



**SUPREME COURT OF VICTORIA
COUNTY COURT OF VICTORIA**

CONSULTATION PAPER

Review of Litigious Costs Stage 1 Implementation

14 December 2022

AUTHORS

**The Hon. Justice Jack Forrest, Acting Judge
of the Court of Appeal**

Her Honour Kathryn Kings

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1 Introduction

In October 2021, the Supreme Court and County Court appointed the Reviewers to review the method by which litigious costs are assessed in Victoria. The Reviewers considered whether the current method, under which costs are assessed by reference to the Scale of Costs, should be discarded and replaced by a contemporary method.

In the Report,¹ the Reviewers made 10 recommendations. The Supreme Court and the County Court endorsed the recommendations for consultation to then take place on implementation. This consultation paper is part of that consultation process.

The recommendations aim to create, in two stages, a method of costs assessment that is transparent to lawyers and clients, encourages certainty and predictability, is cost effective and efficient to apply, and reflects the principle of compensation for the successful party.

The first stage of reform is to repeal the Scale and establish a time-based costing regime similar to that used in New South Wales.

The second stage of reform is to introduce fixed recoverable costs for matters where costs are reasonably predictable, and a costs budgeting approach for more complex matters.

This consultation paper concerns the first stage of reform. It contains questions relating to the design and implementation of a time-based costing regime. Attachment 2 sets out draft provisions for time-based costing, which could be included in the Rules.

The Courts welcome submissions in response to this consultation paper by close of business on **3 February 2023**. Submissions should be sent to **submissions@supcourt.vic.gov.au**.

Separately, the Courts have published a 'Survey for Practitioners' seeking data from practitioners on the hourly rates they charge. The survey is available [here](#), and responses are due by close of business on 3 February 2023.

2 Background

2.1 Costs

In civil proceedings, the Courts may order the unsuccessful party to pay 'costs' to the successful party, to compensate that party for the legal expenses they incurred in asserting or defending their rights. These costs are known as 'party/party costs'.

¹ The Report is available on the Supreme Court website at <https://www.supremecourt.vic.gov.au/news/report-on-litigious-costs>.

A costs order will likely specify that in default of agreement, costs are to be taxed (calculated) by the Costs Court on either a standard basis or an indemnity basis.

When taxed on a standard basis, all costs reasonably incurred and of reasonable amount are allowed. When taxed on an indemnity basis, all costs are allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.

During consultations the Reviewers were informed of a ‘rule of thumb’ in Victoria that the successful party would recover 40–50 per cent of their actual legal costs, and this was based on practitioners’ experience of recovering costs in accordance with the Scale. By contrast, the Reviewers heard that in NSW, where reasonable hourly rates are used for party/party costs assessment, ‘recovery is usually good for litigants, around 70–80 per cent of actual costs’.

Another concept is ‘lawyer/client costs’ or ‘solicitor/client costs’. This refers to the amount a person is charged by a law practice for the provision of legal services. As noted in the Report, the lawyer and client may enter into an agreement in relation to the costs payable and the method of charging, which may be in accordance with the Scale, or based on hourly rates, or some other fee structure.

2.2 Scale

The Costs Court taxes party/party costs by reference to the Scale in Appendix A of the Rules.

The Scale may also be relevant to ‘lawyer/client costs’. In some practice areas, including personal injury claims and estate claims, practitioners use the Scale as the basis for charging clients. Overall, however, time-based costing is the predominant method of charging lawyer/client costs. In most litigation, the Scale is not used for billing clients.

The Scale sets out the amount of fees that can be paid to legal practitioners for particular items of work, such as reading documents, attendances, filing or photocopying.

The Scale includes a mixture of time-based allowances and fixed allowances. There are some fees and allowances that are at the Costs Court’s specific discretion, and there are factors listed to guide the exercise of that discretion. The Rules also give the Costs Court a general discretion to increase or decrease any allowance or expense in the Scale, as it sees fit. For a more detailed overview of the Scale, see pages 16 and 17 of the Report.

2.3 Review

The Reviewers concluded that the Scale should no longer be used as the method to assess costs, including because the Scale:

- does not meet policy or statutory objectives;
- is not working effectively;
- uses outdated language;

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- is opaque and difficult for clients and lawyers to understand;
 - does not reflect the charging practices of almost all law practices in every area of practice;
 - is antithetical to innovative charging in both small and large-scale litigation; and
 - does not facilitate the specific and critical goal of 'proportionate' costs.

The Review also noted that when a party seeks taxation of their costs, they must file an itemised bill of costs in taxable form, and the allowances in the Scale are then applied to that bill. Apart from personal injury and estate claims, law practices generally charge clients on the basis of an agreed hourly rate or, less often but increasingly so, a fixed fee. This means that when it comes to taxation, the bill has to be 'retrofitted' to the Scale. As most practitioners are not familiar with the Scale, a costs consultant is often engaged to draw up the bill, and the charge for that service can be as much as 15% of the professional charges claimed in the bill.

The Reviewers recommended that in the short term, changes to the Rules should be made to adopt a time-based costing regime similar to the NSW Guideline entitled 'Costs Payable Between Parties Under Court Orders'.² They said it should, at a minimum, set out reasonable hourly and daily rates in accordance with the experience of the practitioner or counsel. It should also deal with the charging of administrative items, for example electronic lodgement, scanning etc.

The Report stated that the benefits of a time-based costing regime include:

- hourly and daily rates are easier for consumers to understand;
- the rates would indicate to consumers what a generally reasonable charging rate is, and allow comparison with law practices' charging rates;
- time costing is already prevalent in most law practices, so practitioners will be able to use this method to charge their clients;
- party/party costs may more accurately reflect the actual work done; and
- potentially reduced reliance on costs consultants to draw up bills in taxable form, so reduced expenses for the successful party.

The Reviewers recommended that in the medium term, fixed recoverable costs and costs budgeting mechanisms be adopted, to set limits on litigious costs prospectively. The profession and consumers of legal services will need to be involved in developing those mechanisms. These recommendations are not discussed further in this paper; they will be the subject of consultation at a later stage.

² The NSW Guideline is available on the NSW Supreme Court website at https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_costsassessment/sco2_costsassessment_faqs/sco2_costsassessment_faqs.aspx#CA20.

2.4 Consultation

As part of the Review, a discussion paper was published on the Supreme Court website. Written submissions were received and judges of the Supreme Court and the County Court chaired consultations with the profession. The Reviewers also met with practitioners in different jurisdictions, costs experts, and judicial officers in Australia and overseas.

On the basis of those consultations, consideration of submissions received, and analysis of costs regimes in other jurisdictions, the Reviewers made the recommendations for staged reforms.

The Review anticipated that further consultation would be undertaken in relation to implementation of the recommended reforms. The Courts are committed to ensuring that the plans for implementation take into account the preparation that needs to occur in the Courts and the legal profession and how best to transition to each stage of reform.

3 Time-based costing

In accordance with recommendations 1 and 2 of the Review, it is proposed to amend the Rules to repeal the Scale and insert a time-based costing regime. The regime will have the same force of law as the Scale. A draft of the provisions is at Attachment 2.

3.1 Hourly rates for solicitors

The regime will set out hourly rates for legal service providers. The rates in the Supreme Court Rules will apply to matters in the Supreme Court.

It is anticipated that the County Court will either adopt the same hourly rates, or specify that the hourly rates are a proportion of the rates applicable in the Supreme Court.

3.1.1 Different maximum rates according to experience or position

The draft provisions in Attachment 2 set out maximum hourly rates for 'time incurred by a legal practitioner requiring legal skill or knowledge'.

It has been proposed that the maximum rates should differ, depending either on the practitioner's years of practice, their role and position in the firm or whether they have specialist accreditation.

The Courts seek views on whether:

- there should be a single hourly rate applicable to all legal practitioners, regardless of years of experience or role (Attachment 2, clause 1, Option 1);
- it is appropriate to have different hourly rates according to the practitioner's role or position (Attachment 2, clause 1, Option 2); and
- it is appropriate to have different rates according to years of experience, and if so whether the proposed categories of 1–4 years' experience, 5

or more years' experience, and 10 or more years' experience, are appropriate and sufficient (Attachment 2, clause 1, Option 3).

The hourly rate for time incurred on work requiring legal skill or knowledge would cover all such work.

In addition to hourly rates for time incurred on work requiring legal skill or knowledge, the draft provisions also set out hourly rates for time incurred:

- by legal practitioners on work not requiring legal skill or knowledge;
- by employees who are not legal practitioners, but who exercise legal skill or knowledge (for example paralegals or other non-legal professionals such as people with a financial background and IT specialists); and
- on any other work not requiring legal skill or knowledge, that is capable of performance by a clerk.

Questions

1. Should there be a single maximum hourly rate or different hourly rates based on the practitioner's role/position or level of experience?
2. If there are different hourly rates, should they be categorised in some other way?
3. Is there an alternative to using maximum hourly rates, for example, using fixed hourly rates?

It is noted that this consultation paper does not seek views on what the hourly rates should be. The Courts have published an [online survey](#) seeking data from practitioners on the rates they charge, and the data collected will inform the setting of the hourly rates in the time-based costing regime. Responses to the survey are due by close of business on 3 February 2023.

3.1.2 The test for determining hourly rates

The draft provisions in Attachment 2 state that *"in determining the reasonableness of the hourly rates claimed by the party entitled to costs, the assessor must have regard to the factors referred to in r 63.48(2) of the Supreme Court Rules"*. Those factors are:

- (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;

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- (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.

The Courts seek views on whether the above factors are appropriate (with appropriate amendments to delete references to the Scale) to determine the reasonableness of the claim for hourly rates and whether any additional factors should be listed. For example, should proportionality be added to factors in r 63.48 of the Rules that should be considered by the costs assessor.

An alternative approach might be to 'import' the considerations set out in s 172 of the Uniform Law, as is done in NSW. Section 76 of the *Legal Profession Uniform Law Application Act 2014* (NSW) provides that 'in considering what is a fair and reasonable amount of [party/party] costs for the work concerned, the costs assessor may have regard to the factors in section 172(1) and (2) of the *Legal Profession Uniform Law (NSW)* (as if that section also applied to ordered costs and so applies with any necessary modifications)'

Section 172 of the Uniform Law provides:

- (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.
- (2) In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect—
 - (a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and
 - (b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
 - (c) the labour and responsibility involved; and
 - (d) the circumstances in acting on the matter, including (for example) any or all of the following—
 - (i) the urgency of the matter;
 - (ii) the time spent on the matter;
 - (iii) the time when business was transacted in the matter;
 - (iv) the place where business was transacted in the matter;
 - (v) the number and importance of any documents involved; and
 - (e) the quality of the work done; and
 - (f) the retainer and the instructions (express or implied) given in the matter.

It is noted that s 172 of the Uniform Law deals with lawyer/client costs, not party/party costs. Section 76 of the *Legal Profession Uniform Law Application Act 2014* (NSW) makes the point that section 172 is to be applied “as if that section also applied to ordered costs”.

It is also noted that the factors in r 63.48 of the Rules and the factors specified in s 172(2) are very similar (if not identical), the main difference being the test in s 172(1) includes the concept of ‘proportionality’.

Questions

4. What factors should guide the determination of an hourly rate to apply?
5. Is there anything to be gained by linking party/party recovery to the provisions of the Uniform Law?
6. Should proportionality be added to factors in r 63.48 that should be considered by the costs assessor when determining a reasonable hourly rate?

3.1.3 Standard basis and indemnity basis

It is proposed to retain the two bases on which costs may be taxed, namely the standard basis under r 63.30 and the indemnity basis under r 63.30.1. The hourly rates and fees in the time-based costing regime will apply to both a taxation on the standard basis and a taxation on the indemnity basis.

The Courts seek views on whether the two bases for taxation should be retained in their current form.

An option under consideration is incorporating a test of proportionality into the test for standard basis costs in r 63.30. That would be consistent with s 24 of the *Civil Procedure Act 2010*, which establishes a proportionality requirement for ‘legal costs and other costs incurred in connection with the civil proceeding’.

Questions

7. Should the tests for standard basis costs and indemnity basis costs currently applicable in Victoria be retained?
8. Should a test of proportionality be explicitly introduced into r 63.30?

3.1.4 Discretion to apply a higher rate

The Courts seek views on whether the Costs Court (as opposed to the Court) should have a discretion to apply an hourly rate that is higher than the applicable maximum rate.

The discretion could be an updated form of r 63.34(3) and/or r 63.72, or it could be a new rule providing:

(1) On taxation of costs, an hourly rate in excess of the maximum is not to be allowed unless the Costs Court otherwise orders.

(2) In allowing an hourly rate above the maximum, the Costs Court shall have regard to the factors set out in r 63.48(2).

Question

9. Should the Costs Court have a discretion to apply an hourly rate that is higher than the applicable maximum rate?

3.1.5 Units of time to which the rate is applied

Depending on the law practice, a bill may include time calculated in units of six minutes or part thereof, one minute, or some other unit of time. The Courts seek views on whether it is necessary for the draft provisions to specify the unit of time to which the hourly rate should be applied.

The regime could specify that the Costs Court will have the discretion to apply the hourly rate to units of:

- six minutes;
- six minutes, with a discretion to use a smaller unit for certain actions, such as a one line email or message;
- one minute;
- one minute, with a discretion to use a larger unit where the law practice cannot calculate time in one minute units;
- some other amount of time; or
- no reference to units (as per the NSW Guideline).

Questions

10. Is it necessary or desirable for the draft provisions to deal with units of time?

11. If units of time are applied, what unit or units should be used when applying the hourly rate?

3.1.6 GST

It is proposed that the hourly rates and amounts recoverable under the time-based costing regime will be exclusive of GST. This is consistent with the Scale, the decisions of the Supreme Court and rulings by the ATO.

Question

12. Do you consider that there are circumstances in which GST should be recoverable? If so, what are those circumstances? What would be the basis for recovering GST as between parties?

3.2 Counsel's fees

The draft provisions in cl 3 of Attachment 2 set out maximum fees for junior counsel and senior counsel.

There are:

- daily fees for a 10 hour day, for appearances on trial or appeal (see cl 3(1)(a)(i));
- hourly fees for appearances at applications, directions hearings, interlocutory applications, and 'any other appearance' (see cl 3(1)(a)(ii)); and
- hourly fees for 'other matters', with various activities listed including attending views and conferences, preparation time, and the giving of opinions and advices (see cl 3(1)(a)(iii)).

It is noted that those fees are for work requiring legal skill or knowledge. In the unlikely event that counsel perform work that does not require legal skill or knowledge, party/party costs would not be recoverable in respect of that work.

The Courts seek views on whether it is desirable to specify an hourly fee for appearances specified in cl 3(1)(a)(ii), given that such appearances may range from an hour to a day or longer. Clause 3(1)(a)(ii) could specify a daily fee in addition to an hourly rate.

Question

13. Is an hourly fee appropriate for appearances specified in cl 3(1)(a)(ii) given that such appearances may range from an hour to a day or longer?

3.2.1 Solicitors appearing as counsel

Under the time-based costing regime, an hourly rate will apply to solicitors' work irrespective of what that work is.

To recognise that appearing in court involves a different skillset such that a higher rate might be justified, cl 3(1)(a)(iv) of Attachment 2 provides for a fee for a solicitor who appears as counsel. This fee would be at the discretion of the Costs Court having regard to factors similar to those in r 63.48(2).

Question

14. When a solicitor appears as counsel, should the Costs Court have a discretion to apply an appearance fee rather than the hourly rate that would otherwise apply to solicitors' work?

3.2.2 Discretion to apply a higher fee

The Courts seek views on an appropriate process for allowing counsel fees in excess of the maximum fee in cl 3 of Attachment 2.

If a matter goes to trial, the trial judge may be in the best position to certify fees above the maximum fee. Allowing for the successful party to make an application to the trial judge at the conclusion of the trial would provide certainty. If the trial judge refused the application, fees in excess of the maximum fee could not be sought in the Costs Court. The only application left to be made before the Costs Court would be to set the fee at or below the maximum (assuming the trial judge declined to fix any fee at all).

However, if a matter settled before trial, the Costs Court may be in a similar position to the judge before whom the matter was listed, in terms of being able to certify fees above the maximum fee. There is a question whether, in those circumstances, an application should be made to the judge (contemporaneously with the proceeding) or to the Costs Court at some later time when the Costs Court is seized of the matter.

Clause 4 of Attachment 2 provides:

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

Question

15. Should the Costs Court have a discretion to allow a fee for counsel in excess of the maximum fee, and if so, should that discretion only apply where the Court has not made a determination as to counsel's fees?

3.3 Innovative pricing models

The Report noted that some law practices may be using innovative pricing arrangements such as fixed-price models and subscription-fee models, rather than a time-based model.

It is important to accommodate innovative charging practices because, in developing a time-based costing regime, it is not intended to signal to the legal profession and consumers that time-based charging is preferable.

The Courts seek views on how the time-based costing regime should accommodate charging practices that are not based on time.

One option (similar to Item 12 the Federal Court Scale) would be to provide that where a client was not charged on the basis of time, a 'fair and reasonable amount will be allowed' having regard to factors such as those in r 63.48(2) of the Rules, which were set out above.

Alternatively, for the purposes of taxation, the party claiming costs could be required to draw a bill of costs itemising the work done to justify the "fixed price". In order to do this, law practices would need to keep time records (or WIPS) of the work they do on behalf of clients even where there is a fixed costs agreement.

Question

16. How should the time-based costing regime accommodate pricing models that are not based on time?

3.4 Witnesses and interpreters

Witnesses' expenses and interpreters' allowances are currently dealt with in Appendix B of the Rules. The Report stated that Appendix B of the Rules was not the focus of the Review.

As a matter of convenience and completeness, with the approval of the Legal Costs Committee, it is proposed that the time-based costing regime include provision for witnesses' expenses and interpreters' allowances – see clauses 12 and 13 of Attachment 2 to this paper.

It is also proposed that instead of a fixed rate being allowed for witnesses and interpreters, there be an allowance for **reasonable and proportionate** costs (including **reasonable and proportionate** expenses) having regard to the discretionary criteria in r 63.48.

3.5 Annual review

Under s 93(2) of the *Legal Profession Uniform Law Application Act 2014*, the Legal Costs Committee may advise the judges of the Supreme Court and County Court 'on any desirable adjustments in scales of costs in relation to litigious matters'.

In accordance with recommendation 3 in the Report, it is proposed that the Legal Costs Committee will review the time-based costing regime, and update it as required, on a yearly basis.

Regular reviews of the time-based costing regime will promote confidence and mitigate the risk that the hourly rates are too low and therefore result in a significant gap between costs recovered under a party/party assessment, and lawyer/client costs actually charged.

4 Commencement

The Courts appreciate that the transition from the Scale to time-based costing will require adjustments to processes, in particular for those practitioners who bill their clients on the basis of the Scale. The Courts consider that a commencement date in the second half of 2023 may provide adequate time for practitioners to prepare for the changes.

The Courts seek views on the appropriate commencement date for the time-based costing regime.

Questions

17. When should the time-based costing regime commence?

18. How far in advance of that commencement should the detail of the new position be known to enable a smooth transition?

The Courts also seek views on appropriate transitional provisions. The time-based costing regime will apply to proceedings commenced after the commencement date. There is a need to consider whether the time-based costing regime should also apply to:

- proceedings commenced before the commencement date;
- proceedings where a costs order was made but a summons for taxation has not been filed before the commencement date;
- proceedings where a summons for taxation was filed before the commencement date, but the taxation had not commenced or was not completed;
- costs incurred from a certain point in time onwards.

It is noted that when the Scale is amended, the amendments apply to work done on or after the commencement date of the amendments. For instance, the *Supreme Court (Chapter 1 Appendices A and B) Amendment Rules 2021* were made on 25 November 2021, with a commencement date of 1 January 2022, and the new Scale applies to work done on or after 1 January 2022.

Question

19. What transitional provisions should apply to the time-based costing regime?

Question

20. Do you have any other views on the design of the time-based costing regime or the draft provisions in Attachment 2? For example, is there any utility in keeping items 6 and 9 – 11 in Attachment 2?

5 Next steps

The Courts welcome submissions in response to this consultation paper by close of business on **3 February 2023**. Submissions should be sent to **submissions@supcourt.vic.gov.au**.

Submissions may respond to any or all of the questions posed in this paper, or other issues relating to stage 1 of the implementation of the Review.

Unless a submission indicates that it is confidential, the Courts will not treat it as confidential.

Separately, the Courts have published an [online survey](#) seeking data from practitioners on their charging rates. Responses to that survey are due by close of business on 3 February 2023.

The Courts will conduct further consultation on stage 2 of the implementation of the Review in due course.

6 Definitions

Term	Definition
Legal Costs Committee	The Legal Costs Committee continued under s 92 of the <i>Legal Profession Uniform Law Application Act 2014</i> . The Committee includes the Heads of Jurisdiction (or their nominees) of the Supreme Court, County Court, Magistrates' Court and VCAT, two members nominated by the Attorney-General, two members nominated by the Victorian Legal Services Board, and one member nominated by each legal profession association.
Party/party costs	Legal costs of the successful party in civil proceedings, which the unsuccessful party has been ordered to pay
Report	Report on Litigious Costs dated 3 May 2022
Review	Supreme Court and County Court Review of Litigious Costs
Reviewers	The Hon Jack Forrest and her Honour Kathryn Kings
Rules	<i>Supreme Court (General Civil Procedure) Rules 2015</i>
Scale of Costs; Scale	The costs set out in Appendix A of the <i>Supreme Court (General Civil Procedure) Rules 2015</i> .
Uniform Law	Legal Profession Uniform Law, contained in Schedule 1 to the <i>Legal Profession Uniform Law Application Act 2014</i> .

Attachment 1

Consultation questions

1. Should there be a single maximum hourly rate or different hourly rates based on the practitioner's role/position or level of experience?
2. If there are different hourly rates, should they be categorised in some other way?
3. Is there an alternative to using maximum hourly rates, for example, using fixed hourly rates?
4. What factors should guide the determination of an hourly rate to apply?
5. Is there anything to be gained by linking party/party recovery to the provisions of the Uniform Law?
6. Should proportionality be added to factors in r 63.48 that should be considered by the costs assessor when determining a reasonable hourly rate?
7. Should the tests for standard basis costs and indemnity basis costs currently applicable in Victoria be retained?
8. Should a test of proportionality be explicitly introduced into r 63.30?
9. Should the Costs Court have a discretion to apply an hourly rate that is higher than the applicable maximum rate.
10. Is it necessary or desirable for the draft provisions to deal with units of time?
11. If units of time are applied, what unit or units should be used when applying the hourly rate?
12. Do you consider that there are circumstances in which GST should be recoverable? If so, what are those circumstances? What would be the basis for recovering GST between the parties?
13. Is an hourly fee appropriate for appearances specified in cl 3(1)(a)(ii) given that such appearances may range from an hour to a day or longer?

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14. When a solicitor appears as counsel, should the Costs Court have a discretion to apply an appearance fee rather than the hourly rate that would otherwise apply to solicitors' work?
 15. Should the Costs Court have a discretion to allow a fee for counsel in excess of the maximum fee, and if so, should that discretion only apply where the Court has not made a determination as to counsel's fees?
 16. How should the time-based costing regime accommodate pricing models that are not based on time?
 17. When should the time-based costing regime commence?
 18. How far in advance of that commencement should the detail of the new position be known to enable a smooth transition?
 19. What transitional provisions should apply to the time-based costing regime?
 20. Do you have any other views on the design of the time-based costing regime or the draft provisions in Attachment 2? For example, is there any utility in keeping items 6 and 9 – 11 in Attachment 2?

Attachment 2

Draft Rules on Costs Payable between Parties

'Guideline' to Costs Payable Between Parties (New Appendix A)

Fees and charges to be paid to a party to whom costs are payable (whether the basis of taxation is a 'standard basis' or 'indemnity basis') for work done by legal service providers on and after **[Date]** in relation to matters in the Supreme Court.

The charges are exclusive of any GST chargeable.

1. Hourly rates for legal service providers (equalling 10 units of 6 minutes per unit or part thereof)

Option 1

- (a) Time incurred by a legal practitioner requiring legal skill or knowledge - per hour, up to a maximum of **\$ XX**
- (b) Time incurred by legal practitioner **not** requiring legal skill or knowledge - per hour, up to a maximum of **\$ XX**

OR

Option 2

- (a) Time incurred by a legal practitioner requiring legal skill or knowledge, for a:
 - (i) Senior legal practitioner (*incl. partner, principal, specialist, consultant, special counsel*) per hour, up to a maximum of **\$ XX**
 - (ii) Senior Associate or similar (*incl. senior lawyer, special counsel, consultant*) per hour, up to a maximum of **\$ XX**
 - (iii) 'Junior' legal practitioner or similar (*incl. lawyer, associate, law graduate*) per hour, up to a maximum of **\$ XX**
- (b) Time incurred by legal practitioner **not** requiring legal skill or knowledge per hour, up to a maximum of **\$ XX**

OR

Option 3

- (a) Time incurred by a legal practitioner requiring legal skill or knowledge, for a:
 - (i) Senior partner/partner/specialist (10+ years)

	per hour, up to a maximum of	\$ XX
	(ii) Senior associate (5 years plus) per hour, up to a maximum of	\$ XX
	(iii) solicitor / junior associate (1–4 years) per hour, up to a maximum of	\$ XX
(b)	Time incurred by legal practitioner <i>not</i> requiring legal skill or knowledge, per hour, up to a maximum of	\$ XX
(c)	Time incurred by an employee of a legal practice who is not a legal practitioner	
	(i) but exercising legal skill or knowledge – per hour, up to a maximum of	\$ XX
	(ii) Any other work not requiring legal skill or knowledge, capable of performance by a clerk – per hour, up to a maximum of	\$XX

2. In determining the reasonableness of the hourly rates claimed by the party entitled to costs, the assessor must have regard to the factors referred to in r 63.48(2) of the Supreme Court Rules.

3. COUNSEL'S FEES

	<i>Junior Counsel</i>	<i>Senior Counsel</i>
(1) Subject to paragraphs (2), (3) and (4), such fees as are allowed up to a maximum of—		
(a) appearances—		
(i) on trial or appeal, or an appearance exceeding three hours, up to a maximum of (daily fee) (<i>Daily fee is reference to a 10 hour day</i>)	XX	XX
(ii) For other appearances not covered by Item 1(a)(i), excluding preparation, for each hour	XX	XX
<ul style="list-style-type: none"> • Applications • Directions Hearing • Interlocutory applications • Any other appearance 		

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- (iii) "Other Matters", for each hour **XX** **XX**
- Attending views
 - Conferences (not occurring on day of hearing)
 - Preparation time
 - Settling applications, statements of claim, affidavits, defence, other documents
 - Opinions, advices
 - Written submissions (where not allowed above)
 - Attending to receive judgment (where appropriate)
 - Any other work, not otherwise provided for

(iv) Where a legal practitioner appears as Counsel, at the discretion of the Costs Court having regard to the discretionary criteria set out in r 63.48 of the Supreme Court Rules.

(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 the following criteria:

(a) all the criteria in r 63.48 of the Supreme Court Rules (*i.e. discretionary costs; item 19(3)(a) in the Scale has identical criteria*)

(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 the **maximum fee** are not to be allowed unless the Supreme Court or the Costs Court (in the absence of a

determination by the Supreme Court), otherwise orders, but in any other case the Costs Court has discretion to allow fees in excess of the maximum fee.

4. CORPORATIONS ACT 2001

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 **\$XX**

An additional amount may be allowed for any adjournment.

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

5. 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.

6. 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 hourly rates in item 1, as appropriate.

In considering a claim made pursuant to this item, the Costs Court must have regard to any allowances previously claimed pursuant item 1.

7. 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.

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, as appropriate.

8. RESEARCH

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

9. 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, as appropriate.

10. 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, as appropriate.

11. ELECTRONIC DOCUMENT MANAGEMENT

- (a) Database creation, database administration (including establishing design and agreement protocols), database design and implementation—in accordance with item 1, as appropriate.
- (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, as appropriate
- (c) Imaging of documents to searchable format including rendering to PDF and scanning where necessary—in accordance with item 1, as appropriate
- (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, as appropriate.

12. TRAVEL TIME AND EXPENSES

The legal service provider's travelling time to and from court or conference, to be allowed at one half of that provider's hourly rate.

The out-of-pocket expenses of a legal service provider travelling for the purposes of the matter should be allowed as disbursements.

13. WITNESSES' EXPENSES

1. A person engaged as an expert pursuant to Order 44 or a professional person including accountants, actuaries, analytical chemists, architects, economists, IT consultants, legal practitioners, medical practitioners, medical specialists or consultants, pharmaceutical chemists, psychologists, valuers and similar persons for preparing and giving evidence as an expert or as a witness of fact -
2. Person other than a professional person who is engaged in business as a principal on that person's own behalf -
3. Any other witness—
Allow reasonable costs, including reasonable expenses, having regard to the discretionary criteria in r 63.48 of the Supreme Court Rules, in so far as it is applicable.

14. INTERPRETERS' ALLOWANCES

Allow reasonable costs, including reasonable expenses, having regard to the discretionary criteria in r 63.48 of the Supreme Court Rules, in so far as it is applicable.

Attachment 3

Recommendations from the Review of Litigious Costs

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).
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 Courts 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.
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.
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.

Consultation Sessions

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.

Consultation Session	Attendees
New South Wales Supreme Court	The Hon Justice PLG Brereton AM RFD (Chair of the Costs Assessment Rules Committee (NSW)) Registrar Brendan Bellach
Representative group from the LIV Costs Lawyers Section	Antonella Terranova, Costs Lawyer - Castra Legal Costing Pty Ltd Ariel Weingart, Costs Lawyer Jennifer Young, Costs Lawyer Michael King, Costs Lawyer - Mullen & King Dimitra Dubrow, Maurice Blackburn Lawyers (Personal Injuries Litigation) Ross Nicholas, Costs Lawyer - Costs Plus (NSW) Irene Chrisafis, LIV - Section Lead & Senior Lawyer Litigation, Costs & Privacy Officer
Victorian Bar Consultative Group	James Mighell KC Michael Gronow KC Lachlan Allan Andrew Burnett Veronica Holt Daniel Nguyen Sarah Cherry Stephen Warne

Written Comments

LIV Costs Lawyers Section

Liz Harris, Director Ovid Consulting | Harris Cost Lawyers

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