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The Cost of Access to Courts

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Victorian Law Reform Commission

"Law's costly, tak' a pint and 'gree" Scottish proverb

Contents

1. The source of present concerns about the cost of access to the courts.
2. Recent developments in other jurisdictions, including the move towards greater proportionality and determinacy of legal costs.
 - 2.1 The Woolf reforms
 - 2.2 The filing of cost estimates and budgets
 - 2.3 The proposed establishment of a Costs Council
 - 2.4 The concept of proportionality
 - 2.5 The indemnity principle
 - 2.6 Fixed costs and capping of costs
 - 2.7 The gap between lawyers' costs and the costs recovered from the losing party
 - 2.8 Recent NSW legal fees review
 - 2.9 British Columbia civil review task force
 - 2.10 Manitoba Law Reform Commission report
 - 2.11 New Zealand
 - 2.12 Hong Kong
 - 2.13 Germany
 - 2.14 Costs and the adversary system
 - 2.15 Costs and the overriding objective of civil procedural rules
3. The apparent failure to control costs in England and Wales in the aftermath of the *Woolf* reforms.
4. The calculation and assessment of costs.
 - 4.1 The law governing fee and retainer arrangements for the conduct of civil litigation
 - 4.2 Principles governing the taxation of costs in Victoria
 - 4.3 Methods of calculating/assessing costs in Victoria
 - 4.4 The current Victorian review of costs

- 4.5 The current Victorian review of taxation of costs
- 4.6 Problems with open ended and indeterminate legal fees and expenses
 - 4.6.1 The tyranny of the billable hour
 - 4.6.2 Out of pocket expenses and disbursements
- 4.7 Court fees and charges

5. Costs in 'public interest' litigation.

6. Costs in class action litigation

7. Confidence in the courts and the problematic nature of civil justice reform

Appendix: Summary of submissions to VLRC on costs

Acknowledgement and caveat

This paper was prepared with the assistance of the 'civil justice team' at the Victorian Law Reform Commission comprising Mary Polis, team leader; Samantha Burchell, policy and research officer; Jacinta Morphett, policy and research officer; Christiana McCudden, policy and research officer; and Ross Abbs, research assistant.

The views expressed in this paper do not necessarily reflect the views of the Victorian Law Reform Commission. The commission has not adopted any position in relation to costs to date and welcomes further submissions and comments. The commission will report on the first stage of the civil justice enquiry in September 2007.

I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is no justice, if a decision can only be reached after excessive delay, or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in the quality of justice in a world where resources are limited.¹

Introduction

In May 2004 the Victorian Attorney General Rob Hulls issued a Justice Statement outlining directions for reform of Victoria's civil justice system. The civil justice review being conducted by the Victorian Law Reform Commission (VLRC) is part of the reform program.

The author was appointed as a full time Commissioner with the VLRC in September 2006 to head the civil justice review. A division of the Commission has been established for the review comprising the author, Justice David Harper, Judge Felicity Hampel, Professor Sam Ricketson and Dr Iain Ross.

The policy and research staff of the Commission who are working on the civil justice review are referred to above.

In October 2006 the VLRC issued a consultation paper which identified a number of questions on which submissions were sought. The present paper deals with a number of issues relating to the cost of access to courts and summarises a number of the submissions received with particular reference to costs issues. Some submissions are yet to be received.

1. The source of current concerns about the cost of access to the courts.

Legal and associated costs are often the most critical determinant of whether or not 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. Such factors include:

- fear of adverse costs which may prevent many claimants from commencing meritorious claims
- the adverse impact of concern about adverse costs on the conduct of claims and defences

¹ P Middleton, *Review of Civil Justice: Report to the Lord Chancellor* (1997) [2.20], quoted in I Scott, 'Adjusting The Interests of Parties and Courts : Uniformity, Diversion and Proportionality' (Paper presented at the 22nd Australian Institute of Judicial Administration Annual Conference, Sydney, 17 September 2004) 32.

- 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 over charging;
- 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 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;
- the perceived necessity to cover all issues because of concern about professional responsibilities and potential liability;
- the inherent complexity of the subject matter of some types of cases;
- 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 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 disproportionate relationship between costs and the subject matter of the dispute;
- the complexity and technicality of civil procedural rules;
- the predominant use of oral argument and adversarial processes at both interlocutory proceedings and at trial;
- the a lack of proactive judicial management of litigation;
- insufficient use of alternative dispute resolution techniques, both in and outside the court process;
- the inability of successful parties to recover a substantial proportion of their costs in the event of success;
- the apparent increase in the number of self represented litigants;
- factors relating to behaviour and 'litigation culture', including adversarial conduct and gamesmanship.

The high cost of civil litigation 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.

The submissions which have been received and reviewed by the Victorian Law Reform Commission to date have identified a multiplicity of issues of current concern in relation to costs. These include:

- insufficient use of modern technology

- the lack of early disclosure of witness statements
- the lack of early identification and narrowing of the issues
- insufficient judge managed lists operating within a docket system
- unnecessary interlocutory steps
- the lack of uniform civil procedure
- the requirement for the production of court books
- unacceptable delay
- insufficient judicial resources and court resources
- continual amendment of pleadings
- uncontrolled discovery
- the lack of data to enable better assessment of efficiency
- the lack of defined time frames for the resolution of cases
- the lack of simplified and streamlined processes
- the lack of funding available to litigants
- the absence of costs protection in public interest cases
- the need for greater flexibility in legal costs arrangements
- the 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
- better provisions for the waiver of fees for disadvantaged litigants
- the lack of available funding for disbursements
- the need to re-structure 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, *inter alia*:

- pre-litigation disclosure by persons in dispute
- fee and billing methods used by lawyers
- the conduct of participants in the civil litigation process
- procedural rules for the conduct of litigation
- judicial and court resources
- court and case management

- court fees and transcript costs
- procedures for the assessment and recovery of costs
- particular problems for certain categories of litigants.

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. Also, submissions in respect of other aspects of the civil justice process have implications in relation to costs. The submissions in relation to specific questions concerning costs identified in the VLRC Consultation Paper are summarised in the appendix to this paper.

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. 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 de-regulation 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 recover 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.

Thus, 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 was sufficient to justify the risk of non payment 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 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 in the following terms:

*'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, will 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 and 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,⁴ 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 a number of 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 a number of 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 are as follows:

- (1) improving primary standards of conduct of participants in the civil justice system;
- (2) accelerating disclosure of information and documents;
- (3) enhancing judicial management of cases and the conduct of trials;

² Scott, above n 1, 31.

³ *Ibid.*

⁴ J Peysner and M Seneviratne, *The Management of Civil Cases: the Courts and Post-Woolf Landscape*, DCA Research Series 9/05 (2005).

- (4) reducing the incidence and duration of interlocutory hearings and appeals;
- (5) increasing the determinacy of sanctions for procedural default;
- (6) facilitating greater use of mediation and other alternative dispute resolution mechanisms;
- (7) improving mechanisms for the judicial resolution of issues likely to be dispositive of the proceedings; and
- (8) achieving a greater level of certainty or “proportionality” in relation to both solicitor-client and party-party costs.

Whether or not 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.

Although the Victorian Law Reform Commission has yet to decide what costs issues it will consider in the course of the present civil justice review there are a number of matters that may warrant attention. These include the following:

- (1) whether there is a case for the establishment of an independent body, such as a ‘Costs Council’ of the type recently recommended in England and Wales by the Civil Justice Council, which would comprise representatives of relevant stakeholders under judicial leadership and which would have an ongoing role in monitoring costs reforms and proposing further reform after appropriate research and consultation;
- (2) whether there is a need for a change in the principles and procedures governing the recovery of costs by successful parties in civil litigation;
- (3) whether there is a case for allowing *clients* the option of fee agreements which provide for the calculation of legal fees as a percentage of the amount in issue, subject to appropriate safeguards, including possible judicial approval;
- (4) whether the present system of allowing substantial ‘commercial’ mark ups on out of pocket expenses and disbursements is defensible, in relation to both party-party and solicitor client costs;
- (5) whether there is a case for the establishment of a contingency legal aid fund, which would operate in a manner similar to commercial litigation funders, but which would retain the profits derived from funding successful cases so as to facilitate (a) the funding of further cases, (b) the provision of an indemnity in respect of successful defendants costs, (c) the provision of security for costs and (d) the financing of ‘public interest’ litigation;
- (6) whether there is a need for more determinate, predictable or ‘fixed’ costs for certain types of work or certain categories of cases;

- (7) whether there should be more automatic costs sanctions in the event of interlocutory and procedural default;
- (8) whether court and associated fees should be standardised, simplified and re-structured so as to provide an additional economic incentive to the early disposition or settlement of disputes;
- (9) whether there is a case to require parties to disclose estimates of costs to the court and to the other party;
- (10) whether there is a need to modify costs rules to accommodate problems experienced in certain categories of cases, including ‘public interest’ cases and proceedings brought by self represented litigants.

The Law Reform Commission welcomes suggestions and proposals in relation to the issue of costs generally. The Commission is aware that some aspects of the issues referred to above are already the subject of investigation and report by others and that therefore it may not be necessary or appropriate for such matters to be investigated in the course of the current civil justice enquiry. The submissions on costs which have been received and reviewed to date are summarised in the appendix to this paper.

In considering proposed solutions to the perceived ‘problem’ of legal costs it is perhaps wise to recall the words of H L Menchen:

‘There is always a well-known solution to every human problem—neat, plausible, and wrong’⁵

2. Recent developments in other jurisdictions

Common law justice systems have been in an almost perpetual state of review in one way or the other since the 19th century.⁶ There have also been various calls for reform of many other justice systems throughout the world for a number of decades.⁷

Commenting upon the civil justice enquiry currently being conducted by the Victorian Law Reform Commission, a recent article in the non peer reviewed 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

⁵ H L Menchen, *Prejudices; Second Series* (1920).

⁶ 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].

⁷ See eg Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (2004) 1–4.

commissions or reports on reforming Britain's civil justice system. They have had little impact."⁸

It cannot be credibly contended that reforms of Britain's civil justice system have 'had little impact'. However, it is perhaps salutary to reflect on the fact that in 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.*'⁹

2.1 The Woolf reforms.

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.

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 fixed and capped costs and the filing of cost estimates were all initiatives 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.¹⁰

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.¹¹

Prior to the introduction of the reforms in England and Wales, in 1997 the Lord Chancellor engaged Sir Peter Middleton to conduct a further review of civil justice

⁸ 'Lawyers Safely in Charge of Civil Justice "Reform"', *Justinian*, 3 October 2006.

⁹ *Final Report of the Committee on Supreme Court Practice and Procedure*, Cmnd 8878 (1953), quoted in D Gladwell, 'Modern Litigation Culture: The First Six Months of the Civil Justice Reforms in England and Wales' (2000) 19 *Civil Justice Quarterly* 9.

¹⁰ See eg Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Report No 92 (1999); Australian Law Reform Commission, above n 6; Manitoba Law Reform Commission, *Costs Awards in Civil Litigation*, Report No 111 (2005). The Manitoba report briefly looks at the English system and proportionality and appears to be significantly persuaded by the arguments of Zuckerman that the system is flawed: 'Whatever the merits of the 1999 overhaul of the Rules of Civil Procedure to reflect the principle of proportionality, it is apparent that the current costs regime has serious problems' (at 23).

¹¹ Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 26.

systems. This resulted in a review of the reforms proposed by Lord Woolf and a number of recommendations regarding legal aid. 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.’¹² Middleton then made a number of recommendations. In relation to costs he largely endorsed the proposal for fixed costs whilst recommending some changes. In particular he recommended that as an alternative to government setting the fixed costs¹³ an alternative method would be to require lawyers to agree an all in fixed fee to cover proceedings up to and including trial.¹⁴

Following the commencement of the revised *Civil Procedure Rules* (CPR) in 1999 there was an intense period of debate and uncertainty in the English civil justice system as to 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 reform after they had been in operation for six months.¹⁵ After noting that civil servants were paid to take a ‘measured view’, he indicated that he was ‘cautiously euphoric’. However, there were a number of teething problems, including legal challenges to the *vires* of the new rules. One provision had already been struck down.¹⁶ Another judge had raised concerns about the validity of the rule dealing with privilege attaching to the instructions to an expert witness.¹⁷

However, 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.¹⁸ 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.’*¹⁹

A firm line appeared to be drawn with the past and the Court of Appeal began to refer to the ‘*modern litigation culture*’.²⁰ 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:

‘In May Mrs Justice Arden gave her new powers a test drive-and barbecued the parties.’

¹² Middleton, above n 1, [4].

¹³ He doubted whether the government had the requisite knowledge or expertise.

¹⁴ Middleton, above n 1, [2.43]–[2.45].

¹⁵ Gladwell, above n 9.

¹⁶ *Civil Procedure Rules 1998* (UK), r 48.7(3) on the disclosure of privileged documents on the making of a wasted costs order: *Mediterranean Holdings v Patel* [1999] 3 All ER 673 (Toulson J).

¹⁷ *Civil Procedure Rules 1998* (UK), r 35.10(4).

¹⁸ See eg *Biguzzi v Rank Leisure* [1999] 1 WLR 1926

¹⁹ See also *Walsh v Misseldene* [2000] All ER (D) 261.

²⁰ *Adoko v Jemal* [1999] EWCA Civ 1643, referred to in Gladwell, above n 9.

As a result of proactive judicial intervention in that case, the trial estimate was reduced from 12 to 5 days and settled the next day. According to Gladwell, judges were taking their case management role very seriously indeed.

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 public body, sponsored by the Department of Constitutional Affairs. It was established pursuant to the *Civil Procedure Act 1997*. It represents an interesting model because of its membership, which includes representatives of all the relevant interests, and because 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. The Council comprises 26 members. There is a Chief Executive Officer, full time staff and 8 committees, comprising about 100 members. The committees are 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 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 been reported that the number of claims and appeals filed with the English courts has slumped dramatically since the operation of the CPR.²¹

Corresponding with this decline in the filing of civil claims there was a substantial increase in the filing of applications with the court in respect of costs.²² As one expert on costs has commented, ‘*The public is deserting the courts while lawyers flock to them.*’²³ The explosion in ‘costs litigation’ and ensuing debate prompted the Civil Justice Council to issue a report in September 2005.²⁴ The CJC noted that ‘*[L]itigation that now extends to “arguments about the costs of arguments about costs” brings the civil justice system into disrepute.*’²⁵

²¹ In 1997 2 million claims had been issued in the English County Court. In 2004–2005 it was reported that only 881,300 claims were issued even though the County Court has had an increase in jurisdiction during that period: K Underwood, *Fixed Costs* (2nd ed, 2006) xvi.

²² During 1999–2000 9,525 bills were filed with the Costs Court but 15,812 were received in 2003–2004: *ibid.*

²³ *Ibid.*

²⁴ Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs* (2005).

²⁵ *Ibid* 53.

This report set out a number of recommendations with respect to costs and described the considerable ('disproportionate') work the CJC had already carried out with respect to further costs reform. Of note is the framework for 'predictable costs' for cases such as road traffic accidents which the CJC had settled following extensive consultations and forums with relevant industry participants and stakeholders.

The allocation of cases to different tracks

The Woolf reforms provided for the assignment of cases into tracks according their nature and the value of the amount in issue. The scope of the three tracks is dealt with in Part 26.6 of the CPR as follows.

The small claims track is the normal track for any claim which has a financial value of not more than £5,000 subject to restrictions in the rules or statute (for example the court will not allocate to the small claims track certain claims in respect of harassment or unlawful eviction.) Specific claims listed in the CPR for the small claims track are:

- any claim for personal injuries up to £5,000 and where the financial value of damages (defined as compensation for pain, suffering and loss of amenity not including other damages claimed) is not more than £1,000; and
- any claim by a tenant against a landlord for repairs or damages of not more than £1,000.

The fast track is the normal track for any claim:

- for which the small claims track is not the normal track; and
- 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; and
- oral expert evidence at trial will be limited to –
 - one expert per party in relation to any expert field; and
 - 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.

Parts 26.7 and 26.8 of the CPR govern the rules for allocation and other matters which the court must take into account when assigning a case to one of the tracks. There is also an extensive Practice Direction on Allocation and Re-allocation to supplement Part 26. The usual timing for allocation of matters is after receipt of the allocation questionnaires being filed by defendants or the period for such has expired.²⁶ These questionnaires are usually filed and served soon after defences are filed.²⁷

²⁶ *Civil Procedure Rules 1998* (UK), r 26.05.

²⁷ *Civil Procedure Rules 1998* (UK), r 26.03.

2.2 The filing of cost estimates and budgets

As part of reforms to the CPR for England and Wales, one of the initiatives introduced 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.²⁸ 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.²⁹

The details of these estimates of costs are set out in the Practice Direction on Costs. This requires parties to 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.³⁰

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% from their filed estimate.

The CJC reported that to date 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.’³¹

The rationale for estimates, and in particular for parties to estimate the costs they expect to recover for work done, was an expectation this would put a 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.’³²

In a survey of lawyers and the courts following implementation of the new CPR, serious doubt was cast as to the effectiveness of these cost estimation provisions. The consultation process 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.’³³*

²⁸ Practice Direction About Costs, [6.3].

²⁹ Practice Direction About Costs, [6.4].

³⁰ Practice Direction About Costs, [6.2].

³¹ Civil Justice Council, above n 24, 21.

³² J Peysner and M Seneviratne, *The Management of Civil Cases: the Courts and Post-Woolf Landscape*, DCA Research Series 9/05 (2005), 69.

³³ *Ibid* 70.

In short, the authors of the report concluded that estimates were not acting as an effective control on costs. Although it was noted that as the CPR did not implement all of the recommendations made by Lord Woolf regarding budgets, capping and fixing of costs, it was difficult to see “*how estimates on their own could ever constitute an effective brake on costs.*”³⁴

In Australia similar procedures exist in the Family Court. The *Family Court Rules 2004* require the filing and exchange of legal cost budgets and estimates. Rule 19.04(1) of the Rules³⁵ 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; and
- (b) the estimated future costs of the party up to and including each future court event.

Rule 19.04(3) requires that these notices must be given to the court and each other party on the day of the court event.

Anecdotal reports are 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 inquire 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 amongst family law practitioners who complained that disclosure of such information was potentially a breach client legal privilege and/or open to abuse by other parties.

2.3 The proposed establishment of a Costs Council

One of recommendations made by the CJC that is of particular interest and relevance to other jurisdictions such as Australia arose out of the observation that the successful operation and ongoing viability of the costs reforms required the establishment of an overseeing body. Accordingly, the CJC has recommended the establishment of a body to be called the ‘The Costs Council’. 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 CPR.

The CJC did not recommend that this council should be limited to representatives of the judiciary and the legal profession. Whilst it was recommended that a member of the judiciary should chair the Costs Council the CJC noted that membership should be drawn from all stakeholder organisations involved in the funding and payment of costs.

³⁴ Ibid 71.

³⁵ 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) impose similar requirements, although it did not require disclosure of costs statements and estimates to the other parties.

This 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. Not only are there representatives of various stakeholders on the Civil Justice Council, the CJC has regularly consulted, negotiated and mediated various civil justice issues with representatives of relevant stakeholders in the civil justice system. Its commitment to this wider involvement of all stakeholders is evidenced through various initiatives. For example, the CJC has established a dedicated 'costs' website through which stakeholders are encouraged to post questions and answers and relevant papers are available. Referred to as the 'Costs Debate' the site is found at www.costsdebate.civiljusticecouncil.gov.uk.

The CJC's recommendations were further debated by representatives of the legal profession and other stakeholders at a Costs Forum in March 2006. At this forum concerns and queries regarding the proposed Costs Council were aired. Matters addressed 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 to ensure that the membership would include representatives of all interested parties; and
- The need for further work to identify the function and funding of the proposed Council.

It is understood that here will shortly be a decision as to whether the Costs Council is to be established.

One key feature of the proposed Costs Council would be its role in establishing and annually reviewing the recoverable fixed fees in the fast track and guideline hourly rates between parties in the multi track.

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.³⁶

2.4 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% or more of the amount in issue.³⁷ Hence Lord Woolf's push to impose proportionality as a constraint on excessive legal costs and

³⁶ See Legal Costs Working Group, *Report of the Legal Costs Working Group* (2005) [7.17].

³⁷ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 80.

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:

*[T]here 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.*³⁸

An issue raised in relation to the test of proportionality is that *'there is no causal link between the amount of fees charged for legal services and the value of the claims.'*³⁹ The complexity of cases, and the demand this will place both on the quality and amount of legal services required, is not necessarily dictated by the amount in issue.⁴⁰

Similarly, 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.⁴¹

These concerns are the basis for the practice in other jurisdictions such as New Zealand and British Columbia, in which 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 (MLRC) in its report on Costs Awards in Litigation. The MLRC 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.'*⁴²

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* (CPR) requires that cases be dealt with in a manner proportionate:

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

The Practice Direction issued by the English Courts with respect to the costs provisions in rule 45 of the CPR notes the following:

'In applying the test of proportionality the court will have regard to rule 1.1(2)(c). 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 can not be applied in all cases

³⁸ Scott, above n 1, 7.

³⁹ Submission No 13 from Vicki Waye (27 November 2006).

⁴⁰ Ibid.

⁴¹ Australian Law Reform Commission, above n 6, [4.51]–[4.54].

⁴² Manitoba Law Reform Commission, above n 10, recommendation 5.

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 in *Home Office v Lowndes*:

*'...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 44.5(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.'*⁴³

One difficulty with the concept of proportionality 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.⁴⁴ As a result of various tort reform measures, the quantum of recoverable damages has been significantly reduced in recent years, whereas lawyers have experienced significant increases in the cost of overheads.

2.5 The indemnity principle

Prior to the *Statute of Westminster* in 1275 there was no entitlement to recover costs.

The ALRC's 1995 study and report into cost shifting in Australia recommended retaining the principle that 'costs follow the event' or the costs indemnity rule. The recommendations of the ALRC were endorsed by the Law Reform Commission of Western Australia in 1999 which referred to the principle as that of 'the loser pays.'⁴⁵

Both of these reports noted that there should be exceptions to the general application of this rule in (a) public interest cases, (b) cases where orders are made as sanctions or against third parties such as lawyers, and (c) 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 CPR 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 United Kingdom has recently observed that:

'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

⁴³ [2002] EWCA Civ 365, [31].

⁴⁴ 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.

⁴⁵ Law Reform Commission of Western Australia, above n 10, [16.22]; Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation*, Report No 75 (1995).

*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.*⁴⁶

In its practical operation the indemnity principle has developed a number of flaws. In the United Kingdom at least, the problem appears to have gone from one extreme to the other. 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% 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 in so far 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, like in Australia, is on disclosure and compliance with quite onerous obligations upon lawyers when entering into retainer agreements with clients. The draconian consequence of non compliance was perceived by insurers in the UK to be the ‘Achilles’ heel’. Losing parties, in the hope of getting off the hook, have mounted large scale litigious assaults on the fee and retainer arrangements entered into between the opposing parties and their lawyers. 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.⁴⁷

In the aftermath of the Woolf reforms in England and Wales there does not appear to have been any reduction in the costs of civil litigation. If anything, the anecdotal and other evidence suggests that costs have increased considerably. In part this is because, with limited exceptions, fixed costs have not been introduced.

2.6 Fixed Costs

The ‘fixed recoverable costs scheme’ under the CPR applies only to disputes (a) arising from road traffic accidents (on or after 6 October 2003), (b) where the total value of the

⁴⁶ Underwood, above n 21, xv–xvi.

⁴⁷ 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.

agreed damages does not exceed £10,000, (c) where the disputes are settled *before* proceedings are issued, and (d) where the case would not have been in the small claims track if proceedings had been issued.⁴⁸ Costs are not recoverable in ‘small claims’, which encompass claims up to £1,000 for personal injury and £5,000 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*’.⁴⁹ The court has a discretion to award costs in an amount greater than the ‘fixed recoverable costs’ in ‘exceptional circumstances’.⁵⁰

Where the work has been done pursuant to a conditional fee agreement, a success fee is recoverable on top of the fixed costs. The success fee is now fixed at 12.5% of the base fee. The ‘base’ fee includes both a core fee (£800) plus a percentage amount depending upon the amount of the claim. This percentage is 20% of the amount of damages up to £5,000 and 15% of the amount of damages between £5,000 and £10,000. There is an additional 12.5% 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% above the normal base 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 Simon J (sitting with Master [now Costs Judge] Peter Hurst and Mr Jason Rowley as assessors) 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 CPR Pt 45 ‘*were introduced following “industry wide” discussions under the aegis of the Civil Justice Council*’.⁵¹

In *Nizami* Simon J 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.*⁵²

The Civil Justice Council has proposed the extension of the fixed costs regime to other areas of litigation. In its 2005 report the CJC recommended that the predictable costs scheme (which was then restricted to road traffic accident cases below £10,000) 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.

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 Transport Accident Commission (TAC) met with the Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA, formerly the Australian Plaintiff Lawyers Association) with a view to reaching agreement

⁴⁸ *Civil Procedure Rules 1998* (UK), r 45.7(2).

⁴⁹ Underwood, above n 21, [2.1].

⁵⁰ *Civil Procedure Rules 1998* (UK), r 45.12.

⁵¹ [2006] EWHC (QB) 159; [2006] 2 All ER 140, [22].

⁵² [2006] EWHC (QB) 159; [2006] 2 All ER 140, [23].

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.

In signing up to these protocols with the TAC, the LIV and ALA agreed that their members will be bound by the protocols (see 1.4 of Protocols). The protocols do not have a statutory nature although they were agreed in the presence of the Victorian Attorney General.

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

It has been stated that these protocols were the pragmatic result of stakeholders recognising that the alternative to such voluntary regulation was the imposition of a statutory regime. The protocols have been heralded as ‘*a stark example of the benefit of consultation and engagement in a process of change.*’⁵³ Significantly the protocols recognise the need for claimants to have legal representation and the value of the work performed by plaintiff lawyers.

The protocols mandate ‘early review’ of claims and require adherence to various procedural steps such as early disclosure of relevant information and documents and minimum requirements for exchange of medical evidence. The protocols set strict timetables for delivery of information and in particular for the response by the TAC to applications etc (often within 14 days of receipt).

These measures all contribute to avoiding procedural conduct which increases the legal costs incurred. In turn the protocols provide for payment of fixed legal costs in particular circumstances. Importantly the protocols allow for costs to be paid upon resolution of a claim even if proceedings were not instituted.

The protocols incorporate an agreed regime for payment legal costs by the TAC in certain circumstances. For example, when a claim for 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 whereby 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.

⁵³ Unpublished paper by Peter Burt, provided to the Victorian Law Reform Commission.

The fixed costs mandated by the protocols are indexed according to CPI.

It should be noted that in fixing legal costs for particular circumstances the protocols do not regulate the costs charged on a solicitor own client basis. In review of the costs regime in the serious injury protocol one commentator has noted that this approach *'means that there are going to be winners and losers. In some cases the amount allowed will be more than might otherwise have been allowed on scale. In other cases, especially cases with complex liability and/or quantum issues, the amount will be significantly less than scale costs. Consequently, clients with difficult cases will end up paying more, after the party/party offset, than is currently the case.'*⁵⁴

The notion of fixing and/or capping costs in the Federal civil jurisdiction in Australia was also canvassed in a report prepared for the Federal Attorney General's Department in 1998.⁵⁵ In this report the authors formed the view that the current scales were badly structured and proposed alternative scales to govern both solicitor own client and party-party costs in a number of federal jurisdictions. Key criticisms that the report noted of current scales were that they created uncertainty, were a disincentive to settlement, created an incentives for wasteful expenditure, or "padding" and created inappropriate biases towards types of inputs such as use of expert witnesses. As such the report advocated scales that effectively fixed the costs for a matter at the outset, with allowances being made for a matter being disposed of at different stages in the proceedings and the complexity of the matter.

In December 2003 the Commonwealth Attorney General's Department issued a strategy paper in relation to the federal civil justice system. The paper recommended that the government support a number of the recommendations in ALRC report 75 on costs shifting and in particular the recommendation that would enable a court to specify the maximum amount that may be recovered pursuant to an order for costs.⁵⁶

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 over servicing.

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, 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.

The authors of a discussion paper on civil justice in Victoria noted 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.'*⁵⁷

⁵⁴ Ibid.

⁵⁵ P Williams et al, *Report of The Review Scales of Legal Professional Fees in Federal Jurisdictions*, Commonwealth Attorney General's Department (1998).

⁵⁶ Australian Government, Attorney General's Department *Federal Civil Justice System Strategy Paper* December 2003.

⁵⁷ P Sallmann and R Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (2000) 167.

In the debate about ‘fixed’ costs it is important to focus on (a) *both* the chargeable costs and the recoverable costs, and (b) 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.’⁵⁸

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 de-regulatory moves which are said to be in the interests of efficiency and competition in the market place.

2.7 The gap between lawyers’ costs and costs recovered from the losing party

For some years in much of the civil litigation in the higher courts Victorian lawyers, like those in most other Australian jurisdictions, have 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 VLRC is presently trying to obtain some empirical data to determine what that disparity presently is. Historically the anecdotal evidence suggests that only about 60-70% 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 Victorian Law Reform Commission that only about 50% of the total amount of the costs is likely to be recovered 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. Furthermore, there may be other considerations which may reduce the quantum of recoverable costs, for example in ‘public interest’ litigation (which is discussed in detail at the end of this paper).

⁵⁸ Ian Scott, ‘Adjusting The Interests of Parties and Courts : Uniformity, Diversion and Proportionality’ (Paper presented at the 22nd Australian Institute of Judicial Administration Annual Conference, Sydney, 17 September 2004) 16 referring to the *Review of Civil Justice: report to the Lord Chancellor by Sir Peter Middleton* (September 1997) at [2.42].

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%*’.⁵⁹ By way of comparison, in British Columbia only around 25-30% of actual costs are apparently recovered⁶⁰ and in Manitoba it was variously estimated as less than 50%, no more than 25% and on occasions less than 10% of actual costs.⁶¹

The ‘gap’ between recovered costs and actual legal costs was referred to by the WALRC in 1999 which noted ‘*[i]n a sense it is unfair*’. The WALRC recommended that reduction of the gap be considered by introduction of a statute, for example the ‘Legal Costs Act.’⁶²

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, her or its 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, contributes to over servicing and in turn overcharging. The issue of hourly billing is discussed further below.

2.8 Recent 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 enquiry encompassed a review of the mechanisms through which clients could object to fees that were considered unfair or negotiate other arrangements. The Legal Fees Review Panel comprised a senior public servant, the Legal Services Commissioner and representatives of the NSW Bar Association and the Law Society.

The findings and recommendations of the Panel are set out in its December 2005 report.⁶³ The 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.

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 their successful use of budgets in contracting with lawyers for the conduct of commercially funded litigation.

⁵⁹ Manitoba Law Reform Commission, above n 10, 25, citing E T Spink, *Party and Party Costs* (Unpublished, Alberta Law Reform Institute, 1995) 36, n 129.

⁶⁰ Manitoba Law Reform Commission, above n 10, 17.

⁶¹ *Ibid* 10.

⁶² Law Reform Commission of Western Australia, above n 10, [16.26]–[16.27].

⁶³ Legal Fees Review Panel, *Report: Legal Costs in New South Wales* (2005).

The various proposals of the Panel were said to be based on three 'foundational principles'. These encompassed (a) the short to medium goal of improving communication and transparency of information between lawyers and clients; (b) 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 (c) the medium to longer term goal of providing information to the market which will help to reduce the 'information asymmetries' which currently distort it.⁶⁴

The report includes 37 recommendations, a number of which were not adopted by the legal profession representatives on the panel. The recommendations encompass:

- greater disclosure obligations (1-4);
- 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);
- in the event of failure to comply with disclosure and other obligations practitioners should be only entitled to recover fees based on the fair and reasonable value of the work, less 20% (12);
- where costs estimates are exceeded recovery of fees in accordance with a revised estimate should be from 14 days after the date of the revised estimate (13);
- 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);
- in the event of failure to comply with disclosure obligations, a prohibition on fee recovery proceedings until the bills have been assessed (15);
- 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 6 months after completion of the matter and a prohibition on interest on accounts rendered later than this time frame (30-31);
- a requirement that bills rendered express the amount as a percentage of the estimate or budget and refer to the rights notice provided at the time of commencement of the retainer (32);
- the rendering of bills no less frequently than quarterly unless there is an agreement to only bill upon completion (33);
- where bills are to be rendered upon completion, interim statements of accrued costs and disbursements, at least on a quarterly basis (34), with the amount expressed as a percentage of the estimate or budget (35);

⁶⁴ Ibid 62.

- entitlement to interest, at the rate allowed by the Supreme Court, on professional fees and disbursements carried throughout the course of the matter (36); and
- 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).

2.9 British Columbia Civil Review Task Force

In its recent report, the British Columbia Justice Review Task Force also noted but did not proffer any solutions to problems arising out of hourly billing:⁶⁵

*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.*⁶⁶

2.10 Manitoba

In 2005 the Manitoba Law Reform Commission ('MLRC') 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:

- That the cost rules should provide successful litigants with at least partial indemnification;
- Costs rules should also deter frivolous actions and defences;
- Costs 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 financial incentives to settle at every stage of the litigation;
- Cost rules should not inappropriately impede access to the courts and should facilitate access to justice.

After consideration of the practice in other jurisdictions the MLRC recommended the partial indemnification of successful litigants at a level of approximately 60% of reasonable fees in a typical case.

⁶⁵ British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice* (2006).

⁶⁶ *Ibid* 116–7.

It was 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 MLRC 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.⁶⁷

2.11 New Zealand

In 2000 the High Court of New Zealand radically altered the manner in which costs are assessed and recovered on a party-party basis. Subsequently 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 been apparently using their discretionary powers to simply award 60 – 70% of actual reasonable costs.⁶⁸

After broad consultation, a scheme was developed and implemented which categorizes cases according to complexity and then assigns them to one of three bands according to time requirements for the steps for that case.

The first step is to categorise the cases for complexity and importance into the following:

- category 1 proceeding – straightforward in nature and able to be conducted by junior counsel.
- category 2 proceeding – of average complexity requiring counsel of average skill and experience in the High Court; and
- category 3 proceeding – a complex or significant proceeding requiring counsel with special skill and experience in the High Court.

A schedule of hourly rates applies to each of the categories. For example in the High Court Rules the following rates apply:

- Category 1 - \$1,070 per day;
- Category 2 - \$1,600 per day;
- Category 3 - \$2,370 per day.

The second step is to assign the case to a time band:

- Band A applies where a comparatively small amount of time is required for the particular step;
- Band B applies where a normal amount of time is required for the particular step; and

⁶⁷ Manitoba Law Reform Commission, above n 10, 36, picking up on a recommendation made in Williams et al, above n 55, ¶3.2.

⁶⁸ The Hon Justice G Venning, 'Alternatives to Activity Based Costing: The New Zealand Approach' (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 16 September 2006) 2.

- Band C applies where a comparatively large amount of time is required for the particular step.

A schedule to the rules then assigns a time unit (eg 1.5 days) to each step in a proceeding (for example see Schedule 3 of the High Court Rules).

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. The following example was provided by Justice Venning of the New Zealand High Court.⁶⁹

‘By way of example, take the case of the claim for damages for breach of an oral contract. Assuming that the parties engaged in interrogatories, discovery, attended two case management conferences, and the hearing took three days, an award of costs on a 2B basis in the plaintiff’s favour would lead to the following result:

<i>Step</i>		<i>Time allocation</i>
<i>Commencement of proceedings by the plaintiff:</i>		<i>3.0 days</i>
<i>Notice of interrogatories</i>		<i>1.0 day</i>
<i>List of documents</i>		<i>1.5 days</i>
<i>Production of documents for inspection</i>		<i>1.0 day</i>
<i>Inspection</i>		<i>1.5 days</i>
<i>Two directions conferences –</i>		
<i>Preparation of memoranda</i>	<i>x2 @ .4</i>	<i>.8</i>
<i>Attendance at the conferences</i>	<i>x2 @.3</i>	<i>.6</i>
<i>Preparation for the hearing</i>		<i>6 days</i>
<i>(twice the time occupied by the hearing)</i>		
<i>Appearance at the hearing</i>		<i>3 days</i>
<i>Total:</i>		<i>18.4 days</i>
<i>Result: 18.4 days @ \$1600</i>	<i>=</i>	<i>\$29,440.00’</i>

In a paper delivered to the Australian Institute of Judicial Administration conference in Adelaide in 2006 Justice Venning noted that:

‘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.’⁷⁰

These costs rules have been in operation in the New Zealand High Court since 2000 and in the District Court since 2005. 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

⁶⁹ Ibid 8.

⁷⁰ Ibid.

submissions it received those ‘*commenting on cost recovery almost universally felt that cost recovery bears little relationship to actual fees charged.*’⁷¹

2.12 Hong Kong

The Final Report (2004) of the Chief Justice’s Working Party on Civil Procedure reform makes a number of recommendations in relation to costs, including in relation to:

- 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 non compliance
- 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.

In September 2005 the Conditional Fees Subcommittee of the Law Reform Commission of Hong Kong issued a consultation paper on conditional fees.⁷² In addition to proposing the introduction of conditional fees the report proposed the setting up of a privately run contingency legal aid fund.

2.13 The German cost system

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 court fees are set in units, the value of which depends on the amount of the claim. The number of units payable is determined by the stage the litigation reaches. For instance, if the matter goes to judgement, three fee units are payable. However, if a matter is withdrawn or settled, one fee unit is payable.

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.

⁷¹ New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (2004) 40, n 57.

⁷² Law Reform Commission of Hong Kong, *Consultation Paper: Conditional Fees* (2005).

Like court fees, lawyers' fees are also 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.

2.14 Costs and the adversary system

One of the major contributors to the cost of legal services in civil litigation is the adversary 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 in relation to the same subject matter substantially increases costs. To some extent this is an inevitable by-product of an adversary 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.

It is of interest to note some recent developments in England and Ireland.

2.14.1 Should claimants simply deal 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 ATE insurance premiums), have recently advocated that claimants should deal with them direct rather than engage their own lawyers and thus precipitate an escalation in legal costs on both sides.

In December 2005 the Association of British Insurers (ABI) published a report entitled *Delivering a Fair and Efficient Compensation System*. The report arose out of concern that the present compensation system takes too long to resolve claims, delivers insufficient rehabilitation and involves 'disproportionate' and often hidden handling costs. The report proposed, inter alia, (a) a new process for resolving claims before they reach courts, including fixed timetables, independent arbitration and free legal advice above the small claims limit; (b) extended use of fixed fee regimes; (c) higher financial limits that determine how claims are handled through the courts and (d) new financial penalties to deter exaggerated claims or unreasonable actions by insurers.

Directed at claims under £25,000, which were said to constitute over 90% of all personal injury claims, it was proposed that the new scheme would enable the insurer 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% between 2000 and 2002.⁷³ 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:

⁷³ Based on employers liability claims of less than £15,000: P Fenn and N Rickman, *Costs of Low Value Employers' Liability Claims 1997–2002* (2003) Department for Constitutional Affairs <<http://www.dca.gov.uk/majrep/claims/elclaims.htm>> at 7 February 2007.

*'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.'*⁷⁴

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...'*⁷⁵

It was proposed that a simple universal claim form would be introduced which claimants could complete, without legal assistance, other than a free legal advice service which the insurance industry would fund. Upon receipt of the claim form the insurer would have 3 months to investigate and a further 3 months to make a compensation offer. The claimant would have the option of free independent legal advice on the fairness of the insurer's response if the claim exceeds the small claims limit. In the event of settlement the insurer would pay a fixed legal fee to the claimant's lawyer. In the event of a dispute the matter would be referred to mediation. It would only be in the event that mediation failed that the claimant would be entitled to resort to the courts. To ensure that the system would work it was proposed that there would be 'strict consequences' in the event of non compliance.⁷⁶ The proposed system was intended to control costs and remove disputes about costs. Moreover, it was asserted that the new system would reduce delays from 3 years to 6 months.

In December 2004 one of the UK's largest insurers, Norwich Union, also proposed a new system for dealing with claims.⁷⁷ This also arose out of concern at the escalation in legal costs and proposed that insurers should initially have the option of dealing direct with claimants. As the report notes:

*'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.'*⁷⁸

⁷⁴ Association of British Insurers, *Delivering a Fair and Efficient Compensation System* (2005) 4.

⁷⁵ *Ibid* 6.

⁷⁶ *Ibid* 10. To combat fraud it was suggested that more effective penalties were needed in the civil courts. The report refers (at 13) to the situation in the Irish Republic where a claimant can be subject to a fine up to €100,000 and/or a prison sentence up to 10 years if false or misleading evidence is given to a civil court.

⁷⁷ Norwich Union Insurance, *A Modern Compensation System: Moving from Concept to Reality* (2004).

⁷⁸ *Ibid* 1.

In response to the proposal that claimants do not need their own lawyers and should deal directly with insurers (and their lawyers), the Law Society of England and Wales has mounted a counter-offensive. This accepts, as a starting premise, that there is unnecessary duplication of work which increases costs:

*'The current system involves two sets of professionals undertaking an investigation of the claim. The claimant solicitor investigates on behalf of the injured person and the insurer investigates on behalf of the wrongdoer [or defendant], often before there has been a great deal of contact between the two sides. This is unnecessary duplication of work which increases costs.'*⁷⁹

However, rather than accept the argument of insurers that the necessary investigation work can be done by them (or their lawyers), the Law Society proposes that:

*'The sensible and practical approach is for the work to be undertaken by the claimant's solicitor who can assemble the necessary evidence, including medical evidence to assess the insurer's offer to support the claim. This cannot be dealt with by the insurer for the alleged wrongdoer because there is an inherent conflict for them in dealing with the injured person, who needs the independent advice.'*⁸⁰

Although occurring in the context of claims for compensation for personal injury, this debate has broader implications.

2.14.2 Should an independent body conduct an initial assessment of claims to reduce costs?

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 (PIAB), to conduct the initial assessment of such claims.⁸¹ Interestingly, the Board operates without public funding other than the initial grant to support 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.⁸²

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

⁷⁹ The Law Society, *Compensation Fast and Fair* (2006) <<http://www.lawsociety.org.uk/documents/downloads/dynamic/fastandfairsmallclaims.pdf>> at 6 February 2007, 8.

⁸⁰ Ibid.

⁸¹ See *Personal Injuries Assessment Board Act 2003* (Ireland).

⁸² Alternative dispute resolution (ADR) schemes have been established in some industries to manage disputes more efficiently. For example, the Telecommunications Industry Ombudsman (TIO) is a free and independent alternative dispute resolution scheme for small business and residential consumers in Australia who have a complaint about their telephone or internet service. The TIO is an industry-funded scheme, deriving its income solely from members who are charged fees for complaint resolution services provided by the TIO.⁸² The members consist of telecommunications companies. The TIO has the authority to investigate complaints and make legally binding decisions on the telecommunications companies. Other examples of independent, industry-funded ADR schemes include the Energy and Water Industry Ombudsman (Victoria) (EWOV), the Financial Industry Complaints Service (FICS) and the Banking and Financial Service Ombudsman (BFSO). All of these schemes provide free advice and assistance to consumers to help resolve disputes, avoiding the need for costly court proceedings.

costs for claims resolved. Following a successful legal challenge,⁸³ the Board is now required to deal with lawyers for claimants. At present approximately 90% 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 (a) to significantly reduce the cost of delivering compensation to claimants, without altering the level of awards, and (b) 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.

Since July 2004 *all* personal injury claims (excluding those for medical negligence) have had to be submitted to the PIAB before legal proceedings can be pursued. The Board assesses the injury and recommends a compensation amount which both the claimant and the defendant have the right to accept or reject. If the amount is rejected by *either* party the claimant may proceed with litigation. The PIAB assesses the claimant's medical evidence and where this is inconclusive or disputed by the defendant the claimant may be required to attend an independent medical specialist chosen by the PIAB. 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. According to the Board, 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% of the amounts paid in compensation. According to the Board, the new system is three times faster and four times cheaper than the old litigation based process, while still providing awards of similar value. According to the PIAB, claims are assessed within the statutory timeframes, with 93% assessed within nine months and the remaining claims within 15 months. The Board has projected that it will receive 25,000 cases per annum of which 40% will be assessed, 40% will settle during the process and 20% will proceed to litigation. The cost of processing cases is said to be 7% of the costs of the average claim.

The impact on court statistics is marked. A review of the Court Service data apparently shows that 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 3,000 in 2005.⁸⁴

Critics of the system have suggested that delays have led to large numbers of claimants abandoning the system and returning to the courts. A recent investigation by the *Irish Independent* has alleged that the Board is making awards in fewer than one in eight claims and has assessed just 4,000 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% of claims still end up in the courts.⁸⁵

⁸³ *O'Brien v Personal Injuries Assessment Board* [2005] IEHC 100.

⁸⁴ Personal Injuries Assessment Board, *Annual Report 2005* (2006) 6.

⁸⁵ Neil Rose, 'International Dimension' (2006) 46 *Litigation Funding* 6.

According to a columnist with the *Sunday Times*:

‘That posh whining sound you can hear is a cry of well healed 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.’⁸⁶

As with the adversary 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 PIAB 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% faster than the law courts.⁸⁷

In reviewing such statistical data it is worth reflecting upon the words of the Chairperson of PIAB:

‘...it is frankly, a relief to members of the Governing Board that we do not have any role in the assessment of compensation in any individual case thanks to the professional role discharged by the statutory assessors under the legislation. However, that distance from the suffering of real people does not blind us to the fact that every statistic in the workload can be the end of normal life not only for the Claimant but for their nearest and dearest also. Aside from issues of legal liability and financial considerations, so many of these tragedies could be avoided with a little more care by all of us. At the end of the day, accident prevention and injury avoidance are in all our interests for reasons that are priceless. If there were no more accidents PIAB would gladly declare itself redundant.’⁸⁸

2.15 Costs and the overriding objective of civil procedural rules

In England and Wales, and in other jurisdictions including in 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.

In New South Wales the overriding objective of the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* is ‘to facilitate the just, quick and cheap resolution of the real issues in the proceedings.’⁸⁹ Similar provisions are now incorporated in civil procedural rules in other Australian jurisdictions and in Victoria in the *Magistrates Court Rules*.⁹⁰ Such provisions usually seek to impose (a) primary obligation on judicial officers to give effect to the overriding purpose, (b) a duty on parties to assist the court in achieving this objective and (c) a requirement that lawyers must not, by their conduct, cause a client to be put in breach of such duty. The failure of parties or lawyers to comply with these requirements may be taken into account in the exercise of judicial discretion in relation to costs.

⁸⁶ Ibid.

⁸⁷ Dr Vincent Hogan, *A Cost-Benefit Analysis of the Personal Injuries Assessment Board* (2006), available at < <http://www.piab.ie/pdf/CostBenefitAnalysis.pdf> > at 7 February 2007.

⁸⁸ Personal Injuries Assessment Board, *Annual Report 2005* (2006) 4.

⁸⁹ *Civil Procedure Act 2005* (NSW), s 56(1). A similar provision was incorporated in the former *Supreme Court Rules 1970* (NSW), r 1.3.

⁹⁰ *Magistrates’ Court Civil Procedure Rules 1999* (Vic), r 1.19.

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.

2.16 Costs and statutory provisions governing the conduct of civil litigation

In a number of jurisdictions various statutory provisions have been introduced in recent years for the purpose of preventing unmeritorious claims or defences and/or subjecting lawyers and others to personal liability for costs, or other sanctions, for inappropriate conduct in connection with 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 re-defined, albeit in an ad hoc fashion. Some brief examples are as follows:

- Under the *Legal Profession Act* in NSW lawyers are prohibited from acting in connection with damages claims or defences which do not have merit. There are costs and disciplinary consequences.
- The *PIPA* legislation in Queensland provides for an express statutory override of traditional primary obligations to clients.
- The Commonwealth *Therapeutic Goods Act* punishes severely persons, including lawyers, engaging in unmeritorious patent litigation for collateral commercial advantage to clients.
- The Commonwealth *Migration Act* now imposes penalties on lawyers and others engaged in the pursuit of unmeritorious migration proceedings and appeals.
- There are presently proposals before the Standing Committee of Attorneys General to regulate commercial litigation funders.
- There are proposals in NSW to re-consider sanctions for aberrant expert witnesses.
- The Woolf reforms in the UK and other legislation in some Australian States provide for costs sanctions, including against lawyers, payable forthwith for procedural default.
- Closer to home, Commonwealth and State Governments have adopted *model litigant guidelines* which purport to apply to both the parties and their lawyers.
- In Victoria document destruction is now a criminal offence.
- The Federal Government is promoting collaborative lawyering agreements, particularly in the area of family law disputes.
- In some North American jurisdictions plaintiffs have sought to hold insurers liable to pay damages for procedural default and delay based on theories of

liability derived from alleged obligations of good faith said to be owed to third parties.

All of these disparate developments have one thing in common: they seek to improve the primary standard of conduct of various participants in the civil justice process and impose sanctions and penalties for non conforming 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 in relation to 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 members of the community, clients are often motivated by self interest and are seldom paragons of virtue. Moreover, as Professor Richard Abel has noted in his recent book on English lawyers and the politics of professionalism: '*A duty cannot be both paramount and subordinate. Lawyers offer no principled basis for accommodating these inconsistent loyalties.*'

3. The apparent failure to control costs in England and Wales in the aftermath of the Woolf reforms.

Based on recent consultations between the Victorian Law Reform Commission and English judges, masters, solicitors acting for claimants and insurers, and members of the Civil Justice Council⁹¹ there appears to be consensus that the post Woolf reforms have (a) reduced delays and (b) 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 are 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 (a) the curtailment of legal aid for civil disputes, (b) the widespread use of conditional fee agreements with success fees of up to 100% of the underlying base fee, (c) the well developed market for 'after the event' legal costs insurance, (d) the introduction of 'full recoverability' of legal costs, and (e) the widespread use of (unregulated) hourly billing based on rates, particularly in London, which are relatively high by comparison with legal fees in Australia. Furthermore, as noted above, significant costs have been incurred in connection with satellite litigation and appeals in relation to costs issues in the course of the present 'costs war' between claimant lawyers and insurers.

⁹¹ Such consultations occurred in London in September 2006 and thereafter by e-mail.

4. The calculation and assessment of costs

4.1 The law governing fee and retainer arrangements for the conduct of civil litigation

In Victoria the *Legal Profession Act 2004* (Vic) 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 upon which legal fees may be calculated and charged to the client under a valid costs agreement.⁹² The principal exceptions are that (a) fees may not be calculated as a percentage of the amount in issue,⁹³ (b) success fees in conditional fee agreements in respect of 'litigious' matters must not exceed 25% of the base amount of the fee,⁹⁴ and (c) fees and charges may be varied if the costs agreement is not fair, just or reasonable.⁹⁵ Moreover, a costs agreement that contravenes or is entered into in contravention of the legislation is void.⁹⁶

Lawyers are required to disclose to clients (a) 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, (b) the range of legal costs that may be recovered if the client is successful in the litigation and (c) the range of costs that the client may be ordered to pay if the client is unsuccessful.⁹⁷ Additional disclosure obligations arise in connection with settlement.

4.2 Principles governing the taxation of costs in Victoria

*'There is only one immutable rule in relation to costs, and that is that there are no immutable rules.'*⁹⁸

In Victoria in court proceedings there are four bases for the taxation of costs, being party-party, solicitor-client, indemnity or such other basis as the court may direct.⁹⁹ 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.¹⁰⁰

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.'*¹⁰¹

⁹² In the absence of a costs agreement costs may be payable in accordance with an applicable remuneration order or scale of costs or, if this is not applicable, according to the fair and reasonable value of the legal services provided: *Legal Profession Act 2004* (Vic), s 3.4.19.

⁹³ *Legal Profession Act 2004* (Vic), s 3.4.29(1).

⁹⁴ *Legal Profession Act 2004* (Vic), s 3.4.8 (3).

⁹⁵ *Legal Profession Act 2004* (Vic), s 3.4.32.

⁹⁶ *Legal Profession Act 2004* (Vic), s 3.4.31.

⁹⁷ *Legal Profession Act 2004* (Vic), s 3.4.9

⁹⁸ *Taylor v Pace Developments Pty Ltd* [1991] BCC 406, 408 (Lloyd LJ).

⁹⁹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.28; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.28; *Magistrates' Court Civil Procedure Rules 1999* (Vic), r 26A.02.

¹⁰⁰ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.31; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.31; *Magistrates' Court Civil Procedure Rules 1999* (Vic), r 26A.07.

¹⁰¹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.29; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.29; *Magistrates' Court Civil Procedure Rules 1999* (Vic), r 26A.04.

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.¹⁰² 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 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 subject of proportionality had already become a problem by the late 17th century.¹⁰³

What had more than 20 years ago become the English principle for the determination of party-party costs remains the basis in Victoria for the determination of costs on a 'solicitor and client' basis. On a taxation on a solicitor and client basis all costs 'reasonably incurred and of reasonable amount' shall be allowed.¹⁰⁴

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 a taxation on an indemnity basis in Victoria all costs may be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.¹⁰⁵ The cost of any work which was not necessary or which was done without due care may be disallowed.¹⁰⁶ In a 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.¹⁰⁷ Misconduct in the litigation may entitle a party to costs on a more generous basis than the normal party-party method would entail.

¹⁰² See generally P Hurst, 'Going Round in Circles' (2006) 25 *Civil Justice Quarterly* 546.

¹⁰³ *Ibid* 547.

¹⁰⁴ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.30; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.30; *Magistrates' Court Civil Procedure Rules 1999* (Vic), r 26A.05.

¹⁰⁵ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.30.1; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.30.1; *Magistrates' Court Civil Procedure Rules 1999* (Vic), r 26A.06(1).

¹⁰⁶ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.70; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.70.

¹⁰⁷ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.30.1(2); *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.30.1(2); *Magistrates' Court Civil Procedure Rules 1999* (Vic), r 26A.06(2).

4.3 Statutory Powers and Methods of calculating/assessing costs in Victoria

In Victorian civil proceedings (other than in VCAT) costs are governed by the following provisions.

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 grant broad legislative discretions to the courts with respect to costs orders, with the Magistrates' Court Act 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* 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).¹⁰⁸

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 time;¹⁰⁹
- discontinuance or withdrawal of part of a proceeding/claim;¹¹⁰
- filing a notice on party who has failed to make discovery/answer interrogatories;¹¹¹
- amendment of pleading.¹¹²

The statutory power as to costs in the *Magistrates' Court Act* has the same broad discretion as provided for in the Supreme and County Court as its basis.¹¹³ 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.¹¹⁴

¹⁰⁸ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.13; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.13

¹⁰⁹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.14; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.14.

¹¹⁰ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.15; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.15.

¹¹¹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.16.1; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.16.1.

¹¹² *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.17; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic), r 63A.17.

¹¹³ *Magistrates' Court Act 1989* (Vic), s 131.

¹¹⁴ *Magistrates' Court Act 1989* (Vic), ss 131 (2A) and (2B).

The Magistrates' Court is required under its governing statute to refer any small claim (less than \$10,000) to arbitration.¹¹⁵ 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.¹¹⁶

Under the Magistrates' Court rules there are specified circumstances in which the court must order costs (for example when a complaint is dismissed for default MC r10.06).

The exercise of judicial discretion in relation to costs may encompass orders for:

- Party-party costs
- Solicitor-client costs
- Indemnity costs
- Orders that each party bear their own costs
- Parties being awarded costs for only part/s of the proceeding in which they were successful
- Orders that a third party pay the costs
- Orders that the lawyer(s) for a particular party pay the costs
- Reserving costs orders in interlocutory matters until a later date
- Such other basis as the court deems fit.¹¹⁷

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. This is unlike other jurisdictions which have expressly incorporated the 'general rule' that costs follow the event unless the court believe some other order should be made.¹¹⁸

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 such are for an interlocutory matter. This is different to other jurisdictions such as the Federal Court and NSW courts which provide that interlocutory costs will not be taxed and paid until final resolution of the matter as a whole unless there is a special order of the court.¹¹⁹

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.¹²⁰ Recent amendments to the *Magistrates' Court Rules* which came into effect in 2006 gave power to registrars and deputy registrars to assess the

¹¹⁵ *Magistrates' Court Act 1989* (Vic), s 102.

¹¹⁶ *Magistrates' Court Act 1989* (Vic), s 105.

¹¹⁷ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.28.

¹¹⁸ See eg *Uniform Civil Procedure Rules 2005* (NSW), r 42.1.

¹¹⁹ *Federal Court Rules* (Cth), r 62.3(3); *Uniform Civil Procedure Rules 2005* r 42.7(2).

¹²⁰ Costs in the Magistrates' Court are often agreed by consent by the parties.

costs of parties. The annual report of the Magistrates' Court for 2005-2006 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 registrars of the County Court.¹²¹

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

4.3.1 Scales

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 the 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 institutions 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. As of 1 January 2007, revised scales were introduced covering the following tiers:

- A Covering matters up to and including \$7,500
- B Covering matters over \$7,500 up to and including \$20,000
- C Covering matters over \$20,000 up to and including \$50,000
- D Covering matters over \$50,000

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.

4.3.2 Taxation

There is a prescribed process for the filing and service of Bills of Costs, notices of objections, callovers for taxation etc.

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/registrar will go through the objections to the Bill of Costs and the onus is on the party seeking to uphold the Bill to prove entitlement to those costs claimed.

The master/registrar will then tax the Bill or otherwise fix/assess an amount for costs and this becomes an order which is authenticated and filed.

¹²¹ Magistrates' Court of Victoria, *Annual Report 2005-2006* (2006) 28.

Any party can seek a review of the taxing master's orders by applying by notice to the taxing master.¹²²

The taxing master then reviews the taxation and makes an order confirming or such other order as is necessary. 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.¹²³ 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.

4.4 The current Victorian review of costs.

Concurrently with the present VLRC civil justice review, the Law Institute of Victoria has been undertaking a review of the current scales and making recommendations as to revised scales of legal fees for the civil justice system.

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 LIV 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.

Power of the Courts to set the scale of costs

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.¹²⁴

A similar power to make rules for the County Court is granted to a majority of the Judges of that court.¹²⁵ 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.¹²⁶

In the Magistrates' Court the Chief Magistrate together with 2 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.¹²⁷

¹²² *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.56.

¹²³ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 63.57.

¹²⁴ *Supreme Court Act 1986* (Vic), s 26.

¹²⁵ *County Court Act 1958* (Vic), s 78.

¹²⁶ *County Court Act 1958* (Vic), s 33.

¹²⁷ *Magistrates' Court Act 1989* (Vic), s 16.

In both the Supreme and Magistrates' Court the Rules are subject to disallowance by the Parliament.¹²⁸ There is no 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.¹²⁹ 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.¹³⁰

Councils of Judges

There is also 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 inquire 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.¹³¹

All Courts are required to report annually to the Governor on the operations of their court.¹³²

In its annual report the Supreme Court has outlined that in the first instance 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.

For the financial year 2004-2005 the Supreme Court's annual report notes that one of the rules changes agreed to by the Council of Judges was amendments which substituted new Appendices A and B, which provide the scales of costs

The Council of Judges for the County Court also agreed amendments to their rules which came into effect on 1 January 2006 to substitute an increased scale of costs.

Role of Parliament with respect to scales under the rules and the *Subordinate Legislation Act 1994*

A statutory rule includes a rule relating to a court or tribunal or the procedure, practice or costs of a court or tribunal.¹³³

A proposed rule that is to be made by, or with the consent or approval of, the Governor in Council must be submitted to the Chief Parliamentary Counsel for the issue of a certificate that the rule is within power and appears otherwise appropriate.¹³⁴

¹²⁸ *Supreme Court Act 1986* (Vic), s 27; *Magistrates' Court Act 1989* (Vic), s 16(2).

¹²⁹ *County Court Act 1958* (Vic), s 78(4).

¹³⁰ *County Court Act 1958* (Vic), s 78(5).

¹³¹ *Supreme Court Act 1986* (Vic), s 28; *County Court Act 1958* (Vic), s 87; *Magistrates' Court Act 1989* (Vic), s 15.

¹³² *Supreme Court Act 1986* (Vic), s 28; *County Court Act 1958* (Vic), s 87; *Magistrates' Court Act 1989* (Vic), s 15.

¹³³ *Subordinate Legislation Act 1994* (Vic), s 3.

¹³⁴ *Subordinate Legislation Act 1994* (Vic), s 13.

The rule must be published in the Gazette as soon as practicable after it is made,¹³⁵ and within 6 days must be laid before each House of Parliament.¹³⁶

A rule comes into operation on the day on which the rule is made.¹³⁷

The Scrutiny Committee may report to Parliament if it appears that any statutory rule laid before Parliament does not appear to be within the powers conferred by the authorising Act, contains principles which should properly be dealt with by an Act and not subordinate legislation, unduly trespasses on rights and liberties of the person previously established by law (etc). The Scrutiny Committee may recommend that a rule should be disallowed or amended.¹³⁸

If the power to make the statutory rule is expressed to be subject to the statutory rule being disallowed by the Parliament or the Scrutiny Committee has recommended that the statutory rule be disallowed, the rule will be disallowed if a notice of a resolution to disallow the rule is given in a House of Parliament within 18 sitting days of the rule being laid before that House.¹³⁹

If a rule is disallowed by the Parliament the disallowance has the same effect as a revocation of the rule.¹⁴⁰

The Minister may make guidelines for the preparation, content, publication and availability of statutory rules, and the procedures to be implemented and the steps to be undertaken for the purpose of ensuring consultation, co-ordination and uniformity in the preparation of statutory rules.¹⁴¹

Joint Costs Committees

To further assist the courts with respect to the issue of costs, in 1987 a 'Costs Coordination Committee' was established to advise the courts with respect to applications relating to costs and to ensure coherence in the scale of costs.

The Supreme Court's annual report states that the Costs Coordination Committee met on one occasion during 2004–05. 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 LIV and the Attorney-General.

A further costs committee, The Legal Costs Committee, is established pursuant to section 3.4.25 of the *Legal Profession Act 2004*. Membership of this committee must be constituted by the Chief Justice of the Supreme Court, nominees from the Attorney General and representatives from the LIV, Victorian Bar and the Legal Services Board.¹⁴²

¹³⁵ *Subordinate Legislation Act 1994* (Vic), s 17.

¹³⁶ *Subordinate Legislation Act 1994* (Vic), s 15.

¹³⁷ *Subordinate Legislation Act 1994* (Vic), s 16.

¹³⁸ *Subordinate Legislation Act 1994* (Vic), s 21.

¹³⁹ *Subordinate Legislation Act 1994* (Vic), s 23.

¹⁴⁰ *Subordinate Legislation Act 1994* (Vic), s 24.

¹⁴¹ *Subordinate Legislation Act 1994* (Vic), s 26.

¹⁴² *Legal Profession Act 2004* (Vic), s 3.4.25.

This committee has the power to make orders with respect to costs that may be charged by law practices for legal services other than litigious matters.¹⁴³

4.5 The current Victorian review of taxation of costs

Separately to the review of the Supreme Court scale, in 2006 the Victorian Attorney-General issued terms of reference to the Crown Counsel seeking (a) a review of the offices of Master of the Supreme Court and Master of the County Courts, and to recommend areas of reform for the offices; and (b) 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. In this paper the Crown Counsel describes recent developments in NSW and the United Kingdom with respect to the assessments 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 United Kingdom a unique Supreme Court Costs Office has been established to assess party-party costs. The SCCO 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 notes that there may be benefit in making a number of changes to the nature, function and powers of the office of Master.¹⁴⁴ With respect to the conduct of taxations in Victoria the Issues Paper notes that the LIV's proposal to create a single taxation of costs office "*appears to have the potential to create efficiency and consistency*".¹⁴⁵

The Issue paper was prepared for comment and discussion and included a number of questions regarding the various matters canvassed. The Final Report has yet to be published by the Crown Counsel.

4.6 Problems with open ended and indeterminate fees and expenses.

4.6.1 The 'tyranny' of the billable hour¹⁴⁶

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

¹⁴³ *Legal Profession Act 2004* (Vic), s 3.4.22.

¹⁴⁴ Victorian Crown Counsel, *Review of Office of Master and Costs Office* (2006) 27.

¹⁴⁵ *Ibid* 28.

¹⁴⁶ The Hon J J Spigelman, 'Opening of Law Term' (Speech delivered at the Opening of Law Term Dinner, Sydney, 2 February 2004), available at <http://www.lawlink.nsw.gov.au/lawlink/supreme-court/ll_sc.nsf/pages/SCO_speech_020204> at 7 February 2007.

*rewards inefficiency. Also, hourly billing does nothing to inform a client's understanding of how much a lawyer's services will in fact cost.*¹⁴⁷

As the Law Commission notes, 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 so as to reduce frustration by both lawyers and clients.¹⁴⁸

Problems with hourly billing may be exacerbated where minimum time units 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 whereas the charge to the client is calculated on the basis of a substantial mark up on such rates.¹⁴⁹ 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.'*¹⁵⁰

Various members of the judiciary have criticised the time billing method used by lawyers in Australia. Chief Justice Spigelman of the New South Wales 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*'.¹⁵¹ His Honour noted these were views have been echoed by Chief Justice Gleeson of the High Court.¹⁵²

¹⁴⁷ New Zealand Law Commission, above n 71, 47.

¹⁴⁸ Ibid.

¹⁴⁹ In some jurisdictions at the moment there is a move by some law firms towards outsourcing legal and other work to lawyers and others in other countries who may be contracted to do the work 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 themselves directly outsourcing legal and other work to persons in other jurisdictions so as to reduce the cost to them of the services in question.

¹⁵⁰ New Zealand Law Commission, above n 71, 39.

¹⁵¹ Spigelman, above n 146.

¹⁵² See eg The Hon M Gleeson, 'Are the Professions Worth Keeping?' (Speech delivered at the Greek-Australian International Legal and Medical Conference, 1999).

4.6.2 Out of pocket expenses and disbursements.

Apart from fees for professional services, many firms seek to make a profit from out of pocket expenses and disbursements such as photocopying, facsimile charges etc.

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 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.¹⁵³

4.7 Court fees and charges

In Victoria court fees and charges are governed by various regulations and orders in respect of the Magistrates Court,¹⁵⁴ the County Court¹⁵⁵ and the Supreme Court.¹⁵⁶

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, photocopying¹⁵⁷, setting down, issuing subpoenas, etc. fees may be waived in cases of hardship.

It is not clear what the costs of administering such a piecemeal system of charges are. Query whether or not it might make more sense 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. In the case of fees payable in the Supreme Court, although the funds prima facie go into the consolidated revenue of the state, by agreement with 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-General¹⁵⁸. Similarly, a portion of the moneys collected by the Magistrates Court and the County Court in fees is retained pursuant to administrative arrangements.¹⁵⁹ Court fees collected by the County Court in the financial year 2005-06 totalled approximately \$5.1 million, a decrease for \$5.8 million in the previous year.

¹⁵³ For example, Copy Captain charges 11 cents per page for up to 100 pages, and thereafter costs decrease progressively to 6 cents per page; Fed Ex Kinkos charges 12 cents per page for up to 500 pages, thereafter costs decrease to 10 cents per page; Kwik Kopy charges approximately 6 cents per page.

¹⁵⁴ *Magistrates' Court (Fees, Costs and Charges) Regulations 2001* (Vic).

¹⁵⁵ *County Court (Court Fees) Order 2001* (Vic).

¹⁵⁶ *Supreme Court (Fees) Regulations 2001* (Vic).

¹⁵⁷ \$1.50 per page in the Supreme Court and in the Court of Appeal.

¹⁵⁸ Senior Master of the Supreme Court, *Special Purpose Financial Report for the Year Ended June 2005* (2005) 43.

¹⁵⁹ Made under the *Financial Management Act 1994* (Vic), s 29: see County Court of Victoria, *Annual Report 2005–2006* (2006) 20.

5. Costs in ‘public interest’ litigation.

5.1 Recent Developments in Australia

5.1.1 The ALRC Report (1995)

The ALRC Report *Costs Shifting – Who Pays for Litigation in Australia* (1995) considered the question of costs in proceedings with a ‘public interest’ element, noting that although the courts had the power to depart from the usual rule that costs follow the event, its exercise was uncommon.¹⁶⁰ The ALRC put forward a number of ‘benefits’ said to flow from public interest litigation, in particular development of the law, economies of scale, impetus for reform and structural change, contribution to market reform and public sector accountability and prevention of market and government failures.¹⁶¹ It concluded that ‘the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules’.¹⁶²

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’.¹⁶³

The ALRC felt 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.¹⁶⁴ According to the ALRC, these criteria ‘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’.¹⁶⁵ The Commission 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.¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸ The ultimate purpose of a PICO should be ‘to assist the litigation to proceed’;¹⁶⁹ thus, it

¹⁶⁰ Australian Law Reform Commission, above n 45, [13.3]–[13.4].

¹⁶¹ Ibid [13.6]. Campbell argues that ‘[t]hese are rather sweeping claims and ones which would be difficult to substantiate’: Enid Campbell, ‘Public Interest Costs Orders’ (1998) 20 *Adelaide Law Review* 245, 255.

¹⁶² Australian Law Reform Commission, above n 45, [13.11].

¹⁶³ Ibid [13.13].

¹⁶⁴ Ibid [13.11].

¹⁶⁵ Ibid [13.16].

¹⁶⁶ Ibid [13.18].

¹⁶⁷ Ibid [13.22].

¹⁶⁸ Ibid [13.22].

¹⁶⁹ Ibid [13.25].

‘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’.¹⁷⁰

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.¹⁷¹ It rejected the claim that the determination of PICO applications would degenerate into ‘an expensive and time-consuming interlocutory step’.¹⁷²

The Recommendations of the ALRC have not been implemented. It is notable that the ALRC chose not to address the difficulties surrounding the definition of public interest litigation, preferring to leave that issue to the courts. Moreover, the criteria proposed by the ALRC are problematic. 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’.¹⁷³ Campbell suggests that the enactment of a ‘global’ PICO provision is not a sensible approach where so much depends upon 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.’*¹⁷⁴

She argues that a ‘statute-specific approach’ would:

*‘[force] legislators to be attentive to the relationship between standing to sue, the role expected those accorded standing to sue, and principles regarding allocation of costs.’*¹⁷⁵

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.¹⁷⁶

5.1.2 *Oshlack v Richmond River Council* (1998)¹⁷⁷

In *Oshlack*, the High Court considered the principles governing the discretion to award costs in proceedings with a public interest element. *Oshlack* had brought proceedings under an open standing provision in the *Environmental Planning and Assessment Act 1979* (NSW) (‘the Act’) in respect of the Council’s approval of a proposed development. He had no private interest in the matter but rather sought ‘to preserve the habitat of an endangered native animal on and around the site’. The proceedings were dismissed, but the judge at first instance, Stein J, declined to make an order as to costs (pursuant to the discretion granted under s 69 of the *Land and Environment Court Act 1979* (NSW)),

¹⁷⁰ Ibid [13.24].

¹⁷¹ Ibid [13.27].

¹⁷² Ibid [13.17].

¹⁷³ Campbell, above n 161, 255.

¹⁷⁴ Ibid 257.

¹⁷⁵ Ibid 262.

¹⁷⁶ See eg Australian Law Reform Commission, above n 45, [18.9]–[18.12].

¹⁷⁷ *Oshlack v Richmond River Council* (1998) 193 CLR 72.

noting that: (a) the proceedings had been brought to enforce environmental laws; (b) Oshlack's concerns had been shared by a significant sector of the public; and (c) Oshlack's case was arguable and the proceeding resolved significant issues as to the interpretation of the Act. The New South Wales Court of Appeal upheld the Council's contention that Stein J's discretion had miscarried, rendering Oshlack liable for the Council's costs.¹⁷⁸

The High Court (3:2) reinstated the decision of Stein J. Gaudron and Gummow JJ delivered a joint judgment. Their Honours considered that '[t]he true issue here is not whether this was "public interest litigation"... [but] whether the subject matter, the scope and purpose of s 69 are such as to enable the Court of Appeal to pronounce the reasons given by Stein J to be 'definitely extraneous to any objects the legislature could have had in view' in enacting s 69.'¹⁷⁹ The High Court's previous decision in *Latoudis v Casey*¹⁸⁰ was not to be regarded as decisive on this point as it related to costs in criminal proceedings,¹⁸¹ whereas the instant 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'.¹⁸² Given the breadth of the discretion accorded to Stein J, Gaudron and Gummow JJ declined to interfere with its exercise, although their conclusion that his Honour 'did not take into account considerations which can be said to have been definitely extraneous to any objects the legislature could have had in view in enacting s 69 and in relation to the operation of s 69 upon proceedings instituted under [the Act]'¹⁸³ hardly constitutes an endorsement of his decision on the merits.¹⁸⁴

Kirby J agreed with Gummow and Gaudron JJ in the result and as to the significance of *Latoudis*.¹⁸⁵ *Latoudis* being inapplicable, no 'established error of principle' could be made out and there was no basis for disturbing Stein J's exercise of discretion.¹⁸⁶ However, Kirby J also made some general observations as to the exercise of judicial discretion as to costs in proceedings with a 'public interest' element.

In particular, his Honour expressed concern that the conferral of 'open standing' could be rendered worthless where unsupported by a complementary approach to the question of costs:

Inherent in [the notion of open standing] is a parliamentary conclusion that it is in the public interest that [some] individuals and groups should be able to engage the jurisdiction of the Land and Environment Court, although they have no personal, financial or like interest to do so... The removal of the barrier to standing might amount to an empty gesture if the public character of an applicant's proceedings

¹⁷⁸ *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

¹⁷⁹ *Oshlack v Richmond River Council* (1998) 193 CLR 72, [31].

¹⁸⁰ (1990) 170 CLR 534.

¹⁸¹ *Oshlack v Richmond River Council* (1998) 193 CLR 72, [29]. See also at [126]–[132] (Kirby J).

¹⁸² (1998) 193 CLR 72, [45].

¹⁸³ (1998) 193 CLR 72, [49].

¹⁸⁴ As Campbell notes, 'while the opinions of the majority [make] it clear that the public interest character of the litigation is not to be regarded as entirely irrelevant to the exercise of the discretion, they do not go so far as to suggest that the considerations which Stein J took into account were ones he was required, as a matter of law, to take into account': Campbell, above n 161, 255.

¹⁸⁵ (1998) 193 CLR 72, [104]. Kirby J considered that *Latoudis* determined a 'comparatively narrow and special point': at [126].

¹⁸⁶ (1998) 193 CLR 72, [133].

*could in no circumstances be taken into account in disposing of the costs of such proceedings, either where they succeeded or (as here) where they failed.*¹⁸⁷

He later continued:

*'Given the statutory context and clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in the enforcement of environmental law before the Land and Environment Court, a rigid application of the compensatory principle in costs orders would be completely impermissible. It would discourage, frustrate or even prevent the achievement of Parliament's particular purposes.'*¹⁸⁸

The maintenance of judicial discretion was, in his Honour's view, critical to 'the fair allocation' of costs:

*'Courts, whilst sometimes taking the legitimate pursuit of public interest into account, have also emphasised, rightly in my view, that litigants espousing the public interest are not thereby granted an immunity from costs or a 'free kick' in litigation.'*¹⁸⁹

Kirby J acknowledged the nebulousness of the 'public interest' criterion, but considered the guidance provided by decided cases to be adequate, noting that in some cases the costs incurred had been described as 'incidental to the proper exercise of public administration'.¹⁹⁰

McHugh J, with whom Brennan CJ in general agreed, 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. His Honour emphasised that the discretion as to costs was 'not unqualified' and had to be exercised in a 'judicial' manner.¹⁹¹ He also sought to defend the courts' historical presumption that costs ought to follow the event.¹⁹² For McHugh J, the displacement of this presumption in 'public interest' proceedings was problematic:

*'Much litigation concerns the public interest. Prosecutions and most constitutional and administrative law matters almost invariably affect or involve the public interest. So do many ordinary civil actions concerning private rights and duties... it seems difficult – probably impossible – to formulate a principle that would indicate a rational basis for determining that the present litigation is public interest litigation without being compelled to hold that most cases involving criminal prosecutions and constitutional and administrative law are also 'public interest litigation' for the purpose of costs orders.'*¹⁹³

¹⁸⁷ (1998) 193 CLR 72, [114]; see also at [115]–[119].

¹⁸⁸ (1998) 193 CLR 72, [134]. See also *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)* [1998] HCA 35, [6] (where Kirby J affirmed the significance of the open standing provision to his opinion in *Oshlack*).

¹⁸⁹ (1998) 193 CLR 72, [134].

¹⁹⁰ (1998) 193 CLR 72, [136].

¹⁹¹ (1998) 193 CLR 72, [65].

¹⁹² (1998) 193 CLR 72, [67]–[70].

¹⁹³ (1998) 193 CLR 72, [71].

McHugh J was concerned to avoid what he termed ‘the “I know it when I see it” type of reasoning’.¹⁹⁴ His Honour did not consider the factors adverted to by Stein J to be founded in ‘any principle or criterion that would enable other courts to determine why [they] made the case “public interest litigation”’.¹⁹⁵ For McHugh J:

*‘Without an organising principle to apply or a set of criteria to guide, there is a real danger that, by invoking the ‘public interest litigation’ factor in cases that affect the public interest or involve a public authority, an award of costs will depend upon nothing more than the social preferences of the judge, a dependence that will be masked by reliance on the protean concept of public interest litigation.’*¹⁹⁶

McHugh J disagreed with Gaudron, Gummow and Kirby JJ as to the significance of *Latoudis*, suggesting that the case for departure from the usual costs rule was weaker in civil proceedings than it had been in that case (where the court had nevertheless applied the rule).¹⁹⁷ Thus, *Latoudis* comprised a ‘direct obstacle’ to Oshlack’s submissions.¹⁹⁸ He also rejected the notion of a link between broad standing rules and the costs discretion, noting that:

*‘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.’*¹⁹⁹

The character of a respondent as a public organisation was considered to be irrelevant,²⁰⁰ as was the tenability (or otherwise) of an unsuccessful applicant’s case.²⁰¹

In the result, McHugh J considered that the holding in *Latoudis* ‘forbade Stein J from giving weight to the public interest character of the proceedings’.²⁰²

It is clear that the decision in *Oshlack*:

¹⁹⁴ (1998) 193 CLR 72, [72].

¹⁹⁵ (1998) 193 CLR 72, [75].

¹⁹⁶ (1998) 193 CLR 72, [75]. See also *Buddhist Society of Australia (Inc) v Shire of Serpentine–Jarrahdale* [1999] WASCA 55, [11] (‘great care must be taken with the concept of public interest litigation that it does not become an umbrella for the exercise of discretion with respect to costs in an unprincipled, haphazard and unjudicial manner’).

¹⁹⁷ (1998) 193 CLR 72, [83]; see also at [1]–[2] (Brennan CJ).

¹⁹⁸ (1998) 193 CLR 72, [83].

¹⁹⁹ (1998) 193 CLR 72, [90].

²⁰⁰ (1998) 193 CLR 72, [92].

²⁰¹ (1998) 193 CLR 72, [96].

²⁰² (1998) 193 CLR 72, [104].

*'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 [Osblack itself] was concerned.'*²⁰³

In *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)*,²⁰⁴ Kirby J stated that:

*'Nothing in the recent decision in [Osblack] requires that every time an individual or body brings proceedings asserting a defence of the public interest and protection of the environment, a new costs regime is to apply exempting that individual or body from the conventional rule. To suggest that would be to misread what the court decided in Osblack. It would require legislation to afford litigants such a special and privileged position so far as costs are concerned. No such general legislation has been enacted.'*²⁰⁵

5.1.3 Ruddock v Vadarlis (2001)²⁰⁶

In *Ruddock*, Vadarlis and the Victorian Council for Civil Liberties (VCCL) sought orders in the nature of habeas corpus and mandamus to compel the release into Australia of a group of non-citizens who the Commonwealth had detained on the MV Tampa. The applicants had initial success before a reversal in the Full Court of the Federal Court. Special leave to appeal was refused (as the factual circumstances of the matter had changed), but the High Court declined (without stating reasons) to make orders as to the costs of the application for special leave. The respondents then sought costs in respect of the Federal Court proceedings.

Black CJ and French J endorsed the interpretation of *Latoudis* adopted by the majority in *Osblack*, stating that its ratio 'did not involve any general proposition that the fact that proceedings are brought in the public interest can never be a relevant consideration in the exercise of the discretion to award costs'.²⁰⁷ Their Honours acknowledged, however, the difficulties of the concept of 'public interest' litigation:

'it must be recognised that the concept of the 'public interest' is a very broad one. For that reason it may be difficult in the realm of civil litigation, without further identification of particular circumstances, to essay any useful general proposition about how the fact that the pursuit of proceedings was in the public interest can be a relevant consideration in the discretion to award costs. The term may best be seen as an envelope or class description for a range of circumstances which, upon

²⁰³ *Friends of Hinchinbrook Society Inc v Minister for the Environment (No 5)* (1998) 84 FCR 186, 188 (Northrop, Burchett and Hill JJ), endorsed in *Ruddock v Vadarlis* [2001] FCA 1865, [21] (Black CJ and French J).

²⁰⁴ [1998] HCA 35.

²⁰⁵ *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)* [1998] HCA 35, [5]; see also the further authorities cited in *Ruddock v Vadarlis* [2001] FCA 1865, [21] (Black CJ and French J).

²⁰⁶ *Ruddock v Vadarlis* [2001] FCA 1865.

²⁰⁷ [2001] FCA 1865, [14].

*examination, may be found to be relevant to the question whether there should be a departure from the ordinary rule that costs follow the event.*²⁰⁸

Black CJ and French J later continued:

*‘To say of a proceeding that it is brought ‘in the public interest’ does not of itself expose the basis upon which the discretion to award or not award costs should be exercised. 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...’*²⁰⁹

In the result, their Honours concluded that ‘[t]he award of costs must remain an exercise of discretion having regard to all the circumstances of the case’.²¹⁰

Black CJ and French J considered that ‘[t]he public interest may be considered to converge with that of the individual in cases in which the liberty of the individual is in issue’,²¹¹ quoting Goldberg J:

*‘[the] principle of compensation [in relation to costs] should yield in favour of the principle that a person detained by authority of the State should not be deterred by a potential costs order from seeking his or her liberty.’*²¹²

Their Honours also cite authorities to the effect that ‘[w]here an appeal raises a novel question of much public importance and some difficulty the appeal court may decline to order costs against the unsuccessful appellant’.²¹³

Black CJ and French J thought that the ultimate success of the Commonwealth, and the substantial legal costs it had incurred, militated in favour of the usual rule as to costs being applied. However, other considerations pulled in the opposite direction:

- ‘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 since ‘passed laws purporting to exclude the rights of VCCL and Vadarlis... to pursue the matter further’ and legislated to entrench the decision of the Full Court on the merits; and
- the VCCL and Vadarlis had no financial interest in the proceedings, and their legal representation was provided free of charge.²¹⁴

²⁰⁸ [2001] FCA 1865, [14].

²⁰⁹ [2001] FCA 1865, [19].

²¹⁰ [2001] FCA 1865, [25].

²¹¹ [2001] FCA 1865, [21].

²¹² *Cabal v United States of Mexico (No 6)* (2000) 174 ALR 747, [22]; see also *Cabal v Secretary, Department of Justice (Victoria)* [2000] FCA 1227, [5]; *Te v Ruddock* [2003] FCA 661, [54].

²¹³ [2001] FCA 1865, [17].

²¹⁴ [2001] FCA 1865, [28].

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. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist. The case is quite different in character from the predominantly environmental litigation in which many of the previous decisions concerning the impact of public interest considerations on costs awards have been made. Having regard to its character and circumstances the appropriate disposition is that there be no order as to the costs of the appeal or the application [at first instance].'*²¹⁵

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.²¹⁶

5.1.4 Cases subsequent to Ruddock

The issue of costs in 'public interest' proceedings in light of *Oshlack* and *Ruddock* has been considered in a number of recent cases. A number of these cases are referred to below.

In *North Australian Aboriginal Legal Aid Service Inc v Bradley (No 2)*,²¹⁷ the applicant sought, but failed, to impugn the appointment of the Chief Magistrate of the Northern Territory. It then sought that there be no order as to costs, on the basis that the proceedings had been brought in the 'public interest'. Weinberg J accepted that the case had raised some novel questions as well as some issues of public importance, but noted that in neither *Oshlack* nor *Ruddock* had the fact that the proceedings had a 'public interest' element been 'regarded as decisive' as to the question of costs.²¹⁸ He therefore favoured 'an *adjustment* of the amount of costs ordered against NAALAS to reflect some of the considerations referred to in *Oshlack* and *Ruddock*'.²¹⁹ In the result, he ordered the applicant to pay 70% of the respondents' costs.²²⁰

In *Northern Territory v Doepel (No 2)*,²²¹ the applicant unsuccessfully sought judicial review of a decision of the Native Title Registrar made under the Native Title Act. The applicant then opposed any order as to costs, claiming that the proceedings had been brought in the public interest. Mansfield J commented that:

'It is plain enough that the judicial exposition or clarification of what is intended by certain legislation is in the public interest, as well as resolving the particular dispute

²¹⁵ [2001] FCA 1865, [29].

²¹⁶ See [2001] FCA 1865, [40]–[42], citing *Milne v Attorney-General (Tas)* (1956) 95 CLR 460.

²¹⁷ [2002] FCA 564.

²¹⁸ [2002] FCA 564, [91].

²¹⁹ [2002] FCA 564, [97] (emphasis added).

²²⁰ [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.

²²¹ [2004] FCA 46.

*between the parties. To varying degrees, there is an element of public interest in many cases. Moreover, where the Commonwealth or a State or Territory is the applicant in a proceeding it will very commonly be seeking to maintain a position in the public interest.*²²²

Mansfield J noted that the determination of the application had turned to a large degree on factual matters, rather than on the construction of the Native Title Act.²²³ To that extent the proceeding was of interest only to the parties themselves.²²⁴ On balance, his Honour held that the normal costs rule was applicable.²²⁵

*Mees v Kemp (No 2)*²²⁶ concerned the costs of a failed application for judicial review of a decision of the Minister for the Environment and Heritage. Weinberg J noted that the proceedings had raised difficult and important questions of construction, and had been brought ‘selflessly’ and conducted ‘in a manner that was wholly commendable’.²²⁷ He ordered the applicant to pay 50% of the first respondent’s costs, noting that:

*‘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.’*²²⁸

In *Jacomb v Australian Municipal, Administrative, Clerical & Services Union*,²²⁹ Crennan J considered the submission that particular sex discrimination proceedings (which had been dismissed) had been brought in furtherance of the ‘public interest’:

*‘The decision made in the present proceedings may act as a useful guide for other unions, whose rules are affected by... the Sex Discrimination Act and, to this extent, there is a degree of public interest in having the dispute judicially determined. However, the applicant stood to benefit personally from the decision and, in this regard, I could not be satisfied that the applicant brought the proceeding entirely in the public interest. The public interest was subservient to, although coincided with, his own interests. However, it is important to note in this context, that in the absence of any judicial determination of the question of statutory construction, to which the facts gave rise, the applicant was not acting unreasonably in seeking a determination. While it remains undisturbed, the determination is one which will have the effect of governing the position of persons who find themselves in a similar position to the applicant. In that sense the case can be genuinely described as a test case with some element of public interest...’*²³⁰

In light of these considerations, Crennan J ordered that the applicant pay 75% of the respondent’s costs.

²²² [2004] FCA 46, [11].

²²³ [2004] FCA 46, [13].

²²⁴ [2004] FCA 46, [14].

²²⁵ [2004] FCA 46, [18].

²²⁶ [2004] FCA 549.

²²⁷ [2004] FCA 549, [20]–[21].

²²⁸ [2004] FCA 549, [23].

²²⁹ [2004] FCA 1600.

²³⁰ [2004] FCA 1600, [10].

In *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs*,²³¹ Dowsett J 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.’*²³²

He continued:

*‘We should not encourage litigants to pursue their own views concerning the public interest. That is primarily, but not exclusively, the role of government agencies, including the Attorney-General. On the other hand, we should not discourage citizens from pursuing their individual rights. The view that costs should usually follow the event reflects well-established perceptions as to a reasonable balance between these two considerations.’*²³³

In *Smith v Airservices Australia*,²³⁴ the applicant discontinued judicial review proceedings (except with regard to costs) with the leave of the court. In relation to costs, the applicant relied ‘on his assertion that he 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. He also contended that the proceedings were only discontinued because he reasonably expected the decision to be reversed (although in fact it was not). The respondent nevertheless alleged that he had a ‘private interest’ in the sense of an ‘emotional investment’ in the reforms the subject of the judicial review proceedings. Stone J held that this did not preclude the proceedings being characterised as having a ‘public interest’ element:

*‘it is likely that the only person who could with any credibility or sense challenge the proposed [decision] would be a person with extensive 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 respondent, in asserting the applicant’s private interest, commented in oral submissions: ‘It’s not as if he’s coming to this as an innocent bystander’. My point is that an innocent bystander would be in no position to make any sensible comment on the matter. 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.’*²³⁵

In consequence, Stone J made no order in relation to costs.

In *Save the Ridge Inc v Commonwealth*,²³⁶ the Full Court of the Federal Court emphasised that a confluence of circumstances, rather than isolated factors, must militate in favour of

²³¹ [2004] FCA 1644.

²³² [2004] FCA 1644, [4].

²³³ [2004] FCA 1644, [5].

²³⁴ [2005] FCA 997.

²³⁵ [2005] FCA 997, [69].

²³⁶ [2006] FCAFC 51.

a departure from the usual principle as to costs.²³⁷ There, the circumstances under consideration did not ‘raise questions of the same nature as those at issue in *Ruddock v Vadarlis*; [they] concerned two points of statutory construction which were, although not unimportant, much more limited in their application’.²³⁸ The Court also held that the fact of extended or open standing provisions in relation to the subject–matter of an application were not to be taken to militate against the making of orders as to costs; only Kirby J had suggested otherwise in *Oshlack*.²³⁹

5.2 Recent Developments in the United Kingdom

5.2.1 The Corner House Research Case (2005)²⁴⁰

In *Corner House Research*, the applicant sought to challenge the decision of a government department to alter its anti–corruption procedures. The applicant further sought a Protective Costs Order (PCO) rendering it immune to costs in respect of the substantive hearing. The application for a PCO was refused, and the applicant appealed to the Court of Appeal. The Court took the opportunity to review and summarise the applicable principles 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.*²⁴¹

The Court noted that the form of a PCO was a matter for the discretion of the judge depending upon the circumstances of a particular matter,²⁴² and enumerated a number of different permutations that had arisen:

- (i) *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...*
- (ii) *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...*

²³⁷ See [2006] FCAFC 51, [12]–[16] (Black CJ, Moore and Emmett JJ).

²³⁸ [2006] FCAFC 51, [13] (Black CJ, Moore and Emmett JJ).

²³⁹ [2006] FCAFC 51, [17]–[19] (Black CJ, Moore and Emmett JJ).

²⁴⁰ *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

²⁴¹ [2005] EWCA Civ 192, [74].

²⁴² [2005] EWCA Civ 192, [75].

- (iii) *A case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost;*
- (iv) *The present case where the claimants are bringing the proceedings with the benefit of a [Conditional Fee Agreement], which is otherwise identical to (iii).²⁴³*

The court suggested that 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 him or herself 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.’²⁴⁴

It explained that:

‘The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.’²⁴⁵

The Court further stipulated that an applicant for a PCO would be responsible for the costs of the application, which it suggested would provide a ‘financial disincentive for those who believe that they can apply for a PCO as a matter of course’.²⁴⁶

In terms of 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’.²⁴⁷

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 in respect of it could prove more restrictive than anticipated. 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’.²⁴⁸ Stein and Beagent further note that often (eg in relation to judicial review), it is actually

²⁴³ [2005] EWCA Civ 192, [75] (references omitted).

²⁴⁴ [2005] EWCA Civ 192, [76].

²⁴⁵ [2005] EWCA Civ 192, [76].

²⁴⁶ [2005] EWCA Civ 192, [78].

²⁴⁷ [2005] EWCA Civ 192, [144].

²⁴⁸ R Stein and J Beagent, ‘Case Law Analysis — *R (Corner House Research) v The Secretary of State for Trade and Industry*’ (2005) 17 *Journal of Environmental Law* 413, 438.

necessary for a party to have something resembling a ‘private interest’ in a proceeding to have standing to commence it in the first place.²⁴⁹ On this basis they suggest that the ‘no private interest’ requirement cannot be the subject of a strict construction. Rather, they suggest that:

‘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.’²⁵⁰

Secondly, it has been suggested that even the costs involved with an application for a PCO are likely to be substantial enough to deter ‘many genuine public interest claims’.²⁵¹ 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.’²⁵²

Thirdly, 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’.²⁵³

5.2.2 The Liberty Report (2006)

In 2006, the UK human rights organisation Liberty released a Report entitled ‘Litigating the Public Interest’. The Report was produced pursuant to the meetings of a Working Group and considered, inter alia, the status of PCOs subsequent to the decision in *Corner House*.

The Working Group considered the broad, discretion-based approach to determining whether proceedings were in the ‘public interest’ adopted in *Corner House* to be a reasonable one.²⁵⁴ However, it was critical of a number of other aspects of that decision.

The Working Group was unanimous in its rejection the ‘no private interest’ requirement as a precondition to the grant of a PCO. Like Stein and Beagent, it ‘discerned a lack of clarity as to what constitutes a private interest’.²⁵⁵ It further noted that:

²⁴⁹ Ibid 438–9. Similarly, the ‘no private interest’ requirement ‘would seem to exclude anyone with a claim under the Human Rights Act’: Liberty, *Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation* (2006) [80].

²⁵⁰ Stein and Beagent, above n 248, 439.

²⁵¹ Ibid 441. See also Liberty, above n 249, [54]–[55], [99].

²⁵² Stein and Beagent, above n 248, 441.

²⁵³ Ibid 444.

²⁵⁴ Liberty, above n 249, [75].

²⁵⁵ Ibid [82].

‘there is an enormous difference between a case where the potential financial benefit is substantial and a central reason for bringing the case and one where the potential financial benefit is modest and possibly incidental to the motivation for litigation.’²⁵⁶

The Working Group concluded that:

‘The weight attached to [an applicant’s private interest] should be a matter for the judge considering the application. The courts can legitimately weigh the private interest against the public interest in the case; there are doubtless cases where the public interest in the case is so strong that a relatively modest private interest in the outcome on the part of the person seeking a PCO is such that there is unlikely to be anyone else who could bring the case who did not have such an interest) should not prevent one being granted.’²⁵⁷

The Working Group also criticised the manner in which the Court of Appeal in *Corner House* suggested that different forms of PCO might be appropriate depending upon whether an applicant’s legal representatives were acting pro bono, or under a conditional fee agreement. The Group did not consider that these factors should be relevant to the type of order granted²⁵⁸ (or the question of whether an order should be granted at all).²⁵⁹ The Group was divided as to the appropriateness of capping the costs of PCO-protected litigants. One strand of thought was that:

*‘If a case is considered significant enough to meet the public interest test then it is important that the claimant’s ability to present the case should not be restricted; if the courts are to decide an issue of public importance it is essential that the case be fully and competently argued on both sides. Limiting the claimant to the modest fees of junior counsel, as required by *Corner House*, means that in public interest cases brought with a PCO there is no role for leading counsel unless they act pro bono... Such a limitation will inevitably limit the number of cases where PCOs will significantly increase access to justice.’²⁶⁰*

Other members of the Group, however, considered the restriction to be a reasonable one.²⁶¹

The Group also questioned the significance of the ‘whether or not the action could continue in the absence of a PCO’ criterion, and could:

‘conceive of circumstances 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.’²⁶²

The members of the Working Group were of the view that the principles set out in *Corner House* to govern the costs of making an application for a PCO were ‘unduly harsh

²⁵⁶ Ibid [82].

²⁵⁷ Ibid [84].

²⁵⁸ Ibid [87].

²⁵⁹ Ibid [96].

²⁶⁰ Ibid [93].

²⁶¹ Ibid [92].

²⁶² Ibid [97].

and likely to result in meritorious applicants being deterred'. The suggestion was made that there ought, in the usual case, to be no order as to costs in respect of a PCO application.²⁶³

Finally, the Working Group suggested that there was 'no reason in principle why PCOs should not be available on appeal'.

5.3 Recent Developments in Canada

5.3.1 British Columbia (Minister of Forests) v Okanagan Indian Band (2003)²⁶⁴

The Supreme Court of Canada had occasion to consider the relevance of the 'public interest' to the question of costs in the recent *Okanagan Indian Band* litigation. There, several indigenous Bands commenced logging on Crown land, and resisted Ministerial stop-work orders on the basis that they had aboriginal title to the lands in question and a constitutionally-protected entitlement to log them. The Bands argued that the matter should not go to trial because they lacked the resources to fund it or, in the alternative, sought an order that the Crown fund their legal costs in advance and irregardless of the outcome of proceedings. By a 6:3 majority, the Supreme Court upheld the Court of Appeal's decision to award the Bands interim costs in respect of the litigation.

The majority judgment was delivered by LeBel J (with whom McLachlin CJ, Gonthier, Binnie, Arbour and Deschamps JJ agreed), who emphasised that an order in the nature of that made by the Court of Appeal was permissible, but not without exceptional circumstances:²⁶⁵

*'An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the resources to succeed.'*²⁶⁶

LeBel J enumerated several preconditions to the making of an interim costs order:

*'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. And 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.'*²⁶⁷

LeBel J emphasised that the fact that there remained outstanding live issues would not preclude an order being made.²⁶⁸

His Honour noted that a 'public interest element' could provide the 'special circumstances' required to support its being granted:²⁶⁹ '[i]t is for the trial court to

²⁶³ Ibid [99].

²⁶⁴ *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371.

²⁶⁵ See eg [2003] 3 SCR 371, [1], [29]–[30].

²⁶⁶ [2003] 3 SCR 371, [31].

²⁶⁷ [2003] 3 SCR 371, [36].

²⁶⁸ [2003] 3 SCR 371, [37].

²⁶⁹ [2003] 3 SCR 371, [37].

determine in each instance whether a particular case, which might be classified as ‘special’ by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate’.²⁷⁰ 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’.²⁷¹ Even then, the matter remained at the discretion of the court,²⁷² and as LeBel J 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.’²⁷³

LeBel J ultimately held that had the trial judge applied the principles thus set out, he would inevitably have reached the conclusion favoured by the Court of Appeal and made the interim costs order.²⁷⁴

Iacobucci, Major and Bastarache JJ dissented, holding that there was no basis for disturbing the trial judge’s exercise of discretion.²⁷⁵ Major J expressed concern that an advance award of costs could be seen as ‘prejudging the merits’²⁷⁶ and amounted to ‘a form of judicially imposed legal aid’:

*Interim costs are useful in family law [in respect of impecunious spouses and children], but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.*²⁷⁷

Major J also objected to LeBel J’s proposition that it was for a trial judge to determine whether the circumstances were ‘special enough’ to warrant an interim costs order:

*The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved does not assist the trial judge in determining what is ‘special enough’.*²⁷⁸

Even on the basis of LeBel J’s criteria, however, Major J could discern ‘no evidence to suggest that these land claims [under consideration] should be considered exceptional’.²⁷⁹ 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

²⁷⁰ [2003] 3 SCR 371, [38].

²⁷¹ [2003] 3 SCR 371, [40].

²⁷² [2003] 3 SCR 371, [41].

²⁷³ [2003] 3 SCR 371, [41].

²⁷⁴ [2003] 3 SCR 371, [45].

²⁷⁵ [2003] 3 SCR 371, [51].

²⁷⁶ [2003] 3 SCR 371, [62].

²⁷⁷ [2003] 3 SCR 371, [63].

²⁷⁸ [2003] 3 SCR 371, [65].

²⁷⁹ [2003] 3 SCR 371, [67].

*task, and for its recognition that, in certain exceptional public interest cases, only an interim costs award will satisfy the interests of justice.*²⁸⁰

5.4 Submissions to the VLRC

As noted above, a number of parties have made submissions to the VLRC in respect of the issue of costs in proceedings with a public interest element.

Some submissions, including that of the Victorian Bar, favour 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.

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

‘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 further suggests 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’.

A number of submissions, including those of Victoria Legal Aid and the Public Interest Law Clearing House (‘PILCH’), express 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 suggests 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 O 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.

6. Costs in class actions

Class actions under Part 4A of the *Supreme Court Act 1986* (Vic), 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 ALRC 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

²⁸⁰ Chris Tollefson, Darlene Gilliland and Jerry DeMarco, ‘Towards a Costs Jurisprudence in Public Interest Litigation’ (2004) 83 *Canadian Bar Review* 473, 507.

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 sub group 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 (a) finance cases, (b) provide security for costs and (c) provide an indemnity in respect of 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 and 40%) 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 Court²⁸¹ and the Victorian Supreme Court²⁸², 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.²⁸³

The attempt made in the *Fostif* litigation²⁸⁴ 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 de-railed by the High Court, (by majority) for reasons which are not relevant for present purposes. 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 not either poor or 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 court²⁸⁵ is able to be invoked only in the event of an award of damages and the group members contributions can only be deducted out of the damages awarded to them. Thus, the legislation does not expressly

²⁸¹ *Dorajay Pty Limited v Aristocrat Leisure Limited* [2005] FCA 1483.

²⁸² *Rod Investments (Vic) Pty Ltd v Clark & Ors* [2005] VSC 449.

²⁸³ See generally P Cashman, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80 *Australian Law Journal* 738.

²⁸⁴ *Campbells Cash and Carry Pty Limited v Fostif Pty Limited; Australian Liquor Marketers Pty Limited v Berney* [2006] HCA 41.

²⁸⁵ *Supreme Court Act 1986* (Vic), s 33XJ.

deal with how such 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 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.

7. Confidence in the courts and the problematic nature of civil justice reform

Confidence in the courts will inevitably be determined by factors other than the quality of the decision ultimately handed down for a number of reasons.

First, and most obviously, the overwhelming majority of cases in *all* courts do not proceed to final judgment. Confidence in the courts will obviously be enhanced if courts proactively facilitate settlement, by whatever means. At present, in Victoria and in most other Australian jurisdictions, judicial officers and court personnel have developed a variety of mechanisms to achieve alternative dispute resolution.

Second, for most litigants the ‘process’ of litigation will not only have an important bearing on the outcome, but will generate its own complications, stresses and costs for participants. Whilst most courts are continuing to improve both procedures and processes, in the higher courts in most Australian jurisdictions there would be few who would conclude that there is nothing more to be done both in terms of the optimal use of existing powers and procedures and in terms of the allocation of additional resources.

Third, and perhaps most importantly, for most participants in the civil litigation process the perceived quality of the outcome will be tempered by the transaction costs involved. For some justice is unaffordable, thus leading to a lack of confidence in the courts. For others, justice comes at too high a price thus also undermining confidence in the courts and the legal profession.

Fourth, notwithstanding the breadth of judicial powers, judicial officers and participants in the litigation process are to a large extent constrained by the legislative framework and the civil procedural rules governing the conduct of litigation. Deficiencies in this framework will undermine confidence in the courts.

It is clear that there is scope for improvement in this legislative and procedural framework and this is an area where both judicial officers, public servants and law reform bodies are continuing to play an important role.

However, one of the important lessons to be learnt from both the Woolf reforms and from other developments in Australia is that there is substantial scope for improving the procedures and processes for dispute resolution *before* the machinery of the court system is mobilised and with a view to avoiding the necessity for litigation. In this respect, pre action protocols may facilitate resolution of significant numbers of disputes which at present result in litigation.

As David Gladwell has noted:

'Confucian thought holds that going to court is a failure: a failure by the parties in not having regulated their conduct better, a failure in not being able to resolve their differences themselves and in having to resort to a third party to adjudicate. Resource to law is something shameful. "In death avoid hell; in life avoid the courts". Two and a half millennia later, we in the West have begun to see the sense of that approach.

A leading businessman recently said to the judge in charge of one High Court list: "It's our intention to put you out of a job. The new emphasis on early settlement has made us realise how much money and time we have wasted in the past."²⁸⁶

Although one of the objectives of civil procedural reform is to improve the mechanisms for the early and inexpensive resolution of civil disputes both within and outside the conduct of litigation, I suspect that this is unlikely to result in the judiciary becoming unemployed.

Although it is easy to pin point a variety of problems in relation to the costs of dispute resolution generally and civil litigation in particular, solutions are far more elusive. In this respect 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 administration;
- 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];
- Reforms which have the effect of increasing costs and procedural hurdles may make access to justice less affordable and outcomes less just;
- 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;
- Lawyers play an important role in the civil justice system and reforms which restrict, curtail or render uneconomic legal services may not be in the public interest or in the interests of clients.

²⁸⁶ Gladwell above n 9.

Appendix: Summary of various submissions and proposals made to the Victorian Law Reform Commission on the issue of costs

Contents

- 1 Cost and Delay
- 2 Fees and Costs
- 3 Incentives and Penalties
- 4 Commercially Funded Litigation
- 5 Legal Assistance

A number of the submissions and proposals in relation to costs are summarised below. These are derived from the responses to the Consultation Paper. The questions in the Consultation Paper encompassed both open ended questions and specific questions directed at particular issues. The questions are set out below, along with summaries and extracts of selected responses and submissions received to date.

1 Cost and Delay

1.1 Are there reforms which would reduce the length and cost of trials? (Consultation Paper question 43).

<elaw>: Significant time and cost savings could be made in large litigation through the efficient use of technology. Electronic courtrooms²⁸⁷ can result in shortening the length of a trial by up to 20% with consequential cost savings.

The Transport Accident Commission (the TAC): Supported the use of witness statements, particularly by VCAT in administrative reviews, to save court time. It also suggested that, if statements are exchanged early, as occurs in some pre-litigation processes, they 'serve the additional purpose of enabling fully informed mediation or negotiation'.

The TAC also suggested that early identification and narrowing of issues in the litigation process should obviate the need for the plaintiff to establish the facts already agreed by the defendant to be true thereby reducing time taken at trial.

The Litigation Lawyers Section and Costs Policy Committee of the Law Institute of Victoria (the LIV): noted its lack of support for any proposal to reduce the length of trials by wider 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.

The key to reducing costs and delay is specialised judge-managed lists operating within a docket system. The LIV also suggests:

- the removal of unnecessary interlocutory steps from the general civil justice process that ought to be required on application; and
- the introduction of measures to avoid disputes, including a uniform code of civil procedure across all jurisdictions

²⁸⁷ See eg *Seven Network Ltd v News Ltd (No 9)* [2005] FCA 1394.

The Victorian Workcover Authority (the VWA): considers that the requirement for Court Books should be eliminated or constrained. It submits:

- they contain considerable quantities of irrelevant and, in many cases, inadmissible material which may nevertheless have been perused by the court before arguments on admissibility are heard;
- they are costly and time consuming to produce;
- there is no clear evidence they save court time;
- the appeal process, in particular the settling of appeal books, is made more complex, time consuming and costly by the tendering of voluminous court books at trial; and
- they are environmentally unfriendly in terms of paper consumption.

1.2 Are there reforms which would reduce the cost to parties of:

- **commencing a proceeding;**
- **pleadings;**
- **discovery of documents in hard copy;**
- **discovery of documents in electronic form;**
- **interlocutory hearings;**
- **expert evidence;**
- **the preparation of other evidence;**
- **conducting a trial;**
- **conducting an appeal? (Consultation Paper Question 47)**

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Commencing a proceeding: Electronic filing, such as that used in the County Court, saves costs to the parties in preparing and delivering documents to the court and to the other side. This is particularly so for regional firms that pay for clerks or town agents to lodge documents on their behalf.

Pleadings: Electronic preparation and exchange of pleadings with the court and the other side would save costs.

Discovery of documents in hard copy: Costs can be saved by converting discoverable documents in hard copy to an electronic format. The Supreme Court of Victoria's Practice Note, No 1 of 2002 "Guidelines for the use of Technology in any Civil Matter" provides guidelines for the preparation of and exchange of discoverable materials in electronic format where the matter involves a reasonably large number of documents and where hard copy documents are imaged and objective meta data is manually coded for each document. Preparation and exchange of materials in this way, combined with use of an electronic courtroom can save costs. Locating a document on an electronic system can take seconds, compared with endeavouring to find a piece of paper in a large hard copy set of documents.

Discovery of documents in electronic form: Practice Note No 1 of 2002 does not adequately cover the circumstance in which discoverable documents are sourced in electronic format in the first instance, that is, email and other electronic files located on servers, backup tapes and the like. If electronic documents are to be reviewed for discovery, there is much meta data already embedded in electronic files that can be used.

Further, if large volumes of electronic material are to be discovered, then it is not practical to review every single document in a large tranche of say, millions of documents. Rather, many of these documents can be 'culled' by using well known technologies and search terms agreed upon by the parties to locate those that may be relevant.

The Commission should consult with the legal technology support teams within law firms and litigation lawyers, to develop a standard for the preparation and exchange of electronic material for discovery. It is suggested that a standard for electronic discovery would save costs in trial *preparation* and that use of electronic courtrooms for trial *presentation* would reduce hearing time and cost.

Expert evidence: Experts' reports should be prepared and exchanged in electronic format.

The preparation of other evidence: All other evidence, where practicable, should be placed into electronic format.

Conducting a trial: Trials should be conducted, where practicable, in electronic format. Courts should provide basic facilities such as cabling and sufficient power for such courtrooms.

Conducting an appeal: In some cases the transcripts, exhibits and judgment from the trial should be made available in an electronic appeal book. This is particularly appropriate where an electronic trial has been conducted or where the transcripts and exhibits are lengthy. However, most appeals are short in duration in which case it may be more practicable to prepare hard copy appeal books.

1.3 Are there any other reforms which you consider necessary or desirable to reduce costs and delays in civil proceedings generally? (Consultation Paper question 48)

The Victorian Bar (the Bar): There is a problem (based on anecdotal evidence) with unacceptable delay and cost in some parts of the civil justice system. In particular:

- inadequate judicial resources available to manage and hear long, complex cases; and
- a sense that the elapse of time from commencement of proceedings until trial as uncommercial, generally unsatisfactory, and leading to significant, unwarranted costs.

Of the different types of delay, court based delay (usually because of the lack of judicial resources) is the most significant in terms of perception.

The Bar points to various factors in a broad sense that it suggests affect 'the timeliness, cost and complexity of (commercial) litigation' and summarises Lord Woolf's assessment of some of the ways in which pre-reform English civil procedure contributed to the problems. The Bar also list common complaints said to lead to unnecessary delay and costs as follows:

- (a) continual amendment of pleadings (perhaps in part due to the failure to take adequate instructions at the outset);
- (b) failure to identify the core issues in dispute at an early stage;
- (c) uncontrolled discovery;
- (d) excessive Court Books; and
- (e) the late briefing of counsel.

It is unwise to make wholesale changes to the civil justice system in an attempt to address problems of delay and costs until the particular problem areas are identified. In the short term, the VLRC should commission a study to illuminate the causes of delay and costs. Longer term, the Bar supports the resourcing of the courts to enable the development of data collection systems which would enable the capture of appropriate data to provide an informed, objective basis for the assessment of efficiency.

Further, whilst acknowledging the need for proper court resourcing to achieve benchmarks for disposition of civil proceedings, there should be target periods for different milestones in a proceeding. Rather than provide a single target figure, a range of figures is appropriate. For instance, target periods for cases in judge controlled lists should be shorter than in the general list.

The TAC: Simplification and streamlining of processes, recognising the pre-litigation process participation and greater reliance on written submissions will all contribute to the objective of reducing costs and delay. Strategies to discourage participation in available litigation processes for their own sake should be encouraged.

The Human Rights Law Resource Centre (The HRLRC): An important aspect of a fair hearing is its expeditiousness. In relation to costs, an important aspect of ensuring equal access to justice is an applicant's ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community. The availability of funding for the costs of litigation, including court fees, disbursements and awards of costs is critical to ensuring access to justice for impecunious litigants. The HRLRC recommends that:

- funding be provided for disbursements in certain pro bono matters;
- the guidelines for the Law Aid scheme be expanded;
- the Victorian Government adopt the model guidelines regarding pursuing costs in public interest proceedings; and
- Order 63 of the Supreme Court Rules be amended to incorporate provisions relating to costs and public interest litigants.

2 Fees and Costs

2.1 Is the manner in which lawyers are able to charge or calculate fees in civil litigation in need of reform? If so, what are the problems and what changes should be implemented? (Consultation Paper question 52)

Elizabeth Harris of Harris Cost Lawyers Pty Ltd (Liz Harris): There are many examples of different fee arrangements where the lawyer bears part of the risk of the matter either changing in nature, or success being achieved. Such arrangements can be to the benefit of the client in that they can involve some fixed fee arrangement, which gives the client certainty of cost, and also spreads the risk between both client and lawyer. Under a time charging arrangement, the client bears all risk, and costs are uncertain. If a commercial client, with fully knowledge and bargaining capacity reaches an agreement with a lawyer as to a basis of charging other than on an hourly basis, this should be supported. Generally, value billing arrangements are at risk under the present legislation. Yet such arrangements can be of substantial benefit to both lawyer and client. Such arrangements can also increase the access to justice.

Peter Mair: 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.

Victoria Legal Aid: Court fee scales should be based on lump sum fees for particular tasks, where practicable. The fees should be based on a fixed number of hours for each task but with different hourly rates for professional work to reflect the differing complexity of the work in each jurisdiction.

Edison Masillamani: The fee payable to lawyers ought to be based on their success rather than the present situation where win or lose the legal eagles are whistling to the banks.

Vicki Waye – Associate Dean, Law School, University of Adelaide: There should be mandatory litigation budgets (cost capping) subject to review by the court to achieve proportionality. Recoverable costs should be fixed in the manner envisaged by Part 45 of the *Civil Procedure Rules* in England (the fixed cost scheme for road traffic accident cases).²⁸⁸

The Bar: This area does not require reform. Keeping in mind that civil litigation is very labour intensive and in many respects increasingly complex, the balance between time costing and the current scales of costs is reasonable. It is reasonable to determine an appropriate fee and to review the reasonableness of the fee after the fact to take into account the complexity, novelty and difficulty of the matter.

The TAC: Opposes the introduction of contingency fees or any other basis for charging legal fees calculated as a percentage of the damages recovered. The introduction of contingency fees has the potential to result in significant increases in the gross legal costs actually paid by TAC clients from the proceeds of their settlement or judgment. Access to justice has significantly improved in the personal injury litigation environment in Australia through conditional fee agreements. Its protocols contain generous event based costs for lawyers to recognise their contribution to early dispute resolution.

2.2 Should clients have the option of being able to agree to legal fees being calculated as a percentage of the amount recovered in civil proceedings:

- in individual cases;
- in representative or class action proceedings (where such percentages would be calculated by reference to the total recovery on behalf of the represented group or class)? (Consultation Paper question 53)

Liz Harris: There should be an ability to charge a success fee in litigious matters and the limit on the uplift fee of 25% should be able to be increased and be allowed in more than only no win-no fee matters. Refers to the situation in the USA where defendant insurers tie payments to their lawyers to the amount paid out and to the time frame in which a

²⁸⁸ The rules fix recoverable costs in road traffic accident cases below £10,000 and in all employer liability cases (fast track and multi-track). For example in road traffic accident cases, the amount of base costs is fixed at £800 plus 20% of damages up to £5000 plus 15% of damages between £5000 and £10,000. If the case settles prior to trial, the maximum success fee allowable is 12.5%. If the case concludes at trial, the maximum success fee allowable is 100%.

settlement is reached. This is aimed at achieving a resolution of the matter as early as possible, and is therefore to be encouraged. Another type of arrangement, where fees are reduced if a certain level of recovery is not achieved, is also not available as it would be in breach of the present *Legal Profession Act*. This type of arrangement should be available in Victoria.

Vicki Waye: There should be a consideration of alternative funding sources including contingency fees and adequately funded contingency legal aid funds. Vicki Waye describes in some detail ‘The Supplemental Legal Aid System’ which operates in Hong Kong and suggests that it could be introduced into Australia and could operate on a similar basis.

The LIV: 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 still act as a significant deterrent. 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*’.

Adrian Evans: There are very good ethical reasons why lawyers should not be put in a conflicted position to take a share of their client’s damages. If contingent fees were to be introduced one option is to require all proposed contingent fees to be court approved.

The Bar: Supports conditional fees (colloquially known as ‘no win/no fee’), with the ability to agree an additional margin or ‘uplift’ fee. The Bar opposes the introduction of United States style ‘contingency fees’ (which are presently prohibited by the *Legal Profession Act 2004*). The introduction of contingency fees: ‘*Would act as a grave threat to the independence and detached objectivity of the Bar.*’

The TAC: See answer to question 52.

The VWA: The introduction of contingency fees would result in significant increases in the legal costs paid by injured workers and that it: ‘*Involves an obvious and insurmountable conflict of interest on the part of the plaintiffs’ lawyers.*’ The only argument supporting this option is that it facilitates access to justice. The need for greater access to justice has been largely achieved in Australia by the “no win/no fee” approach to litigation funding including the 25% uplift in fees in successful claims. The pre-litigation process together with the payment of pre-litigation costs further facilitates easy access to justice in the Workcover jurisdiction.

The Group Submission²⁸⁹: Opposes the introduction of contingency fees and suggests that removing the prohibition on contingency fees would have serious consequences for the proper administration of justice including because:

1. 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;
2. 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; and

²⁸⁹ The Group Submission was prepared by Allens Arthur Robinson, Corrs Chambers Westgarth, Deacons, Telstra and the Australian Corporate Lawyers Association.

3. 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.

Lawyers and law firms should be prohibited by legislation from maintaining any financial association with commercial, third party litigation funders so as to avoid a situation where law firms own or partly own, directly or indirectly, funders and thereby circumvent the prohibition on contingency fees.

2.3 Is there 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? (Consultation Paper question 54)

The Bar: The parties are already aware of the likely costs of the proceeding from estimates that their lawyers are required to provide them pursuant to the provisions of the *Legal Profession Act 2004*. The Court's role is to determine the dispute in accordance with law. Unless the costs of the litigation become a relevant matter in any particular case to disposing of the litigation between the parties, it is neither necessary nor desirable for the Court to be informed of what would otherwise be an irrelevant matter.

The TAC: There is no need. Its protocols containing the cost provisions are publicly available.

The LIV: Does not consider that 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. The LIV does not consider that this information would assist with the disposal of the matter before the court.

2.4 Is there a need for reform in relation to the rules or procedures in relation to:

- (a) security for costs;
- (b) offers of settlement or compromise;
- (c) the awarding of costs in favour of the successful party?

If so, what are the problems and what changes should be implemented? (Consultation Paper question 55).

(a) Security for costs

HRLRC: Discusses the impact of the Human Rights Charter in Victoria. Notes the development of human rights law by the Human Rights Commission (HRC) in the UK where notions of fairness in matters relating to security for costs have undergone a case-by-case development. In *Ait Mouhoub v France*,²⁹⁰ the requirement to pay 80,000 francs for proceedings against the gendarmes was held to be a disproportionate obstacle to the author's access to court. However, in *Tolstoy Miloslavsky v UK*,²⁹¹ the payment of 124,900 pounds was not considered an infringement of article 6 of the ECHR.

The LIV: In relation to orders for security for costs, these orders are needed to provide flexibility for the litigants but should not be allowed to stymie litigation.

²⁹⁰ [1998] ECHR 97.

²⁹¹ [1995] ECHR 25.

The Bar: No, these procedures currently work well.

The VWA: Does not believe there is any need for revision of the existing rules. VWA costs regime is governed by the Act. See Section 135A(13)(13A)(13B)(13C) and (13D), Section 134AB (27)(28) and (29)(30) and (31).

The TAC: Does not believe there is any need for revision of the existing rules. However, unlike the VWA, whose costs regime is comprehensively governed by the *Accident Compensation Act 1985*,²⁹² the TAC's position is not regulated.²⁹³

(b) Offers of settlement or compromise

Turks Legal & AXA: Submission assesses the operation of the *Supreme Court Rules* regarding offers of compromise. Order 26 of the Rules currently provides that a plaintiff in a claim for damages arising out of death or personal injury will receive taxed costs on an indemnity basis for the whole proceeding no matter when the offer is made. A defendant in this type of claim, however, only recovers its costs on a party/party basis from the date the offer is made. The plaintiff still recovers its costs until the offer is made. The consequences of non-acceptance of a formal offer of compromise ought to be uniform for all actions and all parties. The LIV supports this view.

Allens Arthur Robinson: There is uncertainty as to the operation of Order 26 of the Supreme Court Rules which has a number of consequences in cases involving multiple defendants, particularly where the claims against them are subject to a proportionate liability regime. The availability, appropriate terms and correct parties to any Offer of Compromise or Offer to Contribute can be difficult to determine. It is difficult for parties to gauge the degree of costs protection that an Offer of Compromise or Offer to Contribute may afford them. Given it may be arguable whether a particular Offer of Compromise or Offer to Contribute is effective under the Rules, parties may be less likely to settle costs disputes following trial. Parties may be inclined to utilise Calderbank letters in addition to or instead of Offers of Compromise or Offers to Contribute. Consideration should be given to possible ways to clarify the operation of Order 26 in relation to multiple defendants, particularly in the context of the introduction of proportionate liability regimes.

The LIV: The sanctions imposed by the current offer of compromise rules are inadequate. As a consequence, parties resort to Calderbank letters. This, in turn, can result in a judicial officer expending significant time in deciding whether or not to allow the costs consequences suggested by the Calderbank letter. More comprehensive rules in relation to offers of compromise, including better sanctions would arguably remove the need for Calderbank letters. Such a move would also provide a regulatory process by which practitioners can advise clients of the repercussions of failing to accept an offer of compromise. As it presently stands, practitioners who receive a Calderbank letter must advise clients that the sanctions suggested in the letter may or may not apply depending on the finding of the relevant judicial officer.

The Bar: No, these procedures currently work well.

²⁹² See *Accident Compensation Act 1985* (Vic), s 135A(13), (13A), (13B), (13C) and (13D), and s 134AB (27), (28), (29), (30) and (31).

²⁹³ See *eg Transport Accident Act 1986* (Vic), s 93(12).

The VWA: No – see answer to part (a) above.

The TAC: No – see answer to part (a) above.

(c) The awarding of costs in favour of the successful party

HRLRC: 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 HRLRC refers to some cases heard in the UK before the Human Rights Commission (HRC) where the HRC 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 a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The HRC 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 HRLRC strongly endorses:

- Recommendation 12 of the PILCH Submission that funding be provided for disbursements in certain pro bono matters;
- Recommendation 13 of the PILCH Submission that the guidelines for the Law Aid scheme be expanded;
- Recommendation 14 of the PILCH Submission that the Victorian Government adopt the model guidelines regarding pursuing costs in public interest proceedings; and
- Recommendation 15 of the PILCH Submission that Order 63 of the *Supreme Court Rules* be amended to incorporate provisions relating to costs and public interest litigants.

The Bar: No, these procedures currently work well.

The VWA: No – see answer to part (a) above.

The TAC: No – see answer to part (a) above.

The Group Submission: The costs indemnity rule should be retained to maintain an appropriate balance between the various participants in the civil justice system. The rationale for the costs indemnity rule is that if a party causes another party to unreasonably incur legal costs, the first party should indemnify the other party for those costs. There are a number of sound arguments to support retaining the costs indemnity rule including:

1. The indemnity rule allows successful litigants to recover the cost, or at least part of the cost, of asserting their rights.
2. The rule helps to deter unmeritorious claims.
3. It may encourage parties to conduct litigation in an efficient and cost-effective manner, to avoid unnecessary interlocutory applications and to settle proceedings where appropriate.

4. It must be remembered that the courts have discretion to award costs in civil litigation, and in cases of public interest or other special circumstances, costs will not necessarily be made against the unsuccessful party.

The UK Civil Justice Council which did not recommend in its 2005 report²⁹⁴ that the fee shifting rule should be abolished. The costs indemnity rule was also considered by the Australian Law Reform Commission (the ALRC) in 1995.²⁹⁵ After considering the arguments in favour for and against the rule, as well as the US rule that each party bears its own costs, the ALRC concluded that costs should follow the event – that is, the unsuccessful party should pay the successful party's legal costs – subject to specific exceptions, such as public interest costs orders.²⁹⁶ The ALRC's conclusion was and remains sound, and the costs indemnity rule should be retained.

2.5 Should successful parties be entitled to recover a greater or lesser proportion of their costs from unsuccessful parties? What are the problems and what changes should be implemented? (Consultation Paper question 56)

The Bar: There is always a tension between the fact that a party who has to go to court to vindicate his or her rights will (in the absence for an order for indemnity costs) be out of pocket. However, as the courts have pointed out over many years the shortfall in party/party costs provides an appropriate incentive to settle cases. The issue is one of balance. The current balance is reasonable bearing in mind that although the guiding principle is that “costs follow the event”, the award of costs is always in the broad discretion of the court which is required to have regard to all of the circumstances including, the conduct of the parties and whether a party has succeeded on part or all of its case.

The Bar does not support a reconsideration of the American ‘no-costs’ rule. The Bar generally supports the principle contained in the Woolf Report 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 consistently with expanded case management duties for courts in a modern litigation environment. The Bar would also welcome thoughtful consideration and analysis of the other costs reforms introduced by the Woolf Report, especially the recommendation that the court should be able 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.

The TAC: The existing offer of compromise provisions and the potential to recover indemnity costs addresses this question.

The LIV: There should be a single scale of costs in Victoria, which should be modernised to better reflect the commercial rates actually being charged and thereby narrow the gap between party/party and indemnity costs orders. The basis on which costs are awarded should be extended to a reasonable basis. 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

²⁹⁴ Civil Justice Council, above n 24, 37–9.

²⁹⁵ Australian Law Reform Commission, above n 45.

²⁹⁶ Ibid ch 4.

be amended to provide that the indemnity costs are to be assessed in accordance with the scale.

The Group Submission: In order to facilitate the expeditious enforcement of cost orders and to improve their effectiveness in minimising delay and cost, consideration should be given to adopting a procedure similar to the New South Wales' model for assessment of legal costs (borne by the legally represented party) whereby the party applies for an assessment of party/party costs by a cost assessor. A party dissatisfied with the determination of a cost assessor can either challenge the decision by:

- Review by a panel comprised of 2 experienced assessors;
- 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% then that party will also be liable for the costs of the review. In the submission it is asserted that the New South Wales' procedure provides: "*expedition and a greater degree of certainty in the process and may result in saving court time.*"

The level of costs recovery as compared to costs incurred in New South Wales is greater than in Victoria. Measures which facilitate the expeditious enforcement of costs orders may greatly assist in approving the efficiency of the civil justice system as a whole.

2.6 Is there a need for reform in relation to court and transcript fees in civil proceedings? If so, what are the problems and what changes should be implemented? (Consultation Paper question 57)

The Mental Health Legal Centre (MHLC): The right to have fees waived for financially disadvantaged parties should exist across all civil jurisdictions. The principle that costs follow the event should be made subject to realistic and well informed consideration of the means of the parties, and their relative financial situations. In considering means, there must be adequate recognition of:

- Not only the person's current means but their likely future needs and situation;
- The impact of debt on, for example, their mental health, irrespective of, say, their presumed capacity to pay a debt off over a long period of time; and
- The capacity of the other party to bear its own costs.

PILCH: Considers that the availability of funding for disbursements in litigation is critical to ensuring access to justice in pro bono matters. The current court fee waiver schemes allow for the waiver of most court fees where the party can show financial hardship. However, the court fee waiver schemes do not cover the costs of many disbursements which are incurred in civil proceedings, such as expert reports. PILCH regularly coordinates pro bono legal services for persons in matters where 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.

Recommendation 12: that the Victorian Government provide funding for disbursements in pro bono matters where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who

are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved.

Recommendation 13: In the alternative, PILCH recommends to the Law Aid Scheme's Board of Trustees that:

- i. the guidelines for eligibility for assistance be extended in the manner outlined in the above Recommendation.
- ii. there should be provision for waiver of the \$100.00 application fee in cases where payment of the application fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights.
- iii. there should be provision to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason for funding the disbursements retrospectively.

The HRLRC: In *Kreuz v Poland*²⁹⁷ the requirement to pay court fees was held to be a violation of article 6 of the ECHR because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not endow citizens with 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 had refused his application without taking into consideration any evidence; and
- 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 his proceedings.

It is clear that the availability of funding for the costs of litigation, including court fees, disbursements and awards of costs is critical to ensuring access to justice for impecunious litigants. In many cases, a lack of available funding creates a significant barrier to progressing claims and may result in an individual being unable to access justice effectively.

Victorian Aboriginal Legal Service Co-Operative Limited (VALS): There is a need to restructure court fees. The amount of court fees should not be dependant on the amount being claimed for in damages, but there should be a standard rate of court fees regardless of the amount of damages being claimed. The current situation is unfair because people who are suing for a higher amount of money have higher court fees. In each jurisdiction each party should bear their own costs, unless a court at a hearing orders otherwise. This would encourage the parties to think carefully before proceeding beyond the pre-issuing procedure.

The Bar: No, save that consideration might be given to adjusting court fees in order to provide an economic incentive to the parties to reduce delay.

Federation of Community Legal Centres: Currently, in order to obtain a waiver of fees and charges to lodge documents in the Magistrate's Court it is necessary to write a statutory declaration about the particular persons' financial circumstances. For many

²⁹⁷ [2001] ECHR 398.

CLC clients this may be a barrier to obtaining the waiver and therefore pursuing their claim, particularly if they are self-represented. Claimants should just be able to present a Health Care Card in order to prove their financial hardship and obtain a waiver of court fees and charges.

The TAC: Questions whether there should be more competition in respect of transcription services in civil proceedings, and greater consistency in cost between jurisdictions including VCAT.

In respect of court fees, the present requirement is that they be paid within a short period after a proceeding is allocated a trial date, regardless of the proximity of that trial date or the steps ordered to be taken between the listing date and trial date. The fee, at present, is not refundable. Such a fee should only be payable within a short, stipulated time before the trial commences. This would recognise the potential for resolution as a result of court appointed mediation, which is presently often too proximate to the hearing date.

Where a proceeding cannot be heard on the appointed hearing date because there is no court or judge available a further hearing fee should not be required. Alternatively, if the hearing fee remains payable well before the trial date and before interlocutory steps (including mediation) have been concluded, the fee should be refundable to the payer in the event the proceeding resolves before the stipulated time referred to above.

It is the practice in both the County and Supreme Courts that if a plaintiff does not pay the setting down for trial fee, the hearing date is vacated unless the fee is paid within 14 days by another party. This is inefficient. It creates avoidable delay and adds to the cost of the litigation.

The VWA: The VWA's comments are substantially the same as the comments made by the TAC as set out above.

The LIV: The courts should facilitate the sharing of transcript fees through the use of on-line or electronic access. At present, the plaintiff is required by the Supreme Court to undertake to pay the entire costs of the transcript. This should be a joint obligation of the parties. Transcripts can amount to up to or in excess of \$1000 a day in some matters. If the plaintiff succeeds in an action and does not recover costs, it is out of pocket for providing a service to the court and the other party. The courts should make transcript available as a cost of the litigation.

The National Pro Bono Resource Centre: Fee waivers should be granted as a matter of course where an applicant is a holder of a health-care card, or where the applicant is represented by a publicly-funded legal service providing civil law assistance to marginalised or disadvantaged clients (i.e. a client assisted with legal aid, by a CLC or an Aboriginal legal service). The Centre also supports reforms that would see court fees waived where a marginalised or disadvantaged litigant, who is impecunious, is being represented on a pro bono basis. Useful models are the Fee Waiver Guides produced by PILCHs in Victoria, Queensland and NSW – noting that some jurisdictions already have fee waivers or exemptions in a number of courts and tribunals.

The Centre notes that costs of disbursements and court-related expenses are barriers to the availability of representation by CLCs, legal aid, Aboriginal legal services and pro bono lawyers. The Centre supports reforms that would allow marginalised and

disadvantaged clients who are represented by a CLC, legal aid, Aboriginal legal services or pro bono lawyers to have access to free court transcripts. Access to free interpreters for marginalised or disadvantaged litigants in all courts and tribunals should also be introduced.

2.7 In making orders for costs or security for costs, should the court be required to have regard to:

- **the financial resources of the parties;**
- **whether the proceeding involves issues that affect or may affect the public interest? (Consultation Paper question 58)**

The Bar: No, these are already matters that the court may have regard to in an appropriate case when security exercising its discretion as to costs. There is no warrant for making it mandatory for the court to have regard to these matters.

The Environmental Defender's Office (EDO): The EDO recommends that costs rules in Victoria be amended in line with the recommendations of the Australian Law Reform Commission recommendations with respect to public interest costs orders, including:

- (a) the ability to apply at any stage in the proceedings for a 'public interest costs order'. A possibility not explored by the ALRC would be enabling a party to such an order prior to the filing of initiating process. To do so would facilitate the early clarification of issues in dispute and, if a public interest costs order was granted, would enable the court to provide directions about the expeditious conduct of the proceedings from the outset;
- (b) a definition of public interest in line with recommendation 45 of the ALRC but amended to clarify that the environment can be a matter of public interest;
- (c) flexibility to make a range of public interest costs orders depending on the circumstances of the parties and the nature of the issue. Options should include insulation of the public interest litigant from any adverse costs, a cap on those costs or any other costs orders that meet the objectives of the public interest costs rules;
- (d) relief from the threat of an adverse costs order does not automatically mean that a public interest litigant is not entitled to recovery of costs should they be successful;
- (e) it would be reasonable and appropriate for the court to have discretion to vary the public interest cost order and to make 'disciplinary or case management' costs orders in exceptional circumstances.

The TAC: The TAC has historically always funded the costs of administrative review, and more importantly appeals to the Supreme and Court of Appeal where TAA scheme issues or issues affecting a class of injured people is in issue or requires clarification. The court is made aware of this funding in submissions or supporting affidavit. The TAC has a litigation funding guideline that is publicly available.

Insofar as the relative financial resources of the parties are concerned the TAC is aware of its Model Litigant obligation not to take advantage of a litigant who lacks resources. Consistently, consideration is given to a TAC client's financial position before determining whether to apply for a costs order at all. The financial status of the losing client will also be considered subsequently in any recovery proceedings to enforce an order for costs appropriately made. Subject to these considerations, costs should normally follow the result without reference to extraneous factors.

The TAC has cost recovery guidelines. Essentially, the TAC will only seek to recover its own legal costs in circumstances where there has been fraud, or a material willing misrepresentation or another exceptionally good reason exists.

The VWA: No. In particular the VWA considers that the issue of the financial resources of a party are primarily issues for the parties to consider when determining whether to enforce an order for costs.

In relation to the making of orders for payment of costs, the Authority considers that courts:

1. should not have regard to the financial resources of the parties; and
2. should not have regard to whether the proceeding involves issues that affect or may affect the public interest (particularly at trial level).

In relation to whether a court should have regard to whether proceedings involve issues that affect or may affect the public interest, the Authority considers there is no warrant for this consideration at trial level, and little need for such regard to be had at appellate level. At appellate level, consideration is now often given by parties as to the liability for costs, and agreements either not to pursue costs in the event of being successful or to pay another party's costs regardless of the outcome may be entered into where a proceeding is truly considered to be "scheme sensitive" or significantly in the public interest.

The LIV: The LIV does not believe that decisions based on the financial resources of the parties to be supportable. Adoption of this basis could lead to courts making decisions based on the basis of the ability of a party to pay costs or pay a judgment. 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.

MHLC: The right to have fees waived for financially disadvantaged parties should exist across all civil jurisdictions.

The principle that costs follow the event should be made subject to realistic and well informed consideration of the means of the parties, and their relative financial situations. In considering means, there must be adequate recognition of:

- not only the person's current means but their likely future needs and situation;
- the impact of debt on, for example, their mental health, irrespective of, say, their presumed capacity to pay a debt off over a long period of time; and
- the capacity of the other party to bear its own costs.

Victoria Legal Aid (VLA): The VLA also supports 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. This is necessary to redress the inequality in resources that typically exists in public interest cases where an individual challenges a public body or commercial corporation.

Federation of Community Legal Centres: There needs to be another avenue of appeal such as VCAT merits review to provide a more accessible and less costly alternative to the Supreme Court. In addition or alternatively, there needs to be costs rules in place that mean that litigants in public interest matters are not exposed to the risk of adverse cost

orders. The threat of an adverse costs order is a significant obstacle to pursuing public interest environmental litigation.

The Federation Supports the submission of the Environment Defenders Office in its recommendation that that costs rules in Victoria be amended in line with the recommendations of the Australian Law Reform Commission recommendations with respect to public interest costs orders.

PILCH: The risk of adverse costs orders is one of the most significant barriers to access to justice in public interest matters, because the risk of these orders acts as a strong deterrent to bringing or continuing litigation. In order to address this issue and to improve access to justice an alternative regime should be established to reduce the potential financial risk from adverse costs orders for individuals and organisations that bring bona fide proceedings in the public interest. PILCH recommends that:

1. The Victorian Government consider adopting Model Guidelines which provide that the State will consider giving an undertaking not to pursue costs if it is successful in public interest proceedings in which it is a party; and
2. The Supreme Court of Victoria consider an amendment to Order 63 of the Supreme Court Rules to incorporate provisions relating to costs and public interest litigants.

These changes would complement any future expansion of not-for-profit litigation funding.

National Pro Bono Resource Centre: The Centre refers to the work of PILCH (Victoria) and QPILCH in relation to costs recovery in pro bono litigation and supports the conclusions and recommendations made by those organisations in relation to costs in pro bono public interest litigation.

In particular, the Centre makes the following observations and recommendations:

- That government model litigant rules provide that government not apply for or enforce cost orders in public interest litigation
- Security of costs rules and procedures should not be used in such a way that may restrict the opportunity for an impecunious litigant to conduct litigation.

2.8 Is there a need for reform of the law relating to the tax deductibility of legal fees and expenses incurred in civil litigation? If so, what are the problems and what changes should be implemented? (Consultation Paper question 59)

Consumer Action Law Centre (CALC): When representing our clients in legal proceedings, the power imbalance is exacerbated by knowledge that loss to our client and subsequent costs would cause a major impact on their lives, possibly losing a car – even their home. The other party is almost always a company – often a large corporation. The difference between what both parties have at risk, can make negotiating a fair outcome difficult. However, the fact that should the company lose, its costs are tax deductible makes the imbalance all the greater. Aside from the fact that tax deductibility could be a disincentive for a company to settle major litigation at an early opportunity, it also adds to the inequality between a company and an individual.

The Bar: No, the Bar is not aware of any problem in this area. In any event, the issue of tax deductibility is not one that can sensibly be considered without reference to the

balances struck by the Commonwealth in relation to its taxation legislation. The tax deductibility of legal fees and expenses in civil litigation is, after all, a Commonwealth (and not a State) issue. Regardless, there is no good reason in principle why legal expenses incurred in deriving assessable income should not be tax deductible, like any other business expense.

The LIV: The LIV does not consider there is a need to reform the law relating to the tax deductibility of legal fees and expenses incurred in civil litigation. Removing the tax deductibility of legal fees would effectively increase the cost to the parties of settling a claim and consequently reduce the likelihood of settlement. This is a federal matter for the consideration of the Commissioner for Taxation as it would require an amendment to the *Income Tax Assessment Act*.

2.9 When a losing party is to be ordered to pay the legal costs of the successful party in circumstances where some or all of such legal costs are able to be claimed as a tax deduction by the successful party, is this something that can or should be taken into account by the court in making an order for costs? (Consultation Paper question 60)

The Bar: No, any such suggestion has the capacity to interfere with the complex balances already struck by the enactment of the Commonwealth's taxation legislation. Obvious difficulties arise in attempting to alter these balances. The Bar asks rhetorically, what would happen if a winning party who the judge thought could claim a tax deduction for its costs ultimately had that tax deduction disallowed months down the track? Similarly, what would happen if the Deputy Commissioner of Taxation decided that an amount for costs (which had already been reduced by the Judge because of the belief that the receiving party's costs were tax deductible) was assessable income? Further, if the Court was required to have regard to whether the successful party's costs could be claimed as a tax deduction, that would add an unnecessary level of complexity to civil trials. Expert evidence may be required to be adduced in an appropriate case to determine the tax savings by the successful party. The tax savings will not be the same in each case. It will depend upon the successful party's financial position.

The LIV: This is a federal matter for the consideration of the Commissioner of Taxation as it would require an amendment to the *Income Tax Assessment Act*.

2.10 Are there any reforms necessary for the costs recoverable by self-represented litigants:

- who suffer pecuniary loss (i.e. loss of income or loss of earning capacity) in preparing their case and attending court;
- apart from any loss of income or loss of earning capacity;
- who incur out-of-pocket expenses?

If so, what changes should be implemented? (Consultation Paper question 61)

The TAC: Self represented litigants may incur disbursements of the kind described. There is no reason of principle why they should not be recovered on the same basis that a represented party would recover them.

The TAC recognises the right of any person to represent themselves in the conduct of a claim and any related litigation. The TAC's experience has been, however, that litigation conducted by self represented clients generally involves far greater contribution of

professional assistance and time, including court time, in assisting the self represented litigant with regard to both law and process, regardless of the ultimate outcome.

In the TAC scheme context, most self represented clients have a history of previous self represented litigation in other jurisdictions, including VCAT, and sometimes involving different parties and issues.

This cohort of self-represented clients often also seek to exhaust every avenue of redress through appeals in relation to both interlocutory decisions and the court judgment again involving considerable contribution of time and expense by other parties drawn into these proceedings.

Whilst the final outcome may result in a measure of success, the route to this success may be protracted and unnecessarily litigious when compared with the decisions which may have been necessitated by reason of the commercial realities faced by a legally represented client. Again the proposal may inadvertently represent an incentive to pursue options which other legally represented clients could not afford to pursue.

Other legally represented litigants, successful or otherwise, incur costs in the conduct of their litigation, including solicitor client costs, loss of income and other litigation related expenses. Consequently, having regard to the issues highlighted above, whilst it is appropriate to ensure that disbursements such as court fees and witness expenses can be recovered, the considerable additional costs component for both the other party and the courts in the conduct of self represented litigation does not support a proposal for recompense of personal expenses, such as loss of earnings to self represented litigants.

The VWA: Endorses the current position with regard to the costs of self represented plaintiffs and has substantially the same comments to the TAC as set out above.

The LIV: Such reforms are unnecessary. All litigants incur pecuniary losses that are not recoverable. Legal costs are incurred, in addition to these losses, by all represented litigants. Time and wages are also lost by represented litigants. Costs orders are intended to be a partial indemnity to a successful represented litigant for actual payments made. The decision of *Cachia v Hanes* provides that a successful unrepresented litigant is able to recover out of pocket expenses paid as a result of litigation.

The Bar: The substantial reduction in legal aid in the past 10 or so years has placed a considerable strain on the civil justice system in Victoria. It has resulted in an exponential increase in the number of self represented litigants. Self represented litigants place an enormous burden on the civil justice system. They substantially increase costs and delay in litigation.

The Bar supports the courts' recommendation that the Commonwealth and Victorian governments should provide an adequate level of legal aid funding to ensure that people have adequate legal representation and that the operation of the courts and VCAT is not adversely affected either by increased numbers of litigants in-person, by underqualified legal representation or the inappropriate allocation of cases to courts and to enable the proper allocation of cases.

Whilst members of the Bar as a whole have an obligation to perform pro bono work for litigants and that such an obligation is an adjunct to each barrister's entitlement to

practise an honourable profession, governments at all levels bear the principal responsibility for maintaining a proper system for the provision of legal aid for both criminal and civil cases. The contribution made from the Bar's pro bono work should not be a substitute for properly funded legal aid programmes.

3 Incentives and Penalties

3.1 Are there any economic (or other) incentives which should be introduced to:

- (a) facilitate greater access to the courts;
- (b) achieve greater fairness for the party that succeeds on disputed pre-trial issues;
- (c) achieve greater fairness for the party that succeeds at a trial;
- (d) provide greater encouragement for lawyers to represent clients who have claims with merit;
- (e) encourage parties to settle disputes;
- (f) increase the use of alternative dispute resolution mechanisms?

If so, what incentives should be provided? (Consultation Paper question 62)

The Bar: Another possible innovation is the use of court fees to dissuade the undue prolongation of civil litigation. Court fees could also be used as an incentive to parties to complete the stipulated interlocutory timetable by the required times. For example, parties who drag their feet such that a case is not ready to be set down for trial within (say) 18 months of commencement of the proceeding might incur higher sitting fees than those that presently prevail.

A potential difficulty with this proposal is that in litigation it is often the case that it is one party (usually the defendant) that is dragging its feet. In those circumstances, it is unfair to impose higher sitting fees upon the other (innocent) party.

In those circumstances, the courts should have discretion to impose the additional costs burden upon the recalcitrant party. This solution is not without potential difficulty for it may well invite satellite litigation between the parties as to which party is responsible for the delay unless a streamlined process could be put in place to deal with these issues.

Introduction of incentives of the sort described above has implications for access to justice. In introducing such an incentive program, safeguards need to be introduced to ensure that access to justice is not unduly imperilled.

The TAC: The TAC's Protocols provide an economic incentive to Victorians injured in transport accidents to resolve their no fault and common law damages disputes with the TAC without the necessity of having to commence court or tribunal proceedings.

The Protocols recognise the value added by clients' lawyers and ensure that the work put into resolving the dispute early is recognised with appropriate stage cost price points. For the client, an early resolution provides investment control of their damages earlier at lower cost. Other analogous legislated pre-litigation procedures in Victoria and interstate provide a more structured approach to the objectives set out in paragraphs (a) to (f) above.

The VWA: The provisions of the *Accident Compensation Act*, including the mandatory pre-litigated process and related Ministerial costs orders together with the approach of

plaintiff practitioners to “no win no fee” fee arrangements ensures that in the case of injured workers the issues raised above are fully addressed.

3.2 Are there any economic (or other) disincentives which should be introduced to:

- (a) deter parties from pursuing claims which are without merit;
- (b) deter lawyers from pursuing claims which are without merit on behalf of clients;
- (c) deter parties from defending claims which have merit;
- (d) deter lawyers from pursuing defences which are without merit on behalf of clients;
- (e) deter expert witnesses from giving partisan evidence;
- (f) encourage the parties to settle disputes;
- (g) encourage the parties to use alternative dispute resolution mechanisms?

If so, what disincentives should be provided? (Consultation Paper question 63)

Tanya Penovic – Faculty of Law, Monash University: The issue of introducing disincentives to deter lawyers from pursuing claims or defences which are without merit on their clients’ behalf is also problematic. It is worth noting that costs orders against lawyers can be and sometimes are made. Such orders are reserved for cases of abuse of process, serious dereliction of duty or where proceedings are brought with no prospects of success and an ulterior purpose.

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.

National Pro Bono Resource Centre: Introducing economic disincentives is, in the Centre’s view, a particularly harsh way to deal with people who are likely to already be economically disadvantaged. Some litigants may be experiencing a range of simultaneous and complex legal and non-legal issues. 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.

The TAC: Costs orders can be a disincentive against pursuing frivolous claims, actions or defences.

The VWA: The Act with its pre litigated regime, exchange provisions, compulsory conference procedures prior to issue of a writ, pre-litigated costs support model and costs consequences provisions does a lot to encourage the bringing of only claims that have merit and maintaining defences that have merit. The VWA also subscribes to the requirements of a model litigant policy which address the need to conduct litigation in an open, cost effective and timely manner.

The LIV: The primary incentive to parties pursuing claims without merit is the threat of adverse costs and this is something that should be maintained as part of any civil justice reform.

Lawyers are already prevented from pursuing fundamentally unmeritorious claims on behalf of clients. To do so would arguably constitute an abuse of process and could result in personal costs orders being made against a solicitor. Given this, the LIV considers that no further penalties are necessary to deter lawyers from pursuing claims which are without merit.

4 Commercially Funded Litigation

4.1 Are procedural, regulatory or other reforms required for cases funded by commercial litigation funders? If so, what are the problems and what changes should be implemented? (Consultation Paper question 49)

The Bar: This answer is in response to Questions 49 and 50. This Bar adheres to the principle that it is for a court and for a court alone to decide on its own motion or on the motion of an aggrieved party whether a litigant is abusing its processes be it because of funding arrangements or any other reason. The protective role of the legislature ought be confined to the consumer relationship between litigation funder and plaintiff. Once it is accepted that a case funded by a profiteer is not therefore an abuse of process at least at its inception, the Bar contends it is unnecessary for court rules to stipulate the sort of criteria that would be applied to determine whether the agreement is valid or acceptable. It can be left to the application of the principles of abuse of process thereafter to determine any challenge.

The Bar does not see a cogent reason why a funding agreement should not be disclosed to a defendant. The fact that it has to be disclosed will of itself fortify a sense of precaution.

The position as between plaintiff and the litigation funder is an entirely different matter. Nothing in *Fostif* or in the abolition of liability for maintenance or champerty under Part VII of the *Wrongs Act* prevents a disaffected plaintiff from seeking to set aside a litigation funding agreement on the grounds that it is against public policy, under the law of contract. That may be an area proper for legislative intervention. That is, the risks to vulnerable plaintiffs, or the potential for extortionate practices and mis-informed consent (typical of the problems sought to be dealt with by consumer credit legislation, for example) could properly be the subject of statute, for they do not concern the administration of justice as such or the practice and procedure of the court.

The VWA: Institutional litigation funding is not presently considered to be an issue for the VWA or the TAC because the litigation funder's presence is predominantly in complex commercial and insolvency recovery litigation. The future concern might be if true contingency fees emerge generally as a competitive bargaining response by the legal profession to meet the threat of emerging inroads by litigation funders.

The TAC: Substantially the same response as the VWA's response above.

The LIV: Supports a litigation funding regulatory regime that involves:

- (a) a retainer between the solicitor and the plaintiff;
- (b) a prohibition on that same solicitor acting for a litigation funding companies (LFC);
- (c) disclosure by solicitors and litigation funding companies to plaintiffs;
- (d) prudential regulation of LFCs;
- (e) the imposition of restrictions on LFC initiated termination after the commencement of proceedings to ensure that plaintiffs receive the benefit of litigation funding agreements; and
- (f) allowing solicitors to regard the risks of litigation borne by a LFC as that of the client.

The LIV considers that such a regulatory regime would provide protection for the plaintiffs in a funded matter without imposing obligations that would stifle the ability of either a LFC to conduct its business commercially or a solicitor to run cases efficiently.

The Group Submission: To protect the administration of justice, plaintiffs and defendants, non-lawyer third party litigation funders should be subject to legislative regulation, including prudential oversight.

The approach of the courts to date has resulted in vagueness and uncertainty as to when funding agreements are or are not acceptable. To avoid ongoing uncertainty, regulation should be in the form of legislation setting out the factors that must be addressed in a valid funding agreement. Critically, litigation funding agreements should be required to be filed with the court along with the writ or originating motion, to ensure that the courts can exercise proper supervision of such agreements. Legislative compliance is preferred to court guidelines that would merely establish various criteria against which courts should assess whether funding agreements are an abuse of process and contrary to policy. Otherwise, as mentioned above, these criteria and the more general doctrine of abuse of process would not be assessed by the court unless the funding agreement were challenged.

4.2 Where parties are being financially supported by:

- **commercial litigation funders; or**
- **insurers**

should there be an obligation on those parties to disclose to the other parties the terms and conditions on which such financial support is being provided? (Consultation Paper question 50)

PILCH: This answer is in response to questions 49 & 50. There are important public policy considerations which mean that there should be comprehensive regulation of litigation funding agreements and the litigation funding industry. In particular, PILCH

is concerned with consumer protection considerations. It is desirable that a strong approach be taken to consumer protection in this area. This would be best achieved by requiring a direct contractual agreement between solicitor and litigant, and by legislating to include certain protective terms and disclosure requirements into litigation funding agreements to ensure transparency and the informed consent of consumers entering into such agreements. Clear and uniform legislation outlining the requirements for a legally enforceable litigation funding agreement would provide a higher degree of certainty for consumers regarding the validity of litigation funding agreements. It may be preferable that a body is empowered to investigate complaints regarding the conduct of LFCs or litigation funding agreements, similar to the role that the Legal Services Commission plays in monitoring the conduct of solicitors in Victoria. Such legislative measures warrant further development.

LFCs should be subject to mandatory minimum disclosure requirements similar to the obligations of solicitors to make certain disclosures to clients regarding, for example, the basis on which costs will be calculated and uplift fees. Such mandatory disclosure is an important requirement for the protection of consumers and will improve certainty regarding the validity of litigation funding agreements.

There is a potential for a lawyer's commercial relationship with an LFC to create a conflict of interest which would undermine a lawyer's duty to his or her client. The State Government should take steps to introduce legislative provision to ensure that the professional obligations of lawyers to act independently and in the interests of clients are upheld in the context of litigation funding arrangements.

The recent High Court of Australia decision in *Fostif* made significant findings in relation to the validity of litigation funding agreements. However, in *Fostif*, the High Court did not consider the position in jurisdictions where maintenance and champerty continue to be torts or crimes. Accordingly, there continues to be a degree of uncertainty in some jurisdictions and a lack of uniformity across Australia on this issue. One way to achieve a degree of uniformity would be for the torts or crimes of champerty and maintenance to be abolished in the jurisdictions where they continue to exist.

The Police Association: We submit that there should be no obligation on the parties who are commercially funded to disclose the terms and conditions of the provision of that funding. Unless there is evidence or intelligence that suggests the funding has been sourced via illicit means, then the terms and conditions of such arrangements should remain confidential.

The LIV: In these circumstances, the LIV considers that there should not be an obligation on those parties being financially supported to disclose to the other relevant parties the terms and conditions on which their financial support is being provided.

The TAC: If commercial litigation funding is being provided in a personal injury action, as is understood to occur in the UK, then it is the TAC's view that it should be disclosed. This may ultimately be a matter for regulation.

The VWA: No

5 Legal Assistance

5.1 Do arrangements for pro bono representation in and/or legal aid funding of civil cases need reform? If so, what changes should be implemented? (Consultation Paper question 51)

PILCH: There remains a critical gap in the availability of advice and representation in civil law areas for those who cannot afford to pay for legal services. The difficulties in obtaining legal advice and assistance are compounded for disadvantaged groups, such as those with a mental illness or persons from culturally and linguistically diverse communities. The gap in legal aid for civil law matters contributes to significant inefficiencies and additional costs in the civil justice system.

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. Where a person cannot afford a private lawyer, advice and assistance is best provided by VLA and community legal centres. VLA and community legal centres meet the legal needs of many members of the Victorian community who cannot afford to pay for legal services.

PILCH recommends that:

1. The Commonwealth and Victorian Governments continually increase funding to community legal centres to enable them to provide case work assistance to the community in civil justice matters.
2. The Victorian Government seek to restore the National Civil Legal Aid Scheme in partnership with the Commonwealth Government. PILCH recommends that, as a minimum, the restoration of a national civil legal aid scheme should include that assistance be available for matters where the amount of the claim is less than \$5,000.00.
3. VLA ensures that when determining eligibility for aid pursuant to the guidelines, that the public interest guideline is not interpreted in an unduly restrictive manner and that VLA does not seek financial contribution from applicants who have been granted aid under a 'public interest' guideline.
4. VLA considers the introduction of a system of 'cascading' financial contributions from applicants, where applicants do not mean the means test.

PILCH Homeless Persons' Legal Clinic: The availability of legal aid for homeless people in respect of civil and administrative law matters is very limited and significantly impacts on their ability to receive legal advice, bring matters before the court and ultimately access justice. Funding for civil law matters should be greatly enhanced, by both Commonwealth and the State government, in order to ensure that applicants can receive legal aid assistance when they have a right of action and cannot afford private legal representation, or are the defendant to an action and cannot afford private representation. The Clinic also gives its in-principle endorsement to the Law Council of Australia's current policy statement regarding the restoration of a National Civil Legal Aid Scheme, which was launched in Melbourne in August at the 2006 National Access to Justice and Pro Bono Conference.

Clinic law firms provide excellent pro bono legal services to homeless people, but these services must always be in addition to appropriately funded legal services through VLA and CLCs. The Clinic also considers that there remains great scope for increased outreach services to provide legal assistance to homeless people.

The Clinic welcomes the Government's recent announcement of its Access to Justice Policy statement, which includes a commitment to provide \$8.8 million of additional funding for existing CLCs (particularly specialist CLCs) and for the establishment of new CLCs. The Clinic commends the stated commitment to the work of the community legal sector and urges the Victorian Government to distribute these funds as soon as possible.

VALS: Arrangements for legal aid funding of civil cases do need reform. The importance of representation in civil cases can simply be related back to the principles of natural justice. An imbalance in representation poses difficulties for judges (i.e.: delay). Civil law legal aid funding is inadequate. Civil law has become virtually unavailable through legal aid offices or grants of legal aid (due to strain on resources, eligibility criteria, priorities for assistance). Community Legal Centres (CLCs) provide a range of civil law advice and education and policy but have limited scope to provide representation. Also, the number of private lawyers doing civil law legal aid work is decreasing and they need to be encouraged to provide such assistance. For every dollar invested in CLCs \$100 may be saved by clients, government and other affected parties. CLCs provide enormous value for money with benefits to individuals and to society far outweighing the public funds CLCs spend.

The failure by governments to provide adequate funding and to develop effective policies for mainstream providers in the areas of civil law undermines the capacity of all Australians to seek civil remedies. The lack of an accessible service civil law service for low income people and Indigenous people in particular is even more reprehensible as the economic impact of civil law problems on these groups will be disproportionately greater. No matter how comprehensive civil laws may be in their legal coverage they are of little significance and use if those who seek recourse are unable to access the laws.

MHLC: Legal aid funding for civil matters should not only be restored to previous levels but expanded. Anyone without means to pay who has a meritorious claim or defence should receive either legal aid funded or pro bono assistance. People routinely do not make claims or defend matters because they cannot get adequate assistance.

In many matters there will be significant capacity to recoup funding through recovery of costs. However, the theory that contingency arrangement and pro bono firms would provide adequate access to legal services has not been vindicated, particularly for people as disadvantaged and discriminated against as our clients. Many people do not get access to a sufficiently expert assessment of the merit of their claim, or essential expert opinion.

Consideration should be given to courts having power to not only approach legal aid and pro bono providers to seek assistance for a party, but to effectively order that representation be provided unless this becomes untenable through exceptional circumstances. Firms could perhaps be required to fulfil part of their pro bono 'quotas' in this way.

Ultimately, a substantial increase in legal aid type resources is essential. Careful analysis is required as to the best means of providing increased access and applying increased resources. Models such as departments like Consumer Affairs brokering funds to providers including community legal centres to assist people with debt matters in courts should be seriously considered.

National Pro Bono Resource Centre: There is scope to expand and enhance pro bono ‘arrangements’ through capacity-building private lawyers to undertake more pro bono work within their own practices, as well as build partnerships with pro bono referral schemes.

The availability of free or low cost legal services for civil law matters needs to be improved. The most efficient and effective way to facilitate access to justice in civil law for disadvantaged people is to provide better funding to publicly funded legal services - legal aid, CLCs and Aboriginal legal services. Reductions in funding for legal aid leads to a tightening of legal aid’s eligibility guidelines and means and merits tests. This results in a widening of the gap for those eligible for legal aid and those who cannot afford to pay for private legal services. This in turn impacts on the demand for services from CLCs, who face increased difficulties meeting demand. While there may be a role for pro bono to work cooperatively with frontline service providers to help meet unmet legal need, the primary role of facilitating access to justice is for the government to properly fund those service providers.

Fitzroy Legal Service: Over the last decade, the reduction in legal assistance for civil matters has had the consequence of increased numbers of people being unable to access the civil justice system. 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.

Clearly, there is a severe lack of legal aid funding for civil law matters. More funding should be made available to assist VLA, Community Legal Centres and others who assist low-income and disadvantaged individuals to pursue or defend civil claims.

Providing more access to free or low cost legal advice and representation at hearings, mediations or arbitration is also a critical measure necessary to increase access to the civil justice system. The increased presence of duty solicitors in courts hearing civil matters would be of assistance. However, it is critical that any assistance is provided prior to the date of the hearing, so that advice and assistance is able to be provided effectively and options for dispute settlement remain available before costs accrue.

FLS notes and endorses the submission of PILCH in relation to VLA guidelines for civil justice and increasing funding for Community Legal Centres to provide this advice and assistance.

VLA: The rules should be relaxed to encourage practitioners to provide pro-bono legal services. For example:

- allow pro-bono lawyers to recover their costs from the other party in the same way as paid legal representatives
- prohibit personal costs orders against pro-bono lawyers and litigation guardians
- provide more flexible time limits for pro-bono lawyers.

Access to justice and quality legal assistance is a fundamental democratic right for every Australian citizen. These rights are currently delivered by a mixture of public funding (legal aid), private cost-sharing (conditional fee arrangements) and pro-bono work. However, it is important to get the balance right.

The Commonwealth and Victorian governments should provide adequate legal assistance to financially disadvantaged litigants who have meritorious civil claims. VLA welcomes

recent initiatives for improving access to legal information, advice and education in state civil disputes. However, there will always be some cases where the litigant requires ongoing legal representation. The current levels of legal aid funding are insufficient to meet the need for legal representation in civil cases.

The civil procedure rules should be reviewed to clarify the nature and effect of VLA's funding role. Sometimes, the courts treat VLA as if it stands in the shoes of the litigant and this may disadvantage legally aided litigants.

EDO: There has only been limited legal aid funding available for civil legal services in Victoria for a number of years. While speculative fee agreements have filled the gap in some areas such as personal injuries litigation, legal aid services are not available in most civil law matters.

We have had an opportunity to view the submission of PILCH and we endorse their submission with respect to the need for greater civil legal aid funding via grants and via the community legal centre program.

The VLA public interest guidelines should be amended to clarify that they extend to matters of environmental significance.

The TAC: Yes. Funding for the courts to maintain a register of firms and counsel willing to provide pro bono assistance to the courts. The court would then refer unrepresented parties for assistance. Funding to assist the courts to assist unrepresented litigants, especially those who have been represented at earlier stages of litigation, may facilitate some limited efficiencies in document presentation, shorten appearances and assist people who require this assistance where private firms, PILCH or Victoria Legal Aid cannot. A special focus to assist unrepresented people to have greater access to alternative dispute resolution resources might be considered.

The LIV: Legal aid funding should be reinstated in appropriate circumstances. In particular, funding should be available for judges to order that a self-represented litigant obtain legal advice from a panel of accredited lawyers as suggested in the LIV's response to Question 33. In addition, legal aid funding ought to be available in civil pro bono and public interest matters.