vi) Thereafter the court will control the parties' budgets in respect of recoverable costs and will not make any case management decision without fully considering its costs implications (r.3.17(1)).

(vii) Once a CMO has been made, each party must actively reconsider its budget and, if a significant development warrants the making of a revision, upwards or downwards, must promptly seek such a revision either by agreement with other parties or with the approval of the court (r.3.15A).

(viii) Applications to the court about costs budgets should, if practicable, be conducted by telephone or in writing unless they are combined with an application for other directions for which a court hearing has been convened (r.3.16(2)).

(ix) All approvals and agreements as to budgets and revised budgets must be recorded in an order of the court (rr.3.13(3), 3.15(2) and 3.15A(5)).

(x) Whenever a party's budget or revised budget has been agreed or approved that party must re-file and re-serve it, with the arithmetic appropriately re-cast and attaching a copy of the order approving it or recording the parties' agreement (r.3.15(7)).

(xi) At the end of the proceedings, the recoverable costs of the winning party will be assessed in accordance with the last agreed or approved budget (r.3.18).[251]

---

251 White Book (n 209) [3.12.2].

241. In England and Wales, a party's budget is prepared as part of the case management process. Usually it is managed by a Judge, occasionally with assistance from the Costs Office. 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, perhaps using both, depending on the circumstances of the case.[252]

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.

(d) Whether there will be any adverse cost impacts to litigants as a result of adopting an alternative model?

242. In our consideration of individual costs models, we have set out the risks associated with introduction of a particular scheme.

243. Our primary concern is that, whatever model is ultimately chosen, successful litigants (ie, with a favourable costs order on a party/party basis) will not, as part of lawyer/client costs, be required to bear a greater burden of the overall costs of the litigation than they currently do. Although we anticipate that the models we have proposed will narrow, rather than widen the gap, the risk of greater cost shifting to the client remains.

244. We were surprised by the current level of disparity between costs recovered on a party/party basis (assessed on the Scale) and the lawyer/client figure (assessed on the Scale with various uplifts as described at [80] to [83]). The conditional costs agreement disclosure in *Pravlik*, set out at [83], demonstrates the gulf starkly with an estimate of just short of $200,000 in additional

252 For instance, to determine whether a variation to a budget should be allowed: see, eg, [240(v)]–[240(vi)], [240(ix)].

lawyer/client costs (over and above party/party recovery) for running a personal injury claim to verdict.

245. We have already described aspects of the Uniform Law and the CPA 2010 directed to proportionate costs, with significant powers given to Courts to oversee lawyer/client costs. We have also noted that this power is exercised in some practice areas.

246. Our primary concern is that, with the introduction of an FRC model, there may be an increase in the amount of lawyer/client costs, inevitably resulting in the client receiving a lesser sum than they would now.

247. We think that a similar approach to that currently taken in WorkCover (common law) proceedings[253] should apply to all cases within the proposed FRC regime. The WIRC Act 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 TAC cases in the proposed FRC model.

248. An alternative method to judicial supervision of lawyer/client costs may be to set specific caps or limits upon the recoverable lawyer/client fees in FRC litigation.

249. Consideration may be given to enacting legislation similar to that in Queensland, which limits the maximum amount of legal costs that a law practice may charge and recover from a client for work done in relation to a 'speculative personal injury claim'. The costs cannot be more than the amount set under the 50/50 rule described at [117] and [118].

250. Another solution would be to introduce legislation or statutory orders stipulating that lawyer/client costs should be capped at no more than an additional 25 per cent of party/party costs.

251. Whether such measures are necessary in proceedings using costs budgets is not clear to us. This would need to be explored.

252. Finally, critical to the success of any new model – and ensuring that there is no increase in cost shifting to the client – is the need for comprehensive education of all users of the civil justice system under any new scheme. We have already expressed our view concerning the need for ongoing education of judicial

253 See WIRC Act, s 344.

officers at [191] of the Report.[254]

253. The need for education of the profession in any new model is also critical. We doubt very much whether those practitioners who still use the Scale to retrofit their lawyer/client bill have any real understanding of the mechanics of the Scale, save for the uplift provisions. A new and transparent model will provide a timely opportunity for practitioners to understand their professional obligations in fixing both party/party and lawyer/client costs.

254. Although it is outside the scope of this review, our consultations clearly revealed that there remains a lack of information available to clients concerning litigious costs and what may be considered 'fair and reasonable' in the circumstances.

255. Most 'unsophisticated' consumers of legal services have little if any understanding of the way in which costs are calculated. We would hope that the introduction of guideline time costing, FRC, and costs budgets would ameliorate this position. However, we think more will need to be done to address these clear information asymmetries.

256. Education of the consumers of legal services is vital. They 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. While the disclosure provisions in a lawyer/client agreement may give the client some understanding of the basis of charging, much of it remains disguised in legalise and language that only a law student or practitioner could follow. Much more is needed.

257. We suggest that:

(a) the possibility of making publicly available 'benchmarking' data concerning party/party costs in particular classes of proceeding be explored; and

(b) there be an education campaign directed towards understanding the costs for consumers of legal services, particularly those in the personal injuries and estates jurisdictions.

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.

254 See also [208] and [235].

(e) What role will the Costs Court play if an alternative model is adopted?

258. The Costs Court was established in 2008 by the *Courts Legislation Amendment (Costs Court and Other Matters) Act 2008*.[255]

259. In the Statement of Compatibility tabled by the Attorney-General, it was noted that in order to 'give Victorians more opportunities to resolve legal disputes at less cost', a single office with responsibility for assessing and resolving costs disputes across the courts, and VCAT disputes under the *Legal Profession Act 2004*, would be established. Further, that the Costs Court would 'promote consistency in the determination of assessments and the resolution of disputes; provide opportunities for the more efficient determination of assessments and the resolution of disputes; and potentially reduce the cost of determinations and resolutions for litigants'.[256]

260. Section 17D of the *Supreme Court Act 1986* provides for powers and functions of the Costs Court. It gives jurisdiction to the Costs Court to hear and determine the assessment, settling, taxation, or review of costs in all proceedings in the Court, as well as in the County Court, the Magistrates' Court, and VCAT. Apart from the other jurisdictions listed under s 17D(1), pursuant to the same section:

> (2) The Costs Court has such powers of the Court as are necessary to enable it to exercise its jurisdiction.
>
> (3) The Costs Court must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act, the Rules and the proper consideration of the matters before the Court permit.
>
> (4) Subject to this Act and the Rules, the Costs Court may regulate its own procedure.

261. Procedures in the Costs Court are set out in a Supreme Court Practice Note.[257] The Practice Note cites the overarching purpose and obligations of legal practitioners under the CPA 2010, noting that '[p]rocedures in the Costs Court seek to facilitate these aims'. It also mentions that the Costs Court may refer any matter to appropriate dispute resolution at any stage of the proceeding, pursuant to Chapter 5 of the CPA 2010.

---

255 On 31 December 2009, the *Courts Legislation (Costs Court and Other Matters) Act 2008* (Vic) came into operation. *Supreme Court Act 1986* (Vic) s 17C established the Costs Court within the Trial Division of the Supreme Court.

256 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2008, 3063–4; see also *Supreme Court Act 1986* (Vic) s 17C.

257 Supreme Court of Victoria, *Practice Note SC Gen 11 (Second Revision): Costs Court*, 1 October 2018, <https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/sc-gen-11-costs-court-second-revision>.

262. During the consultations process, the work of the Costs Court received unanimous praise. As one interviewee put it, 'we are fortunate to have the Costs Court'. Those interviewed supported the Costs Court playing a pivotal role in the formulation, establishment, and supervision of any new model. We agree.

263. The Costs Court provides expertise and uniformity. Published rulings provide transparency and consistency.

264. 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. We see an important role for the Costs Court in any new scheme:

- to continue to determine lawyer/client and party/party disputes as to what is proportionate and reasonable;
- to continue its oversight role in WIRC Act claims and, as we have suggested, to monitor lawyer/client costs in TAC claims under the proposed FRC model;
- if costs budgeting is adopted, to manage its introduction and, in particular, to assist in the fixing of costs budgets where agreement cannot be reached; and to determine what costs should be allowed for pre-issue work where agreement cannot be reached.

265. There will inevitably be other functions involved in the administration of both FRC and costs budgets which will call for the expertise of the Costs Court. To ensure that the Costs Court properly exercises its powers and functions in a new environment, it will likely be necessary to reconsider the level of funding provided for its operations.

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.

Acknowledgements

The authors wish to especially thank Kate Mulvany, Milla Bursac, and Brittany King for their assistance and hard work in the compilation of this report. Of course, any errors are those of the authors alone.

APPENDIX A

Appendix A—Supreme Court Scale of Costs

Scale of fees and charges to be paid to legal practitioners, other than Counsel, and Scale of Counsel's Fees for work done on and after 1 January 2022 in relation to matters in the Supreme Court.

The charges in this Scale are exclusive of any GST chargeable.

Item and Description	*Amount*
1. ATTENDANCES, TRAVEL AND WAITING COSTS	
(a) Attendances requiring legal skill or knowledge by a legal practitioner—	
(i) for each unit of 6 minutes or part thereof;	$43.00
(ii) where a legal practitioner attends the Supreme Court for the purposes of instructing (including conferences with counsel or others on the day of the hearing before or after the Supreme Court sits) per hour or part thereof;	$430.00
(iii) where a legal practitioner appears as counsel, at the discretion of the Costs Court having regard to item 19(1)(a) and (3)	
(b) Where any attendance, requiring legal skill or knowledge, is by an employee of a legal practice who is not a legal practitioner—for each unit of 6 minutes or part thereof	$32.90
(c) Any other attendance, not requiring legal skill or knowledge, capable of performance by a clerk—for each unit of 6 minutes or part thereof	$25.00
(d) Attendances to file or issue any document or similar attendance	$49.90
(e) Travel time is to be allowed at the rate applicable in item 1(a) and item 1(b) where the individual travels in excess of one hour, for such excess	
(f) Waiting time at the Supreme Court is to be allowed at the rate applicable in item 1(a) or item 1(b).	
Where the attendance is by telephone or other electronic means, the charge for an attendance includes the charges made by the communication provider.	
2. DRAWING DOCUMENTS	
All documents whether in printed form or otherwise—for each folio	$63.60
3. ENGROSSING AND/OR APPROVAL OF DOCUMENTS	
Of documents properly drawn by Counsel—for each folio	$12.70

Item and Description	*Amount*
4. REPRODUCTION OF DOCUMENTS	
By photocopy or other machine made copy including hard copies of electronic documents—for each printed side of a page—at the discretion of the Costs Court.	
5. CORRESPONDENCE (including electronic communications)	
(a) Message (20 words or less) or letter forwarding documents without explanation, or circular letter	$21.40
(b) Short (one folio or less)	$43.00
(c) Any other letter—for each folio	$76.30
The charge for a letter includes transmission by standard surface post, facsimile, email or other form of electronic transmission and includes the charges made by the communication provider.	
For each additional page after the first page of a circular letter, a charge pursuant to item 4 shall apply.	
6. SERVICE	
(a) Personal service, including attempts, where reasonable and required and not able to be served by other means	$76.30
(b) By letter in accordance with item 5(b)	$43.00
(c) Or such reasonable charge made by an agent.	
7. RECEIVING AND FILING	
Any incoming document, including correspondence, whether by electronic means or otherwise including first page for file	$21.40
Copies of additional pages received electronically are to be charged pursuant to item 4.	
8. PERUSALS	
Of all documents including incoming correspondence—	
(a) up to three folios	$64.20
(b) thereafter for each folio	$21.40
9. SCANNING	
If it is not reasonable to peruse but it is reasonable to scan a document including incoming correspondence—for each folio or part thereof	$8.70
10. EXAMINATION	
If it is not reasonable to peruse or scan a document but an examination is reasonable—for each page	$8.70
11. REVIEW AND CONSIDERATION	
Review and consideration of the file or particular parts of the file in preparing to draw or redact documents and letters, for conferences, hearings, taxation of costs and the like—in accordance with item 1(a) and item 1(b).	
In considering a claim made pursuant to this item, the Costs Court must have regard to any allowances claimed pursuant to items 8, 9 and 10.	

Item and Description	*Amount*

12. DELEGATION AND SUPERVISION

In matters where the Costs Court considers it reasonable for more than one legal practitioner to be involved in the conduct of the matters, the Costs Court shall make such additional allowances as are considered reasonable in all the circumstances in accordance with this Scale.

Such allowances may include time spent by both principal legal practitioner and delegates in ensuring tasks are properly delegated and supervised—in accordance with item 1(a) and item 1(b).

13. RESEARCH

Where it is appropriate to research a legal question of some complexity that is not procedural in nature—in accordance with item 1(a) or item 1(b), as appropriate.

14. COLLATION, PAGINATION AND INDEXING

Of documents or files including for discovery or inspection purposes, briefs to Counsel, Court Books, Appeal Books, exhibits or annexures to Court documents, hearings, instructions to expert witnesses, correspondence and the like—in accordance with item 1(c).

15. REDACTION

Of documents or files including for discovery or inspection purposes, briefs to Counsel, Court Books, Appeal Books, exhibits or annexures to Court documents, hearings, instructions to expert witnesses, correspondence and the like—in accordance with item 1(a), item 1(b) or item 1(c), as appropriate.

16. ELECTRONIC DOCUMENT MANAGEMENT

(a) Database creation, database administration (including establishing design and agreement protocols), database design and implementation—in accordance with item 1(b);

(b) Document preparation and document design in compliance with any Supreme Court Practice Note or any Supreme Court order or direction dealing with the use of technology in the management of any civil litigation matter—in accordance with item 1(a), item 1(b) or item 1(c), as appropriate;

(c) Imaging of documents to searchable format including rendering to PDF and scanning where necessary—in accordance with item 1(c);

(d) Publishing including—

(i) electronic exchange and discovery; and

(ii) write-to CD/CD ROM/USB or other agreed media—

in accordance with item 1(c).

Item and Description	*Amount*

17. SKILL, CARE AND RESPONSIBILITY

An additional amount may be allowed, having regard to the circumstances of the case, including—

(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 this Scale (including allowances for attendances in accordance with item 1);

(j) any other relevant matter.

18. CORPORATIONS SHORT FORM BILL

Costs of obtaining a winding-up order up to and including authentication, filing and service of the order under section 470 of the Corporations Act and the obtaining from the Costs Court of an order as to costs	$5931.00

An additional amount may be allowed for any adjournment.

A reasonable amount for disbursements is also allowable in addition to the lump sum amount.

19. COUNSEL'S FEES

(1) Subject to paragraphs (2), (3) and (4), such fees as are allowed up to a maximum of—	*Junior Counsel*	*Senior Counsel*
(a) appearances—		
(i) on trial or appeal (daily fee)	$6430.00	$9650.00
(ii) any other appearance (per half day for time spent in the hearing)	$3215.00	$4825.00
(b) other matters (for each hour)	$643.00	$965.00
(c) preparation (for each hour)	$643.00	$965.00
(d) conferences (not occurring on day of hearing) (for each hour)	$643.00	$965.00
(e) views (for each hour)	$643.00	$965.00
(f) drawing or settling documents (for each hour)	$643.00	$965.00

Item and Description			*Amount*
	(g) opinions, advices (for each hour)	$643.00	$965.00
	(h) any other work, not otherwise provided for (for each hour)	$643.00	$965.00

(2) Circuit fees are additional and are to be based on current allowances as provided for in Schedule 1 to Chapter I of the Rules of the County Court.

(3) In allowing a fee to Counsel, the Costs Court shall have regard to the following criteria—

(a) all criteria in item 17; and

(b) the other fees and allowances to Counsel in the matter; and

(c) payments made for interlocutory work where that work has reduced the work which would otherwise have been necessary in relation to the brief; and

(d) the standing of Counsel.

(4) Where costs are taxed pursuant to an order of the Supreme Court, Counsel's fees in excess of scale are not to be allowed unless the Supreme Court otherwise orders, but in any other case the Costs Court has discretion to allow fees in excess of scale.

APPENDIX B

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;[1]

(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

[1] See Appendices A and B to the Supreme Court Rules: https://www.legislation.vic.gov.au/as-made/statutory-rules/supreme-court-chapter-i-appendices-and-b-amendment-rules-2021

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.[2]

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.[3] A party

---

2 https://www.supremecourt.vic.gov.au/sites/default/files/2019-06/gen11costscourt_secondrevision01102018.pdf

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

dissatisfied with a review panel's decision may then appeal to the District Court and Supreme Court against the decision.[4]

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 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

[4] Section 89 of the Act; see also ss 82-91.

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

APPENDIX C

Version Final (16 3 16)

COSTS ASSESSMENT RULES COMMITTEE

GUIDELINE

COSTS PAYABLE BETWEEN PARTIES UNDER COURT ORDERS

("ORDERED COSTS" OR "PARTY/PARTY COSTS")

INTRODUCTION

1. These Guidelines are promulgated by the Costs Assessment Rules Committee (CARC) for the guidance of Costs Assessors in the assessment of costs payable between parties under an order of a court or tribunal[1] ("Ordered costs"[2] or "Party/party"[3] costs). In developing these guidelines, the Committee has, as well as drawing on its own experience, consulted with assessors and relevant stakeholders, and had regard to rules of court in other Australian jurisdictions. It is intended that these Guidelines be reviewed annually.

2. Assessors must always consider the criteria set out in the *Legal Profession Act 2004,* s 364 or *Legal Profession Uniform Law Application Act 2014,* s 76 (which incorporates *Legal Profession Uniform Law,* s 172).[4] These Guidelines do not substitute for consideration of those matters.

---

[1] Recommendation 34 of the Chief Justice's Review of the Costs Assessment Scheme (2014) was that the CARC, in consultation with relevant stakeholders, develop and promulgate guidelines for Assessors on whether, when and in what circumstances, and/or at what rate, frequently occurring items would ordinarily be allowed on party/party assessments, including (a) hourly and daily rates for practitioners of varying seniority and in varying locations; (b) office overheads such as copying, scanning, telephone, faxes, travel expenses and administrative work; (c) agency search and filing fees; (d) research time; (e) reviewing time; (f) conferences between lawyers for the client; (g) briefing senior counsel; (h) retaining experts; and (i) retaining agents.

[2] The term used in the (NSW) *Legal Profession Uniform Law Application Act 2014 (LPULAA 14).*

[3] The term used in the (NSW) *Legal Profession Act 2004 (LPA 04).*

[4] The LPA 04 continues to apply to party/party assessments where the proceedings to which the costs order relates commenced before 1 July 2015. The Legal Profession Uniform Law and the LPULAA 14 apply to "ordered costs" (as party/party costs are now called) where the proceedings to which the costs relate commenced on or after 1 July 2015: see LPULA Regulation 2014, reg 59).

3. These Guidelines are intended to provide guidance for Costs Assessors, in order to promote consistency and predictability. They are not binding on Assessors. They are intended as guidance as to what will usually be appropriate in ordinary cases, and they recognise that there will be unusual circumstances and extraordinary cases which will fall outside them. They are intended to apply to assessments on the ordinary (not the indemnity) basis. [5] All amounts referred to are exclusive of GST.

4. The Guidelines are to be read and construed together with the footnotes.

GUIDELINES

5. **General.** Costs are to be allowed only if and to the extent that they are no more than fair and reasonable in all the circumstances, were proportionately and reasonably incurred, and are proportionate and reasonable in amount, having regard to the matters referred to *Legal Profession Uniform Law* s 172 (or, where applicable, *Legal Profession Act 2004* s 364).

6. **Hourly and daily rates for legal service providers.** Time incurred by legal service providers performing professional work should be allowed within the ranges described below.[6]

Service provider	**Range $**
Senior partner/partner/specialist (10+ years) (hourly)	450 - 750
Senior associate (5 years plus) (hourly)	300 - 500
Employed solicitor / junior associate (1-4 years) (hourly)	200 - 400
Senior counsel, where the assessor considers that it is fair and reasonable to have briefed senior counsel (daily)[7]	5,000 – 8,000
Senior counsel (hourly)	500 - 950

[5] As those terms are used in *Civil Procedure Act 2005* s 98.
[6] Where within the applicable range a particular matter sits should be influenced by the factors referred to in *Legal Profession Act 2004,* s 364 or *Legal Profession Uniform Law,* s 172.
[7] Daily rates for counsel are for a brief on hearing and include a 10-hour day from 8am to 6pm. Briefs on interlocutory applications should usually be allowed at between one-third and two-thirds of the rate for a brief on hearing, according to the complexity of the application and the time involved. Mentions and directions hearings should be allowed at hourly rates. Cancellation fees, over and beyond the first day of a brief on hearing, should not be allowed.

Junior counsel (daily)[8]	2,000 - 5,000
Junior counsel (hourly)	200 - 500
Paralegals[9] (hourly)	120 - 250
Clerks/secretaries[10] (hourly)	75 - 150

7. **Photocopying and document production**.

Photocopying, printing and document production may be claimed and allowed either as a professional cost, or as a disbursement, but not both.

(a) If claimed as a professional cost and if justified, either:

- allow at $0.50c per page up to 50 pages, thereafter $0.20c per page. If in colour, where reasonable, allow at $1.00 per page up to 20 pages, thereafter 50c per page; or
- alternatively, allow as clerk or secretarial time under paragraph 6.

(b) If claimed as a disbursement, allow the amount reasonably outlaid.

8. **Other office overheads.** Overheads specifically attributable to the matter, such as scanning, electronic lodgement, telephone and faxes may be allowed. However, such charges should not be allowed if the hourly rate of the relevant legal service provider is such that it should be regarded as incorporating overheads.

9. **Travelling expenses.** The out-of-pocket expenses of a legal service provider travelling for the purposes of the matter should be allowed as disbursements. The legal service provider's time travelling to and from court or conference should be allowed at one-half of that provider's rate.

10. **Research.** Research time may be allowed, only to the extent that such work is reasonable for the prudent preparation and conduct of the matter.

---

[8] Daily rates for counsel are for a brief on hearing and include a 10-hour day from 8am to 6pm. Briefs on interlocutory applications should usually be allowed at between one-third and two-thirds of the rate for a brief on hearing, according to the complexity of the application and the time involved. Mentions and directions hearings should be allowed at hourly rates. Cancellation fees, over and beyond the first day of a brief on hearing, should not be allowed.

[9] Paralegals should not be allowed if the hourly rate of the relevant legal practitioner is such that it should be regarded as incorporating paralegal services. See also paras 7 and 8.

[10] Clerks and secretaries should not be allowed if the hourly rate of the relevant legal practitioner is such that it should be regarded as incorporating clerical and secretarial services. See also paras 7 and 8.

11. **In-house conferences.** In-house conferences may be allowed, only to the extent that they are shown to have contributed to the efficient conduct of the case.

CARC; 16 March 2016

APPENDIX D

The authors thank the following organisations, bodies and individuals who contributed to the Review. All gave up their valuable time to assist and we found each of the contributions helpful.

Table 1: Written submissions received

#	*Stakeholder*
1.	Association of Corporate Counsel
2.	Australian Centre for Justice Administration (ACJI), Monash University
3.	Australian Lawyers Alliance
4.	Blackstone Legal Costing
5.	Elizabeth Harris, Harris Cost Lawyers and joint editor of Quick on Costs
6.	Mark LaPirow, Barrister
7.	Law Institute of Victoria
8.	Mullen & King, Costs Lawyers
9.	Naomi Murray, Costs lawyer
10.	Roger Quick, Solicitor, costs assessor and leading contributor to Quick on Costs.
11	Robinson Gill Lawyers
12	Slater & Gordon
13	Traffic Accident Commission – confidential submission as per its request.
14	Victorian Bar
15	Victorian WorkCover Authority – confidential submission as per its request.
16	Walpole Menzies

Table 2: Consultation sessions

#	*Consultation session*	*Attendees*
1.	Insurance industry	• Ruth Overington, Partner, Herbert, Smith Freehills • Matthew Foglia, Special Counsel, Wotton + Kearney • David Poulton, Partner, Minter Ellison • Patrick Over, Barrister • Ross Donaldson, Special Counsel, Clyde & Co, Law Institute of Victoria (**LIV**) nominee
2.	Victorian Civil and Administrative Tribunal (**VCAT**)	• Ian Lulham, VCAT Deputy President and Head of Civil Claims List • Teresa Bisucci, VCAT Deputy President and Head of Planning and Environment Division and List • Silvana Wilson, VCAT Senior Member and Deputy Head of Civil Claims List

#	*Consultation session*	*Attendees*
		• Suzanne Kirton, VCAT Senior Member and Head of Building and Property List • Reynah Tang, AM, VCAT Practice List and Deputy Head of Legal Practice List • Peter O'Farrell, Barrister, Victorian Bar • Nicholas Phillpott, Barrister, Victorian Bar • Andrew Whitelaw, Solicitor, Whitelaw Flynn Lawyers • Don Maffia, Solicitor, Arnold, Thomas & Becker Lawyers • Sandrine Lepage, Solicitor, Slater & Gordon • Tom Burgoyne, Solicitor, Fortitude Legal • Tim Graham, Solicitor, Bugden Allen Graham
3.	Association of Corporate Counsel	• Emily Madder (GC Siemens Energy) • Deon Wong (Sen Legal Counsel, Seeing Machines)
4.	Cost consultants and members of the Legal Costs Committee	• Philip Williams, Economist, Frontier-Economics • Debra Paver, Costs Lawyer & Accredited Costs Law Specialist • Antonella Terranova, Chair, LIV Costs Law Section • Antoinette Austin, LIV Executive Committee Member, Slater & Gordon costs dept. • Jenny Young, LIV Executive Committee Member
5.	Building & construction	• Nathan Abbott, Colin Biggers & Paisley, LIV nominee • Joseph Barbaro, Corrs • Darren Cain, KCL Law • Timana Hattam, Herbert Smith Freehills • Andrew Stephenson, Corrs • Alex McKellar, HFW • Megan Calder, Piper Alderman • Persa Buchanan, Thomson Geer • Adam Rollnik, VicBar • Kylie Weston-Scheuber, VicBar
6.	Insolvency practitioners	• Steven Palmer, Partner, Norton Rose Fulbright • Kieran Kelly, Associate Director, Hilton Bradley Lawyers • Sam Kingston, Maddocks • Zoe Hussaini, Senior solicitor, State Revenue Office • Michael Lhuede, Partner, Piper Alderman

#	*Consultation session*	*Attendees*
		• Sazz Nasimi, Partner, Madgwicks • Kathryn Lechner, Senior Associate, Sinisgalli Foster Legal • Michael Watson, Lawyer, Williams Winter Lawyers • Nathanael Kitingan, Managing principal lawyer, Macpherson Kelley
7.	Common law	• John McPherson, LIV nominee for regional Victoria solicitors • Susan Accary, LIV • Lachlan Fitch, President of the Australian Lawyers Alliance • Colin Bellis, WorkSafe • Nicole Carter, Transport Accident Commission • David Whiting, WorkSafe Panel Firm Representative • Patrick Over, VicBar • Dimitra Dubrow, LIV
8.	General commercial	• Catherine Pierce, VicBar • Stewart Maiden QC, VicBar • Sam Bond, SBA Law • Jennifer Ball, Clayton Utz (Sydney) • Peter Cash, Norton Rose Fulbright • Nahum Ayliffe, Russell Kennedy • Alan Mitchell, Herbert Smith Freehills • Kim Mackay, Holding Redlich • Mark Yorston, Hope Earle

Table 3: Individual consultation sessions

	Consultation session attendees	
	• Nigel Evans, Managing Director, Aptum Legal • Philip Williams, Economist, Frontier Economics Pty Ltd • Judge Andrew Gordon-Saker, Senior Costs Judge, Royal Courts of Justice, England and Wales • Stewart Maiden, QC, Victorian Bar • Roger Quick, Legal Insight • Liz Harris, Costs lawyer, Harris Costs Lawyers • Debra Paver, Costs Lawyer & Accredited Costs Law Specialist • Annette Monforte, Manager, Complaints & Resolutions, VLSB • Jennie Pakula, Manager, Innovation & Consumer Engagement, VLSB • Judicial Registrar Conidi, Costs Court, Supreme Court of Victoria