

Supreme and County Court Costs Review of Litigious Costs

Submission to the Supreme Court of Victoria and the
County Court of Victoria

15 December 2021

Contents

Who we are	5
Supreme Court Scale of Costs	6
Response to the criticisms of Scale	6
Unintended Consequences	7
Conclusion	9

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Supreme Court Scale of Costs

1. The ALA welcomes the opportunity to respond to the Discussion Paper from the Supreme Court of Victoria and the County Court of Victoria regarding the review of litigious costs.
2. The ALA submits the Scale of Costs in its current form should be retained but aspects should be modernised to more accurately reflect the current and future practice of law.

Response to the criticisms of Scale

3. In making this submission, we would like to respond to some of the criticisms of the Victorian approach raised in the Discussion Paper.
4. The Scale is used in day to day practice by the legal profession in many areas of practice in Victoria such as Probate, Class Actions, Criminal Law (when indemnity is sought) and Personal Injuries practices including Workcover, Transport Accident Claims, Public Liability and Medical Negligence.
5. Costs are calculated by reference to Scale in the practice of Personal Injury litigation. We understand from ALA members that Personal Injury files are maintained in accordance with the Scale, with terms from the Scale being used in time sheets, in electronic file management systems, terms of settlement and in bills to clients.
6. The Scale responds to and accommodates changes to the way in which Personal Injury litigation is practiced. The pandemic has accelerated these changes. Legal practitioners have largely done away with paper files. Treating health practitioners provide clinical records electronically. Exchange of material, and correspondence between parties, is largely done by email. Briefs and court books are electronic. Appearances at court for interlocutory matters have been and will continue to be remote. The Scale in its current form has been able to keep pace with all of these technological changes.
7. A bill of costs is neither artificial nor opaque. Greater information about work performed on a file is provided in a bill of costs when that bill is prepared with reference to the Scale. For

example, a bill prepared with reference to time might simply state the task performed and time taken. This is also reliant on the accuracy and detail of the time recorder. The task as set out on a bill prepared with reference to the Scale will be more detailed to sufficiently justify the scale fee that arises from the work produced. Therefore, a client requesting a bill drawn with reference to the Scale will be left with a superior understanding of the work performed. We understand it is lack of detail in bills that often lead to client complaints. The Scale is well structured to avoid these issues.

8. Clients in Personal Injury litigation are able to discover the amount owing on a file at a particular time. Clients are provided with details of costs incurred prior to settlement events, such as conferences, mediations and hearings. Those costs are usually certified by an independent costs assessor, and will be based upon the court determined scale of fees. A law client, however, is no better equipped to assess a bill based on time as they are one on the Scale. We therefore do not agree that a move towards hourly rate based billing accurately increases transparency for a client.
9. Even if one were to accept the criticism that the Scale is less transparent, this is only one factor that cannot be weighed in a vacuum. If a greater emphasis on hourly rate based billing leads to greater inefficiency in practice, or less certainty and accountability in costing, then it cannot be said to be in a client's best interests overall. We elaborate upon these points in the section below.
10. In the experience of ALA members, it is rare for a cost consultant to charge 15% of the bill when preparing a Scale based bill of costs. The Costs Court has the discretion to moderate this fee in any event, which in our experience it does in almost every taxation matter.

Unintended Consequences

11. The ALA is concerned about unintended consequences that may be caused by a move away from the current Scale.
12. We submit that to adopt a time-based system would encourage inefficient practices. Time-based billing is being rejected as "anachronist" by a growing number of corporate and business

clients, practitioners and academics. It is well understood that the “billable hour” discourages efficient practice and that a move to value-based billing is being widely embraced.² The Victorian Scale of Costs is “value costing” with reference to work produced. We are concerned that a costs model that discourages efficiencies in legal practice will in turn result in delays in the resolution of litigation. We note Fiona McLeay, Victorian Legal Services Board CEO and Commissioner, has recently written: “Nearly all the costs complaints that come into my office involve billing by time, and in a recent presentation to our Consumer Panel, FirmChecker’s Ben Farrow noted that his data showed that the firms that scored lowest on client perceptions of quality and value bill predominantly by time”.³ The complaints handling experience of the Legal Services Commission will provide important insights for this Review about the preferences of consumers of legal services.

13. The Scale, in comparison to time-based costing, allows for work to only be billed once. By contrast, time-based costing may allow for costs recovery for the same document being read many times by different lawyers working on the file. In the case of discovery, each document can only be charged for one viewing. Hence the Scale in its current form provides certainty and protection for a client against overbilling and greater accountability for practitioners.
14. The ALA expects there will be an increase in disputes heard in the Costs Court if the Scale of Costs is not retained in its current form. Unlike costs assessed by way of the Scale which provide value based on word count and folios which are variable on their face, other methods of assessing costs such as time billing are open to greater interpretation or manipulation and therefore dispute. It is likely that a great deal of time within the Cost Court will be spent hearing arguments about the reasonableness of the time taken to perform a certain task on a client’s matter.
15. We submit that the Scale provides more certainty in relation to party/party cost recovery. By providing what is essentially “value” billing or a price that is reflective of the work performed, plaintiff Personal Injury lawyers are better able to estimate what they are likely to recover from the defendant. If a time-based model were introduced, there would be greater uncertainty because the amount of time taken will vary depending on a number of factors. The

² Fiona McLeay, “The Changing Face of Legal Costs and Pricing”, Law Institute Journal (December 2021) p62

³ *ibid*

lack of certainty regarding costs recovery will lead to less certainty regarding solicitor / client costs estimates.

16. Practitioner health and wellbeing suffers in a time-based system.⁴ The pressures of time-based billing are well documented, including its contribution to the high rate of depression in the profession and low retention rates amongst practitioners.⁵ It is a system that is known to discourage mentoring and professional development which do not fall within the billable target. This is of particular concern to the ALA given the high level of vicarious trauma our members face in their difficult jobs acting for injured Victorians.
17. Time-based costing removes the level playing field for gender equality, creating a system where working longer hours is rewarded.⁶ Unfortunately, women still take the on the majority of childcare responsibilities in Australia, and the legal profession is no exception. Flexible work and part time hours are therefore taken up more commonly by women with young children. Time-based costing does not support flexible working, and instead supports time over value. This is a backwards step for the profession when it comes to gender equality.

Conclusion

18. The ALA submits the Scale of Costs in its current form should be retained but aspects should be modernised to more accurately reflect the current and future practice of law.
19. The ALA is of the view that a time-based model is regressive and is already outdated having regard to the current and future state of legal practice. We therefore encourage the Reviewers to recommend the retention and modernisation of the Scale of Costs in its current form as it better reflects the modern and efficient practice of law. We also note the many benefits to plaintiffs from the current Scale, including transparency, clarity, a focus on output and incentivising efficiency.

⁴ <https://www.lawyersweekly.com.au/news/11008-poll-reveals-cost-of-billable-hours-is-too-high>

⁵ See http://asianlegalonline.com/asia/detail_article.cfm?articleID=5880

⁶ [https://www.lawyersweekly.com.au/newLaw/29118-time-based-billing-not-great-for-gender-equality/amp](https://www.lawyersweekly.com.au/newlaw/29118-time-based-billing-not-great-for-gender-equality/amp)

20. We are also concerned that not enough time has been allowed to investigate and consider a profound change to the way costs are assessed in Victoria. Given the risks posed by unintended consequences, and the missed opportunity to properly modernise costing, we ask the Reviewers to consider a more extensive consultation.

21. We wish to thank the Supreme Court of Victoria and the County Court of Victoria for considering our submissions.

Kind Regards,

A handwritten signature in black ink, appearing to be 'LF' or similar initials, written in a cursive style.

Lachlan Fitch

ALA Victorian President.