

Health Insights

New era for the costing of County Court and Supreme Court claims

Introduction

This insight reports on the recommendations from the ‘Report on Litigious Costs’ (**the Report**) recently released by the Supreme Court and County Court of Victoria (**the Courts**).¹

The Report considers whether it is appropriate for the Supreme and County Courts to continue to use the current Scale based approach in fixing litigious costs, or whether another model should be implemented.

The Report recommends that the current Scale based approach be discarded and that a two-stage process occur to replace the Scale:

- **Stage 1:** In the short term, the Report recommends that **time costing** guidelines are implemented. These guidelines will set out, as a minimum, reasonable hourly and daily rates;
- **Stage 2:** In the medium term, the Report recommends mechanisms to prospectively set limits on litigious costs are introduced. Specifically, the Report recommends **fixed costs** for particular types of litigation, and **costs budgeting** in other cases.

Although the Report’s recommendations have not yet been implemented, both Courts have endorsed the Report’s recommendations and will now begin the consultation process for implementation of the recommendations.

While time costing is already a prevalent billing practice in most law firms, the possible introduction of fixed costs and costs budgeting will represent a significant change to litigation in Victoria. It is hoped that these changes will increase certainty, promote early resolution, reduce costs disputes and reduce overall costs.

Current Approach

In addition to the Supreme Court Scale of Costs,² the regulation of litigious lawyer/client and party/party costs in Victoria also involves statutory mechanisms that require costs to be ‘fair and reasonable’ and ‘reasonable and proportionate’.³

¹ The Hon. Justice Jack Forrest and Her Honour Kathryn Kings, *Supreme Court of Victoria & County Court of Victoria Report on Litigious Costs* (3 May 2022).

² See *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Appendix A.

³ See *Civil Procedure Act 2010* (Vic); Legal Profession Uniform Law.

The current Scale based approach prescribes a quantum of fees that legal practitioners can charge for certain types of work (for example, attendances, reading documents, correspondence, filing and photocopying). The Scale is relevant to two aspects of costs assessment in litigation:

- a. It must be used if a party wishes to enforce a costs order or agreement made against another party (the assessment of party/party costs).
- b. It is used by both Courts when fixing lawyer/client costs in personal injuries/death claims and estate/testator family maintenance (**TFM**) claims.

In regards to lawyer/client costs, the Scale is in practice not used for billing clients in most litigation, other than in personal injury and estate claims.

There are a number of reasons why the Report recommends that the current Scale based approach is discarded. These include:

- that it is difficult to understand and apply
- it lacks both differentiation and flexibility
- it does not reflect the charging practices of many firms, and
- it is open-ended and retrospective.

Recommendations: Two-Step Process

The Report recommends that the Scale is replaced in a two-step process, that is overseen by the existing Costs Court.

Stage 1: Time costing

In the short term, the Report recommends that time costing guidelines are implemented to assess litigious costs by setting out reasonable hourly and daily rates. The Report recommends guidelines that are similar to those currently used in New South Wales.

The aim of the time costing guidelines will be to incorporate greater specificity and clarity and to reflect modern costing practices. The Report recommends that these guidelines are updated regularly, and set at appropriate market rates on a party/party basis. Whether the time costing model is adopted in relation to lawyer/client costs will be a matter for lawyers and their clients.

Stage 2: Fixed costs and costs budgeting

In the medium term, the Report recommends a combination of fixed recoverable costs and costs budgeting to prospectively set limits on litigious costs, based on the model used in England and Wales. This involves:

- a. FRC for particular types of litigation (that is, personal injuries proceedings involving transport accident and WorkCover claims, and most testator family maintenance (**TFM**) proceedings); and
- b. In all other cases, costs budgets which are approved by the Court shortly after the commencement of a proceeding.

The Report notes that it will be necessary to consider whether there should be exceptions permitted to the above approach, for example, in relation to litigation involving unrepresented litigants.

Fixed Recoverable Costs

Fixed recoverable costs set the amount of legal costs that a winning party can claim back from the losing party in litigation. The Report recommends fixed recoverable costs for personal injuries proceedings and TFM proceedings on the basis that these proceedings are more likely to involve 'unsophisticated' clients that would benefit from the certainty of fixed recoverable costs, the progression of these cases involve a degree of consistency, and these claims are already subject to a degree of costs management. However, the Report also recommends that applications to the Court be permitted to exclude complex cases from the fixed recoverable costs model. The Report also acknowledges that, in future, consideration could be given to applying fixed recoverable costs to other types of proceedings currently within the common law divisions of both courts.

The Report notes the concern that the introduction of fixed recoverable costs may result in an increase in the amount of lawyer/client costs, meaning that the client would receive a lesser sum than they would now. The Report therefore suggests that a similar approach to that taken in WorkCover proceedings should apply. This would involve only permitting lawyer/client costs to be recovered pursuant to a Court order.

Costs Budgeting

Costs budgeting involves the Court approving of 'costs budgets' submitted by the parties shortly after proceedings have commenced, with the cost budget outlining the parties' expected legal costs. Applications may be made to vary the estimate as the case progresses.

The Report recommends that costs budgeting is applied 'across the board' in the Supreme and County Courts, with a discretion for some cases to be excluded. Consideration will need to be given regarding whether costs budgeting is carried out as part of the case management process or separately by the Costs Court, or both. This will depend on the circumstances of the case.

The aim of fixed recoverable costs and costs budgeting will be to provide greater certainty and predictability for potential litigants in relation to party/party costs, enhance access to justice, promote early resolution of litigation and reduce costs disputes and associated costs and delay and reduce the overall costs of litigation.

Next Steps

The Courts will now begin the consultation process for implementation of the Report's recommendations. At this point, it is not clear when the recommendations will be implemented.

Meridian Lawyers will maintain a watching brief on the progress of the consultation process and will provide a further update when further details become available.

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This Insight was written by Principal Kellie Dell’Oro with the assistance of Solicitor Amy Hatfield. For further information about the potential implications arising from the recommendations outlined in *the Report on Litigious Costs*, please contact Kellie.



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