THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

COSTS IN REPRESENTATIVE PROCEEDINGS, COSTS BUDGETING AND FIXED COSTS SCHEMES

COSTS ASSESSORS ANNUAL SEMINAR

SATURDAY 4 JUNE 2016[*]

Introduction

1. The law of costs is one of the most litigated aspects of Australian law, with almost every civil case involving a question of costs to be determined. As costs assessors, you have given yourselves a difficult task. Issues surrounding legal costs have been around for as long as the profession itself. In 1853, Dickens famously concocted the case of *Jarndyce v Jarndyce,* in which a legal dispute surrounding a testator who has inexplicably created two wills drags on for so long that when it is finally resolved, legal costs have consumed the entire estate. In *Bleak House,* Dickens describes the litigation process as "an infernal country-dance of costs and fees and nonsense and corruption as was never dreamed of in the wildest visions of a Witch's Sabbath."[1]

2. And that is where you, as costs assessors, come in. No doubt, when looking at certain costs orders or solicitor's bills, you may feel that determining "fair and reasonable"[2] costs is just as fantastical as attending a Witch's Sabbath. However, hyperbole aside, costs assessment has come a long way from the time of Dickens and the field continues to grow and develop along with changes in the process of litigation itself. Indeed, it was well after I started practicing that the assessment of costs by costs assessors replaced the previous process of taxation by taxing officers of the court.

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[*] I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

[1] C Dickens, *Bleak House* (Bradbury & Evans, 1853) 67.

[2] *Legal Profession Act 2004* (NSW) s 363(2); *Legal Profession Uniform Law* (NSW) s 199.

3. More recently, in 2010, Victoria established a Costs Court, the first and only of its kind in Australia. This Court hears and determines matters relating to costs which arise in court proceedings and also hears costs disputes between legal practitioners and their clients. In 2011, the Federal Court Rules were enacted, replacing the original 1979 rules. And most recently, in the middle of last year, New South Wales introduced the Legal Profession Uniform Law, setting out new rules on cost assessment.[3]

4. In such a shifting landscape, the role of costs assessors is increasingly important. Costs assessors in this State provide a global and informal process, intended to be fast and efficient, in contrast to the previous item-by-item approach, which had been described as "overly formal, legalistic and complex".[4] As it is usually clients who seek an assessment of a lawyer's bill, cost assessors also "serve as … an assurance against abuse and exploitation."[5]

5. There are many complex issues associated with the assessment of costs. Today, I will touch on just a few of these issues. First, I will speak about some costs issues which can arise in regard to class action litigation, such as the legality of costs agreements involving uplift or contingency fees. As costs assessors, under the Uniform Law, you may be called upon to examine the validity of such agreements.[6] Indeed, judges of the Court of Appeal have stated on many occasions, although not without controversy,[7] that costs assessors have the power to consider the content of a costs agreement, including an interpretation of its terms.[8]

6. I will then speak briefly on two costs reforms that have occurred as part of the Jackson reforms in the United Kingdom, namely, costs budgeting and

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[3] *Legal Profession Uniform Law* ss 196-205.
[4] J P Hannaford, Attorney-General (NSW), Legal Profession reform Bill 1993, Second Reading Speech, *Hansard,* 16 September 1993, p 3277, cited in G E Dal Pont, *Law of Costs* (2013, LexisNexis Butterworths) 5.3.
[5] Dal Pont, above n 4, 5.3.
[6] *Legal Profession Uniform Law* s 199. See too The Hon Justice Paul Brereton, RFD, 'Costs Update' (Keynote address to the New South Wales State Legal Conference, 28 March 2008).
[7] See Brereton, above n 6.
[8] See *Graham v Aluma-Lite Pty Ltd,* NSWCA, 25 March 1997, Unreported; *Wentworth v Rogers* [1999] NSWCA 403 at [56] (Handley and Stein JJA and Sheppard AJA); *Wentworth v Rogers; Wentworth and Russo v Rogers* (2006) 66 NSWLR 474 at [37]-[43] (Santow JA); *Doyle v Hall Chadwick* [2007] NSWSC 159 at [55]-[62] (Hodgson JA, with whom Mason P and Campbell JA agreed).

fixed costs. Such reforms, if implemented in Australia, would fundamentally change the role of costs assessors.

Costs in Representative Proceedings

7. First, before I discuss costs issues in class actions or representative proceedings, let me define these terms. While the term 'class actions' can be used to describe various types of proceedings,[9] today, I will use it to refer to proceedings whereby the claims of many individuals against a single defendant are conducted by a representative party. The Australian Law Reform Commission has referred to two features of class actions which distinguish them from other procedures involving multiple parties, namely, that they "may include claims for damages, the amount of which may vary from person to person" and "proceedings can be commenced without the need to identify each member of the class and without the consent of each member".[10]

8. These features can create issues in the application of costs principles and the assessment of costs. While the normal rule is that the unsuccessful party in civil litigation pays the successful party's legal costs, this leaves the representative party in an unfavourable predicament. Not only is the quantum of costs commonly increased by the fact that the proceeding is a class action, but the representative party assumes the risk of being liable for adverse costs and may be required to pay security for costs, without gaining any personal benefit for taking on the position as the representative party. On the other hand, group members, who stand to gain damages in representative proceedings, are generally protected from adverse costs orders.

9. The costs of class action litigation can be incredibly onerous for a representative party. As stated by the Victorian Law Reform Commission "[t]he costs of conducting such litigation are enormous. The proceedings are likely to be protracted. There are likely to be numerous contested

[9] *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 403-404 (Mason CJ, Deane and Dawson JJ).
[10] Australian Law Reform Commission (ALRC), 'Grouped Proceedings in the Federal Court – Summary of Report and Draft Legislation' (Report No 46, 1988) [5].

interlocutory battles. The potential liability for adverse costs and security for costs is likely to deter anyone who is not either poor or rich."[11]

10. As such, in order to encourage persons to appear as representative parties, and mitigate the risks associated with appearing as a representative party, alternative funding arrangements and costs agreements have been utilised. Further, in representative proceedings, a court can make orders for costs as it sees fit to ensure that justice is done in the proceedings.[12] A court has the power to order that a representative proceeding be discontinued in the interests of justice where the costs that would be incurred to continue the proceeding are likely to exceed the costs incurred if each represented party was to conduct a separate proceeding.[13]

11. Further, if the costs agreement is not fair and reasonable, the courts have wide ranging powers to make orders that are appropriate to do justice in the proceedings. This is particularly relevant to costs assessors as assessors may be called upon to "determine disputes as to liability to pay costs, as an incident of determining whether the costs are 'fair and reasonable'."[14]

12. An example of an unfair and unreasonable costs agreement can be found in the case of *Johnson Tiles v Esso Australia*.[15] In that case, representative proceedings arose out of an interruption to the supply of gas in Victoria. Two firms of solicitors appeared for the applicants. Counsel for the applicants gave an assurance to the Court that, under fee agreements, each group member's liability for costs would be limited to taxed solicitor and client costs. The Court approved an advertisement to the group members of their right to 'opt-out' of the proceedings. Less than 200 group members out of approximately 1 million opted out.

13. Despite the assurance to the Court, the solicitors entered into standard fee agreements with group members, stating that if the action succeeded, the

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[11] Dr Peter Cashman, Commissioner, Victorian Law Reform Commission, 'The Cost of Access to Courts' (Paper for presentation at Bar Association of Queensland Annual Conference, 16-18 March 2007) p 65.
[12] *Federal Court of Australia Act 1976* (Cth) s 33ZF(1); *Civil Procedure Act 2005* (NSW) s 166(1)(a); *Marks v GIO Australia Holdings Ltd (No 2)* (1996) 66 FCR 128 at 140 (Einfeld J).
[13] *Federal Court of Australia Act* s 33N(1)(a); *Civil Procedure Act* s 166(1)(a).
[14] Brereton, above n 6.
[15] *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167 at 175-6.

group members would be liable to pay legal costs plus a premium, referred to as an 'uplift fee', of 25 per cent.

14. Justice Merkel of the Federal Court held that he was not satisfied that the fee agreements were fair and reasonable, as the notice given to the group members had not identified the prospective costs liability of group members and was thus not sufficient to enable them to make an informed decision as to whether to opt out of the proceeding. His Honour held that "[t]he fee agreements could result in unfair and unreasonable outcomes for group members, who could be subjected to a substantial and unequal costs liability which might not be recoverable from the respondents if the claim succeeded."[16]

15. Under the Uniform Law, in considering whether legal costs are fair and reasonable, costs assessors may have regard to any disclosures and advertisements as to costs.[17] This case not only provides a good illustration of the ways in which costs agreements may be unfair and unreasonable, having regard to a lack of disclosure, but also demonstrates the issues that may arise out of private funding arrangements in class action proceedings.

16. One common funding arrangement that has been used to encourage class action litigation is contingency or conditional funding arrangements. Under such agreements, a lawyer's fees will be dependent on whether or not the claim is successful. One common example is billing on a 'no win no fee' basis, whereby a lawyer does not charge any fees for services if the claim is unsuccessful. However, if successful, the lawyer will charge an agreed 'uplift fee', which is a percentage in addition to the lawyer's regular bill to compensate for the risk of receiving no fee if the claim is unsuccessful.

17. In 2005, in New South Wales, the *Legal Profession Act* was amended to prohibit conditional uplift costs agreements in claims for awards of damages.[18] This amendment was met with considerable controversy and was criticised for effectively discouraging lawyers from representing clients who couldn't afford to pay legal fees in personal injury and class actions.

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[16] Ibid at 168.
[17] *Legal Profession Uniform Law* s 200.
[18] *Legal Profession Act 2004* (NSW) s 324(1).

The Law Society responded by lobbying the Attorney-General to remove the restriction.[19] The Young Lawyers Civil Litigation Committee noted that class action litigation "can ultimately take years, possibly decades, to reach any conclusion." Therefore, practitioners should be compensated for the financial risk and burden that they take on. It stated that the uplift fee could be seen as "an 'interest rate' applicable to a high-risk investment." It also noted that firms may "increase their hourly rates to compensate for the inability to charge the uplift."[20]

18. In 2014, when the Uniform Legal Profession Law was introduced, New South Wales's legal profession legislation was brought in line with other Australian jurisdictions. Uplift fees are now allowed in every Australian jurisdiction, however, for litigious matters, i.e. those likely to involve court or tribunal proceedings, the allowable uplift fee is capped at 25 per cent above regular legal costs payable.[21]

19. As stated by the Productivity Commission, "[t]his limit is intended to prevent lawyers from inflating fees to unreasonable levels and provide a threshold for the amount of risk lawyers accept. .... With an uplift of 25 per cent, lawyers should be willing to accept cases that have at least an 80 per cent chance of success."[22]

20. In addition to capping uplift fees, Legal Profession Acts in many states, including New South Wales, require lawyers to have a reasonable belief in the successful outcome of the case in order to charge an uplift fee.[23]

21. As a side note, I should mention that in most 'no win no fee' arrangements, the client will still be responsible for paying disbursements, that is, fees for court filing, barristers and experts and will bear the risk of paying the

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[19] 'Law Society asks Attorney General for Changes to Costs Provisions' (May 2005) 43 *Law Society Journal* 8.
[20] NSW Young Lawyers Civil Litigation Committee, 'Submission to the Legal Fees Review Panel' (2004) available at <https://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/025821.pdf>.
[21] *Legal Profession Uniform Law* s 182; *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2007* and *Legal Profession Regulation 2007* (Qld); *Legal Profession Act 2008* (WA); *Legal Practitioners Amendment Act 2013* (SA), *Legal Profession Act 2007* (Tas); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT).
[22] Australian Government Productivity Commission, 'Access to Justice Arrangements' (Report No 72, 5 September 2014) pp 603-4.
[23] See *Legal Profession Uniform Law* s 182(2)(a).

opposing party's costs if the outcome is unsuccessful. While if the claim is successful, the client will usually be liable for the uplift fee as it cannot be claimed from the opposing side on a standard basis.[24]

22. It should also be noted that unlike in the United States, damages-based billing, whereby a lawyer receives an agreed percentage of the amount recovered by a client in damages, if the claim is successful, is prohibited in all Australian jurisdictions.

23. There has been much criticism of restrictions on contingency fees and damages based billing. The Productivity Commission's 2014 report on access to justice recommended that, in order to increase access to legal services and benefit clients, these restrictions should be removed. However, the Commission also recommended the introduction of comprehensive disclosure requirements, including the requirement to disclose the percentage of damages and what the liability will be for disbursements and adverse costs orders.[25] Plaintiff firms such as Maurice Blackburn have also criticised the restrictions, stating that contingency fees "align the interests of the lawyers with those of their clients. The incentive for both parties is for the largest payout in the shortest possible time."[26]

24. As costs assessors, it is important to be cognisant of these issues of legality in determining the validity of costs agreements. For example, in order to comply with disclosure obligations, lawyers should notify their clients that despite the phrase 'no win no fee', they may in fact be required to pay fees in the form of disbursements.

Costs Budgeting

25. Let me move on now to discuss two costs reforms that have occurred as part of the Jackson reforms in the United Kingdom, namely, costs budgeting and fixed costs schemes. If adopted in Australia, these reforms have the potential to fundamentally alter the role of costs assessors.

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[24] Australian Government Productivity Commission, 'Productivity Commission Inquiry Report' (No 72, September 2014).
[25] Productivity Commission, above n 22, pp 625-6.
[26] Maurice Blackburn, 'Submission to the Victorian Department of Justice and Regulation's Access to Justice Review', (Submission 42, 22 February 2016) p 12.

26. In 1996, in his report on the civil litigation system, Lord Woolf concluded that the issue of costs was the most serious issue facing the civil litigation system. He stated that the costs of litigation were "too expensive" and "too unequal".[27] He suggested a range of reforms directed at reducing inequalities, costs, delay and complexity, and introducing greater certainty of costs for parties in litigation. Lord Woolf's reforms served as a catalyst for the recently introduced Lord Jackson reforms under the Civil Procedure Rules.[28] Under these rules, all parties in proceedings, apart from self-represented litigants, have to file and exchange costs budgets setting out their estimated costs at each stage of the proceedings.[29] The court can also order a party to file and serve a costs estimate at any stage of the proceedings.[30]

27. The requirements of the costs estimates are set out in the Practice Direction on Costs Management.[31] Under the Direction, parties have to provide an estimate of costs and disbursements already incurred and an estimate of costs and disbursements that they intend to recover from the opposing party if they are successful.[32]

28. This enables courts to consider whether the costs claimed at the end of a case are reasonable and proportionate to the costs submitted in the budget. If the final costs sought differ by more than 20% from the estimate, parties are required to give an explanation.[33]

29. After the budgets are filed, the court can make a "costs management order", in which it records the extent to which the budgets are agreed upon by the parties and the court's approval and/or amendments to the budgets. Where budgets have been exchanged, the court will make such an order "unless it is satisfied that the litigation can be conducted justly and at

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[27] Loord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996, HMSO) p 2, cited in Chief Justice Allsop AO, 'Judicial Case Management and the Problem of Costs' (Speech delivered at Lord Dyson Lecture on 'The Jackson Reforms to Civil Justice in the UK', 9 September 2014).
[28] *Civil Procedure Rules 1998* (UK).
[29] *Civil Procedure Rules* r 3.13.
[30] *Practice Direction 3E – Costs Management* (United Kingdom), 6 April 2016, para 2(a).
[31] *Practice Direction 3E – Costs Management* (UK).
[32] *Practice Direction 3E – Costs Management* (UK) para 6.
[33] *Practice Direction 44 – General Rules about Costs* (United Kingdom), 13 June 2013, para 3.2.

proportionate cost in accordance with the overriding objective without such an order being made".[34]

30. The result of costs budgeting is that, unlike in New South Wales, where costs assessment and management procedures occur retrospectively, at the conclusion of the litigation, these procedures occur prospectively, at the beginning of a case, with the court focusing upfront on how much should be spent or recovered on litigation. Lord Jackson considered that shifting the focus of cost management from retrospective to prospective would be more efficient and would reduce overall costs.

31. In a recent speech given by Lord Jackson on costs management, he outlined a number of key benefits of costs budgeting.[35] First, both sides know what they will recover if they win or what they will be liable for if they lose. Second, "it encourages early settlement." Third, "it controls costs from an early stage" as the very act of preparing a budget can temper behaviour and any party who puts forward an excessive budget "invites criticism". Fourth, "it focuses attention on costs at the outset of litigation". Fifth, case management conferences are more effective when estimates are provided initially. Sixth, "it is elementary fairness to give the opposition notice of what you are claiming". Seventh, "[i]t protects losing parties ... from being destroyed by costs".[36]

32. However, there has been some backlash in the United Kingdom against these reforms. Many have alleged that costs budgeting has not actually reduced costs and has led to the disproportionate front-loading of costs. As noted by Herbert Smith Freehills in its guide to the reforms, "[i]f costs are examined at the outset, when neither party knows whether it will be on the paying or receiving end of a costs award, it may be said that there is less incentive for the parties themselves to minimise recoverable costs than if the exercise is conducted when it is clear where the liability lies."[37] Further,

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[34] *Civil Procedure Rules* r 3.15.
[35] Lord Justice Jackson, 'Confronting Costs Management' (Harbour Lecture, 13 May 2015).
[36] Ibid.
[37] Herbert Smith Freehills, 'Litigation notes: Costs management', 10 November 2014, available at: <http://hsfnotes.com/litigation/jackson-reforms/costs-management/>.

many have complained that costs budgeting procedures are not followed in practice.[38]

33. We have seen some adoption of the United Kingdom approach in Australia. In the Family Court, the rules require parties to file and exchange costs budgets and estimates. Rule 19.04(1) of the Family Court Rules requires that before each court event, the lawyer for a party must give the party 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.[39]

34. These notices must be given to the court and the opposing party on the day of the court event.[40] The Victorian Law Reform Commission has noted that there are anecdotal reports "that in some Registries the court does not strictly enforce compliance with these disclosure requirements."[41]

35. In the Family Provisions list of the Supreme Court, the plaintiff is obliged to serve, with the Summons, [a] copy of an affidavit setting out an estimate of the plaintiff's costs and disbursements, calculated on the ordinary basis, up to, and including, the completion of a mediation".[42]

36. The question which arises for us is whether costs budgeting should be introduced as a general rule in New South Wales. Certainly, this would substantially change the work of costs assessors, with assessments potentially taking place at both the beginning and the conclusion of litigation.

37. The Productivity Commission, in its 2014 report on access to justice, recommended that judges in superior courts should have the discretion to

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[38] Civil Justice Council, 'Improved Access to Justice – Funding Options and Proportionate Costs, Report & Recommendations' (August 2005) at p 21; J Peysner and M Senevirante, 'The Management of Civil Cases: The Courts and Post-Woolf Landscape' (DCA Research Series 9/05, 2005) p 69, cited in Cashman, above n 11, p 15.
[39] *Family Court Rules 2004* (Cth) r 19.04(1).
[40] *Family Court Rules 2004* r 19.04(3).
[41] Cashman, above n 11.
[42] Supreme Court of New South Wales, *Practice Note No SC Eq 7: Supreme Court – Family Provision,* 2 December 2013.

require parties to submit costs budgets at the outset of litigation and, where parties do not agree on a budget, the court should have discretion to cap the amount of costs that can be recovered by the successful party. It also stated that courts should publish guidelines informing parties about such costs budgeting procedures.[43]

38. In a submission to the Victorian Law Reform Commission, the Victorian Bar submitted that parties in civil litigation 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* ... 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."[44]

39. In my opinion, there is not enough empirical evidence to support the introduction of costs budgeting procedures, at least as a general rule, in Australia. I would however support the call, made by the Productivity Commission, for an inquiry into whether costs budgeting procedures should be applied in the Australian context and how they could be integrated into our costs management system.

Fixed Costs

40. The Lord Jackson reforms also introduced fixed costs for particular types of disputes, such as road traffic accidents and where the total value of agreed damages is under 10,000 pounds.[45] As the name suggests, the costs payable in these cases are fixed at a prescribed amount, with the court only having the power to order costs greater than the fixed amount in "exceptional circumstances".[46]

41. The 'base fee' prescribed under the fixed costs regime includes a core fee of 800 pounds plus a percentage amount depending on the value of the

[43] Productivity Commission, above n 22.
[44] Cashman, above n 11, p 78.
[45] *Civil Procedure Rules* r 45.7(2).
[46] *Civil Procedure Rules* r 45.12.

damages claimed. A 'success fee' under a conditional fee agreement can be recoverable on top of fixed costs. This fee is fixed at a percentage of the base fee. In the Queens Bench Division, Justice Simon, sitting with two assessors, commented that the fixed costs rule was intended "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."[47]

42. Both the Civil Justice Council and Lord Jackson have advocated for the extension of the fixed costs regime to other areas of litigation.[48] According to Jackson, "[f]ixing costs is an effective way of ensuring that a party's recoverable costs and its adverse costs risk are proportionate to the subject matter of the litigation … A fixed costs regime provides certainty and predictability … [and] is easier for solicitors to explain to clients than the current costs rules." Importantly for costs assessors, Jackson noted that "a fixed costs regime dispenses with the need for costs budgeting and costs assessment."[49]

43. The notion of fixing costs is not totally foreign to the Australian context. Under statutes or court rules in most Australian jurisdictions, including New South Wales, a court can exercise its power to award costs at any stage of the proceedings and has the power to make a fixed costs order in the place of assessed costs.[50] However, the chief purpose of the court's power to make such an order is to avoid the issues and costs associated with the costs assessment process in complex cases, where the party awarded costs is unlikely to be able to recover all of its assessed costs, or where the expense of an assessment would be disproportionate to the amount of

[47] *Nizami v Butt, Kamaluden v Butt* [2006] EWHC (QB) 159; [2006] 2 All ER 140, [23].
[48] Civil Justice Council, 'Annual Report 2005' (2005) available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Annual+reports/CJC+Annual+Report+2005.pdf>; Lord Justice Jackson, 'Fixed Costs – The Time has Come' (IPA Annual Lecture, 28 January 2016).
[49] Lord Jackson, above n 48.
[50] See *Civil Procedure Act 2005* (NSW) s 98; *Federal Court of Australia Act 1976* (Cth) s 43(3)(a); *Supreme Court Rules* (NT) r 63.04(1); *Supreme Court Rules* (Qld) r 682(1); *Supreme Court Rules* (SA) r 265(1); *Supreme Court Rules* (Vic) r 63.03(1); *Supreme Court Rules* (WA) O 66 r 10(1).

costs recoverable.[51] This process is clearly quite different from the United Kingdom approach of costs being fixed prior to the commencement of litigation.

44. There have been some in Australia who have called for an approach similar to that of the United Kingdom. The Associate Dean of the University of Adelaide Law School submitted to the Victorian Law Reform Commission that "[t]here should be mandatory litigation budgets … 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".[52]

45. However, in the same report, the Victorian Bar submitted that the area was not in need of reform as "civil litigation is very labour intensive and in many respects increasingly complex" and therefore, "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".[53]

46. I am sceptical about the desirability of implementing a broad ranging fixed costs regime in all types of litigation. Ultimately, many types of litigation are complex and uncertain and inflexible caps or the fixing of costs may not take the complexities and uncertainties of such litigation into account. However, I do think that more research should be done into whether fixed or capped costs should be introduced for certain classes of litigation.

Conclusion

47. Ultimately, the cost for participants in the litigation process has a substantial effect on their perception of the quality of the outcome of litigation and therefore their confidence in the courts and the justice system as a whole. Policy makers in Australia should continue to consider costs

[51] See for e.g. *Beach v Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119; *Dunstan v Human Rights and Equal Opportunity Commission (No 3)* [2006] FCA 916; *Ross v Ross (No 5)* [2008] WASC 278; *Bitek Pty Ltd v IConnect Pty Ltd* (2012) 290 ALR 288, cited in Dal Pont, above n 4, p 481-3.
[52] Cashman, above n 11, p 76.
[53] Ibid p 76.

issues and improve existing processes and procedures to facilitate the ‘just, cheap and quick’ resolution of disputes.

48. While the Jackson reforms in the United Kingdom may not be appropriate in the Australian context, they do shed light on the ways in which costs management schemes may evolve and be reformed. While there have been a number of inquiries in Australia regarding costs management, there is little empirical evidence available to those investigating these issues. I think that there is a need for further research into the efficacy of our cost management procedures.

49. I would encourage you to advise the courts and law society about your concerns regarding the cost assessment process and suggestions for improvement. For my part, I regard it as important to get as much input from as possible as to the ways in which courts conduct such work and how this can be improved. On that note, if we have time, I am happy to answer any questions you may have.