

Judicial report highlights Victoria’s current approach to costs is “quite inadequate”

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At a glance

- On 23 August 2022, the Supreme Court of Victoria released *Supreme and County Court Review of Litigious Costs*, a report written by the Hon. Justice Jack Forrest and Her Honour Kathryn Kings.
- The report recommends significant changes to the way costs are awarded, including replacing the much maligned ‘scale of costs’¹ (scale) used in the Supreme Court and County Court of Victoria.
- The report’s conclusions show judicial concern about the lack of fairness in the current costing system and how it can produce disproportionate results.
- There is currently no date set for when the recommendations may be implemented, but it will likely be sometime in 2023.

Overview

In October 2021, the Supreme and County Courts appointed the Hon. Justice Jack Forrest and Her Honour Kathryn Kings to conduct a review into the way litigious costs are assessed in Victoria. Their report, [Supreme and County Court Review of Litigious Costs](#) (the report), which was published on 3 May 2022 and released by the Supreme Court on 23 August 2022, seeks to find a way to make legal costs more transparent, predictable, efficient, flexible and easily understood by the consumer. In short, if implemented, the recommendations will create greater costs awareness for all parties at an early stage.

While the report raises many issues, it comes out strongly in favour of change overall. Its recommendations are likely to carry significant weight as they follow a judicial review process. This finding will not surprise defendant underwriters who have experienced the higher costs of litigation in Victoria compared with many other states.

Recommendations

In Victoria, the current costs regime is based on an annual scale published by the Court that sets out sums referable to particular steps in the case. According to the authors: “We believe that the scale is well past its use-by date and is quite inadequate in today’s legal landscape”.

In the short-term, the authors recommend that the scale, which is unwieldy and encourages overservicing, be discarded and replaced by time costing guidelines that are similar to those in the NSW system. The report mentions that costs consultants expressed opposition to replacing the scale with the NSW costs model as they believe it creates unpredictable results. The report seeks to address this concern by providing access to the Costs Court’s rulings to dissolve any mystery surrounding the application of the new costings model.

In the future, the report recommends the Courts introduce a costs scheme based on the England and Wales model. This would involve fixed costs for particular types of litigation, such as for some personal injury cases and testator family maintenance proceedings. More complex litigation would require the Court to set costs budgets at the start of a proceeding.



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¹ Supreme Court (General Civil Procedure) Rules 2015 – Appendix A.

Changing to the new model

The proposed time costing model would involve hourly and daily rates being charged (commensurate with the experience of the solicitor or counsel), rather than scale items. The report also suggests the model should be reviewed regularly (ideally yearly) and that the Costs Court remains the relevant costs assessor under the new model.

It is envisaged there will be a publicly available guide for what is a generally reasonable charging rate, so that comparisons can be made between different law firms. This may help make legal services more competitive, as the scale was seen to be “anti-competitive” and “capable of artificially sustaining the cost of legal services”.

As of August 2022, the report’s recommendations have been endorsed and sent for “further consultation around implementation”. There is currently no date set for when the recommendations may be implemented, but it will likely be sometime in 2023.

Implications of the new model

The report notes that, currently, consumers of legal services are at a disadvantage because most are paying for a service they do not understand, which means they are not equipped to understand the level of quality they are receiving.

The aim of the model is to allow plaintiffs and defendants to anticipate the costs that may be charged, to budget for these costs, and if they wish, to switch to a lower charging law firm. This should better facilitate access to justice, protect consumers, and ensure costs remain reasonable and proportionate to the claim.

Plaintiff lawyers are likely to be most affected by these changes as their entitlement to receive costs may decrease. This could make some plaintiff lawyers reluctant to act in ‘hard to win’ cases. It may also impact their reliance on outside counsel, as counsels’ costs may not be reimbursed in full by the new model.

For underwriters, the Victorian costs reforms are likely to be welcome. However, as the report deals in concepts, its potential to mitigate the high level of litigation costs in Victoria will only be seen once the detail of the new model is clear.

Need to know more?

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