Chapter 10
Achieving Greater Access to Justice: A New Funding Mechanism
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1. ACCESS TO LEGAL ASSISTANCE

1.1 INTRODUCTION

An essential element of a fair legal system is the ability to access legal assistance and to obtain a fair hearing. Accessibility of the law depends on awareness of legal rights and of available procedures to enforce such rights. When access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful. In many instances ‘injustice results from nothing more complicated than lack of knowledge’. The availability of legal assistance in civil law matters is, therefore, important both in facilitating access to justice and in ensuring that disputes are resolved fairly. As has been noted by the United Nations Human Rights Committee,

the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.2

Although Australian law generally recognises a right to representation in courts, in both civil and criminal matters, there is no ‘right’ to be provided with legal representation at public expense.3 The commission received a number of submissions that highlighted the importance of obtaining legal assistance. The submissions on this issue could be said to support the notion that:

Legal aid cannot, by itself, eliminate all of the effects of discriminatory factors and sources of inequality [and] nor can it, alone, produce a just society. However, without an effective legal aid system the opportunity to realise a just and democratic society is threatened and so are the citizens that make up that society.4

Many of these submissions also outlined current limitations on accessing legal assistance, most particularly because of a lack of legal aid funding for civil law matters. The views expressed in the submissions reflect a wider debate about how access to justice is facilitated, and who is responsible for funding.

Issues related to the adequacy of legal aid funding for civil legal proceedings are matters of some complexity. They are beyond the scope of this first stage of this inquiry, as are the issues of eligibility guidelines for legal aid funding and the allocation of available legal aid funds. Similarly, the commission has not investigated the issue of funding to community legal centres or other organisations outside the private profession involved in the provision of legal services.

The commission acknowledges the importance of this issue and supports calls for further legal aid funding. The first part of this chapter provides a brief summary of the current framework for legal aid funding. The second part of this chapter, we outline our proposal to address, in part, a gap in the provision of funding for civil law matters in Victoria. The submissions received by the commission illuminate areas where demand is high, and include suggestions for reform.

In the second part of this chapter, we outline our proposal to address, in part, a gap in the provision of funding for civil law matters in Victoria. The commission believes that the establishment of a new funding mechanism, the Justice Fund, will assist in achieving greater access to justice.

1.2 LEGAL ASSISTANCE SCHEMES

1.2.1 Legal aid funding framework

Prior to 1997, the allocation of legal aid funding was largely determined by legal aid commissions in each state and territory. Each commission set its own budget priorities and expenditure. Funding was derived from a combination of state and federal government allocations and from other sources, including funds derived from interest on trust accounts. In 1996, the Commonwealth withdrew from this arrangement. From July 1997, the Commonwealth Government entered into new funding arrangements with legal aid commissions whereby Commonwealth funding was restricted to matters arising under Commonwealth law and the previous commitment to people for whom the Commonwealth accepted a ‘special responsibility’ was abandoned.5

1 Chief Justice Murray Gleeson, ‘State of the Judicature’ (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).


3 Human Rights Committee, United Nations General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, [10], UN Doc CCPR/C/GC/32 (2007).

4 Statutory restrictions on or exclusions of the right to legal representation before tribunals and other bodies are not uncommon. See Paul Latimer, Michael Hocken and Stephen Marsden, Legal Representation in Australia before Tribunals, Committees and other Bodies (Murdock University E Law Journal 14 (2) (2007) 122).

5 In the criminal law context, see Dietrich v R 177 CLR 292, a case arising on appeal from the County Court of Victoria. The right to a fair trial is, however, fundamental and, in the absence of exceptional circumstances, a criminal trial may be adjourned or stayed to enable the accused to obtain representation. See also Jago v District Court (NSW) (1989) 168 CLR 23.


The introduction of this new funding arrangement saw the Commonwealth contribution to legal aid decline from 1996 to 2000, with an increase from 2000 to 2004. State and territory contributions to legal aid have increased steadily from 1996 to 2004.8

The change in funding priorities essentially diminished the available funds across the spectrum of legal matters. State legal aid commissions directed funds to criminal matters (where personal liberty was at stake) and family law matters (where the care of children was at issue).9 According to the Victorian Department of Justice, the impact of this policy change on funding for civil law matters was severe. It included the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries. Some of those matters have been picked up by the private profession on a ‘no win, no fee’ basis, but substantial areas of law, particularly poverty related law, have not been picked up.10

The impacts of this policy change have been analysed elsewhere.11 In their submission in response to the commission’s Consultation Paper, Victoria Legal Aid reported that before the 1996 changes, it funded on average 1972 civil cases each year and civil expenditure totalled on average $3.2 million each year. After 1996, civil expenditure dropped to $138 000 each year. On average there were 188 cases in which assistance was provided each year.

For the same period, the Federation of Community Legal Centres also reported a large increase in demand for legal assistance in civil law matters. Its casework statistics show that in 1996, Victorian community legal centres gave civil law advice to 9278 clients, and a further 9248 cases were conducted. In 2006, 40 508 clients were given legal advice on civil law matters, and 13 593 cases were conducted. Civil law makes up 61 per cent of advice and casework performed by community legal centres, more than family law (33 per cent) and criminal law (6 per cent).12

Such an increase in civil law work may be partly attributed to a growth in community legal centre services. However, it is also likely that demand on community legal centres is increasing. Fitzroy Legal Service also reported an increase in demand for civil law legal advice:

FLS has had more clients seeking advice in relation to civil matters, whilst the courts have witnessed significant increases in the number of self-represented litigants involved in civil litigation. The lack of legal aid for civil law matters contributes to significant inefficiencies and additional costs in the civil justice system.13

The Public Interest Law Clearing House also noted

[a] clear correlation between the erosion of legal representation caused by the changes to legal aid funding and the need, and increased demand, for pro bono services to be provided by the profession, particularly in civil litigation.14

Beyond these reports, there is little data available on the accessibility of legal assistance for civil legal problems. There has been a lack of systemic research about legal needs of Victorians. While projects in NSW are attempting to tackle the lack of statistics in that state,15 research in Victoria has been ad hoc.16 Victoria Legal Aid has called for a national survey of demand and unmet need for legal services.17 The commission supports further research into legal needs and constraints on access to the civil justice system. The commission has not carried out or commissioned any such research, given the limited time constraints and terms of reference of the first stage of the present inquiry.

1.2.2 Victoria Legal Aid criteria for funding

Victoria Legal Aid is a statutory body established to provide legal aid in Victoria and to administer legal aid funds provided by state and Commonwealth governments.18 The Legal Aid Act 1978 provides that Legal Aid may provide legal assistance where:

• a person is in need of legal assistance but is unable to afford the full cost of obtaining it from a private legal practitioner

• it is reasonable having regard to all relevant matters.19

Victoria Legal Aid uses a means test to determine if an applicant is able to pay for legal assistance. In assessing the reasonableness of a grant of assistance, Legal Aid will consider ‘the nature and extent of any benefit that may be gained by the applicant, the public or any section of the public from providing legal assistance’, and any detriment that might arise if assistance is not granted.20 The merits of a case are considered and there must be reasonable prospects of success.21
The Legal Aid Grants Handbook outlines additional criteria for a grant of legal aid. Assistance may be granted in civil law cases if the amount claimed is $5000 or more. Prospective plaintiffs will not receive a grant of assistance if they could be assisted by a private practitioner through a conditional (no win, no fee) costs agreement or by Law Aid. Assistance is only available to defendants if their sole place of residence is at immediate risk, or there is a strong prospect of obtaining a life tenancy in respect of the property.22

Civil matters in which Legal Aid may grant assistance if an applicant meets both means and merit tests include Mental Health Review Board matters, guardianship and administration cases, coroner’s inquests, equal opportunity and discrimination cases, Crimes (Family Violence) Act cases, adoption and some infringement penalties.

Assistance may also be granted in public interest cases that involve a legal issue that affects or is of broad concern to a significant number of disadvantaged people, or if there is an untested or unsettled point of law that affects a significant number of disadvantaged people.23

Victoria Legal Aid will not grant assistance for any other classes of matters, including:

- cases at the Residential Tenancies Tribunal
- town planning disputes
- royal commissions or parliamentary inquiries
- internal disputes in organisations
- proceedings on behalf of an unincorporated association
- employment disputes
- building disputes
- change of name applications
- commercial or business disputes
- testator family maintenance applications.

Where the guidelines are silent about a matter, assistance will not be granted unless there are special circumstances. These include if an applicant is under 18 years of age, has a language or literacy problem, or has an intellectual or psychiatric disability.24

Over the past three decades, the proportion of grants approved for civil law matters has generally declined compared with criminal and family law cases.25

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*Mainly child protection matters

1.2.3 Community legal centres

Community legal centres are not-for-profit, independent, community organisations that provide a range of free legal services. Community legal centres are funded by a mix of state, federal and local government funding, donations, grants and pro bono contributions. The centres provide free legal advice, information, assistance and representation as well as contributing to community legal education and law reform. The services available at each centre vary, depending on resources. Community legal centres tend to fill identified gaps in legal aid services in places of high need, providing complementary but different services to those provided by [legal aid commissions] and the private legal profession.26

A national report also found that community legal centres ‘have a vital role to play in helping to achieve a fairer and more effective legal aid system that is available and accessible to all Australians’.27
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The Federation of Community Legal Centres, the peak body for the 52 community legal centres in Victoria, reports that their centres assist over 100,000 Victorians each year. In Victoria, generalist centres service geographic communities and specialist centres provide services in discrete areas of law. They describe the pathways of their clients as follows:

People come to Community Legal Centres for help for different reasons. Often people seek assistance from a CLC because Legal Aid cannot assist them ... People may also come to a Community Legal Centre because they cannot afford a private solicitor or because there is limited private work done in the areas of civil law that CLCs provide assistance ... Increasingly, people come to a CLC after being referred from a court because they are self-represented litigants, and the court feels that they should be legally represented or the client should be advised to investigate other avenues of resolution.

In the 2006 financial year, Victorian community legal centres dealt with more than 72,193 clients in relation to civil law matters. Although community legal centres and other organisations, including PILCH, are endeavouring to cope with the increased demand for legal assistance in civil matters, such bodies are not usually able to provide the necessary assistance for the conduct of major civil litigation, including class actions.

1.2.4 Law Aid

In Victoria, funding is also available (on application) to cover the costs of disbursements in litigation. Law Aid is a charitable trust administered by the Law Institute of Victoria and the Victorian Bar Council. Law Aid can cover the costs of disbursements that arise in civil litigation including experts’ fees, travelling and accommodation expenses, court filing fees, jury fees and witness expenses. Law Aid aims to be a self-funding scheme. The scheme assesses the means of applicants and the merits of their cases before assistance is granted.

An applicant must pay an application fee of $100 and repay all monies spent on disbursements if the case is successful. The Law Aid fund also receives a percentage of the judgment or settlement (5.5 per cent). The legislation provides that such percentage shall not exceed 10 per cent of the award of settlement, excluding costs, or the market value of any property that may be recovered in the legal proceeding. Recoupment of expenses may also be through recovery of costs by court order made against the other party to the proceedings in which the assisted person is involved.

Funding from Law Aid is dependent on the barrister and solicitor acting on a pro bono or ‘no win, no fee’ basis, and not seeking any payment until proceedings are completed.

The types of civil litigation that may be funded include:

- substantial personal injury claims
- claims against institutions involving oppressive behaviour
- loss or destruction of property claims
- professional negligence claims
- wills and estate claims.

Law Aid is not available for criminal matters or family law matters.

Although Law Aid is a useful scheme it is limited in scope and has provided assistance in a relatively small number of matters to date. The existing legislative cap on the proportion of any settlement that may be recouped by the Law Aid scheme undermines its commercial viability.

1.2.5 Pro bono schemes in Victoria

There are three formal pro bono assistance schemes in Victoria. The Public Interest Law Clearing House (PILCH) Scheme, the Law Institute of Victoria Legal Assistance Scheme (LIVLAS) and the Victorian Bar Legal Assistance Scheme (VBLAS) each facilitate the provision of pro bono assistance by solicitors and/or barristers. These schemes are co-located and coordinated by PILCH, a community legal centre. The schemes provide assistance as a last resort, and only if all other avenues of assistance have been exhausted. Assistance is also subject to a means test and merit test.

The PILCH Scheme provides legal assistance only in public interest matters, namely legal matters for not-for-profit organisations with public interest objectives. Public interest matters can also include requests by individuals where the issue needs addressing for the public good, affects a significant
number of people, is of broad public concern, or impacts on disadvantaged or marginalised groups. The PILCH scheme is funded by its members. During 2006–07, the scheme received 568 requests for legal assistance; 223 of those matters were referred to barristers and solicitors for pro bono assistance. From 1 July 2005 to 1 December 2006, approximately 48 per cent of inquiries to PILCH, and 46 per cent of referrals made, were in relation to state civil legal aid matters. PILCH also operates a Homeless Persons’ Legal Clinic that provides free legal assistance, including for civil matters, for homeless persons.

The LIVLAS is a pro bono assessment and referral service that links members of the public to lawyers willing to provide pro bono legal assistance. A person seeking assistance must meet the criteria noted above. Where an applicant receives assistance and is successful in the matter, the solicitor–client legal costs will be agreed between the client and the solicitor. The applicant remains liable for any adverse costs order, and must cover the costs of all disbursements. In 2006–07, LIVLAS received 767 enquiries and made 110 referrals to solicitors. Many of the rejected applicants were assisted to pursue other forms of legal assistance.

The VBLAS is a similar referral service that links people in need of assistance to barristers willing to provide pro bono assistance. Assistance is available, on application, where:

- the assistance of a barrister is required
- the case has legal merit
- the applicant does not have the financial means to obtain assistance from a barrister
- the applicant is unable to obtain assistance from another source
- an application for legal aid has been refused.

Applicants to VBLAS are required to first seek assistance from community legal centres or ‘no win, no fee’ firms wherever possible. Over 570 barristers are registered with VBLAS. In 2006–07, VBLAS received 448 enquiries and made 245 referrals to barristers.

The Supreme Court operates a pro bono referral program for self-represented litigants. There are no other formal court-based pro bono referral programs in Victorian courts although individual judicial officers may often recommend that pro bono assistance be obtained.

Apart from what the National Pro Bono Resource Centre describes as an evolving pro bono industry that has resulted in formalised pro bono schemes, many lawyers and barristers perform work on a pro bono basis that is not administered by one of the above schemes. The resource centre reports that ‘the majority of pro bono work being done in Australia is done by lawyers in their private capacity’. Small firms account for a large proportion of pro bono work conducted in Australia, but perform this work outside formal schemes.

It is difficult to determine the amount of pro bono assistance that is provided for civil law matters in Victoria. It is possible to calculate amounts of assistance through various services, but the ad hoc nature of private assistance means that calculations are problematic. In 2003 a NSW study showed that civil work was the most common pro bono work undertaken in that state, accounting for 30 per cent of matters. However, a National Pro Bono Resource Centre survey rates family law as the most common matter type, followed by criminal law and wills and probate.

There are constraints on the capacity of pro bono work to meet demand. Limitations on the scope of pro bono services include a mismatch of skills, conflicts of interest, and constraints on the capacity of those involved to undertake litigation. Uncertainty regarding the size, length, complexity and cost of litigation is a recognised deterrent to pro bono support for litigation.
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2. CALLS FOR REFORM

The Commission received many submissions that documented a critical lack of legal aid funding for civil matters.

Many submissions called for an urgent increase in legal aid for civil law matters. The submissions often noted that a mix of services—including legal aid, conditional costs agreements and pro bono—currently supports the provision of legal aid systems. Victoria Legal Aid noted that ‘it is important to get the balance [between services] right’. The Environment Defenders Office reported that while speculative fee agreements have filled a gap in personal injuries litigation, many other civil law matters remain unfunded. Certain claims, such as family and property matters, are unlikely to attract commercial litigation funders. Similarly, the Homeless Persons’ Legal Clinic emphasised that ‘the significant pro bono contribution made by private practitioners is no substitute for proper government funding of VLA and CLCs’.

The current Legal Aid funding guidelines for civil law matters came under scrutiny in submissions received by the commission. A number of organisations were critical of the guideline that stipulates that, subject to Legal Aid guidelines, a civil claim must value at least $5000 for a person to be eligible for assistance. It was submitted that this figure is too high and is arbitrary.

The Homeless Persons’ Legal Clinic commented on the guideline that Legal Aid funding is only provided where assistance is not available through a conditional costs agreement. The Clinic reported that an upfront contribution of $2000 is sometimes sought to secure assistance on that basis, which is out of reach for homeless people and other low income applicants. Other requirements exclude homeless people by definition.

Some submissions suggested that a restrictive interpretation of the guidelines by Legal Aid denies legal assistance to people with meritorious claims. PILCH is in consultation with Victoria Legal Aid about these matters, including the ‘special circumstances’ guideline, the equal opportunity guideline and the guideline for public interest and test cases. PILCH also recommended that where applicants do not meet the means test Legal Aid consider a system of ‘cascading’ financial contributions from applicants.

Submissions highlighted a number of areas of civil law that are not covered by legal aid funding. These include Crimes (Family Violence) Act 1987 matters, employment law, de facto property settlements, family law settlements, tenancy matters and advice for prisoners. Springvale Monash Legal Service noted that civil matters often have a significant impact on families, and argued that their importance warrants legal aid funding.

Some submissions called for targeted legal aid funding for particular groups in need—including homeless people, Indigenous people, low income earners, immigrant and culturally and linguistically diverse communities—who all have particular civil law problems. The Victorian Aboriginal Legal Service noted that the economic impact of civil law problems on these groups is disproportionately greater.

State Trustees also noted that the differing natures, obligations and requirements of the various assistance schemes introduce a level of complexity to obtaining assistance that can result in a meritorious claim being defeated.

2.1 SUGGESTIONS FOR CHANGE

The commission received many suggestions for improving the provision of legal assistance for civil law matters. In many cases, these suggestions were made alongside a call for additional funding of legal aid.

Particular mention was made of the need for more funding for frontline services to provide initial advice. Ensuring access to initial advice can prevent an escalation of disputes:

Significant time and money for parties to a dispute, court resources, PILCH resources, and pro bono resources could be saved if people were able to obtain appropriate legal advice in civil matters at an early stage.

The Victorian Aboriginal Legal Service outlined a proposal for an urgent list for civil law matters, while the Federation of Community Legal Centres supported a dedicated civil law duty service at court. The Mental Health Legal Centre argued that courts should be able to order representation,
either through a pro bono service or through legal aid. Other submissions also supported a court-based pro bono referral program. Different structures for administering legal aid were also suggested.

The Australian Legal Assistance Forum has advocated for the reinstatement of a national civil legal aid scheme. This coalition of legal bodies includes the Law Council of Australia, the National Aboriginal and Torres Strait Islander Legal Services Secretariat, National Legal Aid and the National Association of Community Legal Centres. The proposed scheme entails a national civil legal aid program and funding on a cooperative basis by state and federal governments. A grant of assistance would be available if an applicant:

- has a right of action against a person, a corporation or government, which is justifiable in a court or a tribunal of competent jurisdiction or has been or is likely to be the subject of action in such a court or tribunal;
- has a legal position which is assessed as having such merit, ie, it has passed the ‘reasonable prospects of success’ test, the ‘prudent self-funding litigant’ test and the ‘appropriateness of spending public funds’ test.

The proposal suggests that grants should be available for discrete stages of a matter, such as taking instructions, commencing negotiations, seeking the assistance of a mediator, assistance to prepare and issue proceedings, preparation of the matter for trial, conducting the hearing or trial.

National Legal Aid has also issued a vision statement for the provision of legal aid in Australia. Australia’s eight Legal Aid Commissions have set priorities for funding based on areas of need, rather than a state/federal dichotomy. Of the five priority areas, the second is supporting Australians at risk of social exclusion due to poverty. This ‘recognises the “cause and effect” relationship between poverty and other problems’.

The policy recommends that federal legal aid funding be available for the following matters, irrespective of whether the legal issue arises under Commonwealth, state or territory legislation:

- social security
- employment
- housing
- consumer legislation matters, particularly credit and debt.

2.2 COMMISSION’S VIEW

The commission strongly supports calls for greater funding for legal aid in civil matters.

The commission notes that the Victorian Government has acknowledged the relatively small number of grants available for civil matters. The Attorney General’s Justice Statement also records a government commitment to ‘commence discussion with Victoria Legal Aid to identify those means by which the number of grants could be increased’.

61 Submissions CP 22 (Mental Health Legal Centre), CP 16 (National Pro Bono Resource Centre), CP 27 (Victorian Aboriginal Legal Service Co-operative), CP 44 (Fitzroy Legal Service), CP 29 (PLCH Homeless Persons’ Legal Clinic), ED1 19 (Human Rights Law Resource Centre), ED1 31 (Law Institute of Victoria).

62 Submissions CP 44 (Fitzroy Legal Service), CP 17 (Environment Defenders Office (Vic) Ltd), also Submission CP 22 (Mental Health Legal Centre).

63 Submissions CP 22 (Mental Health Legal Centre), CP 16 (National Pro Bono Resource Centre), CP 27 (Victorian Aboriginal Legal Service Co-operative), CP 44 (Fitzroy Legal Service), CP 29 (PLCH Homeless Persons’ Legal Clinic), ED1 19 (Human Rights Law Resource Centre), ED1 31 (Law Institute of Victoria).

64 Submission CP 31 (Victoria Legal Aid).

65 Submission CP 17 (Environment Defenders Office (Vic) Ltd), also Submission CP 22 (Mental Health Legal Centre).

66 For example, a government agency could administer funds to community legal centres, as is done by Consumer Affairs Victoria in relation to debt matters: submission CP 22 (Mental Health Legal Centre).

67 Australian Legal Assistance Forum, Restoration of a National Civil Legal Aid Scheme (2006); copy supplied to the commission by Public Interest Law Clearing House (Vic).

68 National Legal Aid, A New National Policy for Legal Aid in Australia (2007). Some submissions received by the commission endorsed this model.

69 Ibid 6.

which some funding for civil cases may be restored.73 The government has committed to introduce further reforms to ensure the civil justice system is more responsive, accessible and affordable, particularly for the vulnerable and disadvantaged.74

The commission supports these commitments, but notes that there is still a substantial demand for legal assistance that is met by way of pro bono assistance, and considerable demand that is not met at all. The commission believes the government should not rely on the pro bono sector to fulfil what is a fundamental government responsibility. The commission believes that, if implemented, its recommendations throughout this report will result in a more efficient justice system. Adequate legal aid funding is an essential component of the civil justice system.

The commission is, however, mindful of constraints on state and federal funding for legal aid services. Although a federal matter, and thus beyond state responsibility and outside the terms of reference of the current civil justice inquiry, the issue of the continuing tax deductibility of legal costs was raised by a number of persons in the course of submissions and consultations. One obvious source of additional federal funding for legal aid services, without any net increase in Commonwealth Government expenditure, could be through removal or restriction of the present deductions allowed to businesses for legal fees and other expenses incurred in litigation. Whatever policy position is adopted in relation to tax deductibility generally, there are cogent arguments in favour of restrictions on or removal of such deductibility in cases where the party claiming the deduction did not have a meritorious legal claim or defence but conducted the matter in a way that incurred considerable public and private expense. Whether such private expense should continue to be allowed as a tax deduction warrants review by an appropriate body.

Mindful of the constraints on state government expenditure in providing financial and other assistance in civil litigation, the commission has developed a model for a form of ‘self financing’ litigation funding that we believe will meet some of the present demands. This model is discussed below.

3. FUNDING MECHANISMS

In its October 2006 Consultation Paper the commission sought views on whether the law relating to representative or class actions needs reform. The submissions received are summarised in Chapter 8. Views were also sought on whether there is a need for reform in relation to the funding of representative or class actions. The submissions received are summarised in this chapter.

On 28 June 2007 the commission released an exposure draft setting out preliminary reform proposals for public and professional comment. The draft proposals for reform of the statutory class action provisions in Part 4A of the Supreme Court Act 1986 are set out in Chapter 8, along with a summary of the submissions received. That exposure draft also included proposals for the funding of class actions and litigation generally. The submissions received are summarised in this chapter.

The exposure draft set out recommendations for the establishment of a new funding mechanism, with benefits for both plaintiffs and defendants who are parties to litigation, including statutory class actions. The operation of the fund would not be limited to class actions. It could provide assistance in representative actions brought under the representative action rule or in any other civil proceeding. However, the proposed fund is likely to be in demand in class action litigation and likely to derive substantial revenue from class action proceedings.

After reviewing the various submissions received the commission has recommended that certain reforms should be implemented. The remainder of this chapter deals with the recommendations in relation to the funding of class actions and other litigation and incorporates the commission’s proposals in relation to the establishment of a new funding body.

3.1 NEW LITIGATION FUNDING MECHANISM: JUSTICE FUND

Class actions are now an established part of the legal landscape. However, Victoria remains the only jurisdiction, apart from the Commonwealth, to have enacted a comprehensive statutory class action regime. The Victorian provisions in Part 4A of the Supreme Court Act 1986 are modelled on the provisions of Part IVA of the Federal Court of Australia Act 1976. The federal provisions were based substantially on the recommendations of the ALRC.75 However, the Commonwealth Government failed to implement the ALRC’s important proposal in relation to the establishment of a class action fund. The proposed Victorian Justice Fund will remedy this problem. However, it is presently proposed that the fund will not be restricted to funding class actions. The fund is intended to be self-funding, as discussed below.
It is proposed that a new funding body be established (provisionally titled the Justice Fund) which would provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect of any adverse costs order and meet any requirements imposed by the court in respect of security for costs.

In return for providing this financial support, the proposed fund would, subject to judicial approval, receive an agreed percentage of the amount recovered in successful cases. The body would seek to be self funding (through income derived from success fees in funded cases, costs recovered from unsuccessful parties and payments into the fund which the court would be empowered to order pursuant to the cy-près type remedies referred to in Chapter 8).

The ALRC report that led to the introduction of Part IVA of the Federal Court of Australia Act 1976 (on which the Victorian class action provisions are based) recommended the establishment of a special fund to assist in financing class action litigation and as a source of funds to pay costs awarded against representative parties. The ALRC also proposed that the fund could be ‘self-financing to some extent’ through receiving the residue of monetary relief not claimed by eligible class members or returned to the defendant.

The Law Council of Australia submission to the Standing Committee of Attorneys-General on litigation funding recommended that a similar fund be created. The Law Council called it a Litigation Guarantee Fund.

Funding and costs are a particular problem in class action litigation for a number of reasons:

- Class action litigation is often expensive to conduct and protracted.
- There are often numerous interlocutory applications and appeals.
- Class members have statutory immunity from adverse costs orders and thus the representative plaintiff may be ordered to pay the costs of the defendant(s) or any amount required by way of security for costs.
- The present law relating to orders for security for costs against representative plaintiffs in class action litigation is unclear. It is arguably unfair for a representative party to provide security for the costs of pursuing remedies for the benefit of others.
- Although the amount at stake in the litigation may be very large, the representative plaintiff’s individual claim may be very modest.
- Civil legal aid is generally not available for plaintiffs.
- Corporate defendants and insurers often have substantial financial and human resources and may be able to claim a tax deduction for the legal fees and expenses incurred in defending an action.

There are also particular costs problems for defendants and their insurers:

- It may be difficult to quantify the total value of the claim(s) and thus settlement may not be practicable and the proceedings may become protracted and expensive.
- Until the case is advanced or concluded it may not be possible to determine how many members of the group will in fact proceed to submit claims, even if liability is established.
- Where there are multiple defendants it may be difficult to apportion liability or determine appropriate contributions.
- Apart from the substantial costs of determining the common issues, there may be substantial transaction costs in determining the claims of individual class members.
- Because of the statutory immunity of class members, any costs orders in favour of the defendant may only be against the representative party, who may be unable to pay such costs.

To some extent, several of these problems have been ameliorated, for the benefit of both plaintiffs and defendants, by the emergence of commercial litigation funders. Some commercial funders are prepared to finance the litigation, meet any obligations to provide security for costs and provide an indemnity in respect of any adverse costs order. This is usually in consideration of agreement by the assisted parties to pay to the litigation funder a specified percentage of the amount recovered if the litigation is successful.
However, such agreement cannot be entered into by the representative party on behalf of the class. In order to secure a legal entitlement to share in the amount recovered by class members, litigation funders usually endeavour to get individual class members to enter into contractual litigation finance arrangements. Litigation funders are usually only willing to fund litigation on behalf of those class members who have entered into litigation finance agreements. These commercial considerations have led to a proliferation of class actions which the defined classes are limited to persons who have agreed to enter into litigation finance arrangements with commercial litigation entities. In effect, the opt out statutory class action regimes have been, in many cases, used by groups limited to those who have contractually agreed to opt in to proceedings brought to recover money on their behalf.

This has a number of undesirable policy consequences given that the class action procedure was designed as a means of obtaining a remedy for ‘all’ of those adversely affected by the conduct giving rise to the litigation. This has attracted judicial scrutiny and expressions of concern. Some judges have refused to allow class actions to proceed where the classes have been restricted to claimants who have either entered into litigation finance arrangements with a commercial funder or have agreed to fee and retainer arrangements with a particular law firm.

There are a number of ways these problems might be addressed, in whole or in part:

- A legal mechanism could be adopted to allow a litigation funder to claim a share of the total amount recovered by litigation on behalf of an opt out class, without necessarily requiring each of the group members to enter into separate contractual arrangements with the funder on commencement of the proceeding (but preserving the existing right of individual class members to opt out of the litigation if they are unhappy with the proposed payment to the litigation funder out of any money recovered on their behalf).

- The existing statutory provision empowering the court to deduct from sums recovered on behalf of class members any ‘shortfall’ between the legal costs incurred by the representative applicant in the proceeding and the amount of costs recovered from the defendant could be expanded to include settlements (as distinct from judgments) and amounts payable to a litigation funder (as distinct from legal costs).

- The existing prohibition on law practices being able to charge a fee calculated by reference to the amount recovered in the litigation could be abolished, at least for class actions.

- A fund could be established which could provide financial assistance in class actions, satisfy any order for security for costs and provide an indemnity for any adverse costs order made against the representative plaintiff if the class action is unsuccessful.

The first three of these alternatives (which are not mutually exclusive) are not discussed here. The way in which the proposed fund would operate is explained below.

### 3.1.1 How the Justice Fund would operate

For administrative convenience, and to reduce establishment costs, the fund should be set up, at least initially, as an adjunct to an existing entity. One appropriate body would be Victoria Legal Aid. Alternatively, the existing Law Aid scheme could be modified to incorporate the proposed features of the Justice Fund.

The fund would require a statutory foundation, including to facilitate its recovery of a share of the proceeds of the litigation (given that the representative party has no legal authority to contractually assign a share of the amounts recovered on behalf of other class members), and to limit its potential legal liability for adverse costs (see below). The statutory provisions would also specify the objects of the fund and the criteria for granting assistance.

Although an initial seeding grant would be required to establish the fund, it would seek to become self-funding out of revenue derived from class action cases that were financially supported. It could also enter into joint venture arrangements with commercial litigation funders. However, unlike such commercial funders that distribute profits to shareholders, the fund would use any profits received by it for the purpose of:

- providing additional funding for commercially viable meritorious litigation
- funding important test cases or public interest cases
The fund should have considerable commercial flexibility to determine the nature and extent of financial assistance provided and the terms and conditions of such assistance. For example, in some cases it might provide comprehensive financial support for the litigation as a whole, including financial assistance for the conduct of the case, satisfying any requirements in relation to security for costs and providing an indemnity for adverse costs orders made against the assisted party. In other cases it might provide only some parts of this ‘package’, or assistance only up to a certain point in the litigation, subject to further review.

In class action proceedings, notice would be required of the terms and conditions of the funding arrangement, and group members who were not agreeable to the financial terms would retain the right to opt out of the proceeding.

The fund would seek to make a ‘profit’ out of providing assistance rather than merely seek to recoup its outlays. It would be permitted to provide assistance on the basis that the assisted party agreed to pay to the fund a percentage of the amount recovered. This revenue would be used for the purposes of the fund.

The statutory provisions establishing the fund would authorise the fund to recover monies not only from the representative party conducting the class action proceedings but also from any monies recovered for the benefit of class members, including by way of judgment or settlement.

The fund should be structured to minimise potential liability for income tax or capital gains tax on any ‘profits’.

In order to reduce the level of ‘cash’ initially required to finance its operations each law firm acting in funded cases would be normally expected to continue to conduct the case to its conclusion (including any appeal) without any financial contributions from the fund, other than a guarantee that the firm would ultimately be paid agreed fees and reimbursed agreed expenses if the case was unsuccessful.

For the purpose of conducting the case, the firm would be required to utilise its own professional and financial resources, including meeting expenses and disbursements such as counsel’s fees and the cost of witnesses. In all successful cases the fund would receive income without having to outlay monies. Leaving aside the administrative costs of operating the fund, in crude financial terms the fund would break even if there were at least twice as many successful as unsuccessful cases (assuming that the average cost of such cases is the same). There would need to be twice as many successful cases because in unsuccessful cases the fund would be liable for the costs of both the unsuccessful applicant and the successful respondent. Since the fund would only provide assistance in cases that were determined to have merit, on the basis of independent expert opinion, the success rate of the funded cases should be relatively high.

To maintain the financial viability of the fund, it would be desirable, initially at least, to be able to quantify the potential liability of the fund to meet any adverse costs order in cases where assistance has been provided. This could be done using the approach of the English Court of Appeal in determining the liability of commercial litigation funders for adverse costs in civil litigation in England and Wales. The legal liability of the fund for adverse costs would be capped at the level of financial assistance provided by the fund. For example, if the fund provided assistance of $1 million to the assisted party, the maximum liability of the fund for any adverse costs order would be that amount.

This may not adequately indemnify successful defendants in some cases, particularly where there are multiple defendants, but would be a considerable improvement on the present position of defendants in class actions brought by parties of limited means. The fund would have discretion to pay in excess of the statutory cap, and the defendant would also retain any rights under existing law to seek enforcement of any costs order.

The fund would be able to receive income by way of cy près orders made in cases, including cases where the fund had not provided financial assistance.

Decisions about the funding of cases would be made in the light of independent advice concerning the merits and financial viability of the proposed litigation, including by counsel and experienced solicitors.

79 The commission has received several suggestions about sources of funding to establish the fund. Such funding need not necessarily be from the Victorian Government. One possible source is the Consumer Credit Fund, which is discussed in Chapter 9. There are other non-government funding sources in Victoria.

80 Following the Quebec model, it might be feasible to establish a mechanism for the fund to derive revenue from all class action proceedings, whether technically supported by the fund or not. The Quebec model is discussed further in paragraph 3.2.3 of Chapter B.

81 In cases where this might not be practicable, the fund could agree to advance or reimburse disbursement expenses before the case finishes.

82 Arkin v Borchard Lines Ltd [2005] 3 All ER 613. English courts have held that ‘pure funders’ (as distinct from commercial litigation funders) should not have liability for adverse costs. See Hamilton v Al Fayed [2003] QB 1175. A legislative provision could be enacted to impose a statutory limit on liability for costs, similar to s 46 of the Legal Aid Commission Act 1979 (NSW). That provision seeks to limit the liability of the legally aided person. To that extent, it has been held to be inapplicable in federal proceedings: Woodlands v Permanent Trustee Co Ltd [1996] 68 FCR 213, Bass v Permanent Trustee Co Ltd [1999] 198 CLR 334. See also Peter Cashman, Class Action Law and Procedure (2007) ch 7. This would not create a difficulty in the present context as the proposed fund would only provide assistance in connection with proceedings in Victorian courts. For a review of English, Australian and other judicial decisions concerning litigation funding see Rachael Mulheron and Peter Cashman, Third-Party Litigation Funding: A Changing Landscape (forthcoming) (2008) Civil Justice Quarterly.
Once it became sufficiently solvent, the fund would be able to provide financial assistance on non-commercial terms in areas of litigation other than class actions, including test cases and public interest cases. At its inception the fund would not be restricted to funding class action proceedings, but it is likely to be a highly desirable source of financial support in such cases and also likely to derive substantial income from successful class actions.

Funding in class actions would be limited to actions in the Supreme Court of Victoria, pursuant to Part 4A of the Supreme Court Act 1986 and representative actions under order 18 of the Supreme Court (General Civil Procedure) Rules 2005.83

There would be a minimum of fulltime professional and support staff, and a board of directors or trustees who would serve in an honorary capacity. There needs to be detailed consideration of how such people would be appointed. Initially, at least, the fund might only require a chief executive officer and an administrative assistant. If the fund is implemented through existing bodies (eg, Victoria Legal Aid or Law Aid) then it may be that additional personnel may not be required.

The operation of the fund would be subject to audit and under the scrutiny of the proposed Civil Justice Council.

Although the fund may compete with commercial litigation funding entities, it could also enter into joint venture agreements, in particular cases, both with commercial litigation funders and with private law firms engaged in the case on behalf of the party assisted by the fund. Where a joint venture agreement is entered into with a private law firm the fund would be able to negotiate with the law firm about both the degree of financial risk the firm would assume in the litigation and the sharing of a percentage fee between the fund and the firm. The intention is that the fund should have considerable commercial flexibility as to how it operates.

Where a joint venture arrangement is entered into with a commercial litigation funder or a law firm, the funder or law firm could contribute capital for the purpose of financing the litigation and/or meeting any order for costs or security for costs, assist in assessing the legal merits and commercial viability of the proposed litigation and use its experienced personnel to assist in the management of the litigation.

The commission has considered whether more detailed financial and actuarial calculations are needed concerning the financial viability of the proposed fund. Any such analysis is unable to be undertaken by the commission within the limited time frame and terms of reference of this stage of the civil justice inquiry. Moreover, because of the unique features of most class action litigation, it is not feasible to carry out meaningful financial analyses without reference to particular cases. The costs of conducting such litigation are variable, the amount of damages differs significantly between cases and the number of actual or potential group members varies enormously. Furthermore, using current or recently completed class actions for the purpose of assessing the financial viability of the proposed fund is problematic. Many such cases were brought on behalf of limited classes comprising group members who consented to the conduct of proceedings on their behalf. The proposed fund would be able to facilitate proceedings on behalf of larger ‘opt out’ class where the amount of damages recoverable (and hence the return to the fund) would be significantly greater. The commission’s proposals as to how the fund would operate are intended to help ensure that it is financially viable.

3.1.2 Responses to draft proposal

Support for proposed Justice Fund

The Environment Defenders Office expressed support for the proposed Justice Fund on the basis that it would support public interest litigation generally, and in the expectation that funding would extend to public interest environmental law matters.84 Similar support for the fund came from the Mental Health Legal Centre, the Public Interest Law Clearing House and the Consumer Action Law Centre.85

The Human Rights Law Resource Centre drew attention to the findings of the Senate Legal and Constitutional Affairs Committee into legal aid and access to justice86 and the need for additional funding for legal aid generally, including for Victoria Legal Aid and community legal centres. It contended that there would be a significant saving in ‘time and money for parties to a dispute, court resources and pro bono resources … if people were able to obtain appropriate legal advice in civil matters at an early stage’.87 Other submissions drew attention to the need for a general expansion of legal aid for civil proceedings, whether through legal aid bodies, pro bono organisations or community legal centres.
Professor Peta Spender noted that the creation of the Justice Fund would be ‘an important adjunct to the growth of commercial litigation funders in Australia, particularly by creating competition in the market for litigation funding’. However, given the reduction in public funds allocated to legal aid in recent years, she expressed a preference for the fund to be ‘used more broadly for civil claims, particularly in ... family and property matters that are unlikely to be funded by the commercial litigation funders.’

State Trustees was highly supportive of the commission’s draft proposals, including in relation to litigation funding.

Victoria Legal Aid expressed support for the proposed Justice Fund. However, it noted the proposal that the fund be administered through Victoria Legal Aid would require certain legislative, administrative and financial reforms. It did not believe the fund should be required to use profits to fund initiatives of the Civil Justice Council.

In its initial submission, the commercial litigation funder IMF (Australia) Ltd reiterated certain concerns expressed by the Civil Justice Council in the UK about the viability of a particular type of fund being established, in the context of the present litigation funding system in England and Wales.

The UK Civil Justice Council had concluded that there was ‘no realistic prospect’ of a freestanding contingent legal aid fund being established to support civil litigation in England and Wales because of:

- the inability to ‘compete effectively’ with lawyers acting on the basis of conditional fee arrangements
- adverse case selection
- an inability to obtain seed funding
- exposure to adverse costs orders.

In its report the Civil Justice Council differentiated a contingent legal aid fund (CLAF) from a supplemental legal aid scheme (SLAS). Both adhere to the principle that in return for funding a recovery is made from damages. The fundamental difference is that a SLAS is operated as an adjunct supplemental legal aid scheme (SLAS). Both adhere to the principle that in return for funding a recovery is made from damages. The fundamental difference is that a SLAS is operated as an adjunct supplemental legal aid scheme.

The Civil Justice Council had recommended that a SLAS should be established and operated by the Legal Services Commission:

A SLAS would expand access to justice by increasing legal aid coverage, [at] good value for money by (i) creating additional funds and (ii) reducing the net costs of the scheme. The SLAS would introduce a form of self-funding mechanism into the legal aid scheme whereby, if a case was won, costs would be recovered and an additional sum would be payable to the fund by means of a levy to be paid as a percentage of damages recovered, or out of recovered costs. The SLAS would offer protection to parties from adverse costs if a case is lost. Positive recovery via the levy could be used to expand public funding for the civil legal aid budget. Also, the SLAS scheme could be engineered to link with Conditional Fee Agreements as a complementary method of funding via a levy on costs/damages recovered.

The Civil Justice Council report also recommended recognition of properly regulated commercial third party funding of litigation and the introduction of regulated contingency fees in multi-party cases, ‘where no other form of funding is available’, to provide access to justice.

The IMF submission noted one major difference between commercial litigation funders and the proposed Justice Fund: the former distribute (after tax) profits to shareholders, whereas the Justice Fund would presumably be exempt from income or capital gains tax. The Justice Fund would apply any ‘profits’ to further litigation funding, including in public interest cases, and for the purposes of civil justice research, including through the proposed Civil Justice Council.

IMF also noted that commercial litigation funders such as itself have a strong board with relevant expertise, an experienced management team, substantial capital in the form of cash to invest through the funding of cases, and substantial experience in civil litigation funding. In contrast, the proposed Justice Fund would have ‘(a) a board of directors or trustees serving in an [n] honorary capacity, (b) a minimum of full time and professional and support staff ... ‘, (c) a less immediate drain on funds as firms would be expected to advance the costs of conducting cases until conclusion and would only require financial support from the Justice Fund where cases were unsuccessful and (d) the prospect of...
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receiving income ‘without having to outlay any money’. As noted above, the proposed fund would be able to enter into litigation joint venture arrangements with commercial litigation bodies, such as IMF, and in doing so would be able to draw on their significant legal and management experience and resources.

In class actions funded by the Justice Fund, the fund would be able to seek court approval for a payment of a contribution from any judgment or settlement in favour of an opt out class. In contrast, commercial litigation funders at present have limited funding of statutory class actions or representative action proceedings to persons who have individually agreed to the commercial terms of the litigation funding arrangements. Effectively, this has limited the number of beneficiaries of class action proceedings and converted what was intended to be primarily an opt out procedure to an opt in mechanism, with consequential disadvantages for access to justice and frequent expressions of judicial concern.

Under the draft reform proposals the Justice Fund would only be liable for adverse costs awarded in favour of the other party up to an amount equal to the amount of funding provided by the fund. The Justice Fund could also be the beneficiary of cy près distributions of damages if the commission’s proposals for a judicial power to make cy près awards in appropriate cases are implemented.

The commission’s proposals are intended to overcome solvency restraints and to maximise the prospect of the Justice Fund becoming financially viable in circumstances in which funding from the state or federal government cannot be guaranteed and where private sources of funding may not be readily available, other than through joint venture arrangements with commercial litigation funders.

IMF contended that the Justice Fund should compete on “a level playing field” with commercial funders, except for its likely tax preferred status. On one view, there is no policy reason why a public body with public interest objectives and an obligation to apply the income received from litigation to fund additional cases should be required to operate on the same financial terms as a profit oriented commercial litigation funder which seeks to distribute profits to private shareholders. However, the proposed Justice Fund is intended to supplement rather than supplant existing commercial litigation funding arrangements. This is likely to be achieved because in practice the Justice Fund may choose not to fund cases where commercial litigation funding is available. However, there is considerable scope for commercial litigation funders and the Justice Fund to operate on the same ‘playing field’ through joint venture funding arrangements, whereby commercial litigation funders would enjoy the same, or substantially the same, advantages as the Justice Fund.

The commission’s view is that the Justice Fund should proactively seek to enter into joint venture arrangements with commercial litigation funders. Such ‘public–private’ models for various forms of service delivery have become increasingly common. There would be advantages for both the Justice Fund and commercial litigation funders through partnership or joint venture funding arrangements.

For example, commercial litigation funders are currently unable to secure any return from group members in class or representative action proceedings, other than by contractual arrangements with those individuals who are identified and who consent. In contrast, the fund would be able to obtain a return from the class as a whole, subject to judicial approval, and this advantage would flow on to a commercial litigation funder involved in a joint venture arrangement with the fund. At present commercial litigation funders spend a considerable amount of time and expense in seeking to ‘sign up’ group members to litigation finance agreements. Alternatively, a case could be conducted whereby the commercial litigation funder maintained its existing modus operandi and funded the cases of those who consented to litigation funding arrangements and the Justice Fund could finance the additional claims brought on behalf of unidentified class members. In appropriate cases, if joint venture cases were conducted on the basis that the lawyers who conducted the proceedings were not paid until the conclusion of the case, and were only paid by the fund/commercial funder where the case was unsuccessful, this would have substantial cashflow advantages for the commercial funder. At present, many commercially funded cases are conducted on the basis that some or all of the legal fees and expenses incurred in conducting the case are paid monthly from the inception of the litigation.

In such joint venture arrangements, access to justice would be improved as the existing trend from opt-out to opt-in classes could be reversed, which would increase the number of beneficiaries of class action litigation.

The Justice Fund would benefit greatly from joint venture arrangements with commercial litigation funders. In such arrangements the fund would have the advantage of the resources, experience and expertise of commercial litigation funders. This could provide invaluable assistance, including
in assessing the merits of proposed litigation and in the management of funded cases. Also, the commercial litigation funders could provide capital input. The Justice Fund and the commercial litigation funder involved in any joint venture funding arrangement would negotiate on their respective input and on the allocation of any profits between them.

The Law Institute of Victoria supported the establishment of the proposed Justice Fund in the absence of the introduction of a national civil legal aid scheme.101 The Law Institute contended that once financially viable the Justice Fund should not limit its funding to “commercially viable” meritorious litigation, and that the profits of the Fund should also be applied in providing assistance to “any litigant in a commercial matter … who has a meritorious claim [or defence] regardless of whether there is a prospect of the Fund recovering a percentage of a monetary award”. The Law Institute also recommended that the fund should pay for disbursements as they are incurred during proceedings. It contended that the fund might meet the costs of providing advice to self represented litigants “from accredited specialists about the prospects of success and/or preparation for trial of the matter”. It further suggested that the fund should be able to provide assistance to litigants for compliance with pre-action protocols.102

The Consumer Action Law Centre supported the proposed Justice Fund. However, it expressed concern that the proposed limit on the fund’s liability for adverse costs would defeat the purpose of the fund, as potential litigants would be unwilling to embark on litigation where they remained at risk for the shortfall between the liability of the fund and the total amount of costs ordered to be paid. It suggested that a possible solution to this could be legislation to enshrine certain common law principles relating to costs orders in public interest litigation.103 Alternatively, it suggested there could be a presumption that the costs claimable by a successful defendant would be limited to the capped costs (payable by the fund) unless the defendant could show that further costs, calculated on a party–party basis, were “necessary, proportionate to the nature of the claim, reasonably incurred and not incurred due to the defendant’s lack of good faith”.104

Although not opposing the proposed fund, the Australian Bankers’ Association contended that there is a need for a more ‘in-depth examination of litigation funding in Australia … with particular emphasis on the economic benefits and disadvantages … for both the community and for business’.105

**Opposition to proposed Justice Fund**

Submissions opposing the proposed fund or aspects of the proposal were received from a number of companies, several commercial law firms acting for defendants in class action proceedings and the Australian Corporate Lawyers Association.

In a joint submission, Allens Arthur Robinson and Philip Morris contended that any present difficulties with access to justice were ‘not sufficient to warrant the introduction of such a fund’. The proposed fund was unnecessary in light of (a) the availability of ‘no win, no fee’ arrangements with plaintiff law firms, (b) the ability of regulators such as the Australian Competition and Consumer Commission to take action on behalf of plaintiff classes, (c) the availability of non-profit funding schemes such as Law Aid and (d) the services of commercial litigation funders.106

The aspects of the proposal which were of particular concern include the cap on the fund’s liability for adverse costs and the absence of any proposal to ‘regulate commercial litigation funders to ensure that parties who successfully defend funded cases are able to enforce costs orders against the funder’.107

The joint submission was adopted by the Australian Corporate Lawyers Association, which also proposed that commercial litigation funding arrangements should be disclosed to the defendant and to the court.108 The commission is in favour of the disclosure of litigation funding arrangements.109 In any event, it is the practice of many litigation funders, including IMF, to disclose arrangements to the defendants in any litigation in which a party is in receipt of funding.

Corrs Chambers Westgarth contended that the proposed Justice Fund was unnecessary in view of the availability of commercial litigation funding and the willingness of plaintiff law firms to take on cases on a speculative fee basis.110 Expressing concerns about the proposed cap on the fund’s liability for adverse costs, the firm suggested that if this cap is retained it should only apply to personal injury claims and not claims for economic loss. Corrs also suggested that the Justice Fund was likely to attract the less meritorious claims rejected by commercial litigation funders and that such cases were therefore more likely to result in adverse costs orders. It stated that additional judicial and
other resources would be required to deal with the increased workload generated by class action proceedings commenced as a result of access to the new litigation fund. In an earlier submission, the firm contended that there is a need to introduce prudential oversight and legislative regulation of commercial litigation funders, together with a legislative obligation to meet adverse costs orders.\textsuperscript{111} Law firm Clayton Utz raised concerns about the need for such a fund and expressed the view that the proposed fund would be ‘the likely province of endless bureaucracy and non-market decision making’.\textsuperscript{112} It was also concerned at the proposal to cap the fund’s liability for adverse costs orders.

Having considered the various arguments in favour of and against the proposed fund, the commission is of the view that there is a pressing need for the establishment of such a fund. However, a number of the concerns raised have been taken into account in modifying the original proposal. It is presently proposed that the cap on the funds liability to pay costs ordered against the assisted party should only exist for a limited period (five years or such lesser period as the trustees of the fund may determine in light of financial circumstances). It is also proposed that those administering the fund should have discretion to meet some or all of the amount of any shortfall between the amount of costs ordered against an assisted party and the capped amount payable by the fund.

3.1.3 Funding of representative or class actions

In addition to seeking views on reform of representative and class action procedures (discussed in Chapter 8), the commission in its initial Consultation Paper sought views on whether there is a need for reform in relation to funding of representative or class actions.

In support of reform, the Mental Health Legal Centre submitted that legal aid funding or ‘guaranteed expert pro bono assistance for class actions should be a priority’.\textsuperscript{113} After noting recent developments, including the decisions in the \textit{Fostif} proceedings,\textsuperscript{114} the Law Institute proposed that the rules for opt out proceedings should be amended so that:

\begin{itemize}
  \item a funded plaintiff would be expressly empowered to apply for the class to be ‘closed’ following the close of pleadings
  \item the available orders of the court would apply only to the current proceeding and would not operate to prevent the commencement of future proceedings by non-funded plaintiffs.\textsuperscript{115}
\end{itemize}

Some submissions expressly commented on costs in these types of proceedings. Allens Arthur Robinson submitted that ‘litigation funders involved in class action proceedings [should] be obligated to meet costs orders adverse to the parties they fund’.\textsuperscript{116} The Legal Practitioners’ Liability Committee said that ‘uplift fees in representative proceedings or class actions add to the cost of litigation’.\textsuperscript{117} In view of what it contended are the ‘very large’ costs incurred in class action proceedings, Maurice Blackburn proposed that:

\begin{itemize}
  \item there should be greater use of indemnity costs orders against unsuccessful defendants in class action proceedings
  \item there should be reform of the rules relating to success fees, including a significant increase in the maximum percentage uplift allowed under current legislation
  \item percentage contingency fees should be permitted, particularly given that commercial litigation funders are now able to charge on this basis.\textsuperscript{118}
\end{itemize}

IMF (Australia) Ltd also said that the court should be empowered, ‘at the commencement of proceedings, to order that a certain percentage of any fund created [as a result of class action] proceedings be paid to the funder of the proceedings’.\textsuperscript{119}

**RECOMMENDATIONS**

133. A new funding body (the ‘Justice Fund’) should be established to (a) provide financial assistance to parties with meritorious civil claims, (b) provide indemnity for any adverse costs order or order for security for costs made against the party assisted by the fund.

134. For administrative convenience, and to minimise establishment costs, the fund should be established, at least initially, as an adjunct to an existing organisation. One possible body is Victoria Legal Aid.
135. The fund should be structured to minimise potential liability for income tax or capital gains tax on any amount received by the fund.

136. The fund should seek to become self funding through (a) entering into funding agreements with assisted parties whereby the fund would be entitled to a share of the amount recovered by the successful assisted party; (b) having statutory authority in class action proceedings under Part 4A of the Supreme Court Act 1986 (Vic) to either (i) enter into agreement with an assisted representative party whereby the fund would be entitled to a share of the total amount recovered by the class under any settlement or judgment, subject to approval of the court, or (ii) to make application to the court for approval to receive a share of the total amount recovered by the class under any settlement or judgment; (c) recovering, from other parties to the proceedings, costs incurred in providing assistance to the assisted party where the assisted party is successful and obtains an order for costs; (d) receiving funds by order of the Court in cases where cy-près type remedies are available and (e) entering into joint venture litigation funding arrangements with commercial litigation funding bodies.

137. Where the fund provides assistance the lawyers acting for the assisted party should normally be required to conduct the proceedings without remuneration or reimbursement of expenses until the conclusion of the proceedings. Where the proceedings are successful they should normally be remunerated by costs recovered from the unsuccessful party and/or out of any monies recovered in the proceedings, without the fund having to pay the costs incurred in the proceedings. Where the assisted party is unsuccessful the fund should meet the costs of the funded party as set out in the funding agreement or varied thereafter by agreement between the fund and the law firm conducting the case of the assisted party.

138. During its first five years of operation (or such lesser period as the trustees of the fund may determine in light of the financial position of the fund), the liability of the fund for any order for costs or security for costs made against the funded party should be limited, by statute, to the value of the costs incurred by the assisted party under the funding agreement. During such period the fund would have a discretion to pay some or all of the shortfall between the amount ordered by way of adverse costs or security for costs against the assisted party and the amount of such costs for which the fund is liable.

139. At any stage of the proceedings the fund or the assisted party could apply to the court for an order limiting the amount of costs that the assisted party may be ordered to pay to any other party if the funded party is unsuccessful in the proceedings.

140. The operation of the fund should be subject to audit and monitored by the Civil Justice Council.

111 Submission CP 42 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January 2008).
112 Submission ED1 18 (Clayton Utz).
113 Submission CP 22 (Mental Health Legal Centre).
114 Campbells Cash & Carry Pty Ltd v Postif Pty Ltd (2006) 229 CLR 386.
115 Submission CP 18 (Law Institute of Victoria).
117 Submission CP 21 (Legal Practitioners’ Liability Committee).
118 Submission CP 7 (Maurice Blackburn).
119 Submission CP 57 (IMF (Australia) Ltd).
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1. INTRODUCTION

Issues relating to costs permeate all aspects of the administration of civil justice and affect both access to the courts and the quality and cost to the parties of the justice delivered. As the Human Rights Law Resource Centre noted in its submission:

An important aspect of ensuring equal access to justice is the applicant’s ability to pay the associated costs of litigation and the discriminatory effect this has on disadvantaged members of the community.

Apart from the cost to the parties there is of course the cost borne by the public purse through the provision of court facilities and personnel and arising out of the tax deductibility, to certain litigants, of the legal costs incurred in litigation.

In view of the variety and complexity of the issues which have a bearing on costs it could not reasonably be expected that there is a simple solution to the problem of ‘excessive’ cost. Moreover, important cost consequences have flowed from various policy changes. For example, the deregulation of legal fees and the legislative imprimatur given to conditional fees and success fees has important cost implications.

Changes in legal aid have also contributed to an increase in costs in some areas of civil litigation. For many years it was assumed that many people were deprived of access to justice because of the absence of adequate legal aid in civil matters. The subsequent expansion of salaried and private sector legal aid schemes was relatively short lived. At present, conditional fee arrangements and commercial litigation funding have superseded legal aid arrangements in many areas of litigation. This has undoubtedly facilitated access to the courts but has also resulted in a significant increase in the costs borne by clients and losing parties. Lawyers who may have hitherto been prepared to do civil legal aid work at relatively modest hourly rates (payable in any event) are now able to recover (in the event of success) higher ‘commercial’ hourly rates, success fees, interest and disbursements, which include a substantial profit element.

In the case of litigation funders, they may receive a substantial percentage of the amount recovered in the litigation. Such higher returns are, however, a by-product of the fact that law firms and commercial litigation funders have assumed many of the commercial risks inherent in litigation and facilitated access to justice by persons who could not otherwise afford it and who may not have previously qualified for legal aid in any event.

The substitution of a private sector legal service delivery model for state-funded legal aid schemes could only be expected to work if the element of profit were sufficient to justify the risk of nonpayment in civil cases undertaken on conditional fees. Moreover, these developments have other important policy dimensions. The extension of the ‘profit for risk’ model of legal service delivery is likely to have had a beneficial impact by screening out cases with insufficient legal merit, thus reducing the burden of unmeritorious cases on both potential defendants and on the court system generally. However, one downside is that lower value meritorious claims may not be sufficiently profitable to justify the investment of resources by private firms or litigation funders.

In any event, the transition from public funding to private legal service delivery models in civil litigation is symptomatic of the change in public policy described by Professor Ian Scott:

We live in a time in which the political and economic climate is shifting the public good and private benefit balance. The theory is that the government should pay for less and the user should pay for more.2

As Professor Scott proceeds to note, this policy, as reflected, for example, in the increasing cost of court fees paid by users, may aggravate the proportionality problem. Moreover, as Scott also observes, a substantial increase in judicial case management may bring about a reduction in the costs of civil litigation borne privately by litigants, but may require an increase in the public cost of court services. Thus, “the private benefit cost will go down but the public cost will go up”3, contrary to the direction of much current government policy.
Those attracted to solutions to complex problems derived from modern management theory may benefit from a consideration of the ‘quality triangle’. As noted by Professors Peysner and Seneviratne, in the business world there is virtually an iron law that of the three objectives of improving the business by increasing the speed of delivery, reducing the cost of production and improving the quality of service, it is possible to improve two out of three, but rarely all three.

In reviewing data on the increase in the costs of civil litigation in the aftermath of the Woolf reforms, Peysner and Seneviratne noted that Lord Woolf’s hypothesis was that by increasing the efficiency of the litigation process, by diverting disputes from litigation and by cutting delay in most cases there would be a reduction in costs with the constrained procedures. Their research concluded that this has proved wrong. However, as noted below, there are other factors which explain the ongoing high cost of civil litigation in those courts in England and Wales, where the Woolf reforms have been implemented.

In the aftermath of the Woolf reforms there are ongoing changes in civil procedure and court administration in various Australian jurisdictions, including Victoria. Various reforms of civil procedural rules, substantive law and case management seek to achieve strategic objectives in connection with the conduct of civil litigation.

Such strategic objectives may seek to achieve significant changes in not only the formal rules for the conduct of proceedings but also in the culture of dispute resolution and the conduct of participants. Some important strategic objectives of the reform proposals in this report are as follows:

- facilitating the resolution of disputes, through pre-action protocols, without the necessity for litigation
- improving primary standards of conduct of participants in the civil justice system
- accelerating disclosure of information and documents
- enhancing judicial management of cases and the conduct of trials
- reducing the incidence and duration of interlocutory hearings and appeals
- increasing the determinacy of sanctions for procedural default
- facilitating greater use of mediation and other ADR mechanisms
- improving mechanisms for the judicial resolution of issues likely to dispose of the proceedings
- achieving a greater level of certainty or ‘proportionality’ in relation to both solicitor–client and party–party costs.

Each of the commission’s proposals has costs implications.

Whether any current or future reform initiatives will bring about a marked reduction in the costs of civil litigation or facilitate greater access to the courts is likely to be difficult to establish, particularly in the absence of reliable or comprehensive empirical data.

The commission has made recommendations regarding various costs issues. We believe:

- there is a case for the establishment of an independent body, provisionally called the Costs Council, similar to the body recently recommended in England and Wales by the Civil Justice Council. This would comprise representatives of relevant stakeholders under judicial leadership and would have an ongoing role in monitoring costs reforms and proposing further reform after appropriate research and consultation
- there is a need for a change in the principles and procedures governing the recovery of costs by successful parties in civil litigation
- there is a case for review of the present prohibition on allowing clients the option of fee agreements which provide for the calculation of legal fees as a percentage of the amount in issue
- the present system of allowing substantial commercial mark-ups or profit on out-of-pocket expenses and disbursements is not defensible, except for clients of substantial means

3 Ibid.
Chapter 11

Reducing the Cost of Litigation

- there is a case for the establishment of a contingency legal aid fund, which would operate in a manner similar to commercial litigation funding arrangements, but which would retain the profits derived from funding successful cases to facilitate the funding of further cases, the provision of an indemnity in respect of successful defendants’ costs, the provision of security for costs, and the financing of ‘public interest’ litigation
- there is a need for more determinate, predictable or ‘fixed’ costs for certain types of work or certain categories of cases
- there should be more automatic costs sanctions in the event of interlocutory and procedural default
- court and associated fees should be standardised, simplified and re-structured including for the purpose of providing an additional economic incentive for the early disposition or settlement of disputes
- there is a case to require parties to disclose estimates of costs to the court and to the other party
- there is a need to modify costs rules to accommodate problems experienced in certain categories of cases, including ‘public interest’ cases
- there is a need for further research on costs.

There are additional recommendations, which have an important bearing on costs, in connection with a number of the other proposals discussed in other chapters of this report.

The proposed new pre-action protocol provisions are designed to accelerate disclosure of information and facilitate early resolution of disputes without the necessity for proceedings to be commenced. Insofar as disputes are resolved early without litigation, this is likely to reduce the costs of dispute resolution. Where disputes proceed to litigation compliance with pre-action protocol requirements may increase costs.

Both the overriding obligation provisions and the overriding purpose proposals incorporate important elements which explicitly seek to reduce the costs of dispute resolution and court proceedings. The overriding obligations include a duty to be imposed on all key participants in civil litigation to use reasonable endeavours to ensure that legal and other costs are minimised and proportionate to the complexity or importance of the issues and the amount in dispute. The overriding purpose proposals focus on, among other things, the cost-effective resolution of the real issues in dispute and proportionality.

The proposed new procedure for oral pre-trial examinations has important cost implications. Insofar as use of this procedure may accelerate disclosure of information and facilitate settlement this may reduce the costs that might otherwise be incurred in the proceedings. However, the introduction of this new procedure may increase the costs incurred in some cases, particularly those that still proceed to trial.

The various proposals in respect of discovery and disclosure are likely to reduce costs in many cases. The proposals in respect of case management and alternative dispute resolution have complex costs consequences. More proactive judicial management of litigation may increase costs in some cases which proceed to trial but may facilitate earlier and cheaper resolution of others. Similarly, greater use of ADR processes may increase costs by requiring parties to pay for the expense of third parties and facilities otherwise available through the court system. However, such costs may be less than the costs incurred if the matter proceeds to trial. Therefore, cases which are settled or resolved through ADR processes may incur less cost, but where the matter still proceeds to trial there may be an increase in the overall costs borne by the parties. However, if there is a narrowing of the issues, or if certain matters are resolved during the ADR process that might otherwise have led to significant interlocutory costs, then the ADR process may result in a net decrease in costs in cases which still proceed to trial. Generalisations about the likely costs consequences of many of the commission’s civil justice reform proposals are fraught with difficulty.

In this chapter the focus is on the rules, procedures and practices relating to legal costs. As this is only the first stage of a longer inquiry the commission has been selective in identifying a limited number of areas in which reform in relation to costs is required. In Chapter 12 we identify a range of other areas where, in submissions and consultations, others have proposed reforms, including in respect of costs.
2. VICTORIAN RULES AND PROCEDURE ON COSTS

2.1 FEE AND RETAINER ARRANGEMENTS FOR CIVIL LITIGATION CONDUCT

In Victoria the Legal Profession Act 2004 governs fee and retainer agreements with clients, including in connection with the conduct of litigation. Although the legislation imposes onerous disclosure and other obligations, it does not, with several exceptions, seek to prescribe or limit the basis on which legal fees may be calculated and charged to the client under a valid costs agreement. The principal exceptions are that fees may not be calculated as a percentage of the amount in issue, success fees in conditional fee agreements in respect of ‘litigious’ matters must not exceed 25 per cent of the base amount of the fee, and fees and charges may be varied if the costs agreement is not fair, just or reasonable. Moreover, a costs agreement that contravenes or is entered into in contravention of the legislation is void.

Lawyers are required to disclose to clients:

- an estimate of the total legal costs or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the variables that will affect the calculation of those costs
- the range of legal costs that may be recovered if the client is successful in the litigation
- the range of costs that the client may be ordered to pay if the client is unsuccessful.

Additional disclosure obligations arise in connection with settlement. The provisions of the Legal Profession Act governing cost agreements and costs disclosures were amended in May 2007. The amendments:

- made provision for agreements and disclosure obligations with respect to ‘third party payers’
- refined the definition of uplift fees and the provisions governing the terms, nature and disclosure requirements of conditional fee agreements
- removed the prohibition on percentage fees for non-litigious matters
- refined and amended the provisions governing obligations on each party when a client disputes a legal bill, and the procedures governing reviews of costs by the taxing master.

2.2 PRINCIPLES GOVERNING VICTORIAN COSTS TAXATION

In court proceedings in Victoria there are four bases for the taxation of costs: party-party, solicitor-client, indemnity, or such other basis as the court may direct. The rules state that unless the court orders otherwise or as provided for by the rules the general basis for all taxations will be the party-party basis.

In Victoria, where costs are taxed on a party-party basis, all costs ‘necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed shall be allowed’. The ‘necessary or proper’ test was incorporated in the English civil procedural rules in the period 1883 to 1986. The test of ‘reasonableness’ was substituted for the test of ‘necessity’ in 1986 because of the perception that the party-party basis had operated too harshly and that the successful party was not recovering a sufficiently high proportion of the costs reasonably incurred. The only difference between costs awarded on a standard party-party basis and costs on an indemnity basis was the way in which any doubt was resolved. The standard of reasonableness was retained in the period 1986 to 1998. Since that time the Civil Procedure Rules (UK) have retained the reasonableness criterion but altered the definition. The court may not allow costs which have been unreasonably incurred or are unreasonable in amount. However, a new benchmark was introduced. The court will only allow costs which are ‘proportionate’ to the matters in issue. Although the indemnity basis makes no mention of proportionality, the overriding objective requires the court to take account of proportionality and the Costs Practice Direction requires the court to have regard to the overriding objective. As noted by Senior Costs Judge Peter Hurst, in England the issue of proportionality had already become a problem by the late 17th century.
What had more than 20 years ago been abandoned in England and Wales as the principle for the determination of party–party costs remains the basis in Victoria for the determination of costs as between parties. On taxation on a solicitor–client basis all costs ‘reasonably incurred and of reasonable amount’ shall be allowed.20

In Victoria, where the taxation is for the purpose of determining the amount payable by the client (as distinct from the amount to be recovered from the losing party) costs not reasonably incurred or not of reasonable amount may be allowed in certain circumstances.

On taxation on an indemnity basis in Victoria all costs may be allowed except where they are of an unreasonable amount or have been unreasonably incurred.21 The cost of any work which was not necessary or which was done without due care may be disallowed.22 In taxation on an indemnity basis, when the taxing master has any doubt as to whether costs were unreasonably incurred or were of an unreasonable amount the rules provide such shall be resolved in favour of the party to whom the costs are payable.23 Misconduct in the litigation may entitle a party to costs on a more generous basis than the normal party–party method would entail.

2.3 STATUTORY POWERS AND METHODS OF CALCULATING COSTS IN VICTORIA

The power for each of the Victorian courts to make costs orders in civil proceedings is found in each of their governing statutes. These statutes confer broad discretions on the courts with respect to costs orders, with the Magistrates’ Court Act 1989 setting out some further limitation to the discretion. The discretion as to costs orders can be further limited by the rules of each of the courts.

Section 24(1) of the Supreme Court Act 1986 provides:

Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

Section 78A of the County Court Act 1958 similarly provides: ‘The costs of and incidental to all proceedings are in the discretion of the Court and the Court may determine by whom and to what extent the costs are to be paid’.

The rules of the relevant courts state that no costs will be recovered unless there is an order of the court (or agreement between the parties).24

The rules make provision for presumptive costs orders. Rules in each of the Supreme Court and County Court provide that costs are to be paid in the specified circumstances unless the court orders otherwise:

- application for extension of time25
- discontinuance or withdrawal of part of a proceeding/claim26
- filing a notice on party who has failed to make discovery/answer interrogatories27
- amendment of pleading.28

The statutory power as to costs in the Magistrates’ Court Act has the same broad discretion as provided for in the Supreme and County Courts.29 The Magistrates’ Court Act also expressly provides the court with a power to take into account any unreasonable act or omission by a party when making a costs order, but this power is subject to having given that party a reasonable opportunity to be heard.30

The Magistrates’ Court is required under its governing statute to refer any small claim (less than $10 000) to arbitration.31 If in such an arbitration the court awards a party less than $500 then the court must not award costs unless satisfied that special circumstances make a costs award appropriate.32

Under the Magistrates’ Court Rules there are specified circumstances in which the court must order costs.33
In addition to the statutory provisions and rules the Victorian courts are generally guided by the principle that costs follow the event. Often described by lawyers and judges as ‘the usual rule as to costs’, this principle entitles a successful party to receive his or her costs unless special circumstance warrant otherwise. However, the ‘entitlement’ is subject to the exercise of judicial discretion. The rules of the Victorian courts do not codify this general principle but it has a long history. A number of other jurisdictions have expressly incorporated the ‘general rule’ that costs follow the event unless the court believes some other order should be made.\(^{35}\)

If a party obtains an order for costs from the court such costs can be taxed and paid forthwith. This means there is no further need for any order allowing taxation to proceed on those costs even if they are for an interlocutory matter. This is different to other jurisdictions, such as the Federal Court and NSW courts, where interlocutory costs will not normally be taxed and paid until final resolution of the matter unless there is a special order of the court.\(^{36}\)

If a party has a costs order in the County or Supreme Courts (other than a lump sum or fixed costs order) they then need to prepare a bill of costs in the prescribed form.

The presiding magistrate in the Magistrates’ Court will fix the costs, usually on the day of the hearing pursuant to the scale.\(^{37}\) Recent amendments to the Magistrates’ Court Rules, which came into effect in 2006, gave power to registrars and deputy registrars to assess the costs of parties. The 2005–6 Magistrates’ Court annual report notes that this amendment was made as part of the court’s preparation for its increased jurisdiction. It also notes that currently, pursuant to an administrative arrangement, the task of assessment of costs is presently undertaken by County Court registrars.\(^{38}\)

Bills of costs will be prepared pursuant to the relevant scale of the court, as ordered.

**2.3.1 Scales of costs**

If the order does not specify the scale it will be on a party–party basis, also called the ‘ordinary scale’. The three courts all operate pursuant to their own scales, which vary considerably.

In the Supreme Court, there are scales for party–party costs and costs calculated on a solicitor–client basis. The scale fixes amounts for various items of work, with a limited discretion allowed to the master to increase allowances or expenses given the circumstances of a case and to add amounts for reasonable instructions.

Unlike the Supreme Court item-by-item approach, the County Court scale allows costs on a composite item basis. Instead of step-by-step amounts, the County Court allows a lump sum for certain stages such as work associated with the institution of proceedings.

Also, unlike the Supreme Court, which simply has one party–party scale, the County Court divides its scale into four tiers, depending on the monetary value of the case. The scales cover the following tiers:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>matters up to and including $7500</td>
</tr>
<tr>
<td>B</td>
<td>matters over $7500 up to and including $20 000</td>
</tr>
<tr>
<td>C</td>
<td>matters over $20 000 up to and including $50 000</td>
</tr>
<tr>
<td>D</td>
<td>matters over $50 000</td>
</tr>
</tbody>
</table>

Similar to the County Court scale, the Magistrates’ Court scale provides for items (which may include a composite item for all work relating to matters such as the institution of proceedings). The scale then sets out fees on a tiered basis, providing for seven tiers, according to the value of the claim.
2.3.2 Taxation of costs

There is a prescribed process for the filing and service of bills of costs, notices of objections and callovers for taxation. Taxations are controlled and managed by the master of taxation in the Supreme Court and the registrar in the County Court.

In the taxation process the master or registrar reviews the objections to the bill of costs. The onus is on the party seeking to uphold the bill to prove entitlement to those costs claimed. The master or registrar will then tax the bill or otherwise assess an amount for costs, and this becomes an order which is authenticated and filed. Any party can seek a review of the taxing master’s orders by applying by notice to the taxing master.39

The taxing master then reviews the taxation and may make an order confirming or varying the amount sought. During this process the taxing master can receive further evidence and parties can seek written reasons for the decision.

A party can then make an application for review by a judge. Further evidence cannot be received and the notice for review cannot raise any new ground of objection. The judge may confirm, set aside or vary the taxing master’s orders, or remit any item in the bill to the taxing master or make such other order as the case requires.40 There is a strong presumption by the court in favour of the correctness of the taxing master’s decision unless it is clear there has been an error.

2.3.3 Offers of compromise

Order 26 of the Supreme Court Rules provides a regime for the making of early offers of compromise which aims to encourage parties to accept a fair and reasonable offer. Under Order 26, an offer may be made by any party to the proceedings at any time before judgment. The offer will be kept in confidence prior to judgment but must:

- be in writing
- be served on the party to whom the offer is made
- remain open for not less than 14 days.

Order 26 outlines the costs consequences of failing to accept an offer of compromise. All orders are subject to the discretion of the court.
Table 3.

<table>
<thead>
<tr>
<th>SCENARIO</th>
<th>RESULT</th>
<th>CONSEQUENCE</th>
<th>ORDER 26</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff makes offer to</td>
<td>Plaintiff wins and the offer is not less favourable than the judgment</td>
<td>If damages claim in personal injuries or wrongful death case, defendant pays plaintiff’s costs on indemnity basis. For all other claims, defendant pays plaintiff’s costs on party-party basis up to day of service of offer; and thereafter defendant pays plaintiff’s costs on indemnity basis.</td>
<td>26.08(1)</td>
</tr>
<tr>
<td>defendant</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plaintiff makes offer to</td>
<td>Plaintiff wins but its offer is less favourable than the judgment</td>
<td>The usual orders as to costs would apply to the relevant outcome as the offer will not be relevant to the deliberations for the purpose of costs.</td>
<td>N/A</td>
</tr>
<tr>
<td>defendant</td>
<td>(alternatively, the defendant wins)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant makes an offer</td>
<td>Plaintiff wins and defendant’s offer is less favourable than judgment</td>
<td>The usual orders as to costs would apply as the offer will not be relevant to the deliberations for the purpose of costs.</td>
<td>N/A</td>
</tr>
<tr>
<td>to plaintiff</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant makes an offer</td>
<td>Plaintiff wins but defendant’s offer is more favourable than the</td>
<td>Defendant to pay plaintiff’s costs on party-party basis up to date of service of offer; thereafter plaintiff pays defendant’s costs on party-party basis.</td>
<td>26.08(2)</td>
</tr>
<tr>
<td>to plaintiff</td>
<td>judgment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant makes an offer</td>
<td>Defendant wins and therefore the offer is more</td>
<td>Supreme Court Rules are silent so it falls to</td>
<td></td>
</tr>
<tr>
<td>to plaintiff</td>
<td>favourable than the judgment</td>
<td>the court’s discretion. ‘However it is well established that … in the exercise of its general discretion, [the court may] award costs to defendant on a more generous basis than party and party from the time the offer was served.’ Stipanov v Mier (No 2) [2006] VSC 424 at 2 (Holingworth J).</td>
<td></td>
</tr>
</tbody>
</table>

Offers for settlement may also be made outside the framework of the provisions discussed above. Such offers are often expressed as being made ‘without prejudice … save as to costs’. They are commonly known as Calderbank letters.41 The court rules for offers of compromise do not apply to these offers, and the court retains full discretion to make an order as to costs. Ordinarily, a party will be penalised in relation to costs if it does not accept an offer and proceeds to obtain a less favourable result.

2.4 PROCEDURES FOR REVIEW AND REFORM OF COSTS

2.4.1 Power of courts to set costs scale

Pursuant to section 25 of the Supreme Court Act, the judges of the Supreme Court are given broad powers to make ‘Rules of Court’ covering a wide range of matters. This includes the scale of costs. These powers can be exercised by a majority of judges present at a meeting for that purpose.42 A similar power to make rules for the County Court is granted to a majority of the judges of that court.43 The County Court Act also makes provision for the court to fix the fees to be allowed to lawyers practising in that court and expenses to witnesses as fixed by the scale in the rules.44 In the Magistrates’ Court the Chief Magistrate together with two or more deputy chief magistrates may jointly make rules of court for or with respect to any matter relating to the practice and procedure of the court in civil proceedings.45

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39 Supreme Court (General Civil Procedure) Rules 2005 r 63.56.  
40 Supreme Court (General Civil Procedure) Rules 2005 r 63.57.  
42 Supreme Court Act 1986 s 26.  
43 County Court Act 1958 s 78.  
44 County Court Act 1958 s 33.  
45 Magistrates’ Court Act 1989 s 16.
In both the Supreme and Magistrates’ Courts the rules are subject to disallowance by the parliament. This is due to the lack of an express provision as to disallowance by parliament in the County Court Act. The power granted to make rules under the County Court Act expressly extends to the repeal and amendment of rules even if they have been ratified, validated and approved by the parliament. In any case not provided for in the County Court Act or Rules, the general principles of practice and the rules observed in the Supreme Court may be adopted and applied.

2.4.2 Councils of judges

There is a legislative requirement that each of the Supreme, County and Magistrates’ Courts have a council of judges, which is to meet at least once a year. These councils are broadly required to consider the operation of the legislation and the rules, consider the working of the offices of the court and enquire into and examine any problems with the procedure or administration of the law in the court or in any other court from which an appeal lies to the court. All courts are required to report annually to the Governor on the operations of their court.

In the Supreme Court, the Council of Judges delegates this power to make rules to a rules committee, which then makes recommendations to the judges for any rule change. In 2007, the Council of Judges agreed to a new scale of costs, which came into effect on 1 January 2008.

The Council of Judges for the County Court also agreed amendments to their rules, which came into effect on 1 January 2008 to substitute an increased scale of costs.

2.4.3 Role of parliament

The parliament has a role in ensuring that rules are not made beyond the powers of the court to make rules. A statutory rule includes a rule relating to a court or tribunal or the procedure, practice or costs of a court or tribunal. Under the Subordinate Legislation Act 1994, a statutory rule that is beyond power may be disallowed or amended. Rules of court, including those relating to costs, are also subject to oversight by the Scrutiny of Acts and Regulations Committee of Parliament.

2.4.4 Joint costs committees

To further assist the courts with costs, in 1987 a Costs Coordination Committee was established to advise the courts about applications relating to costs and to ensure coherence in the scale of costs. The Costs Coordination Committee met once during 2004–5. The committee has membership from the Supreme, County and Magistrates’ Courts, including judges and masters or registrars, and also includes representatives from the Victorian Bar, the Law Institute and the Attorney-General’s office.

A further costs committee, the Legal Costs Committee, is established pursuant to section 3.4.25 of the Legal Profession Act 2004. The committee has the power to make orders about costs that may be charged by law practices for legal services other than litigious matters. Membership of this committee must be constituted by the Chief Justice of the Supreme Court, nominees from the Attorney-General and representatives from the Law Institute, Victorian Bar and the Legal Services Board.

2.5 CURRENT VICTORIAN REVIEWS OF COSTS

The commission is aware that a number of costs issues are already the subject of investigation and report by others. These include a review of the scales and taxation of costs in the Supreme Court, discussed below. PILCH and the Victoria Law Foundation are also developing a public interest costs protocol for the Supreme Court, while new scales of costs in the Supreme and County Courts were to commence on 1 January 2008.

2.5.1 Scales of costs

Concurrently with the commission’s civil justice review, the Law Institute of Victoria has been undertaking a review of the scales of costs and making recommendations as to revised scales of legal fees for the civil justice system. The revised scale, which is due to be presented to the court in mid 2008, proposes the basis of costs recovery be ‘on a reasonable basis’ and an ‘indemnity basis as assessed on scale’.

Currently, the Victorian scales in relation to costs recoverable on a party-party basis are adjusted by the courts themselves. Although we understand there is a consultation process whereby submissions are made by the Law Institute and the Victorian Bar Association as to amendments for scale items on an annual basis, the power to set the scale is retained by the individual courts.
2.5.2 Taxation of costs

In 2006 the Victorian Attorney-General issued terms of reference to the Crown Counsel seeking a review of the offices of master of the Supreme Court and master of the County Court. This review was separate to the review of the Supreme Court scale. The review was directed to recommend areas of reform for the office, to review the current structure for resolving cost disputes between parties in Victorian courts and make recommendations, including the possibility of creating a central taxing office.

The Crown Counsel published an issues paper in response to these matters in May 2006. This paper described recent developments in NSW and the UK with respect to the assessment of costs rather than the traditional taxation. Under the NSW scheme, parties entitled to costs can apply to have their costs assessed by a costs assessor appointed by the Chief Justice. There is also provision for a panel to then review the assessor’s determination as to costs and in turn the panel’s determination can be appealed to the Supreme Court. In the UK a Supreme Court Costs Office has been established to assess party-party costs. The Costs Office has broad jurisdiction to assess costs awarded by judges from the Court of Appeal, High Court or County Court and, more recently, the Family Division of the High Court.

In conclusion, the issues paper noted that there may be benefit in making a number of changes to the nature, function and powers of the office of master.58 With respect to the conduct of taxations in Victoria the issues paper noted that the Law Institute’s proposal to create a single taxation of costs office ‘appears to have the potential to create efficiency and consistency.’59

The Crown Counsel’s final report was published in 2007.60 The report recommends replacing the office of master with a new office of ‘associate judge’ to reflect the current functions of the master. The functions of associate judges would be an internal matter for the courts.

The report also recommends the creation of a Victorian Costs Court. Under this proposal, the Costs Court would exist as a division of the Supreme Court. An associate judge would head the court, which would perform the functions currently performed by the taxing master in the Supreme Court, and by registrars in other Victorian jurisdictions. The report recommends that further consideration be given to expanding the membership and functions of the Legal Costs Committee to perform coordination and advisory functions.

At the time of writing, there had been no parliamentary response to the Crown Counsel’s recommendations. However, the Department of Justice noted that ‘[t]he report’s recommendations are consistent with the government’s commitments to modernise the office of master and to continue with the process of modernising the Victorian court system’.61

2.6 COURT FEES AND CHARGES

In Victoria court fees and charges are governed by various regulations and orders of the Magistrates’ Court,62 the County Court63 and the Supreme Court.64 Depending on the court and the particular list within the court, such fees encompass fees for the commencement of proceedings, entry into certain lists, the filing of documents, hearing fees, jury fees, late filing fees, mediation fees, notice of trial, production of court files and searching of court files, the filing of motions, pre-trial conference fees, photocopying,65 setting down and issuing subpoenas. Fees may be waived in cases of hardship.

It is not clear what the costs of administering such a piecemeal system of charges are. At least for certain types of cases it would appear that it may be more administratively convenient, and involve less ‘transaction costs’, to have one uniform aggregate fee either payable or incurred at the outset, with provision for a reduction or refund in the event of settlement, as an added financial incentive.

The quantum of the fees collected and where they end up are matters of interest to both the government and the courts for obvious reasons. Fees payable in the Supreme Court go, prima facie, into the consolidated revenue of the State, but by agreement with the Treasury a proportion of the fee revenue collected is maintained as a ‘revenue pool’ which is allocated to the courts in accordance with priorities approved by the Attorney-General.66 Similarly, a portion of the fees collected by the Magistrates’ Court and the County Court is retained pursuant to administrative arrangements.67 Court fees collected by the County Court in the financial year 2005–6 totalled approximately $5.1 million, a decrease on $5.8 million in the previous year.
Chapter 11

Reducing the Cost of Litigation

Recently, there has been some professional and public debate about the desirability of requiring certain parties, including corporate litigants in commercial disputes, to pay higher fees. There have also been suggestions that courts should be empowered, or should make more use of existing powers, to require well-resourced litigants to reimburse some or all of the ‘public’ costs incurred in pursuing claims or defences, particularly those found to be without merit. Elsewhere in this report we have also referred to the issue of whether commercial parties involved in commercial proceedings should continue to be entitled to claim a tax deduction for all legal and other expenses incurred in the conduct of litigation, particularly where a claim or defence is found to lack merit. These matters require further consideration.

The Chief Justice of the NSW Supreme Court has also canvassed the option of demanding full cost recovery from unsuccessful parties in lengthy cases. Full costs recovery could entail costs of judges’ time and overheads, such as building rents, etc.

The commission’s present proposals for overriding obligations recommend that in exercising discretion in relation sanctions, the court should be empowered to make an order for payment into the (proposed) Justice Fund of such amount as the court considers reasonable having regard to the time spent by the court as a result of the failure to act in accordance with the overriding obligations or any civil claim or civil proceeding arising out of the failure to act in accordance with the overriding obligations.

3. CONCERNS ABOUT THE COST OF ACCESS TO THE COURTS

Legal and associated costs are often the most critical determinant of whether members of the community have access to the courts. Moreover, for those who are litigants, costs considerations will not only determine the price of access to justice but will often have an important impact on the conduct and outcome of litigation.

Contemporary concerns about costs in civil litigation are many, varied and well documented. At least in the higher courts, it is often contended that problems arise out of a multitude of factors which either singularly or in combination prevent access to the courts, give rise to injustice, or result in justice at too high a price. Some of these factors can be directly attributed to costs rules and principles, including:

- fear of adverse costs which may prevent many claimants from commencing meritorious claims, or may impact on the conduct of claims and defences
- the open-ended method of calculating legal fees based on hourly rates, which leads to uncertainty and which is conducive to inefficiency, over-servicing and in some instances overcharging
- the high cost of out-of-pocket expenses and disbursements, particularly those which include substantial mark-ups on the real cost to the law firm of the items
- the inherent complexity of the subject matter of some types of cases
- the disproportionate relationship between costs and the subject matter of the dispute
- the inability of successful parties to recover a substantial proportion of their costs in the event of success.

Many other factors which contribute to prohibitive costs have been discussed elsewhere in this report. They include:

- the lack of incentives or mechanisms to facilitate disclosure of the strengths and weaknesses of the parties’ positions both prior to and following the commencement of proceedings
- the absence of procedures or powers to require persons with knowledge relevant to the issues in dispute to disclose such information other than through being called as a witness at trial
- the failure of parties and their legal representatives to limit the factual or legal issues in dispute and the perceived necessity to cover all issues because of concern about professional responsibilities and potential liability
- the multiple processing of the same information and documents by multiple parties
• the deployment of numerous professional personnel on each side, both within firms and through the use of counsel as a result of the divided legal profession
• the predominant use of oral argument and adversarial processes at both interlocutory proceedings and at trial
• insufficient use of ADR techniques, both in and outside the court process
• a lack of proactive judicial management of litigation
• the wide ambit of document discovery, which is alleged to be a major contributor to excessive costs in complex matters
• the use of multiple expert witnesses and the increasing cost of the professional services of such experts
• the apparent increase in the number of self-represented litigants.
• the complexity and technicality of civil procedural rules
• factors relating to behaviour and ‘litigation culture’, including adversarial conduct and gamesmanship.

The high cost of civil litigation thus arises out of a combination of complex factors relating to the conduct of participants in the process, the business practices of the legal profession, micro-economic considerations, the legal and procedural framework governing the conduct of litigation, the managerial methodology adopted by courts and a variety of diffuse cultural considerations.

3.1 CONCERNS IDENTIFIED IN SUBMISSIONS

The submissions that the commission received in response to the Consultation Paper identified a multiplicity of issues of current concern in relation to costs. These include:

• insufficient use of modern technology
• lack of early disclosure of witness statements
• lack of early identification and narrowing of the issues
• insufficient judge-managed lists operating within a docket system
• unnecessary interlocutory steps
• lack of uniform civil procedure
• requirements for the production of court books
• unacceptable delay
• insufficient judicial resources and court resources
• continual amendment of pleadings
• uncontrolled discovery
• lack of data to enable better assessment of efficiency
• lack of defined time frames for the resolution of cases
• lack of simplified and streamlined processes
• lack of funding available to litigants
• absence of costs protection in public interest cases
• the need for greater flexibility in legal costs arrangements
• absence of costs budgets which are adhered to
• the need to fix the amount of recoverable costs
• problems in relation to the rules governing offers of compromise
• the deterrent effect of the indemnity principle on meritorious claims generally and public interest claims in particular
• the need to narrow the gap between actual costs and costs recovered from the losing party
• changes in the method of assessing and recovering costs

69 Ibid 2.
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- the need for better provisions for the waiver of fees for disadvantaged litigants
- lack of available funding for disbursements
- the need to restructure court fees
- the need for the sharing of transcript costs
- the need to better take into account the financial resources of the parties in making costs orders
- more accessible and less costly alternatives to the Supreme Court in certain types of cases
- the imbalance between litigants arising out of the tax deductibility of legal expenses for some parties and insurers
- particular problems arising out of the conduct of cases by self-represented litigants
- use of court fees to deter the undue prolongation of litigation
- the need for greater regulation of commercial litigation funders.

These issues encompass:
- court and case management and judicial and court resources
- pre-litigation disclosure by persons in dispute
- court fees and transcript costs
- fee and billing methods used by lawyers
- the conduct of participants in the civil litigation process
- procedural rules for the conduct of litigation
- procedures for the assessment and recovery of costs
- particular problems for certain categories of litigants.

The submissions that the commission received regarding these matters are discussed below. The proposals in relation to costs made in the submissions extend from micro issues about sharing transcript fees to macro issues about funding, resource allocation and management.

3.1.1 Costs impacts and causes of delay

A number of submissions in response to the consultation paper raised the interconnectedness of delay, cost and court procedure. The Human Rights Law Resource Centre noted that ‘[a]n important aspect of a fair hearing is its expeditiousness’.70 A person’s right to a fair hearing is now enshrined in the Victorian Charter of Rights and Responsibilities.71 At international law, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the right to a fair hearing.72

The Law Institute of Victoria reported that anecdotal evidence suggests there is unacceptable delay and cost in some parts of the civil justice system. The Institute argued that there are insufficient judicial resources available to manage and hear long, complex cases and there is a sense that delays are unsatisfactory and lead to increased costs. It was further contended that this latter type of delay significantly affects the perception of the civil justice system.

Other factors identified as contributing to delay included:
- failure to identify the core issues in dispute at an early stage
- unnecessary interlocutory steps73
- continual amendment of pleadings (perhaps in part due to the failure to take adequate instructions at the outset)
- uncontrolled discovery74
- excessive court books75
- the late briefing of counsel.76

Many of these issues are dealt with in other chapters of this report.

Many submissions identified broad reform proposals to deal with various issues. Recommendations in submissions included the simplification and streamlining of court processes and increased judicial
management, including the early identification and narrowing of issues in the litigation process. There was support for the introduction of measures to avoid disputes and for strategies to discourage litigation.

Some submissions identified measures to reduce delay, including:

- a uniform code of civil procedure across all jurisdictions
- greater reliance on written submissions
- specialised judge-managed lists operating within a docket system
- increased use of technology, such as electronic filing, electronic courtrooms and discovery of documents in electronic form
- removal of unnecessary interlocutory steps.

The Victorian Bar, however, argued that further research into the causes of delays and costs is required before introducing reforms to reduce excess cost and delay. The Law Institute noted its lack of support for any proposal to reduce the length of trials by greater use of sworn witness statements. It argues that any costs saved at trial through such means would be subsumed by the additional costs of drafting and settling the statements.

### 3.1.2 Disclosure of costs estimates

The Consultation Paper queried whether there is a need for a procedure whereby the court would be informed, at an early stage of the proceeding, of the parties’ estimates of the likely costs of the proceeding. In their initial submissions the Victorian Bar, Transport Accident Commission and Law Institute did not support disclosure of costs estimates to the court. The TAC noted that there are costs provisions in its protocols which are publicly available.

In a recent submission the Victorian Bar noted that:

> Many in the profession agree that a lack of transparency in costs throughout the pre-trial process makes it difficult for clients and judges alike to adequately assess the true cost of litigation and to manage cases accordingly. We believe there is significant merit in revising rules related to costs transparency, for example rules that require parties to produce costs estimates at the first directions hearing or scheduling conference. These reforms are consistent with many reforms worldwide.

### 3.1.3 Fee and billing methods used by lawyers

#### Time costing

The commission received submissions that were critical of the current method of hourly billing for lawyers’ costs. It was contended that time billing allocates risk to the client and encourages over-servicing. A submission that the commission received from a litigant was highly critical of the hourly billing method. The litigant wrote:

> When the going per-hour rate is typically some $200 or more the temptation for lawyers to fill in a few idle hours with judicious over-servicing must often be irresistible—and that points the finger at ‘blank cheque’ arrangements for costs … There should be no presumption that lawyers are in any way entitled to recover costs associated with ‘make work’ of no meaningful consequence. There should be an agreement on the total costs at the outset.

Harris Cost Lawyers Pty Ltd supported the use of a range of fee arrangements, including those where the lawyer bears part of the risk of litigation. For example, a fixed fee arrangement offers the client cost certainty, and also spreads the risk between client and lawyer.

In contrast, the Victorian Bar submitted that this area does not require reform. The Bar argued that the labour intensive and complex nature of litigation mean that current costs are reasonable.

The Supreme Court noted that while some solicitors are attempting to move away from time sheets, hourly billing arrangements ‘remain the dominant paradigm’. Taxation of solicitor and own client bills accounts for approximately 10–15 per cent of all Supreme Court taxations.

The Bar supported conditional fees (colloquially known as ‘no win/no fee’), with the ability to agree an additional margin or ‘uplift’ fee.

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70 See also United Nations Human Rights Committee, General Comment No 32: Art 14: Right to Equality before Courts and Tribunals and a Fair Trial, UN Doc CCR/C/GC/32 (21 August 2007).
72 Human Rights Committee, General Comment 32.
73 Submission CP 18 (Law Institute of Victoria).
74 Submission CP 33 (Victorian Bar).
75 Submissions CP 33 (Victorian Bar), CP 48 (Victorian WorkCover Authority).
76 Submission CP 33 (Victorian Bar).
77 Submission CP 18 (Law Institute of Victoria).
78 Submissions CP 37 (Transport Accident Commission), CP 48 (Victorian WorkCover Authority).
79 Submission CP 18 (Law Institute of Victoria).
80 Submission CP 19 (<e.law Australia Pty Ltd).
81 Submission CP 18 (Law Institute of Victoria).
82 Submission CP 62 (Victorian Bar), February 2008.
83 Submission CP 10 (Peter Mair).
Percentage contingency fees
The Transport Accident Commission and Victorian WorkCover Authority opposed percentage contingency fees, contending that this would increase legal costs paid in a dispute. They submitted that existing conditional fee arrangements were sufficient to increase access to justice in their areas of expertise. Moreover, conditional fee arrangement protocols contain generous event-based costs for lawyers to recognise their contribution to early dispute resolution.

A number of large commercial law firms opposed the introduction of percentage contingency fees on the following grounds:

- there is a real risk that a lawyer’s independent financial interest in the litigation will conflict with the lawyer’s duty to the client and the court
- lawyers who stand to benefit from a contingency fee arrangement may not be disposed to inform their clients that the contingency fee in question is too high in light of the work involved
- allowing lawyers to charge contingency fees may damage the reputation of the legal profession and public confidence in the administration of justice by encouraging lawyers to advertise for plaintiffs and to persuade potential plaintiffs to commence proceedings for their own benefit.

The firms also argued that the prohibition on contingency fees should extend to prohibiting lawyers and law firms from having any financial association with commercial, third party litigation funders. Otherwise, they argued, law firms could own, directly or indirectly, litigation funders and thereby circumvent the prohibition on percentage contingency fees.

The Victorian Bar also opposed the introduction of contingency fees calculated by reference to the value of a particular item in dispute (such as property), or according to any award or settlement that may be recovered. In addition to the arguments canvassed above, the Bar submitted that such contingency fees ‘would act as a grave threat to the independence and detached objectivity of the Bar, which is one of the basal justifications for its existence’.

Associate Professor Adrian Evans argued that lawyers should not be put in a position of conflict which could arise if they were able to take a percentage share of their client’s damages. However, if contingent fees were to be introduced, Associate Professor Evans suggested that all proposed contingent fees be court approved, similar to the scheme proposed by the Law Institute of Victoria.

Other submissions were supportive of percentage contingency fee arrangements. The Law Institute submitted that there is nothing to suggest that contingency fees would increase speculative claims, which would still be governed by rules concerning abuse of process as well as the availability of adverse cost orders, which act as a significant deterrent. The Institute stated that any provision to allow lawyers to charge a contingency fee or an uplift fee must be overseen by the courts and the agreement must be ‘fair and reasonable’.

A number of law firms, particularly those who traditionally act for plaintiffs, including in personal injury litigation, expressed support for the removal of the current prohibition on fees calculated as a percentage of the damages recovered.

Overall, the submissions indicated that the legal profession is divided on the question of whether percentage contingent fees should be permitted.

3.1.4 Taxation and scale
Taxation of costs
Victoria Legal Aid suggested that the court fee scales should be simplified. Current problems and complexities in the system include:

- each of the courts having a different scale that covers different professional items and disbursements
- the distinction between party-party costs and solicitor-client costs
- the fact that most legally aided work is funded based on lump sum fees fixed by Legal Aid, whereas many private practitioners charge fees based on hourly rates.
Legal Aid supported a coordinated approach across the jurisdictions, particularly in light of increases in the jurisdiction of the Magistrates’ and County Courts. Where practical, they submitted, court fee scales should be based on lump sum fees for particular tasks. The Transport Accident Commission also supported greater consistency in costs between jurisdictions, including VCAT.

The Law Institute submitted that there should be a single scale of costs in Victoria that reflects current commercial rates charged. This would reduce the gap between party–party and indemnity costs orders. The Institute also submitted that the basis on which costs are awarded should be modified to a reasonable basis.

3.1.5 Court fees and transcript costs

A large number of the submissions received by the commission commented on court fees.85 Some submissions argued that there is no need to change court fees,86 but that adjusting court fees could provide an economic incentive to the parties to reduce delay. Litigation funder IMF submitted that court fees should remain on a user-pays basis, ‘other than where public policy dictates access to justice considerations prevail’.87

The Victorian Aboriginal Legal Service (VALS) maintained there is a need to restructure court fees so they are not dependent on the amount of damages being claimed.88 The current system means that people who sue for a higher amount are subject to higher court fees, which the legal service submitted, disadvantages some claimants.

Court fees can impact on a person’s access to justice. The Human Rights Law Resource Centre drew attention to the European case of Kreuz v Poland, where the requirement to pay court fees was held to be a violation of article 6 of the European Convention on Human Rights because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not confer on citizens the right to free civil proceedings, the European Court said that the imposition of court fees must be balanced against the burden placed on the individual litigant. The relevant factors in this case were:

- the level of court fees involved
- the court’s refusal of the application without taking into consideration any evidence and
- the fact that under the relevant domestic law, an exemption from fees could be revoked when the circumstances of the individual changed, effectively suspending the fees temporarily and allowing the applicant to commence proceedings.

Fee waiver

It is at the discretion of the court whether to waive the payment of court fees required to commence and conduct litigation. A person may apply to the court for a fee waiver. The decision-maker will have regard to the income, day-to-day living expenses, assets and liabilities of a person liable to pay a fee. If the decision maker is of the opinion that payment of the fee would cause financial hardship, the decision maker may exercise a discretion to waive the fee.89 Only individuals may apply for a fee waiver. An application form and affidavit of financial situation must be filed with the court. A separate application must be made for each fee waiver sought.

PILCH, the Mental Health Legal Centre, Victoria Legal Aid and the Federation of Community Legal Centres (the Federation) commented on the current fee waiver system in cases of financial hardship. The Mental Health Legal Centre said that the right to have fees waived for financially disadvantaged parties should exist across all civil jurisdictions. Legal Aid supported fair and consistent rules about court fee waivers for financially disadvantaged litigants. It reported that the practice of the Supreme Court differs from many federal courts that automatically waive all fees for legally aided parties.

The Federation submitted that the current procedure for applying for a fee waiver (which involves writing a statutory declaration describing financial circumstances) is a barrier to litigants obtaining the waiver, particularly if they are not represented. The Federation and the National Pro Bono Resource Centre recommended that presentation of a health care card should be sufficient to prove financial hardship and obtain a waiver of court fees and charges. In addition, fees should be waived where the applicant is represented by a publicly-funded legal service providing civil law assistance to marginalised or disadvantaged clients (eg, a client assisted with legal aid, by a community legal centre or an

84 Submissions CP 15 (Edison Masillamani), CP 40 (Harris Cost Lawyers), CP 7 (Maurice Blackburn).
85 Submissions CP 34 (PILCH), CP 22 (Mental Health Legal Centre Inc), CP 32 (Federation of Community Legal Centres), CP 36 (Human Rights Law Resource Centre), CP 27 (Victorian Aboriginal Legal Service Co-operative Ltd), CP 48 (Victorian WorkCover Authority).
86 Submission CP 33 (Victorian Bar).
87 Submission ED1 8 (IMF (Australia) Ltd).
88 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative Ltd).
89 Supreme Court Act 1986 s 129(3), County Court Act 1958 s 28(4), Magistrates’ Court Act 1989 s 22(2).
Aboriginal legal service). The National Pro Bono Resource Centre also supported reforms that would see court fees waived where a marginalised or disadvantaged litigant, who is impecunious, is being represented on a pro bono basis.

Disbursements
PILCH and the National Pro Bono Resource Centre argued that the availability of funding for disbursements in litigation is critical to ensuring access to justice in pro bono matters. However, the current court fee waiver schemes do not cover the costs of many disbursements. PILCH noted that the costs of disbursements are significant, ‘the lack of available funding for disbursements creates a significant barrier to progressing the matter and may result in a client being unable to obtain access to justice’. In PILCH’s experience, the limited availability of funding for disbursements acts as a disincentive to practitioners providing pro bono legal advice.

PILCH recommended that the Victorian Government provide funding for disbursements in pro bono public interest matters, or where the matter raises an issue concerning the human rights of the applicant involved. In the alternative, PILCH recommends that the Law Aid Scheme guidelines for assistance be extended to take into account urgent disbursement needs and provide for fee waiver.

Transcript fees
The Law Institute submitted that courts should facilitate the sharing of transcript fees through the use of online or electronic access. Under the current system, a plaintiff seeking access to a transcript must pay the cost, which can amount to up to $1000 a day. The Institute noted that the transcript provides a service to the other party and the court, and as such the cost should be shared. It was also contended that courts should make transcript available as a cost of the litigation. The Transport Accident Commission questioned whether there should be more competition in respect of transcription services in civil proceedings.

Some submissions commented on the impact of the high cost of transcripts. Legal Aid noted that the high cost of obtaining transcripts may deter or prevent some litigants from obtaining advice on the merits of appealing decisions. The National Pro Bono Resource Centre supported reforms that would allow marginalised and disadvantaged clients who are represented by a community legal centre, legal aid, Aboriginal legal services or pro bono lawyers to have access to free court transcripts.

3.1.6 Procedures for assessment and recovery of costs

Party–party costs
The commission received a number of submissions on party–party costs. The Victorian Bar noted that the practical effect of such a rule is that a party who has to go to court to vindicate his or her rights will (in the absence of an order for indemnity costs) be out of pocket. However, the Bar supported the rule on policy grounds, namely, that the shortfall in party–party costs provides an appropriate incentive to settle cases.90 Submissions noted the broad discretion of the court in making an award of costs, which can take into account the conduct of the parties.

The Victorian Bar’s submission also encouraged consideration of permitting the court to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case.91

Indemnity principle
Many submissions supported the current indemnity principle that ‘costs follow the event’.92 A number of large law firms argued that the costs indemnity rule should be retained.93 They submitted that the rule is a balancing tool, namely, that if a party causes another party to unreasonably incur legal costs, the first party should indemnify the other party for those costs, to maintain an appropriate balance between the various participants in the civil justice system. The submissions noted the following advantages of the rule:

- it allows successful litigants to recover the cost, or at least part of the cost, of asserting their rights
- it helps to deter unmeritorious claims
- it may encourage parties to conduct litigation in an efficient and cost-effective manner, including avoiding unnecessary interlocutory applications and settling proceedings where appropriate.
The Supreme Court, however, submitted that there is merit in considering a more generous basis than the current party and party test that applies in a majority of cases, and moving to a two-tier system similar to the UK model.

Some submissions supported the indemnity rule, but endorsed the court’s discretion to modify costs according the circumstances of the case. The Victorian Bar argued that the general rule that costs follow the event should be relaxed so that the court could use to the full its wide statutory discretion over costs to support the conduct of litigation in a proportionate manner and to discourage excesses. The Mental Health Legal Centre said that the rule should be subject to consideration of the means of the parties, and their relative financial situations. This should include recognition of a person’s current means, their likely future needs and situation, and the impact of debt on, for example, their mental health. The legal centre also said that consideration should be given to the capacity of the other party to bear its own costs.

The Human Rights Law Resource Centre’s submission highlighted the impact of the law on human rights. It submitted that an important aspect of ensuring equal access to justice is the applicant’s ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community. The centre referred to UK cases heard before the UN Human Rights Committee, where the committee held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. The imposition of substantial costs against disadvantaged claimants may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The Human Rights Committee held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.

The Law Institute recommended that if indemnity costs are awarded, the court should be informed of any costs agreement between the parties and their legal practitioners. In addition, the current definition of indemnity costs in the rules should be amended to provide that indemnity costs are to be assessed in accordance with the scale. Law firm Deacons suggested an alternative procedure for costs orders. It submitted that a procedure similar to the NSW model for assessment of legal costs should be considered. Under that model, a party applies for an assessment of party–party costs by a cost assessor. A party dissatisfied with the determination of a cost assessor can challenge the decision either by:

• review by a panel comprised of two experienced assessors, or
• appeal to the Supreme Court of NSW.

A party who challenges the assessment taxation will not only be liable to pay the filing fee, but should the application fail, or fail to succeed by having the original determination varied by more than 15 per cent, then that party will also be liable for the costs of the review. Deacons asserted that the NSW procedure provides ‘expedition and a greater degree of certainty in the process and may result in saving court time’.

3.1.7 Incentives and penalties

Many submissions commented on current economic incentives that exist to facilitate efficient and fair use of the justice system. Costs orders can be a disincentive against pursuing frivolous claims, actions or defences. Moreover, cost orders can be made directly against solicitors. Many pre-litigation requirements and proactive judicial management serve to fetter claims without merit.

Some submissions described incentives and penalties currently operating in Victoria. For example, damages claims following injury in motor vehicle accidents are governed by Transport Accident Commission protocols. Under these protocols, work put into resolving the dispute early is recognised with appropriate stage cost price points, thereby encouraging parties to settle their claims expeditiously. The Victorian WorkCover Authority noted that the Accident Compensation Act 1985 includes a pre-litigation regime, information exchange provisions, compulsory conference procedures prior to issue of a writ, pre-litigated costs support model and costs consequences provisions. Such provisions were said to encourage bringing or defending only meritorious claims.
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The Victorian Bar suggested that court fees could be used to discourage undue prolongation of civil litigation, or as an incentive to parties to complete the interlocutory steps in the required time. It suggested that any additional costs burden would be imposed at the discretion of the court.

The Bar suggested as an example that higher sitting fees might apply if parties delayed and could not meet a trial date. However, the Bar acknowledged the difficulty inherent in this proposal, that is, it is often one party (usually the defendant) that is dragging its feet. In those circumstances, it is unfair to impose higher sitting fees on the other (innocent) party. There is also concern that this could lead to satellite litigation. Furthermore, safeguards would be necessary to ensure that this did not obstruct access to justice.

Some stakeholders expressed concern at further use of economic incentives or disincentives in the conduct of litigation. Tanya Penovic, Lecturer in Civil Procedure at Monash University, discussed the impact of federal cost ‘disincentives’ under the Migration Act 1958:

> The court’s ability to administer disincentives in the form of costs has been fortified at the Federal level by the Migration Litigation Reform Act 2005 (Cth). The Act prohibits a person from ‘encouraging’ a litigant to commence or continue migration litigation which has little prospect of success in circumstances where proper consideration is not given to the prospects of success or the purpose of the litigation is unrelated to the objectives of the court process.

> While it is too early in the life of the Act to evaluate its impact on the court system, legislation such as this may have a perverse effect. The deterrent effect on lawyers representing clients in difficult claims may result in an increase in self-representation, thus increasing delay on account of the absence of legal advice and understanding of court process. An increase in self-representation may have the effect of reducing the likelihood of settlement, and increasing the length of trials, the number of unmeritorious claims and appeals.

> Such disincentives may also limit access to justice by requiring lawyers (rather than judges) to act as the arbiters of merit in litigation and thus confining access to justice. Once again, the right to a fair hearing enshrined in section 24 of the Charter of Human Rights and Responsibilities Act 2006 may be frustrated.

The National Pro Bono Resource Centre submitted that introducing economic disincentives is a harsh way to deal with people who are likely to already be economically disadvantaged. The centre suggested that:

> More holistic, multidimensional approaches should be adopted to assist these people through their legal problems. These approaches may include court-based self-help support officers and resources, court-based support staff, and increased funding to duty lawyers and service providers such as CLCs and legal aid who are adept at dealing with people with complex problems.

3.1.8 Offers of compromise

The commission invited submissions on whether the rules or procedures in relation to offers of settlement or compromise are in need of reform. Submissions were divided between those that believed the current procedures work well or did not need modifying,96 and those that believed the current position is unclear and must be regulated.97

The Law Institute called for clearer and more comprehensive rules for offers of compromise, accompanied by sanctions, arguing it would assist both lawyers and clients to make decisions about litigation. TurksLegal and AXA noted that under Order 26, different restrictions apply for plaintiffs and defendants in a claim for damages arising out of death or personal injury. The Institute and TurksLegal and AXA supported uniform consequences across jurisdictions and matters for non-acceptance of an offer of compromise.

Other submissions argued that the commission should consider clarifying the operation of Order 26 in relation to multiple defendants, particularly in the context of the introduction of proportionate liability regimes.98 Law firm Allens Arthur Robinson said that the order is uncertain in cases where there are multiple defendants. It is also unclear how the offers relate to proportionate liability schemes. Maurice Blackburn also cited difficulties with multiple defendants.
During consultations conducted by the commission, concerns were also voiced about the ineffectiveness of offers of compromise. A plaintiff law firm stated that plaintiffs tend to accept offers of compromise at relatively high rates, whereas defendants with deep pockets are less affected by costs penalties. Another firm supported broader rules with increased flexibility. Slater and Gordon suggested that, for example, the imbalance in resources between a plaintiff and defendant in a public injury case could warrant the addition of a premium to any unaccepted offer, or additional interest attached to a costs penalty.

3.1.9 Security for costs
The Victorian Bar submitted that the current security for costs procedures work well. The Victorian WorkCover Authority and TAC believe there is no need for revision of the existing rules. WorkCover operates under a costs regime under the Accident Compensation Act 1985; the TAC is governed by the Transport Accident Act 1986.

The Law Institute said security for costs orders are necessary to provide flexibility for litigants, but should not be allowed to stymie litigation.

The Human Rights Law Resource Centre noted that notions of ‘fairness’ in matters relating to security for costs have developed in cases before the European Human Rights Commission. In Ait Mouhoub v France, the requirement to pay 80,000 francs for proceedings against the gendarmes was held to be a disproportionate obstacle to access to the court. However, in Tolstoy Miloslavsky v UK, the payment of 124,900 pounds was not considered an infringement of article 6 of the European Convention on Human Rights.

3.1.10 Financial resources in public interest cases
A number of submissions expressed concern at the proposition that the financial resources of the parties, or the public interest nature of a matter, should be considered when making an order for costs, or security for costs.

The Victorian Bar submitted that these are already matters that the court may have regard to in an appropriate case when exercising its discretion as to costs. In a similar vein, the Law Institute argued that ‘factors of consideration of the financial means of a party can result in a fettering of the discretion of the court to decide a matter’. The Victorian WorkCover Authority considered this to be a matter for the parties, not the courts.

Victoria Legal Aid, however, supported requiring the courts to consider the financial resources of the parties when making costs orders in public interest cases or where there are other exceptional circumstances. Such a requirement could ‘redress the inequality in resources that typically exists in public interest cases where an individual challenges a public body or commercial corporation’.

Some public authorities indicated that they consider the financial resources and wider implications of a decision before seeking costs, or security for costs.

The TAC described its obligations under Model Litigant Guidelines, which require the TAC not to take advantage of a litigant who lacks resources. The TAC gives consideration to a TAC client’s financial position before determining whether to apply for a costs order at all. Similarly, the financial position of the losing party is considered in any proceedings to enforce an order for costs. The TAC has cost recovery guidelines and will only seek to recover its own costs in the case of fraud, misrepresentation or other exceptionally good reason.

The TAC funds appeals to the Supreme Court and Court of Appeal where Transport Accident Act scheme issues or issues affecting a class of injured people are in dispute or require clarification. The court is made aware of this funding in submissions or a supporting affidavit.

3.1.11 Review and reform
The Bar called for more research to address the ‘dearth of statistics’ on the causes of cost and delay in Victoria’s civil justice system.

A number of submissions also noted a lack of available information about the incidence and causes of high costs in the civil justice system.
Chapter 11

Reducing the Cost of Litigation

3.2 SOME PROBLEMS IDENTIFIED

3.2.1 Gap between lawyers’ costs and costs recovered from losing party

In much of the civil litigation in the higher courts Victorian lawyers, like those in most other Australian jurisdictions, have for some years operated under a costs system whereby a substantial proportion of the costs incurred by the winning party will not be recovered from the losing party pursuant to a party–party costs order.

The commission sought to obtain empirical data to determine what that disparity is. Historically, the anecdotal evidence suggests that only about 60–70 per cent of the actual costs could be expected to be recovered. However, there are obviously variations in the percentage amount recovered for different items within the total costs. For example, a higher percentage of amounts for court fees, witnesses’ expenses and counsel fees may be recoverable compared with some other items such as solicitors’ fees or photocopying charges. At present, many experienced practitioners have suggested to the commission that only about 50 per cent of the total amount of the actual costs is likely to be recovered from the losing party in many instances.

Generalisations are fraught with difficulty because of different practices and procedures applicable to different categories of civil work. Moreover, both the common law and court rules make provision for the recovery of a substantially higher percentage of the actual costs incurred in various circumstances, including where settlement offers are rejected and where there is forensic misconduct. There may be other considerations which reduce the quantum of recoverable costs, for example, in ‘public interest’ litigation (which is discussed in detail below).

The Manitoba Law Reform Commission in its 2005 report on costs awards in civil litigation reported that in Australian jurisdictions successful parties generally recover a higher proportion of their actual legal costs compared with Canadian jurisdictions. In Australia the proportion recovered was said to be ‘probably as much as 60–70 per cent’.106 By way of comparison, in British Columbia only around 25–30 per cent of actual costs are apparently recovered107 and in Manitoba it was variously estimated as less than 50 per cent, no more than 25 per cent and on occasions less than 10 per cent of actual costs.108

The ‘gap’ between recovered costs and actual legal costs was referred to by the Law Reform Commission of Western Australia in 1999 when it noted ‘[i]n a sense it is unfair’. The WA commission recommended that reduction of the gap be considered by introduction of a statute, for example the ‘Legal Costs Act’.109

One explanation for this gap is that the scales providing for quantification of recoverable party–party costs are outdated and do not reflect the market price for legal services. If lawyers as professionals are entitled to be remunerated for their skill and expertise at proper commercial rates and if the losing party is paying his or her own lawyers at similar rates, the application of the indemnity principle arguably entitles the winning party to recover the real costs incurred in the pursuit of the claim, or at least a substantial proportion thereof.

One counter to this argument is that lawyers’ billing methods, in particular the time-based system, contribute to over-servicing and in turn overcharging. The issue of hourly billing is discussed further below.

3.2.2 Open-ended and indeterminate fees and expenses

Tyranny of billable hours110

According to the Law Commission of New Zealand:

> Hourly billing can drive costs up, especially in firms where lawyer performance is measured by targets of billed hours. This can make ‘bill padding’ a temptation and rewards inefficiency. Also, hourly billing does nothing to inform a client’s understanding of how much a lawyer’s services will in fact cost.111

As the NZ commission noted, there are suggestions that commercial clients are using their bargaining power to encourage a movement towards quotes, tenders and costs agreements with lawyers. There is some indication of a ‘lawyer-led’ trend away from hourly billing, with at least one New Zealand firm having abandoned hourly billing to reduce frustration for both lawyers and clients.112
Problems with hourly billing may be exacerbated where minimum time units (usually six minutes) are used as a basis of calculating costs charged to the client. This may artificially inflate the actual time for which charges are computed.

Moreover, many firms achieve a relatively high level of profitability by leveraging up charge rates. Employee solicitors, paralegals and others are contracted to provide services at a relatively modest hourly rate but the charge to the client is calculated on the basis of a substantial mark-up on such rates. Obviously, as profit-making entities law firms are no different in this respect from any other commercial enterprise and proper allowance has to be made for overheads and a return on capital investment etc.

However, the open-ended nature of billing arrangements in most civil litigation creates obvious problems for clients, particularly those who don’t have the volume of work or the commercial standing to negotiate in relation to the price of legal services. Moreover, as the New Zealand Law Commission has noted, although the open competitive market assumes that regulation of price and quality is carried out by consumers who are the best judge of the value of goods and services, this model does not work effectively in the legal services market for a number of reasons:

Consumers are not in a good position to judge prices and quality since information is poor and general knowledge and understanding of legal work, its complexity and the extent to which cost can be incurred, is very low. Various members of the judiciary have criticised the time billing method used by lawyers in Australia. Chief Justice Spigelman of the NSW Supreme Court has expressed the view that time billing is unsustainable since ‘it is difficult to justify a system in which inefficiency is rewarded with higher remuneration’. He noted these views have been echoed by Chief Justice Gleeson of the High Court.

In some instances, time recording and economic and promotional incentives based on the volume of time recorded serve as an incentive to overcharging and fraud. At least in the US context, it has been suggested that unethical billing practices are widespread. Steve Mark, Legal Services Commissioner for NSW, has advocated the use of alternative billing methods in the legal industry. ‘Alternative’ billing methods include fixed fee billing, capped fees, contingency or percentage fees, blended hourly rates, task-based billing and fees based on value. Mark notes that the uptake of alternative billing methods in Australia has been slow, and largely driven by client demand rather than innovation by law firms. This may be because alternative methods of billing are more complex and require individualised assessment of a client’s needs.

Value billing, for example, requires fees to be determined on the value given to the client. A written agreement will cover the billing schedule, people within the firm who will work on the matter (and in what capacity), monitoring of the work. The value of the work will depend on the effectiveness, efficiency, urgency, complexity and predictability of the work. Value billing is thus said to encourage negotiations between practitioners and clients, and to focus on ‘results, efficiency and reward, not hours billed’.

However, according to Steve Mark:

In Australia, the move towards alternative forms of billing has been slow. There has been much resistance by law firms to change[ing] their established billing practices. The push for change is thus largely coming from clients.

Out-of-pocket expenses and disbursements

In order to conduct litigation, it is often necessary to incur out-of-pocket expenses apart from the cost of the legal services provided by law firms and counsel. Such expenses may include telephone, postage and communication expenses, couriers’ fees, photocopying charges, travel and accommodation expenses, court fees and the fees payable to expert witnesses and consultants.

In many instances theses expenses are passed on to clients with the addition of a component for profit.

To some extent this is encouraged by scales in relation to recoverable party-party costs which provide for recovery of the marked-up price of such items from the losing party. For example, the Victorian Supreme Court makes provision for the recovery of photocopying charges at the rate of $1.70 per page. Costs agreements of many firms provide for photocopying to be charged to the client at the


108 Ibid 10.


112 Ibid.

113 In some jurisdictions there is a move by some law firms towards outsourcing legal and other work to lawyers and others in countries at considerably less cost to the firm than persons employed in the jurisdiction. This does not necessarily result in a reduction in the cost to the client. However, in some instances insurers are directly outsourcing legal and other work to people in other jurisdictions to reduce the cost to them.


116 See, eg, the Hon M Gleeson, “Are the Professions Worth Keeping?” (Speech delivered at the Greek–Australian International Legal and Medical Conference, Kos, Greece, 31 May 1999).


120 Ibid 7.
rate of $1 or more per page. Commercial photocopying companies, which include a profit element in their charges, often charge around 10 cents or less per page, with substantial further discounts for volume.\textsuperscript{121}

As part of this enquiry, the commission reviewed data on the taxation of costs from the Supreme Court taxing master. More than half of the 37 bills of costs reviewed included a disbursement figure that exceeded the professional fees claimed. The impact of the costs of disbursements on the total cost of litigation is a matter of obvious concern, particularly to clients.

3.3 COSTS RESEARCH UNDERTAKEN BY THE COMMISSION

The commission sought to investigate the concerns about the cost of litigation raised in submissions by conducting some limited research. The commission sought raw data on costs from both legal firms and the Supreme Court taxing master. This was to examine information on costs claimed, the gaps between recovered costs and actual costs incurred and the time required to finalise costs.

3.3.1 Survey of legal firms

The Commission conducted a survey which sought to ascertain:

- the cost of litigation
- the relative cost of each stage of litigation
- who bears the gap between actual costs and recovered cost
- the costs of particular types of proceedings
- the relationship between cost and delay.

The commission contacted 70 law firms and organisations asking each firm to provide costs data on recently completed matters. In the survey, the commission asked questions about the type, duration and outcome of the matter, the costs sought and awarded (including disbursements) and the method for calculating costs. We asked each firm to complete the survey across a sample of 20 matters.

The response rate to the survey was low. Seven law firms participated and the commission received data on 65 recently completed matters. Of the returned surveys, more than two-thirds were completed by firms representing the plaintiff. Two of the 65 returned surveys were from non-parties to a matter. Not all survey questions were answered. Some firms maintained that they could not disclose certain information on the basis of client confidentiality.

The surveys recorded the length of time required for each matter. In 55 per cent of the surveys returned, the matters were finalised in less than two years (one included an injunction application). The remaining matters took between two and eight years to complete.

The surveys also asked respondents to provide details of recovered and actual legal costs. Only 35 per cent of the surveys were able to identify what percentage of actual costs were recovered, as many of the cases had ‘all in’ settlements. Other respondents did not disclose recovered costs. Of the 24 cases where information was available, the percentage of recovered costs to actual costs ranged from 44–80.

It was also possible to examine the relationship between the amount of damages recovered and the amount of legal costs incurred. The commission was able to assess this data from 31 plaintiff files and five defendant files. The total legal costs of the parties, as a percentage of the total amount awarded for a claim, ranged from 256 per cent of the amount award to just 8 per cent of the amount awarded.

The low response rate, the possibly unrepresentative nature of the cases where costs data were supplied and the relatively small scale of the study prevent firm conclusions being drawn. However, the data tended to support the view that, in many cases, only about half of the actual costs incurred in conducting cases is recovered from the losing party. Also, it would appear that the net costs borne by the client, when calculated as a percentage of the amount of damages recovered, is relatively high in many cases. Further detailed research is required.

3.3.2 Survey of Supreme Court data

The commission obtained data from the Supreme Court regarding the taxation of costs before the taxing master. The 247 summonses for taxation filed with the Supreme Court between July and December 2006 were reviewed.
Of the 247 summonses:
- 113 were dismissed or struck out (in most cases because they were settled)
- 134 were taxed by the taxing master.

In correspondence to the commission, the taxing master noted that while individual bills result in quite different amounts being taxed, on average:
- 77 per cent of costs claimed were allowed for bills taxed by the master
- 74 per cent of costs claimed were resolved to be paid by consent in those cases where the costs had been settled and the court was informed of the settlement amount.

The percentage of the amount allowed by the taxing master compared to the amount claimed in the bill ranged from 99.66–28.

The commission also conducted a review of a sample of 30 files taxed in the period July–December 2006, recording 37 separate bills for costs. These files were selected randomly. This review collected data on the legal fees, disbursements and total costs claimed in each bill of costs and the time taken for resolution of costs before the taxing master.

More than half of the bills were taxed or settled within three to four months of the summons being filed. The longest period for resolution was 11 months.

The length of time between obtaining the relevant costs order and filing the taxation summons ranged from two months to five years. There are obviously a number of factors that can influence this period, most of which are entirely beyond the control of the court.

Twenty of the 37 bills as prepared claimed costs which included a disbursements figure greater than the professional fees.

Twenty-seven of the 37 bills resulted in an amount being taxed or agreed by consent and disclosed to the court. Of these 27 bills the costs recovered ranged from 95.94 per cent to 43.64 per cent of the amount claimed in the bill.

In more than half of the bills taxed (where notations as to the amounts taxed off were made available on the court file) more than half of the amount taxed off came from disbursements claimed. These disbursement amounts taxed off were mostly made up of counsel fees.

4. COSTS REFORMS IN OTHER JURISDICTIONS

Common law civil justice systems have been in an almost perpetual state of review in one way or another since the 19th century.122 There have also been various calls for reform of many other justice systems throughout the world for a number of decades.123

Commenting on the commission’s civil justice inquiry, an article in the publication Justinian noted:

*In the 20th century, the Woolf civil justice reforms, introduced in England in 1999, were described at that time by The Economist magazine as, ‘the most radical shake-up of the civil-justice system this century’. Indeed, like the revolting Smallweed in Bleak House, the litigation system seems to ask with regularity, ‘shake me up’. Back in 1996, when the Woolf reform process had commenced, The Economist noted that since Dickens published Bleak House in 1852 there had been: ‘60 official commissions or reports on reforming Britain’s civil justice system. They have had little impact’.124*

It cannot be credibly contended that reforms of Britain’s civil justice system have ‘had little impact’. However, it is of interest to note that as far back as 1953, a committee chaired by the then Master of the Rolls, Sir Raymond Evershed, recommended that masters and judges ‘should pursue a more active and dominant course in the interests of the litigant’. Moreover, it was recommended that the ‘emphasis in the Rules should be shifted in the direction of imposing on the Court a duty of “robustly” applying the powers which already exist, but which by reason of existing habits and practices are rarely employed today’.125

Although the transition from party control of litigation to proactive judicial management has been protracted, and incremental, the pace of civil justice reform has increased in recent years. However, the high costs of litigation remain a major problem.

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121 Eg, in December 2006, Copy Captain charged 11 cents per page for up to 100 pages, and thereafter costs decreased progressively to 6 cents per page; Fed Ex Kinkos charged 12 cents per page for up to 500 pages, thereafter costs decreased to 10 cents per page; Kwik Kopy charged approximately 6 cents per page.

122 Lord Woolf refers to 60 reports on civil procedure in the UK since 1851 in his interim report. See also Australian Law Reform Commission, Managing Justice: A Review of the Federal Civil Justice System, Report No 89 (2000) [1.72]–[1.73].


4.1 THE WOOLF REPORT: A BROAD APPROACH TO COSTS

The reforms introduced in the late 1990s to the English civil justice system following Lord Woolf’s reports have brought about important changes in civil procedure, judicial management of litigation and the culture of dispute resolution.

Initiatives to reduce costs and delays in civil litigation included:

- the introduction of pre-action protocols requiring greater disclosure
- the imposition of overriding obligations, including the concept of proportionality in relation to the conduct, management and costs of litigation
- the development of separate court lists for cases of varying importance and complexity
- the introduction of provisions for fixed and capped costs
- the filing of cost estimates.

These and other initiatives were designed to reduce costs and delays in civil litigation. Just how successful these reforms have been in achieving more affordable justice is discussed further below.

Civil justice reform is symbiotic in nature. The Woolf reforms were in part based on civil justice developments in other jurisdictions, including Australia, and have served as a further catalyst to reform in other countries. Many of the concepts central to the Woolf reforms, in particular those of proportionality and the overriding objective, have been the subject of analysis in civil justice reviews conducted in other jurisdictions in recent years.

The objectives of the Woolf reforms were to improve access to justice by reducing inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs.

Prior to the introduction of the Woolf reforms in England and Wales, the Lord Chancellor engaged Sir Peter Middleton to conduct a further review of civil justice systems. Middleton noted that the Woolf proposals amounted to a coherent programme that can improve the efficiency and flexibility of the court system. I have concluded that the reforms are capable of delivering worthwhile overall benefits.

Middleton then made a number of recommendations. In relation to costs he largely endorsed the proposal for fixed costs while recommending some changes. In particular, he recommended that an alternative to government setting the fixed costs would be to require lawyers to agree on an all-in fixed fee to cover proceedings up to and including trial.

Following the commencement of the revised Civil Procedure Rules in 1999 there was an intense period of debate and uncertainty in the English civil justice system over the impact of the changes, particularly with respect to costs. The head of the Civil Justice Division of the Lord Chancellor’s Department reviewed the impact of the reforms after they had been in operation for six months. After noting that civil servants were paid to take a ‘measured view’, he indicated that he was ‘cautiously euphoric’. However, there were teething problems, including legal challenges to the vires of the new rules. One provision had already been struck down. Another judge had raised concerns about the validity of the rule dealing with privilege attaching to the instructions to an expert witness.

Notwithstanding various concerns, the overwhelming impression was that the reforms were having their desired effect: cases were settling earlier and there appeared to be a change in culture. Importantly, in a number of instances it had been held that authorities dealing with the old rules were no longer relevant. The words of Judge Kennedy were adopted with approval:

_The new order will look after itself and develop its own ethos … references to old decisions and old rules are a distraction. We will not look over our shoulders._

A firm line appeared to be drawn with the past and the Court of Appeal began to refer to the ‘modern litigation culture’. The profession appeared to accept that ‘front loading’ was no more than good practice and that doing the work at the outset promoted early settlement. Moreover, solicitors were said to be adopting a more collaborative, less adversarial, approach to their opponents. The approach to the use of experts was also said to have changed appreciably. Judicial case control seems to have been embraced with enthusiasm. As Gladwell notes with reference to one particular incident: ‘In May Mrs Justice Arden gave her new powers a test drive and barbecued the parties’. As a result
of proactive judicial intervention in that case, the trial estimate was reduced from 12 to five days and settled the next day. According to Gladwell, judges were taking their case management role very seriously indeed.137

The procedures for the summary assessment of costs were apparently causing some difficulties, notwithstanding the fact that this procedure had been developed previously in the Patents Court. Importantly, an evaluation and monitoring program accompanied the introduction of the new procedural reforms. Also, one of the important elements of the reform program was the establishment of the Civil Justice Council. The council is an independent statutory body, sponsored by the Department of Constitutional Affairs. Its membership comprises representatives of all relevant interests. It has an ongoing role in monitoring the impact of reforms and proposing further reforms following a process of consultation, negotiation and mediation with representatives of different interest groups. Work is coordinated across the following committees: alternative dispute resolution, access to justice (including responsibility for the fees consultative panel and public legal education working group), housing and land, clinical negligence and serious injury, experts, costs, rehabilitation policy and rehabilitation rules. The chair is the Master of the Rolls. Members of the council are not remunerated. The need for a similar body in Victoria is discussed in Chapter 12.

The reforms have not escaped criticism. The introduction into civil procedural rules and statutory provisions of ‘overriding objectives’ was intended to facilitate more proactive judicial management and a reduction in the costs of litigation. In England and Wales it would appear that the former has been achieved but not the latter.

The issue of cost recovery has been complicated by an explosion in ‘satellite litigation’ in respect of costs generally, and the use and enforceability of conditional fee agreements in particular. It has also been reported that the number of claims and appeals filed with the English courts has slumped dramatically since the commencement of the Civil Procedure Rules.138

Corresponding with this decline in the filing of civil claims was a substantial increase in the filing of applications with the court in respect of costs.139 As one expert on costs has commented, ‘[t]he public is deserting the courts while lawyers flock to them’.140 The explosion in ‘costs litigation’ and ensuing debate prompted the Civil Justice Council to issue a report in September 2005.141 The council noted that ‘litigation that now extends to “arguments about the costs of arguments about costs” brings the civil justice system into disrepute’.142

Based on recent consultations between the commission and English judges, masters, solicitors acting for claimants and insurers, and members of the Civil Justice Council,143 there appears to be consensus that the post-Woolf reforms have reduced delays and resulted in a substantial increase in cases settled without the commencement of litigation, and a consequential decline in the number of court proceedings filed. However, there appears to be an almost universal consensus that there has not been any reduction in costs and that there may have been an increase in costs.

Generalisations are fraught with difficulty given the enormous diversity of civil litigation. Moreover, there is a variety of factors which have had an important influence on legal costs in England and Wales unrelated to the civil procedure reforms. These include the:

- curtailment of legal aid for civil disputes
- widespread use of conditional fee agreements with success fees of up to 100 per cent of the underlying base fee
- well developed market for after-the-event legal costs insurance
- introduction of ‘full recoverability’ of legal costs
- widespread use, particularly in London, of (unregulated) hourly billing based on rates which are relatively high by comparison with legal fees in Australia.

Furthermore, as noted, significant costs have been incurred in connection with satellite litigation and appeals in relation to costs issues in the course of the recent ‘costs war’ between claimant lawyers and insurers.
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In Hong Kong, reforms to reduce the cost and delay of litigation have also taken a broad, multifaceted approach. The 2004 Final Report of the Chief Justice’s Working Party on Civil Procedure Reform made a number of recommendations in relation to costs, including:

- reducing the need for interlocutory applications, including by costs orders aimed at deterring unreasonable interlocutory conduct
- encouraging the parties to adopt a reasonable and cooperative attitude in relation to procedural issues
- giving directions without the necessity for a hearing
- making orders with automatic consequences for noncompliance
- summary assessments of costs at the conclusion of interlocutory applications
- taking into account the conduct of parties, in light of the overriding objective in relation to the economic conduct of the proceedings, in the exercise of discretion on costs
- changes to practices and procedures for the taxation of costs
- greater disclosure obligations and costs transparency.

A proposal for the introduction of a requirement that parties disclose to the court and to each other estimates of costs already incurred and likely to be incurred was not adopted as a recommendation.

4.2 ALLOCATION OF CASES TO DIFFERENT TRACKS

The Woolf reforms provided for the assignment of cases into tracks according to their nature and the value of the amount in issue. Parts 26.7 and 26.8 of the Civil Procedure Rules govern the rules for allocation and other matters which the court must take into account when assigning a case to one of the tracks.\(^\text{144}\)

The small-claims track is the normal track for any claim which has a financial value of not more than £5000 subject to restrictions in the rules or statute. Specific claims listed in the Civil Procedure Rules for the small-claims track are:

- any claim for personal injuries up to £5000 and where the financial value of damages is not more than £1000
- any claim by a tenant against a landlord for repairs or damages of not more than £1000.

The fast-track is the normal track for any claim:

- for which the small-claims track is not the normal track
- which has a financial value of not more than £15 000.

The court will only allocate one of these claims to the fast-track if it considers:

- the trial is likely to last for no longer than one day
- oral expert evidence at trial will be limited to
  - one expert per party in relation to any expert field
  - expert evidence in two expert fields.

The multi-track is the normal track for any claim for which the small-claims track or the fast-track is not the normal track.

Allocation of matters usually occurs after receipt of the allocation questionnaires being filed by defendants, often soon after defences are filed.\(^\text{145}\)

4.3 COST ESTIMATES AND BUDGETS

One of the initiatives introduced in England and Wales to control costs (apart from the introduction of ‘fixed’ costs) was the requirement of parties to file and exchange costs estimates. The court may order a party to file and serve an estimate of costs at any stage in a proceeding.\(^\text{146}\) In addition to this general discretion, all parties other than those within the small-claims track must file an estimate of costs when they file an allocation questionnaire or their pre-trial checklist.\(^\text{147}\) Parties must provide an estimate of costs and disbursements already incurred and an estimate of costs and disbursements to be incurred which they intend to seek to recover from the other party if successful in the case.\(^\text{148}\)
This tool is designed to allow judges to assess the reasonableness and proportionality of the costs ultimately claimed, with parties required to provide explanations if the costs ultimately claimed by a party differ more than 20 per cent from their filed estimate. Compulsory estimates were expected to put downward pressure on costs from the perspective of all involved:

It was hoped that downward pressure on costs would be exercised by both the potential payers, the losing party and the winner who might not recover all costs on a between the parties basis, and the case managing judge.146

In 2005 the Civil Justice Council reported that the use of estimates and costs capping have met with mixed success:

They are not used consistently and there is much confusion about what each term means in practice and about the relationship between these various devices to control costs.150

In a survey of lawyers and the courts following implementation of the new Civil Procedure Rules, serious doubt was cast on the effectiveness of these cost estimation provisions. It revealed a general view of practitioners that no one really followed the rules on estimates at all and that ‘judges universally stated that the cost estimation rules were not obeyed, but they seemed somewhat reticent in enforcing them unless, say at the end of a Fast Track trial on summary assessment, the costs claimed far exceeded the estimate’. Later it was noted, ‘[s]ome judges seemed to be adopting a somewhat laissez faire attitude … and this appeared to reinforce the lackadaisical attitude of many practitioners’.151

In short, the study by Peysner and Seneviratne concluded that estimates were not acting as an effective control on costs. They noted, however, that as the Civil Procedure Rules did not implement all of the recommendations made by Lord Woolf, it was difficult to see ‘how estimates on their own could ever constitute an effective brake on costs’.152

In Australia similar procedures for filing and exchange of legal cost budgets and estimates exist in the Family Court. Rule 19.04(1) of the Family Court Rules153 requires that immediately before each court event, the lawyer for a party must give the party a written notice of:

(a) the party’s actual costs, both paid and owing, up to and including the court event
(b) the estimated future costs of the party up to and including each future court event.

These notices must be given to the court and each other party on the day of the court event.154

Anecdotal reports indicate that in some registries the court does not strictly enforce compliance with these disclosure requirements. Some practitioners advise that at court events registrars will often enquire whether a party has been given a statement of actual and estimated costs but will rarely require production of a written notice. Exchange of this information in writing between parties also rarely occurs. In fact, when the requirement of exchange of costs information between parties was first introduced it caused consternation among family law practitioners, who complained that disclosure of such information was potentially a breach of client legal privilege and/or open to abuse by other parties.

In the recent procedural reforms of civil litigation in NSW, the courts were given explicit statutory powers to order directions regarding the disclosure of actual and estimated legal costs of a proceeding. Section 62(6) of the Civil Procedure Act 2005 (NSW) provides that the court may by order at any time

direct a solicitor or barrister for a party to give to the party a memorandum stating:

(a) the estimated length of trial and the estimated costs and disbursements of the solicitor or barrister; and

(b) the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.

Further to this provision, Order 42.32 provides that the court may order at any stage of proceedings that a party’s legal representative serve on the party a notice that specifies:

• an estimate of the largest amount (inclusive of costs) for which judgment is likely to be given if the party is successful

144 There is also an extensive Practice Direction on Allocation and Reallocation to supplement Part 26.
145 Civil Procedure Rules 1998 (UK) r 26.05.
146 Her Majesty’s Courts Service, Practice Direction About Costs (2007, 45th Update) [6.3]–[6.4].
147 Ibid [6.4].
148 Ibid [6.2].
150 Civil Justice Council (2005) above n 141, 21.
151 Peysner and Seneviratne (2005) above n 4, 70.
152 Ibid 71.
153 The predecessor to the current Rule 19 of the Family Law Rules 2004 was Order 38, Div 1A of the Family Law Rules 1984, which imposed similar requirements. Family Court Practice Direction No 2 of 1991 (which has subsequently been repealed) imposed similar requirements, although it did not require disclosure of costs statements and estimates to the other parties.
154 Family Court Rules, r 19.04(3).
• an estimate of the largest amount (by way of costs) that the party may be ordered to pay if the party is unsuccessful
• estimates of the best and worst case outcomes the party is likely to achieve if successful or unsuccessful in the proceeding.

It has been noted that this order enshrines orders that ‘have over the years been made from time to time by other judges and magistrates … They are of course, a tool to facilitate settlement in face of intransigence’.155

Unlike the English provisions regarding estimates, the NSW provisions anticipate orders to disclose both the actual costs it is estimated will be incurred (pursuant to the client and solicitor retainer), and the estimated party–party costs that the party could be ordered to pay if unsuccessful. The rules do not extend to the filing or service of the costs estimates with the court or between the parties. To this extent the NSW provisions elaborate and give weight to the statutory obligations for disclosure of costs estimates that already exist in the Legal Profession Act 2004 (NSW) at sections 309(1)(c) and (f).

Similar disclosure obligations for costs estimates exist in Victoria.156

4.4 PROPOSED ESTABLISHMENT OF A COSTS COUNCIL

The UK’s Civil Justice Council has observed that the successful operation and ongoing viability of the costs reforms requires the establishment of an overseeing body. Accordingly, the council has recommended the establishment of a body to be called the Costs Council.157 This body’s role would be to oversee the introduction, implementation and monitoring of reforms and in particular to establish and review annually both the fixed fee regimes and guideline rates for the different tracks provided for in the Civil Procedure Rules.

The Civil Justice Council recommended a member of the judiciary should chair the Costs Council and that membership should be drawn from all stakeholder organisations involved in the funding and payment of costs. The proposal to include all stakeholders in the setting, monitoring and reviewing of costs regimes is in keeping with the modus operandi of the Civil Justice Council itself. Its commitment to this wider involvement of all stakeholders is evidenced through various initiatives. For example, the council has established a dedicated ‘costs’ website through which stakeholders are encouraged to post questions and answers, and where relevant papers are available.158

The Civil Justice Council’s recommendations were debated by representatives of the legal profession and other stakeholders at a Costs Forum in March 2006. Concerns and queries regarding the proposed Costs Council discussed at the forum included the following:

• government concern that the Costs Council may infringe the government’s policy making powers and that it must be clear this body would not be involved in ‘implementing’ reforms
• concern that the Costs Council should only ever recommend rates which ultimately always remain a judicial decision
• concern that the membership would include representatives of all interested parties
• the need for further work to identify the function and funding of the proposed Costs Council.

At the time of writing, a decision on whether the Costs Council is to be established has not been announced.

The report of the Irish Legal Costs Working Group has also recommended the establishment of a legal costs regulatory body which would take over the existing functions performed by the court rules committees and other bodies, as well as exercising new powers to set guidelines and limits in respect of costs. It is proposed that such a body would also have a public information role.159

4.5 THE CONCEPT OF PROPORTIONALITY

The concept of proportionality and its application to the issue of legal costs has an immediate attraction in its simplicity. How can justice be associated with a matter in which the hearing of a claim for $10,000 incurs legal fees of $12,000 or greater? The research conducted for Lord Woolf’s review revealed a number of matters in which the legal costs amounted to 100 per cent or more of the amount
in issue—hence Lord Woolf’s push to impose proportionality as a constraint on excessive legal costs and disproportionate use of court resources. The problem is easily identified but the solution is somewhat more elusive.

The exercise of applying proportionality to costs is not as simple, nor effective, as one would hope. It has also been questioned whether the notion of awarding costs proportionate to the value, complexity and importance of a matter is really a new solution:

There is a question whether proportionality is really something original, likely to have a beneficial impact on procedural law. Or whether it is simply old wine in new bottles, and likely to disappoint us.

One problematic issue in relation to the test of proportionality arises out of the fact that often ‘there is no causal link between the amount of fees charged for legal services and the value of the claims’. The complexity of cases, and the demand this will place on both the quality and amount of legal services required, is not necessarily dictated by the amount in issue. Moreover, the costs incurred will be directly related to the breadth of the claims asserted and the vigour with which the defendant chooses to resist the claims and the resources available.

In its review of the federal civil justice jurisdictions in Australia, the ALRC noted that the simple exercise of applying a test of proportionality to costs and the value of claims runs into difficulty when the case in question does not involve a quantifiable amount of money.

The need to factor into costs provisions some allowance for the ‘complexity’ or importance of the issues in dispute has been accepted in a number of jurisdictions. For example, in New Zealand and British Columbia, cases are assigned to the relevant costing tariffs, scales or bands based on the complexity of the issues involved. This practice was most recently endorsed by the Manitoba Law Reform Commission in its report on costs awards in litigation. The Manitoba commission made a specific recommendation that ‘proceedings be assigned to classes on the basis of their relative degree of difficulty and/or importance, rather than the amount of money in issue’.

A recent Ontario report on reforming the civil justice system used proportionality as one of four key principles and considerations for reform. The Hon. Coulter Osbourne, former Associate Chief Justice of Ontario, said proportionality ‘reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake’. The report goes on to recommend the inclusion of an overarching principle of proportionality in the Rules of Civil Procedure,

that the court and the parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.

Following from this principle, it was proposed that all cost orders should consider the time and cost justified in the circumstances of the case, not merely the time and cost expended.

This is not to suggest that Lord Woolf intended that the test of proportionality merely required a quantitative assessment of the economic relationship between the legal costs and the amount in issue. Rule 1.1(2)(c) of the Civil Procedure Rules requires that cases be dealt with in a manner proportionate to:

(i) the amount of money involved
(ii) the importance of the case
(iii) the complexity of the issues
(iv) the financial position of each party.

Moreover, it was noted that:

The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

Lord Woolf has himself given guidance with respect to proportionality:

What is required is a two stage approach: there has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part
4.4.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the costs for that item should be reasonable.\textsuperscript{160} One difficulty with the concept of proportionality, at least in its application to the quantum of damages, arises out of the fact that law firms, as commercial businesses, are subject to inflationary pressures whereas damages, by and large, have not increased correspondingly.\textsuperscript{161} As a result of various tort reform measures, the quantum of recoverable damages has been significantly reduced in recent years, while lawyers have experienced significant increases in the cost of overheads.

4.6 COSTS RECOVERY

4.6.1 Indemnity principle

Prior to the Statute of Westminster in 1275 there was no entitlement to recover costs. Since then in various common law jurisdictions a variety of mechanisms and formulas have been introduced to facilitate recovery by the winning party of some or all of the costs of the litigation from the losing party. Although the ‘indemnity’ or ‘loser pays’ principle has been adopted in many common law jurisdictions, including throughout Australia, most civil litigation before US courts is conducted on the basis that each side bears its own responsibility for the legal costs which it incurs. Moreover, unlike in Australia, fees are usually calculated as a percentage of the amount successfully recovered.

In 1995 the ALRC recommended retaining the principle that ‘costs follow the event’ or the costs indemnity rule. The ALRC recommendations were endorsed by the Law Reform Commission of Western Australia in 1999, which referred to the principle as that of ‘the loser pays’.\textsuperscript{171} Both of these reports noted that there should be exceptions to the general application of this rule in:

- public interest cases
- cases where orders are made as sanctions or against third parties such as lawyers and
- situations where the financial circumstances of a party means the general rule would adversely impact the presentation of the case or chances of settlement.

Legal costs remain an issue of complexity and continuing controversy. Indeed, in the post-Woolf landscape in England there remain many who call for the end of the indemnity principle. The advent of the fixed costs regimes as part of the Civil Procedure Rules was heralded by many as being the first move towards this goal. However, there are only limited circumstances at present where legal costs are ‘fixed’, although this matter is under review by the Civil Justice Council. One commentator in the UK has recently observed:

Parliament may have executed a monarch, precipitated a civil war, dismantled an empire and taken on the unions; judges may have taken on the government that took on the unions etc. etc. but no one, it seems, is capable of dealing with this apparently indestructible beast. So unhappy 731st birthday Mr Indemnity Principle and may you have no more.\textsuperscript{172}

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 costs recovered by the successful litigant. Thus, successful plaintiffs were often required to meet the shortfall out of the fruits of the litigation or out of their pockets. Successful parties would often feel justifiably aggrieved. This still remains the position in Australia in most jurisdictions, including Victoria. In many instances, a successful party can expect to recover on a party–party basis only about half of the costs incurred by that party.

In England and Wales, with the introduction of conditional fees and success fees in civil litigation, the government introduced ‘full recoverability’ of legal fees and expenses concurrently with its curtailment of legal aid funding for civil litigation. Thus, not only are the basic expenses and legal fees (usually calculated on hourly rates) recoverable from the losing party, the losing party is also required to foot the bill for the ‘success fee’ component. The understandable concern on the part of losing parties has been exacerbated by the fact that success fees are permitted to be up to 100 per cent of the underlying base amount of the fee. Moreover, as in most Australian jurisdictions, the quantum of the base fee is not itself regulated or restricted, at least insofar as the contractual relationship between
solicitor and client is concerned. To make matters worse for the losing party, any premium paid or payable by the plaintiff for ‘after the event insurance’ (in respect of legal costs) is also payable by the losing party.

The primary regulatory focus in relation to legal fees, as in Australia, is on disclosure and compliance, with quite onerous obligations on lawyers when entering into retainers agreements with clients. Alleged noncompliance with these onerous requirements has led to a considerable amount of ‘satellite litigation’ whereby unsuccessful defendants (or, more usually, their insurers) have sought to avoid the impact of adverse costs orders. This ‘costs war’ has been conducted because technical or other breaches of disclosure and other obligations may give rise to an unenforceable fee agreement as between solicitor and client. In this event, the losing party has no obligation to indemnify any amount, let alone the full amount.170 Recent judicial rulings and changes in the law have sought to bring an end to this litigious war.

In 2005 the Manitoba Law Reform Commission published its report Costs Awards in Civil Litigation. The report commences by examining the rationale for cost awards and listing the broad and often competing goals that need to be balanced to the greatest extent possible:

- Cost rules should provide financial incentives to settle at every stage of the litigation.
- Cost rules should be easy to understand and simple to apply, providing clear guidance to courts and litigants and predictability at each stage of litigation.
- Cost rules should provide successful litigants with at least partial indemnification.
- Cost rules should also deter frivolous actions and defences.
- Cost rules should provide access to justice.

The Manitoba commission recommended the partial indemnification of successful litigants at a level of approximately 60 per cent of reasonable fees in a typical case.

It further recommended that six classes of tariffs be designed and that cases be assigned to those classes on the basis of their relative degree of difficulty and/or importance, rather than the amount of money in issue.

The Manitoba commission recommended that parties should indicate the appropriate class for the matter at the time they file their first pleading, and failing consent the judge should assign the case at the first directions hearing.174

### 4.6.2 Party–party costs

In 2000 the High Court of New Zealand radically altered the manner in which costs are assessed and recovered on a party–party basis. In 2004, the rules of the District Court in New Zealand were amended to effectively bring that court’s costs regime into line with that of the High Court. The impetus for the change was universal agreement that the existing scale was outmoded and ineffective. Judges had apparently been using their discretionary powers to simply award 60–70 per cent of actual reasonable costs.175

> After broad consultation, a scheme was developed and implemented which categorises cases according to complexity and then assigns them to one of three bands according to time requirements for the steps for that case. The costs are then calculated by multiplying the relevant category hourly rate by the time for each step as set out in the timing band.

As Justice Venning of the New Zealand High Court has noted:

> The costs award is tied to the time allocated to the steps in the proceeding and the skill required to conduct the proceeding. It is unaffected by whether the claim is for $200 000 or $2 000 000 or whether the parties took substantially longer than six days to prepare for hearing.176

It should be noted, however, that in the 2004 review of the civil justice system in New Zealand, the Law Commission reported that in the submissions it received, those ‘commenting on cost recovery almost universally felt that cost recovery bears little relationship to actual fees charged’.177

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169 Home Office v Lownds [2002] EWCA Civ 365 [31].
170 One of the by-products of recent tort reforms in Australia has been the introduction of caps on general damages (albeit with provision for some inflationary adjustment) and other restrictions on the quantum of recoverable general and special damages.
173 In Hollins v Russell [2003] EWCA Civ 718 the Court of Appeal gave guidance on technical challenges to conditional fee agreements with a view to curtailing the highly technical arguments based on relatively minor infractions of the requirements contained in the primary and secondary legislation.
176 Ibid 8.
4.7 FIXED COSTS

The ‘fixed recoverable costs scheme’ under the UK Civil Procedure Rules applies only to disputes:

- arising from road traffic accidents (on or after 6 October 2003)
- where the total value of the agreed damages does not exceed £10 000
- where the disputes are settled before proceedings are issued, and
- where the case would not have been in the small-claims track if proceedings had been issued.

Costs are not recoverable in small claims, which encompass claims up to £1000 for personal injury and £5000 otherwise.

The costs payable under the fixed costs regime are fixed rather than capped at the prescribed amount. There is no need to justify the amount of work done or to specify who carried it out. As Underwood notes, this ‘opens up the possibility of fixed cost work being offshored to cheaper jurisdictions’.

The court has a discretion to award costs in an amount greater than the ‘fixed recoverable costs’ in ‘exceptional circumstances’.

Where the work has been done pursuant to a conditional fee agreement, a success fee is recoverable on top of the fixed costs.

Importantly, given the historical resistance to percentage-based fees, the fixed costs regime explicitly adopts as part of its methodology a component of the fee calculated as a percentage of the amount of damages recovered. Moreover, as Justice Simon noted in Nizami v Butt, Kamaluden v Butt changes made to the Rules of Court, and in particular the provisions of sections II to V of the Civil Procedure Rules Part 45 ‘were introduced following “industry wide” discussions under the aegis of the Civil Justice Council’.

In Nizami Justice Simon commented on the new fixed costs rules:

It seems to me clear that the intention underlying CPR 45.7-14 was to provide an agreed scheme of recovery which was certain and easily calculated. This was done by providing fixed levels of remuneration which might over-reward in some cases and under-reward in others, but which were regarded as fair when taken as a whole.

The Civil Justice Council has proposed the extension of the fixed costs regime to other areas of litigation. In its 2005 report, the council recommended that the predictable costs scheme should be extended to all personal injury cases in what is referred to as the fast-track, and in turn that the cap for cases in the fast-track be increased to £25 000.

4.7.1 Transport accident protocols

Fixed fees are not totally foreign to the Australian experience generally or to Victoria in particular. In accordance with its Charter and commitment to the Victorian Government’s model litigant guidelines, in October 2004 the TAC met with the Law Institute of Victoria and Australian Lawyers Alliance with a view to reaching agreement on various matters, including costs. Three protocols were adopted which deal with no-fault resolutions, impairment benefit claims and serious injury and common law claims. The protocols govern the conduct of both the TAC and lawyers for claimants with respect to claims or matters arising under the Transport Accident Act after 1 April 2005.

The Victorian protocols reflect similar procedures applicable in Queensland under the Motor Accident Insurance Act 1994.

The protocols outline measures to avoid procedural conduct that increases the legal costs incurred, including:

- mandating ‘early review of claims’
- adherence to procedural steps such as early disclosure of relevant information and documents and minimum requirements for exchange of medical evidence
- strict timetables for delivery of information
- strict timetables for the response by the TAC to applications.
In turn, the protocols provide for payment of fixed legal costs in particular circumstances. Importantly, the protocols allow for costs to be paid on resolution of a claim, even if proceedings were not instituted.

The protocols incorporate an agreed regime for payment of legal costs by the TAC in certain circumstances. For example, when a claim for a serious injury certificate is made and prior to proceedings being issued the TAC issues a certificate consenting to the bringing of common law proceedings but in circumstances where the TAC is not solely on risk, then fixed costs are payable by the TAC within 14 days of such certificate.

In some circumstances the protocols set a cap or limit on costs. For example, where a common law action is resolved in circumstances where the TAC is satisfied the claimant’s injury is a serious injury and has issued a certificate consenting to common law proceedings, the TAC will pay legal costs limited to a set amount exclusive of disbursements.

The protocols provide for any party’s legal costs not covered by their provisions to be determined by reference to the appropriate court scale. The table of agreed costs annexed to the protocols also provides for certain categories of uplift amounts, for example when court approval is required or when the TAC did not admit liability prior to the case conference.

The fixed costs mandated by the protocols are indexed according to the Consumer Price Index.

178 Civil Procedure Rules 1998 (UK) r 45.7(2).
180 Civil Procedure Rules 1998 (UK) r 45.12.
181 The success fee is now fixed at 12.5 per cent of the base fee. The base fee includes both a core fee (£800) plus a percentage amount depending on the amount of the claim. This percentage is 20 per cent of the amount of damages up to £5000 and 15 per cent of the amount of damages between £5000 and £10 000. There is an additional 12.5 per cent payable if the claimant lives in a specified geographical region (the ‘golden ring’) and instructs a law firm practising in that area. Thus, where this is applicable the fee will be 25 per cent above the normal base costs.
182 Sitting with Master [now Costs Judge] Peter Hurst and Mr Jason Rowley as assessors.
183 [2006] EWCH (QB) 159; [2006] 2 All ER 140, [22].
184 [2006] EWCH (QB) 159; [2006] 2 All ER 140, [23].
185 Formerly the Australian Plaintiff Lawyers Association.
186 Unpublished paper by Peter Burt, provided to the Victorian Law Reform Commission.
4.7.3 Widening the application of fixed costs?

Almost a decade ago, the notion of fixing and/or capping costs in the federal civil jurisdiction in Australia was canvassed in a report prepared for the Federal Attorney-General’s Department. The report found that the current scales were badly structured and proposed alternative scales to govern both solicitor–client and party–party costs in a number of federal jurisdictions.

Criticisms of costs scales included the contentions that the scales:

- created uncertainty
- were a disincentive to settlement
- created an incentive for wasteful expenditure, or ‘padding’ and
- created inappropriate biases towards types of inputs such as use of expert witnesses.

Accordingly, the report advocated scales that effectively fixed the costs for a matter at the outset, with allowances being made for the stage of the proceedings when the matter is disposed of and the complexity of the matter. A later Commonwealth Attorney-General’s Department strategy paper supported a recommendation to enable a court to specify the maximum amount that may be recovered pursuant to an order for costs.

Proponents of fixed costs regimes emphasise the need for predictability and proportionality and the desirability of getting away from open-ended billing arrangements which may be conducive to cost escalation and which reward inefficiency and overservicing.

Opponents of fixed costs point to the complexities and uncertainties of litigation, and the desirability of ensuring that legal work is not rendered uneconomic as a result of arbitrary and inflexible caps on the quantum of chargeable or recoverable fees. Moreover, they say, commercially unreasonable restrictions may result in a lack of access to justice if lawyers are not prepared to do the work, or a deterioration in the quality of legal services in the event that the work is required to be delegated to junior or paralegal staff.

Nevertheless, some commentators have observed that ‘notwithstanding difficulties or complexities, it seems to us that a fertile line of inquiry is to explore systems of cost capping and fixed prices’.

In the debate about ‘fixed’ costs it is important to focus on both the chargeable costs and the recoverable costs, and the costs chargeable by both parties to the litigation. Capping or fixing one component of the costs without taking account of the other may create additional problems. For example, merely capping recoverable costs may simply increase the disparity between chargeable costs and recoverable costs. This may lead to injustice for the winning party and an erosion of the indemnity principle with consequential benefits for the losing party. Capping chargeable costs for one party without capping them for the other party may give rise to commercial and forensic advantages to the party whose costs are uncapped. As Professor Scott has commented:

> If wealthier parties are allowed to cause delay or use non standard procedures, their position might, if anything, be strengthened by fixed costs, because they could put their opponents to extra costs that they would in future be unable to recover, even if they eventually won the case.

Capping chargeable costs for either party may preclude the provision of legal services or have an adverse impact on the quantity or quality of the services provided. Moreover, limiting the ability of lawyers to charge for their services may give rise to other problems, and runs counter to recent deregulatory moves which are said to be in the interests of efficiency and competition in the marketplace.

These difficulties and tensions in relation to capped or fixed costs have been evident in the new costs provisions in NSW, which fix maximum costs for personal injury claims that recover damages up to $100 000. The provisions set maximum costs that may be recovered by either plaintiffs or defendants in such cases in the following manner:

- for plaintiffs maximum costs are fixed at 20 per cent of the amount recovered or $10 000, whichever is greater
- for defendants maximum costs are fixed at 20 per cent of the amount sought to be recovered by the plaintiff or $10 000, whichever is greater.
The provisions also purport to fix or cap the amount that a law practice is entitled to be paid for legal services in these cases at the same maximum levels. However, this is subject to section 339 of the Act, which states that the maximum costs do not apply to those law practices which have a complying costs agreement with their client. In effect, the Act fixes the recoverable costs so that a successful party can only recover between $10,000 and $20,000. The actual legal costs or ‘gap’ in costs for such matters are not compulsorily regulated, as law firms may contract out of any cap on fees for legal services provided.

The negative impact of these maximum costs provisions on successful plaintiffs has been criticised. The authors of a NSW report have argued that the section does not have any effect on the overall cost of running matters but simply shifts the cost burden from the defendant to plaintiff, and have described the legislation as creating a ‘continuing and gross injustice. The result is that many successful plaintiffs fail to get adequate compensation or compensation at all and many others are dissuaded from commencing meritorious cases.

4.8 BILLING

4.8.1 Approaches to hourly billing

In its recent report, the British Columbia Justice Review Task Force noted but did not proffer any solutions to problems arising out of hourly billing:

For several decades, the vast majority of lawyers have charged for their services based on an hourly billing model. This method, however, has been increasingly criticized as a primary cause of escalating legal costs, decreasing practitioner efficiency, reduced career satisfaction, unhealthy work-life balance, loss of respect for the legal system, and decreased access to justice. Hourly billing was initially adopted as a means of providing clients with cost certainty while facilitating the management of law office budgets. However, the problems with that approach appear to be overtaking its benefits. Although the current predominance of the hourly billing system is recognized as a problem, a solution remains elusive. Alternative billing schemes exist, but it is unclear whether these would in fact address the root problems that plague the current model. Lawyers are reluctant to adopt untested systems that they fear will result in less flexibility, lower profits, and more complicated management. We suggest that the issue be studied further.

In Germany, the general rule in civil procedure is that the losing party bears the costs (court fees, lawyers’ fees, witness and expert expenses) of the opposing party. The lawyers’ fees are regulated by the recovery scale (the BRAGO scale). Lawyers normally charge in accordance with the BRAGO scale although, with the agreement of the client, they can charge lower or higher than the scale. Higher costs cannot be recovered from the losing party. It is only recently that lawyers have been allowed to charge lower than BRAGO. This means that it is reasonably clear to the opposing parties what their liabilities might be if they lose the case.

Like court fees, lawyers’ fees are set in units with a value that is determined by the value of the claim. The percentage value of the lawyers’ fee unit compared to the value of the claim increases the more the value of the claim decreases. The number of units of lawyers’ fees payable is set for different stages of the litigation. For example, one fee unit is payable at the commencement of the proceeding; a fee unit is earned when there is a hearing; another fee unit is payable if there is a settlement.

4.8.2 NSW legal fees review

In February 2004 the NSW Premier commissioned an inquiry into the legal costs system, the calculation of prices and the methods in which bills are presented to clients. In addition, the inquiry encompassed a review of the mechanisms through which clients could object to fees that were considered unfair or negotiate other arrangements.

The 2005 report documents the failings and resistance of the legal services industry to address concerns about time billing. However, the panel’s report suggests that the market (albeit sophisticated corporate clients and commercial litigation funders) may be mounting a ‘push back’ which demands change from legal firms.
Chapter 11

Reducing the Cost of Litigation

One of the alternatives to time billing mooted in the panel’s report is the greater use of costs budgets. This has considerable support from IMF, the litigation funding organisation which made submissions regarding its successful use of budgets in contracting with lawyers for the conduct of commercially funded litigation.

The panel’s various proposals were said to be based on three ‘foundational principles’:

- the short to medium term goal of improving communication and transparency of information between lawyers and clients
- the medium to longer term goal of encouraging ‘cultural change’ in the legal profession, reducing the dominance of time billing and moving towards more actively negotiated and more directly value based remuneration and
- the medium to longer term goal of providing information to the market which will help to reduce the ‘information asymmetries’ which currently distort it.

Many of the report’s 37 recommendations were not adopted by the legal profession representatives on the panel. The recommendations encompass:

- greater disclosure obligations (1–4) with consequences on recoverable fees for failing to comply (12, 15)
- a proposed prohibition on profits on disbursements and separate charges for disbursements in the nature of overheads (5–6)
- proposals for obtaining estimates of experts’ fees and client consent (7)
- the establishment of a working group to develop guidelines in respect of barristers’ cancellation fees (8)
- a further review of class actions with a view to possible further reforms in relation to disclosure and cost arrangements (9)
- a proposed requirement that, other than in exceptional circumstances or with express consent of the client, solicitors not be entitled to be paid solicitor-client costs until party-party costs are resolved (10);
- provision for costs assessors to refer matters to the Legal Services Commissioner where there has been a failure to comply with legislative disclosure requirements (14)
- a statutorily regulated budgeting process as an alternative to the compulsory disclosure regime and various provisions relating to budgets (16–29)
- a requirement to render final accounts no later than six months after completion of the matter and a prohibition on interest on accounts rendered later than this time frame (30–31) including a requirement that bills rendered express the amount as a percentage of the estimate (32)
- entitlement to interest, at the rate allowed by the Supreme Court, on professional fees and disbursements carried throughout the course of the matter (36)
- the establishment of a research unit to examine and publicly discuss issues of law firm economics and legal practice management and their economic impact on the overall justice systems (37).

4.8.3 Conditional fees

In September 2005 the Conditional Fees Subcommittee of the Law Reform Commission of Hong Kong issued a consultation paper on conditional fees. In addition to proposing the introduction of conditional fees the report proposed the setting up of a privately run contingency legal aid fund.

4.9 COSTS AND THE ADVERSARIAL SYSTEM

One of the major contributors to the cost of legal services in civil litigation is the adversarial system. Often each of a number of parties has engaged its own team of lawyers, experts and witnesses in support of its case. This inevitably results in a multitude of identical or similar tasks being done more than once by different personnel. The ‘multiple’ processing of the same information and documents inevitably escalates costs. The calling of multiple experts for the same subject matter substantially increases costs. To some extent this is an inevitable by-product of an adversarial process whereby each
party is partisan and seeks to advance its self-interest. To a large extent this is not only facilitated but is necessitated by traditional civil procedural rules and the litigation culture which has developed. There are, however, many signs of change, as recent developments in England and Ireland show.

4.9.1 Claimants dealing directly with insurers to reduce costs

In England a number of insurers, concerned at the costs of civil litigation (particularly given the introduction of ‘full recoverability’ of legal costs, including success fees and after-the-event insurance premiums), have recently advocated that claimants should deal with them directly rather than engage their own lawyers and thus precipitate an escalation in legal costs on both sides.

Insurers were concerned that the present compensation system takes too long to resolve claims, delivers insufficient rehabilitation and involves ‘disproportionate’ and often hidden handling costs. They proposed, inter alia:

- a new process for resolving claims before they reach courts, including fixed timetables, independent arbitration and free legal advice above the small-claims limit
- extended use of fixed fee regimes
- higher financial limits that determine how claims are handled through the courts
- new financial penalties to deter exaggerated claims or unreasonable actions by insurers.202

Directed at claims under £25,000, which were said to constitute more than 90 per cent of all personal injury claims, the new scheme proposed that the insurer would be able to offer an apology, accept liability and make an offer of compensation before the claimant’s representatives incurred costs. In part this proposal arose out of concern at the increase in transaction costs in compensation litigation. Claimants’ legal costs and disbursements were said to have increased by 40 per cent between 2000 and 2002.203 It was contended that for every £1 insurers paid out in personal injury compensation, nearly 40 pence went to claimants’ representatives. According to the report:

*The personal injury claims process is now an industry in its own right, generating an income out of all proportion to the value it adds. A claimant seeking redress has become a commodity whose case is bought and sold by the different claimant service providers. Each service provider pays large referral fees for the right to provide services to the claimant because the costs flowing around the system enable each provider to make money on top of any referral fees paid. The current system, based on market principles but without an effective market of informed consumers shopping around to get the best price, is allowing claimants’ representatives to set their prices and commission reports without sufficient checks and balances.*204

The report was particularly critical of the Woolf civil procedure reforms and the pre-action protocols:

*This front-loading of costs is often disproportionate and unnecessary. For example, in many cases, insurers would accept liability without requiring all of the research undertaken by claimants’ representatives.*205

Norwich Union, one of the UK’s largest insurers, also proposed a new system for dealing with claims.206

We want to find a way of settling straightforward claims direct with the claimant. We recognise this requires implicit trust from the public that they will get a fair deal, and that as an insurer, we might be charged with self interest. We accept, therefore, that we must be better and quicker at dealing with claims, and where we are not, are financially punished for it.207

4.9.2 Independent body and initial assessment of claims

In Ireland, concern about the costs of litigation arising out of adversarial civil proceedings in personal injury cases has led to the establishment of an independent board, the Personal Injuries Assistance Board, to conduct the initial assessment of such claims.208 Interestingly, the board operates without public funding other than the initial grant that supported its establishment in 2004. It is funded by levying fees on respondents who pay the compensation. This funding mechanism is not unlike industry-based dispute resolution schemes in Australia.209
Initially the Personal Injuries Assistance Board adopted a simple solution to the problem of legal costs: it refused to deal with lawyers for claimants and made no payment of legal costs for claims resolved. Following a successful legal challenge, the board is now required to deal with lawyers for claimants. At present approximately 90 per cent of claimants are legally represented, even though legal costs are not payable by the board if it accepts and pays a claim. Thus the claimant is required to meet legal costs out of the compensation amount.

The board was established to significantly reduce the cost of delivering compensation to claimants, without altering the level of awards, and to implement a less adversarial and faster process for resolving personal injury claims. This was intended to result in a reduction in insurance premiums and was introduced as part of the government’s Insurance Reform Program.

The board does not deal with cases which involve legal issues or where liability is disputed. Proponents of the reform have suggested that the new system has accelerated the process and reduced costs. The board has stated that:

- awards are made within nine months compared with the time frame for litigation which was said to be three to four years
- under the old litigation system ‘delivery costs’, on top of the amount of awards, including legal and medical expenses, were said to account for around 46 per cent of the amounts paid in compensation
- the new system is three times faster and four times cheaper than the old litigation based process, while still providing awards of similar value
- claims are assessed within the statutory timeframes, with 93 per cent assessed within nine months and the remaining claims within 15 months.

The board has projected it will receive 25,000 cases per annum of which 40 per cent will be assessed, 40 per cent will settle during the process and 20 per cent will proceed to litigation. The cost of processing cases is said to be 7 per cent of the costs of the average claim.

The impact on court statistics is marked. Whereas 15,000 writs were issued in the High Court in 2004 there were only 750 in 2005. In the Circuit Court there were some 20,000 civil claims instituted in 2004 and approximately 3000 in 2005.

Critics of the system have suggested that delays have led to large numbers of claimants abandoning the system and returning to the courts. There are claims that the board is making awards in fewer than one in eight claims and has assessed just 4000 claims out of a total of 36,000 lodged since 2004. It was reported that a large proportion of cases are not being dealt with by the board because insurance companies circumvent assessment by making undisclosed settlement offers and that up to 25 per cent of claims still end up in the courts.

According to a columnist with the Sunday Times:

_That posh whining sound you can hear is a cry of well heeled pain. For Ireland’s lawyers, the suffering and emotional distress is concentrated in the most sensitive part of a legal practitioner’s body: the wallet._

As with the adversarial system, the truth may lie somewhere between the extreme positions advocated by the parties. A recent cost-benefit analysis of its operations concluded that the board has reduced the costs of processing personal injury cases considerably, without any diminution in the size of the awards to injured claimants and possibly with some higher awards. Assessments were said to be delivered, on average, 75 per cent faster than the law courts.

4.10 COSTS AND THE CONDUCT OF CIVIL LITIGATION

In England and Wales, and in other jurisdictions including Australia, civil procedural rules and statutory provisions have been amended by the incorporation of overriding objectives designed to facilitate more proactive judicial management of litigation and to reduce costs. Overriding objectives and obligations are discussed in Chapter 3 of this report.

It remains to be seen whether the introduction of such overriding objectives, per se, will give rise to more proactive judicial management of cases or a reduction in costs.
As noted in Chapter 3, in some Australian jurisdictions statutory provisions have recently been introduced to prevent unmeritorious claims or defences and/or to subject lawyers and others to personal liability for costs or other sanctions for inappropriate conduct in the commencement, defence or conduct of civil proceedings.

In response to perceived problems in the civil justice system, the roles and responsibilities of participants in the civil litigation process are being statutorily redefined, albeit in an ad hoc fashion. Some examples are provided in Chapter 3.

All of these disparate developments have one thing in common: they seek to improve the primary standard of conduct of participants in the civil justice process and impose sanctions and penalties for nonconforming behaviour. Costs sanctions are a major part of the armoury sought to be deployed with a view to reducing the incidence of unmeritorious and costly claims and defences.

Such provisions in part seek to legislatively override lawyers’ perceived obligations or duties to clients. Lawyers have always been said to have a duty to the court and to the other side, in addition to their duty to their client. In reality, many if not most lawyers have traditionally perceived their duty to their client to be paramount. This has significant implications for the adversarial conduct of litigation and important cost consequences. Where the client is a paragon of virtue a lawyer’s duty to the client may not present a potential conflict with other duties. However, like many other members of the community, clients are often motivated by self-interest and are seldom paragons of virtue.

5. COSTS IN ‘PUBLIC INTEREST’ LITIGATION

There is little point in opening the doors to the courts if litigants cannot afford to come in.

5.1 THE CASE FOR PUBLIC INTEREST COSTS ORDERS

Cases brought in the ‘public interest’ play an important role in determining legal issues for the benefit of the community. As the Australian Law Reform Commission has noted, public interest litigation assists the development of the law, providing ‘greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law’. Public interest litigation can also provide an impetus for reform and structural change and encourage public sector and corporate accountability.

It is also clear that the threat of an adverse costs order, which operates as a deterrent to many forms of litigation, has a particular impact on public interest litigation. It has been noted that:

As the cost of litigation soars, access to justice suffers. This axiom particularly holds true in the case of public interest litigants. While such litigants typically do not stand to gain financially from pursuing court action, they risk significant economic consequences if their suits are ultimately unsuccessful and they are ordered to pay the victor’s legal costs. This is problematic because our civil justice system presumes that plaintiffs are motivated by rational self-interest, typically financial, in making decisions respecting the initiation and conduct of litigation.

Particular rules for awarding costs in public interest litigation have been under consideration in Australia for over a decade.

The ALRC considered the question of costs in proceedings with a ‘public interest’ element. Their report, Cost Shifting—Who Pays for Litigation in Australia noted that although the courts had the power to depart from the usual rule that costs follow the event, its exercise was uncommon. The ALRC concluded that ‘the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules’ and recommended that courts be permitted to make specific public interest costs orders.

The commission has taken into account this and other developments in considering the introduction of special costs rules for public interest litigation.

212 The Irish independent investigation.
214 Ibid.
217 ALRC (1995) above n 171, [13.6].
221 Ibid Recommendation 37.
5.1.1 The ALRC’s proposed ‘public interest costs order’

The ALRC proposed that a court or tribunal ought to be empowered to make a ‘public interest costs order’ (PICO) in respect of proceedings that will:

- determine, enforce or clarify an important right or obligation affecting a significant sector of the community
- involve the resolution of an important question of law or
- ‘otherwise have the character of public interest or test case proceedings’.  

The ALRC determined that personal interests on the part of one or more parties ought not to preclude a court making a PICO, although the extent and nature of parties’ commercial interests were matters to be taken into account in determining whether or not to do so. The ALRC’s criteria were designed to ‘reflect those already developed by the courts’ and ‘preserve the ability of a court or tribunal to determine whether litigation is in the public interest in light of all the circumstances of a the case’. The ALRC rejected the notion that their formalisation would lead to a ‘flood of litigation’, noting that case management costs orders would remain appropriate in respect of unmeritorious claims.

The ALRC considered that a court should retain a broad discretion as to the terms of a PICO, and proposed that such an order could leave the parties to bear their own costs, eliminate or cap the applicant’s liability for the other party’s costs or render a third party liable for such costs. Relevant factors would include the comparative resources of the parties and their ability to present their cases properly, the probable cost of the proceedings and the extent of the parties’ private or commercial interests therein. The ultimate purpose of a PICO should be ‘to assist the litigation to proceed’, thus, it ‘should reflect, as far as is possible, the extent to which a party could satisfy an adverse costs order without such an order affecting the party’s ability to pursue the litigation’.

The ALRC further proposed that the court ought to be able to make a PICO at any stage of a proceeding, including at its inception. It rejected the claim that the determination of PICO applications would degenerate into ‘an expensive and time-consuming interlocutory step’. The ALRC chose not to address the difficulties surrounding the definition of public interest litigation, preferring to leave that issue to the courts. Such a broad approach has attracted some criticism. Campbell argues that they are ‘so broadly framed as to embrace many kinds of cases which courts have not hitherto recognised as coming within the category of public interest litigation’. Campbell suggests that the enactment of a ‘global’ PICO provision is not a sensible approach where so much depends on the circumstances of individual cases:

>The better approach, in my opinion, is to move for the incorporation of special costs regimes in particular statutes governing the exercise of particular jurisdictions. That approach would certainly allow for a finer degree of discrimination in selection of the factors to be taken into account by a court or tribunal in the exercise of its discretion in the award of costs.

Campbell argues that a ‘statute-specific approach’ would

>force legislators to be attentive to the relationship between standing to sue, the role expected of those accorded standing to sue, and principles regarding allocation of costs.

It is arguable that such an approach would also be conducive to the establishment of public interest litigation funds to complement legislative guidelines, in appropriate areas.

The ALRC recommendations have not been implemented, though the courts have continued to refine the criteria for adjusting or reversing the normal rule that the losing party should pay the winning party’s costs. Some recent litigation is considered below.

5.1.2 Judicial determination of public interest costs orders

Courts have a wide discretion to vary the ‘usual rule’ regarding costs. The High Court case of Oshlack v Richmond River Council affirms the court’s discretion to include the public interest character of litigation as a relevant factor when determining an award of costs. That case concerned a specific legislative discretion to make an order as to award of costs under the Land and Environment Court Act 1979 (NSW).
In Oshlack, the applicant brought proceedings under an open standing and seeking ‘to preserve the habitat of an endangered native animal on and around the site’. Oshlack had no private interest in the matter. At first instance, Justice Stein made no order as to costs on the grounds that:

- the proceedings had been brought to enforce environmental laws (not a private interest)
- Oshlack’s concerns had been shared by a significant sector of the public
- Oshlack’s case was arguable and the proceeding resolved significant issues as to the interpretation of the Act.

The High Court upheld the decision of Justice Stein. Justices Gaudron and Gummow considered that in light of the broad discretion accorded under the Act, they could not interfere with its exercise.238 The justices noted that the case related to ‘a new species of litigation’ such that the costs discretion was ‘to be exercised so as to allow for the varied interests at stake in such litigation’.239 As such, the case has been said to hardly constitute an endorsement of Justice Stein’s decision on the merits.240 Justice McHugh, in dissent in Oshlack, advanced a sharp criticism of the notion that characterisation of proceedings as being in the public interest could be relevant to the allocation of costs. He emphasised that the discretion as to costs was ‘not unqualified’ and had to be exercised in a ‘judicial’ manner.241 He also sought to defend the courts’ historical presumption that costs ought to follow the event.242

For Justice McHugh, the displacement of this presumption in public interest proceedings was problematic because much litigation concerns the public interest. Determining a principle that

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236  Supreme Court Act 1986 s 24, County Court Act 1974 s 7BA.
238  Oshlack v Richmond River Council (1998) 193 CLR 72. [31].
239  (1998) 193 CLR 72, [45].
240  As Campbell notes, ‘while the opinions [with which [Oshlack itself] was concerned."

| The possibility of adverse costs orders may well inhibit some individuals and groups from bringing cases to court which involve challenges to aspects of public law. Express recognition of this fact does not, however, mean that the courts should remove this inhibition by adopting a practice of declining to follow the usual order as to costs in cases of “public interest litigation”. Whether or not one regards a particular applicant’s actions as well-intentioned and striving, albeit unsuccessfully, to serve some perceived public interest, the respondent still faces real costs from having to defend the proceedings successfully. The applicant had a choice as to whether or not to be a party to the relevant litigation. The respondent typically had no such choice. The legislature has chosen not to protect such applicants from the affects of adverse costs orders, whether by an express statutory exemption or the creation of some form of applicants’ costs fund. In such circumstances, one may well feel some sympathy for the plight of the unsuccessful applicant. But sympathy is not a legitimate basis to deprive a successful party of his or her costs.248
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The character of a respondent as a public organisation was considered to be irrelevant,249 as was the tenability (or otherwise) of an unsuccessful applicant’s case.250

It is clear that the decision in Oshlack does not lay down a rule for application in other cases in the making of costs orders. It affirms the width of the discretion conferred upon a court in relation to costs, with particular reference to the specially wide discretion it held to exist under the legislation with which [Oshlack itself] was concerned.251

In subsequent cases before the courts, the following issues have been considered regarding the order of costs in public interest cases:

- whether the public interest is a valid factor in the exercise of discretion as to costs
- the type of costs order that should be made
- the definition of public interest.
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The relevance of the public interest to costs

Departure from the usual costs award is said to occur only in unusual cases. For example, in QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs, Justice Dowsett cautioned against too liberal an approach to the costs discretion:

If it seems unfortunate that an unsuccessful party should bear the costs of the successful party, it seems even more unfortunate that a successful party should be left to bear the cost of having vindicated its position.

The result of some litigation has been to confirm that public interest is only one factor in the exercise of discretion. In Ruddock v Vadarlis, it was concluded that ‘[t]he award of costs must remain an exercise of discretion having regard to all the circumstances of the case’.

Factors which support the usual costs award being made are:

- whether the successful party was wholly successful
- the amount of costs incurred by the successful party
- whether the decision turned on factual, rather than legal matters

The following factors will support judicial discretion to vary a costs award:

- the case ‘raises a novel question of much public importance and some difficulty’
- the liberty of the individual is at stake
- the case has been brought ‘selflessly’ and conducted ‘in a manner that was wholly commendable’
- the case raises difficult and important questions of construction
- there is public interest in the matter and whether it has been reached according to law
- whether sufficient public interest related reasons connected with or leading up to the litigation warrant a departure from or outweigh the important consideration that a wholly successful respondent would ordinarily be awarded its costs.

In Ruddock v Vadarlis, Vadarlis and the Victorian Council for Civil Liberties sought orders in the nature of habeas corpus and mandamus to compel the release into Australia of a group of noncitizens who the Commonwealth had detained on the MV Tampa. The following factors were relevant to Chief Justice Black and Justice French’s decision not to make an award as to costs:

- ‘The proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the Migration Act 1958 (Cth) and Australia’s obligations under international law’.
- The issues were difficult, and the subject of divided judicial opinion.
- The Commonwealth Parliament had passed laws to exclude the applicants from pursuing the matter further, and legislated to entrench the decision of the Full Court on the merits.
- The VCCL and Vadarlis had no financial interest in the proceedings, and their legal representation was provided free of charge.

Their Honours concluded:

This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights.

Scope of a ‘public interest’ costs award

The case law illustrates that the ultimate award of costs is a matter of judicial discretion. That is, it is possible for the court to decline to award costs, award part of the winner’s costs, or order full recovery.

In Mees v Kemp (No 2) Justice Weinberg noted that the proceedings had raised difficult and important questions of construction and had been brought ‘selflessly’. His Honour ordered the applicant to pay 50 per cent of the first respondent’s costs, noting:
The award of costs need not be an ‘all or nothing’ proposition. Costs are discretionary, and although the discretion to award costs must be exercised judicially, reasonable minds can differ as to what would be appropriate in any given case.266

Other cases have also made adjustment to the award of costs because of the public interest element of the case. In North Australian Aboriginal Legal Aid Service Inc v Bradley (No 2),269 it was noted that a ‘public interest’ element had not been ‘regarded as decisive’ as to the question of costs.270 Justice Weinberg therefore favoured ‘an adjustment of the amount of costs’ and ordered the applicant to pay 70 per cent of the respondents’ costs.271

In another example, a proceeding to clarify the operation of the Sex Discrimination Act 1984 that would ‘have the effect of governing the position of persons who find themselves in a similar position to the applicant’ was taken to be in the public interest.272 The fact that the public interest was subservient to the applicant’s own interest was, however, also a relevant consideration. The applicant was ordered to pay 75 per cent of the respondent’s costs.

Defining ‘public interest’

A clear definition of what constitutes litigation ‘in the public interest’ remains elusive. It has been judicially acknowledged that the concept of ‘public interest’ is broad, even ‘nebulous’,273 and that without particulars of the circumstances, it is difficult to determine why the public interest will be relevant to a costs award.274 Moreover,

[In contentious areas of public policy it may be said that there are many ‘public interests’ and that it is the elected government which must seek to achieve a balance between those competing interests.275

However, developments in case law have determined a range of factors is relevant to determining that a case is in the public interest. Importantly, a confluence of circumstances, rather than isolated factors, must militate in favour of a departure from the usual principle as to costs.276 Whether proceedings have a public interest element has been relevant but not ‘regarded as decisive’ as to the question of costs.277

Personal interest

A personal interest will not preclude the proceedings from being characterised as having a public interest element. In Smith v Airservices Australia,278 the applicant ‘had commenced the proceedings in the public interest because he had grave concerns about the impact of the decision on the safety of air navigation in Australia’, a subject on which he had particular expertise but no direct personal interest. The respondent alleged that he had a ‘private interest’ in the sense of an ‘emotional investment’. Justice Stone made no order as to costs, finding that:

It is likely that the only person who could with any credibility or sense challenge the proposed [decision] would be a person with extensive

252 Ruddock v Vadarlis [2001] FCA 1865, [29].
254 [2004] FCA 1644, [4].
255 Ruddock v Vadarlis [2001] FCA 1865, [25].
256 In Ruddock v Vadarlis, Beaumont J dissented, holding that the Commonwealth had been ‘wholly successful’ in defending the proceeding, and that there was no ‘good reason’ for departing from the usual rule: [2001] FCA 1865, [40]–[42], citing Milne v Attorney-General (Tas) (1956) 95 CLR 460.
257 Northern Territory v Doepel (No 2) [2004] FCA 46 [14]; see also Blue Wedges Inc v Minister for the Environment, Heritage and the Arts [2008] FCA 8 [73].
258 [2001] FCA 1865, [17].
259 [2001] FCA 1865, [21].
260 Mees v Kemp [2004] FCA 549, [20]–[21].
261 Blue Wedges Inc v Minister for the Environment, Heritage and the Arts [2008] FCA 8 [73].
264 Ruddock v Vadarlis [2001] FCA 1865 [28].
265 [2001] FCA 1865, [28].
266 [2001] FCA 1865, [29].
267 [2004] FCA 549.
268 [2004] FCA 549, [23].
270 [2002] FCA 564, [91].
271 [2002] FCA 564, [107]. This figure also incorporated an adjustment in respect of the applicant’s success in resisting challenges to its standing and the justiciability of certain claims.
272 Jacomb v Australian Municipal, Administrative, Clerical & Services Union [2004] FCA 1600, [10].
273 Oshlack v Richmond City Council (1998) 193 CLR 72, [136].
274 Ruddock v Vadarlis [2001] FCA 1865, [14].
277 North Australian Aboriginal Legal Aid Service v Bradley (No 2) [2002] FCA 564, [91].
experience in air safety and who would be likely to have deeply held convictions on the matter. Such a person will always have the type of private interest to which the respondent refers … The applicant is no ordinary bystander, officious or otherwise; he is by virtue of his expertise and experience, in a special position in relation to air safety. For these reasons I am satisfied that there was a public interest element in these proceedings.279

In a similar vein, that an applicant who alleged discrimination under the Sex Discrimination Act sought to benefit from the proceeding did not preclude a finding that the matter was brought in the public interest.280

The relevance of standing

In Oshlack, Justice Kirby suggested that the standing provisions are a consideration in determining costs orders. Justice Kirby expressed concern that the Parliament’s conferral of ‘open standing’ to promote the public interest could be rendered worthless where unsupported by a complementary approach to the question of costs:281 ‘A rigid application of the compensatory principle in costs orders … would discourage, frustrate or even prevent the achievement of Parliament’s particular purposes.’282 Nevertheless, a costs order should still rely on judicial discretion, so that costs were allocated fairly and that ‘litigants espousing the public interest are not thereby granted an immunity from costs or a “free kick” in litigation’.283

More recent decisions have not adopted this approach. The Full Court of the Federal Court has noted that extended or open standing provisions in relation to the subject matter of an application are not to be taken to militate against the making of orders as to costs.284 Moreover, standing provisions of an Act will ‘not alter the ambit of the discretion’ of the court to award costs.285

5.1.3 Public interests costs in Victoria

The Victorian Supreme Court has a wide discretion to ‘determine by whom and to what extent costs are to be made’.286 However, the Supreme Court has not developed jurisprudence regarding costs in public interest cases in the same manner as the Federal Court. Many of the cases above concern environmental matters arising under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) or the Land and Environment Court 1979 (NSW). Similar matters in Victoria are handled by VCAT. At VCAT, each party is to bear their own costs, subject to the court awarding otherwise if, for example, a party has failed to comply with an order of the court.287

5.2 COSTS IN PUBLIC INTEREST MATTERS IN THE UNITED KINGDOM

In the United Kingdom, there may be a variation of standard costs rules in public interest litigation. A Protective Costs Order (PCO) can be ordered to render an applicant immune to costs in respect of the substantive hearing. This order sits within the framework of an overriding objective for matters before the court,288 and a broad framework for awarding costs. The costs rules include consideration of the general rules as to costs, circumstances such as the conduct of the parties, the success of the parties and any payment into court.289

5.2.1 Protective costs orders

The conditions for a PCO were outlined in the Corner House Research case.290 The applicant sought to challenge the decision of a government department to alter its anti-corruption procedures, arguing that there had been inadequate public consultation prior to the decision. The UK Court of Appeal summarised the applicable principles for a PCO thus:

(1) A PCO may be made at any stage of the proceedings, on such conditions as the Court thinks fit, provided that the court is satisfied that:
   (i) the issues raised are of genuine public importance;
   (ii) the public interest requires that those issues be resolved;
   (iii) the applicant has no private interest in the outcome of the case;
   (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that is likely to be involved it is fair and just to make the order;
(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

(2) If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, at its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.291

The form of a PCO is a matter for the discretion of the judge, depending on the circumstances of a particular matter.292 To date, cases where a PCO has been sought include:

- a case where the claimant’s lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there should be no order as to costs in the substantive proceeding whatever the outcome
- a case where the claimants were expecting to have their reasonable costs reimbursed if they won, but sought an order capping their maximum liability for costs if they lost
- a case where the claimants were expecting to have their reasonable costs reimbursed if they won but sought an order to the effect that there would be no order as to costs if they lost
- the Corner House case, where the claimants brought proceedings with the benefit of a [conditional fee agreement], which is otherwise identical to the previous situation.293

Where a PCO was granted and the applicant was not being represented pro bono, it would in the usual case be appropriate to cap the costs that the applicant could recover in the event of success:

The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses and, as a balancing factor, the liability of the defendant for the applicant’s costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors’ fees and a fee for a single advocate of junior counsel status that are no more than modest.294

This approach was designed to enable an applicant to present a case without being exposed to financial risks that would deter a case of general public importance. Accordingly, only modest representation would be covered.295

An applicant for a PCO would be responsible for the costs of the application, which provides a ‘financial disincentive for those who believe that they can apply for a PCO as a matter of course’.296

In the case at hand, the court determined that a PCO ought to be granted, as all of the requisite criteria (set out above) were satisfied and ‘Corner House had a real prospect of showing [it] had been wronged’.297

5.2.2 Status of protective costs orders

A report by the human rights organisation Liberty considered the broad, discretion-based approach to determining whether proceedings were in the public interest adopted in Corner House to be reasonable.288 However, several aspects of the decision in Corner House have been argued to present difficulties, some of which are outlined below.

First, the bar on an applicant with a private interest in a proceeding seeking a PCO has been argued to be unduly restrictive. The term ‘private interest’ was not explained in the decision. As Stein and Beagent have pointed out, it seems that ‘only the “public-spirited individual” with nothing to gain personally, or an NGO with no direct connection to individuals who might benefit, would be eligible for a PCO’.299

Stein and Beagent further note that often (eg in relation to judicial review), it is actually necessary for a party to have something resembling a private interest in a proceeding to have standing to commence it in the first place.300 On this basis they suggest that the ‘no private interest’ requirement cannot be the subject of a strict construction. Rather, they suggest:

**Ultimately, it will be a matter of fact and degree as to whether the personal interest of the claimant is to be characterised as a “private interest”, and it is suggested that the financial benefit to the claimant will be the most telling factor.**301

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79 [2005] FCA 997, [69].
281 (1998) 193 CLR 72, [114]; see also at [115]–[119].
286 Supreme Court Act 1986 s 24(1).
287 Victorian Civil and Administrative Tribunal Act 1998 s 109. A list of reasons for a departure from the usual rule is found at s 109(3).
288 Civil Procedure Rules r 1.1, 1.2.
289 Civil Procedure Rules r 44.3.
290 R (Corner House Research) v The Secretary of State for Trade and Industry [2005] EWCA Civ 192.
291 [2005] EWCA Civ 192, [74].
292 [2005] EWCA Civ 192, [75].
293 [2005] EWCA Civ 192, [75] (references omitted).
294 [2005] EWCA Civ 192, [76].
295 [2005] EWCA Civ 192, [76].
296 [2005] EWCA Civ 192, [78].
297 [2005] EWCA Civ 192, [144].
300 Ibid 438–9. Similarly, the ‘no private interest’ requirement ‘would seem to exclude anyone with a claim under the Human Rights Act’: Liberty (2006) above n 298, [80].
301 Stein and Beagent (2005) above n 299, 439.
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The Liberty report also concludes that ‘the weight attached to [an applicant’s private interest] should be a matter for the judge considering the application’.302

Second, it has been suggested that the requirement that the applicant be responsible for the costs of a PCO application is likely to deter ‘many genuine public interest claims’.303 Moreover, the ability to fund an application would sit oddly with a plea for insulation from costs liability. As Stein and Beagent point out:

> It is … hard to see how a full PCO, ie one extinguishing all liability, will ever be granted again in future, given that a successful applicant will have run the risk of considerable costs already. If the applicant has been able to run that risk, it is unlikely that [the principle that ‘the applicant will probably discontinue the proceedings and will be acting reasonably in doing so’] will be offended by a PCO limited to the level of costs, which the successful applicant has already shown a willingness to accept.304

Third, it is easily conceivable that the cost-capping procedure, under which a PCO-protected applicant can be limited to a ‘moderate’ level of representation, will in practice ‘create an artificial inequality of arms’.305 The limitation on the scope of legal representation permitted under a PCO could ‘limit the number of cases where PCOs will significantly increase access to justice’.306

Fourth, the suggestion that different forms of PCO might be appropriate, depending on whether an applicant’s legal representatives were acting pro bono, or under a conditional fee agreement has been criticised. Liberty did not consider that these factors should be relevant to the type of order granted307 (or the question of whether an order should be granted at all).308

The group also questioned the significance of the criterion ‘whether or not the action could continue in the absence of a PCO’, and could conceivably differ in terms where granting a PCO might be appropriate even though the party seeking it might still be able to pursue the claim without one. The public interest in the case and the disparity of resources between the parties might nonetheless justify granting a PCO.

5.3 CANADIAN DEVELOPMENTS

In Canada, the relevance of the public interest to the question of costs has also been judicially considered.310 The Supreme Court of Canada has upheld a decision to award interim costs to impecunious litigants, who without such an order could not afford to go to trial. The criteria outlined for such an order were:

- The party seeking the order must be impecunious to the extent that, without the order, the party would be deprived of the opportunity to proceed with the case.
- The claimant must establish a prima facie case of sufficient merit to warrant pursuit.
- There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

A ‘public interest element’ could provide the ‘special circumstances’ required to support its being granted.312 It was critical that ‘the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases’.313 Even then, the matter remained at the discretion of the court.314 Justice LeBel emphasised, ‘[w]hen making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them’.315

The decision was not without contention, however, and dissenting opinion raised concern that an advance award of costs could be seen as ‘prejudging the merits’ and amounted to ‘a form of judicially imposed legal aid’.316

The capacity to award interim costs so that litigation may proceed is perhaps the most progressive approach to public interest costs to date. Tollefson, Gilliland and DeMarco suggest that:

> The Okanagan Indian Band decision is important in three respects: for its affirmation of the social utility of addressing costs issues early in the course of such proceedings, for its unequivocal assertion of the judicial jurisdiction to undertake this task, and for its recognition that, in certain exceptional public interest cases, only an interim costs award will satisfy the interests of justice.317
5.4 SUBMISSIONS

The commission received a number of submissions in respect of the issue of costs in proceedings with a public interest element. In the Consultation Paper, the commission asked whether, in making orders for costs or security of costs, the court should be required to have regard to whether the proceeding involves issues that affect or may affect the public interest.

Some submissions, including that of the Victorian Bar, favoured the maintenance of the status quo, that is, leaving the matter of costs to judicial discretion, with ‘public interest’ ramifications an available but not a mandatory consideration.318

A number of submissions, including those of Victoria Legal Aid and the PILCH, expressed concern about the ‘inequality [of] resources that typically exists in public interest cases’, suggesting that it tended to preclude the proper ventilation of meritorious claims.

PILCH suggested as a solution:

- the adoption by the Victorian Government of Model Guidelines to govern its conduct in relation to public interest proceedings, in combination with
- an amendment to Order 63 of the Victorian Supreme Court Rules, which would allow an applicant to be declared a ‘public interest litigant’ and thus be protected against adverse costs orders.

The Human Rights Law Resource Centre recommended that proposals be developed to:

- establish a disbursements fund to aid pro bono, human rights and public interest matters319 and expand the guidelines for the Law Aid scheme320
- establish model guidelines for the Victorian Government regarding costs in pro bono, human rights and public interest proceedings321
- amend Order 63 of the Supreme Court Rules to incorporate provisions relating to costs in pro bono, human rights and public interest proceedings.322

Other submissions, including those of the Environment Defenders Office Victoria (EDO) and the Federation of Community Legal Centres, proposed the implementation of the ALRC model discussed above. The EDO submitted that:

> The threat of adverse costs is a crude exclusion device the burden of which falls disproportionately on individuals and community groups which do not have the same deep pockets as government and corporations.

The EDO suggested that the establishment of clear procedures in connection with public interest costs orders could require ‘potential public interest litigants to turn their minds to the strengths and public interest merits of the case at an early stage’.

2.2 DRAFT PROPOSAL AND RESPONSES

In response to the submissions received, and the developments regarding costs in public interest litigation (above), the commission drafted the following proposal:

> There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.323

This proposal was supported by the Environment Defenders Office, Human Rights Law Resource Centre, PILCH and Victoria Legal Aid.324 In particular, the Environment Defenders Office welcomed the recognition in the draft proposals that ‘the threat of adverse costs orders are a significant obstacle to public interest litigation’.325

The EDO supported a case-by-case approach that would not preclude a court from determining that the proceedings are in the public interest where an applicant has a pecuniary interest in the proceedings. The Law Institute of Victoria also supported the proposal, but noted that courts already have a wide discretion in ordering costs.326
The Human Rights Law Resource Centre and PILCH noted the importance of permitting costs orders to be made at the outset.327 However, the Law Institute observed that it may not be possible to decide if a case is in the public interest until the proceeding is complete.328

A submission received from Telstra queried how ‘public interest’ would be defined.329 As the discussion above shows, the definition of public interest, and the scope of protective public interest costs orders has been the subject of judicial consideration in Australia and abroad.

5.6 CONCLUSIONS
The commission believes there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases. This could include orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

The commission notes that PILCH is currently working on a costs protocol for public interest litigation in the Supreme Court. PILCH’s proposal envisages that Order 63 of the Supreme Court Rules should be amended in order that on application, a litigant could be declared a ‘public interest litigant’. A public interest litigant would be protected from an adverse costs order, provided the court’s declaration remained in place throughout the proceedings.330

The commission supports this development, and believes the protocol would supplement an express provision that permits courts to make orders protecting public interest litigants from adverse costs in appropriate cases.

6. CLASS ACTION COSTS
Class actions under Part 4A of the Supreme Court Act 1986, and representative actions generally, give rise to a number of unique and vexed issues in relation to costs.

In considering the introduction of class actions in the Federal Court, the Australian Law Reform Commission recommended that a class action fund should be established to overcome a number of the costs problems likely to arise in class action litigation. Such a fund was intended to not only provide financial assistance for representative parties but to also meet the costs of defendants who had been successful. Also, any uncollected damages might be paid into such a fund. However, such a fund was not established, either at federal level or in connection with the statutory class action regime introduced in Victoria.

Group members represented in class action litigation are protected from adverse costs orders (except in limited circumstances where they participate in the litigation as subgroup representatives or for the determination of individual issues arising in respect of their claim). However, the representative party is potentially liable for adverse costs and may be required to provide security for costs.

To some extent the ‘void’ arising out of the failure to establish a class action fund has been filled by commercial litigation funders who are prepared to finance cases, provide security for costs and provide indemnity for adverse costs. However, this comes at a price and on terms which run counter to the philosophy underlying the introduction of opt out class action regimes. Litigation funders, as profit-making entities, usually seek to ‘sign up’ group members on contractual terms requiring the group members to give the litigation funder a percentage share (usually between 25 per cent and 40 per cent) of the amount recovered in the event that the litigation is successful. This has resulted in the class action being commenced and pursued only for the benefit of those who opt in by agreeing to the commercial terms for the conduct of the litigation. This has led to several somewhat controversial decisions, in both the Federal Court331 and the Victorian Supreme Court,332 whereby the courts have declined to allow class actions to proceed, in class action form, for the benefit of only those who agreed to the litigation funding arrangements and were clients of the one law firm.333 These decisions, and more recent judgments, are discussed in further detail in Chapter 8.

The attempt made in the Fostif litigation334 to commence a representative action but only continue to conduct it for the benefit of those who agreed to the terms proposed by the litigation funders was derailed by the High Court, (by majority) for reasons which are not relevant here. However, the judicial imprimatur given to the commercial litigation funding arrangements is of broader significance.
In the absence of a class action fund or commercial litigation funding arrangements, many if not most ‘economically rational’ claimants would be deterred from agreeing to be a representative in class action litigation. The costs of conducting such litigation are enormous. The proceedings are likely to be protracted. There are likely to be numerous contested interlocutory battles. The potential liability for adverse costs and security for costs is likely to deter anyone who is neither poor nor rich.

Apart from the economic disincentives to representative applicants there are glitches in the class action legislation which may give rise to further problems in relation to costs. Although there is provision for the recovery from group members of any shortfall between the costs of conducting the action and the amount of costs recovered from the losing party, the express power conferred on the court is able to be invoked only in the event of an award of damages. In this event, the group members’ contributions can only be deducted out of the damages awarded to them. Thus, the legislation does not expressly deal with how such a shortfall may be recovered in the event of a settlement. Even where the individual claim of the representative plaintiff proceeds to judgment, and is successful, it is relatively rare for the claims of each of the remaining group members to proceed to formal judgment. The general powers of the court may be sufficient to enable contributions to be extracted from group members in the event of settlement of the proceedings as a whole, given that settlements of the class action require judicial approval. However, there is nothing to prevent group members individually settling their individual cases (even en masse) without court approval.

This is not intended to be an exhaustive list of costs problems in class action litigation. Chapter 8 incorporates the commission’s recommendations for improving remedies in class action proceedings. Chapter 10 sets out the commission’s proposals in relation to a new funding mechanism (the Justice Fund) which could finance class action and other civil litigation, provide an indemnity against adverse costs and meet any order for security for costs.

7. DRAFT PROPOSALS AND RESPONSES

The issues and problems relating to the cost of litigation are extensive. The commission has been unable to address all of the issues, criticisms and suggestions that have been received in the course of the review. We addressed a number of significant cost issues in our draft proposals, published in June and September 2007. The proposals and the responses received are outlined below. In this section, we also explain the approach we have taken to particular problems and identify further areas where review is required. Chapter 12 deals in detail with ongoing civil justice review and reform and also incorporates various proposals for further reform made by various interested persons and organisations in the course of the present review.

7.1 ONGOING REVIEW AND REFORM OF COSTS

7.1.1 Establish a costs council

The commission proposed that a specialist Costs Council should be established, as a division of the (proposed) Civil Justice Council. Some submissions were unclear about what the role of a specialist costs council would be. The commission envisages that the Costs Council, in consultation with stakeholder groups, would perform the following functions:

- review the impact of the commission’s recommendations on costs which are implemented
- investigate the additional matters in relation to costs referred to in the commission’s report, including those matters raised in submissions
- carry out or commission further research on costs
- consider such other reforms in relation to costs as the council considers appropriate.

Submissions from the Law Institute and Legal Aid questioned the need for a costs council, given the ‘impending introduction of the Victorian Costs Court’. The Office of Crown Counsel recommended the introduction of a Victorian Costs Court in its review of the Office of Master in 2007.

The Costs Court proposed by the Office of Crown Counsel would be established as a division of the Supreme Court and would perform the functions currently performed by the taxing master in the Supreme Court, and by registrars in other Victorian jurisdictions. The report also recommends that...

327 Submissions ED1 19 (Human Rights Law Resource Centre) and ED1 20 (Public Interest Law Clearing House).
328 Submission ED1 31 (Law Institute of Victoria).
329 Submission ED1 17 (Telstra Corporation).
330 Correspondence with Tabitha Lovett, PILCH Manager, 23 January 2008.
332 Rod Investments (Vic) Pty Ltd v Clark & Ors [2005] VSC 449.
335 Supreme Court Act 1986 s 33XJ.
336 VLRC, Exposure Draft 1, Proposal 9.1.
337 Submission ED1 17 (Telstra Corporation).
338 Submissions ED1 31 (Law Institute of Victoria), ED1 25 (Victoria Legal Aid).
further consideration be given to establishing an advisory and coordination role for the Legal Costs Committee. This proposal is similar to the commission’s proposal but the commission proposes a body with broader stakeholder participation.

Moreover, the proposed functions of the Costs Council are broader than those envisaged by the Office of Crown Counsel for the Legal Costs Committee. The commission believes a specialist Costs Council, operating as part of the proposed Civil Justice Council, is the preferred body to carry out these functions. If adopted, the Civil Justice Council would have statutory responsibility for review and reform of the civil justice system and would be resourced to conduct its own research. This broader ambit is necessary to ensure that the rules for costs can continue to be reviewed and reformed. As noted above, costs are a key determinant of the fairness and efficacy of the civil justice system. The establishment of a council was supported in other submissions.

7.2 COSTS DISCLOSURE

7.2.1 Costs estimates disclosed on order of the court

The commission proposed that the court should have the power to require parties to disclose to each other and the court estimates of costs and actual costs incurred.

Giving the courts power to require disclosure of costs could have the following benefits:

• it may encourage use of ADR or bring pressure for parties to settle

• it could give the court more intelligence to ascertain the duration and complexity of a matter before the court

• it allows a party to gauge the intentions of the other side

• it allows the court to gather data on costs estimates and outcomes.

The proposed power need not be exercised, but could be exercised at any stage of the proceedings. The submissions received by the commission expressed divergent views on the merits of this proposal. Some submissions supported this proposal as a key measure to give predictability to stakeholders in the civil justice system. IMF said ‘increased transparency regarding expected costs would benefit the Courts, the parties and the parties’ lawyers’, noting that the biggest risk in litigation is ‘assuming the risk of paying the other side’s costs if the claim is unsuccessful’.

IMF argued that costs estimates allow for informed decision-making by parties, as well as providing information for effective case management by the courts. In addition, it contended that the provision of estimates to the court allows courts to monitor excessive costs and timelines and to quantify costs orders more efficiently.

Other submissions pointed out that existing disclosure requirements require lawyers to advise clients about the costs to be incurred in litigation. Others thought the taxation of costs was a sufficient measure to address the issue of excessive costs.

The Law Institute opposed the draft proposal. It contended that the ‘NSW experience would suggest that solicitors find this requirement quite onerous or alternatively give estimates that are not credible’.

The commission also received submissions on whether there should be limits on the type of information that should be disclosed to the court. Telstra argued that estimates of costs could reveal strategic decisions of a party and disclosure would give a way a forensic advantage. In contrast, IMF said that budgets and timelines should be disclosed to the court and parties to the litigation.

The commission has considered the arguments raised in submissions and has decided to modify its original proposal. We maintain that the court should have an express power to require parties to disclose to each other and the court estimates of costs and actual costs incurred. Costs estimates can offer predictability to all stakeholders and offer parties the opportunity to make informed decisions about their approach.
However, the commission acknowledges that information about costs may include material relevant to the strategy or conduct of litigation. We believe that the information disclosed to the court should be of a limited nature. Information that may have confidential, strategic or forensic significance or which might otherwise be privileged (other than information concerning the quantum, break up or method of calculation of legal fees and expenses) should be protected from disclosure.

**7.2.2 Parties to disclose costs data to the court**

The commission believes there is a need for more data and research on costs. We proposed that this might be achieved by empowering the court to require parties to disclose costs data at the conclusion of the matter.\(^{346}\)

The lack of available data on costs was raised in a number of submissions to the Consultation Paper. In their responses to the Exposure Draft, the Law Institute and Legal Aid agreed that more data is needed. However, Telstra submitted that because parties in commercial litigation agree to costs, taxation before the court is rare.

The Law Institute suggested that additional data could be provided anecdotally through stakeholder groups. This would mean that parties do not have to bear the cost of providing this information. In contrast, IMF submitted that collation of data from the commencement of the process ought to be systemic, not discretionary.

The commission believes that it is essential to obtain data on costs and for systematic research to be conducted on the causes of excessive costs, and the impacts of costs rules. For this reason, the commission has recommended the creation of a Costs Council as part of the (proposed) Civil Justice Council.

If our recommendation empowering the court to order disclosure of cost estimates and actual costs incurred is implemented, data will be available to the court about the costs of litigation. We make no additional recommendation regarding disclosure of costs data at the conclusion of the matter.

**7.3 FIXED OR CAPPED COSTS**

**7.3.1 Capped costs for particular areas of litigation**

The commission proposed that fixed or capped costs should be developed for particular areas of litigation after consultation and with agreement of stakeholders (under the auspices of the Costs Council or Civil Justice Council).\(^{347}\)

This proposal was made in light of developments in the area of fixed costs in other jurisdictions, as outlined above.

The commission received submissions that supported further consideration of fixed costs in appropriate cases. Victoria Legal Aid noted that if a lump sum is set at a reasonable level, this could remove the need for more complex cost recovery procedures.\(^{348}\) It would also counter some of the unpredictability of litigation.

The commission also received submissions that opposed fixed costs. The Law Institute submitted that it does not consider capped costs to be ‘a good idea in principle’. It argued that capped costs rarely reflect actual work done and that it is impossible to determine what is the amount of work required in any one type of matter. It also noted that the Federal Court decided not to introduce fixed costs.

Submissions that supported the fixed costs proposal acknowledged practical difficulties with setting fixed costs. IMF, for example, argued that caps should not be set on a macro level because it would lead to a distortion in the market for legal services. In NSW, it argued, caps on personal injury costs have prevented some plaintiffs from being able to bring a claim. Rather, IMF argued, in recognition that each piece of litigation is potentially different, caps should be individually determined according to cost budgets at or shortly after the initial pre-litigation conference.\(^{349}\)

The Australian Bankers’ Association suggested that any changes to costs should be accompanied by a study of the economic impact on practitioners and their clients.\(^{350}\)

The commission acknowledges these concerns. However, we maintain that fixed costs, if appropriate, can bring both predictability and proportionality to the costs of litigation. The Costs Council of the (proposed) Civil Justice Council would be well placed to determine which matters should be subject to a fixed costs regime, and to determine how fixed costs will be set.
7.4 TAXATION OF COSTS

7.4.1 Simplification of multiple bases of costs
In Exposure Draft 1 the commission proposed that the present multiple bases of taxation should be simplified.\(^{351}\) As discussed above, there are four bases for the taxation of costs: party–party, solicitor–client, indemnity, or such other basis as the court may direct.\(^{352}\)

Simplification of multiple bases of costs was supported by the Law Institute and Legal Aid. As noted above, the Institute has been funded by the Victoria Law Foundation to develop a revised Supreme Court scale of costs. That revised scale proposes the basis of costs recovery be ‘on a reasonable basis’ and an ‘indemnity basis as assessed on scale’. Reasonably incurred costs, it argues, is a preferable basis to costs ‘necessary or proper for the attainment of justice’.\(^{353}\)

The commission believes the bases for taxation of costs should be simplified to include three categories only: standard, indemnity and any other basis as the court may direct. The principles to be applied are discussed further below.

7.4.2 Interlocutory costs orders
During consultations, it was suggested to the commission that the present process for the ‘routine’ taxation of interlocutory costs orders is expensive to the parties, unduly burdensome to the court and in many cases ultimately a waste of time because most cases are settled on terms whereby the interlocutory costs orders are either waived or are otherwise irrelevant to the terms of settlement. The practice in Victoria is said to differ from that followed in the Federal Court and in NSW. Moreover, enforcement can be a problem for impecunious parties and can be used as a strategic forensic weapon by deep pocketed parties.

The commission circulated a draft proposal that the presumptive rule should be that interlocutory costs orders are not to be taxed prior to the final determination of the case unless the court orders otherwise.\(^{354}\)

The commission received submissions that supported the proposal on the ground that it could reduce delay. White SW Computer Law, for example, submitted that taxation of costs prior to trial only serves to ‘protract the dispute and antagonise the parties’.\(^{355}\)

Legal Aid noted that in some cases it may be appropriate for the court to delay taxation of costs. However, it did not support the presumptive rule because the process of making timely interlocutory costs orders may limit abuse of process.

The Law Institute also opposed the proposal, on the ground that costs relate to the professional responsibility of their clients. The Institute submitted that the ‘draft proposal may end up encouraging more litigation as recalcitrant parties will know that they do not face an immediate costs penalty’.

The Law Institute’s submission also raised the implications of the proposal on the interest a party may claim on costs. In Victoria, interest is calculated on costs only when they are taxed. If interlocutory costs are not taxed until the final determination of the case, a party will not be entitled to interest until that time. There seems no reason in principle or in practice why the courts should not, in appropriate cases, exercise their discretion to award interest on costs.

Other submissions reported that the courts do not often order costs until the end of litigation, and that interlocutory costs orders would encourage compliance.\(^{356}\)

The commission proposes a presumptive rule that interlocutory costs orders should not be taxed prior to the determination of the case unless the court orders otherwise. This proposal should be considered in conjunction with the commission’s further recommendation, discussed below, that courts should more often make costs orders on a more determinate basis (eg in a lump sum amount, or as a specified percentage of the actual costs) to avoid the costs and delays arising out of the present process for the taxation of costs.
7.5 SOLICITOR–CLIENT COSTS AND PARTY–PARTY COSTS

7.5.1 Party–party costs should be ‘all reasonable costs incurred’

The present gap between party–party and solicitor–client costs is unreasonable in a number of cases. Research carried out by the commission showed that in many instances only half or less of the solicitor–client costs are recovered on a party–party basis following the taxation of costs.

The commission, in its earlier draft proposal, suggested that the recoverable costs on a party–party basis should be ‘all reasonable costs incurred’.

There was some support for reforming the current rule for party–party costs. The Law Institute suggested that ‘costs should be allowed as “all costs reasonably incurred and of a reasonable amount” as defined in the current solicitor and client basis in Order 63.30 of the Supreme Court Rules’.

Despite its support for the proposal, the Law Institute noted it had not seen the research to support the proposal. It reported that anecdotally, in NSW, changes did not narrow, and in some cases widened, the gap between costs actually paid by the client and those recovered. Legal Aid suggested the current gap may actual serve as a check within the system that encourages parties to settle early.

There was also opposition to any change in the principles governing the award of party–party costs. The Insurance Council of Australia did not support a change to party–party costs. If there is a change, the Insurance Council supported a test of ‘reasonable and necessary’. The Australian Bankers’ Association was unsure how the proposal would address the gap.

IMF commented that the critical issue is when ‘reasonable’ is determined, at a pre-litigation conference or at the conclusion of proceedings. The Law Institute submitted that ‘reasonable’ must be ‘interpreted in terms of what is realistic in the marketplace’. It suggested that sometimes costs are disallowed because they are ‘not reasonable’, despite there being no way of avoiding a particular fee (such as barristers’ fees). IMF suggested reasonable costs in Supreme Court matters should be estimated and fixed at or shortly after the pre-litigation conference.

The commission has taken into account these suggestions. We believe that the Law Institute’s proposal that recoverable costs should usually be ‘all costs reasonably incurred and of a reasonable amount’ is appropriate. We believe that the court should continue to have discretion to make an order on some other basis, when considered appropriate by the court.

7.5.2 Other methods for ordering recovery of costs

In Exposure Draft 1, the commission proposed that other methods for quantifying the legal costs recoverable by a successful party should be utilised (more often), including ordering costs as a specified percentage of the actual (reasonable) solicitor–client cost, with a view to avoiding the costs and delays associated with the present process of taxation of costs.

Submissions expressed concern about how the proposal would be practically implemented. Telstra and Australian Commercial Lawyers Association said ordering a percentage of costs would require a standardised assessment of costs, for example, the hourly rates of law firms.

The Law Institute argued that the proposal should not be adopted. It submitted that the current taxation of costs based on detailed bills on scale allows for an impartial decision maker to fix the costs based on the actual work reflected in the clients’ solicitors’ file.

The proposal, the Institute argued, would create additional work for courts to assess the basis on which costs were charged, thereby increasing cost and delay. Moreover, it submitted that the proposal contradicted the commission’s proposal that the present multiple bases for taxation of costs be simplified.

Clayton Utz submitted that the basic problem is ‘that the current system of taxation by reference to scales of costs is outdated and unnecessarily consumes significant court resources and generates significant additional costs between the parties’. It proposed that:

(a) once judgment is given and an order for costs is made, the parties should be required to disclose to the court what their actual costs were

(b) the parties should then be heard on whether the court should depart from the normal rule

(c) the normal rule should be that a party awarded costs recover all of its costs
(d) in deciding whether to depart from the normal rule, the court should make an assessment as to whether the costs incurred by the successful party are unreasonably excessive having regard to the costs incurred by the other parties and

(e) there is no reason why, in all but the most exceptional cases, the parties need be heard for more than 10 minutes each on the question of costs.

The commission agrees that this proposed approach to the resolution of costs makes sense and could be appropriate in many cases. Such a summary approach may be best suited to cases where the costs do not exceed a certain economic threshold.

The commission is of the view that it is desirable for the courts to more often utilise methods, such as lump sum costs orders or orders for payment of a specified percentage of the actual reasonable costs incurred, rather than require the parties to proceed with a taxation of costs. In this respect it is of interest to note, from the costs data obtained from the Supreme Court referred to earlier in this chapter, that where bills of costs are submitted for taxation, the amounts allowed where the bills are taxed, and the amounts agreed where the parties resolve the costs issue without the need for formal taxation, are around 75 per cent of the amount of the bill of costs. However, there is obviously considerable variability between individual cases.

In England and Wales the Commercial Court Long Trials Working Party has recently recommended that courts should be prepared to make a summary assessment of costs where the total costs claimed are £250,000 or less.

At present, the processes involved and the procedures required to be complied with in relation to the assessment of costs are relatively expensive and time consuming. Often independent costs consultants are engaged who may charge a fee based on a percentage of the amount of the bill.

No doubt these costs and delays would be substantially reduced by appropriate computer software which could take data routinely recorded by legal practices for the purpose of time recording and preparing solicitor–client bills and automatically convert the items into a bill in a form taxable on a party–party basis. There would no doubt need to be adjustments for certain items. However, part of the present cost and delay arises out of the necessity to prepare different bills in different form using different methods of quantifying legal costs (and to then submit the bill for assessment by an independent court officer). The issue of court scales of costs is considered further below.

7.6 SCALES OF COSTS

7.6.1 Courts scales

In Exposure Draft 1 the commission proposed that court scales of costs be revised or updated. There was support for reviewing the scales of court costs. IMF suggested the scales could form the basis of cost estimates or caps and data collected on estimates and actual costs would inform the scale.

7.6.2 Common scale of costs

The commission proposed that there should be a common scale across courts.

The commission did not express a view on the question of whether there should be proportionate differentials between courts in terms of recoverable party–party costs. Legal Aid supported this proposal. The Law Institute advised that a revised Supreme Court costs scale is currently being developed. It reported that the scale will be adopted by all courts, but the rates will vary with jurisdiction.

IMF argued that different levels of liability and quantum—and not necessarily the court involved—should be the basis for different scales:

Differentiation is clearly necessary between personal injury, workers compensation, motor vehicle damage, intestacy, contract, trade practices, medical negligence, Corporations Act, product liability and other civil claims.

Other submissions opposed a common scale. Telstra and the Australian Corporate Lawyers Association argued that it is important to differentiate between courts and as such, different scales should be retained.

The commission maintains that there should be a common scale of costs across courts. However, we
note that further research is required on whether there should be proportionate differentials, between courts, in terms of recoverable party-party costs. We believe that the issue of whether or not there should be proportionate differentials should be considered by the proposed Costs Council.

In the event that there is a common scale for recoverable party-party costs, the Costs Council should also consider whether the principle that the recoverable costs should be ‘reasonable’ is sufficiently flexible to accommodate variations between courts (in the event that such variations are considered desirable) without the need for prescribed variations.

### 7.7 DISBURSEMENTS

#### 7.7.1 Prohibition on profiting from disbursements

In Exposure Draft 1 the commission proposed that there should be a prohibition on law firms profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. Where a client recovers costs only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party. However, under the commission’s draft proposal law firms would still be entitled to recover a reasonable allowance for law practice office overheads.

A number of submissions commented on the commission’s draft proposal, ranging from those who argued that profiteering should be prohibited, to those who said profiteering did not occur.

Some law firms disputed the assertion that there is abuse by practitioners in relation to charging disbursements. One law firm submitted that ‘gross overcharging is professional misconduct and can be dealt with within the current regulatory framework for practitioners provided by the Legal Profession Act 2004’. Law firms also submitted that some ‘profit’ must be factored in for disbursements such as photocopying, because business must outlay costs for equipment. Indeed, the current scale of costs permits high rates, including up to $2 per page of photocopying in the County Court.

Other submissions suggested that disbursement costs are a question for clients, and that clients could choose another law firm if they are unhappy with the costs of disbursements. Market forces, they said, mean that photocopying occurs ‘pretty much at cost now anyway’. The Law Institute noted that photocopying and other in house services are not disbursements but are charged as ‘legal costs’ and as such should be charged according to scale. Legal Aid recommended that fixing the rate charged per day would prevent profiteering.

The Law Institute was critical of the commission’s proposed provision, and argued it is ‘far too onerous, imprecise and would not be workable in practice’. The commission has taken into account these concerns. We have also considered the current practice of the courts in relation to costs and disbursements, and analysed the courts’ own data. We remain concerned about the costs of disbursements incurred in the conduct of civil litigation.

The commission is aware that the County Court has given litigants guidance on the costs that may be recoverable for the production of court books. Judge Strong of the County Court has applied the following guidelines:

- where copies of the court book are produced commercially: two copies on scale and subsequent copies at commercial copying rates to be determined by the taxing officer, plus necessary attendances
- where as a matter of choice all copies of the court book are produced ‘in-house’: one copy on scale and subsequent copies at a reasonable rate to be determined by the taxing officer, plus necessary attendances
- where as a matter of necessity all copies of the court book are produced ‘in-house’: once copy on scale and subsequent copies at a reasonable rate to be determined by the taxing officer, plus necessary attendances.

This approach is flexible but intends to ensure that the costs recoverable reflect commercial reality.

364 Submission ED1 18 (Clayton Utz).
366 VLRC, Exposure Draft 1, Proposal 9.8.
367 Submissions ED1 17 (Telstra Corporation), ED1 16 (Australian Corporate Lawyers Association), ED1 31 (Law Institute of Victoria), ED1 25 (Victoria Legal Aid).
368 VLRC, Exposure Draft 1, Proposal 9.9.
369 VLRC, Exposure Draft 1, Proposal 9.10.
370 Submission ED1 25 (Victoria Legal Aid).
371 Submission ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January, 2008).
372 Submissions ED1 16 (Australian Corporate Lawyers Association), ED2 17 (Telstra Corporation).
373 Submissions ED1 16 (Australian Corporate Lawyers Association), ED2 17 (Telstra Corporation).
375 A reasonable rate may be a commercial rate: it will depend on the circumstances of the particular solicitor.
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The commission is also aware that in practice experienced litigants, particularly corporations and insurers, often strictly control costs incurred in relation to disbursements and limit the amounts able to be charged for items such as photocopying.

The commission maintains that there should be a prohibition on law firms profiting from disbursements, including photocopying, but that there should be a reasonable allowance for office overheads. This prohibition should not apply in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. Where a client recovers costs, only the reasonable actual costs of the disbursements (excluding any profit element but making allowance for reasonable overheads of the law practice) should be recoverable from the losing party.

Where a law firm incurs an out of pocket expense on behalf of a client pursuant to a case being conducted under a conditional costs agreement, if the costs agreement provides that such disbursement expenditure will only be payable by the client in the event of success in the litigation (however defined) there is arguably no reason in principle why the law practice should not be entitled to charge a component for ‘uplift’ or ‘success’, as provided for in the Legal Profession Act 2004, in respect of the disbursement amount. This would compensate the firm for the risk of having to bear such expense in the event of the case failing. However, this would remain subject to disclosure and agreement by the client in accordance with the requirements of the Legal Profession Act 2004.

At present section 3.4.27 of the Legal Profession Act 2004 provides that payment of ‘some or all of the legal costs’ may be conditional on the successful outcome of the matter to which those costs relate. Legal costs include legal fees and disbursements. It is further provided that a conditional costs agreement may provide for the disbursements to be paid irrespective of the outcome of the matter.376 However, where a conditional costs agreement relates to a litigious matter ‘the uplift fee must not exceed 25 per cent of the legal costs (excluding disbursements) otherwise payable’.377 It is not clear whether the inclusion of the words ‘excluding disbursements’ in parenthesis is intended to preclude the charging of an uplift in respect of the ‘disbursement’ component of legal costs. If so, this warrants further consideration.

7.8 PERCENTAGE FEES

In the Consultation Paper and in Exposure Draft 2 the commission canvassed the possibility of removing the present prohibition on charging proportionate (or percentage) fees in civil litigation.378 At present, the Legal Profession Act 2004 prohibits a law practice from entering into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.379 The legislation envisages that this prohibition does not apply to the extent that the costs agreement adopts an applicable scale of costs.380 A number of the arguments in favour, and against allowing the charging of legal fees proportionate to the amount in dispute are set out below.

More than two decades ago, the previous incarnation of the commission, the Law Reform Commission of Victoria, considered the issue of percentage fees. A discussion paper reviewed the arguments for and against allowing proportionate fees and the then commission’s views were that the weight of the arguments was in favour of allowing such fees.381 After considering responses to the discussion paper that commission recommended that the statutory prohibition on charging proportionate fees should be removed. It was envisaged that the Law Institute and the Bar Council would make rules in relation to ‘contingent fees’382 and proposed that both such bodies would be subject to the Trade Practices Act 1974.

7.8.1 Arguments against proportionate fees

The commission has received submissions or views expressed in consultations in favour of retaining the prohibition on proportionate fees. They include the following:

- Fees should properly reflect the nature and extent of the legal services provided.
- Lawyers should not have a proportionate pecuniary interest in the outcome of litigation.
- Where lawyers have a proportionate pecuniary interest in the outcome of litigation:
this may give rise to the pursuit of unmeritorious claims in the interests of a financial return for the lawyers
- this may result in ethical standards being undermined with a view to achieving a favourable outcome
- this has a negative impact on community perceptions of the professional role of lawyers generally, on the fiduciary obligation to clients in particular, and on lawyers’ duties to the court
- this may drive up the value of settlements or judgments and reduce incentives to alternative dispute resolution.

- It is a hallmark of a profession for remuneration to be based on fee for service arrangements.
- There is potential for windfall profits, and scope for ‘cherry-picking’ in high value cases.
- Remuneration at a proportionate rate disguises from the client the actual work required and performed for a matter.
- The absence of proportionate fees has not been shown to lead to a denial of access to justice.
- Proportionate fees are not permitted in other jurisdictions, such as the United Kingdom.
- The prospect of large proportionate fees may encourage lawyers to engage in more extensive advertising and ‘ambulance chasing’.

Insofar as proportionate fees are proposed as a solution to the problems of open-ended hourly billing practices, the submissions argued that an alternative solution would be to address that problem directly. This could be done by a variety of means, including event-based charges, regulating hourly rates or cost-capping.

7.8.2 Arguments for proportionate fees

The commission has also received submissions or views expressed in consultations that the historical prohibition on lawyers charging proportionate fees is arguably anomalous in the light of recent developments:

- The prohibition on proportionate fees by lawyers runs contrary to the goal of ‘proportionality’ which has become accepted as a goal of civil justice reform.
- In practice many if not most clients would prefer the option of a proportionate fee as it provides certainty determinacy and ensures that ultimately the client is the beneficiary of the (successful) litigation, regardless of how long and protracted the litigation is.
- In present civil litigation virtually every person and entity other than a law practice is able to charge a fee calculated as a proportion of the amount in dispute. This is now routinely done by commercial litigation funders, some accounting firms providing assistance in connection with litigation, liquidators and companies providing services in connection with litigation.
- The prohibition on proportionate fees is to be related to the outcome of a matter or the amount of the damages awarded: Submission ED2 14 (Institute of Chartered Accountants Australia).
- The prohibition on proportionate fees runs contrary to the goal of remuneration to be based on fee for service arrangements. The Statement of Forensic Accounting Standards—APS11, which is mandatory for all members of the Institute of Certified Practising Accountants Australia, states that: ‘23 No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded’: Submission ED2 14 (Institute of Chartered Accountants in Australia).

The Law Institute also questioned if proportionate fees are permitted under current accounting standards. The Statement of Forensic Accounting Standards—APS11, which is mandatory for all members of the Institute of Chartered Accountants in Australia and Certified Practising Accountants Australia, states that: ‘23 No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded’: Submission ED2 14 (Institute of Chartered Accountants in Australia).

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The Institute of Chartered Accountants submitted that proportionate fees are not permitted under current accounting standards. The Statement of Forensic Accounting Standards—APS11, which is mandatory for all members of the Institute of Certified Practising Accountants Australia and Certified Practising Accountants Australia, states that: ‘23 No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded’: Submission ED2 14 (Institute of Chartered Accountants in Australia).

The Institute also questioned if such fees are currently being charged. Including companies established by the partners of law firms where the partners are the directors of the companies providing the litigation ‘support’ services and where the principal place of business of the company is the office of the law firm which the directors are partners of.

376 Legal Profession Act 2004 s 3.4.27(3) (b).
377 Legal Profession Act 2004 s 3.4.28(4) (b).
378 VLRC, Exposure Draft 2, Proposal 6.2. In the Consultation Paper, we asked whether the manner in which lawyers are able to charge or calculate fees is in need of reform, and whether clients should be able to agree to legal fees being calculated as a percentage of the amount recovered in civil proceedings.
379 Section 3.4.29(1)(b) Legal Profession Act 2004 (Vic). Controversion renders a law practice liable to a penalty of 120 penalty units.
380 Section 3.4.29(2) Legal Profession Act 2004 (Vic).
383 Endorsed by the High Court, by majority, in Campbell’s Cash & Carry Pty Ltd v Fossil Pty Ltd (2006) 229 ALR 58.
384 The Institute of Chartered Accountants submitted that proportionate fees are not permitted under current accounting standards. The Statement of Forensic Accounting Standards—APS11, which is mandatory for all members of the Institute of Chartered Accountants in Australia and Certified Practising Accountants Australia, states that: ‘23 No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded’: Submission ED2 14 (Institute of Chartered Accountants in Australia).
385 Including companies established by the partners of law firms where the partners are the directors of the companies providing the litigation ‘support’ services and where the principal place of business of the company is the office of the law firm which the directors are partners of.
The present open ended nature of fee charging practices by lawyers often results in fees which:
- are disproportionate to the amount in dispute
- are impossible to estimate or quantify in advance
- provide an incentive for inefficiency, over-servicing, and/or fraudulent billing practices and a disincentive to early resolution of the dispute.

At present there is no prohibition on charging a fixed lump sum fee for the provision of legal services. Any such fee will in fact be a proportion of the amount in dispute or the amount recovered even if it is not purportedly calculated on a percentage basis;

In a number of areas of litigation at present fees are limited or calculated by express reference to the amount recovered in the litigation.\(^386\)

The **Legal Profession Act 2004** expressly contemplates that legal fees may be calculated by reference to the amount of any award or settlement insofar as a costs agreement adopts an applicable ‘scale of costs’.\(^387\)

At the request of the commission a large firm agreed to include questions on fee arrangements in a survey of over 1000 clients conducted by an independent market research firm.\(^388\) The client survey sought to ascertain clients’ views on preferred fee arrangements; 42 per cent clients who were contacted commented on fees and charges. In 85 per cent of these cases the clients were being represented on conditional fee arrangements; 40 per cent of such clients said they would not have pursued their claim but for the conditional fee arrangement. Importantly, for present purposes, 46 per cent of clients said they would have preferred a fee arrangement where legal fees were calculated as a percentage of the amount recovered.

### 7.8.3 Safeguards and protections

In considering whether or not the existing prohibition should be retained the commission has considered what safeguards and protections, if any, would be appropriate in the event that proportionate fees were to be permitted.

Safeguards, in addition to the fee review mechanisms presently available under the **Legal Profession Act 2004**, may be necessary to protect the interests of clients, to avoid ‘cherry-picking’ and to provide for appropriate adjustment in the event of changes in circumstances during the conduct of proceedings.

Various safeguards and protections have been suggested to the commission in the course of the review. These include:

- a requirement that a law firm seeking to act on a percentage fee basis offer clients the choice between this option and other ‘customary’ methods of calculating fees with the client having the right to determine which arrangement to accept
- a requirement that any percentage fee agreement be approved by the court at the conclusion of any proceedings to which the agreement relates following either judgment or settlement
- a requirement that clients be advised to seek independent legal advice before entering into a percentage fee agreement\(^389\)
- a requirement that clients be advised to obtain ‘quotes’ in relation to proposed fee arrangements from more than one firm before entering into a percentage fee agreement
- a requirement that where there is a material change in circumstances in connection with the proceedings which are the subject of the fee agreement then there should be a means whereby the fee arrangements can be varied\(^390\)
- a possible cap on the maximum percentage amount of the fee or a sliding scale of permissible maximum amounts, which decrease as the amount of the recovery increases
- retaining the existing legislative right of clients to have a costs agreement set aside where it is not fair or reasonable pursuant to section 3.4.32 of the **Legal Profession Act 2004**
• a requirement that where a proportionate fee agreement is entered into the law practice should also maintain records of the actual work carried out and the time incurred so that this may be taken into consideration in any subsequent dispute about the reasonableness of the fee charged under the agreement
• a cooling off period for a specified number of days after any proportionate fee agreement is entered into
• regulation of proportionate fee and retainer arrangements by the Law Society and/or Bar Council and/or Legal Services Commissioner.

There is already a common law and statutory requirement in ‘no win no fee’ cases that the lawyer be satisfied about the ‘merit’ of the client’s case and this is also dealt with in the commission’s recommendations in relation to overriding obligations.

7.8.4 Dealing with party–party costs

It is also necessary to consider how party–party costs awards would operate if proportionate fees were to be allowed and costs were recovered by the party to the proportionate fee agreement.

One option is as follows:

In any case where the successful party has entered into a proportionate fee arrangement the fee and retainer agreement would need to specify, at the outset of the litigation, how any costs recovered are to be treated.

There are obvious difficulties inherent in any attempt to prescribe how such party–party costs should be treated. In some cases it may be appropriate for a firm to have a ‘relatively low’ proportionate fee with an entitlement to retain any costs recovered. In other cases, where there is a ‘relatively high’ proportionate fee it may be appropriate for the client to be paid the full amount of any party–party costs recovered.

The position in relation to out of pocket expenses and disbursements may depend on who advances such costs in the course of the litigation. Where they are advanced by the client then clearly the client should receive any such expenses that are recovered. Similarly, where they are funded by the law firm it may be appropriate for the law firm to retain any amount recovered in respect of such expenses.

7.8.5 Conclusions

This commission is of the view that the current absolute legislative prohibition of percentage contingent fees should be reconsidered, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect consumers and to prevent abuse. Alternatively, (regulated) percentage fees could be considered for introduction by way of a ‘scale of costs’, within the meaning of the Legal Profession Act 2004. This is discussed below.

The determination of whether regulated percentage fees should be introduced, with appropriate safeguards, should be made by the proposed Costs Council after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar Council. The Costs Council could also consider whether there are particular types of legal work where percentage fees should not be permitted. Removal of the prohibition on percentage fees would permit not only plaintiffs but also defendants to engage lawyers on a percentage basis.

Although in many instances allowing fees to be calculated on a percentage basis will result in greater certainty and lower fees for consumers of legal services, in other instances this may result in substantially higher fees than under current fee-for-service arrangements. Accordingly, the commission does not favour mere abolition of the current prohibition on percentage legal fees. If percentage fees are to be allowed there is a need for safeguards to protect consumers and to prevent abuse. Some of the safeguards have been outlined above.

Although this is a matter to be considered by the Costs Council, provision for the calculation of fees on a percentage basis does not have to be limited to cases conducted on a speculative basis (i.e., where the lawyer is only entitled to be paid in the event of success). In principle, if (regulated) percentage fees are permissible there is no reason why a client, whether plaintiff or defendant, should not be able to agree to pay fees calculated as a percentage of the amount in dispute where such fees are payable, regardless of the outcome of the proceedings.

386 See, eg, O 26 r 2 Magistrates’ Court Civil Procedure Rules and Appendix A to the rules.
387 Legal Profession Act 2004 (Vic) s 3.4.29(2).
388 These questions were included on the basis that the identity of the firm would remain confidential.
389 Section 3.4.27(3)(d) of the Legal Profession Act 2004 requires conditional costs agreements to incorporate reference to the client’s right to seek independent legal advice before entering into an agreement.
390 An example of a potential problem is where a fee arrangement is entered into in a case where both liability and quantum are in serious dispute but where, after relatively little work has been done, the defendant admits to liability. A fee arrangement which may be appropriate in circumstances where substantial legal work was likely to be required and where the law firm undertook to accept the risk on nonpayment in the event of the case failing may no longer be reasonable where liability is no longer in issue and where little further legal work is required.
391 Section 3.4.27(3)(e) of the Legal Profession Act 2004 provides for an uplift fee agreement because of ‘exceptional circumstances’. Solicitors Act, RSO 1990, c S15.
392 See Clyne v New South Wales Bar Association (1960) 104 CLR 186.
393 Section 3.4.28(4) of the Legal Profession Act 2004 provides that where a conditional fee agreement provides for an uplift fee the law practice must have ‘a reasonable belief that a successful outcome of the matter is reasonably likely’.
394 In Ontario legislation provides that a contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement unless the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of “exceptional circumstances”. Solicitors Act, RSO 1990, c S15.
395 For example, in the areas of family law and criminal law, where at present conditional costs agreements are prohibited: Legal Profession Act 2004 s 3.4.27(2).
A client may lawfully enter into an agreement to pay an agreed lump sum amount for fees, whether on a contingent basis or otherwise. The current statutory prohibition prevents the amount of any such lump sum payable to the law practice, or any part of that amount, being calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.396

The legislation states that this prohibition does not apply to the extent that the costs agreement adopts an applicable scale of costs.397 Thus, in conformity with this legislative framework, (regulated) percentage fees could be introduced by way of a ‘scale of costs’ within the meaning of the Legal Profession Act 2004.

7.9 PROPORTIONATE AND OTHER FEES IN CLASS ACTIONS

Apart from the issue of proportionate fees in ordinary civil litigation it is necessary to consider whether it may be desirable to permit proportionate or other types of fees to be recovered in class action litigation.

The commission sought submissions on the issue of whether proportionate or other types of fees should be recoverable in class action proceedings.398

Maurice Blackburn contended that proportionate fees could increase access to justice for victims of cartel and other corporate misconduct.399 Cartel claims, they argued, are particularly expensive, risky and complex. It is difficult to find representative plaintiffs willing to bear the risk of an adverse costs order. Lawyers who run the case take on a significant financial burden and may claim ordinary fees plus a 25 per cent uplift fee.

Maurice Blackburn submitted that percentage fees subject to court supervision would allow more people to bring claims for corporate misconduct. It submitted that the prohibition against lawyers charging percentage fees when non-lawyers are permitted to do so is ‘illogical’.

The commercial litigation funder IMF expressed support for percentage contingent fees in class action proceedings.

Although commercial litigation funders are able to charge a fee calculated as a proportion of the amount recovered by assisted parties (who contractually consent) there is no mechanism at present for the funder to obtain a return from class members who have not entered into litigation funding arrangements.400 This has led to a situation whereby funders, for obvious commercial reasons, are only prepared to provide financial assistance to those who enter into litigation funding agreements. The consequences of this are that much time and effort is expended in ‘signing up’ class members, and only group members who have executed litigation funding agreements can have proceedings brought on their behalf. This restriction of the class runs contrary to the policy objective of class action legislation to facilitate larger ‘opt-out’ classes. This situation has received adverse judicial comment.401

The commission notes that the issue of legal fees in class action proceedings is different from the position in ordinary litigation. In part, this is because where there is an ‘opt-out’ class, most of the class members will usually not be parties to any fee or funding agreement and may obtain the benefit of the litigation without any risk or cost.402

Class action proceedings are also different from most other civil litigation in that any settlement is required to be approved by the court and this includes approval of fees and expenses.

The commission also received submissions opposing the introduction of proportionate fees in class actions. The Law Institute maintained that:

*The use of contingency fees in litigation creates a conflict between the interests of the law firm as the law practice acquires an interest in the litigation over and above acting for the client.*403

The Institute submitted that the level of risk should not warrant a new fee and regulation regime, rather ‘the fact that the represented party is at a costs risk is part and parcel of the litigation’.

7.9.1 Class action fee arrangements in other jurisdictions

In class action proceedings in both Canada and the United States, courts are also required to approve fee arrangements and payments out of any settlement or judgment monies. However, in all jurisdictions there is provision for recovery, subject to judicial approval, or more than just the legal costs incurred in conducting the litigation in order to:
• provide compensation for the risks involved
• provide an adequate incentive for lawyers to take on the conduct of such proceedings and
• ensure that the beneficiaries of the litigation contribute to the costs rather than remain ‘free riders’.

Importantly, lawyers conducting class actions in the United States and Canada do not contract to provide legal services on a proportionate basis. However, courts have discretion (either under statutory provisions or based on principles developed by the courts) to allow payment, out of any fund created by judgment or settlement, of amounts which may exceed the actual legal costs and expenses incurred in conducting the litigation. Such fees may be allowed:

• as a proportion of the recovery
• based on the actual legal fees and expenses increased by a multiplier (the lodestar method)
• based on some combination of these methodologies.

Often information on the actual quantum of fees, based on hourly rates, is used as a yardstick in determining the reasonableness of the fees awarded at the conclusion of the case. This is done at an open hearing at which any interested person, including class members, may appear, make submissions and object.

In 2007, the Civil Justice Council recommended that in England and Wales consideration should be given to the introduction of proportionate fees on a regulated basis, along similar lines to those permitted in Ontario, particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.

7.9.2 Conclusions

In light of the divergent submissions received in response to this issue, the commission believes that more research and consultation is necessary. We believe that the proposed Costs Council should also review proportionate fees in class actions.

The Costs Council, after consultation with the Legal Services Commission, the Law Institute and the Bar Council, should also consider whether proportionate and other types of fees—including fees based on the work actually done with a multiplier (similar to the ‘lodestar’ method applied by Canadian and US courts)—should be recoverable in class action proceedings. However, fees in class action proceedings should be subject to court approval where they will ultimately be paid or reimbursed by class members who have not individually consented to the fee arrangements.

7.10 COURT FEES

The issue of court fees was raised in the Consultation Paper. The commission received a strong response to this issue, which is summarised earlier in this chapter.

In light of the concerns raised in submissions, the commission believes that court fees should be reviewed by the proposed Costs Council. There is a need for greater standardisation and simplification of court fees. There are strong arguments in favour of higher ‘user pays’ fees for commercial litigation and easier and simpler methods for reducing or waiving fees for those who cannot afford them.

The Consumer Action Law Centre’s submission proposed that court fees in all Victorian courts should be changed so that complainants or defendants that are businesses pay a higher fee than individuals. It suggested that this would to some extent offset the commercial advantages businesses obtain through the tax deductibility of legal costs incurred in some cases.

7.11 OFFERS OF COMPROMISE

The commission received further submissions regarding offers of compromise following the Consultation Paper.
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Litigation funder IMF submitted that ‘offers of compromise are the only way that parties can, unilaterally, seek to manage their costs exposure’. IMF submitted that:

Open offers be required to be made at or shortly after the Pre Litigation Conference (when disclosure of material information has been made), which should not only have cost consequences but also be relevant to the project line and budgets either agreed or set by the Court. This procedure would enhance proportionality, enable the parties to reality test their positions and provide material data for the Court in exercising its case management and cost allocation functions.

The commission believes that the rules relating to offers of compromise and costs consequences need further investigation. These matters should be reviewed by the Costs Council.

7.12 THE JUSTICE FUND

7.12.1 Assistance, including indemnity in respect of costs

The commission’s proposals in relation to a new funding mechanism (the Justice Fund) are discussed in Chapter 10.

The commission proposed that the Justice Fund should be able to provide assistance, including indemnity in respect of adverse costs, in cases other than class actions after it has become self funding.407

That proposal envisages:

- placing a limit on the liability of the proposed fund for adverse costs orders made against the party assisted by the fund for a limited period
- leaving the party assisted by the fund liable to meet any shortfall between the total amount of an adverse costs order and the capped liability of the fund.

One difficulty with limiting the liability of the fund in respect of an adverse costs order is that the successful party who obtains an order for costs against a funded party may not recover all of the costs from the fund. That would leave the assisted party liable to meet the shortfall. The commission received submissions contending that many persons would not agree to be a representative party in class action proceedings in view of such potential liability.408

The discussion in this chapter has highlighted the significant role that costs, and the threat of adverse costs, play in mediating access to justice. A number of respondents supported the view that the Justice Fund should fully indemnify assisted parties on these grounds.409 The Consumer Action Law Centre argued that ‘failing to fully indemnify the assisted party against adverse costs orders would in large part defeat the purpose of the Justice Fund’.410 It noted that the risk that adverse costs could exceed the proposed Justice Fund’s cap on liability would result in litigation not being pursued. The Law Institute also submitted that in order to facilitate access to justice, there should be no limit on the liability of the fund.411

The proposal, however, represents a departure from the standard rule that the losing party pays the winning party’s costs. Giving the assisted party immunity from liability for any adverse costs not met by the fund would alter the standard rule that the losing party pays the other side’s costs. Such an approach could have broader application for cases that are being funded by Legal Aid or conducted on a pro bono basis, and should be carefully considered. IMF submitted that the Justice Fund should compete on an ‘equal playing field or not at all’.412

The commission also sought further submissions on whether the fund-assisted party would remain liable for any shortfall between the capped liability of the proposed fund and the total amount of party–party costs ordered against an unsuccessful party.413 We canvassed the options of:

- giving the assisted party immunity from adverse costs414
- giving the proposed Justice Fund standing to apply to the court in which the funded proceedings are pending for an order limiting the potential liability of the funded party for adverse party–party costs.415

One submission suggested that the fund-assisted party should remain liable for the shortfall between capped liability and any costs order. They acknowledged this would dissuade some plaintiffs, but on balance would be ‘fairer to defendants’.416
QBE opposed providing the Justice Fund with immunity against adverse costs. It argued that a possible adverse costs order discourages unnecessary litigation and assists settlement. In the alternative, QBE submitted that the fund should be liable for the full amount of costs made against the assisted party. Similarly, State Trustees submitted that the prospect of adverse costs may not be against the interests of justice per se. Thorough consideration of the merits of a matter, they said, together with reliance on model litigant guidelines, would reduce the potential for adverse costs orders.

Other submissions reiterated their support for the Justice Fund, including in connection with the provision of indemnity against adverse costs orders. Victoria Legal Aid said that ‘protecting parties from adverse costs orders, especially in public interest cases, is important in ensuring these cases are dealt with adequately by the civil justice system’. The Consumer Action Law Centre submitted that public interest costs principles ought apply, or that costs should be capped, except where a defendant could show that further party-party costs were ‘necessary, proportionate to the nature of the claim, reasonably incurred and not incurred due to the defendant’s lack of good faith’.

The commission has taken into account these views. As discussed in Chapter 10, we believe that the Justice Fund would play an important role in the civil justice system, particularly in class actions and public interest proceedings and in facilitating access to justice for disadvantaged litigants. However, we are concerned that the fund could be vulnerable to adverse cost orders before it is self-funding, which would render it unviable. For this reason, the commission recommends that for the first five years of its operation, adverse costs orders against the fund should be limited to the amount equivalent to the amount of funding provided to the assisted party.

This recommendation means that an assisted party would remain personally liable to meet any shortfall between the amount of an adverse costs order and the maximum liability of the fund. Nevertheless, the commission expects that where the fund is in a financial position to do so, it should have a discretion to pay any shortfall. The commission also recommends that the fund should have standing to apply to the court for an order limiting the potential liability of the funded party for adverse costs.

7.13 RESEARCH ON COSTS

The commission has been considerably hampered in the course of the present inquiry by the lack of comprehensive and reliable data on legal costs incurred and recovered in civil litigation before Victorian courts.

There is clearly a need for more research and empirical data on legal costs. Information about court ordered disclosure of costs incurred (and estimated further costs) at the commencement of litigation, and costs actually incurred at the conclusion of litigation, would be of considerable value, not only to the parties and to assist the court in the management of proceedings, but also to facilitate further research and reform. The proposed Civil Justice Council and Costs Council could play a valuable role in facilitating such further research and reform.

The commission understands that three years ago the Supreme Court proposed that a Court Statistics and Information Resources Centre should be established. In its recent submission the Victorian Bar stated that this is an important initiative that should be pursued with urgency and urged the Government to support it. The establishment of such a centre would no doubt assist in facilitating further research on costs and on the operation of the civil justice system generally.

8. CONCLUSIONS

Although it is easy to pinpoint a variety of problems in relation to the costs of dispute resolution generally and civil litigation in particular, solutions are far more elusive. It is important to bear in mind the problematic nature of civil justice reform, especially in relation to the issue of costs and the impact of other reforms on the costs of litigation:

- Reforms which accelerate disclosure and disposition don’t always reduce costs.
- Cost penalties and sanctions require careful design and cautious application.
- Draconian costs penalties and the loss of substantive rights may be too high a price for procedural irregularity.
- Provisions with benign intent may have unintended consequences (e.g., further costs disputes and satellite litigation).

407 VLRC, Exposure Draft 1, Proposal 9.2.
408 Submission ED2 12 (Consumer Action Law Centre).
409 Submissions ED1 14 (Environment Defenders Office), ED1 25 (Victoria Legal Aid), ED1 20 (Public Interest Law Clearing House), ED1 19 (Human Rights Law Resource Centre), ED1 31 (Law Institute of Victoria).
410 Submission ED2 12 (Consumer Action Law Centre).
411 Submission ED2 16 (Law Institute of Victoria).
412 Submission ED1 8 (IMF (Australia) Ltd).
413 VLRC, Exposure Draft 2, 73.
414 See, eg, Legal Aid Commission Act 1979 (NSW) s 47.
415 See, eg, O 62A Federal Court Rules.
416 Submission ED2 19 (Maurice Blackburn Lawyers).
417 Submission ED2 17 (QBE Insurance Group).
418 Submission ED2 7 (State Trustees Ltd).
419 Submission ED2 10 (Victoria Legal Aid).
420 Submission ED2 12 (Consumer Action Law Centre).
421 Submission CP 62 (Victorian Bar).
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- Reforms which have the effect of increasing costs and procedural hurdles may make access to justice less affordable and outcomes less just.
- The complexity of the legal and factual matters required to be determined will have a significant bearing on the cost of dispute resolution.
- Lawyers play an important role in the civil justice system and cost reforms which restrict, curtail or render uneconomic legal services may not be in the public interest or in the interests of clients.
- On the other hand, the traditional adversarial approach to the conduct of civil litigation and the commercial and professional practices of the legal profession have increased the cost of dispute resolution.

There are complex, conflicting or countervailing policy and economic considerations to be factored into any proposed solution to perceived costs problems in the civil justice system.

RECOMMENDATIONS

Ongoing costs review and reform

141. A specialist Costs Council should be established, as a division of the Civil Justice Council. The Costs Council, in consultation with stakeholder groups, would: (a) review the impact of the commission’s implemented recommendations about costs; (b) investigate the additional matters in relation to costs referred to in the commission’s report, including those matters raised in submissions; (c) carry out or commission further research in relation to costs; and (d) consider such other reforms in relation to costs as the council considers appropriate.

Costs disclosure

142. The court should have an express power to require parties to disclose to each other and the court estimates of costs and actual costs incurred.

143. In exercising the proposed power to order disclosure of costs incurred and estimates of costs likely to be incurred, there should be limits on the type of information required to be disclosed to protect information that may have confidential strategic or forensic significance or which might otherwise be privileged (other than information concerning the quantum, break up or method of calculation of legal fees and expenses).

Fixed or capped costs

144. 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).

Taxation of costs

145. The present multiple bases for taxation of costs should be simplified.

146. There should be a presumptive rule that interlocutory costs orders should not be taxed prior to the final determination of the case unless the court orders otherwise.

Solicitor–client costs and party–party costs

147. The present gap between party–party and solicitor–client costs is unreasonable in a number of cases. The recoverable costs on a party–party basis should usually be ‘all costs reasonably incurred and of a reasonable amount’, unless the court, in the exercise of its discretion, makes an order on some other basis.

148. Other methods for ordering recovery of legal costs of a successful party should be utilised (more often), including ordering costs as a specified percentage of the actual (reasonable) solicitor–client costs, with a view to avoiding the costs and delays associated with the present process of taxation of costs.
Scales of costs

149. The court scales of costs need to be revised and/or updated.

150. There should be a common scale of costs across courts. The question of whether there should be proportionate differentials, between courts, in terms of recoverable party–party costs should be considered by the Costs Council.

151. In the event that there is a common scale for recoverable party–party costs applicable across the three courts, in addition to considering whether there should be ‘standard’ percentage reductions in the amount of costs recoverable depending on which court the proceeding is in, the Costs Council should consider whether the principle that the recoverable costs should be ‘reasonable’ is sufficiently flexible to accommodate variations between courts (in the event that such variations are considered desirable) without the need for prescribed variations.

Cost of disbursements

152. There should be a prohibition on law firms profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. When a client recovers costs, only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party.

A draft provision is as follows:

(1) Unless the client or another person providing indemnity or financial support for the client is (a) of reasonably substantial means and (b) agrees to pay in excess of the prescribed rate for disbursements, a law practice shall not charge a client any amount for disbursements in excess of the prescribed rate.

(2) In making any order for costs against a party or other person who is not a party the court shall not allow recovery of any amount for disbursements in excess of the prescribed rate.

(3) Law practice includes any related person or entity, including a service company.

(4) Prescribed rate means the approximate actual cost of the disbursement without any allowance for mark-up by the law practice or profit by the law practice. The actual cost may include a reasonable allowance for law practice office overheads. (For example: the ‘actual cost’ of internal photocopying would include (i) the cost of the paper, (ii) charges payable to an unrelated lessor or owner of any photocopying equipment used in making the copies and (iii) other costs associated with the purchase, lease or use of photocopying equipment in the possession of the law practice. The cost of the labour involved in the copying and collating would be included as part of the allowance for law practice office overheads. The ‘actual cost’ of copying done externally would be the charges made by an unrelated commercial photocopying company plus a reasonable allowance for law practice office overheads, including the labour involved in collating, despatching and collecting the documents.)

(5) To avoid complicated computations, the law practice may make a reasonable estimate of the approximate actual cost of the disbursement or charge at a rate approximate to the rate charged by unrelated commercial suppliers of services (eg, photocopying).

(6) The prescribed rate for disbursements may be set by the Costs Council.

Comment 1: Rather than use the term ‘client’, it may be preferable to pick up the terminology currently incorporated in the Legal Profession Act 2004 in respect of related persons to whom the costs disclosure obligations now apply.

Comment 2: The commission is mindful that the expression ‘of reasonably substantial means’ is imprecise.

Public interest litigation costs

153. There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

422 Based on research carried out by the commission, it would appear that in many instances only about half or less of the solicitor–client costs are recovered on a party–party basis following taxation of costs.
Percentage fees

154. The current absolute legislative prohibition of percentage contingent fees should be reconsidered, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect consumers and to prevent abuse.

155. The determination of whether regulated percentage fees should be introduced, with appropriate safeguards, should be made by the Costs Council after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar Council. The Costs Council could also consider whether there are particular types of legal work where percentage fees should not be permitted.

156. The Costs Council should also reconsider whether percentage fees could be introduced by way of a ‘scale of costs’ within the meaning of the Legal Profession Act 2004.

157. The Costs Council should consider what safeguards and protections, if any, would be appropriate in the event that proportionate fees were to be permitted.

Proportionate and other fees in class action proceedings

158. The Costs Council, after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar should also consider whether proportionate and other types of fees, including fees based on the work actually done with a multiplier (similar to the ‘lodestar’ method applied by Canadian and US courts) should be recoverable in class action proceedings. However, fees in class action proceedings should be subject to court approval where they will ultimately be paid or reimbursed by class members who have not individually consented to the fee arrangements.

Court fees

159. Court fees should be reviewed by the Costs Council. There is a need for greater standardisation and simplification of court fees. There are strong arguments in favour of higher ‘user pays’ fees for commercial litigants and easier and simpler methods for reducing or waiving fees for those who cannot afford them.

Offers of compromise and costs

160. The rules relating to offers of compromise and costs consequences should be reviewed by the Costs Council.

Justice Fund

161. The (proposed) Justice Fund should provide assistance, including indemnity in respect of adverse costs, in cases other than class actions, after it has become self-funding.

162. In cases where funding is provided by the Justice Fund during its first five years of operation the liability of the fund in respect of adverse costs should be limited to an amount equivalent to the amount of funding provided to the assisted party. The assisted party would remain personally liable to meet any shortfall between the amount of an adverse costs order and the maximum liability of the fund. However, during this period the fund should have a discretion to pay any shortfall if it is in a financial position to do so. Also, the fund should have standing to apply to the court for an order limiting the potential liability of the funded party for adverse costs.

Research on costs

163. There is a need for more data and research on costs. One means by which this might be achieved is by empowering the court to require parties to disclose costs data at the conclusion of the matter or at any other stage of the proceeding.